Breaking Out of Consumer Welfare Jail: Addressing the Supreme Court's Failure to Protect the Competitive Process

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ABSTRACT

It is time to free antitrust law from the yoke of Robert Bork's consumer welfare terminology. Bork's vision has gained ascendency over the past 40 plus years and, subject to variations, is now widely regarded as the core antitrust paradigm. In a companion article, I examined why a consumer welfare standard cannot sustain this role. I made the case for a symmetric welfare standard anchored to the traditional view that the Sherman Act protects the competitive process. In this article, I expand this analysis. A consumer-labelled paradigm invites a static analysis—one focused on competitive effects at only one end of the distribution chain. In fact, competition is a dynamic and interactive process in which players at all levels of the chain add value and affect each other's choices. All participants in the distribution chain are disciplined by competition – and all should be protected from power-based abuse of competition. I provide extended analysis of why non-price and non-efficiency preferences of buyers and sellers are a critical part of the competitive process and cannot be comfortably accommodated by consumer welfare standards. I offer examples of preferences, not just of consumers but of all participants in the distribution of goods and services, that are at the heart of the competitive process. I then examine Supreme Court decisions. More than a few recent cases demonstrate a fixation with consumer welfare standards and fail to protect competition. Righting the antitrust ship will require embracing a tradition-based, symmetric welfare standard that equally protects all players in the competitive system.

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I. **Introduction**

For over 40 years, antitrust doctrine has been commandeered by Robert Bork's consumer welfare approach.[1] Both at home and abroad, the Bork language and doctrine have strongly influenced court decisions, agency policy, and academic scholarship. Even scholars who strongly disagree with Bork have allowed Bork's consumer focus to frame the issues. It is time to break out of consumer welfare jail.

At a time when Bork's approach continues to be lauded, there are increasing signs that the consumer welfare paradigm, at least as Bork envisioned it, is unworkable. Within a thirty-day period, the head of the Justice Department's Antitrust Division celebrated Bork's influence over the past four decades[2] and offered a definition of consumer welfare in a broad fashion incompatible with Bork's narrow focus on efficiency and output.[3]

To restore antitrust order, no revolution is required. Antitrust can return to its venerable paradigm: protecting the competitive process.[4] That paradigm honors all participants in the process, including consumers, laborers, farmers, service providers, retailers, and middlemen of all sorts. A focus on the competitive process will always provide special protection for consumers and other small players in the system. By recognizing abusive conduct at any point in our distribution system, antitrust can best honor Adam Smith's vision of an aggregate allocation

[1] Bork's thinking evolved in writings over a period of years but was comprehensively set forth in his seminal book ROBERT H. BORK, THE ANTITRUST PARADOX (1978).
[2] Makan Delrahim, Assistant Att'y Gen., Antitrust Div. of the U.S. Dept. of Justice, Remarks at the The Federalist Society Conference Celebrating the 40th Anniversary of The Honorable Robert Bork's The Antitrust Paradox, Antitrust 40 Years After the Paradox: No Longer "A Policy at War with Itself" (June 22, 2018).
[3] Makan Delrahim, Assistant Att'y Gen., Antitrust Div. of the U.S. Dept. of Justice, Remarks at the Jevons Colloquium in Rome, All Roads Lead to Rome: Enforcing the Consumer Welfare Standard in Digital Media Markets, 13-16 (May 22, 2018) [hereinafter "Delrahim Speech"].).
[4] Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713, 726-743 (2014) (reviewing cases in which the Court has viewed antitrust as a protector of competition or the competitive process). *See generally*, Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253 (2013); Eleanor Fox, *The Efficiency Paradox* 77 (NYU Ctr. for L., Econ. & Org., Working Paper No. 09-26), http://ssrn.com/abstract=1431558.

of goods and services that society most prefers.[5] Competition both disciplines and protects all players in a market system.

In a companion article, I have explained why consumer welfare standards, in all of their variations, are unsustainable.[6] In this article, I summarize the case against consumer welfare standards and provide an extended analysis of competition as a dynamic process involving all players in the distribution chain. I examine nonprice preferences that control buying and selling decisions. A consumer welfare standard focused on price, output, or even wealth transfer, cannot comfortably accommodate these preferences. I explore examples of nonprice preferences that dictate outcomes of the competitive process. I then examine recent Supreme Court cases in which undue focus on consumer effects sidetracked the analysis and allowed misguided results harmful to the competitive process. My conclusion is that antitrust should embrace a tradition-based symmetric welfare standard anchored to protection of the competitive process. In the absence of corrective legislation, strong leadership from the federal antitrust agencies is necessary to restore this focus.

II. **A Summary: The Case Against Consumer Welfare Standards**

The term "consumer welfare" means different things to different people. To begin with, it is unclear what the term "consumer" means.[7] Are all buyers considered consumers, or should the term cover only the end user? A person buying yarn from a retail shop may knit sweaters, some for personal use, some for gifts, and some to sell to outsiders. Businesses, both small and large, buy goods and services for use or consumption by employees (food, clerical or cleaning

[5] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, 594-95 (1937).
[6] Warren Grimes, *Adam Smith, the Competitive Process, and the Flawed Consumer Welfare Standard*, 69(1) GRUR INTERNATIONAL 3 (2020).
[7] Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMP. L. & ECON. 133, 163 (2010) ("the identity of the parties as 'consumers' is arbitrary and subject to social traditions and marketing strategies.").

supplies, furniture, automotive products) in the same way those goods or services would be used or consumed outside the work environment. In some cases, businesses effectively act as buying agents for their employees (health insurance is an example). School systems buy food to provide free or subsidized meals for their students. Municipalities, both large and small, purchase for end use the products needed to build and maintain infrastructure, including paving materials, streetlights, traffic lights, and signs. A small restaurant owner may purchase food supplies in the same supermarket that a family frequents. Which of these buyers should be considered consumers? In the context of monopsonistic abuse, should the small supplier be considered a consumer?[8]

If vulnerable suppliers are protected under a consumer welfare standard, then the standard is deceptively named. Should it be called a *consumer and vulnerable supplier welfare standard*? Defining which players constitute vulnerable suppliers, just as defining who is a consumer, is problematic. Laborers or workers employed by business firms presumably fall in this category. So too would farmers, ranchers, and fishermen. The list is, however, likely to be far longer. Service providers such as plumbers or gardeners, or professional service providers such as doctors or lawyers, would, at least under some circumstances, be considered vulnerable suppliers. So too would visual artists, musicians, athletes, and craftsmen. What about a microbrewer who struggles to find distribution in a U.S. market that is dominated by two very large firms? A microbrewer, under varying circumstances, may be considered both a consumer in purchasing needed supplies and a vulnerable supplier in marketing its finished product.

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[8] John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 FORDHAM L. REV. 2425, 2429 (2013) (demonstrating that, in the case of buyer power abuses, the welfare that matters is the welfare of suppliers); Orbach, *supra* note 7, at 163 ("in monopsonistic markets, most would identify the sellers as consumers."). If the terms "consumer" and "supplier" are broadly defined, the result may be a welfare standard that approaches the competitive performance paradigm, but one that is still focused on narrow measures of the benefits of competition such as output or wealth transfer.

In barter transactions, each side may be viewed as both a buyer and a seller. Barter transactions are no longer the norm, but still exist (for example in small town or rural settings). Even some large firm transactions involve barter. A large firm that produces paint may sell its product to a large automobile producer while agreeing to purchase various vehicles in return, with or without the transfer of currency. A large supermarket chain may purchase inventory from a branded food producer and make partial payment in the form of prominent shelf display. The difficulty in defining "consumer" is compounded because firms that sell will transfer significant portions of their sales revenues as compensation to management and employees, who are themselves consumers. The end consumer is seldom more than one or two steps removed from direct participation in any transaction.[9]

Adding the term "welfare" further obfuscates. Does "consumer welfare" address only deadweight loss (the decline in output of a product) or does it also include the wealth transfer loss (additional amounts paid by purchasers who continue to buy at a supracompetitive price)?

Former Assistant Attorney General Delrahim used a still broader definition of "consumer welfare" to capture interests in consumer choice, quality, and innovation.[10] This broad definition is a far cry from the narrow standard Bork envisioned. The Delrahim definition, by directly addressing other benefits of competition, moves antitrust closer to the traditional goal of protecting the competitive process, but does not directly address buyer power abuse. It also perpetuates problems with any standard that appears to weigh harm to the consumer, often

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[9] Roger G. Noll, "*Buyer Power" and Economic Policy*, 72 ANTITRUST L. J. 589, 594 (2005) (making the related and extended point that sellers in a monopsonized market "also are consumers in other markets, and their lost income translates into lower demand and lower net welfare in other markets").

[10] Delrahim Speech, *supra* note 3, at 13-16. In Delrahim's words, the Supreme Court and other courts have noted that "innovation, consumer choice, and product quality constitute competitive effects that merit consideration in an antitrust analysis. Because these factors can be difficult to quantify, they often play a subsidiary role to price and output measures." Although allocating innovation, consumer choice and product quality to a lesser role, Delrahim made no effort to explain how one could honor those values when they conflict with price and output considerations.

measured by price or output measures, above the broader interests in protecting the competitive process.

There is no consensus among theorists as to which consumer welfare standard should apply, or indeed, whether a consumer welfare standard is pivotal in applying the antitrust laws.[11] The Bork thesis that the Sherman Act protects against deadweight loss (but not wealth transfer loss) has lost ground[12] but remains a sort of lowest common denominator for antitrust analysis – a claimant who can demonstrate that a restraint reduces output will promote this fact. Baker, Elhauge, Lande, Kirkwood, Noll and Salop, among others, advocate a consumer welfare standard that captures wealth transfer loss.[13] Many of these scholars also agree that the antitrust laws protect other values of competition, including consumer choice, quality, and innovation.[14]

A century of case law establishes that buyer power abuses are violations of the Sherman Act.[15] A consumer centric standard, however, creates confusion and doubt about how antitrust

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[11] Werden, *supra* note 4.

[12] In the years after Bork's book was published, Baxter and Rule, for example, argued that wealth transfer loss should not concern antitrust. *See. e.g*., William Baxter, *Separation of Powers, Prosecutorial Discretion, and the 'Common Law' Nature of Antitrust Law*, 60 TEX. L. REV. 661, 693-94 (1982); Charles Rule, *Merger Enforcement Policy: Protecting the Consumer*, 56 ANTITRUST L.J. 739, 740 (1989); *but see* A. Douglas Melamed, *Antitrust Law and Its Critics*, 83 ANTITRUST L.J. 269, 286 (2020) (suggesting "Antitrust law should retain its singular focus on economic welfare.")

[13] Jonathan B. Baker, *Competition Policy as a Political Bargain*, 73 ANTITRUST L.J. 483, 515 (2006) (criticizing Bork's total surplus view and supporting the consumer surplus interpretation); *see also* Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Analysis*, 78 ANTITRUST L.J. 471, 473 (2012); Joseph P. Brodley, *The Economic Goals of Antitrust, Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1022-23 (1987) (arguing for the consumer surplus standard); Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 436 (2009) (accepting the consumer surplus standard and arguing that the Supreme Court has applied this standard); John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 213 (2008) (arguing that the literal meaning of "consumer" would require recognizing consumer surplus as the welfare standard); Steven C. Salop, *What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336 (2010); Herbert J. Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 118 (2018) (noting the consumer surplus standard has the advantage of being more administrable).

[14] *See, e.g.*, Brodley, *supra* note 13 (recognizing technological progress and other goals of antitrust); Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503 (2001). Kirkwood & Lande, *supra* note 13, at 192 (recognizing consumer choice as a goal of antitrust).

[15] *See e.g.*, United States v. Griffith, 334 U.S. 100 (1948) (defendant theater chain used monopsony power over distributors to suppress competition with rival theaters); Mandeville Island Farms, Inc. v. Am.Crystal Sugar Co., 334

norms should apply to buyer power abuses. Some buyer power abuses may not be passed on to consumers in the form of lower output or higher prices and, in some circumstances, might even result in lower consumer prices. How should anticompetitive injury to a small seller be weighed against possible lower prices for a consumer? Such questions are more easily addressed if the focus is on a substantial distortion of the competitive process, not on price and output that affects consumers.

The inadequacies of a consumer welfare definition, whether welfare is linked to output or wealth transfer, are stark when one considers more service-oriented markets. These failings are evident, for example, in labor markets, markets for the sale of professional or trade services, or markets for products with a strong service component.[16] In each of these markets, the preferences of market participants are not adequately measured by concepts of price, output, or wealth transfer effects.

In applying the Sherman Act, choice is a critical metric not only for consumers,[17] but also for those who sell, whether they be farmers, fishermen, specialist service providers, or workers in the labor market.[18] Indeed, the choice of how one makes a living reaches deeply into an individual's and society's collective level of satisfaction. Seen in a strict Borkian paradigm, one could argue that every individual, after measuring their capabilities, takes a look at supply and

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U.S. 219 (1948) (buying cartel that sought to suppress the price paid for sugar beets); Standard Oil Co. v. United States, 221 U.S. 1 (1911) (Standard Oil used monopsony power over railroads to dictate the terms on which railroads dealt with oil company rivals); Swift & Co v. United States, 196 U.S. 375 (1905) (buying cartel by meat processors).

[16] Real estate markets are another example of the limitations of price and output focus. The choice of where an individual chooses to live will be limited by price, but by many other non-monetary factors such as the convenience of the location, the character of the neighborhood, the adequacy of schools and services in the community, and the layout and design of the housing unit itself. Some, but not all, of these factors may be reflected in the price. For example, two substantially different designs of an apartment may be attractive to different types of buyers but still be priced equally. Unless one were to consider each housing unit as a separate market, a price and output focus does not fully account for consumer housing preferences.

[17] Lande, *supra* note 14, at 504–05; Kirkwood & Lande, *supra* note 13, at 192.

[18] *See generally* Warren Grimes, *Entrepreneurial Choice: Restoring a Relevant Antitrust Policy*, 68 CASE W. RSRV. L. REV. 61 (2017).

demand factors for each alternative profession, choosing the one that would pay the highest return.[19] That vision does not adequately describe human behavior.

Consider a talented young athlete who aspires to be a professional player. As a young teenager, the athlete might face a choice whether to pursue basketball or tennis as a preferred sport. The decision of a 12-year-old will likely be consequential. Those who devote themselves to tennis for the next six years will likely find it difficult, when they are 18, to switch to another sport and still enjoy maximum professional opportunities. Will this 12-year old make decisions as a rational economic actor, weighing the likelihood of high compensation a decade later? Even if this young person wishes to base a decision on likely future compensation, will there be sufficient information to guide the decision? Indeed, can the teenager be confident that their future athletic development will enable a professional career? In most cases, love of the sport, a non-price factor, is likely the best indicator of the young athlete's choice.

The competition policy implications of choice do not diminish after a young person makes a career decision. Assume that a student decides to pursue a career in medicine. Upon graduating from medical school and completing any required internships, will that young physician have a choice whether to pursue medicine in a sole or small practice as opposed to an HMO or large hospital practice? Competition policy, or the lack thereof, will very much play a role in preserving that medical graduate's choices. Mergers to oligopoly of hospitals, health insurance firms, pharmacies, and drug manufacturers can make it difficult to pursue a small practice option.[20]

[19] *See e.g.* Noll, *supra* note 9, at 694. Roger Noll presumes that in sports, "each player has a reservation wage that must be paid to induce participation, which usually is the player's earnings in another profession." For many journeymen athletes in non-high paying sports (a minor league baseball player might be an example), the reservation wage may be less than what the athlete would earn in another profession. The player chooses to persevere because of love of the sport, the momentum generated by many years of training in a particular sport, and the hope, rational or not, that, by persisting, the player will achieve greater success with a commensurate financial reward.

[20] Grimes, *supra* note 18, at 80-85.

An individual laborer or seller of specialized services will typically place great importance on career or work choices, much greater weight than a consumer would place in choosing which television to buy or which restaurant to visit. Therein lies another problem with a consumer welfare standard that tends to weigh consumer impact above any injury to entrepreneurial choice. The value of protecting consumer choice reaches broadly but probably to relatively shallow depths. A person's choice of profession, or of how to practice that profession, can weigh deeply for that person. In cases in which buyer power might lead to reduced consumer prices, how is that benefit to be weighed against the loss of entrepreneurial choice? No court can objectively weigh values so disparate in nature and intensity.

When competition decides what choices are available to consumers as well as entrepreneurs, service providers, actors, athletes, and laborers, no government agency or court is asked to choose between these values. An antitrust policy linked to competitive process assigns these decisions, in the first instance, to the marketplace.[21] All market participants should have the choices that the market offers, unencumbered by abuses of power-wielding players.

III. A Symmetric Welfare Standard Anchored to the Competitive Process

A. The Competitive Process versus Consumer Welfare Standards

Werden makes the case that protecting the competitive process has long been, and remains, the goal of the competition laws. Writing in 2014, Werden concluded that no welfare standard was required and none had been adopted by the Supreme Court.[22] Although the Court

[21] F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 18-19 (3d ed. 1990). Under perfect competition, the "resource allocation and income distribution problem is solved through the almost mechanical interaction of supply and demand forces on the market." The authors continued: "[I]ndividuals 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."

[22] See Werden, *supra* note 4, at 714-18. Implicit in Werden's position is that protection of the competitive process is not a welfare standard. By protecting societal preferences, competition does serve the welfare of that society.

has not squarely addressed the standard issue, it has used consumer welfare terminology.[23] Language in some more recent decisions demonstrates the problems with a consumer focused paradigm, leading to false negatives that fail to protect the competitive process.[24] For reasons addressed above, a focus on consumer welfare leads to confusion about the dynamic and multilevel nature of competition and understates the broader goals of protecting competition. A standard anchored to protection of the competitive process has a venerable history in the United States and Europe.[25] In their 1965 book, Kaysen and Turner wrote that "protection of competitive processes by limiting market power" was "the most desirable and flexible guide for antitrust policy."[26] The competitive process standard continues to enjoy substantial support.[27]

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[23] Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting Bork, the Court declared that "Congress designed the Sherman Act as a 'consumer welfare prescription.'")

[24] See the discussion of Supreme Court cases *infra* part VI.

[25] Grimes, *supra* note 6, at 5 (noting transatlantic tradition underlying competitive processes).

[26] CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 44-45 (1965) (postulating that there are four general goals for antitrust policy but selecting the protection of competitive processes as the most desirable goal and further explaining that protecting the competitive processes could best be achieved through restraints on market power except when such restraints were "incompatible with efficiency and progressiveness.").

[27] *See* Werden, *supra* note 4, at 756-59. (although not regarding it as a welfare standard, Werden strongly supported the view that antitrust is intended to protect the competitive process); *see also* Fox, *supra* note 4, at 77; Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1167 (1981); Barak Orbach, *The Consumer Welfare Controversy*, ANTITRUST CHRONICLE 23, 29 (2019); LAWRENCE A. SULLIVAN, WARREN S. GRIMES & CHRISTOPHER L. SAGERS, THE LAW OF ANTITRUST, AN INTEGRATED HANDBOOK, 10-11 (3d ed. 2016) (antitrust's "overriding goal is to maintain the market mechanism" and a properly implemented antitrust policy "would prevent economic oppression by maintaining competition."). Others supporting a symmetric antitrust standard include: Suresh Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 600-01 (2018) (advocating a symmetric approach but also suggesting that a divestiture remedy may be necessary to address massive employers with monopsony power in labor markets); Clayton J. Masterman, *The Customer Is Not Always Right: Balancing Worker and Customer Welfare in Antitrust Law*, 69 VAND. L. REV. 1387, 1413-20 (2016); Noll, *supra* note 9, at 623 (while tracing the economic injury from monopsony abuse to consumers, Noll advocates for a symmetric standard because the effects of monopoly and monopsony power "are basically the same, policy should be symmetrical."); Kirkwood, *supra* note 8, at 2429 (without expressly addressing a symmetric standard, Kirkwood emphasized the importance of protecting seller interests against buyer power abuses as the consumer welfare standard applies to suppliers when dealing with buyer power restraints); Philip Areeda, *The Rule of Reason—A Catechism on Competition*, 53 ANTITRUST L. J. 571, 572 (1986) (the consumer welfare standard should protect "the availability of free choices in the marketplace for consumers and producers alike."); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 84 HASTINGS L.J. 67, __ (1982) ("all purchasers, whether consumers or businesses, were given the right to purchase competitively priced goods. All sellers were given the right to face rivals buying at competitive prices."); Kirkwood & Lande, *supra* note 13, at 234-35 ("just as Congress wanted to prevent sellers from using unfair means to acquire monopoly power . . . Congress wanted to prevent buyers from using unfair means to acquire monopsony power.").

A standard linked to protecting the competitive process honors the preferences of all market participants. This focuses the antitrust inquiry on whether power based restraints are interfering with preferred choices at any level of the supply chain. Without favoring consumers, middlemen, producers, small suppliers, or laborers, the goal is to let competition determine all aspects of market performance, including consumer prices, allocation, and business success.

A consumer welfare standard suggests that analysis should focus on competitive effects at one end of the distribution chain. This might make sense if competition were a static process. It is not. Competition is fluid, interactive, and dynamic. As Professor Fox has put it: "The words "consumer welfare" are static, passive and reductive, and they represent only one side of the market . . . . . The word 'consumer' needs a lot of stretching to connote the dynamic process of competition . . . . ."[28] A competitive process standard more comfortably captures all the goals of competition, including protecting choice, quality, and innovation.

Although not expressly embracing a competitive process standard, a large block of theorists acknowledge that the Sherman Act protects against not only wealth transfer loss, but also against other competition goals, including protecting choice, quality, and preserving opportunities for innovation.[29] Clarity is lost when AAG Delrahim employed a sweeping definition of consumer welfare that includes these benefits of the competitive process.[30]

Confusion is further compounded when one adds vulnerable suppliers to the list of players protected by antitrust. While scholars agree that buyer power abuses are and should be captured by a welfare standard, at this point the analysis becomes more fractured. If the focus

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[28] Interview with Eleanor Fox, Professor, N.Y.U. Sch. of Law (Nov. 7, 2019) https://www.competitionpolicyinternational.com/cpi-talks-eleanor-fox/.
[29] See sources cited in note 14, *supra.*
[30] Delrahim Speech, *supra* note 3.

remains on harm to consumers, some scholars would allow buyer side antitrust enforcement only if consumers are harmed. Noll has argued that monopsony abuses harm consumers in almost all cases.[31] This would occur, for example, if a monopsonist suppressed purchases of input products in order to obtain a lower price for the inputs, with downstream ripple effects that could ultimately reduce the availability and raise the price of end consumer products. Hovenkamp and Marinescu have similarly argued that a consumer welfare standard focused on preventing monopolistic reductions in output is well suited to protect against abuses on the buyer side.[32]

Consumer welfare standards do not easily capture non-economic seller preferences that could undermine this reasoning. For example, for more than a generation, powerful chicken processors have been able to sustain a business model that suppresses the prices paid to chicken farmers contractually subservient to the processor. There is no evidence that powerful processors were forced to limit their output of processed chickens because of this exploitation. Instead, the processors have created a series of contractual incentives that push the individual farmer to increase output of chickens. The oligopolistic processors can attract new farmers through promotions appealing to non-price preferences to own and operate one's own business.[33]

There is a long list of service providers, or providers of service intensive products, who prefer working with a degree of entrepreneurial independence and will sacrifice income to follow that preferred path. The list includes athletes, entertainers, artists, artisans, tradesmen, retailers, restauranteurs, farmers, ranchers, fishermen, and professional service providers such as doctors, lawyers, and accountants. Non-price or non-revenue preferences can and often do open the door

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[31] Noll, *supra* note 9, at 623.
[32] Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 INDIANA L.J. 1031, 1063 (2019).
[33] *See infra* notes 50-56 and accompanying text.

to exploitation. Relying on these preferences, powerful buyers can exercise monopsony power without notably limiting the output or prices that end consumers pay.[34]

One of the problems with all consumer welfare standards is reconciling the welfare of consumers with the welfare of vulnerable suppliers. If buyer power abuses result in underpayment of vulnerable suppliers, this may or may not result in lower output for the end consumer. In some cases, for example, the vulnerable suppliers may continue to perform because of non-price lifestyle preferences or because they are able to rely on externalities to survive. Losses of vulnerable suppliers could be absorbed by them or by taxpayers who pay for social welfare programs. The monopsonistic abuse might provide consumers with the same output, or even greater output, at a cost below what competitive conditions would dictate.

Would the monopsonistic abuse that suppressed prices to vulnerable suppliers be justified by the lower costs for consumers? Enforcers or courts could be confronted with a difficult weighing process with no objective measures to resolve. Any such weighing process is avoided by adhering to the competitive process approach. Once the abusive monopsonistic conduct is established, the conduct would be condemned. This result should be the norm even if it ended up creating higher consumer prices that transferred wealth away from consumers. Unimpeded competition generally favors efficiency and low prices but would not do so uniformly.

Even if a sophisticated economic analysis could demonstrate that most monopsony abuses ultimately result in harm to consumers, in the face of a clear anticompetitive abuse that harms an upstream player, it is bad antitrust policy to require such a showing. It is inconsistent with traditional antitrust jurisprudence addressing buyer power.[35] Antitrust does not ask whether

[34] *See e.g.*, FTC v. Super. Ct. Trial Law. Ass'n, 493 U.S. 411 (1990) (attorneys in the District of Columbia represented indigent criminal defendants for extremely low hourly pay).
[35] Grimes, *supra* note 6, at 5 (citing cases in which courts applying the Sherman Act to buyer power abuses and noting similar approach under European competition law).

a seller cartel that harms consumers might benefit upstream vulnerable suppliers. Nor should antitrust ask about possible consumer benefits in the face of a clear monopsonistic abuse. Such a requirement complicates antitrust cases, often resulting in anticompetitive exploitation of upstream buyers. In part V, I address Supreme Court decisions that illustrate this concern.

Bork's consumer welfare approach has shaped the scholarship of even those highly critical of his thesis. For example, my own writings over the past three decades have acknowledged the existence of a consumer welfare standard and often attempted to explain how anticompetitive conduct upstream from the consumer will ultimately harm consumer welfare, in one form or the other.[36] Robert Lande's seminal article on wealth transfer injury was framed by Bork's thesis that harm to the consumer is a prerequisite to establishing an antitrust violation.[37] Another example, cited here, is Roger Noll's influential article on buying power, explaining why in all or almost all instances, abusive buying power will be harmful to consumers.[38] All of this scholarship will remain relevant to an overall economic assessment of anticompetitive conduct if we return to a competitive performance paradigm. The fact remains, however, that a great deal of scholarship of the past four decades has been defensive, playing off Bork's consumer welfare approach. Instead of focusing on whether conduct was harmful to the competitive process, many commentators have engaged in elaborate analyses to demonstrate that upstream power abuses are harmful to consumers.

For litigants, the consequences of the obsession with consumer price and output have been severe. Upstream conduct that had long been held to be harmful to the competitive process

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[36] SULLIVAN, GRIMES & SAGERS, *supra* note 27, at 12-16 (accepting consumer welfare goals as part of the antitrust paradigm); Id. at 408-09 (explaining how upstream full line forcing ties that video content providers impose on cable providers indirectly harm consumers by limiting choice and forcing wealth transfer loss).
[37] Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust*, *supra* note 27.
[38] Noll, *supra* note 9.

can now be shielded from liability unless the plaintiff can link that conduct to consumer harm. These problems are evident in the review of Supreme Court decisions in Part V.

B. What is the Competitive Process?

It is difficult to improve on Adam Smith's description of the competitive process.[39] Aggregate welfare can be maximized, Smith wrote, by allowing individual preferences of all participants in the distribution chain. It follows that substantial distortions in the process will result in a less desirable allocation of goods and services.

Tracing modern welfare standards to Smith has been called an "historical travesty" because these standards vary from what Smith envisioned.[40] What a theoretical economist may find useful in devising economic models does not bind antitrust. As Paul Samuelson remarked, "economists should be on tap, not on top."[41] When it comes to the Sherman Act, both legal commentators and economists are on the sidelines of a law-making process that directly involves the Congress and the courts that interpret and enforce the statutory scheme. Also, in the front line, although perhaps insufficiently valued, are the federal and state agencies that shape the law through guidelines, speeches, and their choice of enforcement actions.

Economists do not determine antitrust policy but can and do play a key role in determining how it is applied. A valuable contribution of Chicago theorists was to champion economic analysis. The consumer welfare standard, however, was not primarily the work of an economist, nor was it compelled by economic theory. It was instead the product of legal

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[39] Smith, *supra* note 5, at 594-95 ("without any intervention of law, . . . the private interests and passions of men naturally lead them to divide and distribute the stock of every society among all the different employments carried on in it, as nearly as possible to the proportion which is most agreeable to the interest of the whole society.").
[40] MARK BLAUG, ECONOMIC THEORY IN RETROSPECT 60 (Cambridge Univ. Press ed., 5th ed. 1997).
[41] Quoted in F.M. Scherer, *Conservative Economics and Antitrust: A Variety of Influences*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK 30 (Robert Pitofsky ed., 2006).

theorists such as Bork, who later claimed that his consumer welfare paradigm was "merely law, not a farrago of amorphous and leftist political and sociological propositions."[42] In fact, Bork had his own ideological premises. Among these premises were that competition was being restrained by false positives and that freedom of action of monopolists and power players was unduly constrained.[43] Any contention that a consumer welfare standard is somehow compelled by consensus economic learning is false. In the words of one critic, Bork's consumer welfare standard is an example of "marketing political agenda through quasi-scientific narrative."[44]

Any antitrust paradigm has an ideological component. Ideological visions of how to organize and discipline an economy are not readily suited to empirical proof. Bork sought to simplify and delimit antitrust in a manner that accorded large firms maximum freedom of action; Smith sought to describe how competition could achieve maximum aggregate welfare. Society is best served by a standard that has explanatory power and maximizes political support for the antitrust idea. Adam Smith's invisible hand quote has that explanatory power and appeals to values such as decentralized power, equal opportunity and fairness, and respect for choices and preferences of all players in the system. It explains economic behavior more comprehensively and more accurately than a standard with a laser like focus on output or wealth transfer.

C. The Role of Non-Price Preferences in the Competitive Process

Smith's view that competition will lead to a preferred aggregate outcome still honors efficiency and output goals. Prices, costs, and efficiency are key elements in influencing preferences, but they often do not determine what we do and what we buy or sell. Here are a few examples of marketplace decisions strongly influenced by non-price or non-efficiency values.

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[42] Bork made this claim in 1993 in a foreword to the revised edition of his book—ROBERT H. BORK, THE ANTITRUST PARADOX, A POLICY AT WAR WITH ITSELF x (rev. ed. 1993).
[43] *See, e.g.*, Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407-08, 414 (2004).
[44] Orbach, *supra* note 27, at 28.

Branded Goods – Consumers often do not choose the lowest priced brand. The more expensive brand that some choose may or may not be of higher quality. Some of these choices may be viewed as market failures or a result of inadequate or misleading information. Still, there are examples of consumer behavior that value prestige or status, where the buyer would choose the prestige brand even when in possession of information that a less costly brand is of equivalent or better quality.[45] Some buyers also prefer products for novelty, even if they are functionally identical,[46] a practice that sports equipment manufacturers can exploit by periodically bringing out new models of skis, tennis rackets or golf clubs.

Service-Related Purchases – A whole range of service-related professions work with human trust and familiarity influencing consumer choice. Trust in a doctor, trust in an auto mechanic, trust in a plumber is pivotal to these consumer purchase decisions. When hiring a personal assistant or secretary, the hiring person is concerned with compatibility, reliability, and trust, factors that are not easily captured by price-output analysis. While buyer choice will still be influenced by the price of the service, demand likely will not correlate smoothly with the price of the service. Even when buying a product, if service adjustments are likely to be needed, the buyer will look well beyond price to factors of trust and reliability. A firm buying a new machine that will have to be customized to the firm's business will look to the competence and reliability of the seller in providing post sale service.

Labor Markets –Whether a factory worker, clerical worker, actor, professional athlete, or doctor, the worker wants to work in a pleasant environment and for people who value worker services in ways other than simply with monetary compensation. Many choose an occupation because of factors of entrepreneurial independence, location, working conditions, or satisfaction

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[45] Orbach, *supra* note 7, at 153-56 (describing buyers who pay more for status brands).
[46] *Id.* at 156-58 (addressing buyer preferences for novelty).

with the work, not because it is paid better than another choice. The depth of concern with these non-monetary factors is probably far greater in the typical labor market when compared to most consumer transactions. A consumer deciding which television set to buy will be concerned with the quality of the product but probably less concerned with factors of trust and reliability of the salesman. For labor markets, the concern with trust is likely to be far greater and more enduring, lasting for the life of the employment relationship.

Human Preferences and Proclivities – Behavioral economists have observed that consumers and other market players do not neatly fit the paradigm of the rational economic actor.[47] The Bork analysis generally assumes otherwise: that market players are rational actors with reasonable information. Market imperfections, under this approach, are assumed to be relatively short-term perturbations. Information vacuums are assumed to be corrected over time. There are many examples that suggest otherwise. For example, many consumers assume that a higher priced product is better quality, or at least equally as good and more status building for the purchaser. As consumer testing reveals, higher priced products may be no better and more than occasionally inferior to products sold for less.[48] Despite efforts to educate consumers, this human proclivity to favor higher priced products will endure.

On the seller side, many have a lifestyle preference for entrepreneurial independence. Given a choice, many would prefer to own and control their own business, set their own hours, and not be directly answerable to bureaucratic controls.[49]

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[47] *See* Max Huffman, *Marrying Neo-Chicago With Behavioral Antitrust*, 78 ANTITRUST LJ. 105 (2012) (anticipating the impact of behavioral economics on antitrust policy).
[48] Warren S. Grimes, *Spiff, Polish and Consumer Demand Quality: Vertical Price Restraints Revisited*, 80 CALIF. L. REV. 817, 832-836 (1992) (documenting the lack of close correlation between price and quality based on tests run by Consumer Reports magazine).
[49] Grimes, *supra* note 18, at 72 (describing the lifestyle preference for entrepreneurial independence).

Externalities –Market players are adept at production and marketing strategies that pass the costs of doing business to society at large. These externalities are often hidden to buyers of the products and services that are sold. If there were more transparency, some buyers might decline to buy products that are "efficiently" offered at low prices with the help of externalities. Most poultry products in the United States come from crowded facilities that are now the norm among the large oligopolistic chicken processors. Among the external costs of these offerings are thin shelled eggs that are less nutritious because chickens are denied their natural diet of bugs, grubs, and worms; traces of antibiotics in the chickens and eggs that may degrade the effectiveness of these drugs when trace amounts are ingested by humans; higher rates of respiratory ailments among workers that must breath the unhealthy air of crowded chicken coups; and welfare costs to society incurred when underpaid workers operating the chicken coups are forced to rely on the welfare system for themselves or family members.[50] Some informed buyers, even if unconcerned with the compromised nature of these poultry products, may alter their buying choices because of their dislike of the exploitation.

The chicken processing industry offers an example not only of externalities that might affect consumer buying preferences but also of non-price preferences of those who raise chickens. Chicken farmers who sign a long-term contract with a poultry producer may do so in part because of an inherent preference for living and working on land that they own and maintain. Many who sign such contracts learn that the terms are onerous and exploiting.[51] Because of large sunk costs, farmers who signed these contracts cannot lightly abandon their investments. One would expect that, over time, the word would get out and later investors would

[50] *Id.* at 75-76.
[51] U.S. DEP'T OF JUSTICE, COMPETITION AND AGRICULTURE: VOICES FROM THE WORKSHOPS ON AGRICULTURE AND ANTITRUST ENFORCEMENT IN OUR 21ST CENTURY ECONOMY AND THOUGHTS ON THE WAY FORWARD, 21 (2012), https://www.justice.gov/sites/default/files/atr/legacy/2012/ 05/16/283291.pdf [https://perma.cc/9VTQ-SBU9].

refuse to sign similar contracts, yet chicken producers seem to have no difficulty signing up new generations to do this work.

The model used by large US poultry processors has features of a franchise arrangement, albeit one that is likely to be far more exploitative than most franchising contracts. The farmer signing the contract is a supplier, agreeing to sell exclusively to the processors. The contractual arrangements are, however, even more constricting because the farmer also agrees to purchase newly hatched chickens from the processor and has no power over the price in either buying or selling transactions with the processor. The farmer's servile relationship is amplified further if the farmer borrows from the processor large sums of money needed to construct chicken coups and other facilities. The farmer's status has been described as "economic serfdom,"[52] yet the large chicken processors have sustained this business model over generations.[53]

The chicken farmer's plight also illustrates the limitations of traditional economic theory of monopsony. That theory is based on a monopsonist's ability to suppress input in order to be able to buy at a lower price (the converse of a monopolist's ability to sell at a higher price by suppressing output).[54] Applying this theory, one would predict that the chicken processor's leverage over farmers would allow them to suppress the price paid for slaughter ready birds, but result in reduced output by farmers. Conventional economic theory holds that these arrangements, allowing a powerful buyer to capture quasi rents (rents based on sunk investments

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[52] C. Robert Taylor, ALFA Eminent Scholar Agric. & Pub. Pol'y, Auburn., Comment to Dep't. of Justice & Fe. Trade Commission Joint Workshop on Merger Enforcement 248–49 (Feb. 17, 2004) (transcript available at https://www.ftc.gov/sites/default/files/documents/public_events/ftc/doj-joint-workshop-merger-enforcement/040217ftctrans.pdf).

[53] *Prospective Farmers*, TYSON FOODS, https://www.tysonfoods.com/who-we-are/our-partners/farmers (last visited 12/18/2020) (noting that Tyson began dealing with chicken farmers on a contract basis in the late 1940s).

[54] *See generally* ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY: ANTITRUST LAW AND ECONOMICS (Princeton Univ. Press 1993).

made by the seller) will die out after the life of the investment runs out.[55] Not so. The chicken processors' record in sustaining their business model beyond the life of a farmer's assets must be attributed to success in attracting new investors in subsequent generations. In promotional materials, the processors stress the independent lifestyle and entrepreneurial control of the chicken farmer who signs the long-term contract.[56] Many would see these promotional materials as incomplete and deceptive, but they are effective because they play on non-price preferences of future investors. Non-price factors permeate all economic transactions but seem particularly prevalent in service and labor markets.

The central point here is not that price and efficiency are irrelevant, but that non-price preferences of buyers and sellers are part of the competitive process. The preferences of many entrepreneurs to own and operate their own business can be exploited, for example, by oligopolistic firms with buyer power. During the populist era of antitrust, protecting small business was sometimes seen as a goal of antitrust. That misstates the proper goal of protecting the competitive process. Businesses of all sizes should have an opportunity to start and compete in the marketplace without exclusionary conduct practiced by power-wielding rivals or large suppliers or buyers. A proper antitrust policy is one in which entrants of any size have an opportunity to enter and compete on their own merits.

IV. **What an Austrian Ski Resort Tells Us About Efficiency and the Competitive Process**

The western most state in Austria, Vorarlberg, is rugged Alpine country adjacent to Switzerland. Until after the Second World War, Vorarlberg had beautiful mountain scenery, but

[55] Noll, *supra* note 9, at 602 (explaining that a monopsonist's extraction of quasi rents "is a transitory phenomenon," limited by the "useful life of an asset if the asset has no other comparably productive use.").
[56] John Oliver, *This Week Tonight*, YOUTUBE (May 17, 2015), https://www.youtube.com/watch?v=X9wHzt6gBgI. (showing portions of a Tyson's promotional video in which the chicken farmer is portrayed as a contented owner entrepreneur).

scant opportunity for wealth. Today, thanks to the winter sports industry, Lech, the Vorarlberg town where a famous resort is centered, has the highest per capita income of any community in Austria.[57]

A skier in Lech can embark on the longest down-hill ski circuit in the world, taking a series of lifts that allows for a 22-kilometer round trip through beautiful mountain scenery.[58] Multiple lifts enable this up and down adventure and hoist a skier a total of 5,500 meters while completing the circuit. The skier on this ambitious trek can start in Lech, have lunch in a neighboring village and return to Lech by dusk, having never taken the same lift or skied the same trail. This circuit has been available for more than 60 years.[59] It was put together thanks to the cooperation of relatively small landowners. They formed an association and agreed on terms for operation of the lifts, for grooming the slopes, for hours of operation, for issuing joint lift tickets, and for revenue and cost sharing arrangements.

The cooperative ownership of Lech contrasts with large ski resorts in the U.S., which often have a single owner. For example, Aspen Colorado features four well-known ski areas. There is no ski circuit comparable to Lech, but the resort offers a large variety of skiing options that attract visitors from all over the world. Aspen, like Lech, has attracted the wealthy and famous. There were once three separate owners of Aspen ski areas, but today the Aspen Ski Corporation owns all four areas.[60]

The contrast between the two ski resorts offers instructive perspectives on efficiency and the competitive process. To develop Lech's ski circuit over 22 kilometers, the organizers were

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[57] Warren Grimes, *A Tale of Two Ski Towns: New Perspectives on a Dominant Firm's Refusal to Deal with a Rival 2* (Southwestern Law School, Working Paper No. 1021, 2010), https://dx.doi.org/10.2139/ssrn.1656125.
[58] LECH ZUERS, <https://www.derweissering.ski/en/the-most-legendary-ski-circuit> (last visited 12/29/2020)
[59] *Id*.
[60] Grimes, *supra* note 57, at 1.

forced to deal with numerous small landowners. The land parcels, which may have been in the family for generations, were probably used for farming or grazing. Negotiating with each owner to purchase, or to obtain license to traverse, these lands would have been difficult. The organizers, however, made the cooperative arrangement work by allowing land holders to join the association while retaining ownership. The single ownership model employed in Aspen may have efficiency advantages over the Lech association, but that association, with some consolidation, continues to thrive.[61]

For a variety of reasons, the efficiency advantages may or may not lie with the single ownership model. The association of landowners in Lech can cooperate to attain many of the scale advantages of size. Scale economies may, in any event, be less prominent in a service-oriented ski resort. Profit maximization for a winter resort will, as with transportation industries, turn more on operating at full capacity and less on absolute size.[62] As the franchise literature explains,[63] an owner managed small businesses can capture incentives that are lacking in a large firm. For many workers, "the smaller the work unit, the greater the satisfaction."[64] A single ski lift owned and operated within a family unit may operate quite efficiently. Employee agents hired by a large ski resort may have less incentive to go the extra mile and may demand higher compensation for their work.

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[61] Grimes, *supra* note 57, at 11, n.27 (As of 2010, six firms owned the interlocking ski lifts in the Lech area. It is unclear whether these six firms owned all the land used for ski trails, or whether they paid individual landowners licensing fees for access to certain parcels.)

[62] *Id.* at 9-10.

[63] Paul H. Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, 21 J.L.& ECON. 223, 226-29 (1978) (describing incentives that promote franchise efficiency); Benjamin Klein & Lester F. Saft, *The Law and Economics of Franchise Tying Contracts*, 28 J.L.& ECON. 345, 350 n.20 (1985) (The incentive for workers to supply effort that is not explicitly specified and measurable by the employer . . .is harvested by franchising managements).

[64] Alonzo L. McDonald, *Of Floating Factories and Mating Dinosaurs*, 64 HARV. BUS. REV. 82, 83 (1986).

Regardless of how the efficiency advantages pan out, the organizers of the ski circuit in Lech might have failed had they sought to pursue a single ownership model. The Lech model demonstrates how market preferences at all levels of the distribution chain alter market outcomes. The ski circuit was shaped by landowners, lift operators, skiers who patronized the resort, and all sorts of workers and entrepreneurs who operate the lifts, groom the slopes, patrol the slopes, or provide restaurant or hotel services. The players interact. For example, hotel and food services, were they to be of low quality or be inordinately expensive, would reduce patronage of the ski lifts.

The participants in this venture had preferences that were not governed solely by price and efficiency considerations. The opportunity to participate in what would turn out to be a highly profitable ski circuit must have been a major incentive for the landowners, but many of these owners wanted to retain ownership of land. Seller preferences in how to do business were a reality then and remain so.

Seller preferences are likely to be culturally diverse but remain relevant to the competitive process. It is possible, for example, that if mountain terrain suitable for a ski circuit were available in the U.S., a different result would ensue. Perhaps the seller preferences of U.S. landowners would have led to a similar ski circuit under a single ownership model, or perhaps those preferences would have precluded the creation of the ski circuit altogether. The point is that those preferences are entitled to work within the competitive process, unimpeded by buyer or seller power abuses.[65]

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[65] Whether the competitive process was respected and protected in the case of Aspen ski resorts is an open question. The dominant owner of three of the four Aspen ski areas was successfully sued for exclusionary treatment in a famous U.S Supreme Court case. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985). The Aspen case, which has generated controversy, is defended in Grimes, *supra* note 57. Some years after the Supreme Court case, the Aspen Skiing Corp. was able to acquire Aspen Highlands and now is the sole owner of the four areas.

If we assume that a single ownership of a large ski resort with multiple facilities is an efficient model, how is a court to weigh that efficiency against the preferences of landowners to maintain ownership and an element of control? If the interests in efficiency and low prices always prevail over seller preference, will this ultimately result in a seller segment that underperforms because participants are prevented from doing business in preferred ways? What is it in the text of the Sherman Act, framed in the language of competition, that allows a court to weigh consumer interests above seller interests?

A welfare paradigm that undervalues seller preferences is ultimately misguided and unworkable. A competitive economy, as Adam Smith saw it, was very much about allocating resources in a manner that society preferred. Consumers, sellers, and players at all levels of the distribution chain, are part of that society and, as a part of the market mechanism, can and do exercise their preferences. While price and efficiency are major factors in many transactions, they are not controlling and may be relatively inconsequential in other instances.

The Lech/Aspen comparison also provides a powerful example of the strategic dangers of allowing one firm to obtain a dominant market, particularly in industries in which cooperation is critical. The Aspen Ski Corporation owned two areas (Aspen Mountain and Buttermilk) before opening a third much larger area (Snowmass). That left one remaining rival, Aspen Highlands, with probably 15% or less of the lift capacity in the Aspen area.[66] Exclusionary conduct by the dominant firm then became easy and highly profitable. In contrast, with six firms sharing ownership of the interlocking lifts in Lech, it is unlikely that any one firm could profitably employ exclusionary conduct.

[66] Grimes, *supra* note 57, at 4.

V. Supreme Court Precedents

In *Brown Shoe Co. v. United States*, the Supreme Court wrote that it "is competition, not competitors, which the Act protects."[67] This is one of a long line of Court decisions that affirmed the fundamental goal of the Sherman Act as protecting the competitive process.[68] The language is broad but limiting. It underpins decisions that deny antitrust protection to those excluded from markets because they could not meet the demands of the competitive process.[69]

An examination of some landmark Supreme Court decisions demonstrates that, while the venerable goal of protecting the competitive process continues to resonate, some more recent Court decisions have been sidetracked by confusing rhetoric surrounding consumer welfare standards, resulting in a failure to protect the competitive process.

A. Ohio v. American Express

Ohio v. American Express Co.[70] marks a low point in the Court's application of the Sherman Act to protect the competitive process. American Express refused to allow merchants to steer customers away from use of the Amex credit card, notwithstanding the high percentage fee charged to merchants each time the card was used. Urging customers to use rival cards that charged a lower fee is a natural and healthy market response fundamental to competition.[71]

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[67] Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).
[68] Werden, *supra* note 4, at 726-731.
[69] *See, e.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) (recognizing an "antitrust injury" requirement as a condition to pursue an antitrust complaint); *see also* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 139-140 (1998) (dismissing a claim because the plaintiff failed to allege and prove harm "to the competitive process, i.e., to competition itself.")
[70] Ohio v. Am. Express Co.,138 U.S. 2274 (2018).
[71] John B. Kirkwood, *Antitrust and Two-Sided Platforms: The Failure of American Express,* 41 CARDOZO L. REV. 1805, 1851 (2020) (describing the benefits to competition from steering); Herbert Hovenkamp, *Platforms and the Rule of Reason, The American Express Case*, COLUM. BUS. L. REV. 35, 44 (2019) ("'Steering' is fundamental to competition of any kind."); Adam Gitlin & Brendan Glackin, *The Antitrust of Dominant Hospital Systems: United States v. CMHA and UFCW v. Sutter Health,* 34 A.B.A. Antitrust Mag. (No. 3) 78, 80 (2020) (in the context of large hospital chains that impose antisteering provisions on health insurers, noting that "empirical evidence continues to mount that steering reduces health care costs while ensuring quality of care").

Amex's antisteering clause was classic exclusionary conduct that targeted rival credit cards but also harmed retail businesses and deprived consumers of lower cost choices.[72]

The Supreme Court majority found a way to look past this obvious exclusionary conduct. The decision was focused on proper treatment of two-sided platforms. Amex could make money from its credit cards in two ways. The fee charged to merchants who honored Amex cards was its major source of revenue, but Amex could also charge credit card holders annual subscription fees and amounts for late payments or interest on unpaid balances.[73] Consistent with the discipline of the competitive process, Amex was, and should be, free to charge any amount on either side of the market, even if it loses money on one side.

Both the majority and the dissenters agreed that the first step in applying the rule of reason was for the plaintiff to demonstrate "that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market."[74] The majority ruled that the plaintiff had failed to make this showing, in part because it accepted an Amex argument that higher merchant fees imposed by Amex could benefit consumers by offering them loyalty rewards or other services from use of the card.[75] Had Amex card users been offered a choice on whether they wished to trigger the extra service fee in return for the additional services, the argument might be consequential.[76] They were not given that choice. Merchants could refuse to accept the Amex card, but to do so risked losing sales.

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[72] I criticized the Court's decision in the companion article [Grimes, *supra* note 6, at 11-12], while other critics have parsed the Court's opinion in detail, addressing multiple issues with the Court's reasoning [Kirkwood, *supra* note 71; Hovenkamp, *supra* note 71.]

[73] In some cases, Amex may have lost money on card holders who paid no late fees or interest on unpaid balances. *See, e.g.,* Amex 138 U.S. at 2274, 2281.

[74] *Id.* at 2290 (Justice Breyer dissenting) (agreeing with the three-step rule of reason test employed by the majority).

[75] *Id.* at 2288 ("Amex's increased merchant fees reflect increase in the value of its services and the cost of its transactions, not an ability to charge above a competitive price.")

[76] If merchants could steer customers to a rival's credit card that charged a smaller merchant fee, consumers might have been offered a discount for use of that credit card.

Leaving aside other shortcomings of the Court majority's reasoning, the issue here is what the decision means for the consumer welfare standard. By focusing on harm to consumers, both the majority and the dissent appeared to be endorsing some form of consumer welfare standard. Although the Court identified price, output, and quality as relevant factors,[77] there was no meaningful discussion of what that consumer welfare standard should be or how to apply it. The Court seemed to imply, however, that no matter how harmful to the competitive process and the ability of a rival credit card firm to enter and compete, if consumers somehow benefit in terms of price, quality, or output, the restraint is lawful.

It is a fool's errand to undertake an assessment of whether the Amex antisteering restraint benefited consumers. The government plaintiffs alleged that the restraint increased consumer prices. Amex responded that its increased fees paid for valued services such as a loyalty rebate program or a product guarantee linked to use of the card. How does one balance these consumer effects? Some users of the credit card may have desired to pay for all these services. Others may have preferred to pay for some, but not for others. Still other users might have preferred to pay for none of these services. No Amex credit card user was given a choice, so a court applying this standard is being asked to second guess what some, most, or all consumers would prefer. Asking a court to untangle and evaluate these consumer effects, and then to weigh them against upstream harm to rival credit card issuers, is an impossible task. The consumer welfare standard becomes an excuse for a powerful upstream firm to engage in undisguised exclusionary conduct based on an unverifiable claim that consumers might benefit from the restrictions. The

[77] Amex, 138 U.S. at 2284 (Plaintiffs could show direct proof of anticompetitive effects, which could include "reduced output, increased prices, or decreased quality in the relevant market.") (citing FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460 (1986)). As Justice Breyer's dissent points out, direct proof of anticompetitive effects does not require a market definition. *Id*. (Breyer J., dissenting).

ideologically driven premise is exposed – a powerful firm's obvious exclusionary conduct can be justified by even the most contorted claim of consumer benefit.

One of the benefits of protecting the competitive process is that no court is asked to make impossible determinations that weigh possible benefits to consumers against classic exclusionary conduct that harms rivals. A classic exclusionary restraint that undermines competition can be identified, as it was by the district court in *Amex*.[78] Eliminating this obvious restraint, the relief sought by the state antitrust enforcers and the Justice Department, was the only proper way to protect the competitive process.

B. Chicago Board of Trade

Board of Trade v. United States[79] reminds us that not all restraints on marketplace behavior undermine the competitive process – some enhance that process. The case also established early in the twentieth century that, in enforcing the Sherman Act, the Court was concerned about buyer as well as seller power abuses.

The Board of Trade ran a grain exchange that operated during limited hours. The Board adopted the Call Rule requiring that purchases of grain after the close of the Call but before the opening of trading the next day be made at the price established at the close of the Call. One of the purposes of the rule was to prevent large Chicago warehouses from exploiting farmers by purchasing to-arrive-grain at very low prices. The Justice Department challenged the restraint on a mechanical theory that any attempt to fix prices during an important part of the business day was an illegal restraint of trade under the Sherman Act. Rejecting this approach, Justice

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[78] United States v. Am. Express Co., 88 F. Supp. 3d 143 (E.D.N.Y. 2015).
[79] Board of Trade v. United States, 246 U.S. 231 (1918); *see also* Peter C. Carstensen, *The Content of the Hollow Core of Antitrust, The Chicago Board of Trade Case and the Meaning of the "Rule of Reason," in Restraint of Trade Analysis*, in 15 RES. L. & ECON 1 (Richard O Zerbe & Victor P. Goldberg, eds. 1992) (suggesting how this case promoted competition).

Brandeis wrote for the Court that "the true test of legality is whether the restraint . . . merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition."[80]

The restraint on pricing was imposed by the Board of Trade, a body that was neither a buyer nor seller of grain. The Board was a business entity that earned revenue by providing an exchange that treated both buyers and sellers fairly. If farmers sensed unfairness, they might send their grain elsewhere, undermining the business of the exchange. The restraint was limited to off hours trades and did not substantially impede the give and take of market prices responding to supply and demand factors. As the Brandeis opinion suggested, the board's rule can be seen as an enhancement of the competitive process that protected against a buying power abuse -- exploitation of farmers who lacked information and leverage in selling to the large grain warehouses.[81] The Court did not ask, nor should it have, what effect the abuse, or the remedy for the abuse, would have on output or consumer prices.

Board of Trade illustrates a proper application of a symmetric welfare standard linked to the competitive process. Private restraints that may limit competition in a technical sense may have the purpose and effect of improving operation of the competitive process.

C. Brooke Group

If there were a designation for the single most misguided Supreme Court antitrust decision, *Brooke Group. v. Brown & Williamson Tobacco Corp*.[82] would be a strong contender. This decision has left powerful firms a de facto free ticket to engage in exclusionary conduct through low prices targeting a smaller rival. The effect of this conduct can be to eliminate the

[80] Board of Trade, 246 U.S. at 238.
[81] John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 518-519 (2019) (offering a similar view of *Board of Trade*).
[82] Brooke Group. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

rival from the market, but it may also cause the smaller rival to sell its business to the predator at a low price or tacitly to agree to play follow the leader in a pattern of supracompetitive oligopolistic pricing. Under any of these scenarios, healthy price competition has been squelched. What's worse, as explained below, the penumbra of the *Brooke Group* decision has now infected the law governing other price related exclusionary conduct, including predatory buying, bundled discounting and an integrated monopolist's price squeezing. *Brooke Group* severely undermines the antitrust's fundamental goal of protecting the competitive process.

The road to *Brooke Group* was paved with good intentions. An influential 1975 Areeda and Turner article proposed a below cost pricing test for predatory pricing claims.[83] The article was written in an antitrust climate that lamented misuse of the predatory pricing claim by a firm whose higher priced product did not sell. Around this time, Bork and others were arguing that efficient large firms were being punished for using low prices to compete, turning antitrust law on its head. Areeda and Turner proposed the below cost pricing test as a tool to eliminate these false positives. Under their proposed test, unless the alleged predator was shown to have priced below its average variable costs, the predation claim would be dismissed.[84]

The below cost pricing test was also intended to bring clarity and administrability to the law governing predatory pricing. Some prices below cost are offered for valid business reasons and are not anticompetitive. Some prices above cost can have intended and severe exclusionary impacts on viable competitors, firms that would thrive in a market undistorted by predatory conduct. The Areeda-Turner test is a compromise, albeit one that would likely generate more false negatives than false positives. A defendant pricing below average variable cost might still

[83] Philip Areeda & Donald Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).
[84] *Id.* at 716-18.

invoke a defense such as a need to dispose of excess inventory. A plaintiff unable to demonstrate below average variable cost pricing would simply be out of court.

The key to understanding the anticompetitive potential of price predation is the relative advantages of size and scope enjoyed by the predator. The larger firm is likely to have a higher market share in products in which the two firms compete, deeper pockets, a broader geographic market, and may also have more products to sell. Collectively, these advantages allow the predator to sustain the losses of a price war longer than its smaller rival. The predator can often minimize losses by discounting only in a geographic area or product segment most likely to harm the rival. Discriminatory low pricing targeting a smaller rival, along with the relative advantages in size and scope, should be the gravamen of a successful price predation complaint.[85]

The cost-based test adopted in *Brooke Group* had the unfortunate effect of reinforcing a view that low prices and efficiency are the pivotal goals of antitrust enforcement. They are not. Low prices and efficiency are benefits of protecting the competitive process, but not goals in and of themselves. The *Brooke Group* holding gave powerful firms a ticket to use targeted price discrimination against maverick smaller competitors. Over time, this undermines not only the competitive process but also ancillary benefits of antitrust such as lower prices and efficiency.

The problems with the cost-based test were exacerbated when the Supreme Court in *Brooke Group* added a further requirement: that the plaintiff in a predatory pricing case establish the likelihood that the defendant could recoup its losses from its predatory, below cost pricing. When the predation is isolated and targeted against a smaller rival, the losses are easily borne by the larger predator. The proof requirements for recoupment, however, greatly burden the plaintiff and make it even more difficult to win a price predation case. Areeda and Turner would

[85] If the defendant is merely matching a lower price offered by the plaintiff, this should be a defense under either the Robinson Patman Act or the Sherman Act.

not have seen this as a reasonable resting place for predatory pricing law.[86] Meanwhile, the recoupment test has become the focus of intense criticism of the *Brooke Group* holding.[87]

Utah Pie Co. v. Continental Baking Co.[88] provided an excellent example of how the law governing predatory pricing, as it existed before *Brooke Group*, could benefit the competitive process. Although the firm had only 18 employees, Utah Pie was a strong regional competitor in the frozen pie market.[89] There was evidence that larger national rivals deemed Utah Pie "an unfavorable factor" in the Salt Lake City area and that each was charging discriminatory low prices in that area, lower than the firms charged elsewhere.[90] The defendants participated in a localized price war centered on the Salt Lake City market, with some evidence that Continental's low prices did not cover the firm's costs.[91] The evident intent was either to drive Utah Pie from the market or force it to follow the larger firms' lead in setting oligopolistic prices.

The *Brooke Group* Court, without empirical evidence, declared that predatory pricing rarely occurred.[92] *Utah Pie* presented a scenario in which predatory pricing could and did occur: oligopolistic firms, with targeted price discrimination that limited any losses, could employ price predation to substantial exclusionary effect. If Continental or other large oligopolistic rivals are free to deal with smaller regional competitors in this manner, the effect is to insulate such large firms from competition and ensure that their pattern of oligopolistic pricing can and will

[86] Phillip Areeda argued for plaintiff Brooke Group before the Supreme Court.

[87] Among those urging elimination of the recoupment requirement are C. Scott Hemphill & Philip J. Weiser, *Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing*, 127 YALE L.J. 2048 (2018); Christopher Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695 (2013); and Sullivan, Grimes, and Sagers, *supra* note 27, at 172-75. See also Jonathan Baker, *Predatory Pricing After Brooke Group: An Economic Perspective*, 62 ANTITRUST L.J.585 (1994) (strong critic of *Brooke Group*).

[88] Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967). Some scholars attacked the decision as not in the consumers' interest. *See, e.g.*, Ward Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 YALE L.J. 70 (1967).

[89] Utah Pie Co., 386 U.S. at 689.

[90] *Id.* at 696-97.

[91] *Id.* at 698-99.

[92] Brook Group, 509 U.S. at 226 ("predatory pricing schemes are rarely tried, and even more rarely successful") (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986).

continue. A regional pie producer should not be insulated from competition, but should be protected from targeted exclusionary conduct. Utah Pie's opportunity to participate in the frozen pie market, free of targeted predatory conduct, is precisely what the Sherman Act should protect.

D. The Progeny of **Brooke Group**

In two prominent Supreme Court cases involving exclusionary conduct related to pricing, the Court has followed *Brooke Group* with little or no attention to potential harm to the competitive process. The Court has done so in fact patterns dissimilar from predatory pricing. Ignoring *Brooke Group's* inherent flaws, the Court invoked the case as a super precedent that obviated the need for independent fact-based analysis of competitive performance.[93]

In *Weyerhaeuser v. Ross-Simmons Hardwood Lumber Co.*,[94] the Court, after declaring without empirical backing that such conduct was rare, applied a modified *Brooke Group* two step test to predatory buying. Under the test, the plaintiff must show that the predator bought input goods at such a high price that it would lose money when reselling the finished product and that there was a dangerous probability that the predator could recoup the loss.[95]

Weyerhaeuser was a large national firm that operated six hardwood producing sawmills in the Pacific Northwest. Ross-Simons operated a single sawmill in the same area until it was forced out of business. The two firms had been direct competitors in purchasing red alder logs. The jury had returned a verdict in favor of Ross-Simons. It was upheld on appeal but overturned by the Supreme Court. Weyerhaeuser had the same sort of size and scope advantages that make predatory pricing credible: Weyerhaeuser could target its predation on a small local competitor

[93] *See* Warren Grimes, *Judicial Activism in the First Decade of the Roberts Court: Six Activism Measures Applied*, 48 SW. U. L. REV. 37, 50-52 (2019) (suggesting the term "super precedent" describes a case that is followed beyond its factual context, dictating a result without careful policy analysis of its suitability to differing facts.)
[94] Weyerhaeuser v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007).
[95] *Id.*; *see also* John B. Kirkwood, *Powerful Buyers and Merger Enforcement*, 92 B.U.L. REV. 1485 (2012) (critic of the *Weyerhaeuser* decision).

and could easily weather temporary losses through its vast profitable operations. As in *Brooke Group*, the two-step test would be all but impossible for a plaintiff to meet, allowing an oligopolistic firm to intimidate or eliminate a maverick rival.

Weyerhaeuser also demonstrated confusion over the welfare standard that should govern antitrust claims. The Court declared that "predatory bidding presents less of a direct threat of consumer harm than predatory pricing."[96] Although the Court stopped short of saying it directly, the implication here is that harm to consumers in the form of higher prices is the preeminent harm that triggers antitrust liability and that harm to input providers, even to the point of driving them from the market, is less worthy of antitrust protection.

The Court's opinion lacked a full appreciation for the fate of sellers of red alder logs after Ross-Simmons' demise. These sellers would likely confront a monopsonistic market, with Weyerhaeuser as the only regional buyer. The Sherman Act is designed to protect the competitive process, and that protection extends to these sellers. Even in the unlikely event that the exercise of Weyerhaeuser's monopsony power led to lower consumer prices, there is no basis in the Sherman Act for deciding lower prices for finished hardwood products are to be favored over seller side protection. That protection includes allowing loggers to sell into a competitive market and allowing small sawmills to enter and compete free of exclusionary conduct.

Bundled discounting is another area in which *Brooke Group* could alter the law. Although the Supreme Court has yet to rule in this area, the Ninth Circuit applied the *Brooke Group* below cost pricing test to a bundled discount for hospital services offered to health insurers. To obtain the discount, the insurer had to agree to make the discounter's hospital chain

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[96] Weyerhaeuser, 549 U.S. at 324-25 ("Even if output prices remain constant, a predatory bidder can use its power as the predominant buyer of inputs to force down input prices and capture monopsony profits.").

the exclusive preferred provider.[97] This threatened a smaller hospital that, while offering lower prices, was not able to offer the full range of hospital services that the discounter offered. Although recognizing the potential exclusionary effect on the smaller rival, the Court chose the *Brooke Group* standard as "the course safer for consumers and our competitive economy." [98]

The Court's focus on short term price reductions that benefit insurance companies (and perhaps consumers) is unfortunate. Any discounted pricing can be beneficial to competition if it is not predatory. Large hospital chains, however, have been aggressive in using bundled discounts to pressure health insurers to eliminate smaller rivals from insurance plans.[99] Such exclusionary conduct is predictable and anything but rare when a larger business has the leverage to exclude a smaller but efficient rival. The Third Circuit chose a different standard to apply in *LePages Inc. v. 3M*, upholding a verdict against 3M's bundled discounting despite the absence of any evidence of below cost pricing.[100] This holding recognized the value of protecting the competitive process. That process is undermined when a large firm can employ multi-product discounts that target an equally or more efficient rival.

Pacific Bell Telephone Co. v. Linkline Communications, Inc.[101] is yet another spin off from *Brooke Group*. Pacific Bell ("Pac Bell") was an integrated monopolist that sold digital subscriber lines (DSL) at both the wholesale and retail level. As the result of an FCC decision

[97] Cascade Health Sos. v PeaceHealth, 515 F.3d 883 (9th Cir. 2008).
[98] *Id*. at 903. The Court found reassurance in the report of the Antitrust Modernization Commission [ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 97 (2007)] which had recommended application of the Brooke Group test to bundled discounts.
[99] Pro Medica Health System, Inc. v. FTC, 749 F.3d 559, 571 (6th Cir. 2014) (Large hospital chain offered an insurer a 2.5% discount on hospital services conditioned on the insurer agreeing to exclude a smaller rival hospital from coverage); *see aslo* Gitlin & Glackin, *supra* note 71, at 78, 80-81 (describing settlements in two Sherman Act cases against large hospital chains, in each case obtaining injunctive relief against antisteering provisions).
[100] LePage's Inc. v. 3M, 324 F.3d 141, 156 (3d Cir. 2003) (holding that 3M's incentive was "to preserve the market position of Scotch-brand tape by discouraging widespread acceptance of the cheaper, but substantially similar, tape produced by Le Page's.").
[101] Pac. Bell Tel. Co. v. Linkline Comc'n, Inc., 555 U.S. 438 (2009)

approving a merger, Pac Bell was obliged to offer DSL lines to third party sellers, including plaintiff Linkline. In what is known as a price squeeze, Pac Bell offered DSL lines directly to customers at a price that was lower than the wholesale price offered to Linkline and other middlemen. None of the middlemen could survive with this pricing structure, and four of them brought suit for a Section 2 price squeeze violation.

Court precedents governing price squeeze claims dated back to Judge Learned Hand's Second Circuit opinion in *United States v. Aluminum Co. of America*.[102] Hand concluded that Aluminum Co. of America ("Alcoa") had engaged in an unlawful price squeeze by selling aluminum ingots at a relatively high price while selling fabricated aluminum sheets at a relatively low price. This squeezed rival fabricators of aluminum sheets who were forced to pay a high price for Alcoa's ingot. The Supreme Court had never ruled on price squeeze claims, but over a 63-year period, Hand's opinion had been followed and amplified by a string of lower court rulings.[103]

In *Pacific Bell*, Justice Roberts wrote for a 5-4 majority striking down the price squeeze claim, reasoning that plaintiffs had failed to identify "any independent competitive harm" that was not covered by a duty to deal violation at the wholesale level or a predatory pricing violation at the retail level.[104] The statement ignores the ease with which an integrated monopolist, at no cost to itself, may exclude rival middlemen by simply raising its wholesale price.

Based on the unsupported premise that predatory pricing was extremely rare and difficult to sustain, the *Brooke Group* Court crafted major obstacles for any plaintiff bringing a predatory pricing claim. For an integrated monopolist, such predation is far less difficult – at little or no

[102] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
[103] *See* Sullivan, ET AL., *supra* note 27, at 125-26.
[104] Pac. Bell, 555 U.S. at 455.

cost to it, the monopolist need only raise its price on the primary good. Ignoring these glaring differences, the Court relegated the price squeeze claim to the *Brooke Group* waste basket.

There is another perverse aspect to the *Pacific Bell* ruling. The telephone company was obliged to sell wholesale lines to middlemen because of an FCC ruling that was intended to maintain a degree of competition in the sale of DSL lines. The Court refused to acknowledge this regulatory mandate as a basis for finding a duty to deal with a rival retailer.[105]

The interaction of a regulatory scheme with the Sherman Act has not infrequently forced the Court to draw a line between antitrust enforcement and regulation. In many of these cases, the Court may end up displacing the rules of competition in favor of an agency's regulation.[106] In *Pacific Bell*, the Court used its misguided interpretation of the Sherman Act to undercut an FCC regulatory initiative favoring competition. The implication is that if the Sherman Act does not cover conduct, then a regulatory agency's effort to protect competition should be ignored.

E. Leegin Creative Products

In *Leegin Creative Products, Inc. v. PSKS, Inc.*,[107] the Court overturned a line of cases that had construed vertical minimum price fixing, or resale price maintenance (RPM), to be per se unlawful.[108] The *Dr. Miles* decision in 1911,[109] although never mentioning a per se rule, is often seen as the progenitor of this line.[110] Congress supported the rule in 1975 when it repealed

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[105] *Id*. at 448, n.2 (the majority dismisses the FCC's regulation in this footnote, arguing that the FCC itself had subsequently found there to be adequate competition in the sale DSL lines).
[106] *See infra* Section F.
[107] Leegin Creative Prods. Inc. v. PSKS, Inc., 551 U.S. 877 (2007).
[108] *See generally* Warren S. Grimes, *The Path Forward After Leegin: Seeking Consensus Reform of the Antitrust Law of Vertical Restraints,* 75 ANTITRUST L. J. 467, 469-71 (2008) (Vertical minimum price fixing occurs when a manufacturer or other upstream provider dictates to downstream sellers (most often retailers) the minimum price at which they may resell the upstream provider's product).
[109] Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).
[110] *Miles* is more accurately construed not as a per se case but as a declaration that resale price maintenance is unlawful when it is a naked restraint, not ancillary to an arrangement with net procompetitive effects. For a description of the evolution of the law governing resale price maintenance, *see* Grimes, *supra* note 108, at 469-71.

legislation that had allowed state legislatures to create exceptions to per se treatment[111] and in 1984 and subsequent years when riders to Justice Department appropriations prohibited the expenditure of appropriated funds to argue for repeal of the per se rule.[112]

Writing for the majority, Justice Kennedy declared without support that the rule of reason, in design and function, "distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest."[113]Once again, this focus on the consumer leaves unanswered how the Sherman Act applies to upstream power abuses and casts doubt on over a century of jurisprudence applying the Act to injuries to upstream competitors, with or without a showing of injury to consumers.[114]

The literature has long recognized that RPM is likely to raise consumer prices, a concern that Justice Breyer noted in his dissent.[115] The player most directly harmed by RPM, however, is the maverick or efficient retailer. British economist Basil Yamey wrote in 1966 that "by stopping price competition in retailing, the practice impedes the replacement of high cost by low-cost forms of retailing, and of less efficient by more efficient firms." Yamey continued: "The brake on price competition is especially severe on the development of new forms of retailing."[116] These

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[111] 15 U.S.C. §§ 1, 45(a), *amended by* Consumer Goods Pricing Act of 1975, 89 Stat. 801.
[112] *See* Leegin, 551 U.S. at 906.
[113] *Id*. at 886. Werden interprets Justice Kennedy's statement as an affirmation that protecting the competitive process is in the consumer's best interest. Werden, *supra* note 4, at 742-43.
[114] *See* Warren S. Grimes, *A Dynamic Analysis of Resale Price Maintenance: Inefficient Brand Promotion, Higher Margins, Distorted Choices, and Retarded Retail Innovation*, 55 ANTITRUST BULLETIN 101, 126-28 (2010) (suggesting a primary harm flowing from retail price maintenance may be higher retail prices, but another anticompetitive effect is the inability of innovative and efficient retailers to gain market share through lower retail prices.)
[115] *Leegin*, 551 U.S. at 912 (Breyer, J., dissenting); See Grimes, *A Dynamic Analysis of Resale Price Maintenance*, *supra* note 114, at 115-16.
[116] Basil S. Yamey, *Introduction, The Main Economic Issues*, in RESALE PRICE MAINTENANCE 5 (Basil S. Yamey, ed. 1966); *see also* BASIL S. YAMEY, THE ECONOMICS OF RESALE PRICE MAINTENANCE 86 (1954) ("the only general conclusion is that price maintenance tends to slow down the pace of change in retail markets, to delay changes in the shares of trade handled by different types of retail enterprise and to discourage the development of "unorthodox" methods of retailing.").

observations are borne out by the facts of *Leegin*, where the discounting retailer was put out of business when the manufacturer cut off its supplies.

Justice Kennedy argued generally that resale price maintenance can be procompetitive because: (1) it discourages discounting retailers from free riding on presale services provided by full price retailers;[117] (2) it may provide an incentive for high profile retailers to carry the brand, thereby "certifying" the brand's quality;[118] and (3) it may provide retailers an incentive to carry a larger inventory consistent with the manufacturer's wishes.[119] None of these justifications can be linked to the facts in *Leegin*.[120] The terminated retailer was not free riding on services provided by others and had actively promoted the Brighton line, relying on these sales for a majority of its revenues.[121]

RPM is all about brand marketing. The use of brands has undeniable benefits for the consumer and society in general. The real question that the Supreme Court should have addressed in *Leegin* is whether a manufacturer's use of RPM to snuff out intrabrand retail price competition is an appropriate tool for brand marketing. It may be, as Benjamin Klein contends, that RPM is very useful to the manufacturer of a branded product in winning and maintaining dealer loyalty.[122] There are, however, numerous other ways to convince dealers to carry a branded product that have none or few of the anticompetitive effects of RPM.[123]

Justice Kennedy's reliance on the three theoretical procompetitive benefits for brand sellers

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[117] *Id.* at 890-91.
[118] *Id.* at 891.
[119] *Id.* at 892. Justice Kennedy's majority opinion follows the general outline offered by the Solicitor General's amicus brief.
[120] Benjamin Klein, *Competitive Resale Price Maintenance in the Absence of Free-Riding*, 76 ANTITRUST L. J. 431, at 433-34, 451-53 (2009) (concluding that none of these three procompetitive rationales for resale price maintenance explain Leegin's use of the pricing limits, arguing that Leegin's intent was to maintain a large specialty dealer network that might be threatened by retail discount competition.)
[121] *Leegin*, 551 U.S. at 882-83.
[122] Klein, *supra* note 130, at 449.
[123] Grimes, *supra* note 114, at 110-19.

exposes a disturbing ideology of the contemporary Court to give the benefit of the doubt to powerful upstream firms that choose to limit competition for their own purposes, despite likely increased prices to consumers. This issue was also evident in Amex[124], where the Court insisted on a detailed showing of consumer harm while accepting Amex's perfunctory claim of a consumer benefit from its exclusionary conduct. In similar fashion, the *Leegin* Court was willing to look at theoretical upstream benefits for the brand seller as a basis for limiting retail price competition for a brand. In both of these cases, a likely result for consumers would be higher prices. If consumer welfare should control antitrust analysis, why is it that obvious constraints on competition that affect consumer prices can be so lightly pushed aside?

Of course, the Court's close attention to the concerns of upstream sellers reinforces a general point here: that the competitive process is the dynamic interaction between buyers and sellers at all levels. What the Court failed to do in both *Amex* and *Leegin* was to protect the competitive process at upstream levels. Consumers were likely harmed in both cases, but were not the most directly injured parties. In *Amex*, the enforcement failure was directly harmful to merchants and credit card rivals; in *Leegin,* that failure was directly harmful to efficient and innovative retailers.

F. Conflicts with Other Statutory Schemes

No matter the welfare standard, many Sherman Act decisions are unlikely to be easily resolved by a simple paradigm. One reason for the complexity is that antitrust must grapple with conflicts, actual or potential, with other statutory schemes. Such conflicts arise, for example, when intellectual property laws authorize monopoly, when federal regulatory statutes replace competition with government oversight, or when actions by state authorities appear to displace

[124] 138 S.Ct. 2274.

competition.[125] The Court should approach such cases with a predisposition to maintain the competitive process protected by the Sherman Act as far as possible consistently with carrying out other statutory mandates. Among other benefits, this approach would create an incentive for regulatory agencies to maintain competitive values in structuring regulation. In *Pacific Bell*, there was no genuine conflict between the FCC's regulatory initiative to preserve competition and Sherman Act values.[126]

In *American Express Co. v. Italian Colors Restaurant*,[127] the Court majority relied on the Federal Arbitration Act to enforce a contractual waiver of class action rights. The Court dismissed a Sherman Act suit against AMEX that challenged the high merchant fees that the credit card firm charged and did so notwithstanding high costs for individual arbitration that would have exceeded the cost of any recovery. The Court left the small restaurant and its fellow small retailers with no evident path for challenging potentially anticompetitive conduct. At no point did the Court address the underlying purposes of the Sherman Act, or whether the Sherman Act claims had merit. The Court's aversion to class action private enforcement suits, evident in other decisions,[128] is not a basis for patent disregard of the Sherman Act and the competitive process it was designed to protect. Indeed, one could read the pattern of these decisions, almost

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[125] Examining the Supreme Court's docket of the last four decades reveals many cases in which the Court confronted potential conflicts with other statutory schemes. Examples include FTC v. Actavis, 570 U.S. 136 (2013) (patent law); N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015) (state action); Comcast Corp. v. Behrend, 569 U.S. 27 (2013)(communications regulation); Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438 (2009) (communications regulation); Credit Suisse (USA) LLC v. Billing, 551 U.S. 264 (2007) (SEC regulation); Ill. Tool Works, Inc. v. Independent Ink, Inc., 547 U.S. 28 (2006) (patent law); Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004) (communications regulation); NYNEX Corp. v. Discon, Inc., 525 U.S. 126 (1998) (communications regulation); Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979) (copyright law).

[126] *Pac. Bell*, 555 U.S. 438.

[127] American Express Co. v. Italian Colors Rest., 570 U.S. 228 (1911).

[128] *See, e.g.*, Comcast Corp. v. Behrend, 569 U.S. 27 (2013); Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004); NYNEX Corp. v. Discon, Inc., 525 U.S. 126 (1998).

uniformly in favor of the defendant,[129] as one in which the Court seizes on any possible statutory conflict as a basis for pushing aside the goal of protecting the competitive process.

VI. Administrability: An Elusive Goal?

Bork's narrow definition of consumer welfare was designed to delimit antitrust, but also to provide clarity in counseling and administration. Clarity and simplicity of administration are important goals. After 40 plus years, variations of the consumer welfare standard have failed to achieve this clarity. Instead, the consumer focus has led to confusion, misdirection, and complexity as litigants and courts struggle to determine whether anticompetitive conduct is linked to consumer harm.

If the consumer welfare standard is interpreted narrowly in terms of output or wealth transfer, many of the benefits of the competitive process are lost. An output measure does not comfortably reach issues of quality, innovation, and non-price preferences, nor does it adequately explain antitrust's applicability to buyer abuses. These shortcomings can be at least partially addressed if one broadens the definition of consumer welfare as Assistant Attorney General Delrahim suggested.[130] One can further broaden the definition to include suppliers in monopsony power cases. With that broadening comes an evisceration of the simplicity of administration that Bork sought.

Leaving aside regulatory conflicts, a symmetric welfare standard linked to protecting the competitive process is simple in concept and often straightforward to apply. Critics of the competitive process as the central paradigm have argued, as Bork did, that it would give rise to many false positives.[131] The danger of false positives was greater during the populist era when

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[129] *See* American Needle Inc. v. Nat'l Football League, 560 U.S.183 (2010) (an exception to the long list of rulings against private plaintiffs).
[130] Delrahim Speech, *supra* note 3.
[131] Newman, *supra* note 81, at 513-16.

per se rules were widely employed to assess both horizontal and vertical restraints. After *Leegin*, except for tie ins subject to a modified per se rule, no vertical restraint is subject to per se treatment. Over the last few decades, Supreme Court decisions have narrowed the category of horizontal restraints considered per se unlawful.[132] Defending a case under the rule of reason affords ample opportunity to argue that the subject conduct does not undermine the competitive process.

Critics also have claimed that a competitive process standard cannot bring simplicity and clarity.[133] Some of that clarity can come from the precedent system which, over a century plus of Sherman Act application, has identified categories of anticompetitive conduct. Per se rules have been eviscerated, but there is still ample opportunity for structured rule of reason approaches,[134] or burden shifting approaches, that simplify judicial administration. Economic analysis has and will continue to play a role in analyzing the competitive effects of a particular type of potentially anticompetitive conduct.[135] The federal agencies, through guidelines or public speeches, can provide additional clarity. Collectively, these tools can provide needed transparency that proponents of a consumer welfare standard have sought but never attained.

VII. Conclusion

The term "welfare" belongs in the antitrust vocabulary. It is the welfare of society at large, as Adam Smith envisioned it, that is protected by competition laws. It is time to push aside the term "consumer welfare" as doctrinal imperative. Competition values are not limited to

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[132] NCAA v. University of Oklahoma, 468 U.S. 85 (1984) (regulations of sports umbrella organization not per se unlawful); Broadcast Music, Inc., v. Columbia Broad. Sys. Inc., 441 U.S. 1 (1979) (conduct that allows marketing of a blanket copyright license not per se unlawful); National Society of Prof. Engineers v. United States, 435 U.S. 679 ((1978) (self-regulatory conduct by a professional society not per se unlawful).
[133] Newman, *supra* note 81, at 515-16.
[134] *Id*. Newman suggested using an additional screen to separate lawful from unlawful restraints: whether the defendant's restraint was designed to remedy a market imperfection.
[135] E.g., SULLIVAN ET AL., *supra* note 27, at 386-89 (reviewing and assessing economic analysis of a requirements tie-in.)

a static measure of price and output. Focusing on consumer harm based on output or wealth transfer ignores the dynamism of the competitive process and the role of other players in the market system. It complicates the showing that an antitrust plaintiff must make and, by distorting the analysis, fails to protect the competitive process.

More than a few Supreme Court decisions of the past few decades have undermined antitrust's role in protecting competition. The federal antitrust agencies, through their promotion of consumer welfare standards, have fostered much of the confusion and misdirection. Absent legislative intervention, those same federal agencies will have a responsibility and an opportunity to steer antitrust back to a symmetric welfare standard anchored to the competitive process.

Turning away from consumer welfare standards in no way eliminates the role for economic analysis. It does require recognition that all players in the market system, whether they be consumers, laborers, service providers, middlemen, or manufacturers, add value to the system and should be freeto make choices free of market power distortions. All of these players are disciplined by competition. Each is equally entitled to the protection of the Sherman Act.

ADDENDUM

In part III of this article, I sought to canvas views of other scholars on the competitive process standard as a principled and improved replacement for consumer welfare standards. In this addendum, I briefly survey some additional relevant scholarship.

In a short paper published in April of 2018, Tim Wu strongly criticized consumer welfare standards and argued for a "protection of competition" standard as an alternative.[136] He described those critical of the extremes of Chicago school as falling into two groups: those who

[136] Tim Wu, After Consumer Welfare, Now What? The 'Protection of Competition" Standard in Practice, published in www.competitionpolicyinternational.com

would endorse a consumer welfare standard but believe it has been "abused and misused"; and those who believe that antitrust "cannot be fully recovered without first jettisoning . . . [the standard]."[137]

Some scholars do not fit cleanly into these bipolar categories. For example, Christopher Leslie has written that the consumer welfare standard should be defined broadly in a manner that seems largely consistent with a competitive process standard,[138] but has elsewhere referred directly to the antitrust goal of protecting the competitive process.[139]

Wu places himself in the category of scholars who would eliminate the consumer welfare standard. He argues that "the promised scientific certainty of the Chicago method has not materialized, for economics does not yield answers, but arguments."[140] The legal system, Wu postulates, "often does better trying to protect a process than the far more ambitious goal of maximizing an abstract value like welfare or wealth."[141]

Scott Hemphill and Nancy Rose have addressed the competitive process standard in the context of mergers that create buyer power.[142] Advancing a position consistent with this article, the authors argue that "harm to sellers in an input market is sufficient to support antitrust liability."[143] There is no need to demonstrate harm to consumers in order to trigger antitrust liability for conduct that harms these sellers. The authors cite numerous cases to support this proposition.[144]

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[137] Id. at 1.
[138] Christopher R. Leslie, *Antitrust Made (Too) Simple*, 79 **ANTITRUST L. J**. 917, 924-25 (2014).
[139] Christopher R. Leslie, *Monopolization Through Patent Theft*, 103 **GEO. L. J.** 47, 87 (2014) (discussing illegal monopolization as distorting the competitive process and noting "For the competitive process to operate efficiently, it must have integrity—a set of basic rules that firms abide by").
[140] Wu, *supra* note 136, at 2.
[141] Id. at 9.
[142] C. Scott Hemphill and Nancy L. Rose, *Mergers That Harm Sellers*, 127 **YALE L. REV**. 2078 (2018).
[143] Id. at 2079.
[144] Id. at 2087-2092.

Hemphill and Rose criticize the imprecision of the phrase "consumer welfare," noting that a merger of intermediate good providers is actionable even though the direct effect is on purchasing firms, not consumers. Antitrust law, in their view, protects the competitive process.[145] They endorse a "trading partner welfare" standard as the best way to protect the competitive process.[146] The authors also address mergers that harm competition through increased bargaining leverage without classic monopolistic injury (reduced output) or classic monopsonistic injury (reduced input). Examples of such cases include American Express (where Amex's large customer base could force merchants to honor the credit card despite high merchant fees)[147] and a large hospital chain that uses its broad array of hospital services to force health insurers to exclude smaller hospitals from preferred provider status.[148] The anticompetitive effects of such conduct do not obviously change industry input or output. The obvious exclusionary impact is more directly and easily addressed through a competitive process or trading partner welfare standard.[149]

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[145] Id. at 2091.
[146] Id. at 2091-92.
[147] See the discussion of *Amex* in Part V(A), *infra*.
[148] See notes 71 & 72 and accompanying text, *infra*.
[149] Hemphill & Rose, *supra* note 142, at 2093-2105.