ANTITRUST LAW, POLICY, AND PROCEDURE

Cases, Materials, Problems

NINTH EDITION

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CAROLINA ACADEMIC PRESS

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ISBN 978-1-5310-2753-7
eISBN 978-1-5310-2754-4
LCCN 2023944032

Carolina Academic Press, LLC
700 Kent Street
Durham, NC 27701
(919) 489-7486
www.cap-press.com

Printed in the United States of America

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Chapter 1

Introduction to the Competition Model

I. Overview: The Policies and Goals of Antitrust Regulation

Throughout history, antitrust law has been concerned with governmental control of business concentration and economic power. Since 1890, the antitrust laws have had varying interpretations in order to promote certain policies and goals perceived to underlie the original statutes. Antitrust analysis, like much of antitrust conduct, however, is cyclical in nature. As the decisional law indicates, at various times Congress and the courts have defined and refined the values sought to be advanced by enforcement of the antitrust laws. Current antitrust analysis suggests that courts interpret the law in order to promote the maximization of consumer welfare. Such an approach, however, deemphasizes certain prior precedents and displaces other analytical approaches toward antitrust. To put antitrust in perspective, and to understand the analysis today, one must consider the interdisciplinary nature of the subject and the historical debates and enforcement trends that encircle the law's development.

Probably the single most important factor affecting antitrust analysis has been the introduction and application of economics into antitrust law. As the judicial debate began concerning how "competition" as the goal of antitrust should be defined, economic models were introduced into the definitional analysis. If the challenged conduct was foreseen as unreasonably anticompetitive, then it was to be condemned under the antitrust laws. Economics was offered as an analytical measure or tool to inform the content and rationale of the antitrust laws. Other assumptions draw on social and political values as well as experience. Moreover, it is very likely impossible to isolate a model that measures all the relevant antitrust concerns.

Historically, two central themes have been recognized at one time or another as the underpinnings for antitrust policy. One supported the noneconomic approach that enforcement was to be carried out so as to control the economic concentration of industrial power. "Competition" was defined as the promotion of equal access among businesses through the dispersion of economic power. Free access to markets was an objective. Economic power was the evil sought to be condemned. Freedom of individual choice, distributive justice, and pluralism were core values. This often meant that the small entrepreneur was favored and protected against the

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encroaching economic leverage of the larger concentrated entity, even if the result was increased costs to the consumer.

The other theme viewed antitrust as a body of law designed to enhance economic efficiency, without regard to the sociopolitical imbalance that such a goal might create between the larger and smaller firms. Under this approach, the antitrust laws were intended to protect competition rather than competitors. "The whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare." R. Bork, The Antitrust Paradox 91 (1978). However, Bork gave the term "consumer welfare" an idiosyncratic meaning that included low output and high producer profits as part of the welfare of "consumers." *See* Herbert J. Hovenkamp & Fiona M. Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. Pa. L. Rev. 1843 (2020); Bruce H. Kobayashi & Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century*, 78 Antitrust L.J. 147 (2012); Hovenkamp, *Antitrust Policy After Chicago*, 84 Mich. L. Rev. 213 (1985).

Central to the debate underlying the values inherent in antitrust policy is the issue of how "competition" ought to be defined. In one of the Supreme Court's first opinions on the subject, the Court suggested that one goal of the law was to protect small business units from reduced prices brought about by larger competitors. In *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 322–23 (1897), Justice Peckham reasoned:

> Manufacturing or trading companies may also affect prices by joining together in forming a trust or other combination, and by making agreements in restraint of trade and commerce, which, when carried out, affect the interests of the public. . . . It is true the results of trusts, or combinations of that nature, may be different in different kinds of corporations, and yet they all have an essential similarity, and have been induced by motives of individual or corporate aggrandizement as against the public interest. In business or trading combinations they may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class and the absorption of control over one commodity by an all-powerful combination of capital.

This theme found expression, though not consistently, in many other Supreme Court opinions, particularly during the Warren Court era. An example can be found in *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958), where the Court observed that

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions.

Citations to this Supreme Court statement have been made frequently in support of the argument that the antitrust laws have as their foundational goal the noneconomic objectives of preserving democratic institutions and industrial organization in the form of small units, and the encouragement of equal competitive opportunity. *See, e.g., United States v. Von's Grocery Co.*, 384 U.S. 270, 274–75 (1966); *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945). *See also* 21 Cong. Rec. 2457, 2459–60 (1890). *See also* Barak Orbach, *The Present New Antitrust Era*, 60 Wm. & Mary L. Rev. 1439 (2019).

Most courts, however, express the goal of the antitrust laws as controlling conduct that results in reduced output, higher prices, or diminished innovation. *E.g., United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 274 (6th Cir. 1898) ("restricting competition and maintaining prices"); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 289–90 (1985) ("restrict competition and decrease output"); *NCAA v. Alston*, 141 S. Ct. 2141, 2155 (2021) ("capacity to reduce output and increase prices"). *See* Herbert Hovenkamp, *The Antitrust Text*, __ Indiana L.J. __ (forthcoming 2023).

During the Warren Court era, antitrust law and remedies were used by the Court as corrective instruments to equalize the economic landscape. Many of the Court's decisions appeared to condemn conduct that "reduced costs" or improved product quality as it made competition more difficult for less-equipped rivals, even if the conduct ultimately benefitted consumers. For the favored class of small businesses, antitrust cases under the Warren Court were relatively likely to proceed to a successful jury trial. Generally, the Warren Court disfavored the concentration of power that could result from product innovation and favored a more decentralized economy. H. Hovenkamp, The Antitrust Enterprise 1 (2005).

The most forceful articulation of an antitrust policy directed toward the protection of small business can be found in the Warren Court's *Brown Shoe* decision. Although the context was Section 7 of the Clayton Act, Chief Justice Warren stated in *Brown Shoe* that the Court had struck the balance in favor of competition "equity" rather than efficiency:

> [W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.

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370 U.S. 294, 344 (1961). The Court approved the lower court's conclusion that vertical merger should be condemned because it resulted in either "lower prices in higher quality for the same price," leaving rivals less able to compete. 179 F. Supp 721, 738. *Brown Shoe*, very likely more than any other decision, thus drew the bal line between protecting the consumer interest in high quality and low prices, or t competitor interest in being protected from more efficient firms. Workers, incide tally, are generally more aligned with consumers: as markets have lower prices an produce more, there are more jobs.

Evidence that the Supreme Court has accepted gradually the economic objec tives of higher output and lower prices as the underlying policies of antitrust ha emerged from recent decisions. This is particularly true since 1974. For examp relying on earlier pronouncements by Justice Brandeis in *Chicago Board of Trade United States*, 246 U.S. 231 (1918), the Court in 1978 held that the trial court's respon sibility is limited to determining the "competitive effect" of the challenged restraint *National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 691–95 (1978). Such a economic approach explores only "the facts peculiar to the business, the history o the restraint, and the reasons why it was imposed."

Many decisions conclude that the antitrust laws should be read as advancing consumer interests. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979) (granting consumers standing to challenge price fixing); *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979) (output expanding blanket licensing agreement lawful); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (vertical non price restraints lawful, particularly when associated with higher output); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (plaintiff competitor cannot challenge merger on the theory that the defendant reinvigorated competition in post-merger market).

As the study of antitrust reveals, the Supreme Court's interpretation of the poli cies and goals of the antitrust laws has neither been static nor consistent. The debate continues among the Court's members and, as the following suggests, also among the antitrust academic community.

Although economic factors always have been at the forefront of antitrust law, Professor Robert Pitofsky argued that the modern courts are mistaken to ignore the intended impact of antitrust legislation on non-economic concerns. Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1075 (1979).

> [T]he trend toward use of an exclusively economic approach to antitrust analysis excludes important political considerations that have in the past been seen as relevant by Congress and the courts.

Id.

The drafters of the Sherman Act and subsequent antitrust statutes were con cerned with promoting democracy and individual freedom, as well as avoid ing the need for governmental rescue of those abused by the inevitable rise of

monopolistic giants. Moreover, Pitofsky notes that early judicial interpretations recognized the legislative intent to address the political implications of anticompetitive behavior.

> Such considerations as the fear that excessive concentration of economic power will foster antidemocratic political pressures, the desire to reduce the range of private discretion by a few in order to enhance individual freedom, and the fear that increased governmental intrusion will become necessary if the economy is dominated by the few, can and should be feasibly incorporated into the antitrust equation. Although economic concerns would remain paramount, to ignore these non-economic factors would be to ignore the bases of antitrust legislation and the political consensus by which antitrust has been supported.

Id.

While disagreement about antitrust's ultimate goals may continue, general recognition of the doctrine's disruptive potential has led to a "far humbler enterprise" of antitrust jurisprudence than existed in the 1960s. H. HOVENKAMP, THE ANTITRUST ENTERPRISE 7 (2005). Because antitrust functions, in part, as a form of regulation, and an imperfect one at that, courts have become more restrained in intervening with antitrust solutions. Even practices that economists might agree have anticompetitive potential are more often left alone because the judiciary is unable to create administrable solutions. Frankly, antitrust intervention is more generally today viewed as "the exception rather than the rule." *Id.*

R.H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*

32 HASTINGS L.J. 67, 67–106 (1982)*

Considerable dispute over the goals of the antitrust laws has surfaced in scholarly commentary on the subject. While it is unanimously agreed that Congress enacted these laws to encourage competition, disagreement continues over Congress' ultimate goals. . . .

The prevailing view is that Congress intended the antitrust laws only to increase economic efficiency. Others, however, contend that Congress was largely motivated by a number of social, moral, and political concerns. . . . Congress passed the antitrust laws to further economic objectives, but primarily objectives of a distributive rather than of an efficiency nature. In other words, Congress was concerned principally with preventing "unfair" transfers of wealth from consumers to firms with market power. . . . Congress intended to subordinate all other concerns to

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the basic purpose of preventing firms with market power from directly harming consumers. . . .

The antitrust laws were passed primarily to further what may be called a distributive goal of preventing unfair acquisitions of consumers' wealth by firms with market power. It should be stressed, however, that Congress did not pass the antitrust laws to secure the "fair" overall distribution of wealth in our economy or even to help the poor. Congress merely wanted to prevent one transfer of wealth that it considered inequitable, and to promote the distribution of wealth that competitive markets would bring. In other words, Congress implicitly declared that "consumers' surplus"[1] was the rightful entitlement of consumers; consumers were given the right to purchase competitively priced goods. Firms with market power were condemned because they acquired this property right without compensation to consumers. . . . [T]he antitrust laws embody a strong preference for consumers over firms with market power.[2]

Economic Effects of Monopoly Power: A Brief Overview

Modern economists have, of course, made many important advances in the theory of monopoly. The most important development may be the modern analysis of the implications of monopoly self-interest, long recognized as including higher prices and restricted output. These effects can be divided into three categories. The first, allocative inefficiency, describes the misallocation of resources, which diminishes the total wealth of society. A second effect is a transfer of wealth from consumers to monopolists. The third involves the effect of monopolies, and antimonopoly statutes, on firms' productive efficiency. . . .

Allocative Inefficiency

Monopoly pricing reduces the total amount of wealth in society. Because a monopolist produces less than would be produced under competitive conditions, some resources that would otherwise have been used to make the monopoly product will instead be used for other purposes, ones that consumers value

1. [FN 18] Consumers' surplus is the difference between the maximum amount that a consumer would pay and the price that he or she actually pays. Suppose that widgets are priced at $2.00, the competitive price. Marginal consumers of widgets would be willing to pay only this amount. Some consumers, however, would particularly desire widgets and willingly pay more — as much as $3.00. These consumers receive $1.00 in consumers' surplus when they purchase competitively priced widgets. If a monopolist gained control of the widget market and raised the price of widgets to $3.00, marginal consumers would no longer purchase widgets, and nonmarginal consumers would lose their surplus. The widget monopoly would acquire $1.00 of monopoly profits at the expense of widget consumers. For a more detailed definition, see N. Gregory Mankiw, *Principles of Microeconomics (9th ed. 2020)*; G. Stigler, *The Theory of Price* 78–81 (1966).

2. [FN 19] Thus, although Congress was strongly interested in increasing the size of the economic "pie" when it passed the antitrust laws, it was even more interested in ensuring its "fair" ownership. It should also be observed that all purchasers were to be protected, whether they were resellers, farmers or ultimate consumers.

demonstrably less. This misallocation of resources results in diminished satisfaction of society's wants, and thus, in terms of what society values, a reduction of society's total wealth. This effect is termed "allocative inefficiency." Elimination of monopoly pricing would, *ceteris paribus*, increase society's total wealth and, therefore, increase consumer satisfaction.

Transfer of "Consumers' Surplus" from Consumers to Monopolists

The most visible and obvious result of monopoly pricing is a transfer of wealth from purchasers to the monopolist; consumers become poorer while the monopolist becomes richer. The relative size of the transferred wealth and the allocative inefficiency will vary considerably from case to case depending upon a number of factors. Under market conditions most likely to be encountered, however, the transferred wealth usually will be between two and forty times as great as the accompanying allocative inefficiency. Thus, the redistributive effects of market power generally exceed the allocative inefficiency effects by a substantial amount.

The two principal effects of monopolistic pricing, the transfer of wealth from consumers to monopolists and the decrease in allocative efficiency, are different in one fundamental manner: the latter represents a decrease in society's absolute wealth, while the former merely redistributes that wealth. As Professor Williamson has observed, "[t]his [redistributive] transformation of benefits from one form (consumers' surplus) to another (profit) is treated as a wash under the conventional welfare economics model."[3]

Nevertheless, this transfer of wealth raises a very controversial question: is the transfer of wealth a "good," "bad," or neutral result of monopoly pricing? The value-laden answer in large part is determined by whether anyone is thought to be entitled to the economic benefit of the "consumer's surplus." Under monopoly pricing, some consumers' surplus is acquired by the monopolist. Depending on one's perspective, one can be entirely indifferent to the result, or one can conclude either that the monopoly is "unfairly taking" property from consumers, or that the monopoly is only reaping its just reward.

The redistributive effects of monopoly power are clearly good or bad only with respect to the assumptions and welfare criteria that are used to evaluate them. Condemnation of the direct consumer impact of monopoly power is therefore normally and properly termed "subjective" or a "value judgment," because it is based upon a preference for consumers over monopolists. . . .

Congress decided that consumers were entitled to the benefits of a competitive economic system. Consumers were deemed entitled to the "consumer's surplus" because Congress regarded the competitive scenario as the normal one. Monopoly pricing represented a change from the norm which Congress condemned as an "unfair" taking of consumers' property.

3. [FN 40] Williamson, *Economies as an Antitrust Defense Revisited*, 125 U. Pa. L. Rev. 699, 711 (1977).

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In summary, considerable controversy exists over the proper treatment of monopolistic transfers of wealth. . . . Congress believed consumers were entitled to products priced at competitive levels and to the opportunity to buy the quantity of products a competitive market would offer. . . . When Congress passed the antitrust laws it condemned the use of market power to interfere with these property rights or entitlements out of an explicit antimonopolistic, pro-consumer bias.

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Congressional Goals

. . . It is not possible to ascertain with certainty the original goals of the antitrust laws. Not only are there conflicting statements of legislative purpose, but it is often difficult to decide whether certain statements represent isolated, unimportant views or infrequently mentioned but nevertheless significant motivating factors. . . .

[T]he legislative history of the Sherman Act reveals a total lack of concern for allocative inefficiency. Trusts and monopolies were condemned principally because they "unfairly" extracted wealth from consumers. Productive efficiency also was an aim of the Act. Congress wanted the economy to function efficiently primarily to provide consumers the benefits of free competition. . . . [I]n balancing the competing considerations, Congress condemned firms with monopoly power despite their acknowledged efficiencies, and with the knowledge that this condemnation might not maximize society's economic efficiency. Indeed, the evidence suggests that Congress was unwilling to subordinate its distributive-based distaste for trusts and monopolists to the goal of corporate efficiency when the efficiency gains would be retained by the monopolists. . . . Congress passed the Sherman Act because it believed that trusts and monopolies possess excessive social and political power, and reduce entrepreneurial liberty and opportunity.

. . . .

In the legislative debates over the Sherman Act, Congress clearly condemned the use of market power to raise prices and restrict output. This condemnation, however, did not arise from concern with allocative efficiency. The debates strongly suggest that Congress condemned trusts and monopolies because they had enough market power to raise prices and "unfairly" extract wealth from consumers, turning it into monopoly profits.

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The debates strongly suggest that higher prices to consumers were condemned because they unfairly extracted wealth from consumers and turned it into monopoly profit. For example, during the debates Senator Sherman termed monopolistic overcharges "extortion which makes the people poor," and "extorted wealth." Congressman Coke referred to the overcharges as "robbery." Representative Heard declared that the trusts, "without rendering the slightest equivalent," have "stolen untold millions from the people." Congressman Wilson complained that the beef

trust "robs the farmer on the one hand and the consumer on the other." Representative Fithian declared that the trusts were "impoverishing" the people through "robbery." Senator Hoar declared that monopolistic pricing was "a transaction the direct purpose of which is to extort from the community . . . wealth which ought to be generally diffused over the whole community." Senator George complained that "[t]hey aggregate to themselves great enormous wealth by extortion which makes the people poor."

Congress condemned monopolistic overcharges in strong moral terms, rather than because of their efficiency effects. Purchasers, whether resellers or ultimate consumers, were entitled to purchase competitively priced products. Members of Congress also condemned the unequal distribution of wealth resulting from monopolistic overcharges. The legislators decided that competitive prices were "fair" whereas monopoly prices were not; therefore, consumers were entitled to own that quantity of wealth known today as "consumer surplus." The unfair prices, in effect, robbed consumers of that wealth. As a result, Congress was willing to risk some immediate efficiency losses in order to benefit consumers ultimately. Congress was willing to pass the Sherman Act in large part in an attempt to prevent such "unfair" transfers of wealth from consumers to monopolies.

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The legislative history also demonstrates that Congress condemned monopolies in part because they increased the cost of goods to consumers. This cannot be the complete explanation, however, because just prior to the passage of the Act, price levels in the United States were stable or slowly decreasing. In 1890, American consumers paid less for goods than at almost any time since the end of the Civil War.

The legislative history reveals that a major factor leading to the passage of the Sherman Act was a congressional desire to curb the power of trusts. While Congress was concerned about the uses of this power to raise prices and restrict output, it also desired, as an end in itself, the prevention of accumulation of power by large corporations and the men who controlled them. Alarm over corporate aggrandizement of economic, social, and political power pervaded the debate. The legislators feared not only the economic consequences of monopoly power, but potential social disruptions as well. Moreover, this apprehension has been recognized repeatedly by courts interpreting the legislative history of the Act.

A review of the social history of the period illuminates the reasons underlying Congress' alarm. The post-Civil War period saw a rural agricultural nation transformed into an increasingly urban and industrial society. Work patterns changed. By the end of the Civil War individual yeoman farmers had all but vanished. In their places stood entrepreneurs and commercial farmers who shipped their goods to markets and then used the resulting cash to purchase goods from small businesses. Thus, traditional independence gradually changed into interdependence.

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Congress also expressed concern for preserving business opportunities for small firms. The opportunity to compete has been viewed as particularly important for small entrepreneurs, perhaps because of their vulnerability to predatory activities. . . .

Judicial statements of congressional intention to assist small businesses have been frequent. Courts have even occasionally viewed congressional interest in protecting small businesses as overriding its consumer-oriented goals.

Despite clear judicial recognition, close examination reveals relatively little support in the legislative history, beyond the few references above, for the "small producer" rationale. Although there are a few statements suggesting that the protection of the opportunity of small business to compete was one motivating factor for the legislators, these statements do not imply that protection of small businesses was meant to override other goals. Congress probably did not intend to go further than establishment of an economic system providing free opportunities for entry and enough producers to ensure vigorous competition, a system in which no company became large enough to dominate.

Additionally, the congressional intent to assist small businesses can be interpreted as promoting distributive, rather than efficiency, considerations. Passage of the Sherman Act may have been intended, in part, to transfer wealth to small businesses. The legislative history does not indicate, however, that Congress intended to help small businesses as a means of improving the overall efficiency of the economy. The debate suggests only a possible intent to assist small businesses as an end in itself, not as a means of increasing total economic output.

Sympathetic to the plight of small businesses harmed by trusts, Congress expressed a desire to create an environment in which small businesses could effectively compete. It can fairly be said that one of Congress' goals was to assist small businesses; although consumers' interests were meant to be paramount, and conflicts between the welfare of consumers and small businesses were generally to be resolved in favor of consumers, Congress' desire to help small businesses certainly extended to those circumstances in which small businesses would be helped but consumers would not significantly suffer. . . . [T]his expression of sympathy did not amount to a congressional directive to assist small businesses in ways conflicting with the essential purpose of the Act, the protection of consumers.

. . . .

Note: Antitrust Goals — Consumer Welfare v. General Welfare

One widely debated issue is whether United States antitrust policy should adopt a "consumer welfare" principle rather than a more economic "total welfare" principle for determining illegality. "Total welfare" refers to the aggregate value that an economy produces, without regard for the way that gains or losses are distributed. For example, if a product costs $5 to make and is sold for $8, the $3 surplus goes to

the seller. On the other side, if a customer would have been willing to pay $10 for a product but is able to purchase it for $8, then this $2 surplus is value added to the consumer. A perfectly competitive market maximizes total welfare, at least when we are not concerned about innovation. A perfectly competitive market also gives most of the surplus to consumers, however, because firms compete to the point that price equals marginal cost.

Formally, "consumer welfare" looks only at the surplus that goes to consumers, ignoring what goes to sellers. Suppose, for example, that a joint venture among the firms that dominate a market simultaneously (1) facilitates a collusive output reduction that raises consumer prices, but (2) reduces the firms' variable costs by permitting them to share production or distribution processes. In some cases the cost reduction might be so great that even the cartel price is lower than the pre-venture price. In that case this joint venture should be approved under general welfare grounds because it increases total wealth. It would also be approved under the consumer welfare principle because consumers actually benefit. Further, as a general matter, suppliers (including labor) benefit as output is larger.

But suppose that the joint venture produces significant savings in production costs of, say, $100; however, it also facilitates a price fix that raises the overall price level by $80. In that case the joint venture would be efficient under total welfare criteria because the productive efficiency gains exceed the losses that result from collusion. The consumer welfare criterion would condemn it, however, because consumers are worse off.

The debate has both historical (descriptive) as well as normative aspects. The historical debate concerns mainly whether the original intent of the framers of the Sherman Act or one of antitrust law's subsequent amendments was a general welfare test for legality, a consumer welfare test, or perhaps some alternative test. The normative debate is concerned with whether general welfare or consumer welfare should be the antitrust goal.

Concerns for administrability often favor the consumer welfare test. It does not require "balancing" to net out producer gains and consumer losses. If consumers are harmed (either by reduced output or product quality, or by higher prices resulting from the exercise of market power), then this fact trumps any amount of offsetting gains to producers, and presumably to others. Theoretically, even a minor injury to consumers outweighs significant efficiency gains. In this sense the consumer welfare test is easier to administer on a case-by-case basis than general welfare tests. Under a simple rule of reason test employing the consumer welfare principle one would have to consider whether the challenged practice creates a sufficient inference of higher prices resulting from lessened competition. If so it is presumptively unlawful. At that time the defendants will have an opportunity to show that the output model ignores efficiencies that the challenged practice produces, and that these efficiencies are so significant that the resulting price level is no higher than it had been before the venture was formed.

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By contrast, a general welfare test requires a measure of net gains or losses. Some cases would not be difficult. For example, naked price fixing, unaccompanied by any integration of research, production, or output, produces no measurable efficiency gains and leads directly to higher prices. Total welfare "balancing" is easy because there is nothing to place on one side of the scale. Similarly, many purely vertical practices, including vertical territorial restraints, tying or exclusive dealing, may not result in higher consumer prices at all and have efficiency benefits that serve to explain them. In these cases the other side of the scale is empty and balancing is again easy. In the middle, however, are joint ventures with some integrative function, mergers, many unilateral practices, and at least a few vertical practices, including some instances of resale price maintenance, exclusive dealing, and tying. What these practices have in common is that under the right circumstances they can serve as an opportunity for exercising market power, but they can also produce considerable efficiencies. In these cases the market power requirement, which applies in some fashion to all of them, serves to distinguish cases where there is no consumer harm because a market wide output reduction is impossible. If market power is present, then the case is much more difficult.

The courts have rarely engaged this debate explicitly. It is worth noting, however, that any time the courts find that a limitation on competition has caused higher consumer prices or a significant threat of them they condemn the practice, without considering offsetting producer benefits. This suggests that they at least implicitly apply a consumer welfare test. *See* Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 FORDHAM L. REV. 2471 (2013). In the 2013 *Actavis* decision all eight Justices (Justice Alito did not participate) appeared to agree that consumer welfare should be the goal of the antitrust laws. Justice Breyer's opinion for the Court focused exclusively on consumer harm, saying nothing about producer gains. Chief Justice Roberts dissented (joined by Justices Scalia and Thomas), but he also concluded that "[t]he point of antitrust law is to encourage competitive markets to promote consumer welfare." By contrast, "[t]he point of patent law is to grant limited monopolies as a way of encouraging innovation." *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2238 (2013). Can those views be reconciled?

II. Common Law Legacies

A. English Foundations

Many of the framers of the Sherman Act believed they were merely enacting and federalizing the common law of trade restraints. 21 Cong. Rec. 2456, 3146, 3151–52 (1890). But as the rich literature of today indicates, the common law had numerous branches, English and American, which included statutory as well as judge-made doctrines. H. THORELLI, THE FEDERAL ANTITRUST POLICY 10 (1954). Because of the diversity of the sources and versions of the common law up to the 1890s, no single integrated common law existed. No single standard governed the concept

of restraint of competition. H. HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–937, ch. 21 (1991); Dewey, *The Common Law Background of Antitrust Policy*, 41 VA. L. REV. 759, 761 (1955). Of course, the framers of the Sherman Act believed that there was a single "general" common law. Consider *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which was not overruled until *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), decided almost 50 years after the Sherman Act was enacted. Certain developments in the common law are helpful for a general understanding of the status of the law on restraints of trade at the time of the passage of the first federal statute in 1890. *See generally* James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880–1918*, 135 U. PA. L. REV. 495 (1987); DANIEL A. CRANE & HERBERT HOVENKAMP, *Classicism, Neoclassicism, and the Sherman Act*, *in* THE MAKING OF COMPETITION POLICY 71 (2013).

It seems clear that the common law developed and changed direction during the eighteenth and nineteenth centuries depending upon the economic policies being espoused at a particular time. That common law development regarding monopolies has been described as follows:

W. Letwin, Law and Economic Policy in America: The Evolution of The Sherman Antitrust Act

18–32 (1956)*

Monopoly at Common Law

The Sherman Act was founded on the common law, the body of judicial decisions that the United States inherited from England. The common law, it has been widely believed, always favored freedom of trade. When English and American judges during the eighteenth and nineteenth centuries decided cases against monopolists, engrossers, or restrainers of trade, they thought they were continuing a tradition that reached back into "time of which no man hath memory." The congressmen who drafted and passed the Sherman Antitrust Law thought they were merely declaring the illegality of offenses that the common law had always prohibited. Those judges and legislators, like other lawyers, must have known, or at least would not have doubted, that the common law rules on these subjects had changed in the course of time, for it is taken as axiomatic that the common law "grows." But it is not always recognized that the common law can change its direction, and without much warning begin to prohibit practices it had formerly endorsed, or to protect arrangements it had earlier condemned. Lawyers do not so readily see that the common law at any given time reflects the economic theories and policies then favored by the community, and may change as radically as those theories and policies. As a result they have too easily accepted the mistaken view that the attitude of the common law toward freedom of trade was essentially the same throughout its history.

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The common law did not always defend freedom of trade and abhor monopoly. For a long time it did quite the opposite: it supported an economic order in which the individual's getting and spending were closely controlled by kings, parliaments, and mayors, statutes, and customs, and his opportunities limited by the exclusive powers of guilds, chartered companies, and patentees. The common law first began to oppose this system of regulation and privilege at the end of the sixteenth century; it did not do so wholeheartedly until the eighteenth century; and by the middle of the nineteenth century, it had again lost its enthusiasm for the task. It would have been surprising if the pattern of development had been different. Changes in the common law are changes in the attitudes of judges and lawyers; it would have been remarkable if they had persistently opposed monopoly when the rest of the community did not know the word and considered the phenomenon natural or desirable. It would have been strange if lawyers had upheld *laissez faire* policies centuries before any statesman or economist had advocated or stated them, and had continued following them long after they had been abandoned or denied by the rest of the community. In fact, English laws governing monopoly and English policies for the economic organization of society changed together, except for minor differences in timing. The English law of monopoly traditionally includes four branches: the law on monopoly proper, whether by patent, charter, or custom; on forestalling, engrossing, and regrating; on contracts in restraint of trade; and on combinations in restraint of trade. These branches, distinct in form and based on more or less independent bodies of precedent, nevertheless show the same development from an active support of monopolies in the earliest period, through active opposition during an interlude of less than two centuries, to leniency and indifference which characterized them in 1890.

. . . .

The idea that the common law opposed monopolies from the earliest time onward was invented largely by Sir Edward Coke, who argued that monopoly was forbidden by the Civil Law, and implicitly by Magna Carta as well as by certain statutes of Edward III's reign. The earliest common law precedent he could mention was a case that arose during the fourteenth century, and the modern lawyers and historians who follow his authority continue to cite that case as evidence of the ancient antagonism of common law to monopolies. Yet the case gives at least equally good evidence to the contrary.

. . . .

The first recorded case on monopolies was *Davenant v. Hurdis*, or *The Merchant Tailors'* case decided in 1599, which shows not only the extent of monopolistic control that the guilds exercised, but also the ends that such controls were supposed to serve, and the collisions that were taking place between several guilds as each tried to maintain intact its power over a trade. The case arose under a by-law passed by the London tailors' guild in 1571. . . . [The ordinance required guild members who had clothes finished by others to have at least half the finishing done by a guild member. Plaintiff, a member of the tailors' guild, brought an action of trespass. Sir Edward Coke argued for Davenant that the by-law was unreasonable and illegal because it created a monopoly, although no clear basis in common law could be cited for the proposition. Judgment was unanimous that such a by-law that brought "all trade on traffic into the hands of one company, or one person, and to exclude all others, is illegal."]

. . . .

The next step, and perhaps the greatest single one, in creating the modern common law on monopolies was *Darcy v. Allen*, or *The Case of Monopolies*, decided in 1603. Where *Davenant v. Hurdis* established that a corporate by-law was invalid if it created a monopoly, *Darcy v. Allen* went further, laying down the principle that even a royal grant [by Queen Elizabeth] by patent would be invalid if it did so. . . . In short, Darcy's patent was held void on the argument that it violated the right of others to carry on their trade.

. . .

There is no doubt that the series of cases at the turn of the seventeenth century radically changed the attitude of the common law toward monopolies.

. . . .

The first important law contributing to that result was the Statute of Monopolies of 1624, which, however, has a deceptive ring. For though it was certainly directed against monopolies, it was based not on a preference for competition, but on constitutional objections to the power which the Crown presumed in granting monopolies and to the arbitrary reasons for which it had granted them. Parliament did not at this period oppose monopolies in themselves. As Bacon told the House of Commons in 1601, its attitude was inconsistent and suspect: "If her Majesty make a patent or a monopoly unto any of her servants, that we must go and cry out against: but if she grant it to a number of burgesses or a corporation, that must stand, and that forsooth is no monopoly."

This inconsistency the House of Commons carried over into the Statute of Monopolies. The first section declared void "all monopolies and all commissions, grants, licenses, charters, and letter patents heretofore made or granted, or hereafter to be made or granted to any person or persons, bodies politic or corporate whatsoever, of or for the sole buying, selling, making, working, or using of anything, or of any other monopolies." The ninth section nevertheless provides that the Act shall not apply to any cities or towns, or any of their privileges, "or unto any corporations, companies, or fellowships of any trade, occupation, or mystery, or to any companies or societies of merchants within this Realm, erected for the maintenance, enlargement, or ordering of any trade of merchandise. . . ." And this inconsistency, which symbolized Parliament's willingness to have monopolies, provided Parliament alone granted them, was not merely a matter of words in statute.

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