The rise and (coming) fall of efficiency as the ruler of antitrust

BY ROBERT H. LANDÉ*

Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give.

R. Bork, The Antitrust Paradox at 50 (1978)

The debate over the legitimate goals of antitrust is ceaseless and its practical resolution influenced by politics. The answer often given in the past, and particularly during the Warren Court era when a heavy emphasis was placed on social and political factors, contrasts sharply with the consensus view during the Reagan Administration that only economic efficiency counts. Since antitrust moves in cycles, a natural question arises—will antitrust

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continue to stand upon a foundation of efficiency, return to the old social and political perspective, or embrace some third view of its proper direction?

This article will trace the genesis of the efficiency approach to antitrust and attempt to predict its future. Although the efficiency approach has triumphed over the social and political view through clever articulation and a promise of superior implementation and predictability, it too is likely to be replaced, by a "price to consumers" or "wealth transfer" standard. This new approach asserts that the antitrust laws were enacted to give consumers the right to purchase competitively priced goods. It condenses the use of market power to artificially raise prices and stresses that the antitrust laws were designed to prevent wealth extractions from consumers by firms with market power. Consumers, not carrels, were given the fruits of competitive capitalism. This article asserts that the wealth transfer approach is starting to replace the efficiency standard and eventually will succeed at implementing Congressional populist sentiment in an administrable, predictable manner.

1. The rise of economic efficiency

A. Bork's "strict constructionist" view of the legislative history

The view of the goals of the antitrust laws that almost universally prevailed until less than a generation ago was decidedly populist. Various social and political goals were deemed important to the antitrust laws' framers. These included the prevention of industrial concentration, the reduction of the political influence of large firms and policies to promote small business and to encourage competition. The social stage virtually until the advent of the Court and appears to have breathed new life into the administration of Chairman F.E. Pate of the Federal Trade Commission during the Carter administration.

Few antitrust scholars believe that a Warren Court approach based on social concerns. Yet today there is a consensus that antitrust was far too interventionist, with substantive standards, the exceptions that inevitably arise in the

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4 Id. at 382-84; Eliot, The Economics of Monopoly: A New Equilibrium, 68 Colum. L. Rev. 1471 (1978).

5 Many moderates and liberals see the social and political perspectives of antitrust enforcement as slower to rely completely upon economic criteria.

6 See, for example, M. Fort, The Antitrust Decision, Remarks at The Eleventh Annual Meeting of the Federal Trade Commission, Boston, Massachusetts 10 (November 1977).

7 "Although efficiency objectives, such as the disbursement of surplus, may sometimes outweigh the social policies by-productive efficiency, energy saving, environmental quality, and so on, the psychological effect of unregulated demands.

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1 This article will argue that Congress, in passing the antitrust laws, helped to define the property right that we today term "consumers surplus," and awarded this property right to consumers. Congress condemned the uncompensated taking of this property right by firms with market power.

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Purpose of the Antitrust Laws, 26 Mass.

influence of large firms and promotion of individual liberty; the promotion of small business and the creation of entrepre-
neurial opportunity." The social and political view held center
stage virtually until the advent of the Reagan Administration,
and appears to have breathed its dying gasp only under the
administration of Chairman Pertschuk, head of the Federal
Trade Commission during the Carter Administration.

Few antitrust scholars believe that antitrust should return to
a Warren Court approach based largely on social and politi-
cal concerns. Today there is a consensus that this type of anti-
trust was far too interventionist. In addition to overly strict
substantive standards, the excesses included the practical prob-
lems that inevitably arose in the implementation of a relatively


4 Id. at 382-84; Elzinga, The Goals of Antitrust: Other Than Com-

5 Many moderate and liberal antitrust academics began to move
away from the social and political orientation well before 1980. Many
politicians, antitrust enforcers and judges were, however, somewhat
slower to rely completely upon economic analysis.

6 See, for example, M. Pertschuk, Chairman, Federal Trade Com-
mission, Remarks at The Eleventh New England Antitrust Conference,
Boston, Massachusetts 10 (November 18, 1977):

[Although efficiency considerations are important, they
alone should not dictate competition policy. Competition policy
must sometimes choose between greater efficiency, which may
carry with it the promise of lower prices, and other social
objectives, such as the dispersal of power, which may result in
marginally higher prices. In 1977, no responsive competition
policy can neglect the social and environmental harms produced
as unwelcome by-products of the marketplace: resource deple-
tion, energy waste, environmental contamination, worker alien-
ation, the psychological and social consequences of marketing
stimulated demands.

7 See, e.g., sources cited in Fox, The Modernization of the Anti-
amorphous social/political orientation. These problems helped make the antitrust world receptive to a more conservative alternative that promised superior implementation, clarity and predictability.

If one scholarly work were singled out for credit for launching the efficiency-oriented view of antitrust it would surely be the seminal 1946 article by then Professor Robert Bork, the foundation for both his own 1978 masterwork and the views of countless other conservative scholars. Bork asserted that his analysis was a strict constructionist view of the legislative history of the Sherman Act. In a lengthy, heavily footnoted text he developed the argument that the original framers of the Sherman Act had a single intent: to enhance economic efficiency. Bork argued that “[t]he whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.” Bork further asserted that there was “not a scintilla of support” in the Act’s legislative history for “broad social, political, and ethical mandates.” Bork explicitly rejected distributive (i.e., wealth transfer) issues as a possible area of concern.

12 Bork, supra note 8, at 10.

13 Bork, supra note 9, at 67-69.

14 Bork, supra note 8, p.

15 Bork, supra note 8, p.

16 Id.

17 To raise prices a mere fraction of a cent, the goods no longer sold than they would cost society.
as a possible area of congressional concern: "[I]t seem clear the income distribution effects of economic activity should be completely excluded from the determination of the antitrust legality of the activity. It may be sufficient to note that the shift in income distribution does not lessen total wealth. . . ."

Bork developed his argument through a detailed analysis of the 1890 legislative debates. He pointed to dozens of statements revealing an overriding Congressional concern that trusts and certain other business forms would acquire monopoly (or market) power that would give them the ability to artificially raise prices and restrict output. Bork wove these quotations into a convincing case that this concern preoccupied Congress. He then used modern economic analysis to explain how monopoly power leading to higher prices for consumers can produce a form of economic inefficiency termed "allocative inefficiency." (The explanation of why monopoly pricing produces allocative inefficiency, a reduction in the total wealth of society, is extremely complex.) Bork reasoned that since we now

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13 R. Bork, supra note 9, at 111.
14 Bork, supra note 8, passim. For example, Senator Sherman asked that Congress protect the public from trusts that "restrain commerce, turn it from its natural course, increase the price of article, and therefore diminish the amount of commerce." 21 Cong. Rec. 2462 (1890). Sherman also stated: "The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote selfish interests . . . . Its governing motive is to increase the profits of the parties composing it. The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. . . . When it embraces the great body of all the corporations engaged in a particular industry in all of the States of the Union, it tends to advance the price to the consumer of any article produced." Id. at 2457.
15 Bork, supra note 8, passim.
16 Id.
17 To raise prices a monopoly reduces output from the competitive level. The goods no longer sold are worth more to would-be purchasers than they would cost society to produce. This foregone production of
"know" that the "only" harm to "consumer welfare" from higher prices is economic inefficiency. Congressional displeasure with market power can fairly be equated with a concern about economic efficiency. He then presented a smaller, although still significant, number of quotations that manifest a Congressional desire to preserve and enhance corporate productive efficiency.¹⁸ On the basis of this evidence, Bork concluded that the antitrust laws embody only a concern for "consumer welfare" which he equated with the "maximization of wealth or consumer want satisfaction" and the aggregate efficiency of our economy.¹⁹

Notice the subtly yet crucial change in terminology. Bork used "consumer welfare" as an Orwellian term of art that has little or nothing to do with the welfare of true consumers!²² His desire to maximize "consumer welfare" (which he defines as economic efficiency) carried with it no concern about the welfare extracted from consumers and transferred to firms with market power as a result of the higher prices that arise from cartel or other prohibited behavior. Bork thus defined "consumers" to goods worth more than their cost is pure social loss and constitutes the "allocative inefficiency" of monopoly. For example, suppose that widgets cost $1.00 in a competitive market (their cost of production plus a competitive profit). Suppose a monopolist would sell them for $2.00. A potential purchaser who would have been willing to pay up to $1.50 will not purchase at the $2.00 level. Since a competitive market would have sold them for less than they were worth to him, the monopolist's reduced production has decreased the consumer's satisfaction without producing any countervailing benefits for anyone. This pure loss is termed "allocative inefficiency." For an extended discussion and formal proof that monopoly pricing creates allocative inefficiency, see E. MANFIELD, MICROECONOMICS: THEORY AND APPLICATIONS 277-92 (4th ed. 1982).

¹⁸ Bork, supra note 8, at 26-31.
¹⁹ Bork, supra note 8, at 7.
²⁰ R. BORK, supra note 9, at 91.
²¹ Bork did not invent the term but chose it from the available options.

include monopolists and cartels, the "real" consumers—the purchasers of the firms with market power—extract wealth from purchasers, fine with Bork so long as the monopoly is more efficient. In fact, the only costs under Bork's regime are monopoly profits.

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²² I am indebted to Professor John D. H. Klein for pointing out that in a technical sense "real" consumers—the purchasers of the firms with market power—extract wealth from purchasers, fine with Bork so long as the monopoly is more efficient. In fact, the only costs under Bork's regime are monopoly profits.

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include monopolists and cartels. Antitrust based on his definition of "consumer welfare" makes no distinction between "real" consumers—the purchasers of goods and services—and the firms with market power that raise prices and thereby extract wealth from purchasers. Higher prices to consumers are fine with Bork so long as the monopolist or the cartel produces more efficiently. In fact, the only "consumers" sure to benefit under Bork's regime are monopolists and cartels.

The view that economic efficiency should be the only value that counts in the antitrust analysis was quickly embraced by the entirety of the Chicago School and many leading "moderate" antitrust analysts as well. Although this view had been picking up adherents for more than a decade, it was not really implemented until President Reagan's election.

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2 I am indebted to Professor Salop for this and related articulations of this concept.

3 I am indebted to John Kirkwood for this formulation. He observes that in a technical sense "consumer welfare" has increased but that the cartels and monopolists acquire all of this increase in the classic tradeoff situation "true" consumers gain none of the efficiency benefits, absorb some of the allocative inefficiency losses, and have their surplus extracted by the firms with market power.

4 See sources cited supra note 10. Of course, some may have adopted the belief that antitrust should be based entirely upon efficiency for reasons having little or nothing to do with Bork's legislative history analysis.


B. Administrability arguments

Bork's argument that only an efficiency approach to antitrust is clear and predictable for businesses also won many converts to the efficiency school. Even many who strongly suspected that Congress may have intended antitrust laws to encompass more had to admit that the social-and-political school of antitrust was extremely difficult to administer. Bork, however, has now taken his support of superior administrability much further; he has argued that courts cannot include values other than economic efficiency in antitrust analysis "without engaging in a task that is so unconfinedly legislating as to be unconstitutional."27

As a practical matter Bork admitted that to actually balance the triangles and rectangles that inevitably arose from an efficiency-based analysis was impossible on a case-by-case basis.28 But he asserted that only rules based on economic effi-

ciency could lead to predictable and, avoiding the endless and imprecise "big," "how small is good" or "how small is good" antitrust rules to encompass more had to admit that the social-and-political school of antitrust was extremely difficult to administer. Bork, however, has now taken his support of superior administrability much further; he has argued that courts cannot include values other than economic efficiency in antitrust analysis "without engaging in a task that is so unconfinedly legislating as to be unconstitutional."27

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27 Consider the plight of an honest, aggressive business operating under a "big is bad, small is good" antitrust regime. What mergers can it lawfully undertake? What vertical restraints or pricing decisions can it implement? What are the rules under which we judge its conduct? An efficiency approach carried out through rules, such as clearly defined merger guidelines (but not the relatively unprincipled analysis conducted within the Reagan Administration) would indeed be more workable than a "big is bad, small is good" approach.


29 Bork provided the following summary of what a case-by-case efficiency analysis of a horizontal merger actually would involve:

Passably accurate measurement of the actual situation [including an estimate of efficiencies and deadweight loss] is not even a theoretical possibility; much less is there any hope of arriving at a correct estimate of the hypothetical situation. Consider two of the factors that would have to be known: the demand curve over all possible relevant ranges of output and the marginal cost curve over those same ranges. Only by knowing where marginal cost and demand intersect could one know whether there was a restriction of output and what its size was. Nobody knows these curves. Even the companies involved do not . . . .

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ciency could lead to predictable antitrust decisionmaking. By
avoiding the endless and imprecise debates over "how big is too
big," "how small is good" or "how much more should con-
sumers pay to prevent bigness and/or preserve smallness," the
efficiency view of antitrust with its single quest offered the
promise of clarity and predictability. Under this approach the
decisionmakers were charged with figuring out, at least as a the-
oretical matter, the applicable triangles and rectangles, and then
with designing rules that would implicitly incorporate them.
(Baxter has similarly asserted that "economic efficiency pro-
vides the only workable standard from which to derive opera-
tional rules and by which the effectiveness of such rules can be
judged." ) Even those whose instincts told them something was
wrong with Bork's analysis of the legislative history were under-
standably dazzled by the economics and found it difficult to
answer Bork's administrability arguments.

The administrability claims may have gained more converts
than the belief that Congress in 1980 cared only about economic
efficiency. Perhaps what took place in the minds of most ob-
servers was, in effect, the following: It is clear that in 1980
Congress was concerned with prices increasing as a result of
market power, and it is clear that higher prices lead to eco-
nomic inefficiency. Since economic efficiency is much easier to
implement than a "big is bad, small is good" policy, let's choos
what seems to be a plausible view of the legislative his-
tory since it leads to the most predictable implementation.

(Footnote continued from previous page)

There is a good reason why firms do not know these things, and
it is the same reason why they cannot be known through an
antitrust trial. The demand curve is not known because it
changes continually and because the company is not constantly
plotting it by running its prices up and down. The attempt to do
so might make a minor contribution to science, but quite a
research grant would be required, since the losses incurred in an
attempt by a major company might make serious inroads on the
resources of even the Ford Foundation.

9. Baxter, Responding to the Reaction: The Draftman's View, 71
Calif. L. Rev. 618, 621 (1983) ("Draftman's View").
Relative to the then-existing situation, the efficiency standard certainly brought the promise of clarity and predictability. All the decisionmakers had to do was ascertain and balance crisp, clear triangles and rectangles that could be predicted in advance by the affected parties. Bork (and others) recognized, moreover, that since rarely in practice could we accurately predict or measure the appropriate efficiencies and inefficiencies, to enhance administrability and predictability we should implement the efficiency approach through rules, not by case-by-case tradeoffs. Thus, for example, Bork (like Posner) believes that mergers should be evaluated solely in terms of their efficiency effects, yet would not allow as efficiencies defense. Their approach to mergers giving rise both to allocative inefficiency from higher prices and productive efficiency gains from, for example, economies of scale, would be to set the merger guideline thresholds at a level calculated to allow most productive efficiency gains and prevent most allocative inefficiency losses. They would perform the market power/efficiency trade-off implicitly, but not have an explicit, case-by-case efficiencies defense. Their efficiency approach would thus be implemented through relatively clear rules that would optimize business planning and judicial administration.

C. Efficiency's embrace by the Reagan administration.

It is hardly surprising that President Reagan's first choices to head the antitrust enforcement agencies adopted the efficiency standard. The administration's first Assistant Attorney General for Antitrust, William Baxter, was succinct and clear:

31 R. Bork, supra note 9, at 221-22.
33 R. Bork, supra note 9, at 221-22; R. Posner, supra note 10.

"The only goal of antitrust is economic efficiency." His successor, Paul McGrath, "This James C. Miller III, Reagan’s first Trade Commission, most spectacular case."

Allied appears to have been the first differences between the efficiency approach clearly were articulated and implemented decision. Allied involved an increased the Herfindahl-Hirschman industrial acid markets by as much as 4,026 (figures that normally would FTC economic assigned to the case, even if it had led to a price-affected markets a generous estimate, merger would be unlikely to lead a demand for the acids was completely.

34 Taylor, A Talk With Antitrust Chief, Mar. 4, 1982, at 28, col. 3. Baxter has a premise of our economic system is that the greatest possible efficiency in the allocate yield maximum productivity. . . . One of joining the Department has been to assure laws are enforced and interpreted to achieve the American Economy, 1982: Health, Employment and Productivity of the 5 Human Resources, 97th Cong., 2d Sess., William F. Baxter, Assistant Atty. Gen., Antitrust Justice); Draftsman’s View, supra note on Powers, Prosecutorial Discretion, and Antitrust Law, 60 TEXAS L. REV. 661, 663.
35 McGrath, Statement of Mr. McGrath, 131 (1985).
36 In re Allied Corp., FTC File 31111 ("Allied").
37 This account of Allied is taken 158, "Cost-Benefit Analysis, Miller Style
"The only goal of antitrust is economic efficiency." So was his successor, Paul McGroth. This view was also embraced by James C. Miller III, Reagan’s first Chairman of the Federal Trade Commission, most spectacularly in the Allied Corp. case.*

Allied appears to have been the first antitrust case where the differences between the efficiency and price approaches to antitrust clarity were articulated and were pivotal to the enforcement decision. Allied involved a merger that would have increased the Herfindahl-Hirschman Index (HHI) in various industrial acid markets by as much as 416, to a level of as high as 4,026 (figures that normally would suggest a challenge). The FTC economist assigned to the case, Dr. Kenneth Kelly, argued that even if the merger led to a price increase of 10% in the affected markets (a generous estimate in light of the facts) the merger would be unlikely to lead to any inefficiency since demand for the acids was completely inelastic (i.e., even if price

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* Taylor, A Talk With Antitrust Chief William Baxter, Wall St. J., Mar. 4, 1982, at 28, col. 3. Baxter has also stated: "The fundamental premise of our economic system is that the free market will achieve the greatest possible efficiency in the allocation of resources and thereby yield maximum productivity... One of my principal objectives since joining the Department has been to attempt to ensure that the antitrust laws are enforced and interpreted to achieve that goal." Productivity in the American Economy, 1982: Hearings Before the Subcomm. on Employment and Productivity of the Senate Comm. on Labor and Human Resources, 97th Cong., 2d Sess. 478 (1982) (statement of William P. Baxter, Assistant Atty. Gen., Antitrust Division, U.S. Dept. of Justice); Draftsman’s View, supra note 30, at 619-20; Separation of Powers, Prosecutorial Discretion, and the ‘Common Law’ Nature of Antitrust Law, 60 THEA L. REV. 661, 691-93 (1982).


*** In re Allied Corp., FTC File No. 811 0191 (Dec. 8, 1982) ("Allied").

rose by 10%, the quantity sold would not diminish. Thus, the 10% price rise would "only" lead to a transfer of wealth from the products’ consumers to the industrial acids’ producers, a concern that Kelly (following Bork’s lead) deemed irrelevant. Moreover, there would be some inefficiency created if the Commission forced the firms to accept a consent order mandating that Allied divest the affected assets. These costs included brokerage fees and private and FTC compliance costs. The Bureau of Economics analysis concluded that since any resulting monetary transfer from the products’ consumers to its producers was irrelevant, and since ordering the divestiture would cause inefficiency, the merger should be approved even assuming prices would rise by 10%.

The issues in Allied can be illustrated by a version of Professor Williamson’s famous diagram. The rise in price from the competitive level (Pc) to the monopoly level (Pm) normally produces both economic inefficiency (triangle I) and transfer of wealth from consumers to the firm with market power (rectangle T). Productive efficiency gains from the merger would lower the firm’s costs, from Pc down to the lower dashed line, resulting in the efficiency savings marked E. In the Allied case, area E was essentially nonexistent—since demand was inelastic within the relevant range the demand curve was vertical. If the wealth transfer from consumers to the merged firm, area T, did not count, the productive efficiency benefits from allowing the merger would mandate its approval.

Chairman Miller cast the only vote endorsing the efficiency-based recommendation not to sue. He termed any monopoly overcharges mere “revenue transfers” that should not factor into the enforcement analysis. Miller’s decision may have been

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38 Id.

39 Kelly’s novel analysis was endorsed by Bureau of Economics Director D. Robert Tollison. Tollison also would not count the wealth transfer effects of the merger. See 43 ANTITRUST & TRADE REG. REP. (BNA) 5861 (Dec. 9, 1982).


41 Muris presented a detailed analysis of the Celler-Kefauver Act and its implications for enforcement under Section 7 of the Clayton Act, Section 1 of the Sherman Act, and Section 3 of the Robinson-Patman Act. See, e.g., W.J. Landes, supra note 8, at 1.
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influenced by an article by Professor Timothy Muris (later
Miller's Director of the Bureau of Competition) that was
precisely on point. Muris argued that only efficiency should count
in merger analysis and that a merger producing a net increase in
efficiency should be allowed even if it led to significantly higher
prices to consumers for a significant period of time."

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in a detailed analysis of the legislative history of
the Celler-Kefauver Act and argued that Congress meant for mergers to
be evaluated solely in efficiency terms. See Muris, The Efficiency
Defense Under Section 7 of the Clayton Act, 30 CASE W. RES. L. REV.
381, 393-402 (1980). For a point-by-point refutation of Muris' analysis,
see Lande, supra note 8, at 132 n.256.

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The Commissioners appointed by President Carter disagreed. They all voted to reject a proposed consent order that included divestiture of the offending assets. They understood clearly the differences between the efficiency and wealth extraction approaches; Commissioner Clinton, joined by Commissioners Baily and Pertchik, concluded that "preventing such transfers is one of the goals of the antitrust laws."45

Another illustration of the Reagan administration's single-mindedness can be found in the DOJ's 1985 Vertical Restraints Guidelines.46 Its section on tying lists a large number of reasons why tying can be anticompetitive, but acknowledges no circumstances under which purely private uses of tying, even by a cartel or monopolist, could ever be anticompetitive. One inevitably leaves this section, the Guidelines' most illogical, wondering why it does not treat tying as per se illegal. The explanation for their approach undoubtedly lies in the Department's desire to equate "anticompetitive" with "inefficient"; i.e., their desire to implement the view that the only concern of antitrust is efficiency. The Department's ideological blinders must have caused them to miss or ignore the tying standard set forth in Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984) ("Hyde"). This case can best be explained as condemning certain instances of tying because of wealth transfer effects.47

43 FTC: Watch, supra note 37, at 3.
45 Id., at Sec. 3.
46 Hyde involved a contract between a firm of anesthesiologists and a hospital requiring all anesthesiological services for the hospital's patients to be performed by that firm. A competing anesthesiologist tried to obtain privileges to practice at the hospital and was denied on the basis of the contract. For a more detailed discussion see Sim, "Monopoly, 'Hyde': Rodings Put Baxter Slightly Ahead," Legal Times, Apr. 16, 1984, at 14.
47 For a more complete analysis of tying arrangements using both wealth transfer and efficiency criteria, see R. Laude, "Untangling Tying" (1988) (unpublished manuscript) (draft).

Although the majority of the value of efficient tying is that they also "may be used as a device to restrain trade... and may be used to increase the monopoly power of a firm," the Department continues to believe in the general proposition that tie-in arrangements are anticompetitive.48

While five justices' views of wealth transfers, O'Connor's pure Chicago School analysis, producer-consumer battle, hold, whether tying can ever cause "casually" occurs and that even is inefficient from the tie's economic benefit. It condemns...

48 Basic is the fact that if it is..."the assumption" that is.../12 quoting Times-Picayune (1953).
49 Hyde at 13 n. 19 (quoting Steel Corp., 394 U.S. 495, 512 n. 19 (1969)).
50 Hyde at 14 (citing United States 610. 617 (1977)).
51 Id. at 15 n. 22.
52 Id. at 36-37 (O'Connor, J.).
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only concern of antitrust is effi-
lological blinders must have caused
ying standard set forth in Jefferson
be explained as condemning cer-
of wealth transfer effects."

7, at 3.
'ter Distribution Restraints Guide-
tween a firm of anesthesiologists and
ological services for the hospital's
orm. A competing anesthesiologist
at the hospital and was denied on
more detailed discussion see Simons,
nt Baxter Slightly Ahead," Legal
s of tying arrangements using both
ria, see R. Lande, "Untangling
(preliminary draft).

Although the majority opinion in Hyde certainly appreciated
the value of efficient tying arrangements," it complained that
they also "may be used as a countag device to effect price dis-
crimination, and they may be used to force a full line of prod-
cts on the customer so as to extract more easily from him a
monopoly return on one unique product in the line." Tying
was held to be anticompetitive since it "can increase the social
costs of market power by facilitating price discrimination,
thereby increasing monopolistic profits over what they would be
absent the tie . . . ." The court explained how anti-
competitive tying can lead to undesirable extractions of wealth
by the firm with market power: "Sales of the tied item can be
used to measure demand for the tying item; purchasers with
greater needs for the tied item make larger purchases and in
effect must pay a higher price to obtain the tying item."

While five Justices' views can best be explained in terms of
wealth transfers, O'Connor's concurring opinion is close to
pure Chicago School analysis. This opinion largely ignores the
producer-consumer battle, holding that the relevant question is
whether tying can ever cause inefficiency. It argues that this
rarely occurs and that even in these unlikely circumstances the
inefficiencies from the tie must be balanced against any eco-
nomic benefits. It condemned a tying firm's "exploitation of

42 "Basic to the faith that a free economy best promotes the public
weal is—[the assumption] that the public, acting through the market's
impassionl judgment, shall allocate the Nation's resources." Hyde, at 12
(quoting Times-Picayune Co. v. United States, 343 U.S. 94, 105
(1952)).

43 Hyde at 13 n. 19 (quoting Former Enterprises v. United States
Steel Corp., 394 U.S. 495, 512 (1968) (dissenting opinion) (footnotes
omitted).

44 Hyde at 14 (citing United States Steel v. Former Enterprises, 429
U.S. 610, 617 (1977)).

45 Id. at 15 n. 23.

46 Id. at 36-37 (O'Connor, J., concurring).

47 Id. at 40-41.
consumers" and the “increase [in] the profit it can extract from . . . consumers. . . .” The opinion, however, held that even the use of tying to price discriminate is not necessarily undesirable and largely focused upon the potential efficiencies and efficiencies created by tying arrangements. It cited primarily the work of Bork and other Chicago School scholars."

Thus, the views of most Reagan administration antitrust enforcers, as well as the views of many Reagan appointed judges, are clear and pure. But while the Supreme Court has become increasingly receptive to the use of economic analysis in antitrust analysis it has never accepted the administration’s suggestion to confine antitrust to efficiency considerations.

D. The Supreme Court’s partial embrace of efficiency

The Supreme Court repeatedly has stated that when it passed the antitrust laws, “Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.” Yet, the Court rarely has found the need to state precisely what “competition” embraces. While there are older cases that are relatively explicit in Continental T.V. Inc. v. GTE Sylvania Inc. (1977) has a specific concern with the forefront of Supreme Court was followed shortly by Brown Broadcasting System Inc. v. Federal Communications Commission. Moreover, in Verizon v. customized, an increase in flexibility and efficiency in the market can be seen. However, in a recent case, the Supreme Court narrowed the scope of antitrust law in price discrimination cases, leaving room for flexibility in the market where vertical restraints are concerned. This decision reflects a continued partial embrace of efficiency in antitrust law.

53 Id. at 35.
54 Id. at 36.
55 Id. at 36 n. 4.
56 “A tie-in should be condemned only when its anticompetitive impact outweighs its contribution to efficiency.” Id. at 42.
57 Id. at 36.
cases that are relatively explicit, only since the landmark opinion in *Continental T.V.* Inc. v. *GTE Sylvania*, 433 U.S. 36 (1977) has a specific concern with efficiency consistently been at the forefront of *Supreme Court* antitrust analysis. This case was followed shortly by *Broadcast Music Inc. v. Columbia Broadcasting System Inc.*, 441 U.S. 1 (1978) (“*BMI*”) and others. Moreover, in *Reiter v. Sonotone Corp.*, 442 U.S. 330

60 For example, in *Northern Pacific Ry. v. United States*, 356 U.S. 1, 4 (1958), the Court stated:

The *Sherman Act* ... rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

See also *United States v. E.I. Du Pont de Nemours Co.*, 335 U.S. 377, 386 (1946) (“A considerable size is often essential for efficient operation in research, manufacture and distribution”); *Cottrell Constr. Co. v. Flour Mills & Steamboilers Local 100*, 421 U.S. 616, 623 (1975) (“[C]ompetition based on efficiency is a positive value that the antitrust laws strive to protect”).

61 In *Sylvania* the Court changed the standard of analysis for non-price vertical restraints from per se illegality to the rule of reason largely because of the efficiencies they generate. The Court noted that while vertical restrictions can reduce competition in a number of ways:

Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of its products. These “redeeming virtues” are implicit in every decision sustaining vertical restrictions under the rule of reason. Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers. Id. at 54-55.

42 *BMI* justified a blanket licensing provision because it “reduces cost” (id. at 11), would “serve a market need” (id. at 17 n. 27), obviates certain transaction costs (id.), and because “a bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established.” *Id.* The Court inquired whether the purpose of the practice was:

(Footnote continued on following page)
(1979), Chief Justice Burger stated that the Sherman Act’s legislative debates “suggest that Congress designed the Sherman Act as a ‘consumer welfare prescription’” (citing R. Bork, The ANTITRUST PARADOX 66 (1978)). Of course, Bork has asserted that the “consumer welfare prescription” embodied in the antitrust laws is limited to a concern with economic efficiency.45

As the Court’s subsequent discussion makes clear, however, it almost certainly was unaware that “consumer welfare,” as Bork defines it, has little or nothing to do with the welfare of consumers. Moreover, Reiter implies that the antitrust laws contain wealth transfer goals and a strong preference for consumers:

It is in the sound commercial interests of the retail purveyors of goods and services to obtain the lowest price possible within the framework of our competitive private enterprise system. . . . Here, where petitioner alleges a wrong because the price of the heirs inflates by reason of response alleged an injury in her ‘price’ was passed as a means of price fixing.46

Justice O’Connor’s concurrence that the view that antitrust and economic efficiency may have votes. But, for the present, restrict antitrust to efficiency cases has shown a trend from concern with the efficiency that the Chicago victory is not complete.

II. The “counterrevolution”

A. Analyzing the legislative history

Many older cases imply that antitrust laws is to prevent the formal exercise of market power.47 Yet, although many

45 442 U.S. at 319-43. This is an earlier cases implying wealth transfer:
Albrecht v. Herald Co., 390 U.S. 115 (1968), and that it was antitrust law to “atime” by dealers who had monopoly power. U.S. 1, 263 (1976). Justice White
ring in part and dissenting in part was urged in preventing monopoly power of the consumer.”

46 See, e.g., Hanover Shoe v. United States, 420 F.2d 489 (1967); Brandwine Corp. v. United
275 (1966); United States v. 305, 309 n. 9 (1956) (condemns Associated General Contractors v. (“the Sherman Act was enacted price competition . . . ”).
ted that the Sherman Act's legislation designed the Sherman Act's (citing Bork, THE...) 48. Of course, Bork has asserted scription' embodied in the anti-
s with economic efficiency. 49 Discussion makes clear, however, 49. A strong preference for con-
the antitrust laws can- 50 have the welfare of of the retail purchasers of the lowest price possible within the private enterprise system. . . . Here,

brute that the practice of retailing makes efficient, by reflecting a competitive market that is not only lower prices, but also 5. In City of Lafayette v. Louisiana 408 (1978), the Court commented on the rational and efficient flexility of free markets which the antitrust laws is thought to prevent. Gypsum, 438 U.S. 422, 441 n. 16 note 14 increase economic efficiency and 56, competitive."

where petitioner alleges a wrongful deprivation policy of her money because the price of the hearing aid she bought was artificially inflated by reason of respondents' anticompetitive conduct, she has alleged an injury to her 'property'. . . . The treble-damages remedy was passed as a means of protecting consumers from overcharges resulting from price fixing. 57

Justice O'Connor's concurring opinion in Hyde demonstrates that the view that antitrust should only be concerned with economic efficiency may have as many as four Supreme Court votes. But, for the present, a majority appears reluctant to restrict antitrust to efficiency. This cursory overview of recent cases has shown a trend from a concern with competition to a concern with the efficiency that results from competition. But the Chicagost victory is not complete.

II. The "counterrevolution" begins

A. Analyzing the legislative history correctly

Many older cases imply that one purpose of the antitrust laws is to prevent the formation of market power that, when exercised, transfers wealth from consumers to firms with market power. Yet, although many doubted Bork's legislative history

55 442 U.S. at 339-43. This language accords with statements from earlier cases implying wealth transfer principles. For example, in Albrecht v. Herald Co., 390 U.S. 145, 153 (1964), the Court implied that it was an antitrust goal to "protect the public from price gouging by dealers who had monopoly power. . . ." In Buckley v. Valeo, 424 U.S. 1, 263 (1976), Justice White, in dicta in a separate opinion concurring in part and dissenting in part, stated that "it is an antitrust law that is aimed as preventing monopoly and price fixing, which gouge the consumer."

analysis," well over a decade passed before Bork's conclusions were challenged in detail."

Bork had correctly noted that the Sherman Act's legislative history is replete with concern over the higher prices facing consumers as a result of monopoly pricing. But he was mistaken that Congressional concern fairly can be equated to a desire to avoid economic inefficiency. None of the quotations Bork presents suggest that Congress was even aware that supra-competitive prices lead to economic efficiency. Even leading economists of the day had only a tenuous understanding of this concept and, as conservative Nobel Laureate George Stigler reminds us, no economist had any significant effect on the Sherman Act's passage. Not surprisingly, Bork's hundreds of citations to the 1890 debates fail to single out any one Congressmen knew that monopolies for exactly this reason were being regulated.

Put simply, Congress did not care about efficiency.

Congress was well aware, however, that wealth from consumers to producers did not flow. Economic historians, such as Scherer, have long suggested that in the two decades before 1890, the owners of trusts earned enormous profits from the consumer, but very little from the producer, "profits that were all too often the result of fees, not the result of economic efficiency," in his words. In the 1890s, not only did Congressmen Wilson complain that the farmer on the one hand and the consumer on the other were kept in the dark by the trusts and monopolies, but Representative Fitbitman declared that it was "a crying shame" the people through "their" Representatives that monopolistic pricing was "that monopoly profit that is the source of which is to extort" from the public.

Scherer, supra note 70, observed that "[t]he Sherman Act was well passed in an era, when economists as a group were in favor of competition. The trusts were the focus of the debate." But even in regulatory commissions the focus was on how to avoid the abuses of the Sherman Act, not on whether or not the Sherman Act would lead to greater overall efficiency.

The Act's original purpose was to keep the Directory, the Federal Trade Commission, from forming monopolies, not to regulate the prices charged by existing monopolies. No one at the time thought that the Sherman Act would lead to greater overall efficiency. Yet, even today, no one in Government or in the private sector seriously considers the Act's impact on efficiency. The 1890s debates focused on the question of whether the Sherman Act should be used to break up trusts, not the question of whether the Sherman Act would lead to greater economy.
citations to the 1890 debates fail to contain evidence that even a single Congressman knew that monopoly pricing is inefficient. Put simply, Congress did not condemn the trusts for a lack of efficiency.

Congress was well aware, however, that higher prices transferred wealth from consumers to firms with market power. The debates strongly suggest that Congress condemned trusts and monopolies for exactly this reason.2 For example, Senator Sherman termed monopolistic overcharges "extortion which makes the people poor," and "extorted wealth."3 Congressman Coke referred to the overcharges as "robbery."4 Representative Heard declared that the trusts, "without rendering the slightest equivalent," have "stolen untold millions from the people."5 Congressman Wilson complained that a particular trust "robs the farmer on the one hand and the consumer on the other."6 Representative Fithian declared that the trusts were "impovertishing" the people through "robbery."7 Senator Hoar declared that monopolistic pricing was "a transaction the direct purpose of which is to extort from the community... wealth which

observed that "[t]he Sherman Act was framed and debated in the pre-expert era, when economists as a professional group were not directly consulted by legislators. But even if they had been, they would have given mixed and uncertain advice." R. Hofstadter, The Pyramidal Style in American Politics and Other Essays 199-200 (1965).

2 This paper only analyzes the legislative history of the Sherman Act. For a similar analysis of the legislative history of the Clayton Act, Federal Trade Commission Act, and Celler-Kefauver Act, demonstrating that these laws' framers cared more about wealth transfers than efficiency, see Lande, supra note 8.

3 21 Cong. Rec. 2461 (1890).

4 Id. at 2614.

5 Id. at 4101.

6 Id. at 4098.

7 Id. at 4103 (Fithian was reading, with apparent approval, a letter from a constituent).
ought to be generally diffused over the whole community." Senator George complained: "They aggregate to themselves great enormous wealth by extortion which makes the people poor."

These value-laden condemnations of the wealth extraction effects of monopoly pricing show a much broader concern than economic efficiency. A fair reading of the Sherman Act’s legislative history reveals that it is largely a consumer protection statute. Congress’ primary reason for passing the antitrust laws was to prevent consumers from paying more than the competitive level for their goods and services. Bork tried to make the stockholders of monopolies and cartels into honorary consumers; the consumers that Congress wanted to protect included only purchases of goods and services."

B. Triangles and rectangles disentangled

Despite the common sense that truly underlay Congressional intent it is not difficult to understand how Bork’s story gained such widespread acceptance. Perhaps the most important reason was his clever but deceptive selection of his key term, "consumer welfare," as the lodestar of antitrust. Few people realize how he counterintuitively defined it to exclude a concern with the welfare of ordinary consumers. Bork succeeded in promot-

71 Id. at 2722.
72 Id. at 1768. Senator George continued: "Then making this extorted wealth the means of further extortion from their unfortunate victims, the people of the United States, they pursue unmercifully, intempered by law . . . . [They] have extorted their ill-gotten gains from the poor and then used the money thus obtained to complete the ruin of the people." Id. Senator George complained that consumers were being robbed. Id. at 3150. He also complained that the trusts were able to "fleece and rob the people." Id.
73 This article asserts that the wealth transfer standard should govern antitrust because Congress has so ordered, not because it is the superior approach. That is the subject of another article that the author is working on.

ling this interpretation largely by complex; few understand that allocative inefficiency and a threat to the monopolist. As Bork transmutes triangles and rectangles and then twists their meaning into "consumer welfare," few discover that he is doing so. Even the Supreme Court appears to have been sorely amused by the confusion. See Lande, Just Where Does Judge Bork’s Antitrust Activity? N.Y. L.J., Sept. 1, 1981, supra note 8.

81 I have argued elsewhere that Bork’s personal interest is in his original area of concentration: a judicial activist for his ideological views and those of his champions. Bork has no interest in antitrust law. His work for his ideological views and his personal philosophy has been, and continues to be, a primary goal in his judicial work. See Lande, Just Where Does Judge Bork’s Antitrust Activity? N.Y. L.J., Sept. 1, 1981, supra note 8.
82 Recall the discussion of Relevant Market. Bork observed that the argument for monopoly is that consumers from monopoly externalities consumers would gain from monopoly. He noted that monopoly welfare gains might come out of consumer welfare as a divorce. Bork, supra note 8. Bork also referred to "monopoly externality" and "consumers welfare might seem to be identical with monopoly effects of economic activity and have nothing to do with antitrust. In addition, Bork discussed § 1 of the Sherman Act, noting his belief that Congress intended the Sherman Act to condemn "all that bill declared illegal contracts, agreements, trusts or monopolies in commerce, or which tend to create monopoly in commerce, or which tend to advance commerce." Id. at 15 (citation o
ing this interpretation largely because the subject is extremely complex; few understand that monopoly prices lead to both allocative inefficiency and a transfer of wealth from consumers to the monopolist. As Bork translated legislative intent into triangles and rectangles and then back to an appealing term like "consumer welfare," few discovered what he had really done. Even the Supreme Court appears to have been confused. Perhaps the clearest illustration of the complexity of the issues is that Bork, in his landmark legislative history analysis, twice appeared to suggest that the antitrust laws are concerned with wealth transfers from consumers to firms with market power.

81 I have argued elsewhere that Bork's interpretation of Congressional intent in his original area of specialization demonstrates that he is a judicial activist for his ideological causes. Contrary to his protestations and those of his champions, Bork selectively interprets Congressional will to suit his own agenda; he does not defer to a Congress that had different goals. Bork saves his "strict constructionist" view of a judge's role for instances when this posture is consistent with his preferred ends. In other cases he finds a way to reach the result demanded by his ideology and denounces contrary conclusions as "unconstitutional." See Laude, Just Where Does Judge Bork Stand?: An Anti-Antitrust Activist? Nat'l., L.J., Sept. 7, 1987, at 13 col. 4. Most of this article's discussions of Bork's views are taken from this piece or from Laude, supra note 8.

82 Recall the discussion of Reiter, supra Section II(D).

Bork observed that the argument in Congress for a role against monopolistic mergers "derives in large measure from a desire to protect consumers from monopoly extortion... Where producer and consumer welfare might come into conflict... Congress chose consumer welfare as decisive." Bork, supra note 8, at 11. A concern with "monopoly extortion" and "consumer," as opposed to "producer" welfare would seem to be identical to a concern with the income distribution effects of economic activity that Bork repeatedly said were to have nothing to do with antitrust.

In addition, Bork discussed § 1 of Sherman's bill in a way that indicated his belief that Congress employed price, not efficiency, as its standard. "[T]hat bill declared illegal two classes of arrangements, contracts, agreements, trusts or combinations: (1) those made with a view, or which tend, to prevent full and free competition, and (2) those designed, or which tend, to advance the cost to consumer of articles of commerce." id. at 15 (citation omitted) (emphasis added). Bork ana-
If even Bork can use the concepts imprecisely it is not surprising so many were confused.

C. Adminstrability counterarguments

The efficiency approach, if carried out through clearly designed rules (such as well specified merger guidelines rather than the ad hoc case-by-case analysis used during much of the Reagan administration), would indeed prove relatively more workable than a "big is bad, small is good" approach. But an efficiency orientation is certainly no easier to administer and no more predictable than a price (that is, a wealth transfer) approach. Under each the required quantities—two prediction of both market power and efficiencies—are virtually identical. From a theoretical perspective both involve ascertaining virtually the same triangles and rectangles. From a practical perspective, both are often unworkable on a case-by-case basis since the required quantities are generally unknowable. Both necessitate implementation through general presumptions or rules. But the two approaches lead to very different rules.  

The language in the following manner. "Sherman employed these two criteria of illegality in every measure be presented to the Senate. The first test, which subjects all firms to market forces, is hardly a means of preserving social values that consumers are not willing to pay for. If it can be reconciled only with a consumer-welfare policy. The second test is even more explicit. The standards of illegality is raising prices to consumers. There were no exceptions. Sherman wanted the courts not merely to be influenced by the consumer interest but to be controlled completely by it."  


R. Bork, supra note 9, at 152-26.

Bork wrote that mergers should be evaluated solely in terms of efficiency effects. He would evaluate mergers that gave rise both to allo-

Consider two differences that federal antitrust enforcers attempt to "antitrust law is being forced to pay monopoly etc. significantly more aggressive antitrust.

The first would be the undramatic reasons. Merger Guidelines' numerical three consider the diagram and the merger enforcement discussed in Sec. We formulate merger guidelines base, and suppose we believe that desirability from most mergers outweighs all occurs on the average when a merger of 200 to a level of 2000 (figures cut all levels used by the Department of Justice lower levels written into the merger. Now, consider the effect of also analyzing the net effect of the merger. As these effects are almost always large relative to efficiency effects. Incorporation of these transfers would produce significant differences than would the efficiency approach and would not be affected.

More dramatically, consider a problem, a single, monopsony that would raise price.
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standard actually requires less ini-
. Fisher, F. Johnson & R. Lands,
(Right: When Will Efficiencies
. 1983) (unpublished manuscript)

26.
1d be evaluated solely in terms of
mergers that gave rise both to allo-

cative inefficiency (from higher price) and productive efficiency gains
(from, for example, economies of scale) by setting the thresholds of ille-
gality in the merger guidelines high enough to allow most productive
efficiency gains and prevent most allocative inefficiency losses. But be
would not allow a generalized efficiencies defense. R. Box, supra note
7, at 221-22.

87 For additional differences, see Sims & Lands. The End of
Antitrust—or a New Beginning?, 71 ANTITRUST BULL., 301, 316-18 (1986).

See discussion infra at Section III(B).

9 The particulars of the tradeoff calculations are extremely com-
plex. See Fisher, Lands & Vandenb., Afterword: Could a Merger Lead

Consider two differences that would arise if a new set of
federal antitrust enforcers attempted to use a supposedly
"unconstitutional" antitrust law to prevent consumers from
being forced to pay monopoly extortion." Both would lead to
significantly more aggressive antitrust enforcement.

The first would be the undramatic lowering of the DOJ
Merger Guidelines' numerical threshold levels. For illustration,
reconsider the diagram and the Williamsonian approach to
merger enforcement discussed in Section I(C), supra. Suppose
we formulate merger guidelines based only on the efficiency cri-
teria, and suppose we believe that the point where the ineffi-
ciencies from most mergers outweigh their efficiency benefits
occurs on the average when a merger produces an HHI increase
of 200 to a level of 2000 (figures closer to the current "practi-
cal" levels used by the Department of Justice, despite the nomi-
nally lower levels written into the 1984 Merger Guidelines).
Now, consider the effect of also incorporating the wealth trans-
fer effects of the merger. As the diagram illustrates, these
effects are almost always large relative to the accompanying
inefficiency effects. Incorporation of Congress' intent to count
these transfers would produce significantly lower merger guide-
lines than would the efficiency approach. But administrability
would not be affected.

More dramatically, consider a merger that produced an effi-
cient monopolist that would raise prices significantly (recall the
Allied case, supra, Section I(C). The efficiency approach would ask only whether the merger produced (net) efficiencies. If so, one would approve the merger even though all the efficiency savings from the merger would accrue to the monopolist while consumers would be forced to pay significantly higher prices. By contrast, an "unconstitutional" merger policy truly based upon Congressional intent would block such mergers. A "wealth transfer" or "price to consumer" approach to merger enforcement would ask a different question: is the merger likely to lead to significantly higher prices for consumers? If the answer is "yes" the merger would be blocked, even though this would prevent the formation of an efficient monopoly. Congress cared more about protecting consumers from monopoly extortion than obtaining the "benefits" of allowing efficient monopolies. Again, the result would be different, but it would be at least equally administrable.

Ironically, while the efficiency school's founders' concern for predictability and objective administrability was admirable, some of their disciples in the Reagan administration appear not to have fully grasped their teachers' message. Perhaps the disciples focused too much on the technical aspects of Chicago School economics at the expense of broader Chicago School philosophical concerns. For example, the 1984 Merger Guidelines in effect announce that the Department will listen to any type of efficiency claim and give it any weight the Department deems appropriate. This approach to merger enforcement inflicts administrability and business planning havoc comparable to that committed by the social and political approach the Chicagoans denounced on predictability grounds. Thus, even though the efficiency school gained many adherents because of its promise of superior administration, its practical implementation cannot be shown to be superior.

III. The start of efficiency's decline

A. The "counterrevolution" gains momentum

It is not surprising that many established moderate and liberal antitrust scholars quickly endorsed the idea that an important goal of antitrust is to protect consumers from monopoly overcharges. It would have been startling if scholars such as Professors Adams, Brodie, Flynn, Fox, Pifatsky, Schwartz or L. Sullivan rejected the idea. Of perhaps greater significance has been this view's adoption by antitrust's most influential "centrist" academic and its embrace by an outstanding group of relatively young scholars who comprise a large portion of the emerging generation of influential antitrust academics.

In 1980 Professor Areeda appeared to endorse the view that economic efficiency should be the only factor in antitrust analysis. He stated more recently that a broader perspective was appropriate, observing that even if a hypotenital, perfectly discriminating cartel caused no inefficiency:

[It] is taking from some people and giving to the other people more than competition would. I regard this as an anticompetitive distortion. "Consumer welfare" embraces what individual consumers are entitled to expect from a competitive economy. If the efficiency extemists insist that only their definition of consumer welfare is recognized by economists, we would answer that ours is clearly recognized by the statute. The legislative history of the Sherman Act is not clear on much but it is clear on this."

Many younger scholars concur. Professor Hovenkamp, a self-described Chicago School "fellow traveler" for some

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9 Guidelines (1944), 2 Trade Reg. R. 108; other examples of how the current "efficiency" analysis has been employed, see Sios & Lande, "DOJ

II. Board and Congress. Since Areeda testified in favor of Bork's nomination to the Supreme Court it would be interesting to know whether Bork was one of the "efficiency extemists" to whom Areeda referred.

3 "Younger" is used as a relative term to include open-minded thinkers even if they have some gray hair.
time. " Now explicitly embraces wealth transfers as an important concern of antitrust. 94 Professors Campbell, 95 Jorde, 96 Kaplow, 97 Kovacic, 98 Krattenmaker, 99 Ross, 100 Salop, 101 T. Sullivan, 102


95 Hovenkamp recently addressed the issue of the legislative intent behind the antitrust laws and concluded that efficiency was not the primary concern of the Clayton Act, the Robinson-Patman Act or the Celler-Kefauver Act. Id. at 250. He termed Bork's Sherman Act legislative history analysis the strongest argument in favor of efficiency but concluded that "Bork's work has been called into question by subsequent scholarship showing that . . . Congress had no real concept of efficiency and was really concerned with protecting consumers from unfavorable wealth transfers." Id.


99 See Kovacic's article in this volume.


102 See Krattenmaker & Salop, supra note 100.

Wiley and many others have come to similar conclusions. Unlike the earlier list of more established scholars, each views antitrust questions mostly or entirely in economic terms. But their economic embraces more than efficiency.

The State Attorneys General, rapidly becoming an important factor in the antitrust world, agree. They vigorously endorsed wealth transfers as the primary concern of merger policy in their 1986 Horizontal Merger Guidelines. And, although courts still generally do not focus upon the differences between the approaches, some are beginning to recognize that Bork’s definition of “consumer welfare” is too narrow or is in doubt.


105 "When a firm or firms exercise market power by profitably maintaining prices above competitive levels for a significant period of time a transfer of wealth from consumers to those firms occurs. This transfer of wealth is the major evil sought to be addressed by section 7,” Horizontal Merger Guidelines of the National Association of Attorneys General, 52 Special Supp. Antitrust & Trade Reg. (BNA) No. 1306, at S:4 (March 12, 1987) (footnotes omitted).

106 See Judge Wald’s concurrence to Judge Bork’s opinion in Rothkr Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210, 231, n. 3 (D.C Cir. 1986) (“Even if one thinks that the Court intended to exclude all other considerations, the phrase ‘consumer welfare’ surely includes more than simple economic efficiency”). The Court in Ingle & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1032 (9th Cir. 1981), cert. denied, 459 U.S. 825 (1982), shrewdly observed:

Most commentators who have attempted to develop economic tests of predatory pricing have assumed that the goal of these tests should be the efficient allocation of society’s resources, or, in the language of welfare economics, the improvement of allocative efficiency. . . . The relevance of the economic tests so developed, however, must then depend in large part on whether allocative efficiency is a primary goal of the antitrust laws. . . . [In our opinion] the search for allocative efficiency may lead one to accept conduct that is plainly anticompetitive.

B. The Reagan administration's no longer solid front

Many Reagans Administration antitrust officials remain faithful to Baxter and Miller's legacy. For example, the current Assistant Attorney General for Antitrust, Charles F. Rule, confidently asserts that the only goal of the antitrust laws is to maximize economic efficiency. He affirmatively declines to enforce the antitrust laws in a manner that favors consumers over cartels, noting: "[i]t is not necessarily clear who—the consumer or the producer—is more worthy of the surplus generated by a particular transaction." Rule combatively opines that "all too often" those not sharing his beliefs are engaging in "demagoguery" and asserts that including values other than efficiency in antitrust "is a prescription for tyranny." Federal Trade Commission Chairman Daniel Oliver uses equally strident language. But Oliver's statements about the

108 FTC Commissioner Calvani, for example, strongly maintains that the only proper concern of antitrust is economic efficiency. See Calvani, Consumer Welfare Is Prime Objective of Antitrust, Legal Times, Dec. 24/31, 1984, at 14 col. 1.


110 Id. at 4-5.

111 Id. at 1.

112 Id. at 9.

113 In a recent interview Chairman Oliver stated that under the administration's approach to evaluating mergers and acquisitions "the crucial question is whether such transactions will substantially lessen competition—and hence injure consumers—by increasing price or reducing output." Statement of Chairman Oliver, 57 Antitrust L.J., 235, 237 (1988). Oliver then denounced "counter-revolutionaries" (id. at 241) who advocate "nonlearning—antitrust laws as a mechanism to prevent wealth transfers." Id. at 242 (quoting Professor Rose with approval) (citation omitted). Oliver also denounced "[t]he confiscatory, redistributive, and wealth-destroying policies of yesterday's [antitrust enforcement]." Id. at 243.

(Footnote continued on following page)
subject contradict one another; either he misunderstands the price/efficiency distinction or deliberately confuses it in an attempt to make it appear that he cares about protecting consumers from monopoly extortion.\footnote{116}

Further evidence of a "counterrevolution" is, however, provided by the Reagan Administration's no longer solid support for a pure efficiency model. This is prominently evidenced by the Administration's proposed Merger Modernization Act of 1986. The Administration proposed changing Section 7's ban against certain mergers the effect of which may be "substantially to lessen competition, or to tend to create a monopoly," to a requirement that forbidden mergers "increase the ability to exercise market power."\footnote{116} The Bill adds: "For the purposes of this section, the ability to exercise market power is defined as the ability of one or more firms profitably to maintain prices above competitive levels for a significant period of time."\footnote{116} This is virtually the equivalent of a wealth transfer standard since any merger that leads to higher prices to consumers will be blocked, regardless of whether it produces net efficiencies. Effi-

\footnote{Footnote continued from previous page}
ciencies "deriving from the acquisition" are relevant only insofar as they affect the firm's ability to increase prices."

It is, of course, unclear the extent to which the Administration's merger proposal represented its preferred solution, a concession to political reality, or a recognition that in many circumstances an efficiency standard will provide less clarity for

117 Id. Interestingly, both the 1982 and 1984 Merger Guidelines are ambiguous as to whether more than economic efficiency will count in the Department's merger analysis, merely noting that a merger can cause both: "[T]he result of market power is a transfer of wealth from buyers to sellers and a misallocation of resources." U.S. Dept of Justice Merger Guidelines 1982, 2 Trade Reg. Rep. (CCH) ¶ 4501 (footnote omitted); 1984 Merger Guidelines, supra note 90 at ¶ 4491.

118 A strong supporter of such legislation, former Assistant Attorney General Douglas H. Ginsburg, noted: Under the Merger Modernization Act [of 1988], an efficiency-enhancing but price-increasing merger could be addressed. As a matter of enforcement discretion, however, I would have been unlikely, as Assistant Attorney General, to have opposed a merger that was demonstrably efficient. At the same time, I hasten to point out, however, that I did not find the efficiencies claim persuasive in any of the admittedly few merger reviews where the point was argued... [However,] particularly in view of the infrequency with which efficiency showings can convincingly be made on behalf of a proposed merger, a price-driven standard for mergers would do more to avoid lost efficiencies through over-enforcement (of the Ve's, Brown, or PNB sort) than could possibly be lost by the occasional blocking of a merger that would be both price and efficiency enhancing.

Letter from Judge Douglas H. Ginsburg to Robert H. Lande (Feb. 3, 1988). Ginsburg cautions that one carefully should observe the distinction "between the interpretation of present law and a proposal for change, such as the Merger Modernization Act." Id.

119 Neither the Antitrust Division nor the FTC has ever publicly stated that it refused to challenge a merger, despite the expectation of higher prices, because of anticipated efficiencies. They are not so foolish—imagine the reaction in Congress if either the FTC or the Antitrust Division announced it would not challenge a merger likely to lead to significantly higher prices for consumers because the resulting monopoly would be efficient!
businesses and will be harder to administer. But it matters little.

There is even an indication that Judge Easterbrook may be starting to mellow. A Reagan appointee, Judge Easterbrook has long been a respected advisor and mentor to many Reagan Administration antitrust officials and one of the most influential members of antitrust's efficiency school. He recently wrote that when Congress passed the Sherman Act:

The choice they saw was between leaving consumers at the mercy of trusts and authorizing the judges to protect consumers. However you slice the legislative history, the dominant theme is the protection of consumers from overcharges. 10

120 For example, Posner admits that in certain circumstances efficiency is too difficult to measure. He advocate instead using an output test. See, e.g., Posner, The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality, 48 U. CHICAGO L. REV. 6, 21 (1981). Since restricted output causes supracompetitive prices, an output standard is very similar to a prescription against practices that lead to higher prices for consumers.

There are, of course, some differences between an output standard and a wealth transfer standard. In cases where output is completely inelastic, such as in Allied, discussed supra, Section II(C), the two standards would lead to different results. In addition, Posner would not appear to condemn Arecida's hypotethical, perfectly price-discriminating cartel since such a cartel would not reduce output.

An output standard also was recently proposed by the Director of the FTC's Office of Policy Development, Nolan Clark. He argues that the Sherman Act's prescription against certain practices "in restraint of trade" (26 Stat. 209 (1890) (current version at 15 U.S.C. 1 (1976)) was meant to constitute a ban against practices that restrain output (since trade is only restrained when output decreases). Clark contrasts his proposal with an efficiency standard and explains why reduced output and reduced efficiency are not identical. See Clark, Antitrust Comes Full Circle: The Return to the Curtailment Standard, 38 YALE L. REV. 1125, 1168-70 (1985).


Easterbrook then asserted:

This turns out to be the same program as one based on "efficiency." There are differences at the margins... but the differences are not very important... especially because [in the long run consumers] gain most from a policy that emphasized allocative and productive efficiency.123

Easterbrook thus appears to concede that the wealth transfer view of the antitrust laws' legislative histories is more accurate, but argues that it leads to conclusions that differ only slightly from the efficiency approach.

If the gap between the Chicago School and the adherents of a wealth transfer approach has narrowed to an acceptance of the latter perspective with disagreement over how important it will be for antitrust, this article's thrust has been overly cautious. Antitrust soon will march in a new direction. Only after we have worked out these differences will we truly know where its destination lies.

This is not the place to analyze either the magnitude of the differences between the two approaches or the practical effects of these differences on various types of antitrust cases. But it is noteworthy that the inefficiency effects of market power are surprisingly modest.124 Easterbrook recently estimated that they

123 Id. at 1703. It is probably true that the wealth transfer and efficiency approaches differ more in the short run. Long run and indirect effects are more difficult to predict.

124 "The first estimate of the loss to the American economy caused by monopolistic misallocations was presented by Arnold Harberger in 1954. If the results of Harberger's estimates were expressed in terms of 1982 dollars, they would be equal to approximately $12.00 per person per year. . . . It is hardly surprising that other economists arrive at different estimates, some of which are lower than Harberger's, while others are larger (some even by a factor of 50). Scherer's review of the evidence puts the figure 'between approximately $50 and $200 per person per year' with estimates nearer the lower bound inspiring more confidence than those on the higher side... "The more important question is what the magnitude of this loss would be if there were no antitrust laws. To act as both deterrent and corrective systems, it may be impossible, however, to formulate a meaningful estimate of this figure." Lande, supra note 8, at 73 n. 32.
are half as large as the transfer effects, a figure that is probably an overestimate. Even if we accept his estimate, however, we must conclude that "what's wrong" with market power is approximately trebled when the transfer is also included—a result bound to lead to many significantly tighter antitrust rules.

At least two types of areas will be affected. First, antitrust rules based upon a balance of procompetitive and anticompetitive effects will shift and prescribe much more behavior. Horizontal merger guidelines, for example, would be significantly lower if the wealth transfer effects of mergers also are included. Second, practices without significant inefficiency effects could become illegal if they are used by firms with market power to extract wealth from consumers. Areda's perfectly price-discriminating cartel is one such example. As the discussion supra Section I(C) suggests, some uses of tying or other vertical restraints to price discriminate might be illegal only under a wealth transfer view. And the Allied discussion, supra Section I(C), shows that a practice in an industry with relatively inelastic demand might also be treated very differently if wealth transfers are considered.

123 Easterbrook, Panel Discussion, 55 ANTITRUST L.J. 123, 126 (1986).
125 This is only an approximation, and probably an underestimate of the differences. One weighing approach would be to give wealth transfers equal weight to efficiency effects in the tradeoff calculations. Another approach, probably more in line with Congressional intent, would forbid any merger likely to lead to a significant extraction of consumers' surplus by firms with market power. The latter approach would use price to consumers as its benchmark. In cases involving price discrimination, however, it might be more meaningful to focus upon wealth transfers than consumer prices.
126 Fisher & Lande, supra note 126, passim.
127 See also Lande, Untangling Tying (1988) (unpublished manuscript) (draft).
IV. The Future

Robert Bork's Supreme Court nomination was not rejected because he refused to embrace more than efficiency in antitrust analysis. But his rejection might portend that his antitrust views also will come to be rejected.

When the efficiency-only viewpoint replaced the social/political perspective many in the antitrust community refused to convert. Some refused out of inertia, but most probably balked at supporting Bork's illogical reading of the antitrust laws' legislative histories.

We appear to be at another watershed, one which may split the antitrust community partly along generational lines. Relatively young, intellectually honest conservatives will tend to join moderates and liberals of all ages in accepting the new wisdom. Some will do so by admitting their past errors, others will attempt to cloud the differences and their past positions. But many in the efficiency school will be more rigid and close-minded, especially those who have invested years or decades believing in its exclusivity. The future of antitrust will leave them behind, but because of their strength what should be a peaceful transition will instead be a lengthy struggle.

Like the previous round, this contest probably will be influenced not only by the actual intentions of the Congresses that enacted the antitrust laws but by a Presidential election as well. If conservatives are placed in charge of the federal antitrust enforcement agencies following the 1988 elections, the efficiency standard will die much more slowly. It is even possible that a President Bush could appoint several justices to the Supreme Court who agreed with his school would reign for the

If the Democrats capture of both houses of Congress the more rapid. On the efficiency Supreme Court justices, may a large percentage of economists generally, conservatives would be other Supreme Court be influential congressmen, the and at least a few interests will also be growing among academics.

In many areas of the law the past generation, how aggressive antitrust scholars have effects of an efficiency-oriented successfully advocated it, for it is economics and efficiency return to Brown Shoe* a of many of the reasons why a many of the reasons why a large and effect is not unafflicted by the fall of the practical ramifications are just beginning to be with lawyers and economists, capacity and make compelling judges and justices. These and work symbolically with antitrust enforcers and press antitrust.

* Terms like "conservative" have been used arbitrarily and with license throughout this article. It is, of course, incorrect to view "conservatives" as opposed to vigorous antitrust enforcement and gone in favor. See, e.g., L. THURSTON, THE ZERO-SUM SOCIETY at 146-50 (1980). It is also incorrect to assume that the election of George Bush in 1988 will produce Reagan-era antitrust enforcement since many Republicans favor strong antitrust enforcement.

1 For example, Fred P. for plaintiffs than defendants, 1977 Airline Price Study. Lawyers like to transfer concept in litigation.

Brown Shoe Co. v. United States
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Court who agreed with Bork on the issue and the efficiency school would reign for the foreseeable future.

If the Democrats capture the White House and retain control of both houses of Congress, however, the transition will be much more rapid. On the efficiency side probably would be several Supreme Court justices, many Reagan-appointed federal judges, a large percentage of established antitrust academics, and a generally conservative defense bar. On the consumers' side would be other Supreme Court justices and lower court judges, many influential congressmen, the state and federal antitrust enforcers, and at least a few increasingly astute plaintiffs' lawyers. There will also be growing pressure from an increasing number of academics.

In many areas of the law academics have little impact. During the past generation, however, an influential group of articulate, aggressive antitrust scholars have developed and delineated the effects of an efficiency-oriented view of antitrust policy and have successfully advocated its implementation. The future of antitrust is economics and efficiency will always be important. We will not return to Browning Shoe
antitrust for the foreseeable future, and many of the reasons why antitrust has long been in decline will be unaffected by the fall of efficiency's antitrust monopoly. But the practical ramifications of a price (or wealth transfer) standard area just beginning to be worked out. Aggressive academics, both lawyers and economists, can be expected to rise to the opportunity and make compelling consumerist arguments to open-minded judges and justices. These "young Turks" will provide ideas for and work symbiotically with consumer-oriented federal and state antitrust enforcers and private plaintiffs for a revitalization of antitrust.

For example, Fred Fortner, who usually represents more antitrust plaintiffs than defendants, underwrote most of the expenses for the 1987 Airline House Conference that called for more vigorous antitrust enforcement. Lawyers like Fortner can be expected to use the wealth transfer concept in litigation whenever so doing will benefit their clients.


For additional analysis, see Sims & Lande, supra note 87.