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# Proving the Obvious: The Antitrust Laws Were Passed to Protect Consumers (Not Just to Increase Efficiency)

by  
ROBERT H. LANDE\*

Sometimes an entire field goes astray. When its dominant members make a major mistake, an opportunity arises for someone to say, “The emperor has no clothes.” This is what happened to the antitrust world during much of the 1970s and 1980s. These circumstances gave me the opening and motivation to write the article that appeared in the *Hastings Law Journal* in 1982 (*Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, hereafter *Wealth Transfers*).<sup>1</sup>

In the early 1980s, the Chicago School was firmly in control of the antitrust world. The heads of both federal enforcement agencies were proud disciples, as were an increasing number of federal judges. All based their beliefs upon the Chicago School idea that only one value was an allowable goal of antitrust policy. As explained by then-Professor Robert Bork, a leading Chicago School theorist, “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?

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\* Venable Professor of Law, University of Baltimore School of Law. The author is grateful to Neil W. Averitt, Albert A. Foer and James D. Hurwitz for extremely helpful suggestions and to Elise Balkin and Kelly Phillips for excellent research assistance. All remaining errors are the author's.

1. See Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 *Hastings L.J.* 65 (1982). This article grew out of an early assignment I received as a member of the Planning Office of the Bureau of Competition of the Federal Trade Commission in 1978. My boss, Jack Kirkwood, described an earlier view of antitrust based upon social and political values, a distrust of the political power of big business, and a love of small business. He also explained how it was being replaced by the nascent Chicago School view that the sole goal of antitrust was to enhance economic efficiency. He asked me to read the original legislative histories of the antitrust laws and determine which view was correct. My report, an internal Planning Office document, was finished in January 1979. As shown by the final form of my research, printed in the *Hastings Law Journal*, neither view was correct.

Everything else follows from the answer we give."<sup>2</sup> During the Reagan administration the federal enforcers, leading scholars, and many judges gave a one word answer to Bork's question: efficiency.

Bork not only supplied the question; he was also the original and primary source of its answer. He had performed a "strict constructionist" view of the antitrust laws' legislative history. In a famous 1966 law review article, he analyzed the legislative history of the Sherman Act and appeared to demonstrate how, when Congress debated and passed the Sherman Act, it had only one concern: increased economic efficiency.<sup>3</sup> Bork made an apparently convincing argument that all other possible goals of the antitrust laws were, if the legislative debates were analyzed closely, irrelevant.<sup>4</sup>

In particular, Judge Bork examined the older "populist" views of antitrust—the belief that the antitrust laws were passed to further a variety of social and political goals, such as combating the political power of big business. He asserted that, while social and political values might have motivated Congress to act, when it came down to the operation of the actual laws, Congress cared only about increasing the efficiency of our economy.<sup>5</sup>

Bork also argued that only an efficiency orientation was administrable. He made a convincing case that even if there was any doubt as to Congressional intent—he, of course, had none—the antitrust laws should be construed in an administrable manner. Since a social-political framework was so amorphous, he argued, administrability concerns also militated that the antitrust laws should be interpreted solely as a means of increasing economic efficiency. Indeed, Bork even pronounced all contrary views as being so incapable of use as to be "unconstitutional."<sup>6</sup>

It should be emphasized that Bork went far beyond arguing that the best antitrust policy was one concerned only with efficiency. After all, reasonable people could disagree over which policy was optimal. Bork sought to trump what others thought of his efficiency-oriented policy view with his historical analysis and "strict constructionist" argument. The only question, he correctly maintained, is what Congress cared about. And he seemed to demonstrate that it cared only about increasing economic efficiency.

By making a legislative history argument rather than a "here's

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2. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 50 (1978).

3. See Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

4. See *id. passim*.

5. See *id. passim*.

6. Robert H. Bork, *The Role of the Courts in Applying Economics*, 54 ANTITRUST L.J. 21, 24 (1985).

what is best" argument, Bork vastly raised the stakes. If he could freeze the argument over the goals of the antitrust laws through an analysis of their legislative histories he would win the argument not just while the Reaganites were in power, but for all time. But his approach ultimately led to his undoing.

*Wealth Transfers* demonstrated that Bork was wrong.<sup>7</sup> The Article analyzed the legislative histories of the antitrust laws and showed that Congress' primary concern actually was with protecting consumers from paying more as a result of anticompetitive activity. Congress condemned cartel pricing because it transferred wealth from consumers to the cartel. Congress was not even aware that supracompetitive pricing leads to economic inefficiency.<sup>8</sup> (Indeed, the inefficiency effects of supracompetitive pricing are complex.<sup>9</sup> This makes it difficult to distinguish the inefficiency and wealth transfer effects of market power, and helped enable Bork's argument to succeed.<sup>10</sup>)

*Wealth Transfers* demonstrated that the antitrust laws were intended to be, and are best viewed as, a type of consumer protection statute. While the Congresses that passed the antitrust laws also had additional goals—including greater economic efficiency<sup>11</sup>—these legislatures' overriding concern was that consumers should not have

7. See Lande, *supra* note 1.

8. See *id.* at 86-89.

9. Supracompetitive pricing not only forces consumers to pay more. It also causes a form of economic inefficiency:

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 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 the widgets 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. MANSFIELD, *MICROECONOMICS: THEORY AND APPLICATIONS* 277-92 (4<sup>th</sup> ed. 1982).

Robert H. Lande, *The Rise and (Coming) Fall of Efficiency as the Rule of Antitrust*, 33 *ANTITRUST BULL.* 429, 433-34 n.17 (1988).

10. Bork argued that the antitrust laws were concerned with "consumer welfare," a term that he defined as having nothing to do with the welfare of consumers! Most economists define "total welfare" as the sum of producer welfare and consumer welfare. Bork used "consumer welfare" when he should have used "total welfare." See discussion in Lande, *supra* note 9, at 433-35.

11. See Lande, *supra* note 1, at 83-93, 108-112, 131-35, 142-150.

to pay prices above the competitive level. All other goals were subordinated to this concern.<sup>12</sup>

In later research I followed up on and extended the Hastings article's themes in two fundamental ways. The first was to consider what differences would arise if the wealth transfer goal were incorporated into substantive antitrust analysis. *Wealth Transfers* presented, as an example, an eight page explanation of the differences that would arise if one changed the fundamental question asked in merger analysis.<sup>13</sup> Instead of asking, "is the merger likely to be efficient," the Article asked, "is the merger likely to lead to higher consumer prices?" The Hastings article contained only a limited assessment of this issue.

The complex economic analysis necessary to answer this question more completely required the collaboration of three excellent economists, Drs. Alan Fisher, Frederick Johnson, and Walter Vandaele. Relying on their rigorous economic insights, we examined in detail how merger enforcement would differ if the wealth transfer effects of mergers, in addition to their efficiency effects, were incorporated into merger analysis.<sup>14</sup> This series of articles showed that the wealth transfer thesis was not just theoretical; it offered a concrete approach that readily could be implemented. These articles also showed that a wealth transfer view of antitrust is at least as easy to administer as an efficiency view.<sup>15</sup> Moreover, the articles demonstrate that some mergers that would be tolerated under a pure efficiency approach should nevertheless be blocked since they would prove costly to consumers.<sup>16</sup>

The second issue broached in the Hastings article that I have since pursued concerns the implications of incorporating into antitrust analysis some dimension of consumer welfare other than higher prices. Society's primary fear is that market power might lead to higher prices for consumers. But consumers want many things from the economy, in addition to competitively priced goods, including

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12. See *id. passim* and 150-51.

13. See *id.* at 142-50.

14. See Alan A. Fisher et al., *Price Effects of Horizontal Mergers*, 77 CAL. L. REV. 777 (1989) (co-authored with Dr. Alan Fisher and Dr. Frederick Johnson) [hereinafter *Price Effects*] reprinted in 21 J. REPRINTS FOR ANTITRUST L. & ECON. 471 (1991), in 32 CORP. PRAC. COMMENTATOR 153 (1990), and in ELEANOR M. FOX & JAMES T. HALVERSON, COLLABORATIONS AMONG COMPETITORS: ANTITRUST POLICY AND ECONOMICS 361-402 (1991); Alan A. Fisher et al., *Afterword: Could a Merger Lead to Both a Monopoly and a Lower Price?*, 71 CAL. L. REV. 1697 (1983) (co-authored with Dr. Alan A. Fisher and Dr. Walter Vandaele); Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CAL. L. REV. 1580 (1983).

15. See *Price Effects*, *supra* note 14, at 809-13.

16. See *id.* at 815-18.

optimal levels of quality, variety, and safety.

The Hastings article presented a five-page framework—developed together with a Federal Trade Commission colleague, Neil W. Averitt—that considered how market power might be considered anticompetitive when it interfered with price or non-price<sup>17</sup> aspects of consumer choice.<sup>18</sup> Using this framework we also defined and distinguished antitrust and consumer protection violations. We concluded that antitrust violations (such as price fixing) interfere with the choices available on the market; whereas consumer protection violations (such as false advertising) interfere with consumers' ability to make an informed choice among the options presented by the marketplace.<sup>19</sup>

In recent years, Mr. Averitt and I developed the consumer choice approach considerably beyond its 1982 incarnation.<sup>20</sup> We showed how it would make a difference in a significant number of antitrust situations.<sup>21</sup>

In the seventeen years since the publication of the Hastings Article, the “wealth transfer” thesis has achieved substantial recognition in both the academic literature and the academy. It has been cited at least 240 times in law review articles<sup>22</sup> and at least

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17. Many seemingly “non-price” variables can be expressed in price terms. A loss of product variety or quality due to a merger, for example, might sometimes be offset by a lower price to consumers. See Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713, 750-53 (1997).

18. See Lande, *supra* note 1 at 121-26. The wealth transfer piece uses a traditional, economically-oriented cost/price based approach. For many purposes this fully captures all that may be wrong with anticompetitive activity. A particular merger, for example, would often be undesirable solely because it leads to higher prices for consumers. The “consumer choice” approach extends the wealth transfer approach into areas where more than price is important.

19. See *id.*

20. The first of these articles, Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713 (1997) won the Federal Trade Commission's 1998 award for best published scholarship of the previous year. See also Neil W. Averitt & Robert H. Lande, *Consumer Choice: The Practical Reason For Both Antitrust And Consumer Protection Law*, 10 LOY. CONSUMER L. REV. 44 (1998); Robert H. Lande, *Consumer Choice as the Unifying Goal of Antitrust and Consumer Protection Law*, 14 NIHON U.COMP. LAW 131 (1997).

21. For example, if a merger involves media companies, a choice approach might be especially important since consumer welfare in this area cannot be measured solely by price/cost margins. The postmerger variety of media viewpoints would also be important. See Averitt & Lande, *supra* note 17 at 752-53.

22. Search of Westlaw, Law Review Citations, Shepard's 1986 Bound Volume through September 1999 Supplement (September 30, 1999) (retrieving 170 citations) and Westlaw, EZ Access Search for cases, statutes, Annotated Law Reports, or other types of documents, Texts & Periodicals – All (September 21, 1999) (retrieving 215 citations). Many citations were listed by both sources and were only counted once. This search is,

seventeen times in economics and business journals.<sup>23</sup> The article has been reprinted in part four times<sup>24</sup> (not including the republication in this volume). Its thesis has been presented in revised and condensed forms three times, and these versions have themselves been reprinted three additional times.<sup>25</sup> It has been cited in at least seven antitrust textbooks and other books designed for the classroom.<sup>26</sup> Among the antitrust scholars who have agreed with its fundamental assertion that wealth transfers should count in antitrust analysis are Professors Areeda,<sup>27</sup> Carstensen,<sup>28</sup> Farmer,<sup>29</sup> Flynn,<sup>30</sup> Fox,<sup>31</sup> Grimes,<sup>32</sup> Harris,<sup>33</sup>

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however, incomplete, since several law review articles not listed also cite the article.

23. INST. FOR SCIENTIFIC INFO., SOCIAL SCIENCES INDEX (1982-97).

24. The Article was excerpted in *THE POLITICAL ECONOMY OF THE SHERMAN ACT: THE FIRST ONE HUNDRED YEARS 71-84* (E. Thomas Sullivan ed., 1991); in E. THOMAS SULLIVAN & HERBERT HOVENKAMP, *ANTITRUST LAW, POLICY AND PROCEDURE: CASES, MATERIALS, PROBLEMS* at 15-23 in 1989 edition, and at 14-22 in 1994 edition, in 19 J. REPRINTS FOR ANTITRUST L. & ECON. 159-83 (1989); and in AN ANTITRUST ANTHOLOGY 50-53 (Andrew I. Gavil, ed., 1996).

25. Robert H. Lande, *The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust*, 33 ANTITRUST BULL. 429 (1988) (translated into Portuguese and reprinted in 23 *Revista de Direito Economico* 39 (1996) (Brazil), reprinted in ELEANOR M. FOX AND JAMES I. HALVERSON, *COLLABORATIONS AMONG COMPETITORS: ANTITRUST POLICY AND ECONOMICS* 105-30 (1991)); Robert H. Lande, *Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust*, 58 ANTITRUST L.J. 631 (1989), reprinted in F.M. SCHERER, *MONOPOLY AND COMPETITION POLICY VOLUME 1* 241 (1993); Robert H. Lande, *Just Where does Judge Bork Stand?—An Anti-Antitrust Activist?* NAT'L L.J. Sept. 7, 1987, at 13.

26. E. THOMAS SULLIVAN & JEFFREY L. HARRISON, *UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS* 4 n.3 (3d ed. 1998); PHILLIP AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES* 44 n.12 (5th ed. 1997); ERNEST GELLHORN & WILLIAM E. KOVACIC, *ANTITRUST LAW AND ECONOMICS IN A NUTSHELL* 21 (4th ed. 1994); THOMAS D. MORGAN, *CASES AND MATERIALS ON MODERN ANTITRUST LAW AND ITS ORIGINS* 24 n.20 (1994); STEPHEN F. ROSS, *PRINCIPLES OF ANTITRUST LAW* 5 n.10 (1993); HERBERT HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* 50 n.3 (Lawyer's Edition 1985); HERBERT HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* 50 n.3 (Student Edition 1985).

27. See PHILLIP AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS* 44, 50 (5th ed. 1997); Phillip Areeda, *Introduction to Antitrust Economics*, 52 ANTITRUST L.J. 523, 536 (1983). By contrast, in 1980 Professor Areeda appeared to endorse the view that economic efficiency should be the only factor in antitrust analysis. See 4 P. AREEDA & D. TURNER, *ANTITRUST LAW: AN ANALYSIS OF PRINCIPLES AND THEIR APPLICATIONS* 149 n.2 (1980).

28. See Peter C. Carstensen, *How to Assess the Impact of Antitrust on the American Economy: Examining History or Theorizing?*, 74 IOWA L. REV. 1175, 1216-17 (1989).

29. See E-mail from Beth Farmer, to Robert Lande (March 15, 1999) (on file with the *Hastings Law Journal*).

30. See Flynn, *Antitrust Policy and the Concept of a Competitive Process*, 35 N.Y.L. SCH. L. REV. 893, 910, 911 n.58 (1990).

31. See Eleanor M. Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust As A Window*, 61 N.Y.U. L. REV. 554, 563, 567 (1986). See also E-mail

Hovenkamp,<sup>34</sup> Jorde,<sup>35</sup> Kaplow,<sup>36</sup> Kovacic,<sup>37</sup> Krattenmaker,<sup>38</sup> Lao,<sup>39</sup> May,<sup>40</sup> Patterson,<sup>41</sup> Peritz,<sup>42</sup> Ponsoldt,<sup>43</sup> Ross,<sup>44</sup> Salop,<sup>45</sup> Sullivan,<sup>46</sup> Waller,<sup>47</sup> and Wiley.<sup>48</sup> Even respected analysts normally associated with the Chicago school, including Judges Easterbrook<sup>49</sup> and

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from Eleanor M. Fox, letter to Robert Lande (March 15, 1999) (on file with the *Hastings Law Journal*).

32. See Warren S. Grimes, *When Do Franchisors Have Market Power? Antitrust Remedies for Franchisor Opportunism*, 65 ANTITRUST L.J. 105, 126 (1996).

33. See Robert G. Harris & Thomas M. Jorde, *Antitrust Market Definition: An Integrated Approach*, 72 CAL. L. REV. 1, 14-16 (1984).

34. See Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 250, 251 (1985).

35. See Harris & Jorde, *supra* note 33, at 14-16.

36. See Louis Kaplow, *The Accuracy of Traditional Market Power Analysis and a Direct Adjustment Alternative*, 95 HARV. L. REV. 1817, 1822-23 (1982).

37. See William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413, 1462-63 (1990).

38. See Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209, 279-80 (1986).

39. See E-mail from Marina Lao, to Robert Lande (April 5, 1999) (on file with the *Hastings Law Journal*).

40. See James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis 1880-1918*, 50 OHIO ST. L.J. 257, 260 n.15, 288 n.269, and 11 other footnotes (1989). See also E-mail from James May, to Robert Lande (March 16, 1999) (on file with the *Hastings Law Journal*).

41. See E-mail from Mark Patterson, to Robert Lande (March 16, 1999) (on file with the *Hastings Law Journal*).

42. See Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 281, 282, 314.

43. See John J. Flynn & James F. Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. REV. 1125, 1137, 1138, 1147 (1987).

44. See Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws*, 1997 U. ILL. L. REV. 519, 530-31 (1997); *Antitrust Implications of the Recent NFL Television Contract: Hearings Before the Subcomm. on Antitrust, Monopolies and Business Rights of the Senate Committee on the Judiciary*, 100th Cong. 45-61 (1987) (statement of Stephen F. Ross).

45. See Krattenmaker & Salop, *supra* note 38, at 279-80.

46. See E. Thomas Sullivan, *The Economic Jurisprudence of the Burger Court's Antitrust Policy: The First Thirteen Years*, 58 NOTRE DAME L. REV. 1 (1982); *The Antitrust Division as a Regulatory Agency: An Enforcement Policy In Transition*, 64 WASH. U. L.Q. 997, 999 n.2, 1054 n.267 (1986).

47. See E-mail from Spencer Waller, to Robert Lande (March 15, 1999) (on file with the *Hastings Law Journal*).

48. See John Shepard Wiley, Jr., *Revision and Apology in Antitrust Federalism*, 96 YALE L.J. 1277, 1283, 1284 n.32, (1987); John Shepard Wiley, Jr., *Antitrust and Core Theory*, 54 U. CHI. L. REV. 556, 587 n. 109 (1987); John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 749 n.165 (1986); "After Chicago An Exaggerated Demise?", 1986 DUKE L.J. 1003, 1011, 1012 n.38.

49. Judge Easterbrook, long a stalwart of the Chicago School, wrote that when Congress passed the Sherman Act: "The choice they saw was between leaving consumers



Ginsburg,<sup>50</sup> and Congressman Campbell,<sup>51</sup> appear to have accepted it. It has also been accepted by the current government antitrust enforcers—the National Association of Attorneys General,<sup>52</sup> the Department of Justice Antitrust Division and the Federal Trade Commission.<sup>53</sup>

The article has not, however, been widely cited by the courts. It apparently has been cited only three times by federal courts<sup>54</sup> and twice by state courts,<sup>55</sup> though there might be other decisions that utilize its logic without citing it.

There is often a considerable gap between the time an idea is promulgated and the time it reaches the courts. Nevertheless, it is possible that the Article's thesis is too theoretical to be of much interest to judges. After all, if a merger leads to higher prices for consumers it usually does not matter whether we condemn that merger because of the wealth that it transfers from consumers to a resulting monopolist, or because of the allocative inefficiency caused by the supracompetitive pricing.<sup>56</sup> Conversely, if no market power is

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." Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1702-03 (1986). 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." *Id.* at 1703. Judge Easterbrook appears to agree that Congress wanted antitrust to count wealth transfers, but disagrees with Bork over the importance of determining the correct goals of the antitrust laws.

50. Judge Ginsburg, an Assistant Attorney General for Antitrust under President Reagan, noted:

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 *Von'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).

51. See Thomas J. Campbell, *Has Economics Rationalized Antitrust?*, 52 ANTITRUST L.J. 607, 617 (1983) (focusing largely upon the Robinson-Patman Act).

52. See 1993 Horizontal Merger Guidelines of the National Ass'n of Atty Generals, CCH Trade Reg. Reports No. 256, March 30, 1993, at Section 2.

53. See Revision to Section 4 of Horizontal Merger Guidelines, 72 Antitrust & Trade Reg. Rep. (BNA) No. 359, April 8, 1997.

54. See *Pashall v. Kansas City Star Co.*, 727 F.2d 692, 701 n.9 (8th Cir. 1984); *Consolidated Metal Prods., Inc. v. American Petroleum Inst.*, 846 F.2d 284, 293 n.26 (5th Cir. 1988); See also Judge Wald's concurrence to Judge Bork's opinion in *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 231 n.2 (D.C. Cir. 1986) (Wald, J., concurring), discussed in Robert H. Lande, *The Rise and (Coming) Fall of Efficiency As The Ruler of Antitrust*, 33 ANTITRUST BULL. 429, 457 (1988).

55. See *Redwood Theatres, Inc. v. Festival Enters., Inc.*, 200 Cal. App. 3d 687, 709 n.11 (1988); *Abbott Lab. v. Durrett*, 1999 WL 424338 at \*37 n. (Ala. June 25, 1999).

56. For an explanation of these differences see articles cited in note 14, *supra*, and Lande, *supra* note 1, at 142-50.

likely to be created, the merger is innocuous under either view of antitrust.

There are, however, times when it does matter whether an efficiency or wealth transfer orientation is used in antitrust.<sup>57</sup> By analogy, the flat earth model is a surprisingly good model for most everyday purposes. The earth curves on the average only about eight inches per mile,<sup>58</sup> so if we assume that the earth is flat we will only be wrong by an average of eight inches per mile. An architect designing a building, for example, can safely ignore the earth's curvature.

But sometimes those eight inches per mile add to a significant figure. And, it is nice to know the true shape of the earth for truth's own sake.

It is similarly important to know why we have the antitrust laws. They were passed to protect consumers. That was the message of my 1982 article.

*Wealth Transfers* was published while the Chicago School was tightening its grip on the antitrust world. Although no piece of scholarship could have reversed that historical tidal wave, *Wealth Transfers* did help contribute to a post-Chicago antitrust renaissance by delegitimizing a fundamental part of the Chicago School's foundation,<sup>59</sup> and opening up a space in which a post-Chicago renaissance could grow.

This theme is at least as important today. The notion that the antitrust laws are consumer protection laws was, during the Reagan era, an idea ahead of its time. But now that the political climate has changed and we are in the middle of a post-Chicago antitrust renaissance<sup>60</sup> the antitrust world is ripe for truly consumer-oriented

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57. For examples, see Fisher, et al., *supra* note 14 *passim*; Lande, *supra* note 9, at 463.

58. The earth has a radius of approximately 3,963 miles at the equator. See COMPARISONS OF DISTANCE, SIZE, AREA, VOLUME, MASS, WEIGHT, DENSITY, ENERGY, TEMPERATURE, TIME, SPEED AND SUMBER THROUGHOUT THE UNIVERSE at 50 (1980). Imagine a line drawn perpendicular to its radius that is one mile long. The length of the remaining segment of a right triangle that would connect up the earlier two segments would be the square root of (3,963 squared plus 1 squared), which equals the square root of 15,705,370) which equals 3,963.000126 miles. A mile contains  $5,280 \times 12 = 63,360$  inches. Multiplying 63,360 times this difference of .000126 equals 7.99 inches.

59. See Robert H. Lande, *Beyond Chicago: Will Activist Antitrust Arise Again?*, 39 ANTITRUST BULL. 1 (1994) [hereinafter Lande, *Beyond Chicago*.] A short version of the *Hastings* article appeared in the *National Law Journal* just before the vote on Judge Bork's Supreme Court nomination. See Robert H. Lande, *Just Where does Judge Bork Stand?—An Anti-Antitrust Activist?*, NAT'L L.J. Sept. 7, 1987, at 13. This piece demonstrated that Judge Bork was a "strict constructionist" only when it suited his aims, but not at other times, such as when he interpreted the intent underlying the antitrust laws. The role of the *Hastings* thesis in the Senate's rejection of his nomination for the Supreme Court, however, is analogous to adding a spoonful of water to the Mississippi River and then attempting to trace the effects of that spoonful on subsequent events.

60. See Lande, *Beyond Chicago*, *supra* note 59 *passim*. See also the web site of the

antitrust laws. For this reason the Article's influence might well be even greater in the future.

With the advantage of hindsight the "wealth transfer" thesis was obvious, and it is sometimes difficult for me to believe that the article was ever necessary. But it was. And it still is. For this reason I am especially honored and delighted that the Hastings Law Journal has decided to republish it.

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American Antitrust Institute <<http://www.antitrustinstitute.org>>, a public interest consumer-oriented group founded in 1998 with the goal of helping to lead a post-Chicago revitalization of antitrust. This organization endorses the belief that an important reason why the antitrust laws were passed was to protect consumers from unfair transfers of wealth to firms engaging in anticompetitive activity.