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Reconsidering Antitrust's Goals

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INTRODUCTION

Antitrust policy today is an anomaly. On the one hand, antitrust is thriving. The past twenty years witnessed more countries with antitrust laws, and the birth and growth of the international organization of governmental competition authorities, the International Competition Network ("ICN"), with over 100 member countries.[1] China, which viewed until the late 1970s the term competition pejoratively as a "capitalist monster," now has competition laws.[2] Domestically, the U.S. Department of Justice Antitrust Division, decimated during the Reagan administration,[3] has more prosecutors today than in the 1960s.[4] Its 2010 budget, adjusted

[1] Int'l Competition Network Steering Grp., The ICN's Vision for its Second Decade, Presented at the 10th Annual Conference of the ICN (May 2011), www.internationalcompetitionnetwork.org/uploads/library/doc755.pdf.

[2] Xiaoye Wang, *The New Chinese Anti-Monopoly Law: A Survey of a Work in Progress*, 54 ANTITRUST BULL. 579, 580 (2009).

[3] U.S. GEN. ACCT. OFF., REPORT TO THE CHAIRMAN, COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES: CHANGES IN ANTITRUST ENFORCEMENT POLICIES AND ACTIVITIES 4 (1990), *available at* http://www.gao.gov/products/GGD-91-2 ("Between fiscal years 1980 and 1989, the Division staff declined from 883 (including 429 attorneys) to 468 (including 209 attorneys).").

[4] U.S. Dep't of Justice, Antitrust Div., FY 2012 Congressional Budget Submission 48 (2011) (Antitrust Division's 2012 budget had 880 authorized employee positions, of which 390 were for attorneys), www.justice.gov/jmd/2012justification/pdf/fy12-atr-justification.pdf; Richard Hofstadter, *What Happened to the Antitrust Movement?*, *in* THE

for inflation, is more than triple its 1965 level.[5] The American Bar Association's Antitrust Section boasts over 8,000 "attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors and law students."[6] No other country affords private antitrust plaintiffs the combination of (i) broad civil discovery largely determined by the parties, rather than the courts,[7] (ii) the ability to lower individual litigation costs by bringing antitrust claims, at times, as a class,[8] (iii) automatic treble damages,[9] (iv) recovery of the costs of a successful suit, including reasonable attorney's fees,[10] (v) broad injunctive relief,[11] (vi) a per se illegal standard for evaluating price-fixing and other "hard-core" cartel behavior,[12] (vii) expansive jurisdictional rules, and (viii) the use of collateral estoppel for follow-on private antitrust suits.[13]

Yet antitrust's influence in the U.S. has diminished. One used to hear of antitrust's importance. The Supreme Court once called the federal antitrust

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PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 194 (Vintage 2008) (noting 300 Antitrust Division lawyers in 1962). The Federal Trade Commission (FTC), which enforces both consumer protection and competition law, had 600 lawyers at the end of its 2010 fiscal year. Fed. Trade Comm'n, Performance & Accountability Report--Fiscal Year 2010, at 6 (Nov. 2010), http://www.ftc.gov/opa/2010/11/par.shtm.

[5] Appropriation Figures for the Antitrust Division, Fiscal Years 1903-2012, www.justice.gov/atr/public/atr-appropriation-figures.html. The Division's 2010 budget was $163,170,000. Its 1965 budget was $7,072,000 (*id.*), which adjusted for inflation, equals approximately $48.9 million in 2010 dollars. DollarTimes, Inflation Calculator (Aug. 3. 2011), http://www.dollartimes.com/calculators/inflation.htm (last visited Aug. 11, 2011).

[6] AM. BAR ASS'N SEC. OF ANTITRUST LAW, WHO WE ARE, http://www.abanet.org/antitrust/home.html (last visited Aug. 11, 2011).

[7] FED. R. CIV. P. 26-37.

[8] FED. R. CIV. P. 23.

[9] 15 U.S.C. § 15.

[10] *Id.*

[11] 15 U.S.C. § 26.

[12] United States v Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[13] 15 U.S.C. § 16(a) (if the U.S. brings a civil or criminal antitrust action, and testimony is taken, then any resulting final judgment or consent decree can be used as prima facie evidence against defendants for the same conduct in later private antitrust actions).

laws "the Magna Carta of free enterprise" in preserving economic freedom and the free-enterprise system.[14] Today the Court complains about antitrust suits,[15] and places greater faith in the antitrust function being subsumed in a regulatory framework.[16] Presidential candidates once debated antitrust policy. Now candidates rarely mention, much less debate, antitrust policy.[17] Americans once had "a deep feeling of unrest" and fear of "another kind of slavery" from the aggregations of capital in the hands of a few individuals and corporations.[18] By the mid-1960s antitrust became "complex, difficult, and boring."[19] By 2003–4, many younger Americans were unconcerned about economic concentration.[20] Among the factors to explain this disparity, Gallup's chief economist identified the federal government not

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[14] United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972).

[15] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 895 (2007) (complaining that antitrust's per se illegal standard might increase litigation costs by promoting "frivolous" suits); Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 281-82 (2007) (fearing "unusually" high risk of inconsistent results by antitrust courts); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558-60 (2007) (antitrust's "inevitably costly and protracted discovery phase," as hopelessly beyond effective judicial supervision) (quoting Asahi Glass Co. v. Pentech Pharm., Inc., 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003)); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) (decrying antitrust's "interminable litigation").

[16] Pac. Bell Tel. Co. v. linkline Commc'ns, Inc., 129 S. Ct. 1109, 1124 (2009) (Breyer, J., concurring) (when a "regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits"); *Credit Suisse*, 551 U.S. at 283; *Trinko*, 540 U.S. at 414-15; *see also* Edward D. Cavanagh, *The Private Antitrust Remedy: Lessons From The American Experience*, 41 LOY. U. CHI. L.J. 629, 636 (2010).

[17] Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1390-98 (2009) (discussing Wilson-Taft-Roosevelt debate over rule-of-reason standard, and Reagan administration's departure from earlier Republican administrations in antitrust enforcement).

[18] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 83 (1911) (Harlan, J. dissenting).

[19] Hofstadter, *supra* note 4, at 189.

[20] Linda Lyons, *Youthful Optimism? Young Americans Happy with "Big Business*," Gallup, Mar. 2, 2004, http://www.gallup.com/poll/10816/Youthful-Optimism-Young-Americans-Happy-Big-Business.aspx. Fifty-four percent of the Americans (ages 18 to 29) were very or somewhat satisfied with the size and influence of major corporations, which was fifteen percentage points higher than the next-most optimistic age group (30- to 49-year-olds), and satisfaction with major corporations decreased even more among the older age groups.

pursuing monopolies the way it once did (therefore, younger people did not have such a negative view of monopolies) and that the antitrust laws were not emphasized in business school the way they once were.[21] Few people apparently followed the Government's trial against Microsoft.[22] When the consent decree expired in 2011, several questioned what the remedy accomplished.[23]

So as historian Richard Hofstadter asked in the mid-1960s, what happened to the antitrust movement in the United States? "[O]nce the United States had an antitrust movement without antitrust prosecutions," observed Hofstadter; by the 1960s, there were "antitrust prosecutions without an antitrust movement."[24] Today we have far fewer antitrust prosecutions without an antitrust movement. Since the 1970s, the number of private antitrust lawsuits[25] and DOJ investigations under Sections 1[26] and

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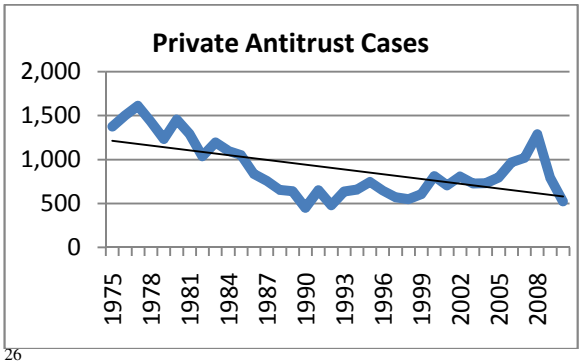
[21] *Id.*

[22] Pew Research Center for the People & the Press, *Campaign Incidents Have Little Punch* (Dec. 16, 1999) (only 11 percent of surveyed said they followed reports of the antitrust trial against Microsoft), http://people-press.org/report/?pageid=253.

[23] Jay Greene, *Microsoft Oversight Ends With Little to Show for Effort*, CNET, May 12, 2011, http://news.cnet.com/8301-10805_3-20062079-75.html#ixzz1RFoy76X9; Robert H. Lande & Norman W. Hawker, *As Antitrust Case Ends, Microsoft is Victorious in Defeat*, BALTIMORE SUN, May 16, 2011.

[24] Hofstadter, *supra* note 4, at 189.

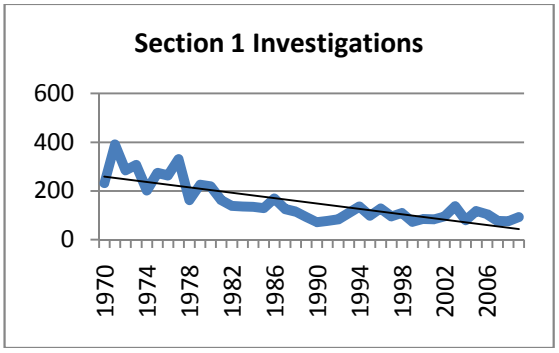
[25] Sourcebook of Criminal Justice Statistics Online, tbl. 5.41.2010 (2010), http://www.albany.edu/sourcebook/csv/t5412010.csv.



[26]

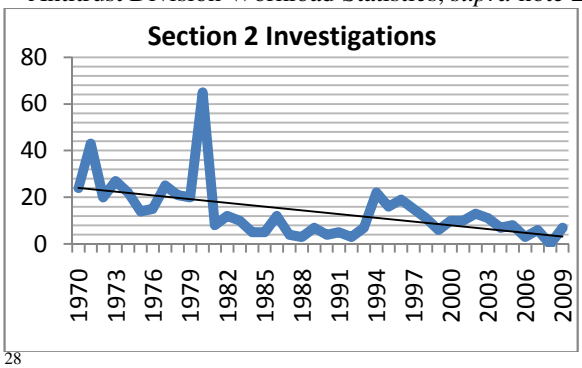
2[27] of the Sherman Act has declined.

Within the U.S. legal academy, antitrust's significance has diminished. The number of law journal articles that mention antitrust, the Sherman Act, or the Clayton Act steadily increased after the 1930s, peaked between 1980-84 (when the Reagan administration embraced the Chicago School paradigm), and steadily declined thereafter.[28] The same trend appears in the



Source: U.S. Dep't of Justice, Antitrust Division Workload Statistics, http://www.justice.gov/atr/public/workload-statistics.html (last visited Aug. 11, 2011). The number does not include FTC investigations or capture the DOJ investigation's success or impact. Kenneth M. Davidson, AAI Senior Fellow, Commentary: Numerology and the Mismeasurement of Competition Laws (Sept. 29 2008), www.antitrustinstitute.org/node/11012 (critiquing reliance on antitrust enforcement statistics).

[27] Antitrust Division Workload Statistics, *supra* note 26.



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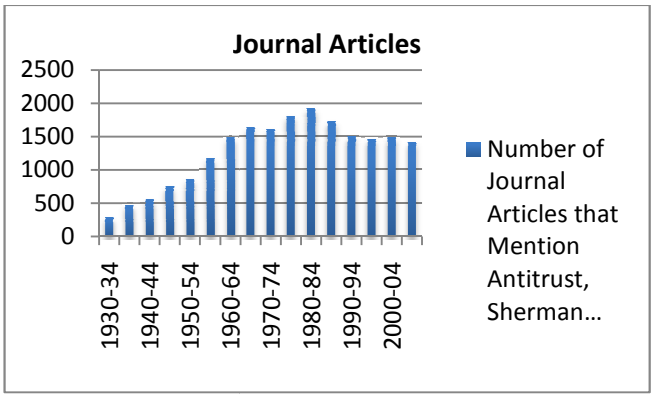
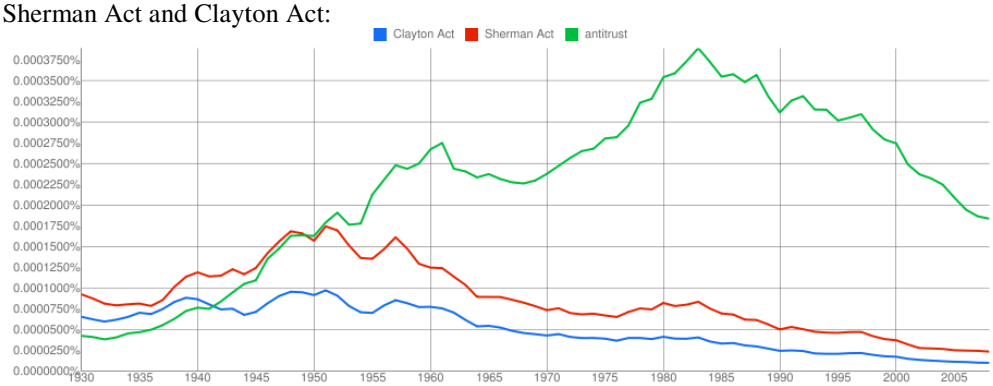
frequency of books published since the 1930s that mention antitrust,[29] the

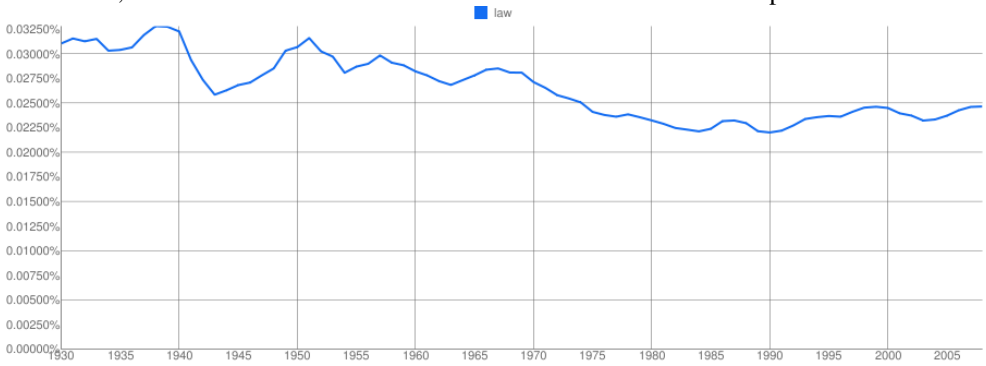


Source: Citations in Heinonline, Most-Cited Law Journals database, http://home.heinonline.org. Most of these journals existed since the 1930s. Two caveats: (i) antitrust articles could appear more frequently in specialty and other law journals; and (ii) the number of articles does not necessarily equate with the articles' significance.

[29] A search of books on Google Books Ngram Viewer (http://ngrams.googlelabs.com/info), which "displays a graph showing how those phrases have occurred in a corpus of books" between 1930 and 2008 for all English books, shows a similar trend for the term antitrust, with an earlier peak for the number of books mentioning the Sherman Act and Clayton Act:



In contrast, the term *law* has seen a more modest decline over the same period:



FTC, or DOJ's Antitrust Division.[30] After a string of Supreme Court defeats for antitrust plaintiffs, the cover of the ABA's fall 2007 ANTITRUST magazine asked *The End of Antitrust As We Know It?* One antitrust lawyer wrote,

> The rhetoric and, arguably, the enforcement records of the agencies—outside the cartel area—are less activist now than at any time in recent years. No one would seriously suggest that we are witnessing the end of antitrust. But is it the end of antitrust as we once knew it, at least in the United States? If so, how should we feel about it?[31]

What explains this anomaly? Why is antitrust growing internationally, yet declining domestically? There are two important factors. The first is salience, especially the salience of the U.S. antitrust's goals. U.S. antitrust policy has roughly twenty to thirty year-long cycles: (i) after initial dormancy, 1900—1920, the promise of antitrust; (ii) 1920s—mid-1930s, antitrust dormancy in the boom and bust years; (iii) mid-1940s—1970s, antitrust representing "the Magna Carta of free enterprise" in preserving economic and political freedom; and (iv) late-1970s—2010, antitrust's contraction under the Chicago and post-Chicago Schools' neoclassical economic theories.[32] In the last cycle, some enforcers viewed antitrust's

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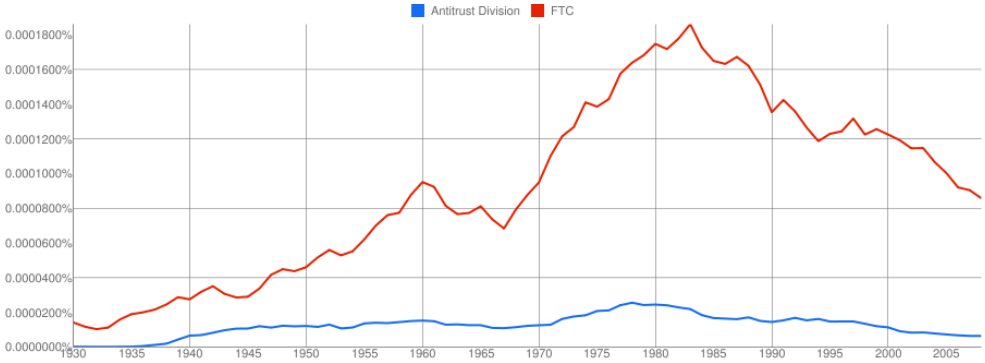
[30] A similar trend exists for the terms *FTC* and DOJ's *Antitrust Division*:



Google Books Ngram Viewer, http://ngrams.googlelabs.com.

[31] Mark D. Whitener, *Editor's Note: The End of Antitrust?* ANTITRUST 5 (Fall 2007).

[32] Maurice E. Stucke, *Antitrust 2025*, CPI ANTITRUST J. (Dec. 2010), *available at*

more salient political, social, and moral goals as diluting antitrust principles. Along with antitrust's non-economic goals went its historic concern about arresting economic power in its incipiency.

A second factor is that antitrust policy during the past policy cycle relied on an incomplete, distorted conception of competition. Adopting the Chicago School's simplifying assumptions of self-correcting markets composed of rational, self-interested market participants, courts and enforcers sacrificed important political, social, and moral values to promote certain economic beliefs. They accepted the increased risks from concentrated telecommunications,[33] financial,[34] and radio[35] industries, among others, for the prospect of future efficiencies and innovation.[36] They ignored an important antitrust concern, namely the Bailout Dilemma.[37]

With the anger over taxpayer bailouts for firms deemed too-big-and-integral-to-fail, the wealth inequality that accelerated during the last policy cycle,[38] and the current budget cuts and austerity measures, the United

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http://ssrn.com/abstract=1727251.

[33] TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES (2010).

[34] SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 12, 203 (2010); Jesse W. Markham, Jr., *Lessons for Competition Law from the Economic Crisis: The Prospect for Antitrust Responses to the "Too-Big-To-Fail" Phenomenon*, 16 FORDHAM J. CORP. & FIN. L. 261, 291 (2011).

[35] Maurice E. Stucke & Allen P. Grunes, *Why More Antitrust Immunity for the Media is a Bad Idea*, 105 NW. U. L. REV. COLLOQUY 115 (2010).

[36] Mercury News Wire Services, *Bigness Is Not Bad White House and Greenspan Defend Mergers*, SAN JOSE MERCURY NEWS, June 17, 1998, *available at* 1998 WLNR 1705551.

[37] Walter Adams & James W. Brock, *Antitrust, Ideology, and the Arabesques of Economic Theory*, 66 U. COLO. L. REV. 257, 268-69 (1995) ("economic power's capacity to obtain government bailouts—regardless of how incompetent, inefficient, and unprogressive those who wield it may be—as the ultimate perversion of private enterprise").

[38] G. William Domhoff, *Power in America, Wealth, Income, and Power* (Sept. 2005 & updated Apr. 2010), http://sociology.ucsc.edu/whorulesamerica/power/wealth.html ("As of 2007, the top 1% of households (the upper class) owned 34.6% of all privately held wealth, and the next 19% (the managerial, professional, and small business stratum) had 50.5%, which means that just 20% of the people owned a remarkable 85%, leaving only 15% of the wealth for the bottom 80% (wage and salary workers")).

States is ripe for a new antitrust policy cycle. If so, what will drive it?

Two issues drove past cycles and will likely drive the next one: What is competition, and what are the goals of competition law? Only after policymakers reconsider what is competition[39] and the goals of competition law, can they answer the third question, what should be the legal standards and rules to promote these goals. Accordingly, this article calls for policymakers to reconsider antitrust's goals.

Part I summarizes the shift during the last policy cycle from embracing multiple political, social, moral, and economic goals to the current debate over a single economic goal. Part II discusses why four oft-cited economic goals (ensuring an effective competitive process, promoting consumer welfare, maximizing efficiency, and ensuring economic freedom) failed to unify antitrust analysis. Part III discusses why it is unrealistic to believe that a single well-defined antitrust objective exists. Part IV proposes how to account antitrust's multiple policy objectives into the legal framework. It outlines a blended goal approach, the risks of this approach, and its benefits in providing better legal standards and reviving antitrust's salience.

I. ANTITRUST'S GOALS

A. Importance in Defining Antitrust's Objectives

The battle over antitrust begins with its goals. As the Chicago School recognized, defining the goals of antitrust is paramount: "Everything else follows from the answer we give."[40] Defining antitrust's objectives serves several important purposes.

First, the antitrust objectives inform the law's enforcement and

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[39] Maurice E. Stucke, *Reconsidering Competition*, MISS. L.J. (forthcoming 2012), *available at* http://ssrn.com/abstract=1646151 (showing how no satisfactory comprehensive definition of competition exists, and how varying one premise of competition--the relative rationality of market firms and consumers–yields different conceptions of competition).

[40] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 50 (1978).

application.[41] The objectives can shape enforcement policy and priorities. They can inform policymakers of any gaps between actual outcomes from current enforcement and desired outcomes. They can assist the courts in applying the antitrust legal standards to assure that the result is aligned with the objectives.

Second, to the extent measurable and transparent, the objectives can increase the accountability of government antitrust enforcers, "increase transparency and facilitate reasoned debate to the extent that they make explicit the rationales for decisions in individual cases."[42]

Finally, in any jurisdiction with multiple enforcers (such as federal and state antitrust agencies in the U.S.), defining objectives ensures that the antitrust enforcers (and other law enforcement officials) are not thwarting each other's efforts. One agency can increase enforcement when another is lax, but all the enforcement is directed toward consistent objectives.[43]

B. Antitrust's Historical Goals

With the Supreme Court's gloss, Section One of the Sherman Act punishes "unreasonable" restraints of trade.[44] Section Two of the Sherman Act prohibits a company to "monopolize, or attempt to monopolize . . . trade or commerce."[45] Section 7 of the Clayton Act prohibits mergers and acquisitions when the effect "may be substantially to lessen competition, or to tend to create a monopoly."[46] Unlike other countries' antitrust statutes,[47]

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[41] AM. BAR ASS'N, SEC. OF ANTITRUST LAW, REPORT ON ANTITRUST POLICY OBJECTIVES (2003), *available at* http://www.abanet.org/antitrust/at-comments/2003/reports/policyobjectives.pdf [hereinafter ANTITRUST GOALS].

[42] *Id.*

[43] LUDWIG VON MISES, BUREAUCRACY 70 (2007).

[44] 15 U.S.C. § 1.

[45] 15 U.S.C. § 2.

[46] 15 U.S.C. § 18.

[47] *See, e.g.*, Anti-monopoly Law of the People's Republic of China, art. I (adopted Aug. 30, 2007) (law enacted "for the purpose of preventing and restraining monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, promoting the healthy

the U.S. antitrust laws do not identify specific objectives. An "unreasonable" restraint ultimately reflects a normative judgment of what is unreasonable.

Nor does the legislative history identify a single objective.[48] Hofstadter, for example, categorized antitrust's goals as (i) economic (competition maximizes "economic efficiency"), (ii) political (antitrust principles "intended to block private accumulations of power and protect democratic government"), and (iii) social and moral (competitive process was "disciplinary machinery" for character development).[49]

The political, social, and moral goals were salient after World War II given the cartels in Nazi Germany colluding with U.S. firms.[50] Congress, in passing section 7 of the Clayton Act and in its 1950 Celler-Kefauver Anti-Merger amendment, "was concerned with arresting concentration in the

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development of the socialist market economy"); Netherlands Competition Auth., Competition Enforcement and Consumer Welfare Setting the Agenda 14 (2011), www.atp.nl/nma/image.php?id=146&type=pdf [hereinafter 2011 ICN Survey].

[48] Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1191 (1977).

[49] HOFSTADTER, *supra* note 4, at 199-200; AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 412 (2005) (discussing how the direct election of U.S. senators was to counter the "undue effects of large corporations, monopolies, trusts, and other special interest groups in the Senate election process"); Frank Maier-Rigaud, *On the Normative Foundations of Competition Law: Efficiency, Political Freedom and the Freedom to Compete* (May 2, 2011), *available at* http://ssrn.com/abstract=1829023; Thomas J. Horton, *The Coming Extinction of* Homo Economicus *and the Eclipse of the Chicago School of Antitrust: Applying Evolutionary Biology to Structural and Behavioral Antitrust Analyses*, 42 LOY. U. CHI. L.J. 469, 503-4 (2011).

[50] F.A. HAYEK, THE ROAD TO SERFDOM: TEXT AND DOCUMENTS--THE DEFINITIVE EDITION 187-92 (2007); WENDELL BERGE, CARTELS: CHALLENGE TO A FREE WORLD (1944); Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497; Message from President Franklin D. Roosevelt to the Congress Transmitting Recommendations Relative to the Strengthening and Enforcement of Antitrust Laws, Apr. 29. 1938, S. Doc. No. 173, 75th Cong., 3d Sess. 1 (1938), *reprinted in* I.iv THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3404 (Earl W. Kintner ed. 1978) ("liberty of a democracy is not safe if the people tolerate the growth of private power to a point where it becomes stronger than their democratic state itself").

American economy, whatever its cause, in its incipiency."[51] Congress' fear was "not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose."[52]

In reviewing the Sherman Act's legislative history, the Court noted Congress's non-economic concerns about the concentration of wealth and power in the hands of the few.[53] The Sherman Act, found the Court, sought to

- prevent the concentration of markets through acquisitions,[54] and "perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other;"[55]
- protect firms' "right of freedom to trade;"[56]
- promote consumer welfare, allocative efficiency and price competition;[57]

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[51] United States v. Pabst Brewing Co., 384 U.S. 546, 551 (1966).

[52] Brown Shoe Co. v. United States, 370 U.S. 294, 316 (1962); H.R. REP. NO. 1191, 81st Cong., 1st Sess. 8 (prohibiting relationships that deprive rivals a fair opportunity to compete); KENNETH M. DAVIDSON, REALITY IGNORED: HOW MILTON FRIEDMAN AND CHICAGO ECONOMICS UNDERMINED AMERICAN INSTITUTIONS AND ENDANGERED THE GLOBAL ECONOMY 9 (2011).

[53] Standard Oil Co. of New Jersey v. U.S., 221 U.S. 1 (1911).

[54] *Brown Shoe*, 370 U.S. at 374.

[55] *Id.*; *see also* United States v. Von's Grocery Co., 384 U.S. 270, 275 (1966) ("[l]ike the Sherman Act in 1890 and the Clayton Act in 1914, the basic purpose of the 1950 Celler-Kefauver Act was to prevent economic concentration in the American economy by keeping a large number of small competitors in business"); United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945) ("possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few").

[56] United States v. Colgate & Co., 250 U.S. 300 (1919).

[57] Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221 (1993) ("antitrust laws' traditional concern for consumer welfare and price competition"); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 107 (1984) ("Congress designed the Sherman Act as a 'consumer welfare prescription'") (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979)) (quoting BORK, *supra* note 40); Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 538 (1983) ("assure customers the benefits of price competition");

- "protect the public from the failure of the market;"[58]

- preserve economic freedom[59] and the freedom for each business "to compete-to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster;"[60]

- condemn practices that "completely shut[] out competitors, not only from trade in which they are already engaged, but from the opportunities to build up trade in any community where these great and powerful combinations are operating under this system and practice;"[61]

- "secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade;"[62] and

- "be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[63]

While concerned of higher prices and less initiative from monopolies,

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Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308 (3d Cir. 2007) ("primary goal of antitrust law is to maximize consumer welfare by promoting competition among firms); L.A.P.D., Inc. v. Gen. Elec. Corp., 132 F.3d 402, 404 (7th Cir. 1997) ("Antitrust law is designed to protect consumers from the higher prices-and society from the reduction in allocative efficiency-that occurs when firms with market power curtail output."); Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1445 (9th Cir. 1995) (characterizing allocative efficiency as synonymous with consumer welfare and as "the central goal of the Sherman Act"); J. Allen Ramey, M.D., Inc. v. Pac. Found. For Med. Care, 999 F. Supp. 1355, 1364 (S.D. Cal. 1998); Ginzburg v. Mem'l Healthcare Sys., Inc., 993 F. Supp. 998, 1015 (S.D. Tex. 1997) ("purpose of antitrust law is the promotion of consumer welfare") (quoting Reazin v. Blue Cross & Blue Shield of Kansas, 899 F.2d 951, 960 (10th Cir.1990)).

[58] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993).

[59] *Associated General Contractors*, 459 U.S. at 538; Kochert v. Greater Lafayette Health Services, Inc., 463 F.3d 710, 715 (7th Cir. 2006); In re Cardizem CD Antitrust Litig., 332 F.3d 896, 904 (6th Cir. 2003); SigmaPharm, Inc. v. Mut. Pharm. Co., 772 F. Supp. 2d 660 (E.D. Pa. 2011).

[60] United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972).

[61] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 10 n.15 (1984) (quoting H.R.Rep. No. 63-627, 63d Cong., 2d Sess., 12-13 (1914)).

[62] Charles A. Ramsay Co. v. Associated Bill Posters of U.S. & Canada, 260 U.S. 501, 512 (1923).

[63] Nat'l Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla., 468 U.S. 85, 104 n. 27 (1984) (quoting Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4-5 (1958)).

courts also expressed social and political concerns of monopolies, including impoverishing individuals of their livelihood.[64] Even if monopolies were beneficent, opportunity, and liberty remain limited.[65]

C. The Quest for a Single Antitrust Goal

Although economists were ambivalent when the Sherman Act was enacted,[66] and even though the Act's legislative history encompassed non-economic concerns,[67] in the past policy cycle, Richard Posner, Robert Bork

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[64] United States v. Vandebrake, CR10-4025-MWB, 2011 WL 488690 (N.D. Iowa Feb. 8, 2011) (quoting United States v. Columbia Steel Co., 334 U.S. 495, 536 (1948) (Douglas, J., dissenting) ("Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. The fact that they are not vicious men but respectable and social minded is irrelevant. That is the philosophy and the command of the Sherman Act."); United States v. Von's Grocery Co., 384 U.S. 270, 274 (1966) ("From this country's beginning there has been an abiding and widespread fear of the evils which flow from monopoly—that is the concentration of economic power in the hands of a few."); United States v. Se. Underwriters Ass'n, 322 U.S. 533, 553–54 (1944) ("'Trusts' and 'monopolies' were the terror of the period. Their power to fix prices, to restrict production, to crush small independent traders, and to concentrate large power in the few to the detriment of the many, were but some of numerous evils ascribed to them."); Bepex Corp. v. Black Clawson Co., 713 F.2d 202, 204 (6th Cir. 1983) ("One freedom which the colonists sought in 1776 was freedom from monopolies."); United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945) (Congress not necessarily actuated by economic motives alone and concerned about monopolies' indirect social and moral effect); United States v. Addyston Pipe & Steel Co., 85 F. 271, 280 (6th Cir. 1898) (Monopolies "deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves.") (quoting Alger v. Thacher, 19 Pick. 51, 54 (1837)); *see also* Case of Monopolies, (1602) 77 Eng. Rep. 1260, 1263 (K.B.) (if monopolies flourish, workers, who maintained for their families, "will of necessity be constrained to live in idleness and beggary"); Mitchel v. Reynolds, (1711) 24 Eng. Rep. 347, 350 (Ch.) (deprives public of useful member).

[65] *See, e.g.*, Morales v. Trans World Airlines, Inc., 504 U.S. 374, 421 (1992) (Stevens, J., dissenting) ("The basic economic policy of the Nation is one favoring competitive markets in which individual entrepreneurs are free to make their own decisions concerning price and output.").

[66] *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 58 (4th ed. 2011) (concepts of allocative efficiency and deadweight loss "were almost certainly not known to the framers of the Sherman Act"); George J. Stigler, *The Economists and the Problem of Monopoly*, 72 AM. ECON. REV. 1, 3 (1982) ("A careful student of the history of economics would have searched long and hard, on July 2 of 1890, the day the Sherman Act was signed by President Harrison, for any economist who had ever recommended the policy of actively combatting collusion or monopolization in the economy at large.").

[67] For further discussion of the Sherman Act's legislative history, including Judge Bork's interpretation and the criticisms thereto, see generally Daniel R. Ernst, *The New*

and other Chicago School scholars pursued a quest for a single unifying economic goal.[68] Antitrust's whole task was "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."[69]

Their economic goal was consistent with their largely static conception of competition, strong belief in the rationality of market participants, skepticism over the likelihood and extent of market failures, and doubts of the government's institutional capacities.[70] With their faith in lightly regulated markets, they saw a limited role for antitrust, and accordingly marginalized antitrust's political, moral, and social goals.[71] By the early 2000s, Posner surmised that

> [a]lmost everyone professionally involved in antitrust today--whether as litigator, prosecutor, judge, academic, or informed observer--not only agrees that the only goal of the antitrust laws should be to promote economic welfare, but also agrees on the essential tenets of economic theory that should be used to determine the consistency of specific business practices with that goal.[72]

Despite Posner's assertion, the U.S. antitrust community never agreed that antitrust's goals were only economic or that antitrust had one goal, to promote economic welfare.[73] Others continued to recognize antitrust's

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Antitrust History, 35 N.Y.L. SCH. L. REV. 879, 882-83 (1990); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 HASTINGS L.J. 871, 889-94 (1999).

[68] Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1, 4 (1982) (collecting articles that antitrust's overriding goal is economic efficiency).

[69] BORK, *supra* note 40, at 91; *see also* RICHARD A. POSNER, ANTITRUST LAW viii-ix (2d ed. 2001).

[70] HOVENKAMP, *supra* note 66, at 71-73 (summarizing Chicago School's theories); Adams & Brock, *supra* note 37, at 282-93 (same).

[71] Markham, *supra* note 34, at 280.

[72] POSNER, *supra* note 69, at ix; *see also* Chesapeake & Ohio Ry. Co. v. United States, 704 F.2d 373, 376 (7th Cir. 1983) (Posner, J.) ("The allocative-efficiency or consumer-welfare concept of competition dominates current thinking, judicial and academic, in the antitrust field.").

[73] Daniel L. Rubinfeld, *On the Foundations of Antitrust Law and Economics*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC

multiple objectives.[74] Professors Adams and Brock, for example, identified among antitrust's traditional aims: (i) private economic power, like all absolute power, is subject to abuse and injurious to public welfare, (ii) such power must be decentralized to protect a free society from its abuse, (iii) competitively structured markets diffuse private power and discipline economic decision-making, and (iv) antitrust policy is critical to preserve competitive markets.[75] While the FTC chair during the Clinton administration, Professor Robert Pitofsky referred to antitrust's non-economic goals.[76] As he earlier wrote, "[i]t is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws," and any antitrust policy that excluded such political values "would be unresponsive to the will of Congress."[77]

Nor did antitrust lawyers ever agree that antitrust's sole goal is

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ANALYSIS ON U.S. ANTITRUST 56 (Robert Pitofsky ed. 2008) (noting disagreement within antitrust community over "whether economic efficiency should be the sole norm in antitrust or whether efficiency should be balanced against other norms such as consumer welfare and/or the promotion of small business").

[74] *See, e.g.,* DAVIDSON, *supra* note 52, at 37; Darren Bush, *Too Big to Bail: The Role of Antitrust to Distressed Industries*, 77 ANTITRUST L.J. 277, 281-96 (2010); Spencer Weber Waller, *Bringing Globalism Home: Lessons from Antitrust and Beyond*, 32 LOY. U. CHI. L.J. 113, 117 (2000); Eleanor Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1182 (1981) (identifying Sherman Act's four major historical goals as "(1) dispersion of economic power, (2) freedom and opportunity to compete on merits, (3) satisfaction of consumers, and (4) protection of competition process as market governor").

[75] Adams & Brock, *supra* note 37, at 262-79; *see also* JOSEPH W. BURNS, A STUDY OF THE ANTITRUST LAW: THEIR ADMINISTRATION, INTERPRETATION AND EFFECT 341 (1958) ("Concern over excessive growth of private economic power and its social and political implications is built into every member of the structure of antitrust policy, including section 7."); Harlan M. Blake & William K. Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422 (1965).

[76] Robert Pitofsky, Fed. Trade Comm'n, Challenges of the New Economy: Issues at the Intersection of Antitrust and Intellectual Property (June 15, 2000), http://www.ftc.gov/speeches/pitofsky/000615speech.shtm.

[77] Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051-52 (1979) (one political value underlying the Sherman Act was a "fear that excessive concentration of economic power will breed antidemocratic political pressures"); William E. Kovacic, ICN Curriculum Project, Module 1: Origins and Aims of Competition Policy (May 2011), http://www.icnblog.org/ftc/ftc-1-module-4-28-11/player.html (discussing Sherman Act's political and economic objectives).

promoting Posner's conception of economic welfare.[78] For example, two years after Posner's assertion, the ABA discussed antitrust's social and political objectives.[79]

While unsuccessful with Congress,[80] the Chicago School influenced the Reagan[81] and Bush[82] administrations and courts.[83] The debate over antitrust's goals shifted, although not completely,[84] to the economic

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[78] *See, e.g.,* Fed. Trade Comm'n & U.S. Dep't of Justice, Sherman Act Section 2 Joint Hearing: Understanding Single-Firm Behavior--Conduct As Related To Competition (May 8, 2007), www.justice.gov/atr/public/hearings/single_firm/docs/225233.wpd-2007-08-29-, (Statement of Douglas Melamed) (characterizing hearings as an "unbounded exercise for a public policy class at the Kennedy School" with the different views stemming from differences in assumptions about antitrust's purpose).

[79] ABA, ANTITRUST GOALS, *supra* note 41.

[80] Anna Cifelli Isgro, *Antitrust Reform: DOA Reagan's Plan Rankles Business Lobbies, Consumer Groups, and Congressman Rodino*, FORTUNE, Mar. 31, 1986, http://money.cnn.com/magazines/fortune/fortune_archive/1986/03/31/67320/index.htm.

[81] As now Chief Justice John Roberts said at the time, the Reagan administration's "antitrust enforcement activities parallel our general concern with excessive regulation." http://www.archives.gov/news/john-roberts/accession-60-89-0372/ doc004.pdf; William F. Baxter, *Responding to the Reaction: The Draftsman's View*, 71 CAL. L. REV. 618, 630 (1983) (announcing that DOJ "will consider only those factors that, according to economic theory or empirical evidence, relate to the ease and profitability of collusion. An industry trend toward concentration is not a factor that will be considered, even though it has been used in the past.").

[82] Competition officials during the last Bush administration stated that the "promotion of consumer welfare and the organization of the free market economy are the only goals of its antitrust laws . . . with other economic or social objectives better pursued by other instruments." Unilateral Conduct Working Grp., Int'l Competition Network, Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies 31 (2007), http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf [hereinafter 2007 ICN Report].

[83] Markham, *supra* note 34, at 264-65 ("Beginning with Continental T.V., Inc. v. GTE Sylvania, Inc., the antitrust laws in the United States began a steady process of judicial erosion to eliminate multiple and possibly conflicting policy objectives, distilling in their place the exclusive purpose of promoting consumer welfare through allocative and dynamic efficiency.").

[84] *See, e.g.*, Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 360 (1990) (Stevens, J., dissenting) (criticizing that "Court, in its haste to excuse illegal behavior in the name of efficiency, has cast aside a century of understanding that our antitrust laws are designed to safeguard more than efficiency and consumer welfare, and that private actions not only compensate the injured, but also deter wrongdoers."); LePage's Inc. v. 3M, 324 F.3d 141, 169 (3d Cir. 2003) (describing Section 2's goal, to curb the excesses of monopolists and near-monopolists, as "the equivalent in our economic sphere of the guarantees of free and unhampered elections in the political sphere. Just as democracy can

sphere.[85] The primary policy debate was whether to apply a total or consumer welfare standard.[86] Likewise, in the past policy cycle, the Court acknowledged antitrust's economic goals, but not its political, social and moral goals.[87] For example, the Court recently praised monopoly prices as an inducement for innovation.[88] One district court, following the Court's dictum, went further afield in announcing, "the purpose of antitrust laws is not to prevent monopolies."[89] This, of course, is squarely inconsistent with the Clayton Act, which prohibits practices and mergers "that tend to create a

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thrive only in a free political system unhindered by outside forces, so also can market capitalism survive only if those with market power are kept in check."); MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1176 (7th Cir. 1983) (Wood, C.J., concurring & dissenting in part) ("While efficiency and consumer welfare are laudable goals, they should not be permitted to entirely eclipse a major aim of the antitrust laws: the promotion of competition. To advance efficiency ahead of competition in the hierarchy of antitrust values is to slight the non-economic dimension of the Sherman Act's concern with competition.").

[85] Michael A. Carrier, *Resolving the Patent-Antitrust Paradox Through Tripartite Innovation*, 56 VAND. L. REV. 1047, 1062 (2003) (noting in the past generation courts have emphasized economic efficiencies to the exclusion of noneconomic objectives); Rudolph J.R. Peritz, *Foreword, Antitrust as Public Interest Law*, 35 N.Y.L. SCH. L. REV. 767, 771-72 (1991) (traditional goals such as "the abatement of unfair competition, a strong preference for individual entrepreneurs, the disfavor of monopoly profits, a distrust of firms with great economic power, and a recognition of competition as a process with social, economic, and political returns" were "shoved into the archives of antitrust history").

[86] *See, e.g.*, John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 208 (2008) (arguing that Congress's overriding concern was with protecting purchasers from paying supracompetitive prices, and antitrust policy can and should take business welfare into account in those few situations that help businesses but do not cause consumers to pay supracompetitive prices); Dennis W. Carlton, Econ. Analysis Grp. Discussion Paper, *Does Antitrust Need to be Modernized?*, EAG 07-3 (Jan. 2007), http://www.justice.gov/atr/public/eag/221242.htm (describing the debate as maximizing consumer surplus, total surplus (total welfare), or some weighted average of producer plus consumer surplus, and arguing that the proper objective of antitrust should be total, not consumer, surplus); Russell Pittman, *Consumer Surplus as the Appropriate Standard for Antitrust Enforcement*, 3 COMPETITION POL'Y INT'L 205, 206 (2007) (discussing debate among senior DOJ's Antitrust Division economists over a total versus consumer surplus standard).

[87] *See supra* note 57.

[88] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

[89] Edgenet, Inc. v. GS1 AISBL, 742 F. Supp. 2d 997, 1034 (E.D. Wis. 2010) motion to certify appeal denied, 09-CV-65, 2011 WL 1305219 (E.D. Wis. Apr. 1, 2011).

monopoly."[90] But it shows how far some courts have strayed from antitrust's historical goals.

D. ICN Members' Multiple Goals

While the U.S. during the past policy cycle sought a single economic goal for antitrust, elsewhere more countries were enacting competition laws, with more antitrust objectives as a result. The ICN recently completed three surveys of its member competition authorities to identify their countries' antitrust objectives. As the ICN found, the "objectives of competition laws vary widely from one jurisdiction to another. . . . [P]arallel objectives, possibly conflicting with that of economic efficiency or consumer welfare, are present in many competition laws."[91]

The ICN in its first survey asked about the countries' objectives regarding laws prohibiting monopolistic behavior. Ten objectives emerged:

- Ensuring an effective competitive process,
- Promoting consumer welfare,
- Enhancing efficiency,
- Ensuring economic freedom,
- Ensuring a level playing field for small and mid-sized enterprises,
- Promoting fairness and equality,
- Promoting consumer choice,
- Achieving market integration,
- Facilitating privatization and market liberalization, and
- Promoting competitiveness in international markets.[92]

In the second survey of 33 jurisdictions, the main antitrust objectives were the promotion of competition, economic efficiency, and increasing

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[90] 15 U.S.C. §§ 13-14, 18.

[91] Advocacy Working Grp., Int'l Competition Network, Advocacy and Competition Policy Report 32 (2002), http://www.internationalcompetitionnetwork.org/OutreachToolkit/media/assets/resources/advocacy_ report.pdf [hereinafter ICN Advocacy Report].

[92] 2007 ICN Report, *supra* note 82, at annex A.

consumer welfare.[93] Included within these terms were other goals such as guaranteeing "equal conditions for all enterprises in the market."[94]

The third survey in 2011 explored 57 countries' conception and application of one oft-cited goal, promoting consumer welfare.[95]

Consequently, the reality facing international firms today is various policy goals. Antitrust goals that prevail in one jurisdiction are not necessarily as important in other jurisdictions.

II. SHORTCOMINGS OF THE CURRENT GOALS TO UNIFY ANTITRUST POLICY

As Part I discusses, U.S. antitrust policy in the United States historically recognized multiple goals. In the last policy cycle, however, some sought to limit antitrust to a single economic goal. This Part examines why four oft-cited economic goals neither unified antitrust policy nor significantly improved antitrust analysis.[96]

A. Why Ensuring an Effective Competitive Process Never Unified Antitrust Policy

The U.S. courts have remarked that the "purpose of antitrust law, at least as articulated in the modern cases, is to protect the competitive process."[97] Similarly all but one of the competition agencies surveyed by the ICN cited "[e]nsuring an effective competitive process" as an objective of the monopolization laws.[98] Presumably, no one advocates an "ineffective" competitive process.

This goal fails, as it simply shifts the debate to the larger, unresolved

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[93] Turkish Competition Auth., International Competition Network Report on Interface between Competition Policy and Other Public Policies 44 (Apr. 2010), http://www.icn-istanbul.org/Upload/Materials/SpecialProject/SP_BackgroundReport.pdf.

[94] 2011 ICN Survey, *supra* note 47, at 7 (identifying one of Barbados's primary objectives).

[95] *Id*.

[96] Richard D. Cudahy & Alan Devlin, *Anticompetitive Effect*, 95 MINN. L. REV. 59, 60-61 (2010); Stucke, *Rule of Reason*, *supra* note 17, at 1421-73.

[97] Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1437 (7th Cir.1986); *see also* Tal v. Hogan, 453 F.3d 1244, 1258 (10th Cir. 2006) (same); SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 963 (10th Cir. 1994) (same).

[98] 2007 ICN Report, *supra* note 82, at 6.

issue, namely defining an "effective competitive process."[99] No consensus exists in the United States or worldwide on an effective competition process or on a unifying theory of competition.[100] Antitrust becomes a tautology. The goal of competition law is "promoting competition by discouraging anti-competitive behaviour."[101]

What constitutes an *effective* competitive process varies by audience.[102] Among the goals cited by the ICN-surveyed agencies were protecting consumers,[103] encouraging creativity in business activities,[104] achieving efficiency and fairness to small and medium-sized enterprises,[105] and safeguarding jobs.[106] Entrenched firms may emphasize promoting their freedom to contract, choose their distributors or retailers, and not deal with their competitors. Domestic competitors may advocate protecting choice for consumers to insulate themselves from more efficient international competitors.[107] Entrepreneurs may emphasize greater access to the

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[99] *Id.* at 8 (noting Chilean Competition Tribunal's response "that while the only objective of competition policy is to promote and protect competition, one of the main difficulties is to define legally what 'free competition means,' or to articulate why competition itself should be protected").

[100] Stucke, *Reconsidering Competition*, *supra* note 39 (discussing how any theory of competition depends on its assumptions, the validity of which can vary across industries and time); Org. for Econ. Co-operation & Dev., Policy Brief: What Is Competition on the Merits? 1 (2006), http://www.oecd.org/dataoecd/10/27/37082099.pdf (noting term "competition on the merits" has "never been satisfactorily defined," which has "led to a discordant body of case law that uses an assortment of analytical methods," which in turn has "produced unpredictable results and undermined the term's legitimacy along with policies that are supposedly based on it").

[101] CUTS Centre for Competition, Inv. & Econ. Regulation, Towards a Healthy Competition Culture... i (2003), http://www.cuts-international.org/THC.pdf [hereinafter CUTS].

[102] *Id.*

[103] 2007 ICN Report, *supra* note 82, at 7.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] For example, certain developing nations noted that transnational companies "enjoy advantages over domestic firms because of their size, reach and control over intellectual property (technologies, brands, copyright etc)." CUTS, *supra* note 101, at 17. One necessity of competition policy, as envisioned by CUTS, is "to prevent these firms from

marketplace. Consumers may want it all: lower prices, greater choices, better quality, more innovation, while preserving their jobs and pay structure at domestic firms.

Nor can policymakers define an "effective competitive process" by the desired effects, such as lower costs and prices, improved quality and services, greater choice, and more innovation. The desired competitive effects can conflict. The Court, for example, stresses the importance of price competition.[108] Yet the Court recently accepted higher prices (and diminished intra-brand competition) for more services (and potentially more inter-brand competition).[109] Higher prices at times are needed for innovation.[110]

Accordingly, the objective of *an effective competitive process* is simply

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unfairly exploiting these advantages." *Id*.

[108] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 107-08 (1984) (restraint "that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law" and restrictions on "price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit"); Pac. Bell Tel. Co. v. linkLine Communc'ns, Inc., 555 U.S. 438, 129 S. Ct. 1109, 1120 (2009) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.") (quotation omitted); *see also* Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 896 (9th Cir. 2008) ("price cutting is a practice the antitrust laws aim to promote"); Wallace v. Int'l Bus. Machines Corp., 467 F.3d 1104, 1107 (7th Cir. 2006) ("goal of antitrust law is to use rivalry to keep prices low for consumers' benefit. Employing antitrust law to drive prices up would turn the Sherman Act on its head."); Animal Sci. Products, Inc. v. China Nat'l Metals & Minerals Imp. & Exp. Corp., 702 F. Supp. 2d 320, 465 (D.N.J. 2010) ("goal of antitrust law is to create the maximum market competition between the sellers of the same goods and, hence, to drive the price on these goods as much down as possible").

[109] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 895-96 (2007); Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1339 (11th Cir. 2010) ("Higher prices alone are not the 'epitome' of anticompetitive harm . . . Rather, consumer welfare, understood in the sense of allocative efficiency, is the animating concern of the Sherman Act.").

[110] Eldred v. Ashcroft, 537 U.S. 186, 215-16 (2003) (need to balance encouraging innovation by rewarding inventors with the right to exclude others for a limited time from using the patented invention with the "avoidance of monopolies which stifle competition without any concomitant advance in the 'Progress of Science and useful Arts.'").

a belief in other objectives, which can conflict.[111]

B. Why Consumer Welfare Never Unified Antitrust Policy

In the past antitrust policy cycle, the U.S. courts increasingly identified consumer welfare as a historic antitrust concern.[112] The irony is that before 1975, the Court never mentioned "consumer welfare" in an antitrust case.[113] Despite its pleasant democratic ring (who, after all, advocates hindering consumer welfare?), it too suffers infirmities.

1. No Consensus Exists on What *Consumer Welfare* Actually Means

In 1987, Professor Joseph Brodley remarked that the terms efficiency and consumer welfare "have become the dominant terms of antitrust discourse without any clear consensus as to what they exactly mean" and that consumer welfare "is the most abused term in modern analysis."[114] That remains true today.[115]

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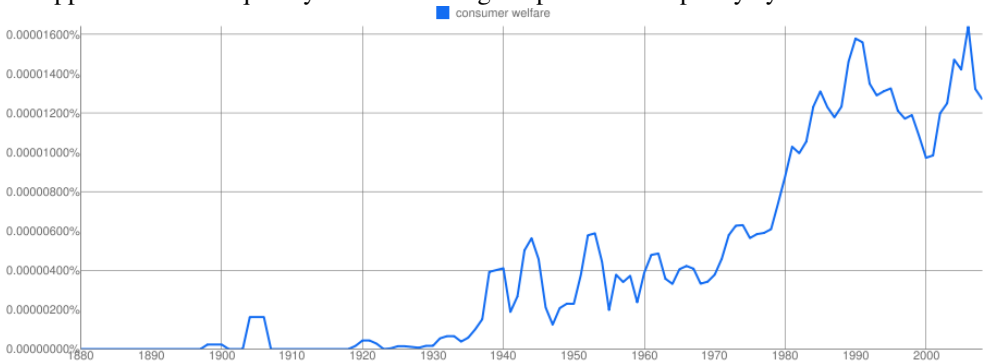
[111] CUTS, *supra* note 101, at i.

[112] See *supra* note 87.

[113] United States v. Citizens & S. Nat. Bank, 422 U.S. 86, 132 n.1 (1975) ("Correspondent banking, like other intra-industry interaction among firms or their top management, provides an opportunity both for the kind of education and sharing of expertise that ultimately enhances consumer welfare and for 'understandings' that inhibit, if not foreclose, the rivalry that antitrust laws seek to promote."). The term consumer welfare appeared more frequently in books during the past antitrust policy cycle:



Google Books Ngram Viewer, http://ngrams.googlelabs.com.

[114] Joseph Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1032 (1987).

[115] HOVENKAMP, *supra* note 66, at 85 (noting term's ambiguity); Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox* 2, 7 J. COMPETITION L. & ECON. 133, 134 (2011) ("academic confusion and thoughtless judicial borrowing led to the rise of a label [consumer welfare] that thirty years later has no clear meaning"); Steven C. Salop, *Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True*

Although thirty of thirty-three countries in the 2007 ICN survey identified this objective, most did "not specifically define consumer welfare and appear[ed] to have different economic understandings of the term."[116] Similarly the 2011 survey, while finding "some agreement" among the surveyed 57 competition authorities, identified significant differences.[117] Only 7 of the 57 agreed with the provided definition of consumer welfare.[118] Most (38 of the 57) antitrust authorities had "no explicit definition" of consumer welfare.[119] Some considered consumer welfare as "a natural result of enforcement activities but not necessarily an underlying goal."[120] Under this definition, antitrust enforcers promote consumer welfare whenever they act (or not act). Others defined consumer welfare broadly to include "safeguarding the competitive process," which in turn encompasses both price and non-price dimensions.[121] France included "enhancing the competitive process . . . stimulating an efficient allocation of resources and preventing unchecked market power" within its conception of promoting consumer welfare over the long-term.[122]

Not only do competition authorities disagree over the term's meaning. The U.S. Antitrust Modernization Commissioners, after three years, could

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Consumer Welfare Standard, 22 LOY. CONSUMER L. REV. 336, 347 (2010) (noting confusion over meaning of aggregate and consumer welfare standards); J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, The Next Challenges for Antitrust Economists, Remarks at the NERA 2010 Antitrust & Trade Regulation Seminar (July 8, 2010) (noting many different ideas exist as to how to promote consumer welfare), www.ftc.gov/speeches/rosch/100708neraspeech.pdf.

[116] 2007 ICN Report, *supra* note 82, at 9.

[117] 2011 ICN Survey, *supra* note 47, at 4-6.

[118] *Id*. at 18 nn. 34-35 (consumer welfare "relates only to consumer surplus" and excludes "non-economic considerations").

[119] *Id*. at 18-19.

[120] *Id*. at 10.

[121] *Compare id*. at 10 *with id*. at 11, 12 (countries separately identifying other goals, such as maintaining effective competition, as distinct from consumer welfare).

[122] *Id*. at 10; Elzinga, *supra* note 48, at 1193 (discussing how efficiency and equity were not mutually exclusive, and included the distribution of income).

not reach unanimity on the term.[123] The Commissioners issued in 2007 their 449-page report on how "antitrust law and enforcement can best serve consumer welfare in the global, high-tech economy that exists today."[124] But the debate before and within the AMC was "about the precise definition of 'consumer welfare.'"[125] The "[d]ebate continues over whether the Supreme Court implicitly adopted the goal of allocative efficiency or the goal of preventing wealth transfers as the standard by which consumer welfare should be measured."[126]

Consequently, consumer welfare means different things to different people. As the economist F.A. Hayek observed, the welfare of a people "cannot be adequately expressed as a single end, but only as a hierarchy of ends, a comprehensive scale of values in which every need of every person is given its place."[127] Consumer welfare is not a well-defined goal but a generality that incorporates different social, political, economic, and moral values. Bork's definition of consumer welfare differs from other scholars' definitions.[128] For Judge Wald and others, the phrase *consumer welfare* "surely includes far more than simple economic efficiency."[129] Professors Sullivan and Grimes discuss within the definition of consumer welfare maintaining allocative efficiency, preventing wealth transfers, and

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[123] The Antitrust Modernization Commission was created pursuant to the Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§ 11051-60, 116 Stat. 1856.

[124] ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 1 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf [hereinafter AMC REPORT].

[125] *Id*. at 26 n.22.

[126] *Id*. at 43 n.19.

[127] HAYEK, *supra* note 50, at 101.

[128] Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. L. & ECON. 7, 7-48 (1966); Lande, *Wealth Transfers*, *supra* note 67, at 65-151; Robert H. Lande, *Proving the Obvious: The Antitrust Laws Were Passed to Protect Consumers (not Just to Increase Efficiency)*, 50 HASTINGS L.J. 959, 963-66 (1999).

[129] Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 231 n.3 (D.C. Cir. 1986) (Wald, J., concurring).

preserving consumer choice.[130] Not surprisingly, courts have reached inconsistent results, based on their conception of consumer welfare.[131]

2. Difficulty in Identifying the Consumer

If antitrust's goal is promoting consumer welfare, another dispute is defining the consumer. If the consumer is anyone who uses economic goods,[132] or "refers to all direct and indirect users who are affected by the anticompetitive agreements, behavior or mergers in question,"[133] then everyone—from the poorest individual to the wealthiest corporate monopoly--is a consumer. The consumer welfare standard becomes a total welfare standard, which raises separate concerns over the distribution of wealth.[134] If the consumer includes poor individuals but excludes wealthy monopolies (and other corporate purchasers of goods and services), then the definition becomes more political and subjective.[135]

3. Operational Difficulties

Some U.S. courts say that the "reduction of competition does not invoke the Sherman Act until it harms consumer welfare."[136] This is nonsense.

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[130] LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 12-16 (2d ed. 2006).

[131] *Compare* Reiffin v. Microsoft Corp., 158 F. Supp. 2d 1016, 1033-34 (N.D. Cal. 2001) (antitrust laws are concerned with consumer welfare and not with competitors seeking to obtain monopoly) *with* Fishman v. Estate of Wirtz, 807 F.2d 520, 536 (7th Cir. 1986) (Sherman Act protects rivalry to obtain monopoly).

[132] WEBSTER'S NEW COLLEGIATE DICTIONARY 242 (1979) (defining consumer).

[133] 2011 ICN Survey, *supra* note 47, at 32.

[134] *Id*. at 27.

[135] *Id*. at 32; Carlton, *supra* note 86 ("if only consumers matter, then a buying cartel should be perfectly legal and indeed should be encouraged" and "the notion that antitrust should focus on consumers, not firms, is premised on a false vision of who are consumers and who are firms. Most transactions in our economy are between firms.").

[136] Metro Indus., Inc. v. Sammi Corp., 82 F.3d 839, 848 (9th Cir. 1996) (quoting Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995)); Templin v. Times Mirror Cable Television, Inc., 56 F.3d 73 (9th Cir. 1995); Ice Cream Distribs. of Evansville, LLC v. Dreyer's Grand Ice Cream, Inc., 09-5815 CW, 2010 WL 3619884 (N.D. Cal. Sept. 10, 2010); J. Allen Ramey, M.D., Inc. v. Pac. Found. For Med. Care, 999 F. Supp. 1355, 1364 (S.D. Cal. 1998); Kinderstart.com LLC v. Google, Inc., C06-2057JFRS, 2007 WL 831806 (N.D. Cal. Mar. 16, 2007); Streamcast Networks, Inc. v. Skype Technologies, S.A., 547 F. Supp. 2d 1086, 1097 (C.D. Cal. 2007); Fox v. Good Samaritan Hosp., C-04-00874RMW, 2007 WL 2938175 (N.D. Cal. Oct. 9, 2007); Perry v.

Courts have not arrived at a shared, specific definition of consumer welfare. Even if they did, courts cannot value, consistent with the rule of law, how much competition can be reduced before harming consumer welfare.

One rule-of-law concern is that quantifying consumer welfare is itself impracticable, if not impossible. Twenty-eight percent of the countries in the 2011 ICN survey believed that quantifying consumer harm was "not possible."[137] Of those who believed it possible to quantify detriment to consumer welfare, they all recognized difficulties and limitations to such quantification.[138] Thus, requiring an antitrust plaintiff to show when a reduction in competition harms consumer welfare is illogical when "no easy, non-contestable, method for quantifying harm to consumer welfare" currently exists.[139]

A second rule-of-law concern is the constraints on data availability to undertake this review. Suppose, for example, courts adopted as their definition of consumer welfare "the individual benefits derived from the consumption of goods and services."[140] Under this definition, "individual welfare is defined by an individual's own assessment of his/her satisfaction, given prices and income;" accordingly, measuring consumer welfare "requires information about individual preferences."[141] Measuring individual preferences is itself difficult. One cannot rely entirely on consumers' choices, as consumers at times choose poorly and contrary to their long-term interests.[142] Moreover, consumer welfare, if measured on

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Rado, 504 F. Supp. 2d 1043, 1047 (E.D. Wash. 2007), *aff'd*, 343 F. App'x. 240 (9th Cir. 2009).

[137] 2011 ICN Survey, *supra* note 47, at 40.

[138] *Id*. at 41.

[139] *Id*. at 88.

[140] ORG. FOR ECON. CO-OPERATION & DEV., GLOSSARY OF INDUSTRIAL ORGANISATION ECONOMICS AND COMPETITION LAW 29 (1993), http://www.oecd.org/dataoecd/8/61/2376087.pdf [hereinafter OECD GLOSSARY].

[141] *Id*.

[142] *See, e.g*., Simona Botti & Sheena S. Iyengar, *The Dark Side of Choice: When*

the individual level, does not address restraints and mergers that increase some consumers' welfare, while decreasing others'.

Some economists adopt consumers' surplus[143] to measure consumer welfare.[144] But consumer surplus is seen as synonymous with static price competition, which is of limited use in industries with dynamic competition.[145] Thus, the ICN surveyed countries generally did "not seem to wish to be tied to a formal definition of consumer welfare as consumer surplus, and certainly not if consumer surplus is given a narrow definition and confined to price, without due consideration for quality, and other economic criteria."[146] Plus, "there is considerable debate over the degree to which [surplus] corresponds to more theoretically appealing measures of consumer welfare."[147] Ultimately proving that consumers were harmed often involves significant labor, time, and other costs and the data is not always available.[148]

A third rule-of-law concern is predictability and objectivity. Taking the mantra that the "antitrust law aims to protect competition, not competitors," courts begin their analysis of antitrust injury "from the viewpoint of the consumer."[149] A "prototypical example of antitrust injury" is that

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Choice Impairs Social Welfare, 25 J. PUBLIC POL'Y & MARKETING 24, 26 (2006).

[143] Consumer surplus is the "excess of social valuation of product over the price actually paid," and "is measured by the area of a triangle below a demand curve and above the observed price." OECD GLOSSARY, *supra* note 140, at 28. Suppose for example, after a long hike, you were willing to pay $2 for a cold Diet Coke. At the local store, you paid 50 cents. Your consumer surplus was $1.50. What consumers are willing to pay (and the amount of consumer surplus) can fluctuate, such as the price one is willing to pay for an umbrella.

[144] 2011 ICN Survey, *supra* note 47, at 18 (7 of the 57 survey countries).

[145] *Id*. at 19.

[146] *Id*. at 26.

[147] OECD GLOSSARY, *supra* note 140, at 28; *see also* Orbach, *supra* note 115, at 20-27.

[148] 2011 ICN Survey, *supra* note 47, at 45.

[149] Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 641 (3d Cir.1996) (quoting Alberta Gas Chemicals, Ltd. v. E.I. du Pont de Nemours & Co., 826 F.2d 1235, 1240 (3d Cir.1987)).

consumers "had to pay higher prices (or experienced a reduction in the quality of service) as a result of a defendant's anticompetitive conduct."[150] This standard is feasible when defendants illegally fixed the price of consumer goods or services. But proving this kind of antitrust injury in many other antitrust cases, such as when an entrenched firm eliminates a start-up through exclusionary means, is harder. Nor can an antitrust plaintiff prove her consumer welfare was reduced; instead he "must prove that the challenged conduct affected the prices, quantity or quality of goods or services and not just his own welfare."[151] As a circuit court judge and his co-author observed, it requires the antitrust plaintiff to engage in a "speculative, possibly labyrinthine, and unnecessary" analysis of how the restraints' efficiencies and inefficiencies affect the ill-defined consumer.[152] This analysis, as the ICN found, engenders "a relatively high degree of uncertainty in estimations or assumptions used for quantification of detriment to consumer welfare."[153]

Some courts equate a reduction of consumer welfare with an increase in price or reduction in quality.[154] This, however, says nothing about other important facets of competition (such as variety or innovation). One district court under its narrow conception of consumer welfare, for example, dismissed an antitrust complaint, in part because "reduced innovation as a result of defendants' conduct does not create an inference of raised consumer prices or reduced output."[155] These courts cannot simply assume

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[150] Mathias v. Daily News, L.P., 152 F. Supp. 2d 465, 478 (S.D.N.Y. 2001).

[151] Ginzburg v. Mem'l Healthcare Sys., Inc., 993 F. Supp. 998, 1015 (S.D. Tex. 1997).

[152] Cudahy & Devlin, *supra* note 96, at 87.

[153] 2011 ICN Survey, *supra* note 47, at 43.

[154] Pool Water Products v. Olin Corp., 258 F.3d 1024, 1034 (9th Cir. 2001) ("Consumer welfare is maximized when economic resources are allocated to their best use and when consumers are assured competitive price and quality.") (quoting Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995)).

[155] Edgenet, Inc. v. GS1 AISBL, 742 F. Supp. 2d 997, 1013 (E.D. Wis. 2010) motion to certify appeal denied, 09-CV-65, 2011 WL 1305219 (E.D. Wis. Apr. 1, 2011).

that because prices did not increase and output did not decrease as a result of the restraint, consumer welfare was not diminished.[156] One cannot assume that generalist courts can determine "how much restraint of competition is in the public interest"; such a "shifting, vague, and indeterminate" standard would put courts into "sea of doubt."[157]

Consequently, consumer welfare provides little guidance as an antitrust goal. While some courts, particularly those in the Ninth Circuit, require a showing that the restraint adversely impacts consumer welfare, this cannot be taken literally. The "connection between consumer welfare and the practical enforcement of competition law is not always straightforward," concluded the 2011 ICN survey; "there may be a considerable gap between policy statements and practice."[158] Consumer welfare for some agencies "provides general, underlying conceptual guidance rather than a technical test for enforcement in practice."[159] Although consumer welfare over the past thirty years is frequently mentioned as a policy goal, there remains no consensus on what the term actually means or who the consumers are. Plus, under any of the current definitions, there remains "no easy, non-contestable method for quantifying harm to consumer welfare that will work for all cases."[160]

C. Why Enhancing Efficiency Never Unified Antitrust Policy

Courts have cited enhancing efficiency as an antitrust goal.[161] But the

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[156] 2011 ICN Survey, *supra* note 47, at 44.
[157] United States v. Addyston Pipe & Steel, 85 F. 271, 283-84 (6th Cir. 1898).
[158] *Id*. at 3.
[159] *Id*. at 19.
[160] *Id*. at 45.
[161] *See, e.g.*, Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289-90 (1985) (whether to apply Court's per se illegal rule turns on "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive'") (quoting Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-20 (1979)).

legal status of efficiencies as antitrust's primary goal is weaker.[162] Although the Supreme Court has not sanctioned the use of the efficiencies defense in merger cases, the trend among lower courts is to recognize the defense.[163] Enhancing efficiency ranked third in the ICN survey (20 of the 33 competition authorities citing goal).[164] It too has a pleasant ring. (After all, who advocates promoting inefficiency?) It too suffers infirmities.

1. The Term Efficiency Is Not Self-Defining, But Encompasses Different Concepts

As the ICN noted, "[e]fficiency is a broad economic term that may refer to allocative efficiency (allocation of resources to their most efficient use), productive efficiency (production in the least costly way), or dynamic efficiency (rate of introduction of new products or improvements of products and production techniques)."[165]

Many of the surveyed competition agencies did not specify which efficiencies were their goals.[166] Indeed some efficiencies (dynamic) can be more important than others (productive).[167] What is important for our purposes is that an antitrust policy that focuses on maximizing one type of efficiency (e.g., productive) will not necessarily maximize other efficiencies (e.g., dynamic).[168]

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[162] F.T.C. v. Staples, Inc., 970 F. Supp. 1066, 1088 (D.D.C. 1997) (noting efficiency defense--whereby merging parties can defend merger by showing its creating significant efficiencies in the relevant market, thereby offsetting any anti-competitive effects--"not entirely clear" as a legal matter); *see also* John B. Kirkwood & Robert H. Lande, *The Chicago School's Foundation is Flawed: Antitrust Protects Consumers, Not Efficiency*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, *supra* note 73, at 93-94.

[163] F.T.C. v. H.J. Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001). No court to date has permitted a merger based on an efficiencies defense.

[164] 2007 ICN Report, *supra* note 82, at 12.

[165] *Id*.

[166] *Id*.

[167] Org. for Econ. Co-operation & Dev., Policy Roundtables: Dynamic Efficiencies in Merger Analysis 10 (May 22, 2007), http://www.oecd.org/dataoecd/53/22/40623561.pdf [hereinafter OECD Dynamic Efficiencies].

[168] William J. Kolasky, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., What Is Competition?, Seminar on Convergence Sponsored by the Netherlands Ministry of Economic Affairs (Oct. 28, 2002),

2. Difficulties in Measuring Efficiency

As Professor Brodley observes, "[p]ractical difficulties of courtroom proof severely limit implementation of efficiency goals, however important."[169] Ideally if maximizing efficiency were the goal, the competition authority would calculate accurately the net present value of each efficiency (e.g., value of new technologies) and inefficiency (e.g., disincentives to innovate post-merger, increase in waste) from the merger, and the likely efficiencies/inefficiencies if the merger were prohibited. The problem (especially in dynamic industries) is one cannot accurately calculate with the current economic tools the merger's impact on allocative, productive, and dynamic efficiencies. Although the 2010 Merger Guidelines are an improvement in incorporating non-price dimensions on competition, the new Guidelines, as FTC Commissioner Rosch observed, still lack a clear framework for analyzing a merger's impact on innovation, variety, and other non-price competition.[170]

a. Difficulties in Measuring Allocative Efficiency

Courts, in particular the Ninth Circuit, state that "an act is deemed anticompetitive under the Sherman Act only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality."[171] The first problem, which these courts never address, is that the term allocative efficiency has different meanings.[172]

The Ninth Circuit appears to define allocative efficiency as to "when economic resources are allocated to their best use."[173] Its definition of

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http://www.justice.gov/atr/public/speeches/200440.htm.

[169] Brodley, *supra* note 114, at 1028.

[170] Rosch, Next Challenges, *supra* note 115, at 7.

[171] Hilton v. Children's Hosp. San Diego, 315 F. App'x. 607, 609 (9th Cir. 2008); Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995).

[172] HOVENKAMP, *supra* note 66, at 83 (calling allocative efficiency a "more theoretical and controversial concept" with "different economists and philosophers prefer[ing] different definitions").

[173] *Rebel Oil*, 51 F.3d at 1433.

allocative efficiency can be construed as perfect price discrimination: Each consumer pays the highest price she is willing to pay (her reservation price), and there is no deadweight welfare loss.[174] While acceptable for some economists, others find this price discrimination (and paying higher prices) as unfair.[175] Another problem is that price discrimination, with several exceptions, is illegal.[176]

Another definition of allocative efficiency is Pareto efficiency, whereby "resources are so allocated that it is not possible to make anyone better off without making someone else worse off."[177] But this definition cannot serve as the policy goal. As Posner observed, Pareto efficiency "has few applications to the real world."[178] Many mergers make someone worse off: competitors (by making the merged entity more efficient), suppliers and distributors (by eliminating them or making the terms less favorable), and customers (higher prices, reduced variety, less innovation).[179]

Some view allocative efficiency as "leading firms to produce output up to the point where the marginal cost of each unit just equals the value of that

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[174] Cudahy & Devlin, *supra* note 96, at 92.

[175] Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 735 (1986) (91% of individuals surveyed thought charging higher prices to those more dependent on the product was offensive) [hereinafter *Fairness*].

[176] Texaco Inc. v. Hasbrouck, 496 U.S. 543, 554-56 (1990) (discussing when price discrimination between a wholesaler and retailer violates the Robinson-Patman Act, 15 U.S.C. § 13(a)).

[177] OECD GLOSSARY, *supra* note 140, at 65.

[178] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 13 (7th ed. 2007).

[179] Likewise potential Pareto superiority fails on two levels: trying to assess how the merger would affect the welfare of individuals and firms not before the court is beyond the district court's capabilities, and "Kaldor compensation principle works as a one off shot, but fails in situations where multiple detriments occur to the same group of people." PHIL EVANS, IN SEARCH OF THE MARGINAL CONSUMER: THE FIPRA STUDY 18 (2008); Wolfgang Kerber, *Should Competition Law Promote Efficiency? Some Reflections of an Economist on the Normative Foundations of Competition Law*, *in* ECONOMIC THEORY AND COMPETITION LAW (Josef Drexl et al. eds., 2009) (discussing criticisms of Kaldor-Hicks as normative criterion for economic analysis of legal rules when gains and losses are distributed unevenly among population).

unit to consumers."[180] This has, at least, two problems. First, a product's marginal cost, courts have recognized, "is notoriously difficult to measure and 'cannot be determined from conventional accounting methods.'"[181] Second, reducing price to marginal cost is not always desirable. Many branded products (from your morning coffee to evening cocktail) are priced above marginal cost and enjoy some market power.[182] So an antitrust goal of promoting marginal cost pricing conceivably would justify restricting advertising, marketing, and product differentiation, which are at times useful. Also pricing at marginal cost leaves little room for companies to invest in innovation.[183] "As Joseph Schumpeter first taught us," a former DOJ official said, "productive and dynamic efficiencies are at least as important as static allocative efficiency in promoting economic growth."[184]

To simplify further, courts can assess whether the restraint will diminish allocative efficiency in that the price will rise above the competitive level or quality, service, variety or innovation will diminish. But, as discussed above,[185] predicting a merger's impact on price and non-price competition

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[180] William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 ANTITRUST L.J. 207, 208 (2003).

[181] United States v. AMR Corp., 335 F.3d 1109, 1116 (10th Cir. 2003) (quoting Ne. Tel. Co. v. Am. Tel. & Tel. Co., 651 F.2d 76, 88 (2d Cir. 1981); Pac. Eng'g & Prod. Co. of Nev. v. Kerr-McGee Corp., 551 F.2d 790, 797 (10th Cir. 1977)). Because marginal cost cannot be determined from conventional accounting methods, courts in predatory pricing litigation use average variable cost as a surrogate. Hanson v. Shell Oil Co., 541 F.2d 1352, 1358 (9th Cir. 1976) (predatory pricing "could be shown by evidence that Shell was selling its gasoline at below marginal cost or, because marginal cost is often impossible to ascertain, below average variable costs"). But one criticism is that average variable cost is a "poor surrogate." HOVENKAMP, *supra* note 66, at 373.

[182] Deven R. Desai & Spencer Waller, *Brands, Competition, and the Law*, 2010 B.Y.U. L. REV. 1425, 1464.

[183] 2011 ICN Survey, *supra* note 47, at 30 (Australia noting how antitrust must account firms' earning sufficient returns to invest and innovate).

[184] William J. Kolasky, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Comparative Merger Control Analysis: Six Guiding Principles for Antitrust Agencies—New and Old (Mar. 18, 2002), http://www.justice.gov/atr/public/speeches/10845.htm#N_5_.

[185] See *supra* II.B.3.

is often difficult.

b. Difficulties in Measuring Productive Efficiencies

As the antitrust agencies recognize, a merger's likely productive efficiencies "are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms."[186]

As the agencies found, "efficiencies projected reasonably and in good faith by the merging firms may not be realized."[187] Indeed many mergers failed to deliver the promised efficiencies.[188] Among the well-known biases and heuristics relevant to the decision to enter in mergers and acquisitions, which frequently result in value destroying transactions, are "myopia, loss aversion, endowment effects, status quo bias, extremeness aversion, over-optimism, hindsight bias, anchoring heuristics, availability heuristics, framing effects, representative bias, saliency effects, and others."[189] Executives in behavioral studies were overconfident in their ability to manage a company, systematically underestimated their competitors' strength, and were prone to self-serving interpretations of reality (e.g., taking credit for positive outcomes and blaming the environment for

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[186] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (Aug. 19, 2010), http://www.justice.gov/atr/public/guidelines/hmg-2010.html; Org. for Econ. Co-Operation & Dev., Policy Brief: Mergers and Dynamic Efficiencies 1 (Sept. 2008) ("even in a static analysis, determining whether a merger is likely to lead to efficiencies and how they will compare with any anti-competitive effects the merger is expected to cause is quite difficult), www.oecd.org/dataoecd/55/48/41359037.pdf [hereinafter OECD Policy Brief].

[187] 2010 Merger Guidelines, *supra* note 186, at § 10.

[188] DAVIDSON, *supra* note 52, at 64; Spencer Weber Waller, *Corporate Governance and Competition Policy*, Loyola University Chicago School of Law Research Paper No. 2011-006, at 48 (Sept. 23, 2010), *available at* http://ssrn.com/abstract=1681673 (examining evidence from corporate finance that suggests entire categories of mergers are more likely to destroy, rather than enhance, shareholder value); Clayton M. Christensen et al., *The Big Idea: The New M&A Playbook*, HARV. BUS. REV., Mar. 2011, at 49 ("study after study puts the failure rate of mergers and acquisitions somewhere between 70% and 90%"); Walter Adams & James W. Brock, *Antitrust and Efficiency: A Comment*, 62 N.Y.U. L. REV. 1116, 1117 n.8 (1987) (collecting earlier studies) [hereinafter *Comment*].

[189] Waller, *Corporate Governance*, *supra* note 188, at 48.

negative outcomes).[190] Not only do many mergers fail to yield significant efficiencies, the merger process itself, while benefitting investment bankers, antitrust lawyers, and economic experts, can misallocate resources and divert managerial talent "from creating things of real value."[191]

Consequently, as one roundtable of competition authorities found, "[m]aking a prospective determination about whether a merger will lead to static efficiencies and how such efficiencies measure up against any anti-competitive effects that the merger is expected to cause can be very challenging."[192] Given these challenges, agency lawyers and economists can differ over whether the merging parties verified the efficiencies defense to otherwise problematic mergers.[193]

Finally, allowing mergers to yield productive efficiencies can lessen dynamic efficiency and endanger the overall economic system.[194] As Professor Horton, a veteran antitrust enforcer, recently argued from an evolutionary biology perspective, "large economic concentrations such as monopolies and oligopolies are vastly overrated in terms of their overall efficiency and positive impacts on the current economic system, and that

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[190] Colin F. Camerer & Ulrike Malmendier, *Behavioral Economics of Organizations*, *in* BEHAVIORAL ECONOMICS AND ITS APPLICATIONS 235, 246, 260-64 (Peter Diamond & Hannu Vartiainen eds., 2007). For several recent surveys of the empirical literature *see* Donald C. Langevoort, *The Behavioral Economics of Mergers and Acquisitions*, 12 TENN. J. BUS. L. 65, 71-74 (2011), http://trace.tennessee.edu/transactions/vol12/iss2/4; Mark Armstrong & Steffen Huck, *Behavioral Economics as Applied to Firms: A Primer*, 6 COMPETITION POL'Y INT'L 2 (Spring 2010); C. Engel, *The Behaviour of Corporate Actors: A Survey of the Empirical Literature*, Max Planck Institute for Research on Collective Goods Preprint No. 2008/23 7-8 (May 2008), *available at* http://ssrn.com/abstract=1135184.

[191] Adams & Brock, *Comment*, *supra* note 188, at 1120.

[192] OECD Dynamic Efficiencies, *supra* note 167, at 9.

[193] Malcolm B. Coate & Andrew J. Heimert, Bureau of Economics, Fed. Trade Comm'n, Economic Issues: Merger Efficiencies at the Federal Trade Commission: 1997-2007 26 (Feb. 2009), www.ftc.gov/os/2009/02/0902mergerefficiencies.pdf (noting "substantial divergence in the efficiency acceptance rate" between FTC lawyers and economists).

[194] Eleanor M. Fox, *The Efficiency Paradox*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, *supra* note 73, at 81.

their dangerous impacts are increasingly underrated."[195]

c. Difficulties in Measuring Dynamic Efficiencies

Dynamic efficiencies arise when firms innovate and foster technological change and progress.[196] Although the most important in improving society's well-being, dynamic efficiencies are the most difficult to measure.[197]

One difficulty is determining when innovation benefits society. Innovation involves introducing something new, "a new idea, method, or device."[198] But not everything new is necessarily good. For example, some financial innovations touted in the 1990s were heavily criticized for contributing to the financial crisis.[199] So promoting dynamic efficiencies really means promoting socially beneficial innovations. The problem is distinguishing between socially beneficial and harmful innovation for goods and services that are still under development and have not reached the market.[200] A restraint may hinder innovation (such as preventing new subprime mortgages that profit banks but worsen the consumers' financial condition), but leave society better off.

A second difficulty is measuring dynamic efficiency. In the 1990s, the antitrust agencies offered a narrow view of an "innovation market," namely

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[195] Horton, *supra* note 49, at 473.

[196] OECD GLOSSARY, *supra* note 140, at 23.

[197] OECD Dynamic Efficiencies, *supra* note 167, at 10 (noting "the uncertainty inherent in innovative activity regarding its cost, timing, and the likelihood and extent of its commercial success, difficulties in measuring innovation itself, the problem of how to conceptually transform innovation into some measure of welfare, and informational asymmetry between the merging parties and the enforcement agencies.").

[198] WEBSTER'S NEW COLLEGIATE DICTIONARY 591 (1979) (defining innovation).

[199] GILLIAN TETT, FOOL'S GOLD: HOW THE BOLD DREAM OF A SMALL TRIBE AT J.P. MORGAN WAS CORRUPTED BY WALL STREET GREED AND UNLEASHED A CATASTROPHE (2009).

[200] OECD Policy Brief, *supra* note 186, at 5 (recognizing the "almost always uncertainty about how much innovative activity will cost, how long it will take and the likelihood and extent of its commercial success"); Josef Drexl, *Real Knowledge is to Know the Extent of One's Own Ignorance: On the Consumer Harm Approach in Innovation-Related Competition Cases* (Dec. 3, 2009), Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper No. 09-15, http://ssrn.com/abstract=1517757.

"research and development directed to particular new or improved goods or processes, and the close substitutes for that research and development."[201] But this assumes that the input--specialized research and development ("R&D") assets or characteristics of specific firms--is a good proxy for the output, socially beneficial innovation.[202] There are also problems in using outputs to measure innovation. Patents and copyrights are both under-inclusive in measuring innovation (in not capturing processes and products not subject to IP protection) and over-inclusive (not every patent or copyright is socially beneficial).

A third difficulty is determining what hinders or promotes innovation, and to what extent greater concentration/market power fosters more innovation.[203] The 2010 Merger Guidelines provide additional guidance of when mergers are likely to diminish innovation competition by encouraging the merged firm to curtail innovative efforts below the level that would prevail absent the merger.[204] But the Guidelines leave many issues unresolved on evaluating a merger's impact on innovation.[205] At times, the competition agencies as part of their competitive effects analysis predict

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[201] U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property § 3.2.3 (1995), http://www.usdoj.gov/atr/public/guidelines/0558.pdf.

[202] OECD Policy Brief, *supra* note 186, at 5 (recognizing host of complicating factors related to innovation).

[203] STEVEN JOHNSON, WHERE GOOD IDEAS COME FROM: THE NATURAL HISTORY OF INNOVATION 21 (2010) (discussing how openness and connectivity may be more important for innovation than competition); Stucke, *Monopolies*, *supra* note 50, at 509-17.

[204] *Compare* 2010 Merger Guidelines, *supra* note 186, at § 6.4 *with* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 0.1 n.6 (1992), http://www.justice.gov/atr/public/guidelines/hmg.htm (mentioning innovation in one footnote).

[205] Rosch, Next Challenges, *supra* note 115, at 9-10; *see also* Darren S. Tucker & Bilal Sayyed, *The Merger Guidelines Commentary: Practical Guidance and Missed Opportunities*, ANTITRUST SOURCE, May 2006, at 11-12, http://www.abanet.org/antitrust/at-source/06/05/May06-Tucker5=24f.pdf (noting significant omission of innovation in agencies' 1992 guidelines and 2006 commentary).

higher prices and less innovation post-merger.[206] Given the difficulties in measuring and predicting dynamic efficiencies, the agencies seldom challenge mergers solely on dynamic efficiency grounds.[207]

Despite the importance of dynamic efficiencies, antitrust policy still has inadequate tools to measure these efficiencies or assess the long-term effects of many restraints on dynamic efficiency.[208]

3. How Current Antitrust Analysis Is Incomplete in Focusing on Some Efficiencies (Such as Short-Term Productive Efficiencies) and not Other Efficiencies and Inefficiencies

Efficiencies today are used as a shield, namely as a defense to an otherwise anti-competitive merger.[209] But if promoting efficiencies, as some courts say, is antitrust's primary goal, then inefficiency should be a sword. Courts and agencies–besides permitting mergers that yield efficiencies--should block mergers that yield greater inefficiencies.

Conceivably a merger may yield greater efficiencies or inefficiencies.[210]

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[206] *See, e.g.*, U.S. Dep't of Justice & Fed. Trade Comm'n, Commentary on the Horizontal Merger Guidelines 18 (Mar. 2006), http://www.justice.gov/atr/public/guidelines/215247.htm#42 (antitrust agencies "generally focus on the likely effects of proposed mergers on prices paid by consumers," but at times allege in their complaints anti-competitive effects on non-price dimensions); Compl., In re Koninklijke DSM N.V., Roche Holding AG, & Fritz Gerber, FTC File No. 031 0064, Docket No. C-4098 (Sept. 22, 2003), *available at* http://www.ftc.gov/os/2003/09/dsmrochecomp.pdf (alleging among the acquisition's anticompetitive effects its reducing the parties' incentives to improve service or product quality or to pursue further innovation in the relevant market).

[207] 2011 ICN Survey, *supra* note 47, at 31 (noting one country's observation that "in reality, the time horizon of reliable analysis often does not make it plausible to take into consideration long term effects, even if the broader conceptual framework would allow that").

[208] 2010 Merger Guidelines, *supra* note 186, at § 10 ("Other efficiencies, such as those relating to research and development, are potentially substantial but are generally less susceptible to verification and may be the result of anticompetitive output reductions.").

[209] *Id*.

[210] United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945) ("Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone."); OECD GLOSSARY, *supra*

Accordingly, if market forces do not prevent mergers that yield greater inefficiencies, then antitrust enforcers and courts would calculate and weigh the multiple efficiencies and inefficiencies arising from a merger. To do so, they need the tools to assess the likely allocative, productive, and dynamic efficiencies and inefficiencies arising from each merger. They next must have the tools to weigh the efficiencies and inefficiencies (including their impact on the poor, whose marginal utility of income differs from wealthier consumers), along with the other benefits, costs, and risks posed by the merger. The problem is that no such tools exist today.[211]

Why don't these tools exist? One reason is that neither the antitrust agencies nor courts consider inefficiencies and other significant costs and risks from a merger, which while less susceptible to quantification, can inflict greater harm. Why don't the competition agencies then consider the inefficiencies and bring them to the courts' attention? One explanation is that promoting efficiencies is not their primary antitrust goal. But if it is, another explanation is the agencies' and courts' belief perseverance in neo-classical economic theories premised on rational market participants. If one strongly believes that market participants are rational profit-maximizers, one can logically conclude that firms merge to maximize profits either legally (through productive or dynamic efficiencies and other lawful means (e.g., tax benefits)) or illegally (by lessening competition). If the government cannot prove that the merger will lead to more market power

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note 140, at 86 (discussing inefficiency when monopoly faces less incentive or competitive pressure to minimize costs of production, and increase the wasteful expenditures in things "such as maintenance of excess capacity, luxurious executive benefits, political lobbying seeking protection and favourable regulations, and litigation"); Roger Frantz, *X-Efficiency and Allocative Efficiency: What Have We Learned?*, 82 AM. ECON. REV. 434 (1992); Harvey Liebenstein, *Allocative Efficiency vs. "X-Efficiency,"* 56 AM. ECON. REV. 392 (1966).

[211] OECD Dynamic Efficiencies, *supra* note 167, at 5 ("general agreement that proving a specific likelihood of claimed dynamic efficiencies and measuring their impact are difficult tasks for which there are no easy approaches. At present, quantitative assessments do not appear to be feasible.").

(e.g., prices post-merger will increase above competitive levels), then the merger by default must maximize profits through legal means (e.g., efficiencies).[212] Accordingly, there is greater concern over false positives than negatives.[213]

This bi-polar outlook does not acknowledge the vast grey middle area of mergers (think AOL-Time Warner and Daimler-Chrysler), where bounded rational executives were overconfident about the efficiencies or merged to build empires or ego (e.g., acquisitions of Hollywood movie studios).[214] Market forces do not always punish the overconfident firms whose mergers destroy shareholder value. Consequently, it is easier to endorse an efficiency goal if one makes simplifying, unrealistic assumptions about competition (static price competition) and market participants (rational, self-interested, fully informed).

If promoting efficiencies indeed were the goal, current antitrust analysis is incomplete and at times leads to bad outcomes for the public. In recent closing statements, for example, the DOJ highlighted the likely efficiencies

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[212] DAVIDSON, *supra* note 52, at 72-73, 78-79; Adams & Brock, *supra* note 37, at 292 (quoting Reagan's first head of the Antitrust Division "Merger activity in general is a very, very important feature of our capital markets by which assets are continuously moved into the hands of those managers who can employ them efficiently" and that interfering with mergers "would be an error of very substantial magnitude"); Debra A. Valentine, General Counsel, Fed. Trade Comm'n, Global Mergers: Trade Issues and Alliances in the New Millennium (Oct. 4-5, 1999), http://www.ftc.gov/speeches/other/dvwiitmerger.shtm ("Most mergers are motivated by goals of efficiency and improved performance, and from an antitrust perspective are at least competitively benign."); U.S. Dep't of Justice, Accompanying Release of Revised 1984 Merger Guidelines, 49 FED. REG. 26823-03 (Dep't Justice 1984) ("most mergers do not threaten competition and that many are in fact procompetitive and benefit consumers").

[213] *See, e.g., Leegin*, 551 U.S. at 879 (while recognizing that its per se antitrust rules provide guidance to the business community and minimize the burdens on litigants and the judicial system, Court noting the risk of false positives from its per se rules in "prohibiting procompetitive conduct the antitrust laws should encourage"); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) ("Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect." (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986))).

[214] WU, *supra* note 33, at 225.

from mergers in the highly concentrated telephone,[215] satellite radio,[216] and airline[217] industries. But the DOJ considered only one type of efficiency, namely short-term productive efficiency gains, and only those efficiencies that the merging firms identified. The DOJ closing statements never address the mergers' impact on dynamic efficiency or potential long-term costs.

As one example, the DOJ predicted that Whirlpool's acquisition of Maytag, which reduced the number of major appliance manufacturers in the United States from four to three, was unlikely to reduce competition substantially.[218] The DOJ predicted that "any attempt to raise prices likely would be unsuccessful;" consumers instead would benefit from the merger's estimated cost savings and other efficiencies.[219] In reality, the DOJ was wrong. Consumers ended up paying more (about 5 to 7 percent more for Maytag dishwashers and about 17 percent more for Whirlpool dryers) and had fewer choices post-merger.[220]

The reality today is that courts and agencies cannot maximize efficiency as a goal unless they undertake a more extensive review. They cannot

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[215] U.S. Dep't of Justice, Press Release, Statement by Assistant Attorney General Thomas O. Barnett Regarding the Closing of the Investigation of AT&T's Acquisition of Bellsouth: Investigation Concludes That Combination Would Not Reduce Competition (Oct. 11, 2006), http://www.justice.gov/atr/public/press_releases/2006/218904.pdf.

[216] U.S. Dep't of Justice, Press Release, Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc.: Evidence Does Not Establish that Combination of Satellite Radio Providers Would Substantially Reduce Competition (Mar. 24, 2008), http://www.justice.gov/atr/public/press_releases/2008/231467.pdf.

[217] U.S. Dep't of Justice, Press Release, Statement of the Department of Justice's Antitrust Division on its Decision to Close its Investigation of the Merger of Delta Air Lines Inc. and Northwest Airlines Corporation (Oct. 29, 2008), http://www.justice.gov/atr/public/press_releases/2008/238849.htm.

[218] U.S. Dep't of Justice, Press Release, Department of Justice Antitrust Division Statement on the Closing of its Investigation of Whirlpool's Acquisition of Maytag (Mar. 29, 2006), http://www.justice.gov/atr/public/press_releases/2006/215326.htm.

[219] *Id*.

[220] Orley C. Ashenfelter et al., *The Price Effects of a Large Merger of Manufacturers: A Case Study of Maytag-Whirlpool* (Apr. 21, 2011), *available at* http://ssrn.com/abstract=1857066.

consider only some efficiencies (e.g., productive) that are easier to measure (e.g., combining all the manufacturing post-merger in the one modern low-cost production facility). They cannot rely on the merging parties' efficiencies defense. They would have to devote more attention to the harder to quantify, yet significantly more important, dynamic (in)efficiencies.[221]

Ironically an efficiency goal would make the courts and agencies more skeptical about mergers yielding efficiencies; they would display greater concern over false negatives than they do currently over false positives. Many times efficiencies do not seem to motivate the merger.[222] The efficiency claims are mostly developed by antitrust lawyers and hired experts, who sift through the companies' documents and data, or extrapolate from the company's past experiences.[223] Thus an efficiency goal logically could lead to more active merger enforcement, whereby only those mergers where the efficiencies are substantiated and likely are permitted.

4. Rule-of-Law Concerns if Promoting Efficiencies is Antitrust's Goal

If promoting efficiencies is antitrust's primary goal, any legal presumption raises the risk of false positives and negatives. Accordingly, the legal analysis must remain case and fact specific. This lessens predictability, and increases compliance costs and rule-of-law concerns.[224]

Predicting the dynamic, allocative, and productive efficiencies from the challenged merger (or restraint) affords the agencies, courts, and defendants

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[221] OECD Dynamic Efficiencies, *supra* note 167, at 10 (although competition authorities want dynamic efficiency considerations to feature more frequently and prominently in merger decisions, the "real-world problem is that no one has figured out a robust way to do that yet, and rather than engage in speculation, courts have tended to avoid dynamic efficiency analysis in cases where it could have been relevant").

[222] Given dynamic efficiencies' importance in providing a competitive advantage, it is surprising that merging firms have "tended to ignore dynamic efficiencies, too." OECD Dynamic Efficiencies, *supra* note 167, at 11.

[223] 2006 Guidelines Commentary, *supra* note 206, at 51.

[224] HAYEK, *supra* note 50, at 114.

ample discretion, with little assurance of accuracy, consistency, objectivity, and transparency. Nations differ widely "as to how economic efficiency itself can be best achieved, depending in part on the different comparative advantages of the economy concerned."[225]

A merger, for example, may yield significant dynamic or productive efficiencies but higher prices.[226] Some consumers may value lower priced homogenous goods; others are willing to pay more for greater innovation in the industry. In different industries and societies, different efficiencies (e.g., dynamic, productive, and allocative) can increase (or decrease) to different degrees citizens' well-being.[227] The goal of promoting efficiencies does not inform the agencies and courts how to make these tradeoffs, and there is often no way to determine whether they made the proper trade-off.[228]

Promoting efficiency would require judges and agencies to engage in industrial policy, rather than to secure compliance with existing competition laws. As the Supreme Court said nearly 40 years ago, "courts are of limited utility in examining difficult economic problems."[229] Also, Congress never intended the courts to decide antitrust cases based on the courts' conception of the latest economic thinking.[230] Not only are the courts and agencies

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[225] Richard Bronk, *Which Model of Capitalism?*, OECD OBSERVER, Summer 2000, http://249.pressflex.net/news/fullstory.php/aid/345/Which_model_of_capitalism_.html.

[226] 2010 Merger Guidelines, *supra* note 186, at § 6 ("merger may increase prices in the short term but not raise longer-term concerns about innovation, either because rivals will provide sufficient innovation competition or because the merger will generate cognizable research and development efficiencies").

[227] Brodley, *supra* note 114, at 1026-27.

[228] Carlton, *supra* note 86 (if "one adopts a (short run) total surplus standard (or long run consumer surplus standard), it will be more difficult to verify whether agency officials are achieving their objectives").

[229] United States v. Topco Associates, Inc., 405 U.S. 596, 609 (1972).

[230] Senate Comm. on Interstate Commerce, Control of Corporations, Persons, and Firms Engaged in Interstate Commerce, S. REP. NO. 1326, 62d Cong., 3d Sess. (1913), *reprinted in* I.v Kintner, *supra* note 50, at 999 (writing in response to the Court's enunciation of its rule-of-reason standard in 1911, "[i]t is inconceivable that in a country

politically unaccountable for their industrial policies, they are ill equipped to resolve the complex economic issues that competition cases raise.[231] "The judicial power involves the responsibility for interpreting and administering the law and settling disputes," noted one judge, "[r]esponsibility for resolving economic issues is a matter for the legislative branch of the Government."[232]

5. Problem of Efficiency as a Normative Goal

Maximizing efficiency, from an utilitarian perspective, does not necessarily promote overall well-being. There comes a point where the marginal cost from the incremental efficiency gain outweighs its benefit.

Moreover, aside from the utilitarian cost-benefit framework, citizens may want to preserve other rights and values (such as economic freedom) for their own sake. In rejecting a pure efficiency rationale for punitive damages, the Court observed that "[c]itizens and legislators may rightly insist that they are willing to tolerate some loss in economic efficiency in order to deter what they consider morally offensive conduct, albeit cost-beneficial morally offensive conduct; efficiency is just one consideration among many."[233] Thus if citizens (i) do not prize efficiency for its own sake and (ii) have different thresholds where they prize other values over the incremental efficiency gain, then in any democracy, promoting

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governed by a written Constitution and statute law the courts can be permitted to test each restraint of trade by the economic standard which the individual members of the court may happen to approve"); MISES, *supra* note 43, at 35 ("characteristic feature that distinguishes [the constitutional state] from despotism is that not the authorities but the duly elected people's representatives have to decide what best serves the commonweal").

[231] For example, in one 1950s survey of judges, 22 judges thought it desirable for courts to resolve the economic issues that antitrust cases raise, 19 found it undesirable, 10 provided qualified responses, 5 tended toward a favorable answer, 3 felt it preferable for antitrust cases heard in an administrative proceeding in the first instance, 2 thought it desirable that at least some of the economic issues be determined by a nonjudicial body. BURNS, *supra* note 75, at 11.

[232] *Id*.

[233] Cooper Indus. v. Leatherman Tool Grp., 532 U.S. 424, 439-40 (2001) (quoting Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1450 (1993)).

efficiencies cannot be sole goal.[234]

Antitrust policy, rather than simply promote efficiencies, can be an important mechanism to disperse economic and political power and promote individual freedom.[235] The concentration of private or governmental economic power is problematic--not only on utilitarian efficiency grounds—given its risks to any democracy.

Consequently, courts must acknowledge their and the antitrust agencies' limitations. Promoting efficiencies is a feasible goal for market fundamentalists and socialist central planners, who have a unifying theory of how markets work, how market participants behave, and how efficiencies can be maximized. But in dynamic markets, the process is imperfectly understood; the outcomes are often indeterminate.[236] There is no conscious design; no DNA from which one can estimate the probabilities of different outcomes; no tools to weigh the discounted values of the efficiencies and inefficiencies. In reality the antitrust agencies and generalist courts do not know whether, and how often, they accurately assess the likelihood and magnitude of the allocative, productive and dynamic (in)efficiencies from mergers and other restraints of trade.[237] They have neither the tools nor knowledge to undertake this analysis. Even if they did, such analysis would raise significant rule-of-law concerns, and could conflict with important political, social, and moral values in any democracy.

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[234] Bronk, *supra* note 225 ("In the field of economics and business, the search for such an elusive balance has been not merely for an optimal trade-off between social fairness and economic efficiency but also for the most efficient model of capitalism itself.").

[235] DAVIDSON, *supra* note 52, at 13; Adams & Brock, *supra* note 37, at 271; Lawrence Anthony Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214, 1222-23 (1977).

[236] JOHN KAY, OBLIQUITY: WHY OUR GOALS ARE BEST ACHIEVED INDIRECTLY 157 (2010).

[237] The agencies rarely do post-merger reviews, assess to what extent the claimed productive efficiencies were realized, and examine the merger's impact on dynamic efficiencies, to the extent quantifiable. Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527, 1560-63, 1574 (2011).

D. Why Ensuring Economic Freedom Never Unified Antitrust Policy

U.S. courts have recognized the antitrust laws as a "charter of liberty."[238] They protect competitors' economic freedom to compete.[239] They seek to maximize the "freedom of opportunity for consumers and for present and prospective businessmen as well."[240] Ensuring economic freedom was the fourth most popular goal in the 2007 ICN survey.[241] Indeed this goal encompasses other goals in the ICN survey, such as ensuring a level playing field for small and mid-sized enterprises,[242] and promoting fairness and equality.[243] Although promoting economic freedom has a pleasant democratic ring, it too cannot be the primary goal.

Humans are social animals. Invariably, the exercise of economic freedom by some market participants will constrain the freedom of others.[244] The Court recognized early in the Sherman Act's history that every contract among market participants conceivably restrains trade.[245] A resale price maintenance ("RPM") policy increases the manufacturer's economic freedom (in setting the minimum or maximum retail price of its goods) while limiting the retailers' freedom (in setting the price of the

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[238] *See supra* note 63; 21 CONG. REC. 2461 (1890) (Sen. Sherman).

[239] *See supra* notes 56, 59, 61; 2007 ICN Report, *supra* note 82, at 14-15 (in the United States, "[a] notion of freedom–of either the dominant firm or of powerless firms–is implicit in many decisions" as "[t]he United States antitrust law also reflects an objective to preserve freedom of firms, as contrasted with government regulation of firms") (quoting Professor Eleanor Fox).

[240] Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 384 (1965) (antitrust laws "expand the range of consumer choice and entrepreneurial opportunity by encouraging the formation of markets of numerous buyers and sellers, assuring ease of entry to such markets, and protecting participants—particularly small businessmen—against exclusionary practices").

[241] 2007 ICN Report, *supra* note 82, at 14.

[242] *Id*. at 17 (promotes "equitable opportunity to participate in the economy").

[243] *Id*. at 18.

[244] *Id*. at 16 (noting "challenge of balancing the economic freedoms of different market participants").

[245] *See, e.g.*, Hopkins v. United States, 171 U.S. 578, 600 (1898) (arguing that Sherman Act "must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it").

manufacturer's goods). Conversely, a policy prohibiting RPM limits the manufacturer's freedom, while increasing the retailers' freedom. Promoting market freedom, observed Professors Adams and Brock, can lead to the evils that the antitrust laws seek to prevent, namely "monopolization, oligopolization, collusion, and anticompetitive mergers and 'joint ventures.'"[246]

One classic example is *Lorain Journal Co. v. United States*, where the dominant newspaper refused to accept advertising from local merchants who advertised with the small competing radio station.[247] Because of its monopoly of local advertising in the community and its practically indispensable coverage of 99 percent of the local residents, the newspaper forced numerous merchants to stop advertising with the radio station. The monopolist asserted its economic freedom as a private business to select its customers and to refuse to accept advertisements from whomever it pleases.[248] But in exercising its economic freedom, the monopolist infringed the economic freedom of the local merchants and radio station, which absent the restraint, would contract with one another. The Court did not dispute the monopolist's general right to refuse to deal, but recognized that:

> the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified. The right claimed by the publisher is neither absolute nor exempt from regulation. Its exercise of a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act. The operator of the radio station, equally with the publisher of the newspaper, is entitled to the protection of that Act.[249]

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[246] WALTER ADAMS & JAMES W. BROCK, THE BIGNESS COMPLEX: INDUSTRY, LABOR, AND GOVERNMENT IN THE AMERICAN ECONOMY 304 (2d ed. 2004).

[247] 342 U.S. 143, 149-50 (1951).

[248] *Id.* at 155.

[249] *Id.*

Consequently, promoting economic freedom inherently involves trading off some people's freedom to promote others'. To make that trade-off, one invariably relies on other values and goals besides economic freedom. Accordingly economic freedom cannot be the primary goal.

E. The End of the Policy Cycle

With the quest for a single economic goal, antitrust progressively became less relevant during the past policy cycle. Among the wreckage from the financial crisis and ensuing Great Recession are the laissez-faire economic beliefs.[250] Bork began the last policy cycle by noting several antitrust paradoxes.[251] Today antitrust suffers greater paradoxes.

One paradox is that in the quest for a single economic goal, antitrust policy in the U.S. now lacks any clear unifying goal. No consensus exists in defining or measuring consumer welfare or designing legal standards to further this goal. Of course competition officials can agree that prohibiting certain egregiously anticompetitive behavior (such as price-fixing cartels) can promote their economic goal (whether it is consumer welfare, efficiency, or economic freedom). But these restraints were condemned when antitrust recognized multiple goals. Moreover in the context of other coordinated conduct (such as group boycott) and monopolization, the current economic goals cannot provide quantifiable objective benchmarks to guide and assess antitrust policy.

To achieve consensus, as the ICN surveys reflect, the antitrust goal

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[250] *See, e.g.*, DAVIDSON, *supra* note 52; JUSTIN FOX, THE MYTH OF THE RATIONAL MARKET: A HISTORY OF RISK, REWARD, AND DELUSION ON WALL STREET (2009); GEORGE A. AKERLOF & ROBERT J. SHILLER, ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM (2009); John Cassidy, *Letter from Chicago: After the Blowup*, NEW YORKER, Jan. 11, 2010, at 28; Paul Krugman, *How Did Economists Get It So Wrong?*, N.Y. TIMES, Sept. 6, 2009, at 37 (noting that more important than the economists' failure to predict was "the profession's blindness to the very possibility of catastrophic failures in the market economy").

[251] BORK, *supra* note 40, at 4, 125 (criticizing antitrust policy which did not sufficiently account productive efficiencies).

accordingly becomes more abstract and less meaningful. The surveyed competition authorities achieved greater consensus as the objectives became more open-ended and the relationship between the goal and specific actions necessary to promote the goal became less defined.

A second paradox is that in the past decade the Court has complained about the state of federal antitrust law (e.g., the interminable litigation, inevitably costly and protracted discovery phase, and its fear over the unusually high risk of inconsistent results by antitrust courts), but it was the Court who has created this predicament. During the past antitrust cycle, the Court increasingly relied on its fact-specific weighing standard, the rule-of-reason,[252] and a vague economic goal (consumer welfare) that accommodated different personal values and interpretation, and often pointed to no particular course of action.

A third paradox is, as Professor Eleanor Fox describes, the efficiency paradox: "by trusting dominant firm strategies and leading firm collaborations to produce efficiency, modern U.S. antitrust protects monopoly and oligopoly, suppresses innovative challenges, and stifles efficiency."[253] While antitrust policymakers recognize dynamic competition as more important, in the past policy cycle, antitrust agencies and courts "tended to avoid dynamic efficiency analysis" focusing instead on a static price competition and productive efficiencies.[254] Courts and antitrust agencies applied a light touch to merger review under a fear of

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[252] California *ex rel.* Harris v. Safeway, Inc., 08-55671, 2011 WL 2684942, at *11 n.10 (9th Cir. July 12, 2011) (court under "rule of reason weighs legitimate justifications for a restraint against any anticompetitive effects. We review all the facts, including the precise harms alleged to the competitive markets, and the legitimate justifications provided for the challenged practice, and we determine whether the anticompetitive aspects of the challenged practice outweigh its procompetitive effects.") (quoting Paladin Assocs., Inc. v. Mont. Power Co., 328 F.3d 1145, 1156 (9th Cir. 2003)).

[253] Fox, *Efficiency Paradox*, *supra* note 73, at 77.

[254] OECD Policy Brief, *supra* note 186, at 4; *see also* DAVIDSON, *supra* note 52, at 85-86 (intellectual confinement of antitrust to static price competition when dynamic competition provides the greater benefits).

false positives and a belief that most mergers promote efficiencies, even though the empirical literature suggests the contrary.[255] While the efficiencies defense developed in the past policy cycle, antitrust enforcers and courts did not account for post-merger inefficiencies or the competitive distortions in creating firms too-big-and-too-integral-to-fail.[256]

A fourth paradox is the economic power paradox. Our constitutional framework seeks to distribute power, rather than promote its consolidation or concentration.[257] Despite the historical concerns about concentrated economic power, antitrust policymakers in the last policy cycle "no longer concern[ed] themselves with preventing bigness, and indeed tend[ed] instead to encourage large-scale enterprise for efficiency's sake."[258] While we saw in nature the benefits of diversity,[259] we disregarded in one of our most important industries, the financial services markets, the dangers of concentration and systemic risk.[260] Despite the public and governmental concern about protecting small businesses from unfair competitive tactics, and the importance of small companies in promoting dynamic efficiencies, the Court now praises monopolies.

A fifth paradox is that while trust, fairness, and prosocial behavior are vital to the functioning of a market economy,[261] antitrust policy ignores these values, and treats market participants as amoral self-interested profit-

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[255] OECD Policy Brief, *supra* note 186, at 6; Reeves & Stucke, *supra* note 237, at 1560-61.

[256] Markham, *supra* note 34, at 314.

[257] *See supra* note 235.

[258] Markham, *supra* note 34, at 264.

[259] Horton, *supra* note 49, at 485.

[260] *Id*. at 491.

[261] LYNN STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE 19 (2011); Paola Sapienza & Luigi Zingales, *Trust and Finance*, 2 NBER REP. 16, 17-18 (2011); Horton, *supra* note 49, at 474, 476, 502, 520 (arguing how fundamental human values of fairness and reciprosity not only enhance trust, but create a healthier, more stable, more efficient economic ecosystem); Joseph Henrich et al., *Markets, Religion, Community Size, and the Evolution of Fairness and Punishment*, 327 SCIENCE 1480 (2010).

maximizers.[262]

A sixth antitrust paradox, observed Professor Jesse Markham, was how during the past policy cycle the government's "laissez-faire policies . . . led to unprecedented government intervention in the private sector."[263]

III. IS A SINGLE UNIFYING GOAL A WORTHWHILE PURSUIT?

As Part II shows, identifying a single antitrust goal, such as promoting consumer welfare, is easy. The open-ended objective simply shifts the debate to defining the term and the means of attaining that end. A single objective is always available; the trade-off is greater abstraction. This Part examines whether pursuing a single goal is a worthwhile pursuit in the next policy cycle.

In today's global economy, a single, well-defined objective has benefits. Nations' antitrust objectives can conflict. Unless the merging firms can carve out one jurisdiction, one country will impose its objectives on another. Transparent, well-defined policy objectives can help increase convergence of the ensuing legal standards, harmonize enforcement among competition authorities, reduce compliance costs on industries, limit the ability of entrenched firms to secure state aid or legal barriers to protect their market power, and lower entry barriers for importers.

But as this Part examines, the lack of a well-defined unifying goal is not for want of mental capacity or incentives. This is not the case where we squeeze "the universe into a ball, To roll it toward some overwhelming question, To say: 'I am Lazarus, come from the dead, Come back to tell you all, I shall tell you all.'"[264] Antitrust simply does not lend itself to a single

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[262] Reeves & Stucke, *supra* note 237, at 1536-38; Maurice E. Stucke, *Money, Is That What I Want? Competition Policy & the Role of Behavioral Economics*, 50 SANTA CLARA L. REV. 893 (2010).

[263] Markham, *supra* note 34, at 313 (discussing how antitrust neither prevented nor redressed the recent systemic threats caused directly by companies too big and integral to the functioning of markets).

[264] T.S. Eliot, *The Love Song of J. Alfred Prufrock*, *in* T. S. ELIOT: COLLECTED POEMS,

well-defined objective.

A. As an Initial Premise, Antitrust Policy Ultimately Must Promote (or at Least Not Impede) Citizens' Well-Being

Competition, however defined, is not the ultimate end. Competition instead represents the means "to achieve broader government objectives for the economy or for a given industry."[265]

If competition is not an end, but the more efficient (or democratic) means to achieve other goals, this has three implications: first, there must be one or more ultimate goals, with perhaps other intermediary goals. Second, one must have a form of competition in mind, and how, and under what circumstances, one's conception of competition can promote or impede one's ultimate objectives. Third, one must understand how the formal legal and informal institutions can promote one's conception of competition.

As an initial premise, competition's ultimate goal is to improve well-being.[266] Competition can be bitter. But we take such bitters to improve overall well-being, not simply to be miserable. If as a result of our competition policy our physical and mental health deteriorates, our isolation and distrust increases, and our freedom and self-determination decrease, then the policy is not worthwhile. A competition policy, which simply

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1909-1962 6 (1991).

[265] Directorate for Fin. & Enter. Affairs Competition Comm., Org. for Econ. Co-operation and Dev., Global Forum on Competition: Roundtable on Bringing Competition into Regulated Sectors 2 (2005), http://www.ftc.gov/bc/international/docs/compcomm/2005-Roundtable%20on%CC20Bringing%20Competition.pdf.

[266] United States v. W. Elec. Co., 767 F. Supp. 308, 326 (D.D.C. 1991) (predicting that "the concentration of the sources of information of the American people in just a few dominant, collaborative conglomerates . . . would be inimical to the objective of a competitive market, the purposes of the antitrust laws, and the economic wellbeing of the American people"), *aff'd*, 993 F.2d 1572 (D.C. Cir. 1993); Org. for Econ. Co-Operation & Dev., Competition Assessment Toolkit 3 (2007), http://www.oecd.org/dataoecd/15/59/39679833.pdf (increased competition "can improve a country's economic performance, open business opportunities to its citizens and reduce the cost of goods and services throughout the economy").

involves a rush for scarce resources, where many are trampled or left scrambling for the scraps, would appeal to the few who captured the resources. So our conception of competition (as defined in part by our competition policy) must promote (or at least not impede) overall well-being.

Some will ask whether this is too much to ask of antitrust. Let competition policy improve the allocation of scarce resources, reduce the costs of goods and services, and maximize overall wealth. Leave well-being to individual choice or supplementary governmental policies. We do not require other laws, such as the U.S. Food and Drug Administration regulations on frozen cherry pies,[267] to promote overall well-being. Why should antitrust bear this burden?

One premise of our economic system of private enterprise is the importance of free competition. The Small Business Act's policy declaration summarizes this philosophy:

> The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. . . .[268]

Congress's policy statement incorporates three important premises. First, competition does not exist independently of the legal and informal institutions. As economist R.H. Coase said, "the legal system will have a profound effect on the working of the economic system and may in certain respects be said to control it."[269]

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[267] 21 C.F.R. § 152.126.

[268] 15 U.S.C. § 631.

[269] R.H. Coase, *The Institutional Structure of Production*, 82 AM. ECON. REV. 713, 717-18 (1992); *see also* HAYEK, *supra* note 50, at 87 (competition "depends, above all, on

Second, the types of competition (fair versus unfair) can vary depending upon the legal and informal institutions.[270] The term "competition on the merits" invariably involves normative considerations of unfair competition.[271] The legal and informal institutions provide the rules of the game necessary for that type of competition to function effectively;[272] and thereby affect the market participants' incentives.[273] As economist Douglass North notes, "How the game is actually played is a consequence of the formal structure [e.g., formal rules, including those set by the government], the informal institutional constraints [e.g., societal norms and conventions], and the enforcement characteristics."[274] A market's performance characteristics are a function of these institutional constraints. The rules will define the opportunity set in the economy. Changing the

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the existence of an appropriate legal system, a legal system designed both to preserve competition and to make sure it operates as beneficially as possible.").

[270] *See, e.g.*, 15 U.S.C. § 45(a)(6) (empowering and directing FTC to prevent persons, from "using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce"); F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) (FTC "in measuring a practice against the elusive, but congressionally mandated standard of fairness, . . . like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws"); HAYEK, *supra* note 50, at 86.

[271] *See, e.g.*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 611 n.32 (1985) (defining exclusionary conduct as behavior that "not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way") (internal quotation omitted); United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 588-89 (1957) ("primary issue is whether du Pont's commanding position as General Motors' supplier of automotive finishes and fabrics was achieved on competitive merit alone, or because its acquisition of the General Motors' stock, and the consequent close intercompany relationship, led to the insulation of most of the General Motors' market from free competition, with the resultant likelihood, at the time of suit, of the creation of a monopoly").

[272] *See* DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE 232-265 (1998); Wolfgang Kerber, *Competition, Innovation and Maintaining Diversity Through Competition Law* 15, *in* ECONOMIC APPROACHES TO COMPETITION LAW: FOUNDATIONS AND LIMITATIONS (Josef Drexl et al. eds., 2010), *available at* http://ssrn.com/abstract=1543725 (noting Ordoliberal concept of shaping rules for this market game so that only quality of performance (merit) determines "market success").

[273] DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 158 (2005).

[274] *Id*. at 52.

rules can lead to different outcomes.[275] If the antitrust laws reward (or are indifferent to) monopolization, monopolies will be the likely outcome in markets conducive to monopolization.[276]

Third, some types of competition ("full and free") promote overall well-being. Other types of competition, such as the "exploitation of child labor, the chiseling of workers' wages, the stretching of workers' hours, are not necessary, fair, or proper methods of competition"[277] and hinder well-being.[278]

Accordingly, legal institutions (including antitrust law)[279] and informal ethical, moral, and social norms[280] can promote overall well-being to the extent they promote fair competition and deter unfair competition. Consequently, the stronger our belief in the importance of preserving and expanding fair competition to promote overall well-being, the greater antitrust's role in defining and deterring unfair competition. In describing the antitrust laws in general, and the Sherman Act in particular, as "the Magna Carta of free enterprise," the Supreme Court said the antitrust laws

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[275] Kerber, *supra* note 272, at 16.

[276] *See* NORTH, *supra* note 273, at 50.

[277] Message from President Franklin D. Roosevelt to the Congress Transmitting Recommendations Relative to the Strengthening and Enforcement of Antitrust Laws, Apr. 29. 1938, S. Doc. No. 173, 75th Cong., 3d Sess. 1 (1938), *reprinted in* I.iv Kintner, *supra* note 50, at 3407.

[278] Citicorp Indus. Credit, Inc. v. Brock, 483 U.S. 27, 43 (1987) (construing 29 U.S.C. § 202(a), where industries whose labor conditions are detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers constitute an unfair method of competition).

[279] Lockheed Martin Corp. v. Boeing Co., 314 F. Supp. 2d 1198, 1229 (M.D. Fla. 2004) ("fundamental objective of our antitrust laws is to promote fair competition for the benefit of all consumers") (quoting Smalley & Co. v. Emerson & Cuming, Inc., 13 F.3d 366, 368 (10th Cir. 1993)); American Heritage Life Ins. Co. v. Heritage Life Ins. Co., 494 F.2d 3, 14 (5th Cir. 1974) (tort of unfair competition "is an equitable concept, resting on general principles of fairness in business practices").

[280] *See, e.g.*, Henrich et al., *supra* note 261, at 1480 (studying how informal religious norms can play an important role in supporting a competitive market economy); Mark Granovetter, *The Impact of Social Structure on Economic Outcomes*, 19 J. ECON. PERSP. 33, 35 (2005) ("when economic and non-economic activity are intermixed, non-economic activity affects the costs and the available techniques for economic activity").

"are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[281] Thus antitrust promotes fair competition, which in turn will promote the good life.[282]

If antitrust's ultimate goal is promoting well-being, our next issue is what constitutes well-being. One definition is "the state of being happy, healthy, or prosperous."[283] But being prosperous or healthy does not necessarily mean greater happiness. Well-being, as the OECD found, is multi-faceted. Promoting well-being entails promoting (i) material well-being (income and wealth, housing, and jobs and earnings) and (ii) quality of life (health status, work and life balance, education and skills, social connections, civic engagement and governance, environmental quality, personal security, and subjective well-being).[284]

Should antitrust law then promote (i) only material well-being or (ii) both material well-being and quality of life? Advances in the happiness economic literature will enable policymakers to tailor governmental policies to promote well-being (or at least minimize sources of unhappiness, such as unemployment, mental illness, or inadequate health care).[285] But it is apparent from the available evidence that one cannot maximize well-being by maximizing only one component.

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[281] United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972).

[282] Karel Van Miert, European Comm'n, Role of Competition Policy in Modern Economies, before Danish Competition Council (Oct. 11, 1997), http://ec.europa.eu/competition/speeches/text/sp1997_061_en.html ("Competition policy is there to help us achieve economic prosperity and increase the welfare of society.").

[283] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1342 (10th ed. 1995).

[284] Org. for Econ. Co-Operation & Dev., Better Life Initiative: Compendium of OECD Well-Being Indicators 6 (2011), http://www.oecd.org/document/28/0,3746,en_2649_201185_47916764_1_1_1_1,00.html [hereinafter OECD Well-Being]; *see also* Enrico Giovannini et al., *A Framework to Measure the Progress of Societies*, Draft OECD Working Paper 2, 5, 14 (Sept. 2009).

[285] DEREK BOK, THE POLITICS OF HAPPINESS: WHAT GOVERNMENT CAN LEARN FROM THE NEW RESEARCH ON WELL-BEING 51 (2010).

After one's basic needs are met, the economic literature shows, increasing income and wealth do not significantly increase well-being.[286] One of the few well-being metrics where America excels is material well-being. The average household disposable income in the U.S. in 2008 was $37,690 per year, and average U.S. household's financial worth was an estimated $98,440, which were much higher than the OECD averages, $22,284 and $36,808, respectively.[287] Increasing aggregate material well-being will not necessarily increase overall well-being.[288] If a larger pie means greater wealth inequality, the wealthier will not be necessarily happier,[289] and there will be greater incentives for the wealthy to use the law to safeguard their interests.[290] Promoting wealth maximization (to the exclusion of other values) can also promote status competition, selfishness,

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[286] In multivariate regressions, income as it correlates to subjective happiness evaluations has a low coefficient. Bruno S. Frey & Alois Stutzer, *What Can Economists Learn from Happiness Research?*, 40 J. ECON. LIT. 402, 410 (2002); *see also* Daniel Kahneman & Angus Deaton, *High Income Improves Evaluation of Life But Not Emotional Well-Being*, PNAS EARLY EDITION 3 (2010) (finding from U.S. survey of subjective well-being that beyond approximately $75,000, higher income "is neither the road to experienced happiness nor the road to the relief of unhappiness or stress, although higher income continues to improve individuals' life evaluations"); Elizabeth Dunn et al., *Spending Money on Others Promotes Happiness*, SCIENCE, Mar. 21, 2008, at 1687.

[287] OECD Better Life Initiative: United States, http://www.oecdbetterlifeindex.org/countries/united-states/.

[288] The economic literature, for example, did not identify a correlation between the doubling of wealth in the U.S. between 1945 and 1991 and greater happiness. BOK, *supra* note 285, at 11-12; RICHARD LAYARD, HAPPINESS: LESSONS FROM A NEW SCIENCE 29-30 (2005). Despite substantial increases in economic well-being, China's citizens are not significantly happier. Daniel Kahneman & Alan B. Krueger, *Developments in the Measurement of Subjective Well-Being*, 20 J. ECON. PERSP. 3-24 (2006) (contrasting China's rapid economic growth between 1994 and 2005 ("real income per capita increasing by a factor of 2.5") and improvements for material well-being (e.g., "ownership of color television sets rose from 40 percent of households to 82 percent, and the fraction with a telephone jumped from 10 percent to 63 percent") with no increase in reported life satisfaction ("the percentage of people who say they are dissatisfied has increased, and the percentage who say they are satisfied has decreased")).

[289] BOK, *supra* note 285, at 12.

[290] Maurice E. Stucke, *Lessons from the Financial Crisis*, 77 ANTITRUST L.J. 313, 339-40 (2010).

and envy, and marginalize other values correlated with greater happiness.[291] Thus the greater issue is fairness, namely how well the resources are distributed.[292] Income inequality in the U.S. increased significantly during the past antitrust policy cycle.[293] The U.S. has "the fourth highest rate of income inequality and relative poverty (17.3% of people [are] poor compared to an OECD average of 11.1%) in the OECD."[294] Other policy challenges involve quality of life issues, such as work and life balance,[295] social connections,[296] safety,[297] and environmental quality, including how efficiently the U.S. uses its natural resources.[298]

Consequently in developed countries, like the United States, an antitrust goal to maximize wealth (to the exclusion of other goals) will not necessarily increase (and can reduce) overall well-being. To maximize

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[291] For many, well-being extends beyond satisfying one's desires to include a moral life. On an individual level, the primary sources of happiness are family relationships, employment, community and friends, health, self-control or autonomy, personal ethical and moral values, and the quality of the environment. BOK, *supra* note 285, at 17; LAYARD, *supra* note 288, at 62–73; DANIEL NETTLE, HAPPINESS: THE SCIENCE BEHIND YOUR SMILE 85, 87 (2005). Prosocial spending is also associated with greater happiness. Lara B. Aknin et al., *Prosocial Spending and Well-Being: Cross-Cultural Evidence for a Psychological Universal*, Harv. Bus. School Working Paper 11-038 at 8, 13 (2010), www.hbs.edu/research/pdf/11-038.pdf (observing a positive relationship in prosocial spending and subjective well-being in 122 of 136 surveyed countries and in experiment involving Canadians and Ugandans).

[292] Wealth inequality was a historic antitrust concern. *See, e.g.*, 21 CONG. REC. 2455, 2460 (Mar. 21, 1890) (statement of Sen. Sherman) (identifying this inequality of condition, wealth, and opportunity as the greatest threat to social order, and stating that this inequality "has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition").

[293] Stucke, *Lessons*, *supra* note 290, at 334-39.

[294] Org. for Econ. Co-Operation & Dev., Society at a Glance–OECD Social Indicators, Key Findings: United States (2011), www.oecd.org/els/social/indicators/SAG.

[295] OECD, Better Life, *supra* note 287 ("Evidence suggests that long work hours may impair personal health, jeopardize safety and increase stress. People in the United States work 1768 hours a year, higher than the OECD average of 1739 hours.").

[296] *Id.*

[297] *Id.* (noting how United States' homicide rate is "higher than the OECD average and one of the highest in the OECD").

[298] *Id. See also* U.S. Gov't Accountability Off., Report to Congressional Addressees, Key Indicator Systems: Experiences of Other National and Subnational Systems Offer Insights for the United States, GAO-11-396 (Apr. 12, 2011), *available at* www.gao.gov/products/GAO-11-396.

well-being, any competition policy must balance the promotion of material wellbeing with quality of life factors such as freedom and self-determination, while not deterring the exercise of compassion and interpersonal relationships.

This is not difficult to imagine. Competition in dispersing political and economic power can increase economic opportunity and personal autonomy,[299] a key predictor of happiness.[300] Citizens can choose to purchase from (and work for) firms that align with their personal religious and ethical values.[301] When a firm engages in exploitative, unfair behavior, a competitive market provides alternatives.[302] Positive sum competition provides richer social connections as people use their personal "vigor, imagination, devotion, and ingenuity" to help others.[303] In promoting

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[299] United States v. Am. Linseed Oil Co., 262 U.S. 371, 388 (1923) ("Sherman Act was intended to secure equality of opportunity, and to protect the public against evils commonly incident to monopolies, and those abnormal contracts and combinations which tend directly to suppress the conflict for advantage called competition—the play of the contending forces ordinarily engendered by an honest desire for gain"); Charles A. Ramsay Co. v. Associated Bill Posters of U.S. & Can., 260 U.S. 501, 512 (1923) ("fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade").

[300] BOK, *supra* note 285, at 23; NETTLE, *supra* note 291, at 74.

[301] Ross v. Bank of Am., N.A. (USA), 524 F.3d 217, 223 (2d Cir. 2008) (antitrust injury includes "[c]oercive activity that prevents its victims from making free choices between market alternatives") (quoting Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 528 (1983)); F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 19 (3d ed. 1990) ("When the no-barriers-to-entry condition of perfect competition is satisfied, individuals are free to choose whatever trade or profession they prefer, limited only by their own talent and skill and by their ability to raise the (presumably modest) amount of capital required."); HAYEK, *supra* note 50, at 127.

[302] Seacoast Motors of Salisbury, Inc. v. DaimlerChrysler Motors Corp., 271 F.3d 6, 9 (1st Cir. 2001) ("central aim of the antitrust laws is to protect consumers against certain abusive business practices-especially price-fixing and monopoly); Kahneman et al., *Fairness*, *supra* note 175, at 735.

[303] United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972); OECD Well-Being, *supra* note 284, at 14 ("Not only [the availability of jobs and earnings] increase people's command over resources, but they also provide people with a chance to fulfill their own ambitions, to develop skills and abilities, to feel useful in society and to build self-esteem.").

productive and dynamic efficiencies, antitrust can promote sustainable consumption and production. Greater productive efficiency can increase leisure time (which employees can use to contribute their unique skills to community voluntary work).[304] In enabling these activities, which are correlated generally with healthier and happier people, competition can promote well-being.

B. Competition Policy Cannot Exclude Social, Political, and Moral Objectives

If maximizing well-being entails a blended approach, the next issue is whether antitrust should promote only economic objectives. Limiting antitrust to economic goals, a former FTC chair said, frees competition law from normative judgments: "Antitrust finally regarded enhancing consumer welfare as the single unifying goal of competition policy, and it used a framework that was based on sound economics, both theoretical and empirical."[305] Another antitrust official warned, "the inclusion of other, non-competition values is very dangerous, and we need to be very careful with it."[306] He cautioned the danger of getting involved "in politically charged issues by reference to populism," which poses a "great danger of diluting our competition principles."[307] If competition authorities incorporate "extraneous social and political values into [their] decision making," then their "competition-based analysis will be polluted by values that, while important, just do not belong in sound competition analysis."[308]

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[304] BOK, *supra* note 285, at 20 (discussing research on how attending monthly club meetings or volunteering once a month is associated with a change in well-being equivalent to a doubling of income).

[305] Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*, 2003 COLUM. BUS. L. REV. 359, 388 (2003).

[306] R. Hewitt Pate, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Competition and Politics 2 (June 6, 2005), http://www.justice.gov/atr/public/speeches/210522.htm.

[307] *Id*. at 3.

[308] *Id*. at 6.

This brings to mind the character General Jack D. Ripper's observation in the movie, *Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb*:

> war is too important to be left to politicians. They have neither the time, the training, nor the inclination for strategic thought. I can no longer sit back and allow Communist infiltration, Communist indoctrination, Communist subversion and the international Communist conspiracy to sap and impurify all of our precious bodily fluids.[309]

This subpart examines the fallacy of viewing social, moral, and political values as "diluting" antitrust analysis. Neo-classical economic theory did not insulate antitrust authorities from lobbyists and political interest groups. Indeed Microsoft and Intel increased their lobbying efforts after the government commenced its antitrust prosecutions.[310] Google, currently under investigation for antitrust violations, is spending even more on lobbyists (over $2 million alone between April and June 2011).[311] Consequently the danger lies not in the inclusion of non-economic concerns in antitrust's goals, but as Part IV addresses, in the ensuing legal standard.

1. Antitrust's Inherent Trade-offs

Even if antitrust technocrats, for normative reasons, limited antitrust to economic goals, they cannot avoid non-economic values. Antitrust policy has inherent tradeoffs. As Hayek noted, "[i]t is the essence of the economic problem that the making of an economic plan involves the choice between conflicting or competing ends--different needs of different people."[312] To resolve the trade-offs, one invariably relies on political, social, and moral

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[309] DR. STRANGELOVE OR: HOW I LEARNED TO STOP WORRYING AND LOVE THE BOMB (Columbia Pictures 1964).

[310] Stucke, *Rule of Reason*, *supra* note 17, at 1419, 1447.

[311] Michael Liedtke, *Google's Lobbying Bill Tops Previous Record*, ASSOCIATED PRESS, July 21, 2011, http://www.huffingtonpost.com/2011/07/21/googles-lobbying-bill-q2-2011_n_906149.html.

[312] HAYEK, *supra* note 50, at 106.

values.

To start with an easy case, suppose residents of a New England community want to preserve their downtown, consisting largely of local merchants. They oppose the entry of a big-box retailer, which would primarily serve the community. The big-box retailer preaches to the villagers the virtues of its lower priced, high quality goods and increased consumer surplus. The community still objects. Should the government dismiss the citizens' behavior as irrational and permit the big-box retailer to enter the New England community? If so, government paternalism could override community preference.

A competition official, when asked this hypothetical, likely would accept the consumers' informed preference. The government, as the Court recognized under its state action doctrine, can displace competition with an anticompetitive regulatory program.[313] Here consumers can sacrifice the benefits of increased competition for other objectives, such as the pleasure (and value) they derive from preserving their downtown's quaintness.[314]

The harder case involves antitrust policy's inherent trade-offs. Suppose a merger of the town's paper mills generates efficiencies that will benefit only the company, with no prospect of being passed along to consumers. Also suppose the efficiency gains (which include purchasing less electricity) outweigh the likely price increase to consumers. Should these efficiencies be counted in favor of a merger? The Antitrust Modernization Commissioners disagreed.[315] Commissioner Carlton, a University of Chicago professor, argued yes. Commissioner Jacobson disagreed: "Any

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[313] City of Columbia v. Omni Outdoor Adver., 499 U.S. 365, 370 (1991); Parker v. Brown, 317 U.S. 341 (1943).

[314] Freedom Holdings, Inc. v. Spitzer, 447 F. Supp. 2d 230, 253 (S.D.N.Y. 2004) ("Classic antitrust analysis must take into consideration the right of states to seek to further other, and equally important, social goals, even at the expense of pure antitrust analysis."), *aff'd*, 408 F.3d 112 (2d Cir. 2005).

[315] AMC REPORT, *supra* note 124, at 422-23.

doubts that a consumer welfare standard better reflects the goals of the antitrust laws than a standard based on total welfare will serve only to undermine antitrust enforcement in the future."[316]

Other trade-offs include (i) a potential increase in inter-brand competition at the expense of reducing intra-brand competition,[317] (ii) offsetting a merger's anti-competitive effects in one market with pro-competitive benefits in another market,[318] (iii) mergers and restraints that yield dynamic efficiencies but also higher prices,[319] (iv) mergers that yield greater productive efficiencies but reduce product variety,[320] and (v) enabling firms to merge to attain productive efficiencies versus the political and social implications of increased concentration[321] and the competitive distortions of firms too-big-and too-integral-to-fail.[322]

Now suppose, in our example of the paper mill merger, that some of the

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[316] *Id*. at 423.

[317] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890-92 (2007); Graphic Products Distributors, Inc. v. ITEK Corp., 717 F.2d 1560, 1572-73 (11th Cir. 1983) ("even if a negative effect on consumer welfare and competition can be shown to flow from a restriction of intrabrand competition, the court must still look to any possible pro-competitive effects on the interbrand market stemming from the intrabrand restriction").

[318] 2006 Guidelines Commentary, *supra* note 206, at 57 ("Inextricably linked out-of-market efficiencies, however, can cause the Agencies, in their discretion, not to challenge mergers that would be challenged absent the efficiencies. This circumstance may arise, for example, if a merger presents large procompetitive benefits in a large market and a small anticompetitive problem in another, smaller market.").

[319] *Id*. at 49 ("Efficiencies in the form of quality improvements may also be sufficient to offset anticompetitive price increases following a merger."); OECD Policy Brief, *supra* note 186, at 5 ("merger may cause prices to rise soon after consummation but it may also bring about dynamic efficiencies that have positive non-price effects such as benefits from new or improved products in the longer term.").

[320] 2010 Merger Guidelines, *supra* note 186, at § 6 (contending that not all reductions in variety post-merger are anticompetitive as "some may reflect efficient consolidation of products when variety offers little in value to customers").

[321] Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249, 258-59 (2001).

[322] Markham, *supra* note 34, at 270 (after antitrust officials permitted significant concentration in the banking industry, some banks became too-integral-and-big-to-fail, leaving policymakers with choosing "which among competing failures to cure via bailout funding").

efficiencies will be passed on to some consumers, while other consumers will pay higher prices. One drafter of the 2010 Merger Guidelines commented that the antitrust agencies may conclude that "the predicted harm to relatively few customers is not substantial enough to warrant an enforcement action, especially if the merger is expected to generate cognizable efficiencies that will benefit a larger set of customers so customers overall are likely to benefit from the merger."[323] This assertion, like the other trade-offs, raises several issues.

First, should the antitrust agency determine whether some citizens should bear the brunt of a merger, so that other citizens may benefit? Suppose immediately after the merger, price will increase on the lower-end products, but the merger may provide "positive non-price effects (e.g., benefits from new or improved products) in the longer term."[324] This merger, as the OECD recognized, "puts investigators in the awkward position of needing to compare different concepts from different time periods–and possibly from two or more different markets with different sets of consumers."[325]

Second, it is questionable whether enforcers and generalist courts, consistent with the rule of law, can assess how "much quality enhancement or how many new products are necessary for some customers to compensate for a given expected price increase affecting other customers" in other markets.[326] In assessing whether lower-incomer consumers (with a higher marginal utility of money) should have to pay higher prices post-merger so that wealthier consumers receive better quality products, the agencies' decision will likely implicate political, social, and moral values.

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[323] Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49, 67 n.69 (2010).

[324] OECD Dynamic Efficiencies, *supra* note 167, at 10.

[325] *Id*.

[326] *Id*.

Third, even if the agencies could make this trade-off solely on economic considerations, a political and social issue is whether they should. Arguably individuals, as a quality of life matter, rather than an antitrust agency, subject to the risk of regulatory capture, should determine whether the potential innovation is significant enough to warrant the higher price. But often consumers cannot make this decision independently. Mergers can harm consumers in one market, while benefitting consumers in other markets. So normative values come into play as to who should decide this trade-off: the legislative branch, enforcement agency, or court?[327]

One recent case illustrates antitrust policy's inherent trade-offs.[328] The state of California challenged under the antitrust laws a profit-sharing agreement among several large southern California supermarket chains during a labor strike.[329] The major supermarkets advocated one trade-off: even if their temporary profit-sharing agreement had reduced the supermarkets' incentives to compete in the short term, it increased their chances of winning the labor dispute with their unionized employees.[330] Thus the court would trade-off any short-term reduction in competition in exchange for lowering retail prices to consumers over the long term. In defeating the union, the supermarkets could lower their employee wages and their costs, and thereby lower the retail prices charged to consumers.

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[327] United States v. Phila. Nat'l Bank, 374 U.S. 321, 371 (1963) (recognizing that a "value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended [section] 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.").

[328] California *ex rel.* Harris v. Safeway, Inc., 08-55671, 2011 WL 2684942 (9th Cir. July 12, 2011).

[329] *Id.* at *1 (grocers agreed that in "a strike/lockout, any grocer that earned revenues above its historical share relative to the other chains during the strike period would pay 15% of those excess revenues as reimbursement to the other grocers to restore their pre-strike shares").

[330] *Id.* at *34 (Reinhardt, J., dissenting and concurring in part).

Also by pooling profits over the short-term to defeat the union, the supermarkets could better compete against other retailers over the long-term.

Rather than evaluate the competitors' profit-pooling agreement under the per se illegal or quick-look legal standards, the Ninth Circuit ultimately left the parties and lower court to ramble through the wilds of economic theory: it instructed a "fair consideration of all factors relevant under the traditional rule of reason test, so as to determine if there are significant anticompetitive impacts and if so whether they outweigh any legitimate justifications."[331] Important here is that a decision will be made, and entering that decision will be social, political, and moral concerns. Thus, even under a pure economic approach, enforcers and courts will confront complex trade-offs, whereby one group will benefit, another will be harmed. And the price is not always clear. Each group can value the benefits and costs of the trade-off differently, and some values are incommensurable (such as fairness and liberty considerations in permitting some consumers to be exploited so that others benefit).

2. Importance of Morals and Fairness to Support a Market Economy

Individuals, as repeatedly shown in the empirical behavioral economics literature, do not predictably behave as neoclassical economic theory posits.[332] They do not delineate between economic and non-economic considerations when considering fairness.[333] They do not enter the marketplace with a blank slate. Instead, years of socialization, and the internalization of social, moral, ethical, and legal norms have already

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[331] *Id*. at *16. Since California stipulated that it would not challenge the restraint under the rule of reason, the Ninth Circuit's ruling was a victory for defendants. *Id*. at *16 n.18.

[332] *See, e.g.,* Reeves & Stucke, *supra* note 237, at 1528-30 (collecting several applications of behavioral economics).

[333] Kahneman et al., *Fairness*, *supra* note 175, at 729.

occurred.[334]

Thus any competition policy, in a world with humans, transaction costs, coercion, and informational asymmetries, is built upon the normative judgments of legal and informal institutions.[335] Principles of ethics, morals and fairness, rather than compromise, can strengthen a market economy.[336]

As most rights are qualified,[337] normative legal judgments are involved in creating, assigning, limiting, and protecting property rights[338] and in the initial and current distribution of assets. So one inquires the extent to which property rights have a social mortgage "to ensure that the basic needs of every [individual] are met and sustained."[339] Ultimately economics is not a value-free science,[340] inoculated from normative judgments.

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[334] HAYEK, *supra* note 50, at 125 ("The ultimate ends of the activities of reasonable beings are never economic."); Horton, *supra* note 49, at 475 ("neoclassical economists have gone against the most basic principles of humanness, and our attendant inborn and cultural standards of reciprosity, justice, and fairness"); C. Mantzavinos, *The Institutional-Evolutionary Antitrust Model*, 22 EUR. J.L. & ECON. 273, 277 (2006) ("When consumers and entrepreneurs begin participating in and exchanging on the market and competing with each other, they are already socialized individuals, sharing a large number of social rules.").

[335] Douglass C. North, *Economic Performance Through Time*, 84 AM. ECON. REV. 359, 361 (1994) (characterizing economic markets as typically imperfect and beset by high transaction costs); Coase, *supra* note 269, at 717 (recognizing that once "we move from a regime of zero transaction costs to one of positive transaction costs" the legal system's fundamental importance quickly becomes apparent).

[336] See *supra* note 261.

[337] Lorain Journal Co. v. United States, 342 U.S. 143, 155 (1951).

[338] Coase, *supra* note 269, at 717.

[339] Letter from the Holy See to the Council for Trade-Related Aspects of Intellectual Property Rights of the WTO, Ethics Cannot Justify Fixing the Highest Prices for Medicines, in L'Osservatore Romano (Vatican City), July 11, 2001, at 9, http://www.catholicculture.org/library/view.cfm?recnum=3966&longdesc (presenting the Holy See's stance on the pharmaceutical industry's responsibility to provide affordably priced medications). For more on the social mortgage on capital, see generally CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE (David J. O'Brien & Thomas A. Shannon eds., 2004).

[340] F.M. Scherer, *Conservative Economics and Antitrust: A Variety of Influences*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, *supra* note 73, at 31 (noting how "economic propositions are among the least provable of those addressed in the various sciences").

3. Praising Antitrust's Purity Is Praising Its Irrelevancy

Even if technocrats somehow could exclude social, moral, and political values from antitrust policy, they must still articulate how their work improves well-being (or at least for their influential constituencies). Antitrust monasteries are not feasible in democracies. Competition authorities seldom have unrestricted endowments. Nor would many politicians leave money outside the antitrust monastery so as to not pollute the technocrats inside. Competition agencies compete with other agencies for funding. So if antitrust policy is irrelevant to the pressing societal issues, then antitrust, relegated to a niche organization with little resources, is easier to marginalize.

Moreover, a plea for antitrust purity can divorce antitrust technocrats from the public concerns. Some antitrust goals are important to the public and Congress but dismissed by antitrust technocrats. Take, for example, the goal of protecting small competitors. In one recent survey, "[a]bout 8 in 10 (81%) EU citizens agreed that small companies needed to be protected from large companies' competition."[341] Indeed more citizens "totally agree[d]" with that statement than other statements considered antitrust gospel, such as competition between companies allows for more choice[342] and better prices[343] for consumers.[344] This cannot be dismissed as European fancy. Protecting smaller competitors was one concern underlying the legislative

[341] Flash Eurobarometer: EU Citizens' Perceptions about Competition Policy--Survey Conducted by the Gallup Organization, upon the request of Directorate General for Competition, Flash EB Series No. 264 7 (2009), ec.europa.eu/public_opinion/flash/fl_264_sum_en.pdf (51% "totally agree" and 30% "somewhat agree").

[342] *Id*. (49% totally agree).

[343] *Id*. (50% totally agree).

[344] In all EU Member States (besides Denmark), over 70 percent of interviewees agreed that small companies needed to be protected from large companies' competition. *Id*. at 11 (27% of the surveyed Danes "tended to disagree" and 14% "totally disagreed," whereas in all other Member Countries less than a quarter of respondents expressed disagreement (between 7% and 22%)).

amendments to the Clayton Act, the primary antitrust statute involving mergers,[345] and surveyed U.S. citizens had more confidence in small businesses than big firms.[346]

But protecting small competitors, for some, is blasphemy.[347] The conventional wisdom is that the antitrust laws protect competition, not competitors.[348]

From the technocrats' perspective, the citizens, even the highly-educated,[349] are ill-informed. From the citizens' perspective, the technocrats must recognize that protecting small companies represents an important value to be independently protected; alternatively, the technocrats, with their focus on static price competition and productive efficiencies, cannot otherwise see, as citizens working in the private sector can, the harms from concentrated economic power. Small start-ups, as one recent study found, drive dynamic competition. Start-ups that survive "have higher productivity levels and higher productivity gains than more mature establishments," and help replace "lower productivity businesses with new, more productive ones, thereby increasing productivity overall."[350] Start-ups create the bulk of private sector jobs in the United States.[351]

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[345] See *supra* note 55.

[346] Dennis Jacobe, Americans Three Times as Confident in Small vs. Big Business--Confidence Gap Greater Now than Prior to the Recession and Financial Collapse, Gallup, July 27, 2010, http://www.gallup.com/poll/141578/Americans-Three-Times-Confident-Small-Big-Business.aspx.

[347] AMC REPORT, *supra* note 124, at 34.

[348] *Id*.

[349] EU Citizen Survey, *supra* note 341, at 15 ("Respondents with a higher level of education were also more likely to agree that mergers between large companies might distort competition (75% vs. 61% of the least educated respondents)" but "were more likely to doubt whether small companies should be protected from large companies' competition"; 18% with a higher level of education disagreed with the latter former statement, compared to 8% of the least educated).

[350] Steven J. Davis et al., Turmoil and Growth: Young Businesses, Economic Churning, and Productivity Gains 4 (June 2008), *available at* http://www.kauffman.org/research-and-policy/business-dynamics-statistics.aspx.

[351] John Haltiwanger et al., Business Dynamics Statistics Briefing: Jobs Created from

Consequently, antitrust officials who warn about social, moral, and political values polluting antitrust analysis are not arguing for sound competition analysis.[352] They argue for an antitrust analysis divorced from reality, a world occupied by self-interested profit-maximizers, unconcerned about fairness and trust, in markets without transaction costs and property rights. In short, they render antitrust irrelevant. The surveyed ICN members considered "that the most important obstacle to their advocacy work surges from the different objectives and opinions held by other Governmental authorities."[353] Seeking to sequester competition goals from moral, social, and political values will not bridge this divide.

IV. ACCOUNTING ANTITRUST'S MULTIPLE OBJECTIVES IN THE LEGAL FRAMEWORK

As Part III discusses, any country's competition law likely will encompass, but not necessarily rank, multiple economic, social, moral, and political goals. The issue is not whether competition policy should incorporate non-economic values. Rather, as this Part discusses, the issue is the degree of freedom that courts and enforcers have in weighing multiple goals in their analysis.

One issue is how to weigh multiple objectives, if as Part II discusses, each objective has shortcomings. For example, promoting efficiency cannot be the primary goal, as all the antitrust scholars and policymakers, taken together, still would not know how to maximize dynamic, allocative, and

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Business Startups in the United States; Second in a series of reports using data from the U.S. Census Bureau's Business Dynamics Statistics (Jan. 2009), *available at* http://ssrn.com/abstract=1352538 (comparing fraction of employment accounted for by U.S. private-sector business startups with the average annual net employment growth of the U.S. private sector over the 1980-2005 period and inferring "that, excluding the jobs from new firms, the U.S. net employment growth rate is negative on average").

[352] HAYEK, *supra* note 50, at 100 (all collectivist systems feature the "deliberate organization of the labors of society for a definite social goal").

[353] ICN Advocacy Report, *supra* note 91, at 72.

productive efficiencies in the long run.[354] As a German Bundeskartellamt official said, we cannot pretend to know what in fact cannot be known.[355] Another issue is whether the goals are better achieved directly (like the goal of crossing the street) or obliquely.[356]

In reconsidering antitrust's goals, policymakers should look at the business literature, which after the financial crisis, is reconsidering capitalism, "one imbued with a social purpose."[357] In the past, the concepts of sustainability, fairness, and profitability generally were seen as conflicting.[358] But these concepts are seen as reinforcing under the principle of shared value, which "involves creating economic value for society by addressing its needs and challenges" and enhances "the competitiveness of a company while simultaneously advancing the economic and social conditions in the communities in which it operates."[359] Profits can be attained not through exploitation (e.g., creating demand for harmful or useless products), but through collaboration and trust and in better helping consumers solve their problems. Sustainability, rather than a cost, represents an opportunity for companies to improve productivity and societal welfare.[360]

So too important political, social, economic, and moral values can

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[354] Christian Ewald, *Competition and Innovation: Dangerous "Myopia" of Economists in Antitrust?*, 4 COMPETITION POL'Y INT'L 253, 261 (Autumn 2008).

[355] *Id*.

[356] KAY, *supra* note 236, at 195 (arguing that direct goals are appropriate (i) when the environment is stable, (ii) the objectives are one-dimensional and transparent, and (iii) it is possible to determine when, and whether, the goals have been achieved).

[357] Michael E. Porter & Mark R. Kramer, *Creating Shared Value: How to Reinvent Capitalism—and Unleash a Wave of Innovation and Growth*, HARV. BUS. REV., Jan.-Feb. 2011, at 77; Ikujiro Nonaka & Hirotaka Takeuchi, *The Big Idea: The Wise Leader*, HARV. BUS. REV., May 2011, at 59 (moral purpose).

[358] Porter & Kramer, *supra* note 357, at 64.

[359] *Id*. at 64, 66.

[360] Org. for Econ. Co-operation & Dev., Roundtable on Pro-Active Policies for Green Growth and the Market Economy--Note by the Delegation of the United States (Oct. 19, 2010), *available at* www.justice.gov/atr/public/international/269284.pdf.

reinforce, rather than undermine, any concept of fair competition. Ideally the politically accountable legislature (but given Congress's reticence, more likely the courts) would blend the multiple objectives into legal standards that comport with rule-of-law principles.

A. Blending Antitrust's Objectives

To illustrate how blending goals works, we can combine several popular competition goals: Ensuring an effective competitive process by enhancing efficiency, while promoting economic freedom, a level playing field for small and mid-sized enterprises, and fairness. In blending these goals, lawmakers can hope to expand the range of entrepreneurial opportunity seeking to satisfy any increasing consumer demand for choice.

As Part III discusses, the U.S. economy relies on new entrants for productivity gains and job creation. Promoting economic freedom and opportunity and ensuring a level playing field for small and mid-sized enterprises consequently will likely promote, rather than undermine, dynamic efficiency.[361] In addition, promoting these blended goals can strengthen the network's resilience.[362] Ensuring a "multiplicity and diversity of independently innovating firms," observed Professor Kerber, can (i) promote the "searching for new problem solutions and safeguarding the effectiveness of competition as a process of parallel experimentation and mutual learning,"[363] and (ii) provide a faster adaptation to exogenous shocks.[364]

The blended goal can also promote productive efficiencies. A low to moderately concentrated industry with diverse competitors can offer greater benefits to competitors, than a highly concentrated industry. One empirical

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[361] Fox, *Efficiency Paradox*, *supra* note 73, at 80.

[362] Sally J. Goerner et al., *Quantifying Economic Sustainability: Implications for Free-Enterprise Theory, Policy and Practice*, 69 ECOLOGICAL ECONOMICS 76, 77 (2009).

[363] Kerber, *Maintaining Diversity*, *supra* note 272, at 3.

[364] *Id*. at 9; *see also* Horton, *supra* note 49, at 488, 491.

study found a positive correlation between industry variety and performance.[365] In considering why the entire industry benefits when firms pursue a variety of competitive strategies, the study's authors posit that with less variety, there will be less opportunity for the firms to learn of the changing conditions and demands and appropriate responses thereto.[366] Likewise, Michael Porter identified how competitors mutually gain from localized competition, such as knowledge spillovers, improving the quality of their labor pool, and strengthening their network of suppliers.[367] A diversity of local competitors can spur variety in products, as competitors strive to differentiate from their rivals' products, as well as in production techniques and strategies, which can lead to further innovation.

1. A Blended Approach for Monopolist's Exclusionary Behavior

One concern underlying economic freedom is when monopolists through exclusionary behavior seek to stifle the introduction of variation or otherwise impede the market's feedback mechanism.[368] Entrenched firms jointly or unilaterally seek to limit the introduction of variation by entrants and consumers' ability to experiment with new products or services.[369]

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[365] Grant Miles et al., *Industry Variety and Performance*, 14 STRATEGIC MGMT. J. 163, 166-72 (1993). The study also found that such variety decreased as the industry matured and declined. *Id*. at 172.

[366] *Id*. at 174.

[367] MICHAEL E. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS 662-69 (1990); Michael E. Porter, *Competition and Antitrust: A Productivity Approach*, *in* UNIQUE VALUE: COMPETITION BASED ON INNOVATION CREATING UNIQUE VALUE 161-65 (Charles D. Weller et al., eds. 2004); *see also* DAVIDSON, *supra* note 52, at 96, 152-53. By analogy, plant species compete for pollinators (bees). But in mutualistic networks, the more plant species that grow in a field, the more pollinators are attracted to the area, so the different plant species stand to gain more when they co-exist. Jordi Bascompte, *Disentangling the Web of Life*, SCIENCE, July 24, 2009, at 416, 418.

[368] JOHNSON, *supra* note 203, at 41; EVERETT M. ROGERS, DIFFUSION OF INNOVATIONS 15-15, 146 (5th ed. 2003) (discussing how information exchange, trialability, and observability are crucial in the innovation-development process).

[369] *See, e.g.,* Realcomp II, Ltd. v. F.T.C., 635 F.3d 815, 822 (6th Cir. 2011) (FTC successfully challenging Realcomp's website and search-function policies that restricted limited-services discount brokers' publishing and marketing nontraditional listings).

One recent example is Intel.[370] The FTC alleged that the monopolist sought to block or slow the adoption of competitive products by, among other things, paying or otherwise inducing suppliers of complementary software and hardware products to eliminate or limit their support of non-Intel microprocessors. Intel allegedly induced computer manufacturers "to forgo advertising, to forgo branding, to forgo certain distribution channels, and/or to forgo promotion of computers containing non-Intel CPUs."[371] Suppose Intel could prove during the complaint period that microprocessor prices actually declined at an annual rate of 42 percent (a price decrease greater than for any other high-technology product) and output of its x86 microprocessors grew from 136.5 million to 324.7 million.[372] If allocative and productive efficiency were the antitrust goals, the FTC would have a hard time showing that absent Intel's conduct, prices likely would have been lower and output greater.

But under a blended goal, the FTC could show how Intel's conduct inhibited its competitors from effectively marketing their products to customers, which also harmed choice (and competition) at the downstream original equipment manufacturers (OEM) and consumer levels, and reduced the OEMs' incentive and ability to innovate and differentiate their products in ways that would appeal to customers.[373] Under a blended goal, the competition authority more likely would follow "the concept of rivalry and consumer choice as the essential conditions for guaranteeing competition and sustainable incentives for innovation."[374]

This blended approach is not novel. The European Commission infers

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[370] Admin. Compl., In re Intel Corp., FTC Docket No. 9341 (Dec. 16, 2009), http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf.

[371] *Id*. at ¶ 52.

[372] Answer, In re Intel Corp., FTC Docket No. 9341 (Dec. 31, 2009), http://www.ftc.gov/os/adjpro/d9341/091231respanswertocmplt.pdf.

[373] Intel Compl., *supra* note 370, at ¶ 94.

[374] Drexl, *Real Knowledge*, *supra* note 200.

anti-competitive effects when a monopolist "prevents its customers from testing the products of competitors or provides financial incentives to its customers on condition that they do not test such products, or pays a distributor or a customer to delay the introduction of a competitor's product."[375] In curtailing the available antitrust defenses for a group boycott, the Supreme Court implicitly blended these goals.[376] And as Hayek argued, it is "essential that entry into the different trades should be open to all on equal terms and that the law should not tolerate any attempts by individuals or groups to restrict this entry by open or concealed force."[377]

A blended objective would promote economic opportunity without unduly penalizing more efficient firms from competing. Economic freedom does not mean economic equality.[378] One cannot assume that all sellers have the same "best practices" and routines, or the same quality of goods and services. Under the blended approach, antitrust would not require a competitor to degrade the quality of its products or services or otherwise punish firms that succeed because of their superior efficiency or product offerings. So a business that loses sales because of its inability to solve the consumers' problems "is not the victim of economic oppression, but of [its] own inefficient methods."[379] In determining whether the monopolist's challenged conduct is exclusionary and unreasonably restrains other

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[375] Communication from the European Commission—Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (2009/C 45/02) ¶ 22, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:EN:PDF.

[376] Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) (group boycotts cripple traders' freedom to sell in accordance with their own judgment); Associated Press v. United States, 326 U.S. 1, 16 (1945) (challenged boycott limits opportunity and initiative of potential entrants).

[377] HAYEK, *supra* note 50, at 86.

[378] BOK, *supra* note 285, at 95 (describing equal opportunity as "giving everyone a more equal chance to become sufficiently educated and informed to resist exploitation and to defend themselves by appealing to the courts or to their political representatives when arbitrary restraints and disadvantages do occur").

[379] Blake & Jones, *Defense of Antitrust*, *supra* note 240, at 398.

competitors' economic freedom, the competition authority can consider whether the challenged conduct is capable of excluding an equally efficient competitor.[380]

2. A Blended Approach for Media Industries

Media industries provide another example of the importance in blending economic and non-economic goals. In some industries, with high fixed costs and homogeneous products, consumers do not desire product variety. Consumers prefer mergers that enable firms to achieve economies of scale by rationalizing production lines. But for media industries, consumers may desire product variety from competing independent news sources even at the cost of some efficiency. The product variety yields a desired outcome (vibrant marketplace of ideas), which in turn promotes the quality-of-life factors important for well-being.[381]

Under a blended goal, cost-savings efficiencies are relevant, when they demonstrably yield greater output of better quality programming.[382] But under a blended goal, antitrust policy will not focus entirely on short-term productive efficiencies and competitive advertising rates. This was the

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[380] *See, e.g.*, Luc Peeperkorn & Katja Viertio, *Implementing an Effects-based Approach to Article 82*, COMPETITION POL'Y NEWSLETTER, at 17 (No. 1 2009), ec.europa.eu/competition/publications/cpn/2009_1_5.pdf (outlining European Commission's standard to assess whether dominant firm's pricing conduct is capable of foreclosing equally efficient hypothetical competitors).

[381] For our discussion of how a vibrant marketplace of ideas can promote civic engagement and governance, increase political accountability, reduce corruption, inform policymakers of the unintended social effects of their policies, and provide a voice to pressure the government for change, see Allen P. Grunes & Maurice E. Stucke, *Plurality of Public Opinions and the Concentration of Media*, *in* GENERAL REPORTS OF THE XVIIITH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW (Karen B. Brown & David V. Snyder eds. Springer forthcoming 2012); Stucke & Grunes, *Antitrust Immunity*, *supra* note 35, at 128-29.

[382] A concern about productive efficiencies can also prevent the government from requiring too much market fragmentation thereby depriving the media of scale economies and investing the savings in journalism. Joaquín Almunia, Vice President of the European Commission Responsible for Competition Policy, Competition in Digital Media and the Internet, SPEECH/10/365, (July 7 2010), http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/365&format=HTML&aged=0&language=EN&guiLanguage=en.

DOJ's mistake in the past antitrust policy cycle when reviewing radio mergers. Consumers suffered as a result.

In 1996, Congress and the FCC relaxed the media ownership rules.[383] They did so under the banner of promoting competition and reducing regulation "to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[384] Not surprisingly, immediately after the 1996 Telecom Act, there was, one Clinton administration official remarked, an "explosion of radio mergers."[385] In analyzing radio mergers, the DOJ considered their economic impact solely with respect to advertisers and the rates they paid.[386] Even though other possible product markets existed, such as listenership and programming, the DOJ consent decrees never addressed the merger's likely impact on programming quality, listener choice, or on the marketplace of ideas.[387] Despite the rising industry concentration, the DOJ challenged few radio mergers.[388] It required firms to divest radio stations in only those highly concentrated markets where it predicted advertisers would likely pay higher rates.[389]

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[383] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202, 110 Stat. 56, 111-12 (1996) (*inter alia* eliminating limits on the number of AM or FM broadcast stations which one entity may own or control nationally); 47 C.F.R. § 73.3555 (eliminating national multiple radio ownership rule and relaxing local ownership rule). Congress also permitted greater concentration in local radio markets and a company to own or control a network of broadcast stations and a cable system.

[384] 110 Stat. at 56 (1996).

[385] Joel I. Klein, Acting Assistant Att'y Gen., Dep't of Justice, Antitrust Div., DOJ Analysis of Radio Mergers (Feb. 19, 1997), *available at* http://www.justice.gov/atr/public/speeches/1055.pdf.

[386] *Id*.; Stucke & Grunes, *Antitrust Immunity*, *supra* note 35, at 128.

[387] Stucke & Grunes, *Antitrust Immunity*, *supra* note 35, at 129-34.

[388] In the first year of the 1996 Act, there were over 1,000 radio mergers, of which the DOJ reviewed 140. Klein, *supra* note 385.

[389] In the two years after the 1996 Act, the DOJ filed eight cases to restructure radio mergers; three additional deals were restructured or abandoned without going to court. Press Release, U.S. Dept. of Justice, Justice Department Requires CBS to Sell Seven Radio Stations as Part of American Radio Systems Acquisition (Mar. 31, 1998), http://www.justice.gov/atr/public/press_releases/1998/1618.htm.

Although Congress amended the Clayton Act in 1950 to arrest "concentration in the American economy, whatever its cause, in its incipiency,"[390] the DOJ official called the concentration in the radio industry "healthy" given the potential for efficiencies.[391] The ensuing consolidation adversely impacted non-price competition, such as programming quality and programming choices for listeners.[392] Moreover, the industry consolidation adversely affected advertising rates, which ironically was the DOJ's sole focus.[393] Mel Karmazin, the former head of commercial radio for Infinity Broadcasting and CBS and the current CEO of Sirius XM, recognized that commercial radio after the 1996 Act became "totally homogenized."[394] Karmazin advocated for radio consolidation "[s]trictly for business reasons. No one asked [him] if it was good for consumers."[395]

By blending goals, lawmakers can enable smaller media firms to grow through mergers. But rather than embrace concentration as "healthy" and consider the mergers' effect only on advertising rates, antitrust officials

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[390] United States v. Pabst Brewing Co., 384 U.S. 546, 551 (1966).

[391] Klein, *supra* note 385. Between 1996 and 2010, the number of radio station owners decreased 39 percent (5,133 to 3,143 owners). Federal Commc'ns Comm'n, Notice Of Inquiry, In the Matter of 2010 Quadrennial Regulatory Review–Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 09-182 12 (May 25, 2010), http://govpulse.us/entries/2010/06/11/2010-14099/2010-quadrennial-regulatory-review-review-of-the-commission-s-broadcast-ownership-rules-and-other-ru.

[392] Stucke & Grunes, *Antitrust Immunity*, *supra* note 35, at 116-29 (identifying several market failures after the 1996 Act). As one FCC Commissioner commented, "It is difficult to fully quantify the harmful effects that media consolidation has had on the news, information and entertainment we receive. Fewer and fewer voices do not an informed electorate and robust democracy make." FCC Opens Notice of Inquiry into Media Ownership Rules, RADIO BUS. REP., May 25, 2010, http://www.rbr.com/media-news/24495.html.

[393] Stucke & Grunes, *Antitrust Immunity*, *supra* note 35, at 130 (between 1998 and 2006 radio listening declined while radio advertising rates nearly doubled).

[394] Phil Rosenthal, *Homogenized Radio Stations Bottle up Growth*, CHI. TRIB., Nov. 11, 2007, http://articles.chicagotribune.com/2007-11-11/business/0711100015_1_sirius-satellite-radio-radio-stations-mel-karmazin.

[395] *Id*.

would be skeptical about monopolies or tolerating mergers in already concentrated industries to yield additional productive efficiencies.

B. Risks and Benefits of a Blended Approach

As Professor Louis Schwartz observed, "The difficult question is not *whether* non-economic considerations are a proper, indeed conventional, component of the antitrust calculus, but how to take them into account."[396]

A trade-off exists between antitrust goals and legal standards. With a narrowly defined antitrust objective, one can use an open-ended, fact-specific weighing standard, such as the rule of reason. The specific goal limits the enforcers' and courts' discretion when weighing the facts, as the goal permits only one outcome. Alternatively, one can have multiple (and conflicting) policy objectives, if they are synthesized into clear rules that market participants can internalize and follow.

One sees this trade-off in past antitrust cycles. Up until the late 1970s, the Court recognized antitrust's multiple economic and non-economic goals. Accordingly, the Court generally (but not always) sought four things. First, it sought a legal standard that was administrable for generalist judges.[397] With some exceptions, the Court turned to the legislative history or common law precedent as a basis for its standards.[398] Second, the Court sought legal standards to enhance predictability. For example, in devising the thirty percent market share presumption for mergers, the Court sought to foster business autonomy: Unless business executives "can assess the legal consequences of a merger with some confidence, sound business planning is

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[396] Louis B. Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076, 1080 (1979).

[397] *See, e.g.*, United States v. Phila. Nat'l Bank, 374 U.S. 321, 362 (1963) ("in any case in which it is possible, without doing violence to the congressional objective embodied in . . . [the statute], to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration").

[398] Stucke, *Rule of Reason*, *supra* note 17, at 1402-03.

retarded."[399] The Court's role was to provide clearer guidance on what was civilly (and criminally) illegal under the Sherman Act. Third, the Court sought to prevent the lower courts from being bogged down in difficult economic problems, such as trade-offs between inter- and intra-brand competition.[400] Fourth, not only was this weighing beyond its institutional competence, the Court recognized that the legislature, while subject to rent-seeking, was more politically accountable than the judiciary; so Congress must make these normative trade-offs.[401]

In the past policy cycle, the Court went the opposite direction. It increasingly emphasized one type of competition (static price competition) and one antitrust goal (consumer welfare) and deemphasized antitrust's political, moral, and social objectives. The Court increasingly narrowed the applicability of its *per se* illegal standard and broadened the applicability of its more fact-intensive, case-specific rule-of-reason inquiry.[402]

One risk of the blended goal approach, therefore, is incorporating multiple goals into the Court's prevailing legal standard, the rule-of-reason. One cannot have, consistent with the rule of law, a fact-specific weighing standard and multiple policy objectives. Having the agencies and courts blend goals in every antitrust case is a recipe for disaster.[403] It is

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[399] *Phila. Nat'l Bank*, 374 U.S at 362.

[400] *See, e.g.,* United States v. Topco Assoc., Inc., 405 U.S. 596 (1972) (neither courts nor litigants could weigh the reduction of competition in one area (e.g., intra-brand competition for Topco private-label products among Topco member supermarkets) versus greater competition in another area (e.g., inter-brand competition between Topco members' and the major supermarkets' private-label goods)); Stucke, *Rule of Reason*, *supra* note 17, at 1404-05.

[401] Stucke, *Rule of Reason*, *supra* note 17, at 1405-6.

[402] *Id*. at 1407-15; *see e.g.*, California *ex rel*. Harris v. Safeway, Inc., 08-55671, 2011 WL 2684942, at *11 (9th Cir. July 12, 2011) (noting Supreme Court's reluctance to adopt per se rules where practice's economic impact is not immediately obvious).

[403] ABA, ANTITRUST GOALS, *supra* note 41 (cautioning against including non-economic objectives in any legal standard that relied on weighing multiple factors, and recommending that social and political objectives employed in the formulation of stand-alone legislation or a priori rules, rather than as operational criteria in individual antitrust

questionable whether antitrust enforcers and courts can operationalize multiple goals in a systematic fashion.[404] Moreover, allowing them to blend goals provides greater freedom to make errors and be politically captured.

Accordingly, if courts and antitrust enforcers acknowledge antitrust's traditional political, social, and moral goals, then the rule of reason cannot be antitrust's prevailing legal standard. Instead, they must blend such goals into clearer rules and legal presumptions. Ultimately, the debate is which is the better trade-off: a single well-defined goal/rule-of-reason standard versus multiple goals/clearer rules.

As this article discusses, the quest for a single well-defined goal has failed. Thus antitrust is adrift under the rule-of-reason. On the other hand, one drafter of the 2010 Merger Guidelines, in praising the Guidelines' flexibility, doubted the business community's desire to return to the 1960s antitrust policies: "Accounting for the real-world business conditions in which a merger takes place is worthwhile, even if doing so means that some simplicity must be sacrificed to achieve greater accuracy in merger enforcement."[405]

On one level, he is correct. Companies seeking to merge in highly concentrated industries prefer a fact-intensive weighing standard than a presumption of illegality. At times a competitively neutral or beneficial merger violates the simpler standard. Moreover, the rule of reason enables the agencies and courts to respond flexibly to resolve novel problems that continually emerge over time.

But this thinking, common in the past antitrust cycle, rests on two

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cases).

[404] Lisa D. Ordóñez et al., *Goals Gone Wild: The Systematic Side Effects of Over-Prescribing Goal Setting*, Harv. Bus. School No. 09-083 7 (2009), www.hbs.edu/research/pdf/09-083.pdf (noting how individuals with multiple goals are prone to concentrate on one goal).

[405] Shapiro, *supra* note 323, at 59.

assumptions: first for most mergers and restraints a fact-intensive rule-of-reason analysis yields greater accuracy; second, the business community prefers the rule-of-reason analysis. These assumptions, as I explore elsewhere,[406] are empirically suspect. No one knows whether the 1992 or 2010 Merger Guidelines increased accuracy, as no one systemically evaluated post-merger whether the agency accurately predicted the merger's competitive effects. Indeed, by weighing some factors (claimed efficiencies) and not others (editorial competition), as the DOJ's review of radio mergers reflects, the fact-intensive inquiry can lead to a worse outcome—higher ad rates, poorer quality, and a less robust marketplace of ideas. There is no empirical evidence that courts and antitrust enforcers systematically optimize efficiency across industries through its vague rule-of-reason standard.

Nor is there any evidence that firms prefer the costly, time-intensive rule-of-reason analysis to clearer rules. Several factors suggest that the contrary. First, simpler rules that emphasize a limited number of structural factors can facilitate "both enforcement decision-making and business planning which involves anticipation of the Department's enforcement intent."[407] If courts, with the assistance of antitrust lawyers, have difficulties applying the rule-of-reason, corporate counsel will also have a hard time advising their clients on the conduct's legality, and it will be hard for employees to internalize norms of what is reasonable and unreasonable behavior.

Second, as private and public antitrust enforcement increases globally, the costs from uncertain and inconsistent legal outcomes will likely

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[406] Stucke, *Rule of Reason*, *supra* note 17, at 1421-73 (discussing how antitrust in the past cycle, under the Court's rule-of-reason legal standard, deteriorated in terms of accuracy, transparency, objectivity, administrability, and consistency).

[407] U.S. Dep't of Justice, Merger Guidelines (1968), www.justice.gov/atr/hmerger/11247.pdf.

increase. Thus the demand for convergence increases. Convergence can occur on two levels: goals and/or legal standards. As the ICN surveys show, competition authorities have not converged, nor will they likely converge, on a single well-defined antitrust goal. The newer antitrust regimes are unlikely, especially after the financial crisis, to regress to a simplistic conception of competition and quest for a single economic goal. Countries that are adopting or revising their competition laws are not condemned to repeat the failures of U.S. antitrust policy, such as debating, as some Chicago and post-Chicago school adherents did, over a single economic goal.

Consequently, any global convergence will be on the legal standards. With different antitrust objectives, however, one cannot expect the same legal standards. So the convergence will not be over the substance of the standard, but the extent to which the legal standard conforms to rule-of-law principles. Multi-national companies likely will demand convergence on legal standards that provide greater transparency, objectivity, accuracy, and predictability. They increasingly will demand clearer rules that their employees can easily internalize (and reduce compliance costs), that will bind them and their competitors, and that will enable them to reasonably anticipate what actions would be prosecuted so they can channel their behavior in welfare-enhancing directions.[408] As the recent ICN survey observed, "A *clearly set* and *uniformly enforced* standard is, therefore, of utmost relevance for enforcement agencies, the business community and final consumers."[409] Accordingly, any future convergence will not be over antitrust's goals (that effort proved unsuccessful in the past policy cycle) or on particular legal standards. Any convergence will come initially from increasing the transparency of antitrust's legal standards (and bringing them

[408] 2011 ICN Survey, *supra* note 47, at 88.
[409] *Id.* (emphasis added).

closer to the rule-of-law ideals).

This makes the Court's rule-of-reason standard an unattractive export, especially to countries with less developed judiciaries. Firms will unlikely want to waste the extraordinary time and expense of a rule-of-reason analysis in China, Russia, the United States, or European Union. This does not mean a return to *per se* illegal standards or death of the rule of reason, which courts and agencies could continue to employ in novel cases. Instead for most run-of-the-mill restraints (such as RPM), the demand for, and supply of, more administrable standards, such as presumptions of illegality, with well-defined exceptions or defenses, will increase. The challenge will be "how to strike a balance between the gains of a more effects-based approach and a higher degree of tailor-made decisions on the one hand, and the extra resources that are needed to achieve this and less legal certainty on the other hand."[410]

As the Court neglected in the past antitrust cycle, "[l]egal requirements are prescribed by legislatures and courts, not by economic science."[411] To the extent economic theories continue to lead the U.S. courts, the trend in economics is toward more complex, yet realistic, conceptions of competition and market participants. Accordingly, businesses and the antitrust bar will be more skeptical about enforcers' and courts' abilities to predict competitive outcomes or maximize efficiency in those markets through the rule of reason. They increasingly will demand simpler standards, more in accord with the rule of law, that incorporate antitrust's blended goals.

Thus, in the next policy cycle, antitrust's legal standards can shift in two ways. First, as recently signaled in *linkLine*, the Court can shift from a

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[410] *Id.*

[411] THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 316 (1955).

"case-by-case" rule-of-reason analysis, which focuses on the "particular facts disclosed by the record"[412] to simpler antitrust standards and rules "clear enough for lawyers to explain them to clients."[413] Second, the standards may shift, whenever feasible, from directly regulating market participants' behavior to maintaining a competitive structure and preserving freedom therein.

Besides increasing demand for better legal standards, a blended goal approach increases antitrust's salience. Currently to achieve consensus, antitrust relies on ill-defined goals, like promoting consumer welfare. The current debate over a total versus consumer surplus standard may interest antitrust technocrats, but few others. Moreover, the debate over antitrust goals is no longer a domestic affair.

One question is why should countries adopt antitrust laws. With the realignment of economic power, the future debate over the purpose of antitrust law will likely be between a "Democracy Consensus" and "Authoritarian Consensus." To the extent the Beijing Consensus continues in its present form (a far from certain conclusion[414]), and to the extent maximizing productive and allocative efficiency is antitrust's goal, then China can claim the advantage. The authoritarian government can claim that the rule of law, democracy, and individual freedoms are unnecessary to secure this economic goal. Indeed antitrust is one of several industrial policies to promote efficiency.

The Democracy Consensus, however, can reply that antitrust's primary aim is not simply to lower price, but to prevent the formation of powerful

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[412] Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 467 (1992).

[413] Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 129 S. Ct. 1109, 1121 (2009) (quoting Town of Concord, Mass. v. Boston Edison Co., 915 F.2d 17, 22 (1st Cir. 1990)).

[414] Yang Yao, *The End of the Beijing Consensus*, FOREIGN AFFAIRS, Feb. 2, 2010, *available at* http://www.foreignaffairs.com/articles/65947/the-end-of-the-beijing-consensus.

firms and state-controlled enterprises that threaten a dynamic economy and democracy. The "competitive system," wrote Hayek, "is the only system designed to minimize by decentralization the power exercised by man over man."[415] The Democracy Consensus, consistent with this broader concept of competition, can emphasize the importance of economic, personal, and political freedoms for their own sake, as well as their promoting dynamic efficiencies and well-being. Antitrust's salience accordingly increases.

CONCLUSION

Other than for idealists, competition policy in any democracy with reasonable pluralism cannot be reduced to a single, well-defined goal. Any antitrust policy, which seeks to promote well-being, must balance multiple political, social, moral, and economic objectives.

The quest in the United States for a single economic goal was a failure. No consensus was ever reached on a specific well-defined goal. The quest did not significantly improve antitrust analysis or align it closer to rule-of-law principles. Antitrust's current objectives of promoting consumer welfare and efficiency are poorly defined. Its prevailing rule-of-reason legal standard fares poorly under rule-of-law principles. The quest distanced antitrust from important policy issues (such as systemic risk) and rendered antitrust less relevant.

Consequently now is the time to reconsider antitrust's political, social, and moral concerns. In reconsidering the goals of competition as a means to secure political, economic, and individual freedoms, antitrust can be more responsive to the citizens' concerns about promoting well-being. With a blended goal approach incorporated in better legal standards, antitrust, in the next policy cycle, will be harder to marginalize.

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[415] HAYEK, *supra* note 50, at 166.