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Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged

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By ROBERT H. LANDE

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Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged

By ROBERT H. LANDE*

Considerable dispute over the goals of the antitrust laws has surfaced in scholarly commentary on the subject.¹ While it is unanimously agreed that Congress enacted these laws to encourage competition, disagreement continues over Congress' ultimate goals.²

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The opinions expressed in this Article are solely those of the author and do not necessarily reflect the views of the Federal Trade Commission, of any individual Commissioner, or of the Bureau of Competition.

An earlier version of this Article appeared as an internal Federal Trade Commission document in January, 1979. This Article has profited from the comments of a number of lawyers and economists. Among those contributing were Richard Craswell, Kenneth Davidson, Kathryn Fenton, Eleanor Fox, Judith Gelman, James Hurwitz, Thomas Jorde, Heather Kirkwood, William Kovacic, Ronald Lafferty, Howard Marvel, Nancy Warder, and Richard Zerbe. I am especially grateful to Neil Averitt for his invaluable assistance with the introduction and the legislative history of the Federal Trade Commission, and, above all, to John Kirkwood for his assistance on the entire project.

1. For excellent summaries of the arguments regarding the wisdom of a large number of possible antitrust goals, see *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1182 (1977); *The Goals of Antitrust: A Dialogue On Policy*, 65 COLUM. L. REV. 363 (1965). For the history of this debate, see Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 377-82 (1965).

2. Nor has the Supreme Court resolved this problem. See *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). The Court has stated on different occasions that the antitrust laws have a variety of goals. The Court has never made clear which goals were meant to prevail under what circumstances, or how conflicts among competing goals should be resolved.

Judicial uncertainty over the goals of the antitrust laws can be illustrated by Chief Justice Burger's opinion in *Reiter*. Some of the Court's language implies that the antitrust laws contain a strong preference for consumers: "It is in the sound commercial interests of the retail purchasers of goods and services to obtain the lowest price possible within the framework of our competitive private enterprise system. . . . Here, where petitioner alleges a wrongful deprivation 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 in her 'property'. . . . [The treble-damages remedy was passed] as a means of protecting consumers from overcharges resulting from price fixing." *Id.* at 339-43.

In the middle of this proconsumer pronouncement, however, the Chief Justice stated

The importance of this debate was eloquently expressed by Judge Robert Bork:

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. Is the antitrust judge to be guided by one value or by several? If by several, how is he to decide cases where a conflict in value arises? Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules.³

The prevailing view is that Congress intended the antitrust laws only to increase economic efficiency.⁴ Others, however, contend that Congress was largely motivated by a number of social, moral, and political concerns.⁵ This Article presents a third view, one suggested by the antitrust laws' legislative histories.⁶ This Article will argue that Congress passed the antitrust laws to further economic objectives, but primarily objectives of a distributive rather than of an efficiency nature.⁷ In other words, Congress was concerned principally with preventing "unfair" transfers of wealth from consumers to firms with market power. This Article will also demonstrate that Congress in-

that the legislative debates "suggest that Congress designed the Sherman Act as a 'consumer welfare prescription'" (citing R. BORK, *THE ANTITRUST PARADOX* 66 (1978)). 442 U.S. at 343. Of course, Judge Bork concluded that the "consumer welfare prescription" embodied in the antitrust laws includes economic efficiency and excluded any concern with wealth distribution or any preference for consumers. R. BORK, *THE ANTITRUST PARADOX* ch. 2 (1978). (Judge Bork wrote the sources cited in this Article while he was still a professor.)

3. R. BORK, *supra* note 2, at 50.

4. See 4 P. AREEDA & D. TURNER, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPALS AND THEIR APPLICATION* 149 n.2 (1980); R. BORK, *supra* note 2; R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE*, (1976) (Judge Posner wrote most of the sources cited in this Article while he was still a professor.)

5. Historian Richard Hofstadter wrote that "[t]he goals of antitrust were of three kinds. The first were economic; the classical model of competition confirmed the belief that the maximum of economic efficiency would be produced by competition, and at least some members of Congress must have been under the spell of this intellectually elegant model, insofar as they were able to formulate their economic intentions in abstract terms. The second class of goals was political; the antitrust principle was intended to block private accumulations of power and protect democratic government. The third was social and moral; the competitive process was believed to be a kind of disciplinary machinery for the development of character, and the competitiveness of the people—the fundamental stimulus to national morale—was believed to need protection." R. HOFSTADTER, *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 199-200 (1965) [hereinafter cited as R. HOFSTADTER, *THE PARANOID STYLE*].

6. This Article will not, however, discuss what the goals of antitrust policy should be. It will merely attempt to ascertain the goals the Congresses that passed the antitrust laws were attempting to further.

7. For an explanation of the distributive and efficiency effects of market power, see *infra* text accompanying notes 23-58.

tended to subordinate all other concerns to the basic purpose of preventing firms with market power from directly harming consumers.

The efficiency view has been espoused by a number of leading commentators, who argue that the relevant legislative history and cases reveal only one goal, the maximizing of economic efficiency.⁸ The use of social, political, or other nonefficiency criteria in antitrust analysis, they conclude, is not only unwise policy, but completely without legal foundation.⁹ Sound analysis under this view consists solely of determining and implementing those actions within the scope of the antitrust statutes that maximize economic efficiency.¹⁰

A second group of analysts believe that in addition to enhanced economic efficiency, various social, moral, and political goals were important to the antitrust laws' framers. These goals include promotion of small business and creation of entrepreneurial opportunity,¹¹ encouragement of local control over business,¹² prevention of industrial concentration,¹³ and the reduction of the political influence of large firms and promotion of individual liberty.¹⁴ Not surprisingly, these commentators often disagree over the specific values to be considered,¹⁵ and the nature of the role these goals should play.¹⁶

The view expressed in this Article is that the antitrust laws were

8. See 4 P. AREEDA & D. TURNER, *supra* note 4; R. BORK, *supra* note 2; R. POSNER, *supra* note 4. Efficiency is defined and distinguished from other possible goals of antitrust policy *infra* at text accompanying notes 33-61.

9. One leading exponent of this view is Judge Bork. In chapter 2 of *The Antitrust Paradox*, he analyzes relevant legislative history with this question in mind. He concludes that there is no support in the legislative history of the antitrust laws for the use of other factors, and that the cases which indicate otherwise are incorrect. In addition, he identifies reasons apart from his analysis of the legislative history for eschewing objectives other than efficiency. R. BORK, *supra* note 2; see also remarks of William Baxter, Assistant Attorney General, Antitrust Division, United States Department of Justice: "The sole goal of antitrust is economic efficiency." Wall St. J., Mar. 4, 1982, at 28.

10. See, e.g., R. POSNER, *supra* note 4, at 8-22 (Judge Posner agrees with Judge Bork that antitrust laws should be used only to enhance economic efficiency, but differs with him over which actions will best achieve this. Compare, for example, Posner's approach to predation analysis, *id.* at 184-96, with Bork's approach, contained in R. BORK, *supra* note 2, at 144-60.).

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

12. *Id.*

13. Arnold, *The Economic Purpose of Antitrust Laws*, 26 MISS. L.J. 207, 207-08 (1955).

14. Blake & Jones, *supra* note 1, at 382-84.

15. Compare, e.g., Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979), with Schwartz, "Justice" and Other Non-Economic Goals of Antitrust, *id.* at 1076.

16. For example, Pitofsky, *supra* note 15, and Schwartz, *supra* note 15, disagree about whether noneconomic values should play a role only when the efficiency considerations are neutral or whether they can be balanced against efficiency considerations.

passed primarily to further what may be called a distributive goal, the goal of preventing unfair acquisitions of consumers' wealth by firms with market power. It should be stressed, however, that Congress did not pass the antitrust laws to secure the "fair" overall distribution of wealth in our economy or even to help the poor.¹⁷ Congress merely wanted to prevent one transfer of wealth that it considered inequitable, and to promote the distribution of wealth that competitive markets would bring. In other words, Congress implicitly declared that "consumers' surplus"¹⁸ was the rightful entitlement of consumers; consumers were given the right to purchase competitively priced goods. Firms with market power were condemned because they acquired this property right without compensation to consumers. This Article contends that the antitrust laws embody a strong preference for consumers over firms with market power.¹⁹

The Article begins by defining possible economic goals of the antitrust laws. Turning to the specific antitrust statutes, the Article first analyzes the legislative history of the Sherman Act to demonstrate Congress' motivations.²⁰ The Article next examines the legislative history of the Federal Trade Commission Act, concluding that its prohibi-

17. On balance, however, the redistribution effects of the antitrust laws probably favor the poor. See *infra* note 37. See also Elzinga, *supra* note 11, at 1194-96.

18. Consumers' surplus is the difference between the maximum amount that a consumer would pay and the price that he or she actually pays. Suppose that widgets are priced at \$2.00, the competitive price. Marginal consumers of widgets would be willing to pay only this amount. Some consumers, however, would particularly desire widgets and willingly pay more—as much as \$3.00. These consumers receive \$1.00 in consumers' surplus when they purchase competitively priced widgets. If a monopolist gained control of the widget market and raised the price of widgets to \$3.00, marginal consumers would no longer purchase widgets, and nonmarginal consumers would lose their surplus. The widget monopoly would acquire \$1.00 of monopoly profits at the expense of widget consumers. For a more detailed definition, see E. MANSFIELD, MICROECONOMICS: THEORY AND APPLICATIONS 15 (4th ed. 1982); G. STIGLER, THE THEORY OF PRICE 78-81 (1966).

19. Thus, although Congress was strongly interested in increasing the size of the economic "pie" when it passed the antitrust laws, it was even more interested in ensuring its "fair" ownership. It should also be observed that all purchasers were to be protected, whether they were resellers, farmers or ultimate consumers. See *infra* note 123 & text accompanying note 137.

20. This Article will attempt to demonstrate that the Sherman Act was passed despite the possibility that its enforcement might impair, to a small degree, the efficiency of trusts, the form of industrial organization that in 1890 was thought to be most efficient. It argues that the legislative history shows that the Sherman Act was passed for a number of purposes: preventing monopolistic transfers of wealth from consumers to trusts, encouraging corporate productive efficiency in order that consumers would receive these benefits as well, reducing the social and political power of large aggregations of capital, and providing opportunities for small entrepreneurs. Congress' more minor goals were not, however, meant to interfere significantly with the right of purchasers to buy competitively priced goods.

tion against "unfair methods of competition" could be restated, with only some restriction in its intent or meaning, as a prohibition against "unfair" transfers of wealth.²¹ A similar interpretation is then developed for the Clayton Act and its major extension, the Celler-Kefauver Antimerger Act.²² Each of these discussions focuses upon Congress' distributive or wealth transfer goals, but also discusses Congress' efficiency goals and other goals so as to place the distributive objectives in proper perspective. Following the legislative history discussions, the Article uses the example of a horizontal merger to illustrate some of the differences that would result if distributive goals, in addition to or instead of efficiency goals, were considered in antitrust analysis. Incorporation of Congress' distributive goals into antitrust analysis would cause the antitrust laws to reach many more mergers and other monopolistic practices than does the present quest for efficiency in antitrust decisions.

Economic Effects of Monopoly Power: A Brief Overview

The observation that monopolies²³ cause increased prices and reduced output is hardly new. This conclusion finds expression in early English common law²⁴ and in classical economic theory. Adam Smith noted that "The monopolists, by keeping the market constantly understocked, by never fully supplying the effectual demand, sell their commodities much above the natural price, and raise their emoluments, whether they consist in wages or profit, greatly above their natural

21. The Federal Trade Commission (FTC) was charged, in § 5 of the Act, with preventing "[u]nfair methods of competition." 15 U.S.C. § 45(a)(1) (1914). The legislative history of the Act shows that certain methods of competition were considered "unfair," but not primarily because they might interfere with economic efficiency. Congress, in a single phrase, condemned both monopolies and fraud as "unfair" methods of competition primarily because each "unfairly" transferred wealth from consumers to firms with market power.

22. The Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a (1976), is not discussed.

23. In this Article, the term "monopolies" will normally be used to include both individual firms with market power and cartels and trusts acquiring or exercising market power. This Article makes no distinction between single-firm and multifirm market power unless expressly noted.

24. See W. LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA* ch. 2 (1965). Even the Bible recognized the impact of monopolies. See *Isaiah* 5:8 ("Woe to those that add house to house/ And join field to field/ till there is room for none but you/ To dwell in the land"); *Proverbs* 11:26 ("He that withholdeth corn, the people shall curse him: but blessing shall be upon the head of him that selleth it."). For an elaborate discussion of the biblical attitude toward market power, see A. LEVINE, *FREE ENTERPRISE AND JEWISH LAW* (1980), especially chapter 2, "Monopoly and Restraint of Trade."

price."²⁵ By the time the Sherman Act was passed, economists were able to prove that a monopolist pursuing its own best interests would normally follow this course of conduct.²⁶

Modern economists have, of course, made many important advances in the theory of monopoly.²⁷ The most important development may be the modern analysis of the implications of monopoly self-interest, long recognized as including higher prices and restricted output. These effects can be divided into three categories. The first, allocative inefficiency, describes the misallocation of resources, which diminishes the total wealth of society. A second effect is a transfer of wealth from consumers to monopolists. The third involves the effect of monopolies, and antimonopoly statutes, on firms' productive efficiency. These three categories, the economic effects that might have caused Congress to legislate to prevent firms from obtaining or increasing market power, are examined here.

Allocative Inefficiency

Monopoly pricing reduces the total amount of wealth in society. Because a monopolist produces less than would be produced under competitive conditions,²⁸ some resources that would otherwise have been used to make the monopoly product will instead be used for other purposes, ones that consumers value demonstrably less.²⁹ This misallocation of resources results in diminished satisfaction of society's wants, and thus, in terms of what society values, a reduction of society's total

25. A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 61 (Modern Library Ed. 1978) (1st ed. 1776).

26. For example, in his influential 1890 book, *Principles of Economics*, Alfred P. Marshall demonstrated that a monopolist will reduce supply to maximize profit: "The monopolist would lose all his monopoly revenue if he produced for sale an amount so great that its supply price, as here defined, was equal to its demand price: the amount which gives maximum Monopoly Revenue is always considerably less than that. It may therefore appear as though the amount produced under a monopoly is always less and its price to the consumer always higher than if there were no monopoly." 1 A. MARSHALL, PRINCIPLES OF ECONOMICS 484 (1st ed. 1890). Interestingly, Marshall also observed that the monopoly price nevertheless can be lower than the competitive price, particularly in the long run, because the monopolist can increase innovation without risking having to share the benefits of any advances made, be more efficient, waste less in advertising, or have greater access to capital. *Id.*

27. See, e.g., E. MANSFIELD, *supra* note 18, chs. 10 & 11 (2d ed. 1975); F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE ch. 2 (2d ed. 1980).

28. E. MANSFIELD, *supra* note 18, at 277-92; F. SCHERER, *supra* note 27, at ch. 2; Stigler, *supra* note 18, at 78-81.

29. Firms operating in a competitive market are forced to use their resources in a manner that consumers desire most. Any deviation from competitive price and output decisions will result in consumer demand being somewhat less satisfied.

wealth. This effect is termed "allocative inefficiency."³⁰ Elimination of monopoly pricing would, *ceteris paribus*, increase society's total wealth and, therefore, increase consumer satisfaction.³¹

Economists have almost universally condemned the allocative inefficiency resulting from monopoly pricing.³² Before one can understand why it is consistently viewed as "bad," however, the welfare criterion that will be used as the appropriate standard must be defined.

Modern economists almost universally use "Pareto optimality" as the appropriate welfare criterion.³³ Under this standard, a change that harms no one and improves the lot of at least one person in his or her

30. For a diagrammatic illustration of allocative efficiency, see *infra* text accompanying notes 290-91. For a formal proof that monopoly pricing leads to allocative inefficiency, see E. MANSFIELD, *supra* note 18, at 277-92; F. SCHERER, *supra* note 27, at ch. 2; Stigler, *supra* note 18, at 78-81.

31. E. MANSFIELD, *supra* note 18, at 277-92; F. SCHERER, *supra* note 27, at ch. 2; Stigler, *supra* note 18, at 78-81.

32. In particular it is condemned by scholars of both the "Harvard" and "Chicago" schools of analysis. See Sullivan, Book Review, 75 COLUM. L. REV. 1214 (1974); see also 4 P. AREEDA & D. TURNER, *supra* note 4; R. BORK, *supra* note 2; R. POSNER, *supra* note 4.

This unanimity of views explains the prominence of allocative efficiency in the antitrust literature. While it is theoretically very significant, there is evidence that it may be quantitatively less important. 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. Harberger, *Monopoly and Resource Allocation*, AM. ECON. REV. 77 (1954). This estimate is based upon a variety of assumptions. 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 0.5 and 2 percent of the gross national product [between approximately \$50 and \$200 per person per year] with estimates nearer the lower bound inspiring more confidence than those on the higher side." F. SCHERER, *supra* note 27, at 464 (footnote omitted). 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.

33. See, e.g., E. MANSFIELD, *supra* note 18, at 57-8, 440, 459; E. PHELPS, ECONOMIC JUSTICE 12 (1973); F. SCHERER, *supra* note 27, at 595-96.

Other welfare criteria exist, see E. PHELPS, *supra*, at 12, and a few economists and philosophers reject the Pareto principle, considering it inadequate or irrelevant. For example, some believe that it is impossible to hold liberal (or libertarian) values, and at the same time accept the Pareto principle. See Peacock & Rowley, *Pareto Optimality and the Political Economy of Liberalism*, 80 J. POL. ECON. 476 (1972); Sen, *The Impossibility Of A Paretian Liberal*, 78 J. POL. ECON. 152 (1970). Like all welfare criteria, Pareto optimality ultimately is subjective; no one is compelled logically to accept it or its economic implications. As all modern economic analysis is based on one or another subjective welfare criterion, philosophically the results of any such analysis inherently are subjective. Nevertheless, it should be noted that Pareto optimality represents the theoretical underpinnings of almost all modern economic analyses of the effects of antitrust actions.

own opinion is considered an improvement.³⁴ The most commonly used version of Pareto optimality, however, recognizes that virtually any change is likely to harm at least one person. Thus, a Pareto improvement is usually defined to include a change that would benefit at least one person and would, through the use of transfer payments, simultaneously eliminate any harm to others.³⁵ Because all modern economic analysis is based upon this, or upon some other subjective welfare criterion, it must be observed that every result of "objective" modern economic analysis is, in some philosophical sense, subjective.³⁶ Economic theory has established that monopolies cause allocative efficiency and therefore violate Pareto optimality. Monopoly pricing, as measured under Pareto optimality, thus harms social welfare, unless some other characteristic of monopolies creates offsetting advantages.

In summary, monopoly pricing leads to allocative inefficiency that virtually every antitrust scholar criticizes as harmful to society. We now turn to a discussion of the other effects of monopolies and antimonopoly statutes.

Transfer of "Consumers' Surplus" from Consumers to Monopolists

The most visible and obvious result of monopoly pricing is a transfer of wealth from purchasers to the monopolist; consumers become poorer while the monopolist becomes richer.³⁷ The relative size of the

34. V. PARETO, *MANUAL D'ECONOMIE POLITIQUE* (1909). There are several variations and restatements of this principle. See, e.g., E. PHELPS, *supra* note 33, at 12.

35. E. PHELPS, *supra* note 33, at 12. In fact, many economists assume that a transfer payment can be made so that all or most losers will be compensated. For this reason they ignore distributive results. Other economists recognize that certain public policy actions inevitably help some people and hurt others, and decline to make the necessary interpersonal comparisons of utility. For a superb general discussion of the disinclination of "positive" economists to consider distributive effects, see Horwitz, *Law and Economics: Science or Politics*, 8 HOFSTRA L. REV. 905 (1980).

36. See *supra* note 33.

37. Scherer concludes that "the redistribution associated with monopoly for the entire economy is . . . probably between 2 and 3 percent of GNP." F. SCHERER, *supra* note 27, at 471. Comanor and Smiley, in *Monopoly and the Distribution of Wealth*, 89 Q.J. ECON. 177 (1975), report that, if there had been no monopoly profits, the share of total personal wealth controlled by the wealthiest 2.4% of American families in 1962 would have been reduced from 40% to somewhere between 16.6 and 32%. *Id.* at 191-93. See the discussion in F. SCHERER, *supra* note 27, at 472-73.

It should be noted that wealth redistribution caused by monopolies does not always transfer wealth from poor consumers to rich stockholders. Monopolized products almost always will be purchased by at least some consumers who are richer than at least some stockholders. On balance, however, the redistributive effects of the antitrust laws would seem to favor the poor. But, as the legislative histories indicate, the legislators passing these laws were concerned with preventing transfers from consumers to monopolists and did not premise these statutes on redistribution from rich to poor. See *infra* notes 110-23, 181-90,

transferred wealth and the allocative inefficiency will vary considerably from case to case depending upon a number of factors.³⁸ Under market conditions most likely to be encountered, however, the transferred wealth usually will be between two and forty times as great as the accompanying allocative inefficiency.³⁹ Thus, the redistributive effects of market power generally exceed the allocative inefficiency effects by a substantial amount.

The two principal effects of monopolistic pricing, the transfer of wealth from consumers to monopolists and the decrease in allocative efficiency, are different in one fundamental manner: the latter represents a decrease in society's absolute wealth, while the former merely redistributes that wealth. As Professor Williamson has observed, "[t]his [redistributive] transformation of benefits from one form (consumers' surplus) to another (profit) is treated as a wash under the conventional welfare economics model."⁴⁰

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

267-74 & accompanying text. This redistributive process will also, of course, affect the total distribution of wealth in our society. For example, a yacht cartel with numerous stockholders might help to even the distribution of wealth, while a cartel that sells to poor people would probably act to skew the distribution. Questions concerning the fairness of the redistributive process are, however, different from questions concerning the initial or final distribution of wealth that the process produces.

38. These factors include the shape of the demand curve and the amounts by which the monopolist restricts output and raises prices.

39. Under certain standard assumptions the wealth redistribution can be shown to be exactly twice as large as the allocative inefficiency. These assumptions include a straight line demand curve and constant marginal costs. See Schmalensee, *Another Look at Market Power in Antitrust*, 95 HARV. L. REV. 1787, 1805 (1982). Under circumstances more likely to be encountered, the wealth transfer probably will be much larger relative to the allocative inefficiency. See Fisher & Lande, *Efficiency Considerations in Merger Enforcement*, 91 YALE L.J. — (1982).

40. Williamson, *Economies as an Antitrust Defense Revisited*, 125 U. PA. L. REV. 699, 711 (1977) [hereinafter cited as Williamson, *Economies Revisited*]. Areeda and Turner similarly wrote that their analysis of Williamson's merger example "assumes that the income transfer from consumers to producers is neutral." 4 P. AREEDA & D. TURNER, *supra* note 4, at 149 n.2. Landes and Posner wrote that "[w]e ignore possible distributional objections to monopoly, as both controversial and difficult to quantify." Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 954 (1981).

that the monopoly is only reaping its just reward.⁴¹

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

This Article argues that Congress decided that consumers were entitled to the benefits of a competitive economic system. Consumers were deemed entitled to the "consumers' surplus" because Congress regarded the competitive scenario as the normal one.⁴² Monopoly pricing represented a change from the norm which Congress condemned as an "unfair" taking of consumers' property.⁴³

This congressional decision does not, moreover, violate the important principle of Pareto optimality. Before one can evaluate an improvement under the Pareto principle, the initial distribution of entitlements or property rights must be defined.⁴⁴ Assuming that Congress decided consumers were entitled to consumers' surplus, condemnation of monopolistic extractions of wealth does not violate Pareto optimality because the monopoly is unfairly taking property from consumers and, as a practical matter, no compensating transfer payments by monopolists to consumers are made.⁴⁵ Condemnation of monopoly pricing can thus be justified as the only practical method of preventing monopolies from "unfairly" taking property that, in the view of Con-

41. We could conclude, for example, that in order to provide firms the incentive to compete vigorously, we should permit them to earn monopoly profits.

42. It appears that Congress considered the distribution of wealth that would result if there were no monopolies as the more nearly "just" distribution. See *infra* notes 114-22, 181-90, 267-75 & accompanying text.

43. Not all of the consumers' surplus is taken by monopolies. Some is left with the consumers; some is destroyed (allocative inefficiency).

44. See *supra* note 33 & accompanying text.

45. Nor does allowing monopolization constitute a taking of property that could be substantially, even if not completely, rectified by transfer payments. If it could be shown that allowing monopolization helped 90% of society, and if 90% of the consumers harmed by monopolization could be compensated through transfer payments, society would almost certainly not condemn monopolization even though, strictly speaking, the change from competitive to monopoly pricing was not a Pareto change. The existence of allocative inefficiency, however, makes it extremely difficult to show that allowing monopolies generates more benefits than losses. Further, as a practical matter, the only way to make these transfer payments is through government regulation of the monopoly or through a complicated taxation and rebate plan, actions that are likely to cause so much waste and inefficiency that any gains from permitting monopolies would be dissipated. As it cannot be shown that most consumers would be compensated for their lost consumer surplus, the policy presumption should be in favor of allowing them to keep their property.

gress, belongs to consumers.⁴⁶

Even if a condemnation of monopolistic transfers from purchasers to producers does violate Pareto optimality, this violation would not undermine the thesis of this Article. Pareto optimality, on which the condemnation of allocative efficiency is based, is itself a subjective standard which almost every modern economist is willing to accept.⁴⁷ No member of Congress, however, when subjectively designing or voting for any antitrust law, was, or is, under any compunction to be held to the Pareto principle. Similarly, it may or may not be wise social policy to design antitrust laws to prevent certain transfers of wealth; the decision, however, belongs to Congress.⁴⁸

In summary, considerable controversy exists over the proper treatment of monopolistic transfers of wealth. This Article contends that Congress believed consumers were entitled to products priced at competitive levels and to the opportunity to buy the quantity of products a competitive market would offer. The Article argues that when Congress passed the antitrust laws it condemned the use of market power to interfere with these property rights or entitlements out of an explicit antimonopolistic, proconsumer bias.⁴⁹

Productive Efficiency and Inefficiency

Monopoly power most directly affects the allocative efficiency and wealth distribution throughout our economy. However, monopolies have a host of other effects, positive and negative, on the productive

46. Further, the antitrust laws might not violate Pareto optimality if society believed that one way to prevent revolutions or the spread of communism or fascism was to prevent monopolistic transfers of wealth. See *infra* notes 125-42, 275-84 & accompanying text.

47. See, e.g., E. MANSFIELD, *supra* note 18 at 457-60; E. PHELPS, *supra* note 33, at 12; F. SCHERER, *supra* note 27, at 595-96.

48. It is possible that many congressional actions violate the Pareto principle. For example, suppose that Congress believed that, in certain circumstances, a poor person valued a marginal dollar more than a rich person. Congress might judge that society as a whole could be made better off by taxing the rich to provide welfare payments. Congress' desire for equality or other notions of justice might at times prevail and override its desire for efficiency. Pareto optimality also might be rejected if Congress believed that the existing distribution of wealth was not a "fair" one. For example, suppose that a certain business practice, without taking any wealth away from anyone in absolute terms, produced a large increase in the yearly GNP, but gave the increase to the richest .01% of the population, or, alternatively, only to white Americans. Further, suppose that transfer payments, as a practical matter, could not be made. This business practice would satisfy Pareto optimality and yet, in the eyes of many, could be socially undesirable.

49. Congress believed that consumers, in other words, were entitled to a matter of right to the range of options that free competition would produce.

efficiency of an economy.⁵⁰ Whereas allocative efficiency concerns overall placement of resources in the economy, productive, or technical, efficiency refers to individual firms' use of their resources in the most effective manner. Productive efficiencies, whether in innovation, purchasing, manufacturing, marketing, distribution, or transportation, are crucial to any economy.⁵¹

Firms' desires to become monopolies can lead to important productive efficiency gains. The desire to earn monopoly profits often motivates businesses to compete energetically, to lower costs and prices, and to improve the quality of their product. Additionally, two or more firms often desire merger or combination to take advantage of large scale or multiplant economies, thereby improving their own efficiency and competitive posture. Any statute that, for other reasons, forbids or discourages mergers, the formation of monopolies, and even cartels, sacrifices these important advantages to some degree.

However, monopolies can simultaneously negatively affect productive efficiency. Sir John Hicks observed in 1935 that monopolists "are likely to exploit their advantage much more by not bothering to get very near the position of maximum profit, than by straining themselves to get very close to it. The best of all monopoly profits is a quiet life."⁵² More recently, other economists have written that inefficiencies result when a monopolist is shielded from hard competition,⁵³ and that waste is caused by non-price competition to obtain monopoly profits.⁵⁴

50. Productive efficiency is probably that type of efficiency which most commonly comes to mind when one thinks of business efficiency.

51. For more complete definitions of productive and allocative efficiencies, see E. MANSFIELD, *supra* note 18, at 1, 4-6; F. SCHERER, *supra* note 27, at 13-21.

52. Hicks, *Annual Survey of Economic Theory: The Theory of Monopoly*, 3 *ECONOMETRICA* 1, 8 (1935).

53. See, e.g., Liebenstein, *Allocative Efficiency vs. "X-Efficiency"*, 56 *AM. ECON. REV.* 392 (1966). Professor Liebenstein argues that the motivations and incentives of workers and managers are different when their firm does not have to face competition: "In situations where competitive pressure is light, many people will trade the disutility of greater effort, of search, and the control of other peoples' activities for the utility of feeling less pressure and of better interpersonal relations. But in situations where competitive pressures are high, and hence the costs of such trades are also high, they will exchange less of the disutility of effort for the utility of freedom from pressure, etc." *Id.* at 413.

Similarly, monopolies can create "organizational slack" by tolerating inefficiency and waste. Without the discipline of competition, monopolies may have less incentive to cut waste and to search for ways to reduce costs. They may have the discretion to make only a comfortable profit and to tolerate a substantial amount of "fat" in their organizations and thus further waste society's resources. Some economists believe that it is "eminently plausible" that inefficiencies resulting from weak competitive pressures "are at least as large as the welfare losses from [allocative inefficiency]." See F. SCHERER, *supra* note 27, at 466.

54. Judge Posner hypothesized, "[A]n opportunity to obtain a lucrative transfer pay-

Similarly, some evidence suggests that the existence of monopolies might curtail overall research and innovation⁵⁵ or lead to other undesirable economic consequences.⁵⁶

As this brief discussion demonstrates, monopolies both positively and negatively affect the productive efficiency of our economy. It thus becomes very difficult to know when the existence of monopolies, or, conversely, the existence of antitrust statutes, ultimately benefits society.⁵⁷ Further, because monopolies also create allocative inefficiency and affect society's distribution of wealth, an overall welfare-analysis of the desirability in various instances of permitting firms to obtain or retain monopoly power becomes extremely complex and involves subjective judgments that transcend conventional economic analysis.⁵⁸

ment in the form of monopoly profits will attract real resources into efforts by sellers to monopolize, and by consumers to prevent being charged monopoly prices. The costs of the resources so used are costs of monopoly just as much as the costs resulting from the substitution of products that cost society more to produce than the monopolized product." R. POSNER, *supra* note 4, at 11. Judge Posner theorized that part or all of a firm's monopoly profits could be dissipated by its wasteful nonprice competition to achieve or protect its monopoly. In addition, he pointed out that this effect might also cause consumers or actual or potential competitors of the monopolist to waste resources as well. *Id.* at 11-12; *see also* Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975). Professors Caves and Porter similarly believe that monopolies may channel their competitive activities into activities such as advertising to create entry barriers that help to preserve their monopoly position. Caves & Porter, *From Entry Barriers to Mobility Barriers: Conjectural Decisions and Contrived Deference to New Competition*, 91 Q.J. ECON. 241, 245-54 (1977). Of course, many economists do not believe that this occurs to a significant degree and believe that monopolies consequently continue to enjoy their full monopoly profits. *See supra* note 37. But if this effect does occur, some or all of the resources that otherwise are thought to be transferred from consumers to the monopolist instead would be wasted by the monopolist and would increase the absolute cost to society of monopoly power. *See generally* Rice & Ulen, *Rent-Seeking and Welfare Loss*, 3 RESEARCH L. ECON. 53 (1981).

55. *See, e.g.,* Kamien & Schwartz, *Market Structure and Innovation: A Survey*, 13 J. ECON. LIT. 1 (1975).

56. Some believe that monopolies overpay their executives or rank-and-file employees. *See* the discussion of those and other allegations in F. SCHERER, *supra* note 27, at 471-73. It is even possible that monopolistic redistributions of wealth might adversely affect employee-consumers' sense of justice and their feeling that they are obtaining their fair share of society's wealth. If so, the accompanying frustration could deaden work incentives and lead to a loss in productivity.

57. Even if monopolies benefit society by resulting in a net increase in society's wealth, and side payments (through the tax laws, for example) in theory could be made which would leave consumers better off despite the redistributive effects of monopolies, one could still justify having antitrust laws on the ground that side payments are, as a practical matter, too difficult to make.

58. The difficulties of analyzing the efficiency and distributive effects of monopoly power are illustrated by presenting an analysis of a horizontal merger that might yield productive efficiencies yet lead to a firm with monopoly power. *See infra* notes 287-309 & accompanying text.

However modern economists may resolve the issue, it is clear Congress has determined that, in certain circumstances, firms should be prevented from obtaining monopoly power. Keeping in mind the catalogue of possible economic effects of monopoly power and the possible economic reasons that Congress might have condemned these firms when it passed the antitrust laws, the following sections of this Article will examine the legislative histories of the major antitrust statutes to discern the true underpinnings of congressional intent.

Congressional Goals

It is axiomatic that when the words of a statute are clear and unambiguous, courts need go no further in their interpretation of that law.⁵⁹ Ambiguous, doubtful, or undefined words or phrases require interpretation, however, by reference to the statute's legislative history.⁶⁰ Examination of a legislative history generally seeks determination of legislative intent regarding particular applications of the statute. The analysis often goes one step further in an attempt to determine what legislative intent "would have been" had Congress considered situations never actually contemplated.⁶¹

59. "[W]hen words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn . . . from any extraneous source." *Caminetti v. United States*, 242 U.S. 470, 490 (1917).

60. Indeed, even the term "legislative history" needs clarification. The term can mean a narrow analysis of the history and progress of a bill in a legislative assembly. Alternatively, "legislative history" can mean an analysis of the condition of the times when the bill was passed, and an analysis of the factors which led to its passage. This Article uses the latter definition. For a more complete discussion of courts' reliance on legislative histories in interpreting acts, see Limbaugh, *Historic Origins of Anti-Trust Legislation*, 18 Mo. L. Rev. 215, 215-17 (1953); Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982).

61. For example, in *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir.), *cert. denied sub nom. Bersch v. Arthur Andersen & Co.*, 423 U.S. 1018 (1975), a case involving antifraud provisions of the Security Acts, Judge Friendly noted: "We freely acknowledge that if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond. . . . Our conclusions rest on case law and commentary . . . and on our best judgement as to what Congress would have wished if these problems had occurred to it." *Id.* at 933 (emphasis added). As Judge Bork noted, "[a] legislature may never address the issue of ultimate policy goals and yet write a law whose various categories and distinctions can be explained only by a particular policy. That policy may then quite legitimately be said to have been intended by the legislature, even though not a single member articulated it even to himself. A system of classifications has implications, and the legislature must be taken to intend not only what it says but also what is implied by what it does." R. BORK, *supra* note 2, at 57.

The Supreme Court, in *Minnesota Mining v. N.J. Wood Co.*, 381 U.S. 311 (1964), quoted an earlier statement by Justice Holmes: "[I]t is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we

The antitrust laws are among the least precise statutes enacted by Congress. The central terms, including "competition," "unfair methods of competition," "conspiracy in restraint of trade," and "monopolize," are inherently vague and not self-defining.⁶² One commentator has observed that antitrust legislation has, perhaps more than any other field, stimulated the courts to consider, as an interpretative aid, the history of the era that gave rise to the legislation.⁶³

It is not possible to ascertain with certainty the original goals of the antitrust laws. Not only are there conflicting statements of legislative purpose, but it is often difficult to decide whether certain statements represent isolated, unimportant views⁶⁴ or infrequently mentioned but nevertheless significant motivating factors.⁶⁵ Therefore, this Article cannot hope to resolve every conflict, but it does attempt to generally reconcile the evidence to determine the common spirit, goals, policies, and purposes underlying the antitrust laws, and to develop an appropriate decisionmaking theory with which to analyze antitrust cases.⁶⁶ This judgment will by necessity be relative instead of absolute.

shall go on as before." *Id.* at 321 (quoting *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908)).

62. No attempt will be made here to list those cases in which the courts have examined the legislative history of the antitrust laws in order to ascertain what Congress "would have wished" if the problems had occurred to it; such a list would be unbearably long. Good compilations of cases which examine the legislative histories of the antitrust laws, as well as comprehensive legislative histories of the antitrust laws can be found in E. KITNER, *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES* (1978); H. THORELLI, *THE FEDERAL ANTITRUST POLICY* (1955); I. A. TOULMIN, *TREATISE ON THE ANTI-TRUST LAWS OF THE UNITED STATES AND INCLUDING ALL RELATED TRADE REGULATORY LAWS* 1-23 (1949).

63. Limbaugh, *supra* note 60, at 217.

64. An example of just such a remark in the FTC Act legislative history would, hopefully, be where Senator Kenyon quoted Senator Martine for the proposition that "everybody should be permitted to kill one lawyer and not be punished for it." 51 CONG. REC. 13,196 (1914).

65. Although it may be assumed that the legislators meant what they said during the floor debates, their statements might at times mask their true intentions. Further, some statements can be best classified as political rhetoric. For example, legislators might have stated that they condemn monopolization out of a concern for consumers when they actually were more concerned with providing small businesses fair opportunity to compete. Some Congress members might have supported weak antitrust legislation in order to protect large predators from stronger remedies. For a cynical view of relevant economic history see G. KOLKO, *THE TRIUMPH OF CONSERVATISM* (1973).

66. As Judge Bork noted in his examination of the legislative history of the Sherman Act, the task of ascertaining legislative intent should not be "an attempt to describe the actual state of mind of each of the congressmen who voted for the Sherman Act but . . . merely an attempt to construct the thing we call 'legislative intent' using conventional methods of collecting and reconciling the evidence provided by the Congressional Record." Bork, *Legislative Intent and The Policy of The Sherman Act*, 9 J.L. & ECON. 7, 7 n.2 (1966).

We can only make our most informed decision as to Congress' true intentions. And, although current antitrust decisionmakers have some degree of discretion in interpreting the antitrust laws, this discretion must be bounded by Congress' desires. This examination of congressional intent proceeds chronologically, because the earlier antitrust laws, and the Sherman Act in particular, laid out Congress' most fundamental antitrust policies.

The Sherman Act

From the language of the Sherman Act,⁶⁷ its legislative history,⁶⁸ and the history of late nineteenth century America,⁶⁹ it is clear Congress was concerned about those activities of trusts and monopolies that unduly restrained trade or caused a monopolization of interstate commerce. It is equally clear that with the Sherman Act "Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent."⁷⁰ These truisms do not, however, reveal why Congress passed the Sherman Act, or what goals it attempted to implement. If the goals of the antitrust laws are to be understood, the

Since most legislation is passed by a coalition whose members have very different interests, a complete reconciliation of every legislator's views is often impossible.

For the purposes of this Article, the historical methodology will be as follows: The statements that support a particular goal or policy will be identified, and given weight according to the relative importance of the speaker, and the strength of his sentiments. They will be balanced against opposing or contradictory legislative statements. If this calculation reveals a preponderance of evidence which favors a particular policy, then it will be assumed that the policy can be ascribed to Congress as a whole. If, however, there are only a few comments by less important legislators on a particular issue, the remarks will be cited but then ignored and it will be assumed that Congress did not articulate a policy toward that issue.

67. The Sherman Act condemns "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. . . ." Sherman Act, § 1, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1 (1976)). It provides punishment for "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States. . . ." Sherman Act, § 2, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 2 (1976)).

68. For comprehensive sources on the legislative history of the Sherman Act, see E. KITNER, *supra* note 62; H. THORELLI, *supra* note 62; A. TOULMIN, *supra* note 62; Bork, *supra* note 66.

69. See *infra* notes 125-42 & accompanying text.

70. Standard Oil Co. v. Federal Trade Comm'n, 340 U.S. 231, 248-49 (1951) (quoting A.E. Staley Mfg. Co. v. Federal Trade Comm'n, 135 F.2d 453, 455 (7th Cir. 1943)). As the National Commission for the Review of Antitrust Laws and Procedures succinctly stated: "[T]he chief aim of government litigation under Section 2 of the Sherman Act is the dissipation of persistent monopoly power." NATIONAL COMMISSION FOR THE REVIEW OF ANTI-TRUST LAWS AND PROCEDURES, 1 REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL 158 (1979) [hereinafter cited as NCRALP REPORT].

crucial issue is the explanation behind Congress' effort to protect competition.⁷¹

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

Improving Economic Efficiency

Judge Robert H. Bork, who has written one of the most thorough analyses of the legislative history of the Sherman Act, contends that the drafters of the Sherman Act were preoccupied with economic efficiency rather than with any nonefficiency considerations.⁷² Judge Bork argues 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 wel-

71. A fascinating illustration of the intense debate over the goals of the Sherman Act is provided by *Inglis v. ITT Continental Baking Co.*, 652 F.2d 917 (9th Cir. 1981). The court held that "[t]he relevance of the economic tests [for predatory pricing] so developed, however, must then depend in large part on whether allocative efficiency is a primary goal of the antitrust laws. As we see those goals, they are limited to the preservation of competition, and while one may assume that enhanced competition will lead to improvements in allocative efficiency, this may not always be the case. . . . Similarly, the search for allocative efficiency may lead one to accept conduct that is plainly anticompetitive. In any event, our objective is set by the antitrust laws and it concerns primarily the protection of competition." 652 F.2d at 936 n.20. Later, the court added that "[t]he antitrust laws were designed to protect competition, not solely to improve allocative efficiency." 652 F.2d at 939-40 (footnote omitted). Six months later, the same panel voted unanimously to amend its opinion by deleting all of the quoted material! *Inglis v. ITT Continental Baking Co.*, Nos. 79-4207, 78-3604 (Feb. 10, 1982).

72. R. BORK, *supra* note 2, at 91.

fare.”⁷³ Judge Bork asserts that the sole purpose of the Sherman Act was enhancement of “consumer welfare,” a term of art he defined as the “maximization of wealth or consumer want satisfaction.”⁷⁴ This view of “consumer welfare” includes maximum economic efficiency but excludes anything giving preference to consumers over monopolists or any concern with “unfair” transfers of wealth from consumers to monopolists. “Antitrust thus has a built-in preference for material prosperity, but it has nothing to say about the ways prosperity is distributed or used.”⁷⁵

Judge Bork asserts that this congressional mandate “requires courts to distinguish between agreements or activities that increase wealth through efficiency and those that decrease it through restriction of output.”⁷⁶ He further asserts that there is “not a scintilla of support” in the Act’s legislative history for “broad social, political, and ethical mandates,”⁷⁷ and explicitly rejects distributive issues as a possible area of antitrust concern.⁷⁸

Judge Bork supports his conclusions by analyzing dozens of citations from the legislative history of the Act, relying most heavily upon the views of Senator Sherman, its primary sponsor.⁷⁹ These statements

73. *Id.*

74. Bork, *supra* note 66, at 7. The Court, beginning with *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958), has condemned the misallocation of resources caused by monopoly pricing. In *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), the Court cited Judge Bork for the conclusion that the debates “suggest that Congress designed the Sherman Act as a ‘consumer welfare prescription.’” *Id.* at 343. See the discussion of this case *supra* note 2.

75. R. BORK, *supra* note 2, at 90.

76. Bork, *supra* note 66, at 7.

77. *Id.* at 10. The only other value that he believes can be identified in the legislative history is the protection of small businessmen. He argues, however, that “this value was given a complementary (or incidental) but not conflicting role in relation to the goal of maximization of consumer welfare.” *Id.*

78. R. BORK, *supra* note 2, at 111: “[I]t seems 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, and a decision about it requires a choice between two groups of consumers that should be made by the legislature rather than by the judiciary.” Interestingly, in his Sherman Act legislative history analysis, Bork observed that the argument in Congress for a rule against monopolistic mergers “derived 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.” *Id.* at 11. A concern with “monopoly extortion” would seem to be identical to the concern with the income distribution effects of economic activity which Bork says should be made by the legislature.

79. Judge Bork wrote that Senator Sherman “was by far the most articulate and thorough speaker on the question of what goals antitrust should serve. Those who spoke overwhelmingly agreed with his position on this issue. Disagreement was largely confined to questions of remedies and the constitutional reach of Sherman’s measure.” Bork, *supra* note

reveal overwhelming congressional concern with the activities of monopolies and trusts tending "to advance the price to the consumer"⁸⁰ and with practices effectively "destroying competition in production and thereby increasing prices to consumers."⁸¹ Judge Bork thus makes a convincing case that these concerns were paramount and indeed represented the overwhelming weight of congressional opinion.⁸²

Judge Bork then examines the proposition that Congress was concerned with "the preservation of efficiency,"⁸³ and finds support for the assertion that Congress, in passing the Sherman Act, did not mean to destroy existing efficient production methods.⁸⁴ In particular, he as-

66, at 45. "Sherman was the prime mover in getting antitrust legislation considered and pressed through the Senate . . . [and] though Sherman's bill was completely rephrased by the Judiciary Committee, of which he was not a member, the final bill in its substantive policy aspects, embodied Sherman's views." *Id.* at 14-15. For a description of the evolution of Sherman's initial bill into the Sherman Act, see *id.* at 13 n.9.

80. *Id.* at 16 (quoting remarks of Sen. Sherman, 21 CONG. REC. 2457 (1890)). In another example, Judge Bork cited § 1 of the bill that Sherman drafted. "[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). Judge Bork analyzes this language in the following manner: "Sherman employed these two criteria of illegality in every measure he 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. It can be reconciled only with a consumer-welfare policy. The second test is even more explicit. *The touchstone 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." *Id.* at 15-16 (citation omitted) (emphasis added).

81. 21 CONG. REC. 2558 (1890) (remarks of Sen. Pugh).

82. Bork, *supra* note 66. Judge Posner cited Judge Bork approvingly in summing up Congress' intent: "The framers of the Sherman Act appear to have been concerned mainly with the price and output consequences of monopolies and cartels . . ." R. POSNER, *supra* note 4, at 23 (citing Bork, *supra* note 66).

83. Bork, *supra* note 66, at 26-31.

84. "Sherman took great pains to stress that his bill would in no way interfere with efficiency. . . . '[The bill] does not in the least affect combinations in aid of production where there is free and fair competition.' He stressed the legality of efficiency repeatedly, citing partnerships and corporations as two forms of combination which were efficiency-creating and therefore lawful. He said corporations 'ought to be encouraged and protected as tending to cheapen the cost of production.' He also praised the efficiency-creating corporate merger.

"Not once did Sherman suggest that courts should blunt or discourage efficient size or conduct in the interest of any social or political value. The only limit he urged to the creation of efficiency by combination was justified explicitly in terms of consumer welfare. He thought combinations of monopolistic size would not pass their efficiencies on to consumers:

" 'It is sometimes said of these combinations [the monopolistic trusts] that they reduce prices to the consumer by better methods of production, but all experience shows that this saving of cost goes to the pockets of the producer. The price to the consumer depends upon the supply, which can be reduced at pleasure by the combination.' Here again Sherman

serts that Congress did not intend to forbid monopolies attained solely through efficiency.⁸⁵ Criticizing the assertion that values other than efficiency should play a role in Sherman Act interpretation,⁸⁶ he concludes that "Congress' position with respect to efficiency cannot be explained on any hypothesis other than that consumer welfare was in all cases the controlling value under the Sherman Act."⁸⁷ In light of his definition of "consumer welfare," Judge Bork contends that Congress' only goal was to promote economic efficiency.⁸⁸ In summary, Judge Bork concluded that the Sherman Act was intended to improve economic efficiency and does not reflect any congressional concern with the effects of monopoly power on the distribution of wealth and other nonefficiency goals.

Allocative Efficiency

The efficiency-oriented view of the Sherman Act, as propounded by Judge Bork and others,⁸⁹ has initial appeal. No basis exists, how-

identified injury to consumers as occurring through restriction of output by firms with market control." *Id.* at 26-28 (citations omitted). Judge Bork's conclusions will be analyzed throughout this paper.

85. *Id.* at 28-31.

86. *Id.* at 39-42. For example, Judge Bork examines Judge Hand's assertions in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), that the Sherman Act should have as a goal the protection of small businessmen. He analyzes the legislative statements that Judge Hand relied upon, and concludes that while Congress certainly showed sympathy for small businesses insofar as they were hurt by the trusts, their concern never constituted an affirmative desire that the Act should seek their protection as an end in itself. Their protection, Judge Bork asserts, was thought to be an incidental benefit of the Act. Bork, *supra* note 66, at 39-42.

Judge Bork found only a single occasion upon which he believed that the Senators considered the preservation of small businesses as an end in itself, and concluded that "it is impossible to find even colorable language suggesting most of the other broad social or political purposes that have occasionally been suggested as relevant to the application of the Sherman Act." *Id.* at 41-42 (citation omitted). He backs up this assertion with a footnote in which he examines a few additional legislative statements which might support other nonefficiency goals and calls them "isolated remarks and shreds of casual rhetoric." *Id.* at 43 n.105. Judge Bork deliberately declines to consider the effects of the forces of populism that provided much of the impetus for the passage of the Sherman Act. *Id.* at 44 n.106.

87. Bork, *supra* note 66, at 26.

88. *Id.*; see also R. BORK, *supra* note 2, at 90-91.

89. See *supra* text accompanying notes 73-75. Areeda and Turner appear to come to essentially the same conclusion as Judge Bork, although they phrase it in less absolute terms. They identify "fairness" and "populist" goals as the principal nonefficiency goals that the antitrust laws might reach. But they conclude that "[a]s a goal of antitrust policy, 'fairness' is a vagrant claim applied to any value that one happens to favor. In our context, it may connote competition or its absence." 4 P. AREEDA & D. TURNER, *supra* note 4, at 21. They further conclude that these goals should play a role in antitrust analysis only insofar as they affect the efficiency of our economy: "In one set of meanings, competition promotes fair results in the sense of prices close to cost and multiple choices for buyers and sellers. Com-

ever, for their contention that Congress was concerned only with allocative efficiency. Indeed, it is unlikely that in 1890 many economists, much less legislators, understood the impact of monopoly power on allocative efficiency.

Judge Bork's review of the Sherman Act's legislative history conclusively demonstrates that Congress was preoccupied with the higher prices facing consumers as a result of monopolistic pricing.⁹⁰ Although he is correct to conclude that Congress was concerned with "consumer welfare,"⁹¹ he incorrectly restricts the definition of this key term to economic efficiency.

The modern economist, Judge Bork asserts, knows that the only harmful result of monopoly pricing is its adverse effects on allocative efficiency;⁹² therefore, in the interest of consumer welfare, the antitrust

petitive results are thus thought to be fair. Similarly, practices promoting competition are fair while those impairing it are not. . . . The promotion of fairness in these senses also promotes efficiency and progressiveness. But competitive processes and results are also called unfair by those who wish higher returns than competition gives them. . . . Here we note only that this conception of fairness is, of course, antithetical to both competition and economic efficiency." *Id.* at 21-22. They also asserted that "the weighing and resolution of conflicting interests and objectives would involve the courts in essentially political decisions for which there are no workable legal standards, and would often place them in a regulatory or supervisory role for which they are ill-equipped." *Id.* at 13.

Although they find some support for nonefficiency goals, Areeda and Turner nevertheless "concur with what we perceive to be the main thrust of the case law because . . . neither the statutes nor the legislative histories compel or even strongly suggest a different course of antitrust interpretation. If anything, they support the priority of competition and its efficiency goals." *Id.* at 12-13. In their view, promoting "non-efficiency goals over efficiency would be excessively costly, futile, and unadministrable." *Id.* at 24. They believe that "[o]nce antitrust rules are properly framed in terms of competitive and efficiency considerations, there is little room left for non-conflicting additional prohibitions; and avoiding conflict would require difficult if not elusive efficiency determinations that in many instances would otherwise be unnecessary. Accordingly, the contribution to populist goals from rules specially created to promote them would be far too small to warrant the inevitable legal difficulties, uncertainties, and enforcement costs they would involve." *Id.* at 30. Moreover, they think goals other than efficiency are inappropriate as antitrust standards even if they do not conflict with efficiency objectives. Areeda and Turner conclude that the Sherman Act's legislative history is vague, uncertain, seldom on point, abounding with casual language, and deserving of relatively little weight. *Id.* at 14-15. Interestingly, they do not appear to directly confront the wealth transfer issue. Although their merger analysis, for example, "assumes that the income transfer from consumers to producers is neutral," they do not directly discuss a possible concern with distributional questions. *Id.* at 149 n.2.

90. See *supra* notes 80-82 & accompanying text.

91. Bork, *supra* note 66, at 16. Judge Bork noted that "[t]he legislators did not, of course, speak of consumer welfare with the precision of a modern economist but their meaning was unmistakable." *Id.* at 10. Judge Bork also stated that "[t]he rules implied by the [consumer welfare] policy of [Congress] are alterable as economic analysis progresses. . . ." *Id.* at 47.

92. See R. BORK, *supra* note 2, at 90-91, 111; Bork, *supra* note 66, at 7, 9.

laws should be concerned only with improving allocative efficiency.⁹³ According to Judge Bork, the redistribution of wealth from consumers to producers is not an appropriate focus because it involves a value judgment and "could only rest upon a tenuous moral ground."⁹⁴

Although modern economists often eschew economic value judgments, the 1890 Congress may have been more willing to make them. The legislative history of the Sherman Act indicates that Senator Sherman and other legislators condemned trusts for raising prices and restricting output,⁹⁵ but no evidence has ever been found to suggest that any legislator understood that monopoly pricing causes allocative inefficiency.⁹⁶ It is extremely unlikely that the legislators' distaste for monopoly pricing could have been based upon its impact on allocative efficiency: the concept of allocative efficiency was, at best, on the verge of discovery by leading economic theorists when the Sherman Act was passed.⁹⁷

More importantly, leading economists of the day had very little

93. See R. BORK, *supra* note 2, at 90-91, 111; Bork, *supra* note 66, at 7, 9.

94. R. BORK, *supra* note 2, at 111. Judge Bork writes that "consumer welfare has no sumptuary or ethical component, but permits consumers to define by their expression of wants in the market place what things they regard as wealth." *Id.* at 90.

95. See *supra* notes 80-81.

96. See, e.g., Bork, *supra* note 66.

97. Alfred Marshall, for example, devoted seventeen pages of the 1890 edition of *Principles of Economics* to a chapter entitled "The Theory of Monopolies" in which only one footnote discussed either allocative inefficiency or any incipient version of this concept. A. MARSHALL, *PRINCIPLES OF ECONOMICS* 466 n.1 (1890). Modern understanding of allocative efficiency is based, inter alia, on the assumption of Pareto optimality, first proposed in 1909. V. PARETO, *supra* note 34. Some of the precursors of this concept can arguably be found in Pareto's first major work, *Cours D'Economie Politique*, which was published in 1896-1897. See *supra* notes 33-35 & accompanying text. Not until 1938 did the first modern and rigorous discussion of allocative efficiency appear. Hotelling, *The General Welfare in Relation to Problems of Taxation and of Railway and Utility Rates*, 6 *ECONOMETRICA* 242 (1938). Even this path-breaking and influential discussion, concerned with allocative inefficiency resulting from improper taxation and incorrect railroad and public utility rate-setting, did not discuss the antitrust implications of allocative inefficiency.

Scherer noted that other nineteenth century economists discussed what we today term allocative efficiency insofar as it related to taxation and the government regulation of public utilities: "The notion of a 'deadweight welfare-loss triangle' entered the mainstream of Anglo-American economics in the first edition of Marshall's *Principles* [citation omitted]. An obscure English-language precursor was Jenkin, *On the Principles Which Regulate the Incidence of Taxes*, reprinted in *READINGS IN THE ECONOMICS OF TAXATION* 227, 233 (R. Musgrave & C. Shoup eds. 1959) (originally published in 1871). A variant of the concept can be traced to Dupuit, *On the Measurement of the Utility of Public Works*, translated in 2 *INT'L ECON. PAPERS* 83, 108 (A. Peacock, et al. eds. 1952) (originally published in French in 1844)." Scherer, *The Posnerian Harvest: Separating Wheat from Chaff*, 86 *YALE L.J.* 974, 977 n.20 (1977).

influence on the passage of the Act.⁹⁸ It is unlikely, then, that the legislators who passed the early antitrust laws were aware that monopoly pricing led to allocative inefficiency.⁹⁹ Nothing in the legislative history of the Sherman Act suggests that they were. No commentator has pointed to any economic testimony that referred to a concept resembling "allocative efficiency," nor is there the slightest evidence that any member of Congress was even remotely familiar with this type of welfare loss.¹⁰⁰

Given the state of economic theory at that time, the assertion that legislators supporting the Sherman Act were influenced by considerations involving allocative efficiency is without credibility. Congressional distaste for the pricing and output consequences of monopoly pricing must therefore be rooted in other concerns. These concerns include the distribution of wealth between consumers and producers and, secondarily, the maintenance of productive efficiency, preservation of economic opportunities for small enterprises, and the concentration of economic, social, and political power in a few hands.

Productive Efficiency

Although the legislative history of the Sherman Act never alludes to any concept resembling allocative efficiency, it does repeatedly praise corporate productive efficiency and recognize that free competition leads to efficient competitors. The productive efficiency of free competition was especially encouraged when gains were passed on to consumers. Nevertheless, there is little basis for suggesting that the Sherman Act was passed primarily to improve or even to preserve pro-

98. It is worth remembering that the antitrust laws were passed by politicians, not economists. Professor Hofstadter 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 PARANOID STYLE*, *supra* note 5, at 200. Professor Stigler's conclusion is even more striking: "A careful student of the history of economics would have searched long and hard, on July 2 of 1890, the day the Sherman Act was signed by President Harrison, for any economist who had ever recommended the policy of activity combatting collusion or monopolization in the economy at large." Stigler, *The Economists and the Problem of Monopoly*, 72 AM. ECON. REV. 1, 3 (1982).

99. Indeed, the following analyses of the antitrust laws' legislative histories demonstrates that not even the most recent major antitrust law, the Celler-Kefauver Antimerger Act of 1950, was passed to enhance allocative efficiency. See *infra* notes 255-65 & accompanying text.

100. See generally R. BORK, *supra* note 2; Bork, *supra* note 66. One could, however, speculate about Congress' likely reaction had it known that trusts and monopolies caused allocative inefficiency. It seems reasonable to conclude that they probably would have used this as another reason to condemn them.

ductive efficiency; indeed, the trusts were viewed as extremely efficient. Rather, Congress wanted to pass a law for other purposes which hampered productive efficiency as little as possible.

Many scholars have suggested that the trusts existing in 1890 were efficient at production.¹⁰¹ Even their harshest critics admit this.¹⁰² Senator Sherman appreciated the efficiencies of large corporations generally:

Experience has shown that they are the most useful agencies of modern civilization. They have enabled individuals to unite to undertake enterprises only attempted in former times by powerful governments. The good results of corporate power are shown in the vast development of our railroads and the enormous increase of business and production of all kinds.¹⁰³

But congressional endorsement of trusts' efficient operations stopped when consumer prices rose, and the legislature withheld approval from combinations that, while yielding more efficient methods of competi-

101. See, e.g., McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137 (1958); see also R. HOFSTADTER, *THE PARANOID STYLE*, *supra* note 5; Koller, *The Myth of Predatory Pricing: An Empirical Study*, 4 ANTITRUST L. & ECON. REV. 105 (1971).

It is unclear how much of monopoly efficiency can be ascribed to the fact that monopolies took the form of trusts, and how much merely came about because these trusts were often combinations of large, efficient corporations. It is unclear, in other words, how much of their productivity would have been lost if they were broken up. An important question to ask is whether Congress believed that it would jeopardize significant productive efficiencies when it broke up the trusts. Perhaps Congress wanted to achieve its other goals out of a belief that it could substantially assist consumers and at the same time only impair productive efficiency a modest amount.

102. Principally for this reason, some economists in the late 1800's believed that monopolies were, in balance, beneficial for society. See Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221, 238-39 (1956); see also R. HOFSTADTER, *THE PARANOID STYLE*, *supra* note 5; Stigler, *supra* note 98. At the same time, however, a minority of legislators held the belief that a lack of competition lowered productive efficiency. For example, Representative Fithian stated his belief that "skill is created and is stimulated by competition. A recent writer on political economy says: 'Wherever monopoly is dominant, the incentive for improvement and skill is deadened. It is only when competitors contend with each other for the favor of the consumer that they are stimulated to attract that consumer by presenting him with wares both skillfully and cheaply made.'" 21 CONG. REC. 4102 (1890). Representative Vest stated: "We know very well that competition always reduces prices. . . . I say if you let these two manufacturing interests compete together and create competition, you then secure lower prices to the consumer. That is the law of trade and that is the law of manufactures [sic] the world over." *Id.* at 2466.

Congress's dilemma became manifest in Mr. Dooley's comment on Teddy Roosevelt's early attitude towards the trusts: "The 'trusts,' says [Roosevelt], 'are heejooous monstheres built up be th' enlightened interprise iv th' men that have done so much to advance progress in our beloved country,' he says. 'On wan hand I wud stamp thim undher fut; on th' other hand not so fast.'" H. PRINGLE, *THEODORE ROOSEVELT* 172 (rev. ed. 1956).

103. 21 CONG. REC. 2457 (1890). "When corporations unite merely to extend their business, as connecting lines of a railway without interfering with competing lines, they are proper and lawful." *Id.*; see also remarks of Senator Sherman cited by Bork, *supra* note 84.

tion, also produced higher consumer prices. The trusts were condemned despite their efficiency in large part because they kept the fruits of such efficiency. As Senator Sherman pointed out in qualification of his praise for efficiency, "It is sometimes said of these combinations that they reduce prices to the consumer by better methods of production, but all experience shows that *this saving of cost goes to the pockets of the producer.*"¹⁰⁴ Congressional condemnation of monopolistic extractions of wealth was so strong that it is even unlikely that Congress meant to provide an exception for a monopoly based solely upon superior efficiency.¹⁰⁵

104. 21 CONG. REC. 2460 (1890) (emphasis added). Senator Sherman and others expressed similar views elsewhere. The Senator, for example, commented that "[the courts] will distinguish between lawful combinations in aid of production and unlawful combinations to prevent competition and in restraint of trade" *Id.* at 2456. He also said, "If they [the Standard Oil trust] conducted their business lawfully, without any attempt by these combinations to raise the price of an article consumed by the people of the United States, I would say let them pursue that business." *Id.* at 2469.

Representative Mason also condemned the trusts despite their efficiencies: "Some say that the trusts have made products cheaper, have reduced prices; but if the price of oil, for instance, were reduced to 1 cent a barrel it would not right the wrong done to the people of this country by the 'trusts' which have destroyed legitimate competition and driven honest men from legitimate business enterprises." *Id.* at 4100. A slightly different sentiment was expressed by Senator Edmunds: "Although for the time being the sugar trust has perhaps reduced the price of sugar, and the oil trust certainly has reduced the price of oil immensely, that does not alter the wrong of the principle of any trust . . . because in the long run, however seductive they may appear in lowering prices to the consumer for the time being, all human experience and all human philosophy have proved that they are destructive of public welfare and come to be tyrannies, grinding tyrannies, that have sometimes in other countries produced riots, just riots in the moral sense, and so on." *Id.* at 2726. Moreover, none of the citations to the legislative history presented by Judge Bork confronted this trade-off. None suggested allowing higher prices to consumers in order to improve, or even to preserve, corporate efficiency. *See supra* note 84.

105. The controversy over whether Congress wanted to prohibit a monopoly achieved entirely by skill and efficiency comes largely from an exchange at the very end of the Sherman Act debates. Senator Kenna asked: "Is it intended by the committee, as the section seems to indicate, that if an individual . . . by his own skill and energy, by the propriety of his conduct generally, shall pursue his calling in such a way as to monopolize a trade, his action shall be a crime under this proposed act? . . ."

"Suppose a citizen of Kentucky is dealing in shorthorn cattle and by virtue of his superior skill in that particular product it turns out that he is the only one in the United States to whom an order comes from Mexico for cattle of that stock for a considerable period, so that he is conceded to have a monopoly of that trade with Mexico, is it intended by the committee that the bill shall make that man a culprit?" 21 CONG. REC. 3151 (1890).

Senator Edmunds gave a direct response to Senator Kenna's hypothetical: "[I]n the case stated the gentleman has not any monopoly at all. He has not got the possession of all the horned cattle in the United States. . . . He has not done anything but compete with his adversaries in trade, if he had any, to furnish the commodity for the lowest price. So I assure my friend he need not be disturbed upon that subject." *Id.* at 3151-52. Senator Edmunds' response indicates that he believed that no monopolization was involved in the

Although Congress was aware that trusts and monopolies raised

hypothetical, so he did not really consider the need for an exception for a firm that achieved its monopoly solely by skill.

Senator Hoar then gave his well-known answer: "[I]n the case put [by Senator Kenna, if] . . . a man who merely by superior skill and intelligence, a breeder of horses or raiser of cattle, or manufacturer or artisan of any kind, got the whole business because nobody could do it as well as he could was not a monopolist, [unless] it involved something like the use . . . [of unfair] competition, like the engrossing, the buying up of all other persons engaged in the same business." *Id.* at 3152. Senator Edmunds then provided the final answer to Senator Kenna's question: "I have only to say . . . that this subject was not lightly considered in the committee, and that we studied it with whatever little ability we had, and the best answer I can make to both my friends is to read from Webster's Dictionary the definition of the verb 'to monopolize': 1. To purchase or obtain possession of the whole of, as a commodity or goods in market, with the view to appropriate or control the exclusive sale of; as, to monopolize sugar or tea.

"Like the sugar trust. One man, if he had capital enough, could do it just as well as two. 2. To engross or obtain by any means the exclusive right of, especially the right of trading to any place, or with any country or district; as, to monopolize the India or Levant trade.

". . . [W]e were not blind to the very suggestions which have been made, and we thought we had done the right thing in providing, in the very phrase we did, that if one person instead of two, by a combination, if one person alone, as we have heard about the wheat market in Chicago, for instance, did it, it was just as offensive and injurious to the public interest as if two had combined to do it." *Id.* The Sherman Act, forbidding any person to "monopolize or attempt to monopolize," was then passed by the Senate. *Id.* at 3153.

This crucial segment of the debate deserves careful consideration. It would seem that Senators Hoar and Edmunds provided opposite answers to Senator Kenna's question. Senator Hoar clearly did not consider a firm to be guilty of "monopolization" if it "got the whole business" by skill and efficiency alone. Senator Edmunds, however, defined "to monopolize" as merely "[t]o engross or obtain by any means" Edmunds intended that "if one person . . . did it, it was just as offensive and injurious to the public interest as if two had combined to do it." Edmunds clearly condemned every monopoly, although by his first response he did not consider the hypothetical situation given to describe a monopoly. Thus, it would appear that these statements should be construed as offsetting one another although, if a judgment had to be made, since Senator Edmunds spoke last and was one of the main sponsors of the bill, his statements could perhaps be said to carry greater weight. The fact that this discussion took place at the very end of the Sherman Act debate could very well mean that it embodied Congress' final view on the subject. However, these statements were also less able to be corrected or opposed by Senator Sherman or other legislators.

An alternative reading of this dialogue, which accepts Senator Hoar's comments and distinguishes or downplays Senator Edmunds' reply is, of course, possible. Under this interpretation, an exception would exist for monopolies achieved by efficiency alone. One possibly could conclude that Congress' desire to avoid discouraging innovation and industriousness outweighed its general distaste for monopoly pricing. Of course, Congress would not extend this exception to firms that combined in order to generate productive efficiencies, perhaps because its experiences with trusts led it to conclude that their true motive was probably to eliminate competition, rather than increase efficiency.

In addition, single-firm monopolization based on superior efficiency often involves lower prices to consumers during the period when the firm is attempting to increase its market share. By contrast, monopolization by merger or conspiracy, not based upon internally generated efficiencies, generally involves no short-term benefits to consumers. Thus, the long-term monopoly overcharges might have weighed more heavily in the multiple firm case

prices and restricted output, the legislators were unaware that this caused allocative inefficiency.¹⁰⁶ They thought that monopolies were relatively efficient producers and that breaking them up could decrease productive efficiency.¹⁰⁷ Yet, Congress enacted the Sherman Act largely to prohibit and condemn them.¹⁰⁸ Clearly, the chief economic concern was not productive efficiency;¹⁰⁹ if Congress' main goal was to encourage that form of industrial organization that was, in 1890, most efficient, it would have praised the trusts, not condemned them. Rather, the Sherman Act was intended to insure that consumers obtained their "fair share" of the benefits of free competition.

Protecting Consumers from Unfair Transfers of Wealth

In the legislative debates over the Sherman Act, Congress clearly condemned the use of market power to raise prices and restrict output.¹¹⁰ This condemnation, however, did not arise from concern with allocative efficiency. The debates strongly suggest that Congress condemned trusts and monopolies because they had enough market power to raise prices and "unfairly" extract wealth from consumers, turning it into monopoly profits.¹¹¹

and might have prompted Congress to condemn it even when it was based upon superior efficiency.

Nevertheless, if the main thrust of the statute is kept in mind, including Congress' basic condemnation of monopoly pricing despite a potential sacrifice of efficiency, the Sherman Act does not appear to provide an exception for the efficient monopolist.

106. See *supra* notes 80-84, 95-100 & accompanying text.

107. See *supra* notes 101-03 & accompanying text. It is unclear just how much of a loss in productivity Congress would have been willing to tolerate in order to break up the trusts. An extreme case of the recognition that it might sometimes be necessary to sacrifice productive efficiencies in order to achieve other goals is exemplified by the court's divestiture order in *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). See Averitt, *Section 5: Structural Remedies in Competition Cases under the Federal Trade Commission Act*, 40 OHIO ST. L.J. 781 (1979) [hereinafter cited as Averitt, *Structural Remedies*].

In a merger context the Supreme Court came to a similar conclusion: "Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition." *Federal Trade Comm'n v. Procter & Gamble*, 385 U.S. 568, 580 (1967).

108. A possible exception to this general desire to prohibit monopolies may have been that provided for an "efficient monopolist." But see *supra* note 105.

109. It should be noted that while Congress was also concerned about small businesses, this concern was based upon a preference for small businesses as an end in itself, rather than upon the belief that protecting small businesses was a good way to increase the total efficiency or wealth of the economy. See *infra* notes 143-53 & accompanying text.

110. See *supra* notes 80-84, 95-100 & accompanying text.

111. See 21 CONG. REC. 2461 (1890). On July 10, 1888, Sherman offered a resolution, which was adopted without debate, condemning certain trusts and other business arrangements which "tend to foster monopoly or to artificially advance the cost to the consumer of

In the legislative debates, Congress discussed at length price increases by trusts and the resulting higher consumer prices.¹¹² For example, Senator Sherman, defending the bill's constitutionality, asked that Congress protect the public from trusts that "restrain commerce, turn it from its natural course, increase the price of articles, and therefore diminish the amount of commerce."¹¹³ From this and other similar evidence Judge Bork correctly concluded, "The touchstone of illegality is raising prices to consumers. There were no exceptions."¹¹⁴

The debates strongly suggest that higher prices to consumers were condemned because they unfairly extracted wealth from consumers and turned it into monopoly profit. For example, during the debates Senator Sherman termed monopolistic overcharges "extortion which makes the people poor," and "extorted wealth."¹¹⁵ Congressman Coke

necessary articles of human life. . . ." 19 CONG. REC. 6041 (1888). Sherman stated: "This bill does not seek to cripple combinations of capital and labor, the formation of partnerships or of corporations, but only to prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer." 21 CONG. REC. 2457 (1890); *see also id.* at 2461 (1890). Sherman added: "The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer." *Id.* He termed consumers subject to monopolistic pricing "unfortunate victims." *Id.*

Representative Heard stated: "We know that by such means the trusts which control the markets on sugar, nails, oils, lead, and almost every other article of use in the commerce of this country have advanced the cost of such articles to every consumer, and that without rendering the slightest equivalent therefor these illegal conspiracies against honest trade have stolen untold millions from the people." *Id.* at 4101.

112. *See supra* note 84.

113. 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 to 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. It dictates terms to transportation companies, it commands the price of labor without fear of strikes, for in its field it allows no competitors. Such a combination is far more dangerous than any heretofore invented, and, 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.

114. Bork, *supra* note 66, at 16.

115. 21 CONG. REC. 2461 (1890). On July 10, 1888, Sherman had offered a resolution, adopted without debate, which condemned certain trusts and other business arrangements which "tend to foster monopoly or to artificially advance the cost to the consumer of necessary articles of human life" 19 CONG. REC. 7 (1888). Sherman also stated that "[t]his bill does not seek to cripple combinations of capital and labor, the formation of partnerships or of corporations, but only to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer." *Id.* at 2457. Sherman added: "The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer." *Id.* Sherman termed consumers subject to monopolistic pricing "unfortunate victims." *Id.* at 2461.

referred to the overcharges as "robbery."¹¹⁶ Representative Heard declared that the trusts, "without rendering the slightest equivalent," have "stolen untold millions from the people."¹¹⁷ Congressman Wilson complained that the beef trust "robs the farmer on the one hand and the consumer on the other."¹¹⁸ Representative Fithian declared that the trusts were "impoverishing" the people through "robbery."¹¹⁹ Senator Hoar declared that monopolistic pricing was "a transaction the direct purpose of which is to extort from the community . . . wealth which ought to be generally diffused over the whole community."¹²⁰ Senator George complained that "They aggregate to themselves great enormous wealth by extortion which makes the people poor."¹²¹

Congress condemned monopolistic overcharges in strong moral terms, rather than because of their efficiency effects.¹²² Purchasers, whether resellers¹²³ or ultimate consumers, were entitled to purchase

116. *Id.* at 2614.

117. *Id.* at 4101 (emphasis added). The full quotation reads: "We know that by such means the trusts which control the markets on sugar, nails, lead, and almost every other article of use in the commerce of this country have advanced the cost of such articles to every consumer, and that without rendering the slightest equivalent therefore these illegal conspiracies against honest trade have stolen untold millions from the people."

118. *Id.* at 4098.

119. *Id.* at 4103. (Fithian was reading, with apparent approval, a letter from a constituent.)

120. 21 CONG. REC. 2728 (1890).

121. 21 CONG. REC. 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 unmolested, unrestrained 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 also complained that consumers were being robbed. *Id.* at 3150. He complained that the trusts were able to "fleece and rob the people." *Id.*

The Supreme Court has also used similar language. In *Albrecht v. Herald Co.*, 390 U.S. 145, 153 (1967), the Court implied that it was an antitrust goal to "protect the public from price gouging by firms with monopoly power . . ." See also *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339-43 (1979), discussed *supra* note 2. In *Buckley v. Valeo*, 424 U.S. 1, 262 (1976), Justice White, in dicta in a separate opinion concurring in part and dissenting in part, stated that "the antitrust laws are aimed at preventing monopoly profits and price fixing, which gouge the consumer."

122. Perhaps Congress was expressing more concern about preventing redistributions of wealth because they were relatively observable and certain. Efficiency gains, on the other hand, were probably more speculative in nature, and there was no guarantee that monopolists would pass them on to consumers.

123. Senator George, for example, recognized: "An advance in price to the middlemen is not mentioned in the bill, for the obvious reason that no such advance would damnify them; it would rather be a benefit, as it would increase the value of the goods he has on hand. He buys to sell again. He buys only for profit on a subsequent sale. So whatever he pays he receives when he sells, together with a profit on his investment; and so of all of them, including the last, who sells directly to the consumer. The consumer, therefore, paying all the increased price advanced by the middlemen and profits on the same, is the party neces-

competitively priced products. Members of Congress also condemned the unequal distribution of wealth resulting from monopolistic overcharges.¹²⁴ The legislators decided that competitive prices were "fair" whereas monopoly prices were not; therefore, consumers were entitled to own that quantity of wealth known today as "consumer surplus." The unfair prices, in effect, robbed consumers of that wealth. As a result, Congress was willing to risk some immediate efficiency losses in order to benefit consumers ultimately. Congress was willing to pass the Sherman Act in large part in an attempt to prevent such "unfair" transfers of wealth from consumers to monopolies.

Other Goals

Curbing the Social and Political Power of Trusts and Monopolies

Evidence also suggests that more than economic considerations motivated Congress to curb the power of trusts and monopolies. Although the concerns discussed thus far relate to the economic power of monopolies and trusts, Congress was also motivated by a desire to curb the social and political power of large businesses. This additional purpose is demonstrated by analyzing the history of the Sherman Act in light of the economic, social, and political context in which the law was passed.

The legislative history demonstrates that Congress condemned monopolies in part because they increased the cost of goods to consumers. Logic would seem to indicate that pressure from consumers burdened by higher prices contributed to the passage of the Sherman Act. This cannot be the complete explanation, however, because just prior to the passage of the Act, price levels in the United States were stable or

sarily damnified or injured." 21 CONG. REC. at 1767. He complained however, "The intent to advance the price to the wholesale or retail dealer alone will not do; it must be to advance it to the consumer. This leaves unpunished and perfectly lawful all these combinations which have proven so disastrous, that have for their object a decrease in the price to be given to the producer, and also those speculative movements now so common by which there shall be a temporary advance in the market, to last till a day not far off, when there shall be a settlement." *Id.* These quotations also suggest that the existence of middlemen should not nullify consumers' right to purchase competitively priced goods.

124. 21 CONG. REC. 2728 (1890). Senator Sherman stated: "The popular mind is agitated with problems that may disturb social order, and among them none is more threatening than the inequality of condition of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition." *Id.* at 2460.

Senator George expressed a similar concern: "Is production, is trade, to be taken away from the great mass of the people concentrated in the hands of a few men who, I am obliged to add, by the policies pursued by our Government, have been enabled to aggregate to themselves large, enormous fortunes?" *Id.* at 2598.

slowly decreasing.¹²⁵ In 1890, American consumers paid less for goods than at almost any time since the end of the Civil War.¹²⁶

Despite the then-recent rise of trusts, this phenomenon of falling prices is easily explained. The first trusts of any significance probably did not achieve their full power until a few years before passage of the Act.¹²⁷ Although some trusts did raise prices in the years immediately before 1890, overall consumer prices decreased dramatically from the end of the Civil War until approximately 1884, when they leveled off.¹²⁸ In addition, the last half of the nineteenth century witnessed a

125. Prices were falling, whether measured by the consumer price index, the cost of living index, or the wholesale price index. For example, in the generation between the end of the Civil War and the enactment of the Sherman Act, the consumer price index went down by 41%. Not only were prices falling on the average, they were falling for products in many of the industries that were cartelized, such as fuel and lighting (by 66%), metal and metal products (by 60%), textiles, chemicals and dyes, sugar, leather, food, spirits, building materials, etc. 1 U.S. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 201-11 (Bicentennial ed. 1975) [hereinafter cited as BUREAU OF THE CENSUS].

126. *Id.*

127. W. LETWIN, *supra* note 24, at 69-70, picks 1887 as the year of the formation of the first significant trusts. Other scholars pinpoint the start of the first great trusts and merger waves at different years. *See, e.g.*, D. MARTIN, MERGERS AND THE CLAYTON ACT 4 (1959) (concluding that the movement started in 1879, with the formation of the Standard Oil trust); OPPENHEIM & WESTON, FEDERAL ANTITRUST LAWS, CASES AND COMMENTS 317-23 (1967) (concluding that the first "merger movement" began after 1890). Regardless of the precise date that the first significant trusts were formed, it is generally agreed that they were stronger after 1890 than before it, and that the peak of the merger movement occurred after 1890.

128. The consumer price index and the cost of living index reveal that prices had not, on the average, started to increase by the time the Sherman Act was passed.

Consumer Price Index (1967=100)		Cost of Living Indices (1913=100)			Wholesale Price Indices (1910-1914=100)	
		Federal Reserve Board Estimate	Burgess Estimate	All Commodities	Fuel & Lighting	Metals & Metal Products
1890	27	78	67.8	82	72	123
1889	27	78	67.8	81	71	116
1888	27	78	67.5	86	72	121
1887	27	76	65.4	85	70	119
1886	27	76	65.3	82	70	110
1885	27	75	64.6	85	72	109
1880	29	80	71.3	100	92	166
1875	33	86	81.2	118	128	175
1870	38	91	92.5	135	134	200
1865	46	102	108.1	185	214	306

1 BUREAU OF THE CENSUS, *supra* note 125, at 201-11.

great industrial revolution;¹²⁹ large-scale production, new technology, and increased production speed resulted in tremendous efficiencies.¹³⁰ The industries that spawned some of the most notorious trusts also benefitted most from the new efficiencies. As a consequence, prices often fell despite the existence of the trusts.¹³¹

Falling prices during this period in fact contributed to the formation of the trusts. Viewing falling prices and increased production with alarm, producers sought to arrest this trend by combining or entering agreements to stabilize or raise prices, restrict output, and suppress competition.¹³² This trend was only beginning, however, by 1890. Most large and significant trusts were formed or achieved full power after and in spite of the passage of the Sherman Act.¹³³

While prices might have fallen more rapidly had the trusts not attempted to halt their decline,¹³⁴ it seems unlikely that consumers would strongly condemn the trusts only because prices were not dropping as rapidly as they should have been.¹³⁵ It is possible that even though overall prices were stable or decreasing, Congress or the public could have focused their attention on those prices that were rising and concluded that trusts were, on the whole, causing higher prices. It is more likely that other factors were at work. Consumers probably were angered less by the reduction in their wealth than by the way in which the wealth was extracted.

The legislative history reveals that a major factor leading to the passage of the Sherman Act was a congressional desire to curb the power of trusts. While Congress was concerned about the uses of this power to raise prices and restrict output, it also desired, as an end in

129. The expansion of the railroads transformed the United States into one economic entity. Industrial growth and innovation were rapid and immense, creating tremendous advances in transportation, communication and distribution. See A. CHANDLER, JR., *THE INVISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 250-59 (1977).

130. A. CHANDLER, JR., *supra* note 129, at 250-59.

131. See *supra* note 128. See also *infra* text accompanying note 133.

132. See R. HOFSTADTER, *THE AGE OF REFORM*, ch. 6 (1969) [hereinafter cited as R. HOFSTADTER, *REFORM*]; W. LETWIN, *supra* note 24, at 139.

133. See R. HOFSTADTER, *REFORM*, *supra* note 132, ch. 6; W. LETWIN, *supra* note 24, at 139.

134. It is uncertain whether in 1890, monopolies and trusts were responsible for more price *raises* than price *declines*. They did bring capital, large-scale production, organization, and modern technology to industry. Price reductions resulting from these efficiencies could have outweighed the price increases resulting from their monopoly power.

135. Trust decisions to raise prices often achieved great notoriety. Their efficiency gains were, of course, relatively invisible. In retrospect, it seems that a trust could have made a good case that its existence was in the public interest by merely pointing to the consumer price index.

itself, the prevention of accumulation of power by large corporations and the men who controlled them. Alarm over corporate aggrandizement of economic, social, and political power pervaded the debate.¹³⁶ The legislators feared not only the economic consequences of monopoly power, but potential social disruptions as well.¹³⁷ Moreover, this apprehension has been recognized repeatedly by courts interpreting the legislative history of the Act.¹³⁸

136. As Senator Sherman warned, "[I]f we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessities of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity." 21 CONG. REC. 2457 (1890). This theme runs throughout Senator Sherman's opening remarks. "If the concentrated powers of this combination are entrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the State and national authorities." *Id.* He framed the issue in the following manner: "The point for us to consider is whether, on the whole, it is safe in this country to leave the production of property, the transportation of our whole country, to depend upon the will of a few men sitting at their council board in the city of New York." *Id.* at 2570. Sherman further stated: "The popular mind is agitated with problems that may disturb social order, and among them none is more threatening than the inequality of condition of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition. These combinations already defy or control powerful transportation corporations and reach state authorities. They reach out their Briarean arms to every part of our country. They are imported from abroad, Congress alone can deal with them, and if we are unwilling or unable there will soon be a trust for every production and a master to fix the price for every necessity of life." *Id.* at 2460. Senator George expressed a similar fear, asking, "Is production, is trade, to be taken away from the great mass of the people and concentrated in the hands of a few men . . . ?" 21 CONG. REC. 2598 (1890).

137. Senator Hoar warned that "[t]he complaint which has come from all parts and all classes of the country of these great monopolies, which are becoming not only in some cases an actual injury to the comfort of ordinary life, but are a menace to republican institutions themselves, has induced Congress to take the matter up." *Id.* at 3146 (1890). *See also supra* text accompanying note 104.

Senator Sherman wanted to protect the "industrial liberty of the citizens," *id.* at 2457, and believed that trusts caused inequality of wealth and opportunity that "may disturb social order." *Id.* at 2460. In his strongest statement expressing fear of corporate power, he cautioned that "[t]hey had monopolies and mortmains of old, but never before such giants as in our day. You must heed their appeal or be ready for the socialist, the communist, and the nihilist. Society is now disturbed by forces never felt before." *Id.* at 2457.

138. Perhaps the most famous expression of this recognition was Judge Hand's citation to the above-quoted remarks of Senator Sherman, in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945): "We have been speaking only of the economic reasons which forbid monopoly; but, as we have already implied, there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results. In the debates in Congress Senator Sherman himself . . . showed that among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them." *Id.* at 428. In one of the first major Sherman Act cases, *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), Chief Justice White offered a similar explanation: "The debates . . . conclusively show . . . that

A review of the social history of the period illuminates the reasons underlying Congress' alarm. The post-Civil War period saw a rural agricultural nation transformed into an increasingly urban and industrial society. Work patterns changed. By the end of the Civil War individual yeoman farmers had all but vanished. In their places stood entrepreneurs and commercial farmers who shipped their goods to markets and then used the resulting cash to purchase goods from small businesses.¹³⁹ Thus, traditional independence gradually changed into interdependence.

With the rise of trusts, interdependence became impotence. Decisionmaking was transferred from traditional power centers to the great industrialists. Self-reliant farmers, business owners, and local leaders became dependent on the discretionary power of a few very rich men. Local control of society ended as numerous small power centers were swept away by the new class, one perceived as greedy and evil.¹⁴⁰ This transfer of power generated hostility towards the trusts and resulted in

the main cause which led to the legislation was the thought that it was required by the economic condition of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the wide-spread impression that their power had been and would be exerted to oppress individuals and injure the public generally." *Id.* at 50; *see also* *United States v. South-Eastern Underwriters Ass'n*, 332 U.S. 533, 553-54 (1944). Another early Supreme Court interpretation of the Sherman Act's legislative history, *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), came to the same conclusion: "[Trading combination] may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured. . . .

"[I]t is not material that the price of an article may be lowered. It is in the power of the combination to raise it. . . . Nor is it for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital." *Id.* at 323-24; *see also* *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359 (1933); *United States v. American Can Co.*, 230 F. 859, 901 (D. Md. 1916).

139. For a concise discussion of the myth of agrarian independence and the emergence of industrial society, see R. HOFSTADTER, *REFORM*, *supra* note 132, chs. 1-2.

140. *Id.* ch. 6. Professor Letwin provides a concise description of the public attitude just before the passage of the Sherman Act: "The great fervor against trusts . . . was for the people living at the time nothing so sudden or strange. It was simply a familiar feeling raised to a high pitch, intense because the speed with which new trusts were being hatched made it seem that they would overrun everything unless some remedy were found soon. The general disposition of the public was not in doubt. There were numerous objections to the trusts. . . . Trusts, it was said, threatened liberty, because they corrupted civil servants and bribed legislators; they enjoyed privileges such as protection by tariffs; they drove out competitors by lowering prices, victimized consumers by raising prices, defrauded investors by watering down stocks, put laborers out of work by closing down plants, and somehow or other abused everyone. The kind of remedy that the public desired was also clear enough; it wanted a law to destroy the power of the trusts." W. LETWIN, *supra* note 24, at 70.

political pressure on Congress to pass antitrust legislation.¹⁴¹

The political and social evils of accumulated power, recited in the legislative debates and reiterated by the cases and historians, probably engendered more public resentment toward the trusts than did an isolated rise in prices during an era of stable and declining prices.¹⁴² The congressional complaint, therefore, was directed not solely at the effects of monopoly power—higher prices and poorer consumers—but also at the process that produced them. The Sherman Act was intended not only to achieve competitive prices but also to restructure the economy in ways insuring a “fair” process for economic, social, and political decisionmaking by reducing the unfairly accumulated power of the trusts.

Protecting Small Businesses

Congress also expressed concern for preserving business opportunities for small firms.¹⁴³ The opportunity to compete has been viewed as particularly important for small entrepreneurs, perhaps because of

141. Certain exceptions to the Sherman Act were almost certainly not enacted in order to increase economic efficiency, but were probably provided in order to transfer power, and perhaps wealth, toward unions and states and in order to curb the social and political power of the trusts. See generally Noll, *Antitrust Exemptions: An Economic Overview* in NCRALP REPORT, *supra* note 70, at 168-70. The exceptions have the overriding purpose of promoting such political goals as federalism and the regulatory power of the states. See, e.g., *Parker v. Brown*, 317 U.S. 341 (1943). One “exception” to the reach of the Sherman Act concerns the right to petition the state legislatures by a combination attempting to influence legislation and thereby produce a monopoly or other restraint of trade. See, e.g., *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). The antitrust laws also exempt labor unions from their coverage. See generally L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 723-31 (1977).

142. See *supra* notes 125-26, 128 & accompanying text. A recent analogy might be found in the reaction of the American public to the recent rise in the price of petroleum. If the public had perceived that prices were rising because oil was getting scarce and expensive to produce, the public certainly would have become unhappy insofar as this meant that consumers would have to pay more for their gasoline and would, as a consequence, be poorer. But it is difficult to feel anger if one believes that price increases are caused “legitimately” by the impersonal factors of supply and demand. By contrast, the fact that the petroleum price increases were dictated by a small group of men acting at their own discretion angered people. The American public felt helpless before OPEC. There was great uncertainty over what OPEC might do next, and resentment that a small group of men had the power to make decisions that drastically affected everyone’s life. The “unfairness” of the way that the price increases came about, in addition to their amounts, helped cause the public anger towards OPEC.

143. In the opening debates on the Act, Senator Sherman stated: “It is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on

their vulnerability to predatory activities.¹⁴⁴ Carrying this goal to its extreme, Representative Mason alone would have condemned trusts even if they lowered prices to consumers because they could financially ruin small businesses.¹⁴⁵

Judicial statements of congressional intention to assist small businesses have been frequent.¹⁴⁶ Courts have even occasionally viewed

equal terms and conditions and under like circumstances. This is industrial liberty and lies at the foundation of the equality of all rights and privileges. . . .

"
 "But, they say, competition is open to all; if you do not like our prices, establish another combination or trust [But] when the combination already includes all or nearly all the producers, what room is there for another?" 21 CONG. REC. 2457, 2460 (1890). This sympathy for the welfare of small businesses was also expressed in the Sherman Act debates by Senator George: "It is a sad thought to the philanthropist that the present system of production and of exchange is having that tendency which is sure at some not very distant day to crush out all small men, all small capitalists, all small enterprises. . . . So now the American Congress and the American people are brought face to face with this sad, this great problem: Is production, is trade, to be taken away from the great mass of the people and concentrated in the hands of a few men . . . ?" *Id.* at 2598. Senator George also stated that "[b]y the use of this organized force of wealth and money the small men engaged in competition with them are crushed out; and that is the great evil at which all this legislation ought to be aimed." *Id.* at 3147. See also the remarks of Senator Pugh concerning the freedom of competitive fairness as a policy to be furthered. *Id.* at 2558.

144. Hofstadter characterized this type of concern as one that was both "psychological and moral. It sprang from the conviction that competition has a disciplinary value for character, quite aside from its strictly economic uses. America was thought to have been made possible by the particular type of character that was forged by competitive individualism, a type that had flourished in the United States because competitive opportunities had been so widespread that alert men could hardly fail to see them, to grasp and use them, and hence, to be shaped by them. The American male character was believed to have been quickened and given discipline by the sight and pursuit of opportunity. For this process to take place it was important that business be carried on fairly . . . and that newcomers be able to enter the game as entrepreneurs. . . .

"The economic order was not merely an apparatus for the production of goods and services; it was a set of rules for forging good conduct." R. HOFSTADTER, *THE PARANOID STYLE* *supra* note 5, at 209.

145. "Some say that the trusts have made products cheaper, have reduced prices; but if the price of oil, for instance, were reduced to 1 cent a barrel, it would not right the wrong done to the people of this country by the 'trusts' which have destroyed legitimate competition and driven honest men from legitimate business enterprises." 21 CONG. REC. 4100 (1890).

146. For example, in *Charles A. Ramsay v. Associated Bill Posters*, 260 U.S. 501, 512 (1922), the Supreme Court held that "[t]he fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade." See also *United States v. Topco Ass'n*, 405 U.S. 596, 610 (1972). This same general purpose has also found expression in the doctrine that group boycotts and concerted refusals by traders to deal with other traders constitute violations of the Sherman Act, even if price competition is unaffected. See, e.g., *Klor's Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959); *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457 (1941); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914). It has also found expression in

congressional interest in protecting small businesses as overriding its consumer-oriented goals.¹⁴⁷

Despite clear judicial recognition, close examination reveals relatively little support in the legislative history, beyond the few references above, for the "small producer" rationale.¹⁴⁸ Although there are a few statements suggesting that the protection of the opportunity of small business to compete was one motivating factor for the legislators, these statements do not imply that protection of small businesses was meant to override other goals.¹⁴⁹ Congress probably did not intend to go fur-

the Court's preferences for individual "enterprise and sagacity." *Associated Press v. United States*, 326 U.S. 1, 15 (1945).

147. The most famous exposition of the view that the Sherman Act was passed in order to preserve small businesses even if this might result in higher prices to consumers is probably that put forth by Judge Hand in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945): "[Congress in passing the Sherman Act] was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. . . .

"Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and *in spite of possible cost*, an organization of industry in small units which can effectively compete with each other." *Id.* at 429 (footnote omitted) (emphasis added). The desire to preserve opportunity for small businesses is perhaps explained by the belief that small businessmen were "worthy men" who lived productive and honest lives. This sentiment was powerfully expressed in *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323-24 (1897), where the Court stated: "Trade or commerce under [circumstances of artificially reduced prices] may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class, and the absorption of control over one commodity by an all-powerful combination of capital." See also *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457, 467 (1941);

An even more striking example of judicial interpretation occurred in a different context in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), where the Court referred to the congressional desire to protect "viable, small, locally owned businesses," even though this might result in "occasional higher costs and prices." *Id.* at 344. See *infra* text accompanying note 254.

148. See *supra* text accompanying notes 143-44. The courts appear to cite repeatedly the same few references. For example, to support the conclusion reprinted *supra* in note 147, Judge Hand relied on the remarks of Senator Sherman and Senator George, *supra* note 143. *United States v. Aluminum Co. of America*, 148 F.2d at 428-29.

149. Only Representative Mason expressed an intent to protect small businesses at the expense of consumers. See *supra* text accompanying note 145. There are perhaps a small number of overlooked statements that support Representative Mason's view. In addition, some of the proconsumer statements may have disguised the desires of a few members of Congress who really favored aid to small businesses. But a few isolated statements do not represent the intent of Congress. Nor can they establish the policy or spirit of the Sherman Act. This is especially true because Representative Mason's views run counter to the strong consumer orientation of the Sherman Act.

ther than establishment of an economic system providing free opportunities for entry and enough producers to ensure vigorous competition, a system in which no company became large enough to dominate.¹⁵⁰

Additionally, the congressional intent to assist small businesses can be interpreted as promoting distributive, rather than efficiency, considerations. Passage of the Sherman Act may have been intended, in part, to transfer wealth to small businesses. The legislative history does not indicate, however, that Congress intended to help small businesses as a means of improving the overall efficiency of the economy. The debate suggests only a possible intent to assist small businesses as an end in itself, not as a means of increasing total economic output.¹⁵¹

Sympathetic to the plight of small businesses harmed by trusts, Congress expressed a desire to create an environment in which small businesses could effectively compete. It can fairly be said that one of Congress' goals was to assist small businesses; although consumers' interests were meant to be paramount, and conflicts between the welfare of consumers and small businesses were generally to be resolved in favor of consumers, Congress' desire to help small businesses certainly extended to those circumstances in which small businesses would be

150. Of course, sentiments in the legislative history denouncing large trusts and monopolies and those praising small businesses are closely related. In the views of Professors Kaysen and Turner, "The legislators were well aware of the common law on restraints of trade, and of the power of monopolists to hurt the public by raising price, deteriorating product, and restricting production. At the same time, there was at least equal concern with the fate of small producers driven out of business, or deprived of the opportunity to enter it, by 'all powerful aggregations of capital.' There was no obvious inconsistency in these two interests. One could readily have identified free access and large numbers of comparatively small producers with competitive processes, and in turn have identified competitive processes derived from such market structures with beneficial economic results for the public at large. Or, to short circuit the proposition, one could have equated beneficial economic results with the protection of large numbers of small independent producers." C. KAYSEN & D. TURNER, *ANTITRUST POLICY* 19 (1959). Nevertheless, the two concepts are not identical. For example, one might fear the economic, social, or political power of IBM and desire that it be split into five parts. Each part would be a multibillion dollar enterprise and one of the largest companies in a huge industry. Splitting IBM into five companies could help small computer companies to compete. Alternatively, however, the five new companies could drive smaller computer companies out of business. One could desire to split up IBM because of its size and power, regardless of, or even in spite of, the effect that this would have on small computer companies.

151. Even large businesses were entitled to protection from predation. At one point Senator George complained, "If some great manufacturer has been injured by an advance in the price of his raw material he can sue, but the poor man, the consumer, the laborer, the farmer, the mechanic, the country merchant, all that large class of American citizens who constitute 80 per cent of our population and who are the real sufferers will have no opportunity of redress, and the bill, so far as they are concerned, will be a snare and a mere delusion." 21 CONG. REC. 3150 (1890).

helped but consumers would not significantly suffer.¹⁵² Despite the wishes of Representative Mason,¹⁵³ however, this expression of sympathy did not amount to a congressional directive to assist small businesses in ways conflicting with the essential purpose of the Act, the protection of consumers.

Summary

Congress passed the Sherman Act to further a number of goals. Its main concern was with firms acquiring or possessing enough market power to raise prices artificially and to restrict output. Congress' primary aim was to enable consumers to purchase products at competitive prices. Artificially high prices were condemned not for causing allocative inefficiency but for "unfairly" transforming consumers' wealth into monopoly profits. All purchasers, whether consumers or businesses, were given the right to purchase competitively priced goods. All sellers were given the right to face rivals selling at competitive prices.

Concurrently, Congress was interested in encouraging efficient behavior in firms. Congress wanted a competitive economy to encourage the greater efficiencies resulting from competition. Efficiency gains were particularly desired when benefits passed through directly to consumers. A concern with productive efficiency could not, however, explain why Congress passed the Sherman Act. Congress condemned the relatively efficient trusts and monopolies for redistributive reasons. With the unlikely possibility of an exception for the "efficient monopolist,"¹⁵⁴ monopolizing conduct was not permitted merely because it pro-

152. Reconciliation of these interests can be illustrated through an analysis of a hypothetical case of predatory pricing. Assume that a firm lowered prices to below marginal cost in the short run, destroyed equally efficient competing small firms, and then increased prices to the monopoly level for an extended period. Because successful predation would hurt both consumers and small businesses, it would be condemned under either rationale. Suppose, however, that the predation attempt was unsuccessful because, although the below-cost pricing secured a monopoly position for the predator, as soon as it attempted to price above cost new competitors entered the market and eroded its market power. Unsuccessful predation would not hurt consumers; moreover, because they obtained below-cost goods for a short term, they benefited. However, small firms in the industry were destroyed by the unsuccessful predation attempt. While Congress desired that consumers not pay monopoly prices, at no point did Congress desire for consumers to be able to purchase goods below the competitive price. Consumers are entitled to competitive prices, not low prices. Unsuccessful predation should, therefore, be condemned out of a desire to protect small businesses.

For a legal and economic overview of predation, see Hurwitz & Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 VAND. L. REV. 63 (1982); Hurwitz, Kovacic, Sheehan & Lande, *Current Legal Standards of Predation*, in STRATEGY, PREDATION, AND ANTITRUST ANALYSIS (S. Salop ed. 1981), and the sources cited therein.

153. See *supra* note 149.

154. See *supra* note 105.

duced efficiency gains for the monopolist.

The Act also involved efforts to decentralize economic, social, and political decisionmaking to ensure that narrow private interests would be unable to override the public good flowing from free competition. The corporate power that the free market inadequately curbed was the target of the Act. Thus, the Act was also aimed at curbing the social and political power of large corporations and at encouraging opportunities for small entrepreneurs to compete, both thought to flow from the desired economic order as expressed in the Act.

The Sherman Act, the first antitrust law, set the tone for future antitrust legislation. Subsequent antitrust laws represented either extensions of the same ideas to different economic arenas, or attempts to better implement the same fundamental principles.

The Federal Trade Commission Act

Section 5 of the Federal Trade Commission (FTC) Act proscribes "[u]nfair methods of competition,"¹⁵⁵ a largely undefined prohibition against such traditional antitrust conduct as cartels and monopolization,¹⁵⁶ and against such consumer protection problems as fraudulent or coercive business practices.¹⁵⁷ Neither this phrase nor any of its component words, however, are defined in the Act. The same controversy and uncertainty that arose over the goals of the Sherman Act similarly cloud the meaning of "unfair methods of competition." The dominant view is that the FTC Act and the Sherman Act have identical, efficiency-oriented antitrust goals.¹⁵⁸ A minority of commentators, however, believe that the FTC Act was passed for a variety of social and political purposes.¹⁵⁹

A third view is warranted. Although efficiency was a significant concern of the FTC Act, this Article argues that the overriding goal of section 5 was the prevention of transfers of wealth from consumers re-

155. FTC Act, 15 U.S.C. § 45(a)(1) (1976).

156. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C.L. REV. 227 (1980) [hereinafter cited as Averitt, *Unfair Methods*].

157. Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225 (1981) [hereinafter cited as Averitt, *Unfair Acts or Practices*].

158. If both statutes were directed to maximize the economic efficiency of our economy it stands to reason that the two statutes should be interpreted identically, and that they would differ only in the scope of their coverage.

159. See *supra* notes 1, 11-16.

sulting from "unfair methods of competition."¹⁶⁰ For example, when monopolies force consumers to pay more for their goods or when fraudulent practices lead consumers to purchase goods they do not really want, wealth is "unfairly" transferred from consumers to firms with market power.¹⁶¹

The Congress that passed the FTC Act endorsed the Sherman Act's prohibitions, but feared that that law was inadequate.¹⁶² The report of the Senate Committee on Interstate Commerce noted that "[a]ll agree that while the Sherman law is the foundation stone of our policy on this question, additional legislation is necessary."¹⁶³ Thus, the objective of both statutes was the same: the prevention and curtailment of monopoly power.¹⁶⁴ The legislative history of the FTC Act shows it

160. The framers of the FTC Act also had a variety of administrative goals, which will not be discussed in this Article.

161. The case of *In re Allied Corp.*, File No. 811 0191, FTC (Dec. 8, 1982), directly confronted the wealth transfer issue. FTC Chairman James C. Miller stated that he endorsed the proposition, advanced by agency economists, that elimination of potential monopoly overcharges should *not* be counted as a law enforcement "benefit" when the agency does cost/benefit analyses. Such monopoly overcharges, said Miller, are merely "revenue transfers." F.T.C. Watch No. 158, Jan. 14, 1983, at 1. Commissioner Clanton, however, joined by Commissioners Bailey and Pertschuk, stated his belief that "preventing such transfers is one of the goals of the antitrust laws." *Id.* at 3.

162. The Senate Committee on Interstate Commerce expressed this idea in its 1913 report advocating additional antitrust legislation. The committee was of the opinion that the Sherman Act "should stand as the fundamental law upon the subject, and that any supplemental legislation for more effectual control and regulation of interstate and foreign commerce should be in harmony with the purpose of the existing statute." S. REP. NO. 1326, 62d Cong., 3d Sess. 2 (1913).

163. *Report of the Senate Comm. on Interstate Commerce*, S. REP. NO. 597, 63d Cong., 2d Sess. 8 (1914). As a consequence, the FTC was empowered to implement the Sherman Act. The Senate Committee on Interstate Commerce stated: "The proper enforcement of the Sherman Law also requires vigilant supervision which is most effectively obtained by a body in continual touch with the business organizations in the various industries." *Id.* at 1. This can also be illustrated by one of the final House debates involving Representative Frederick C. Stevens, a leading FTC sponsor:

REPRESENTATIVE MADDEN. Do the conferees understand, and wish to have the House understand, that this does away with the Sherman Law?

REPRESENTATIVE STEVENS. Not at all; it expressly does not. It is a method of enforcing it and making it more effective and preventing its misuse.

51 CONG. REC. 14,934 (1914).

The FTC was also charged with improving upon the Sherman Act's prohibitions by preventing monopolies in their incipency. See Averitt, *Unfair Acts or Practices*, *supra* note 157, at 242-51. The FTC Act also had the explicit goal of preventing those practices which violated the spirit of the other antitrust laws. See *id.* at 251-71. See generally Averitt, *Unfair Methods*, *supra* note 156.

164. As Representative Morgan succinctly stated, "Monopoly is the evil we wish to control. Competition is the thing we wish to maintain." 51 CONG. REC. 8855 (1914). There was, however, a vocal minority that advocated a mixture of cooperation and competition. Senator Lippitt, for example, stated: "Cooperation in trade is a living, vital force that can

was enacted to better accomplish the goals of the Sherman Act,¹⁶⁵ and to extend Sherman Act principles to one significant new arena: "unfair" or "immoral" business behavior.¹⁶⁶

The remainder of this section examines the legislative history of the FTC Act to determine what Congress meant by "competition" and by "unfair methods of competition." First, a review of the evidence demonstrates that the FTC Act was directed at insuring that corporate productive efficiency was both enhanced and passed on to consumers. The Article next argues that Congress' primary goal was prevention of "unfair" transfers of wealth caused by market power. The evidence also shows that, on balance, Congress did not want its distributive goals to be sacrificed for other objectives. Finally, the evidence relating to morality goals, the goal of curbing the noneconomic power of trusts and monopolies, and the goal of promoting the competitive position of small businesses is examined.

Improving Economic Efficiency

The dominant view of the FTC Act goals proposes that the Act, properly construed, should be concerned only with maximizing "consumer welfare,"¹⁶⁷ that is, with encouraging productive efficiency and

not be neglected, and the problem therefore that has to be intelligently met in the legislation on that subject if the situation is to be put upon a permanent basis is in some way to clearly formulate into law the intermediate ground between an unlimited and unregulated and destructive competition on the one side and an unregulated and unlimited cooperation on the other." *Id.* at 13,216.

165. Representative Morgan offered a very comprehensive early view of the Act's goals. *Id.* at 8854.

166. This prohibition on certain business behaviors, combined with the desire to prevent particular transfers of wealth, gives rise to and provides the goals behind the efforts of the Bureau of Consumer Protection. See *infra* text accompanying notes 213-15 & 221-28. Indeed, Congress' very use of the term "unfair" to modify "competition" strongly suggests a purpose for the prohibition that may be desired as moral, social or political, but in any case does not seem to be primarily efficiency oriented.

167. See R. BORK, *supra* note 2, at 51. Bork cautions, "We are compelled, I think, to accept this definition of 'competition'. . . . Very likely this is the primary value Congress had in mind when it used the word. Moreover, because 'competition' as a shorthand expression for consumer welfare enables us to employ basic economic theory, it avoids the pitfalls inherent in the other definitions surveyed. . . . [A]s will be shown . . . only this reading is consistent with other indicia of congressional intent and with the requirements of the judicial function." *Id.* at 61.

It is interesting to note that Bork considers and rejects four possible alternative meanings of competition:

"1. 'Competition' may be read as the process of rivalry. This is a natural mode of speech [Y]et it is a loose usage and invites the further, wholly erroneous conclusion that the elimination of rivalry must always be illegal.

"But this identification of competition with rivalry will not do for antitrust purposes. It

with minimizing allocative inefficiency. Judge Bork states that the mandated drive to enhance "consumer welfare" focuses on maximum economic efficiency and excludes such distributive concerns as "unfair" transfers of wealth from consumers to monopolists.¹⁶⁸

The prevailing view, however, is not supported by the record. Familiarity with allocative efficiency did not increase substantially from 1890 to 1914, even among economists, who had little influence on the passage of the Act, much less among legislators.¹⁶⁹ No mention of any concept resembling allocative efficiency appears in the legislative history of the FTC Act.¹⁷⁰ On the other hand, the legislative history places considerable emphasis on preserving and even increasing corporate productive efficiency.¹⁷¹

makes rivalry an end in and of itself, no matter how many or how large the benefits flowing from the elimination of rivalry.

"2. 'Competition' may be read as the absence of restraint over one person's or firm's economic activities by any other person or firm. So viewed, competition is the absence of . . . 'bondage'. . . . This is not a useful definition, however, for the preservation of competition would then require the destruction of all commercial contracts and obligations.

"3. 'Competition' may be read as that state of the market 'in which the individual buyer or seller does not influence the price by his purchases or sales. . . . This is an enormously useful model for economic theory, but it is utterly useless as a goal of law. . . . For the law to move either national markets . . . or local markets . . . as close as possible to the model of perfect competition . . . would entail an unbelievable loss in national wealth for no particular purpose.'

"4. 'Competition' may be read, in a meaning closely related to the one just discussed, as the existence of 'fragmented industries and markets' preserved 'through the protection of viable, small, locally owned business.'" *Id.* at 58-60.

168. See *supra* text accompanying notes 72-89.

169. While the concept was known to economists, the theoretical underpinnings of allocative efficiency were mostly undeveloped in 1914. See *supra* notes 91-100 & accompanying text; A. MARSHALL, *supra* note 26, at 395-410 (8th ed. 1920) (reprinted 1961). Professor Stigler, discussing the influence of economists on the 1914 legislation, concluded, "I am unwilling to believe that economists . . . had any appreciable influence on antitrust legislation." Stigler, *supra* note 98, at 6.

170. None of the scholars who advocate allocative efficiency as the goal of antitrust laws have been able to point to any remarks in the Act's legislative history that indicate an understanding of the concept.

171. The statement that perhaps most strongly supports a major role for efficiency in § 5 analysis came from Senator Hollis: "Fair competition is competition which is successful through superior efficiency. Competition is unfair when it resorts to methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper. Without the use of unfair methods no corporation can grow beyond the limits imposed upon it by the necessity of being as efficient as any competitor. The mere size of a corporation which maintains its position solely through superior efficiency is ordinarily no menace to the public interest." 51 CONG. REC. 12,146 (1914). It should be noted that Senator Hollis was not one of the Act's principal sponsors. Nor did he explicitly confront the problem that even efficient firms may charge monopolistic prices. Despite his failure to confront the tradeoff between monopolistic overcharges and efficiency, however, his state-

Undoubtedly efficiency concerns were meant to play a major role in section 5 analysis, but remarks of a number of legislators suggest that efficiency was not Congress' sole objective. Their views imply that Congress was primarily concerned with preserving those efficiency benefits that flowed directly to consumers.¹⁷² For example, Senator Cum-

ment nevertheless provides support for the view that efficiency should play a strong role in § 5 analysis.

Senator Robinson, quoting William H.S. Stevens, a leading economist of the times, provided a similar definition: "Nearly all normal business men can distinguish between 'fair competition' and 'unfair competition.' Efficiency is generally regarded as the fundamental principle of the former—efficiency in producing and in selling, while oppression or advantage obtained by deception or some questionable means is the distinguishing characteristic of 'unfair competition.'" *Id.* at 12,248. Professor Stevens expressed a similar opinion shortly after the Act was passed: "[T]he interest of the public lies in securing the best goods at the lowest prices or, translated into other terms, in a competition of productive and/or selling efficiency. In other words, the power given to the Trade Commission under section 5 is the power to prevent those methods which do not constitute a competition or productive and/or selling efficiency." W. STEVENS, "UNFAIR COMPETITION," A STUDY OF CERTAIN TRADE PRACTICES 236 (1917) (emphasis in original). Stevens continued that "a competition of productive and selling efficiency is, in the last analysis, practically synonymous with the public interest." *Id.*

Further, the 1913 Senate Committee on Interstate Commerce stated that it "believes that the progress of the world depends in a large measure upon that fair, reasonable rivalry among men which has hitherto characterized the advances of civilization. S. REP. NO. 1326, 62d Cong., 3d Sess. 13 (1913). Representative Morgan wanted the Act "[t]o enable us to assure all the benefits and advantages of the large industrial unit and escape the evils and dangers thereof. . . . [t]o relieve doubt and uncertainty to business, develop trade, encourage commerce, and promote enterprise. . . ." 51 CONG. REC. 8854 (1914). Additional concern for efficiency can be found in the earliest proceedings of the FTC, which noted its desire in making rulings and orders "to promote business efficiency and, within the limits of practicability, to cooperate with the business world in developing the best standards of commercial ethics." FEDERAL TRADE COMMISSION ANNUAL REPORT 26 (1916).

172. One early exchange openly revealed a preference for consumers, and explicitly stated that the purpose of the Act was not to help corporations:

MR. BARTLETT. [The bill for the creation of the Federal Trade Commission] is in the interest of the people and not in the interest of the corporations.

MR. STEVENS. . . . This must all be done with an eye single to the welfare of the people, and not in the interest of anyone who may desire these modifications. . . .

MR. BARTLETT. And the course which the gentlemen suggest is not a course that is in the interest of the corporations, but in the interest of the people themselves.

51 CONG. REC. at 8852 (1914).

Representative Frederick C. Stevens, a House manager of the bill and a leading member of the conference committee that produced the final version that was eventually enacted, addressed this issue at the beginning of the debates: "The people have the right to look to us to ascertain what evils there really are and what remedies may be necessary, and at the same time preserve the inestimable blessings of our system of government and the wonderful efficiency and progress of our business affairs. This measure—by regulating efficiency of our organizations and institutions so that the people can get the benefit of that efficiency, can maintain a prosperity for the masses of our people, can assure them that their Government continues for their benefit, can assure stability and harmony and in such way conduce to the general satisfaction with our institutions." *Id.* at 8852 (emphasis added). This same inter-

mins, one of the bill's two main sponsors and the author of the influential "Cummins Report,"¹⁷³ applauded the efficiencies associated with large firms. He warned, however, that "[w]hatever those economies and efficiencies may be, they must . . . stop short of one thing, that is, the power to rule that field of commerce which they attempt to occupy."¹⁷⁴

Even some opponents of the FTC Act based their opposition on the potentially negative impact on consumers of the inefficiencies that the Act would require.¹⁷⁵ The ultimate goal of the opposition was also

pretation also seems to be suggested by Representative Stevens toward the end of the debate: "In the economic field the Commission should assist the business concerns of this country along the lines demanded by the American people of efficiency and fairness. Then, while it is done, the public [sic] also wants to know that with this efficiency will equally go fairness in the distribution of the benefits of such organization and work." *Id.* at 14,938. Representative Stevens also stated: "[W]e want these men who have accomplished so much and are capable of so much to realize that there is a responsibility upon them as American citizens, that they receive a part of the blessings of our institutions, and that they must yield something and do something for the common welfare and not try to grab it all for themselves." *Id.* at 8853.

173. S. REP. NO. 1326, 62d Cong., 3d Sess. (1913).

174. 51 CONG. REC. 11,456 (1914). Cummins continued, "[T]here is no business field in this country so small but that it ought to be occupied by at least two enterprises, whether individual or corporate." *Id.* at 11,455-56; *see also* the remarks of Senator Newlands, 51 CONG. REC. 11,109 (1914).

The minority view expressed in the 1914 Report of the House Committee on Interstate and Foreign Commerce seems to take a similar position. This view would seem to allow corporations to keep the benefits from their efficiency advantages to the extent that these profits are not attributable to harm to consumers: "Any advantage large corporations have over small corporations or individuals through lower costs of production they are entitled to, but they should be prevented from an unfair use of the power that comes from their size alone." H.R. REP. NO. 533, pt. 2, 63d Cong., 2d Sess. (1914).

175. Senator Lippitt extolled the efficiencies of monopolies because, in his opinion, they resulted in lower prices for consumers: "I believe that they enable the farmer and the consumer to buy goods at a cheaper price than they can be sold without some form of efficient organization." 51 CONG. REC. 13,306 (1914). Similarly, Senator Weeks stated that "there are a great many combinations which have reduced prices as a result of the combination, and that therefore they have been for the public good." *Id.* at 12,732. Senator Lippitt later stated that the FTC should not be created because it would achieve the opposite of its stated goal. He believed that it would make corporations less efficient, and that these losses would be passed on to consumers: "I have no doubt myself that it will add millions and millions of dollars to the cost of production of the articles used in the trade of the United States, and I am sorry that there is not somewhere some more definite information to be obtained upon this very important phase: for the ultimate result of such expenditures must undoubtedly be borne by the consumers of the articles as an addition to the already burdensome cost of living." *Id.* at 13,213. Lippitt later quoted a speech by Victor Morawetz, delivered at the second annual meeting of the Chamber of Commerce of the United States, Washington, February 12, 1914: "[S]ome contracts and combinations of that character are necessary to secure economy and efficiency in production and in trade and to preserve strong and healthy competition at home and in foreign markets. If such contracts or combinations involve no

achieving the lowest possible prices for consumers.¹⁷⁶ They differed with the sponsors of the FTC Act only about the method which would best achieve this goal.

The legislative history of the FTC Act thus indicates that Congress wanted efficiency to play a major role in section 5 analysis.¹⁷⁷ Several statements even suggest that efficiency was meant to be the only goal of the Act, or, at least, should not be sacrificed in the pursuit of any other goal.¹⁷⁸ But most statements suggest that economic efficiency was only one of the legislators' concerns and, further, that Congress wanted to ensure that purchasers received their "fair" share of these efficiency benefits.¹⁷⁹ The evidence suggests, moreover, that the majority of the legislators subordinated their appreciation for corporate efficiency to their distaste for monopoly overcharges. The bulk of the legislative history indicates that efficiency should be a factor in section 5 analysis only when its benefits accrue primarily to consumers, and not to trusts or monopolies. That is, Congress was not willing to sacrifice consumers' direct monetary interests in order that monopolists might become richer. Thus, the 1914 Congress, like the Congress that passed the Sherman Act, strongly limited the role of efficiency in antitrust analysis.¹⁸⁰

Protecting Consumers from Unfair Transfers of Wealth

The legislative history of the FTC Act makes clear that Congress

elements of oppression of others, and if they do not put an end to healthy competition in any branch or [sic] trade or commerce, they should not be prohibited." *Id.* at 13,218.

176. *Id.* A cynic viewing these remarks, however, might speculate that they showed concern for obtaining the lowest possible prices for consumers in part because this seemed to be a useful tactic to prevent the creation of the FTC.

177. Congressional remarks concerned only productive efficiency. Although members of Congress did not consider the problem, it seems reasonable to believe that they would have been concerned with allocative inefficiency had they confronted it. *See supra* notes 89-100.

178. *See supra* note 171 and sources cited therein.

179. *See supra* notes 172, 174-76 and sources cited therein.

180. Although the debates show more discussion of efficiency in 1914 than in 1890, the role of efficiency in § 5 analysis seems to be identical to the role it was intended to play in Sherman Act analysis. *See supra* notes 95-108 & accompanying text. Under each statute there are some statements which imply a very strong or even dominant role for efficiency. The remarks by Senator Hoar in the Sherman Act debates, *supra* note 105, and Senators Hollis and Robinson in the FTC Act debates suggest this view. *See supra* note 171. In each statute's legislative history, however, the weight of the evidence suggests that efficiency was meant to be only one factor in the overall welfare analysis, and that efficiency concerns were not meant to prevail in those cases where they helped cause higher prices for consumers. Under the majority view, Congress' goal was both to increase firms' efficiency and to insure that the benefits of modern productivity were directly passed to consumers.

wanted to insure the existence of free competition and to prevent the use of market power to extract unfairly the entitlements or property rights Congress had decided belonged to consumers. Congress' dominant interest was to allow consumers to purchase their goods at competitive prices¹⁸¹ without sacrificing other consumer interests such as optimal product quality.¹⁸²

Congressional motives in condemning artificially high consumer prices were no different in 1914 than in 1890; Congress' redistributive concerns were paramount. Senator Newlands, the Act's main sponsor and the Chairman of the Senate Committee on Interstate Commerce, framed the issue as a concern for "unreasonable and extortionate prices."¹⁸³ Senator Lane identified the danger as

[t]he fraud and the theft which is being practiced upon the people of this country . . . which mulct the people of this country out of hundreds of millions of dollars each year . . . [The people] are also being compelled to pay arbitrarily fixed and unjustly high prices for what they consume, they are being robbed¹⁸⁴

The Minority Report of the House Committee on Interstate and Foreign Commerce complained that "[t]he common people are staggering under the burden they bear as a result of contributing extortionate

181. The goals of "protecting consumers against the high prices and [guarding] the interests of employees" were expressed by the House in H.R. REP. NO. 533, pt. 1, 63d Cong., 2d Sess. 14 (1914) (quoting from the *Preliminary Report of the Industrial Commission*, submitted to Congress in 1900). Senator McCumber even wondered if the only goal of the FTC Act was to control unfair competition whether or not the public obtained their goods "cheaper than they did before." 51 CONG. REC. 13,232 (1914). The Senate Committee on Interstate Commerce wanted to keep "within limited bounds the activities of a multitude of price-fixing associations in different branches of business, which, together with the great trusts, have been potent causes of the present high cost of living." S. REP. NO. 597, 63d Cong., 2d Sess. 9 (1914).

Congress specified competitive rather than low prices out of a recognition that a would-be monopolist might attempt to use predatorily low prices to drive out competition and then price at a monopoly level. Senator Reed presented a typical predatory pricing hypothetical: "It has been charged that . . . [the Standard Oil Company] goes into a trade territory which is occupied by a rival, drops the price of its products below their actual cost, and thus crushes and destroys the competitor, meantime selling in other communities at a higher price and gaining profits there, and out of those profits gained in other places sustaining itself, while it is selling goods at a loss in the community where their rival is located. When he is crushed it puts up the price. Now, that could be condemned under the provision I have drawn." 51 CONG. REC. 13,231 (1914). See *infra* notes 200 & 203.

182. See, e.g., remarks of Senators Cummins and Lippitt. 51 CONG. REC. 11,106 (1914).

183. *Report of the Senate Committee on Interstate Commerce, Appendix: Statement by Sen. Newlands*, S. REP. NO. 597, 63d Cong., 2d Sess. 23 (1914). Newlands also spoke in terms of an "unfair or unreasonable price." *Id.*

184. 51 CONG. REC. 13,223 (1914).

profits to the trusts and monopolies.”¹⁸⁵ Further, the stated goals of Representative Morgan were “[t]o minimize the power of the large industrial corporation to concentrate wealth, and to maximize its power as an agency for the equitable distribution of wealth [and] allay public suspicion and distrust, remove prejudice and secure the people from unjust tribute levied by monopolistic corporations.”¹⁸⁶

Even opponents of the Commission recognized redistribution as a central goal.¹⁸⁷ The legislative history indicates that opponents hoped to secure competitively low prices for consumers, opposing the bill in part because in their opinion it would cause productive inefficiencies that would raise consumer prices.¹⁸⁸

These remarks suggest that Congress was overwhelmingly interested in securing competitive prices for consumers.¹⁸⁹ Congress’ descriptive use of the terms “exactions,” “extortionate profits,” “theft,” and “looting” is evidence of its great displeasure and suggests congressional condemnation of supracompetitive prices not because they caused allocative inefficiency, but rather because they “unfairly” transferred wealth from consumers to producers. Although price was the touchstone of congressional concern, Congress had broader aims as well.¹⁹⁰ As the next section indicates, these goals were primarily social and ethical in nature.

185. H.R. REP. NO. 533, pt. 3, 63d Cong., 2d Sess. 5 (1914) (minority report) (Rep. Lafferty’s views).

186. 51 CONG. REC. 8854 (1914). *See also supra* text accompanying notes 173-74.

Even though Congress sought to protect consumers of particular products, it sometimes was concerned with products that might be inputs for other products. Senator Borah, referring to an instance of predatory pricing, explicitly named “those who should be benefited under the law of competition—that is, the consumers or users of these agricultural implements.” *Id.* at 11,232.

187. Senator Burton, for example, stated that “no one here—I can speak with confidence for the entire Senate—would put one obstacle in the way of punishing dishonesty, of preventing oppression, of prohibiting exactions.” 51 CONG. REC. 14,792 (1914).

188. *See supra* remarks of Senator Lippitt in text accompanying note 175.

189. *See* exchange between Representatives Bartlett and Stevens, *supra* note 172.

190. As Senator Cummins noted, prices were not Congress’ only concern: “We often go wrong, I believe, in assuming that because a great corporation, a vast aggregation of wealth, can produce a given commodity more cheaply than can a smaller concern, therefore it is for the welfare and the interest of the people of the country that the commodity shall be produced at the lower cost. I do not accept that article of economic faith. I think we can purchase cheapness at altogether too high a price, if it involves the surrender of the individual, the subjugation of a great mass of people to a single master mind.” 51 CONG. REC. 12,742 (1914).

Other Goals of the FTC Act

Preventing Unethical Business Practices

Congressional use of the word "unfair" to describe the types of competition it wanted to prohibit strongly suggests that the goals of section 5 include moral or ethical elements. The Act's legislative history strongly supports the conclusion that Congress wanted to prevent certain practices not because of any effects on efficiency or wealth distribution but because Congress considered them inherently unethical.¹⁹¹ The desire to eliminate immoral practices was based, in part, on the belief that monopolies often resulted from immoral business behavior.¹⁹² The FTC, it was believed, would become the "social machinery which will protect the individual from oppression and wrong."¹⁹³ Even the bill's critics thought the prohibition was, in part, an ethical one.¹⁹⁴ Thus, the legislative history leads to the conclusion that moral or ethical concerns helped inspire congressional use of the term "unfair."

The debates list several trade practices or conditions that the legislature considered "unfair;" monopolies created by unfair tactics were

191. Senator Newlands, for example, defined the parameters of "unfair competition" to include "every practice and method between competitors upon the part of one against the other that is against public morals" *Id.* at 11,112. Newlands wanted legislation to prevent "practices that shock the universal conscience of mankind." *Id.* at 12,980.

Senator Newlands strongly believed in the desirability of establishing standards of business ethics: "[I]t would be utterly impossible for Congress to define the numerous practices which constitute unfair competition and which are against good morals in trade, for we are beginning to realize that there is a standard of morals in trade or that there ought to be." *Id.* at 11,084. He stated the objective of Congress to be "simply to maintain by law good morals in business as in other matters." *Id.* at 11,108.

192. "Monopoly commences in insidious ways, by practices that are against good morals and constitute violations of individual rights for which the individual can have an action at law or in equity, but rights which the individual, because of his poverty or of his insignificance is often unable to assert against these great organized powers." *Id.* at 12,030. Newlands believed that his prohibition would cover everything Congress wanted and would "have such an elastic character that it [would] meet every new condition and every new practice that [might] be invented with a view to gradually bringing about monopoly through unfair competition." *Id.* at 12,024.

193. *Id.* at 11,109.

194. Senator Reed, a leading opponent of the Act, unsuccessfully proposed an amendment to redefine § 5 as follows: "The term unfair competition is hereby defined to embrace all these acts, devices, concealments, threats, coercions, deceits, frauds, discriminations, dishonest practices, false representations, slanders of business, and all other acts or devices, whether of like nature with those herein enumerated or not, done or used with the intent or the effect of which is to destroy or unreasonably hinder the business of another or prevent another from engaging in business, or to restrain trade or to create a monopoly." *Id.* at 13,310.

only one such example.¹⁹⁵ Many of these practices could be condemned because they led to monopoly power and eventually to the "unfair" extraction of wealth from consumers. Other practices could be prohibited because they unfairly harmed small businesses. With respect to these practices, characterizing section 5 concerns in terms of morality instead of consumer impact or small business protection might be historically correct, but makes little or no difference in the outcome of these cases.

Many of the practices mentioned in the debates might not lead to monopoly power,¹⁹⁶ but may have been considered *malum in se*.¹⁹⁷ Certain predatory practices, such as blowing up a competitor's plant or industrial espionage, are as obviously immoral as fraud or coercion,¹⁹⁸

195. Senator Robinson presented the longest list of unfair practices that appears in the 1914 debates:

1. Local price cutting.
2. Operation of bogus "independent" concerns.
3. Maintenance of "fighting ships" and "fighting brands."
4. Lease, sale, purchase, or use of certain articles as a condition of the lease, sale, purchase, or use of other required articles.
5. Exclusive sales and purchase arrangements.
6. Rebates and preferential contracts.
7. Acquisition of exclusive or dominant control of machinery or goods used in the manufacturing process.
8. Manipulation.
9. Black lists, boycotts, white lists, etc.
10. Espionage and use of detectives.
11. Coercion, threats, and intimidation.

Id. at 11,230.

In addition, the Democratic Platform of 1912 favored "the prevention of holding companies, of interlocking directors, of stock watering, of discrimination in price, and the control by any one corporation of so large a proportion of any industry as to make it a menace to competitive conditions." REPUBLICAN CAMPAIGN TEXTBOOK 1912 at 272 *reprinted in* G. HENDERSON, THE FEDERAL TRADE COMMISSION 16-17 (1924). Similarly, the Progressive Platform for that year favored strengthening the Sherman Law by "prohibiting agreements to divide territory or limit output; refusing to sell to customers who buy from business rivals; to sell below cost in certain areas while maintaining higher prices in other places; using the power of transportation to aid or injure special business concerns; and other unfair trade practices." T. ROOSEVELT, PROGRESSIVE PRINCIPLES, appendix at 319, *reprinted in* G. HENDERSON, *supra*, at 17.

196. See *supra* note 195. Of course, § 5 has a strong incipency mandate. See *supra* note 163 for a brief definition of incipency mandate.

197. Some members of Congress may have viewed even cartels and monopolies themselves as *malum in se*. Senator Newlands suggested that certain practices were against "the laws of God." 51 CONG. REC. 11,086 (1914) (quoting *State v. Central Lumber Co.*, 24 S.D. 136, 153 (1909)).

198. The legislators often referred to blatantly predatory acts which are relatively rare today. For example, early in the debates Senator Newlands stated that it had been proven that the National Cash Register Company "had men in the employ of their rivals, that they

and were condemned without regard to their effects on efficiency, distribution, small businesses, or consumers.

The primary impact of the ethical mandate of the statute has been the creation of the Bureau of Consumer Protection. It is possible to characterize this Bureau's concern with fraudulent, deceptive, and coercive practices solely as another manifestation of congressional condemnation of unfair transfers of wealth from consumers to producers.¹⁹⁹ It seems at least equally likely that Congress considered conventional consumer protection problems to be matters of morality and, for this reason, the object of prohibition.²⁰⁰

As a practical matter, however, unethical or immoral conduct has rarely been a factor in FTC antitrust enforcement.²⁰¹ Only blatantly unscrupulous practices, such as bribery or industrial sabotage, condemned by society under any circumstances, are challenged by the

had every form of espionage and detection, and that they even resorted to bribery of the employees of the rival concerns." *Id.* at 11,108.

199. It should also be noted that these practices generally lower economic efficiency. For example, coercive or fraudulent transactions can lower business confidence or individual incentive and might thus decrease the total stock of goods produced by the economy. It must be emphasized, however, that such practices were not condemned because of their efficiency effects.

200. This point is illustrated in the following exchange between Senator Lippitt and Senator Cummins:

SENATOR LIPPITT. [I]f the competition is of such high character as to reduce the price to the public, it is going to be a very difficult question to say that it is injurious to the public. I presume he means it is unfair to the public, it is injurious, and that because in some way it will ultimately result in higher prices to them, but if the competition results in lower prices to the public, it is fair to them?

MR. CUMMINS. Not always—If one goes into a store and desires a certain thing and through a misrepresentation, such as I have indicated, he takes another thing he is injured, and the people generally are injured if the same thing is practiced on them, without regard to the price, without regard to the quality of the goods involved.

51 CONG. REC. 11,106 (1914).

201. Only in *Federal Trade Comm'n v. Keppel & Bro., Inc.*, 291 U.S. 304 (1933), and *Federal Trade Comm'n v. Sperry & Hutchinson*, 405 U.S. 233 (1972), did the Court rely upon moral or ethical objections as the basis for finding an antitrust violation. In *Sperry & Hutchinson* the Court referred with approval to the factors that the FTC may consider "in determining whether a practice that is neither in violation of the antitrust laws nor deceptive is nonetheless unfair: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." *Id.* at 244-45 n.5. For a detailed discussion of this case, see Averitt, *Unfair Methods*, *supra* note 156.

FTC on ethical grounds alone.²⁰² Otherwise, immoral or unethical practices are challenged only when the practice is one that unfairly transfers wealth from consumers to producers, unduly harms small businesses, or causes economic inefficiency.²⁰³ As a prescriptive matter, it rarely makes a difference whether congressional displeasure with certain practices is characterized by distributive preferences for consumers or small businesses, or by ethical considerations.²⁰⁴ Under either explanation Congress has directed that these practices be prohibited.²⁰⁵

Curbing the Social and Political Power of Trusts and Monopolies

The FTC Act also was inspired by congressional interest in curbing the social and political power of large trusts and monopolies although this factor is less significant than in the Sherman Act debates. Nevertheless, as historian Richard Hofstadter has noted, the trusts and monopolies inspired "a fear founded in political realities—the fear that the great business combinations, being the only centers of wealth and power, would be able to lord it over all other interests and thus to put

202. See *Federal Trade Comm'n v. Sperry & Hutchison*, 405 U.S. 233 (1972); *Federal Trade Comm'n v. Keppel & Bro., Inc.*, 291 U.S. 304 (1933).

203. The Act was also designed to help firms that were subjected to unfair business practices. For example, Senator McCumber inquired, "Here are two manufacturers selling their articles in competition with each other in a certain territory. One of the manufacturers advertises that his goods are produced by the most modern methods, that they are in every respect as good or better than those of his competitor, and that he will sell them 25 per cent cheaper than his competitor. We will assume that that public statement is false and untrue, that it is absolutely unfair, but the result has been that the competitor in that field has reduced the price of his product to meet the competition, and the public are getting his goods 25 per cent cheaper than they did before. Under that condition can not the man or corporation who has been compelled to reduce the price of his product by reason of that competition go before this commission and insist that his competitor's goods are not as good as his and that the competition is unfair, and ask an injunction against the continuance of that claim for the goods of the competitor?" 51 CONG. REC. 13,232 (1914). Senator Reed answered: "Certainly . . . the Senator has stated a very strong case, a case in which bad morals were involved, in which falsehood was involved, and yet the effect was to promote competition, and hence promote the general welfare." *Id.* Even though prices would fall in the short term, the behavior described by Senator Reed would probably not promote long-term competition and general welfare.

204. For certain immoral acts, however, differences would still remain. If the acts were blatantly immoral, such as industrial espionage, murder, or destroying a competitor's plant, it seems doubtful that the FTC should even allow the defendant to attempt to justify its actions on economic grounds. The FTC should be able to ban such blatantly immoral practices by a per se approach.

205. Although there were certainly views to the contrary, the legislative history also seems to suggest that Congress meant to condemn immoral practices in part because they harmed other businesses. In addition to the quotations presented in this section, some of the statements *infra* in notes 210-11 & accompanying text suggest this.

an end to traditional American democracy."²⁰⁶ One Minority Report of the House Committee on Interstate and Foreign Commerce deplored the "unfortunate state of the Union" because "[f]ifty men in the United States control, through interlocking directorates, 40 percent of the wealth of the country."²⁰⁷

This fear was echoed throughout the debates.²⁰⁸ Congressman F.C. Stevens stated:

Vast wealth has been accumulated, especially in the hands of a few, irresponsible except to their own consciences and sense of justice and patriotism, and these powers have become so concentrated and involved that disentanglement is extremely difficult.

From this situation the great mass of our people have a very just apprehension that this wealth, and power growing out of it, may be not only used to the detriment but also may be a potential source of injury and oppression.

He also advocated the creation of the FTC because "[t]he people will not be afraid of mere size if it knows that an able and wise and powerful commission is guarding their interests"²⁰⁹

Strong statements by Congress notwithstanding, the strident rhetoric that pervaded the Sherman Act debate was largely missing. Because the FTC Act was, in large part, an attempt more effectively to accomplish the Sherman Act's goals, it is not surprising that most speakers debated ways to fine-tune existing antitrust law, rather than declare that Congress should do something about the powerful trusts. The same problems may have existed in both 1914 and 1890, but the contemplated solution in 1914 was more ameliorative than innovative.

206. See R. HOFSTADTER, *REFORM*, *supra* note 132, at 277. "At bottom, the central fear was fear of power and the greater the strength of an organized interest the greater anxiety it aroused. Hence it was the trusts, the investment banking houses, the interlocking directorates, the swollen private fortunes that were most criticized." *Id.* at 241.

207. H.R. REP. NO. 533, pt. 3, 63d Cong., 2d Sess. 5 (1914) (minority report) (Rep. Laferty's views).

208. See, e.g., 51 CONG. REC. 8850 (1914). Senator Newlands, commenting on the "Cummins Report," S. REP. NO. 1326, 63d Cong., 3d Sess. xii (1913), added that "we find that the trusts are more powerful today than when the antitrust act was passed and that the evils have grown up so interwoven with the general business of the country as to make men tremble at the consequence of their disruption." S. REP. NO. 1326, 63d Cong., 3d Sess. 19 (1914) (additional views of Sen. Newlands, quoting a speech he made in the Senate, Jan. 11, 1911). For a discussion of the "Cummins Report," see Averitt, *Unfair Methods*, *supra* note 156, at 231-32. Senator Kenyon feared that "[i]f we are going to concede, after all these years, that this Government is powerless to destroy monopoly, then we have got to concede that monopoly is powerful enough to destroy this Government" 51 CONG. REC. 13,158 (1914); see also *id.* at 13,211 (remarks of Sen. Lippitt); *id.* at 8850 (remarks of Rep. F.C. Stevens).

209. 51 CONG. REC. 14,938 (1914).

Protecting Small Businesses

A number of statements in the legislative history of the FTC Act imply that direct protection of small businesses was an explicit goal of the Act.²¹⁰ There were also suggestions that competition was the only object of the statute.²¹¹ It seems most likely that Congress' primary goal

210. For example, Senator Newlands expressed a desire to stop any practice that tended "to injury of a competitor unfairly." *Id.* at 12,980. Senator Reed articulated the purposes underlying the FTC Act as follows: "We are trying to keep the doors of competition open in this land. We are trying to keep the highways of opportunity unobstructed. We are trying to keep it so that the feet of the men of today may travel along an open path, so that all may have a fair chance to gain a livelihood and to embark in business." *Id.* at 13,231; *see also id.* at 13,232 (statement of Sen. McCumber), 12,932-33 (statement of Sen. Lewis).

Congressman F.C. Stevens stated, "Vast wealth has been accumulated, especially in the hands of a few, irresponsible except to their own consciences and sense of justice and patriotism, and these powers have become so concentrated and involved that disentanglement is extremely difficult. "From this situation the great mass of our people have a very just apprehension that this wealth, and power growing out of it, may be not only used to the detriment but also may be a potential source of injury and oppression." *Id.* at 8850. Further, he advocated the creation of the FTC because "[t]he people will not be afraid of mere size if it knows that an able and wise and powerful and patriotic commission is guarding their interests" *Id.* at 14,938.

Senator Lane feared that if the proposed legislation were not artfully crafted, "every small and honorable dealer may be put to intentional and infinite annoyance or driven out of business by his larger or more crafty rival." *Id.* at 13,223. Senator Burton felt, "In our business life there must be a free field for all, and along with this tendency toward operations on an enormous scale no policy should be adopted or allowed under which equality of opportunity shall be destroyed or the deserving competitor driven out of business." *Id.* at 14,792; *see also id.* at 12,980 (remarks of Sen. Newlands).

These quotations suggesting a moral objective to the Act also show that businesses, in addition to consumers, were objects of the Act's protections. *See supra* notes 191-205 & accompanying text.

211. "Where there is a practice or a class of practices which has for its main purpose an injury to the public by eliminating competition which ought to exist in the public interest, in such cases it is a fraud on the public, both as to purpose and results. If it be for the public interest to preserve healthful competition, then it is our duty to provide the means for it." 51 CONG. REC. 14,937 (1914) (statement of Rep. Stevens); *see also id.* at 14,936-38.

Senator McCumber agreed with Representatives Stevens and Bartlett, *see* their discussion *supra* note 172, about the intended beneficiaries of the Act: "I would like to vote for a trades commission bill the object of which would be to facilitate trade, insure honest competition, and insure a competition that would be beneficial to the public and not interfere with any competition that does not concern the public at large." *Id.* at 13,303.

Senator Cummins emphasized the specific aims of the Act: "The unfairness must be tintured with unfairness to the public, not merely with unfairness to the rival or competitor. . . . We are not simply trying to protect the people of the United States, and of course, there must be in the imposture or in the vicious practice or method something that has a tendency to affect the people of the country or be injurious to their welfare." *Id.* at 11,105. This cannot, however, be fully reconciled with Senator Cummins' later statement that "we must do something to preserve the independence of the man as distinguished from the power of the corporation; that we must do something to perpetuate the individual initiative. We often go wrong, I believe, in assuming that because a great corporation, a vast aggregation of wealth, can produce a given commodity more cheaply than can a smaller concern, therefore

was preventing harm to the general public by prohibiting those practices that harmed small businesses to the extent that the practices harmed competition in general. Congress was certainly concerned with providing equal opportunity for small entrepreneurs and with condemning unfair business methods, in part, because of the effect of such methods on small businesses.²¹²

Although some members of Congress supported the protection of small businesses as an end in itself, it appears that Congress did not intend to protect small businesses if higher prices for consumers resulted. Interpreting the statute as a directive to aid small businesses only when this aid does not interfere with any of Congress' other goals is more consistent with the general import of the FTC and Sherman Acts.

Antitrust and Consumer Protection Synthesis

As previously discussed, the antitrust concerns embodied in the FTC Act were based primarily upon distributive concerns.²¹³ A similar argument can be made concerning Congress' consumer protection goals. That is, Congress did not condemn practices such as fraud because they were inefficient;²¹⁴ rather, it considered them to be unfair transfers of wealth from purchasers to sellers.²¹⁵

Congress' intentions perhaps could be characterized as an implicit and unconscious attempt to promote competition by preventing specific types of market failures. This characterization is appropriate because a basic assumption underlying the Act was that the free market, when functioning properly, would best structure and "regulate" the Ameri-

it is for the welfare and the interest of the people of the country that the commodity shall be produced at a lower cost. I do not accept that article of economic faith. I think we can purchase cheapness at altogether too high a price, if it involves the surrender of the individual, the subjugation of a great mass of people to a single master mind." *Id.* at 12,742.

212. The first stages of a monopolization plan often harm small businesses and aid consumers. Only the advanced stages of monopolization, when prices have been raised above competitive levels, are likely to harm consumers. Condemnation of monopolization in its incipency thus primarily stems from a concern with the welfare of small businesses. *See also supra* note 156.

213. *See supra* notes 181-89 & accompanying text.

214. Of course, one could justify a prohibition against fraud on efficiency grounds. *See, e.g.,* Darby & Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67 (1973). The important point, however, is that Congress did not do so.

215. For example, Senator Reed referred to a case in which one man had "copied another man's goods" and concluded that the copier "was taking advantage of the other man's art and genius and ability. He was, in effect, stealing the other man's ideas." 51 CONG. REC. 12,023 (1914); *see also* remarks of Senator Reed, *id.* at 12,026.

can economy.²¹⁶ While in the long run the operation of the free market might erode every cartel or monopoly, or force companies engaging in fraud or other anticompetitive practices to go out of business, by 1914 Congress recognized that, in the short run, the free market did not always function perfectly. With the advantage of hindsight, one might well conclude that the FTC was established because of a congressional belief that such factors as false information,²¹⁷ imperfect or incomplete information,²¹⁸ free rider problems,²¹⁹ or insufficient resources²²⁰

216. Senator Newlands, in an appendix to the 1914 Report of the Senate Committee on Interstate Commerce, stated that Congress "desires to maintain by governmental action if need be, the full competitive system and to rely chiefly on competition as the regulator of corporate business." S. REP. NO. 597, 63d Cong., 2d Sess. 26 (1914) (appendix). See also the comment by Representative Morgan, *supra* in the text accompanying note 190. In his address of January 20, 1914, President Wilson gave his early view that the FTC should be established so that it would function "only as an indispensable instrument of information and publicity, as a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided, and as an instrumentality for doing justice to business where the processes of the courts or the natural forces of correction outside the courts are inadequate to adjust the remedy to the wrong in a way that will meet all the equities and circumstances of the case." Address by President Wilson on Trusts and Monopolies, H.R. Doc. No. 625, 63d Cong., 2d Sess. 6 (1914). Wilson was saying that the FTC should act only when the "natural forces of correction" were inadequate due, to use his example, to imperfect information, which is an example of and cause of market failure.

Representative R.B. Stevens also framed the issues in these terms: "[I]f we are to rely on the theory of competition to protect the public from the power of large corporations, it is imperative that the Government shall see to it that competition is on fair and equal terms." Report of the House Committee on Interstate and Foreign Commerce, H.R. REP. NO. 533, pt. 2, 63d Cong., 2d Sess. 1 (1914) (minority views, delivered by Rep. Stevens). In addition, the Senate Committee on Interstate Commerce noted in its February 26, 1913 report: "Interference with free competition was generally but not necessarily a restraint of trade, for there were some restrictions that could be put upon competition and upon competitors that left the competitive force as an adequate protection to the people." S. REP. NO. 1326, 62d Cong., 3d Sess. 3 (1913).

217. The 1914 House Commerce Committee report stated: "The publicity secured by the governmental agency should be such as will prevent the deception of the public through secrecy in the organization and management of industrial combinations or through false information. Such agency would also have at its command the best sources of information regarding special privileges or discriminations, of whatever nature, by which industrial combinations secure monopoly or become dangerous to the public welfare." Report of the House Committee on Interstate and Foreign Commerce, H.R. REP. NO. 533, pt. 1, 63d Cong., 2d Sess. 4 (1914) (quoting the *Final Report of the Industrial Commission*, submitted to Congress in 1902, vol. 19, at 650-51); see also the views of President Wilson, *supra* note 216.

218. Congress believed that if the FTC provided the necessary information, imperfect markets would often correct themselves. The House Report on the bill that later became the FTC Act suggested that publication of excessively high business profits would encourage other firms to enter the industry, thus lowering prices. H.R. REP. NO. 533, 63d Cong., 2d Sess. 3 (1914). One businessman testified that the publication of profit levels would cause businesses to keep prices low in order to avoid attracting new competition. Testimony of Wadill Catchings, *Hearings Before the House Comm. on Interstate and Foreign Commerce*, 63d Cong., 2d Sess. 52 (1914). Other members of Congress also stated their belief that the

caused the free market to protect inadequately consumer welfare in the short term. Congress believed that in these circumstances FTC intervention to correct market failures, performed prudently, could prevent unfair transfers of wealth from consumers to producers, improve economic efficiency, and otherwise improve "consumer welfare."

With the one prohibition against "unfair methods of competition" of section 5, Congress attempted to stop "unfair" transfers of wealth caused by such divergent practices as predation and fraud.²²¹ The mar-

publication of profit information would invite entry, thereby obviating the need for antitrust enforcement. *Id.* at 65, 204-05, 220. It was also stated that the publication of the "special privileges or discriminations" used to gain monopolies would ensure private actions which would bring them to an end. See H.R. REP. NO. 533 at 4-5; see also 51 CONG. REC. 8843, 8858, 8980-81, 8983, 8985 (1914). The 1914 House Commerce Committee Report stated that reports issued by the FTC would lead to an "elevated business standard and a better business stability." *Report of the House Committee on Interstate and Foreign Commerce*, H.R. REP. NO. 533, pt. 1, 63d Cong., 2d Sess. 3 (1914). Congress also quoted, with approval, the Preliminary Report of the Industrial Commission, submitted to Congress in 1900: "The larger corporations—the so-called trusts—should be required to publish annually a properly audited report showing in reasonable detail their assets and liabilities, with profit and loss; such reports and audit under oath to be subject to Government inspection. The purpose of such publicity is to encourage competition when profits become excessive, thus protecting consumers against too high prices and to guard the interests of employees by a knowledge of the financial condition of the business in which they are employed." *Id.* at 4.

219. In *Federal Trade Comm'n v. Klesner*, 280 U.S. 19 (1929), the Court held that "[t]o justify filing a complaint the public interest must be specific and substantial. . . . Sometimes, because, although the aggregate of the loss entailed may be so serious and widespread as to make the matter one of public consequence, no private suit would be brought to stop the unfair conduct, since the loss to each of the individuals affected is too small to warrant it." *Id.* at 28. For the FTC's proceedings, see 5 F.T.C. 24 (1922).

In the Sherman Act debates, Senator George challenged the practical effect of such consumer protectionism: "Will any single one of those men who have been thus wronged to the amount of ten, fifteen, twenty, or fifty dollars bring a separate suit? How can he maintain it? He is to employ a lawyer; he has to go to a distance of from 100 to 500 miles, perhaps to a distant State, to maintain his suit. Who will do it? I ask Senators to stop and reflect who will do it? Not one of them. If some great manufacturer has been injured by an advance in the price of his raw material he can sue, but the poor man, the consumer, the laborer, the farmer, the mechanic, the country merchant, all that large class of American citizens who constitute 90 percent of our population and who are the real sufferers will have no opportunity of redress, and the bill, so far as they are concerned, will be a snare and a mere delusion." 21 CONG. REC. 3150 (1890). For a definition of the "free rider" problem used in the context of an important area of antitrust concern, resale price maintenance, see Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86, 91-92 (1964).

220. Senator Newlands, for example, stated his belief that private antitrust suits would not eliminate unfair competition because "[t]he suit of an individual against a strong combination is the contest of a lilliputian against a giant." 51 CONG. REC. 11,083 (1914).

221. Federal Trade Commission Act of 1914, ch. 311, § 5, 38 Stat. 717. The statute was subsequently amended to add the prohibition against "unfair acts or practices." *Id.* (codified as amended at 15 U.S.C. § 45(a)(1) (1976)). Interestingly, Congress did not always use such terms as "fraud," "predation," and "price discrimination" to stand for totally separate problems. The following exchange, which occurred toward the end of the House debates,

ket failures that section 5 was meant to correct, however, can be classified into two general categories, a distinction developed in collaboration with my colleague, Neil Averitt.²²² Congress was primarily concerned with market failures that were external to consumers and restricted or distorted consumers' available options. Those are the traditional antitrust concerns and are the responsibility of the Bureau of Competition of the FTC.²²³ At the same time, however, Congress wanted to prevent market failures that occurred internally to consumers and affected their ability to choose freely and rationally among the options the market presented. This latter category is the area of concern of the FTC's Bureau of Consumer Protection.²²⁴ These two main departments of the FTC were designed to work together to provide two levels of protection for consumers, addressing both internal and external market failures, thereby ensuring that consumers received the full

illustrates the close linkage between the competition and consumer protection missions of the statute.

MR. COOPER. Suppose a corporation worth \$100,000,000 should advertise that it would sell and that it does actually sell its product to one consumer in a certain town for 50 cents, and should advertise that it would not sell and does refuse to sell to any other in that town or in that State for less than \$1?

MR. STEVENS OF MINNESOTA. That is clearly fraud. . . . [S]uch an act might have a result to greatly injure the public by interfering and destroying competition, which the public needs, and that is the purpose of such discrimination. To that extent the injury and intent and result would be a fraud upon the public, now known to the law and under the jurisdiction of this bill.

51 CONG. REC. 14,936 (1914). A short time later Representative Cooper inquired whether there would be any fraud if a corporation "sells its product below cost throughout a certain county or perhaps an entire State, but does not increase the cost of the product to consumers in any other community or State." Representative Stevens replied: "Mr. Speaker, our bill does meet the situation, in this way: Where there is a practice or a class of practices which has for its main purpose an injury to the public by eliminating competition which ought to exist in the public interest, in such cases it is a fraud on the public, both as to purpose and results." *Id.* at 14,937.

Because of our current view that fraud and these antitrust concerns are separate problems, Representative Stevens' views might seem somewhat puzzling. Perhaps he was condemning both types of action as a "fraud on the public" because each "unfairly" took consumers' property.

222. See Averitt, *Unfair Acts or Practices*, *supra* note 157, at 281-84.

223. The work of the Bureau of Competition (BC) comes under the broad heading of antitrust; it deals with monopolization, cartels, resale price maintenance, mergers, and similar issues. See generally Averitt, *Unfair Methods*, *supra* note 156.

224. The Bureau of Consumer Protection (BCP) prevents or redresses a number of practices that directly injure consumers, such as fraud, deception, the provision of insufficient consumer information and unfair credit practices. See generally Averitt, *Unfair Acts or Practices*, *supra* note 157.

benefits flowing from a competitive market.²²⁵ No consumer choices were to be artificially impeded.

The Bureau of Competition and the Bureau of Consumer Protection normally are thought of as performing substantially different functions. It is tempting to think of these functions as being very different and only related on the most general and abstract level, insofar as both Bureaus ultimately attempt to improve consumer welfare. Both the antitrust and consumer protection missions, however, were originally authorized by the single prohibition against "unfair methods of competition." The Congress that used this single phrase to establish one Commission to deal with both kinds of problems surely considered them to be closely related.

Both the Bureau of Competition and the Bureau of Consumer Protection were created to prevent certain "unfair" transfers of wealth and to enhance economic efficiency.²²⁶ These goals are sought whenever

225. It should be noted that these two levels of protection do not perfectly correspond to the respective functions of the BC and the BCP that have evolved over time.

The following chart attempts to illustrate the synthesis of the FTC's purpose with the advantage of hindsight. A modern observer might state that the goals of both the BC and the BCP are virtually identical, including, primarily, the prevention of certain "unfair" transfers of wealth and, secondarily, the enhancement of economic efficiency and other goals.

A UNIFIED APPROACH TO § 5

<i>Goals</i> (The same for each half of the statute)	<i>When?</i> Whenever there is a market failure	<i>What</i> should be prevented or corrected?
Bureau of Competition		
—prevent unfair transfers of "consumers' surplus"	external to the consumer, and caused by —imperfect information	A. The manifestations —monopolies —cartel, etc.
—encourage economic efficiency, especially if the benefits accrue to consumers	—free rider problems —others	B. The market failure should be directly corrected
Bureau of Consumer Protection		
—prevent immoral business competition	internal to the consumer, and caused by —imperfect information	A. The manifestations —fraud —coercion, etc.
—promote entrepreneurial opportunity	—free rider problems —a lack of free will —others	B. The market failure should be directly corrected

226. The primary difference is that the BC is also concerned with reducing the social and political power of large corporations. The other goals overlap. For example, even

there are market failures that interfere with the operations of the free market.²²⁷ In these cases the FTC may either correct the market failure directly or intervene in the market and undo the anticompetitive effect of the failure.²²⁸

Congress' overall mission in passing the FTC Act was to strengthen and improve the Sherman Act, and to better implement its competition goals. Congress viewed "competition" as the rule of the marketplace that would best achieve and enhance "consumer welfare," as Congress defined the term. Congress charged the FTC with carrying out its wishes in a faithful manner, subject to a crucial constraint: the FTC can act only when the free market does not function properly, and only when the FTC, by acting, is likely to improve consumer welfare.

The FTC Act is a more forward-looking and flexible statute than is the Sherman Act. It also encompasses a more expansive range of trade practices, such as unethical or fraudulent business practices. But its ultimate goals were identical to those of the Sherman Act.

The Clayton and Celler-Kefauver Acts

Experience with the Sherman Act and the Supreme Court decision in *Standard Oil Co. v. United States*²²⁹ led Congress to conclude that additional antitrust legislation was necessary.²³⁰ In enacting the FTC and Clayton Acts, Congress made two virtually simultaneous responses.²³¹ The FTC Act, as we have seen, reflected the belief that since it was impossible fully to specify in advance all of those practices which might harm competition, it was necessary to enact a broad prohibition and to leave the implementation specifics to an administrative

though the prevention of immoral acts is normally thought of as a BCP concern, immoral acts can also constitute predatory practices.

227. Many market failures, such as imperfect information, can trigger violations of either half of the statute, corresponding to both the BC and the BCP. Others, however, such as the absence of free will, seem more closely linked to only one half, either the BC or the BCP.

228. For example, suppose that a monopoly has arisen through "unfair methods of competition." The FTC might be forced to intervene directly into the marketplace and impose structural relief. But if, to use the suggestion often made in the legislative history, *see supra* note 218, publishing the profits earned by the monopolist would be likely to cause entry into the market which would erode the monopoly, structural relief might not be necessary.

229. 221 U.S. 1 (1911).

230. For a more detailed discussion of the effect of this case, see Averitt, *Unfair Methods*, *supra* note 156.

231. The FTC Act was enacted September 16, 1914, and the Clayton Act, October 15, 1914. In the FTC Act debates Senator Lippitt stated: "Here is the judiciary bill, the Clayton bill; they are all involved together. The instant you pass this bill you have got to go on and consider the Clayton bill, which is interlocked with it." 51 CONG. REC. 13,164 (1914).

agency.²³² The Clayton Act²³³ reflected a congressional desire to prohibit specific practices believed to be harmful. Several legislators believed that the Clayton Act was duplicative and unnecessary because the broad prohibitions of the FTC Act encompassed all the specific interdictions contained in the Clayton Act.²³⁴ Nevertheless, the prevailing view was that the Clayton Act was justified as a way of insuring that a number of particular practices would be banned.²³⁵ This approach also led, in 1950, to the primary restatement and extension of the Act, the Celler-Kefauver Antimerger Act.²³⁶

The Clayton Act

Section 7 of the Clayton Act prevents firms from acquiring rival companies where "the effect of such acquisition may be substantially to

232. As Justice Brandeis eloquently observed in a dissenting opinion in *Federal Trade Comm'n v. Gratz*, 253 U.S. 421, 434 (1920), "The Clayton Act . . . was framed largely with a view to making more effective the remedies given by the Sherman Law. The Federal Trade Commission Act . . . created an administrative tribunal, largely with a view to regulating competition."

The passage of the Clayton Act was an election promise of the Democratic Party under the leadership of Woodrow Wilson who stated in 1913 that society was sufficiently familiar with the processes and methods of monopoly and restraints of trade so that legislation could be passed to deal with price discrimination and other unfair trade practices. See W. PATMAN, *COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT* 7 (1968).

233. 16 U.S.C. § 12 (1914). For a more detailed account of the legislative history of the Clayton Act, see W. LETWIN, *supra* note 24, ch. 7; D. MARTIN, *supra* note 127; 2 A. TOULMIN, *supra* note 62, ch. 1.

234. For example, Senator Newlands, the principal sponsor of the FTC Act, stated: "[The Judiciary Committee] can, if it chooses, taking the view that is entertained by the Interstate Commerce Committee, conclude that section 5 covers all the various practices that in the common vernacular are termed 'unfair competition,' and having come to that conclusion, the Judiciary Committee can, if it chooses, leave out all legislation with reference to specific practices which are today regarded as unfair competition, or they can put them in, according to their pleasure." 51 CONG. REC. 12,030 (1914); see also *id.* at 15,829 (remarks of Sens. Borah and Culberson).

235. Senator Clapp expressed what very well might have been Congress' final opinion on this proposition: "[T]hose things that may be made plain, upon which we are generally agreed, should be prohibited. We should prohibit them, and then leave the Commission with that territory to work in which we are unable to cover by specific cases." *Id.* at 14,259.

236. 15 U.S.C. §§ 18, 21 (1950). Another major amendment was the Robinson-Patman Act, 15 U.S.C. § 13 (1936), which prohibited certain forms of non-cost-justified price discrimination between businesses that purchase the same goods where the effect of such discrimination may be substantially to lessen competition or to tend to create a monopoly. Space does not permit a full examination of the goals of the Robinson-Patman Act. It is relatively certain, however, that the Act was not passed solely to increase economic efficiency, although efficiency was mentioned as a legislative goal. See, e.g., Committee on the Judiciary, H.R. REP. NO. 2287, 74th Cong., 2d Sess. 306, 368 (1936). The legislators also stated that their intent was not to cause higher prices for consumers. *Id.* at 368-69. Congress was probably more concerned, however, with the financial status of small businesses.

lessen competition, or to tend to create a monopoly."²³⁷ The overall purpose of the Act, stated in the Senate Judiciary Committee's report on the final bill, was to prevent such mergers in their incipency.²³⁸ The legislators explicitly expressed their desire for competition.²³⁹ Congress, in other words, wanted to implement essentially the same goals as those embodied in the Sherman and FTC Acts.

More specifically, Congress wanted to stop the formation of monopolies that might engage in supracompetitive pricing that, in Congress' opinion, unfairly transferred consumers' wealth to monopolists. Some advocates pressed for passage of the Clayton Act because some firms otherwise would have "the power to arbitrarily control prices and thus exact unjust profits from the people."²⁴⁰ The remarks of one Senator expressed a desire to protect consumers and to encourage corporate efficiency in the belief that these benefits would be passed on to consumers: "The chief purpose of antitrust legislation is for the protection of the public, to protect it from extortion practiced by the trust, but at the same time not to take away from it any advantages of cheapness or better service which honest, intelligent cooperation may bring."²⁴¹

Thus, Congress remained preoccupied, as it was when it passed the Sherman and FTC Acts, with the redistributive effects of market power. While it wanted to achieve its direct consumer impact goals, Congress wanted to accomplish them in a manner that did not unduly sacrifice corporate efficiencies, largely because that sacrifice could harm the public. This evidence,²⁴² although somewhat limited, when analyzed in light of the general proconsumer, procompetition goals of the

237. 15 U.S.C. § 18 (1914).

238. "Briefly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the Act of July 2, 1890, or other existing anti-trust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipency and before consummation." Senate Judiciary Report, *quoted in* *United States v. United Shoe Machinery Co.*, 264 F. 138, 162 (E.D. Mo. 1920), *aff'd*, 258 U.S. 451 (1921).

239. For example, Representative Morgan stated that "the one thing we wish to maintain, and retain and sustain, is competition. We want to destroy monopoly and restore and maintain competition." 51 CONG. REC. 9265 (1914).

240. *Id.* Representative Hamlin stated: "The only reason why trusts and combinations are declared illegal is because they are organized and operated for the express purpose of more effectively exploiting the people by taking advantage of their necessities and controlling the price of those necessities to the consumers, as well as the purchase price which they have to pay for the raw material." *Id.* at 9556. Senator Cummins wanted to protect "the people against the rapacity and the avarice of monopoly . . ." *Id.* at 14,256.

241. *Id.* at 14,223 (remarks of Sen. Thompson).

242. See *supra* text accompanying note 241. In addition, see *infra* text accompanying note 245 (remarks of Sen. Borah).

antimerger laws, suggests that a merger should be prohibited, despite potential gains in efficiency, if that merger is likely to create a firm with market power that could adversely affect consumers.

Other evidence suggests that Congress was also motivated by concern for the social and political power possessed by large corporations, based on the fear that the mere existence of this power had the potential to cause social disruption. One Representative, for example, condemned the discretionary political power of men like J.P. Morgan:

[A]ll of the power represented by this wealth is lodged in the hands of a few men. Can anyone doubt the danger which such concentration permits?

. . . It is useless to say that the power represented will never be used to the detriment of the American people. . . . [I]t is too great a power to be concentrated—it affords too great a temptation to frail humanity.²⁴³

Congress also worried that the concentrated wealth and power of those who controlled large corporations could threaten the very fabric of the nation. The House Committee Report accompanying section 8, which deals with interlocking directorships, warned that “[t]he concentration of wealth, money, and property in the United States under the control and in the hands of a few individuals or great corporations has grown to such an enormous extent that unless checked it will ultimately threaten the perpetuity of our institutions.”²⁴⁴ Acknowledging the possibility that antimerger legislation might sacrifice corporate efficiency, one Senator nevertheless strongly condemned monopolies and trusts

243. 51 CONG. REC. 9186 (1914) (remarks of Rep. Helvering). See also remarks of Senator Cummins, *id.* at 14,536.

244. H.R. REP. NO. 627, 63d Cong., 2d Sess. 19 (1914). Representative Kelly echoed this fear: “Enterprises with great capital have deliberately sought not only industrial domination but political supremacy as well Great combinations of capital for many years have flaunted their power in the face of the citizenship, they have forced their way into politics and government, they have dictated the making of laws or scorned the laws they did not like, they have prevented the free and just administration of law. In doing this they have become a menace to free institutions and must be dealt with in patriotic spirit without fear or favor.” 51 CONG. REC. 9086 (1914). Representative Madden expressed the same concern, but in stronger language: “[T]he invisible Government which has controlled the visible government in this Nation for many years has been unscrupulous big business. . . . If this Nation is to be a Government of the people by crooked big business, the doom of our free institutions is assured.” *Id.* at 9087.

Representative Nelson used equally striking words: “As surely and rapidly as the properties of all the people pass into the hands of a few trust magnates, public sentiment, rapidly forming, when once fully aroused, will multiply the socialistic vote as a protest against monopoly privilege. And the day when the people must choose between public ownership of trusts for the benefit of all and the private ownership of the trusts for the privileges of the few, will witness the final triumph of socialism in this country. Therefore, we should act in our days of grace, while we are yet masters of our national destiny.” *Id.* at 9167.

because they "divide our people into classes, breed discontent and hatred, and in the end riot, bloodshed, and French revolutions."²⁴⁵ This brief examination of the Clayton Act's legislative history suggests that its substantive goals were identical to those of the Sherman and FTC Acts; the desire to prevent transfers of wealth from consumers to producers caused by monopoly pricing was Congress' paramount, but not exclusive, goal. A more detailed analysis of the Clayton Act's primary amendment and restatement, the Celler-Kefauver Antimerger Act, reveals similar concerns.

The Celler-Kefauver Antimerger Act

Section 7 of the original Clayton Act prevented companies from purchasing the *stock* of rival companies if the acquisition of that stock might lessen competition.²⁴⁶ A large number of companies evaded the prohibitions of the Act, however, by accomplishing mergers through *asset* acquisition.²⁴⁷

A 1948 study by the FTC describing the post-World War II merger movement²⁴⁸ concluded that corporate acquisitions from 1940 to 1947 had caused the disappearance of almost 2,500 firms with total assets of more than five billion dollars, representing approximately 5.5% of all manufacturing assets in the United States at the time.²⁴⁹ The report warned:

[N]o great stretch of the imagination is required to foresee that if nothing is done to check the growth in concentration, either the giant corporations will ultimately take over the country, or the Government will be impelled to step in and impose some form of direct regulation in the public interest.²⁵⁰

In recognition of this increased concentration,²⁵¹ the Celler-Kefauver

245. *Id.* at 15,955 (remarks of Sen. Borah).

246. 15 U.S.C. § 18 (1914).

247. *See* Arrow-Hart Hegeman Elec. Co. v. Federal Trade Comm'n, 291 U.S. 587 (1934); Federal Trade Comm'n v. Western Meat Co., 272 U.S. 554 (1926).

248. FTC, REPORT ON THE MERGER MOVEMENT: A SUMMARY REPORT V (1948).

249. *Id.* at 17. For a more detailed discussion of the FTC report and other studies of the period on corporate mergers, see Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 230-33 (1961), and the sources cited therein. Many of the citations and references in this section of the paper are from Bok's article. For other discussions of the legislative history, see D. MARTIN, *supra* note 127, ch. 7; Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 30 CASE W. RES. L. REV. 381 (1980); Note, *Section 7 of the Clayton Act: A Legislative History*, 52 COLUM. L. REV. 766 (1952).

250. FTC, REPORT ON THE MERGER MOVEMENT: A SUMMARY REPORT V, at 68.

251. *See, e.g.*, S. REP. NO. 1775, 81st Cong., 2d Sess. 2 (*quoted in* Brown Shoe v. United States, 370 U.S. 294, 316 (1962)).

Although Congress believed that the nation was experiencing a great increase in industrial concentration, this perception was probably false. One study of the time, and several

Act was enacted to ensure that the antimerger laws applied to acquisition of assets as well as stock.²⁵²

The most comprehensive judicial expression of the goals of the amendment is the famous statement by Chief Justice Warren in *Brown Shoe Co., Inc. v. United States*:²⁵³

The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy. . . . Other considerations cited in support of the bill were the desirability of retaining "local control" over industry and the protection of small businesses. Throughout the recorded discussion may be found examples of Congress' fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose.²⁵⁴

The following section examines the Celler-Kefauver Act's legislative history to find support for the Chief Justice's conclusion. It examines, in turn, the legislators' efficiency, distributive or consumer impact, and other goals.

Improving Economic Efficiency

The quoted passage from *Brown Shoe* did not mention economic efficiency as one of Congress' central objectives. Nor does Professor

subsequent studies, have largely confirmed the conclusion that the merger wave of this period was relatively harmless, and that industrial concentration was not growing during this period. See E. MASON, ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM 16-43 (1957); Bok, *supra* note 249, at 231-33. Even if Congress' perception was incorrect, however, "Congress relied heavily upon the Commission report in enacting the amended section 7, and no judge can overlook this point in carrying out the task of interpreting the statute in accordance with the intentions and desires of its framers. This is not to say that every legislative misconception must be rigorously applied until it is formally retracted. But even in the foggy world of antitrust, it is no simple thing for a court to overrule a major premise of Congress by appeal to the supervening authority of the *Review of Economics and Statistics*. Thus, if we are to gain an understanding of the outer limits of the court's discretion under section 7, we must turn to the reports and debates which culminated in the passage of the amendment." *Id.* at 234. (footnotes omitted)

252. In most respects the fundamental purposes of the Act were debated. Representative Celler, for example, stated: "I feel that most of the gentlemen who oppose the bill would like to repeal the Clayton Act in its entirety. That is the import of their argument, it strikes me." 95 CONG. REC. 11,489 (1949). Representative Keating added: "Mr. Speaker, the issue is very clear. Either we should repeal the Clayton Act entirely or we should amend it to make it effective." *Id.* See also Muris, *supra* note 249, at 393 n.47.

253. 370 U.S. 294 (1962).

254. *Id.* at 315. The first sentence was later quoted in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963). The Senate Report stated that a primary purpose of the Act was "to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions. . . ." S. REP. NO. 1775, 81st Cong., 2d Sess. 3 (1950).

Bok find in the legislative record much evidence of a congressional concern for efficiency. He noted that

none of the justifications for mergers by big companies were accorded any significance by Congress. Efficiency, expansion, and the like were ignored or simply brushed aside in the deliberations. Even opponents of the bill did not seek to argue that the interests of large companies would be infringed unwisely or unfairly by the bill.²⁵⁵

He therefore concluded that improved efficiency was not a central goal of the Celler-Kefauver Act.²⁵⁶ Of course, other commentators believe that, in amending section 7, Congress had significant efficiency goals.²⁵⁷ These scholars, however, are impeded by their inability to point to a sufficient amount of evidence in the legislative history indicating that economic efficiency figured significantly in the debates leading to the 1950 amendment.²⁵⁸

255. Bok, *supra* note 249, at 307.

256. Bok's observations imply that Congress did not mean to provide an efficiencies defense in merger cases: "There is little basis for concluding that the achievement of lower costs as such should give rise to favored treatment under Section 7. The possibility of lower costs was brushed aside in the legislative deliberations and there is every reason to believe that Congress preferred the noneconomic advantages of deconcentrated markets to limited reductions in the cost of operations." *Id.* at 318 (citations omitted). See also *id.* at 236-37. The conclusion that Congress was disinclined to permit an efficiencies defense was adopted by the Supreme Court in *Federal Trade Comm'n v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967) (quoting *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 344 (1962)): "Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."

257. See 4 P. AREEDA & D. TURNER, *supra* note 4, at subch. 9E; Muris, *supra* note 249, at 393-402. This interpretation opens the door to the assertion that a merger likely to lead to increased efficiency should not be illegal.

258. For the most comprehensive analysis of the legislative history of the Celler-Kefauver Antimerger Act which advocates the conclusion that Congress had strong efficiency goals and did not mean to preclude an efficiencies defense in merger cases, see Muris, *supra* note 249, at 393-402.

Professor Muris provides four categories of direct evidence that Congress indicated that increased efficiency should point towards the legality of mergers:

1. Evidence from the legislative history of prior bills on the same subject which Congress chose not to enact. However, Muris noted that the first serious efforts to amend the Clayton Act began in 1941. *Id.* at 393. Between 1943 and 1949 sixteen bills to amend the Clayton Act were introduced in Congress. See D. MARTIN, *supra* note 127, at 221. Thus, quotations from the legislative record of a selected number of these bills, none of which were enacted, provide only very indirect insight into the motivations of the Congress that, years later, passed the Celler-Kefauver Act.

2. Mergers between relatively small firms were permitted. This probably only meant, however, that Congress exempted small mergers because there was little chance that they would lead to a firm with a monopoly power, even if they resulted in a firm that was more efficient and more competitive.

3. The "failing company" exception. The wealth redistribution and efficiency effects of this exception are complex and uncertain. Since the failing company exception can save

Despite the recent vintage of this amendment, a search of its legislative history reveals no evidence of congressional concern with allocative inefficiency. Nor do those scholars advocating a strong efficiency orientation to the Act present such evidence.²⁵⁹ The record does contain, however, considerable discussion of productive efficiency.

It should come as no surprise that opponents of the bill asserted that it would inhibit the efficiency of both large and small firms.²⁶⁰

the costs of bankruptcy proceedings, and the management best able to utilize the failing assets will often be a horizontal competitor, the failing company exception could be justified from an efficiency perspective. The exception also, however, has clear distributive effects. It could enable the stockholders and creditors of the acquired company to receive more for their assets. It could also cause a transfer of wealth to the acquiring company if, through the addition of the productive facilities of the failing company, it increased its market power.

The failing company exception could also result in benefits to consumers, for without it there could be a short-term under-supply of the failing company's product. This could result in higher prices to consumers in the short term. Further, if a high level of industry instability increased the cost of capital to businesses in that industry, consumer prices could go up in the long term.

Although Bok recognized that Congress had a number of motivations, he concluded that "Congress's general unconcern with efficiency would indicate that this factor cannot be accorded much importance in accounting for the exception." Bok, *supra* note 249, at 340 (footnote omitted). For a full analysis of the failing company exception, see *id.* at 339-47. Further, the goals of an exception to an Act cannot necessarily be attributed to the rest of the Act.

4. Professor Muris quotes a discussion between Senator Kefauver and Senator O'Connor involving two newspapers that might want to save costs by having "an arrangement by which one plant would print both newspapers, with each one following its own editorial policy." Muris, *supra* note 249, at 400-01 (citing 96 CONG. REC. 16,456 (1950)). The discussion concluded that such a proposal would violate the law only where "it would result in a substantial lessening of competition. . . . *It may well be that by effecting a better arrangement for a more profitable undertaking, in the manner described, competition would be stimulated rather than lessened.*" *Id.* (quoting Sen. O'Connor) (emphasis added by Muris).

Despite his contention that this dialogue evidences an intent to allow efficiency defenses, the venture was to be allowed only if it did not result in a "substantial lessening of competition." Thus, the joint venture was not to be allowed, despite its efficiency-enhancing possibilities, if it might lead to a firm with market power. This exchange probably means that the Act was passed to stop the formulation of firms with market power, and that efficiencies are to be considered only if the merger would not be likely to lead to a significant chance of a lessening of competition or to higher prices for consumers. But, if a merger is not likely to lead to a lessening of competition or to higher prices for consumers, then it should not be prohibited by § 7. Even if the author's and Professor Muris' examinations of the legislative history failed to uncover every reference to a congressional desire for efficiency, it seems fair to conclude that Congress' principal concerns lay elsewhere.

259. See discussion of Muris, *supra* note 258.

260. For example, Representative Goodwin stated: "By preventing harmless and reasonable mergers among small and medium-sized concerns, this bill by freezing them to their present status of size will foreclose the chance that they may by consolidation or acquisition ever approximate either the size or efficiency that the big competitors have already achieved. Thus we will hurt small business and help big business." 95 CONG. REC. 11,487 (1949); see also *Hearings before the Subcomm. of the Senate Comm. on the Judiciary*, 81st Cong., 1st &

Even the Act's proponents admitted that efficiency was important.²⁶¹ Their view, however, was that the Act would help, not hinder, corporate efficiency. As one Representative stated, "[w]hen three or four producers take the place of 20 or 30 the chances are great that price competition will be crippled—that the big concerns will adopt a live-and-let-live policy towards each other at the sacrifice of their efficiency and their progress."²⁶² To Representative Celler, "bigness" did not "mean efficiency, a better product, or lower prices."²⁶³ Rather, the "main reason for antitrust laws is that we believe the competitive system is more efficient than monopoly."²⁶⁴ Moreover, he deprecated "the idea that efficiency and lower prices only come with bigness. We now know that in many lines the middle-sized concerns are either more efficient than the big ones, or else they are of no positive difference. And lower prices do not always accompany bigness."²⁶⁵

Thus, Congress' efficiency concerns in passing the Celler-Kefauver Act were substantially identical to its goals in 1914 and in 1890. Allocative efficiency was not a motivating factor, but productive efficiency was a goal of legislators on both sides of the debates. Given the legislators' passion for "competition," it seems clear that they were willing to risk some efficiency losses in order to prevent the possible rise of market power. We can be certain that Congress wanted to err on the side of losing productive efficiency rather than risk the formation of market power. It is, however, unclear how far Congress would have been willing to go. There is no indication that Congress chose to impose large

2d Sess. 140 (1950) (statement of the National Tool & Die Mfg. Ass'n) [hereinafter cited as *Senate Hearings*]; see also *Hearings Before House Subcomm. on the Judiciary*, 81st Cong., 1st Sess. 45 (1949) [hereinafter cited as *House Hearings*] (statement of Gilbert Montague): "[T]hese bills will handicap the small and medium-sized corporation, and will protect the large corporation, and will lay the dead hand of arrested development upon the entire national economy." Cf. *id.* at 83: "[A]n acquisition of this type could be justified in the public interest only if there were some economies resulting, if there was some improvement in efficiency resulting therefrom." (statement of John M. Blair, assistant chief economist, FTC).

261. Senator Donnelly, for example, was concerned with the bill's "effect on prices, the effect on productive efficiency." *Senate Hearings*, *supra* note 260, at 308.

262. 95 CONG. REC. 11,723 (1949) (remarks of Rep. Yates).

263. *Id.* at 11,717 (1949); see also *id.* at 11,496 (statement of Rep. Boggs).

264. *House Hearings*, *supra* note 260, at 61.

265. *Id.* at 64. Further, Representative Carroll stated that "[f]ree competition safeguards not only the consuming public; it also encourages small business and the development of new types of business and industry." 95 CONG. REC. 11,493 (1949). Representative Yates wrote, "When three or four producers take the places of 20 or 30, the chances are great that price competition will be crippled, that declining markets will be dealt with by restriction of output instead of by price reduction, that the big concerns will adopt a live-and-let-live policy towards each other at the sacrifice of their efficiency and their progress" *Id.*

and certain efficiency losses to gain small and speculative market power benefits. Given Congress' general desire to encourage efficiency in antimerger legislation, categories of mergers likely to result in large and certain efficiency gains should not be prevented short of a substantial risk that the firms might acquire more than an insignificant degree of market power.²⁶⁶

Protecting Consumers from Unfair Transfers of Wealth

In enacting the Celler-Kefauver Act, Congress was principally concerned that mergers would create or increase market power leading to supracompetitive pricing which directly harmed consumers. Proponents of the legislation framed the economic issues in terms of protecting consumers from monopolistic exploitation. One Representative predicted that the legislation would help "to preserve the chances of the average man to make a place for himself in business and [protect] the consuming public from unfair exploitation."²⁶⁷ Another accused certain companies of "maintaining high prices which injure the consumer" and called monopoly prices "outrageous."²⁶⁸ Quoting with approval from the FTC's report, a Representative perceived that "under competitive capitalism consumers are protected from high prices by the constant rivalry among numerous firms for a greater share of the market."²⁶⁹ A Senator castigated opponents of the bill:

266. There was apparently no explicit analysis of the possible tradeoffs involved in implementing actions that simultaneously increase efficiency and raise prices to consumers. A very close case was presented when an economist who testified in favor of the legislation stated that mergers should be permitted up until the point where scale economies in that industry were exhausted. See testimony of Dr. John D. Clark, member, Council of Economic Advisors, *House Hearings*, *supra* note 260, at 37: "I am sure that you would find, with respect to any of those companies that you have mentioned, that the actual advantage of cost of production ceased to grow at a point of size far less than that they have now reached. In other words, for example, I do not know the steel industry, but supposing [sic] a \$25,000,000 plant exhausted the opportunity for further reduction in unit costs. That gives you a datum point from which to start in determining how far you ought to permit the steel firms to grow in order to attain social advantage." As he stated that this point would come at lower levels of concentration than existed at that time, he did not seem to be advocating increased efficiency as justifying higher prices for consumers. Although Bok does not believe that efficiency was one of Congress' primary goals, *see supra* notes 255-56, he nevertheless wrote, "Perhaps more explicit guidance should be demanded from Congress before adopting an interpretation which could block really important increases in efficiency." Bok, *supra* note 249, at 318.

267. 95 CONG. REC. 11,506 (1949) (remarks of Rep. Bennett).

268. *Id.* at 11,492 (remarks of Rep. Carroll). Carroll also stated: "We all know that if there is free competition the public will be protected from unduly high prices and artificial scarcities . . . [C]ompetition keeps prices low and quality high." *Id.* at 11,722.

269. *Id.* at 11,506 (remarks of Rep. Byrne).

The whole trouble with you folks is, a lot of you forget there is such a thing as the consumer, as the great American buyer, the fellow who keeps these beloved corporations you love so much alive, and makes them profitable and sometimes the Government of the United States has to think about that great group of 140,000,000 consumers, and protect them against unjust exploitation.²⁷⁰

One Representative recognized that a prophylactic action was required because, once a company becomes a monopoly, "[t]he protection that surrounds property rights has become attached to the monopoly property."²⁷¹

Even opponents of the legislation framed the issues in terms of harm to consumers, arguing, however, that there was no substantial risk of exploitation of consumers. One opponent stated that the merger bill was not needed because he did "not subscribe to the doctrine that the businessmen of our country are crooks and that those who carry on their business through the instrumentality of corporations are out to fleece and extort higher and higher prices from their customers."²⁷² Witnesses who testified against the legislation also framed the issues in terms of benefits to consumers.²⁷³ In summary, both supporters and opponents of the amendment wanted to prevent consumers from paying artificially high prices. The prevailing legislators feared higher prices due to market power so much that they wanted to stop trends towards concentration in their incipency.²⁷⁴

270. *Senate Hearings, supra* note 260, at 180 (remarks of Sen. Kilgore); *see also* 95 CONG. REC. 8147 (1949) (remarks of Rep. Patman).

271. 95 CONG. REC. 11,493 (1949) (remarks of Rep. Yates).

272. *Id.* at 11,490-91 (remarks of Rep. Goodwin).

273. James L. Donnelly, former Vice-President of the Illinois Manufacturing Association, referred to "the customers' and consumers' interest which, of course, is paramount in all these considerations" *Senate Hearings, supra* note 260, at 30. Benjamin C. Marsh, Executive Secretary, People's Lobby, Inc., stated: "The assumption seems to be that competition and absence of monopoly will alone improve the quality of goods and reduce the price, and so benefit consumers [T]his assumption is not justified" *Id.* at 251. One opponent of the bill even argued against the amendment on the ground that the existing distribution of wealth in society was fair or, if anything, skewed unduly against the fair and necessary interests of businesspersons. He presented excerpts from works by Professor Slichter of Harvard University at the House Hearings, attempting to demonstrate that a fair distribution of income resulted from technological progress: "[T]he gains of technological progress have not gone in the main to capitalists, as Marx thought they would, or even to consumers, but to employees. . . . Does the economy distribute its product widely and fairly? . . . There is no basis for the oft-expressed fears that incomes are becoming concentrated in the hands of property owners. . . . [S]erious inequities in the distribution of income are inadequate compensation for pioneering and risk taking and inadequate compensation for holders of fixed-income securities." *House Hearings, supra* note 260, at 107-08 (remarks of Mr. Montague); *see also* discussion between Sen. Wiley and Sen. Kefauver, 95 CONG. REC. 16,490 (1949).

274. As the Court stated in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), "[A]

Additional Goals

An analysis of the legislative history of the Celler-Kefauver Act leads to the conclusion that the implications of rising industrial concentrations in the American economy were Congress' dominant concern.²⁷⁵ Congress of course was concerned with concentration in particular markets and the amendment was worded to apply to all mergers that might affect competition "in any line of commerce."²⁷⁶

It is unlikely, however, that Congress was concerned only with such economic matters as efficiency and the distribution of wealth.²⁷⁷ Congress also feared that high levels of economic concentration might have disquieting political and social ramifications. Many of the expressed misgivings regarding undue corporate aggrandizement of power were relatively mild and ambiguous.²⁷⁸ Other warnings, however, were chilling, drawing analogies to the alarming consequences of concentration abroad.²⁷⁹ Senator Kefauver, one leading sponsor of the

keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum." *Id.* at 317-18 (footnotes omitted).

275. So great was the congressional fear of industrial concentration that it mandated changes in the standards of proof of mergers' anticompetitive consequences. For example, the Supreme Court in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), held that "[t]his intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects." *Id.* at 363. The Court went on to state: "Such a test lightens the burden of proving illegality only with respect to mergers whose size makes them inherently suspect in light of Congress' design in § 7 to prevent undue concentration." *Id.* The *Brown Shoe* Court noted "[t]hat § 7 was intended to apply to all mergers—horizontal, vertical or conglomerate" *Brown Shoe Co. v. United States*, 370 U.S. 294, 317 n.31 (1962) (citing H.R. REP. NO. 1191, 81st Cong., 1st Sess. 11 (1949)). Members of Congress made numerous references to conglomerate mergers. Congressman Boggs, for example, stated that the Act should apply to conglomerate acquisitions because "this is one of the most detrimental movements to a free enterprise economy This is the type which carries the activities of giant corporations into all sorts of fields, often completely unrelated to their normal operations." 95 CONG. REC. 11,496 (1949).

276. 15 U.S.C. § 18 (1951).

277. See *supra* notes 255-56 & accompanying text.

278. One Representative cautioned that "[t]here has been a growing trend toward economic concentration in the United States . . . which has reached the stage at which it constitutes a vital threat to the American way of life." 95 CONG. REC. 11,497 (1949) (remarks by Rep. Boggs). Equally mild was the observation by Representative Celler that "[b]igness does not mean efficiency, a better product, or lower prices." *Id.* at 11,486 (1949).

279. *Id.* at 11,486 (remarks of Rep. Celler): "I want to point out the danger of this trend toward more and better combines. I read from a report filed with former Secretary of War Royall as to the history of the cartelization and concentration of industry in Germany: 'Ger-

bill, stated:

I am not an alarmist, but the history of what has taken place in other nations where mergers and concentrations have placed economic control in the hands of very few people is too clear to pass over easily. A point is eventually reached, and we are rapidly reaching that point in this country, where the public steps in to take over when concentration and monopoly gain too much power. The taking over by the public through its government always follows one or two methods and has one or two political results. It either results in a Fascist state or the nationalization of industries and thereafter a Socialist or Communist state.²⁸⁰

More than a generation after the end of World War II it is tempting to dismiss these statements as mere rhetoric. The sentiments, however, differ only in degree from those expressed throughout the

many under the Nazi set-up built up a great series of industrial monopolies in steel, rubber, coal and other materials. The monopolies soon got control of Germany, brought Hitler to power and forced virtually the whole world into war.'” It should be noted that Representative Celler’s interpretation of the historical events which led to Hitler’s rise to power is by no means universally shared. *See, e.g.,* A. BULLOCK, *HITLER: A STUDY IN TYRANNY* (1962).

280. 96 CONG. REC. 16,452 (1950) (remarks of Sen. Kefauver). These strong views were not expressed only by the principal sponsors of the amendment. *See, e.g., id.* at 16,446 (remarks of Sen. O’Mahoney: “Collectivism is moving forward apace throughout the world, and industrial collectivism leads inevitably to political collectivism. That I would like to avoid.”), 16,503-04 (remarks of Sen. Aiken: “All of us know too well what has happened in countries where opportunity has been vested in the hands of a few. The result has been that either socialization or a totalitarian form of government has taken over . . .”).

Years earlier, President Franklin D. Roosevelt sent a proposal to Congress entitled *Recommendations to the Congress to Curb Monopolies and the Concentration of Economic Power*: April 24, 1938, proposing the creation of a Temporary National Economic Committee. *Id.*, reprinted in *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 1941 (1938 volume), at 305-32. Roosevelt began his message to Congress with the warning, “[T]he liberty of a democracy is not safe if the people tolerate the growth of private power to a point where it becomes stronger than their democratic state itself Among us today a concentration of private power without equal in history is growing.

“This concentration is seriously impairing the economic effectiveness of private enterprise as a way of providing employment for labor and capital and as a way of assuring a more equitable distribution of income and earnings among the people of the Nation as a whole.” *Id.* at 305-06. Professor Pitofsky, *supra* note 15, at 1064, concluded: “Virtually all proponents of the bill who spoke asserted that the merger trend must be blocked because concentrated economic power would lead to increased government control, because freedom would corrode and totalitarianism prosper, and because absentee ownership by large corporations would diminish local initiative and civic responsibility.” (Footnote omitted.) Bok expressed a similar view in his analysis of the legislative history of the amendment. He concluded that “there emerges a common definition of the problem at hand, a common philosophy as to its import, and a common notion, on a very general plane, of what the new act could do about it This situation was appraised in the same Jeffersonian, egalitarian fashion by almost all who spoke for the bill. . . . In the minds of the Congressmen, the growth of these large economic groups could lead only to increasing government control; freedom would corrode, and the nation would drift into some form of totalitarianism.” Bok, *supra* note 249, at 234-36 (footnote omitted).

Sherman,²⁸¹ FTC,²⁸² and Clayton Act²⁸³ debates. The perceived rise in industrial concentration in 1950 merely provided another occasion for congressional repetition of the alarm regarding the increased social and political power of big business.²⁸⁴

The debates also show a concern for the welfare of small businesses. In *Brown Shoe*, Chief Justice Warren characterized Congress' desire to protect small businesses as going further than a directive to assist them in borderline cases where so doing would be unlikely to result in higher prices for consumers.²⁸⁵ Although the debates do evi-

281. See *supra* notes 136-42 & accompanying text.

282. See *supra* notes 206-09 & accompanying text.

283. See *supra* notes 240-45 & accompanying text.

284. Numerous statements in the legislative history display concern for the possible social and political implications of unduly high concentration levels. With the exception of the statements mentioning conglomerate mergers, however, see *supra* note 275, it is unclear whether this manifest anxiety is attributable to concentration within individual markets or to aggregate levels of concentration. For example, Congress' references to "economic concentration," "cartelization and concentration," and "concentration and monopoly" are ambiguous on this point. In light of the fact that Congress worded the final bill in terms of "lines of commerce," Congress possibly was concerned only with concentration levels within markets. Nevertheless, a large conglomerate might possess almost as much social and political power as a similarly sized monopoly, and this country could be taken over by large conglomerates as easily as by large monopolists. In light of the fact that the merger problem facing Congress in 1950 primarily concerned mergers within markets, it is not surprising that Congress paid very little attention to conglomerate mergers. Nevertheless, if Congress had confronted this issue, see *supra* note 61 & accompanying text, it might have been concerned also with aggregate levels of industrial concentration in 1950.

An interesting unanswered question is whether the strong statements that condemned the corporate aggrandizement of social and political power should make any difference in merger cases. What difference would it make, in other words, if, as the Court stated in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963), there are mergers "whose size makes them inherently suspect in light of Congress' design in § 7 to prevent undue concentration"? Should the horizontal merger guidelines be lowered when large mergers are involved?

Even though § 7 was ultimately cast in terms of competition within markets, the amendment was intended to apply to conglomerate mergers. See *supra* text accompanying notes 277-78. Suppose that there were a large conglomerate merger that had no net effect on individual markets. Could the FTC in carrying out its mission to enforce the "policy" or "spirit" of the other antitrust laws, see *supra* note 163, use the congressional fear of increased aggregate concentration levels (expressed in the legislative history of the Sherman Act, the FTC Act, and the original Clayton Act, as well as in that of the Celler-Kefauver amendment) to halt a pure conglomerate merger that was neutral in its economic effects? The question is, for now, unanswered.

285. Chief Justice Warren wrote, "It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasionally higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization." *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

dence a desire to assist small businesses, it is doubtful that Congress meant to do so if this would result in higher prices to consumers.²⁸⁶

Summary

The primary goals of the Clayton Act were virtually identical to

286. For example, in the Senate Hearings Senator O'Connor asked, "There are some who contend that in instances where a closely held business with a very limited number of principals might by reason of one of a number of causes wish to sell, wish to dispose of its assets, whether they might be prevented from doing so, or be prevented from getting as advantageous a consideration if this enactment is put through, rather than under existing circumstances when they can negotiate possibly with another concern just about of the same size, possibly, nearby, and whether you think it would in the end have any effect." Rep. Patman replied, "I think the public interest is paramount. If this would be injurious to the public I think it should be prevented, even though the owner would probably not get as much. It is the public interest that is involved, and we should not permit these consolidations and mergers to the extent that it will lessen competition or create monopoly, looking at the public interest as No. 1." *Senate Hearings, supra* note 260, at 131. In the Senate debates Senator Keon asked: "[A] small-businessman can now sell to a large competitor, whereas, from what the Senator says, if the bill became law, he would be foreclosed from doing so." Senator O'Connor replied: "Not necessarily. It would all depend upon whether or not the sale would have the effect of substantially lessening competition." 96 CONG. REC. 16,441 (1950).

Another goal was to encourage corporate expansion through internal growth rather than through merger. As the Court stated in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370 (1963): "[S]urely one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition. *See also* *United States v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867, 947 (S.D.N.Y. 1965): "An underlying premise of the Clayton Act . . . is that internal expansion is more healthy for the economy than expansion by merger."

In *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), the Court suggested reasons why Congress preferred internal corporate expansion rather than expansion by merger: "A company's history of expansion through mergers presents a different economic picture than a history of expansion through unilateral growth. Internal expansion is more likely to be the result of increased demand for the company's products and is more likely to provide increased investment in plants, more jobs and greater output. Conversely, expansion through merger is more likely to reduce available consumer choice while providing no increase in industry capacity, jobs or output. It was for these reasons, among others, Congress expressed its disapproval of successive acquisitions." *Id.* at 345 n.72.

The assertion that there are sound economic reasons to prefer corporate growth by internal expansion to growth through merger could be the subject of a lengthy discussion. Regardless, the opinion of Congress should prevail; we must proceed upon the assumption that corporate growth by internal expansion is socially preferable to growth by merger.

Moreover, this judgment may not have reflected any desire to sacrifice significant productive efficiencies. While Congress has condemned the power of large companies, it also encourages the growth of our economy. One way to reconcile these two beliefs is to prefer corporate growth by internal expansion. By making mergers difficult, Congress may have hoped to encourage more of this kind of growth. Perhaps Congress, in expressing this preference, was making the judgment that there were few advantages to consumers that resulted from corporate growth by merger. Congress may have passed the 1950 Amendment in part because it wanted the advantages that came from economic growth but saw few advantages to consumers from mergers and many dangers that might instead result.

those of the Sherman and FTC Acts. The Clayton Act was passed primarily to prevent mergers that might lead to the creation of corporations with sufficient market power to extract wealth unfairly from consumers. The legislative record also evidences a congressional desire to curb the growth of the social and political power of these corporations and to protect small businesses, and suggests that Congress wanted to encourage corporate efficiency. Although the precise role that efficiency was intended to play in Clayton Act analyses is unclear, the debates suggest that this Act, like the Sherman and FTC Acts, is primarily concerned with the efficiency benefits directly passed through to consumers. Congress did not exhibit a desire to forego redistributive goals in order to give nascent monopolists the profits that might flow from increased productive efficiency. Thus, the Clayton Act, together with the Celler-Kefauver Antimerger Act, manifests the same pro-consumer, antimonopoly, anti-corporate power and pro-market control bias present in the earlier legislation.

Despite the large number of factors influencing the passage of the antimerger laws, Congress' central purpose deserves emphasis. The antimerger statutes were passed primarily to benefit consumers directly. The overriding economic purpose was the prevention of consumer exploitation through supracompetitive pricing, a likely consequence of merger-created market power. The concept of allocative efficiency does not figure significantly in the legislative record and no significant evidence exists that Congress was willing to forego its market power concerns in order to increase corporate efficiency. Congress hoped to preserve and achieve corporate efficiencies, to be sure, but not at the cost of allowing significant increases in market power. The legislative history suggests that resolution of otherwise doubtful or ambiguous situations should be in favor of a strict antimerger policy. Congress was willing to forego relatively large efficiency gains in order to be very sure that it prevented corporate acquisitions of market power, unless the resulting efficiency gains would be both large and certain and the risk of significant market power slight.

The implications of Congress' noneconomic concerns, however, are less clear. It is extremely difficult to determine how, and to what extent, to implement in an antitrust analysis the fervently expressed congressional goal of preventing corporate aggrandizement of political and social power or the congressional directive to assist small businesses in ways that do not result in artificially high prices for consumers. That determination is beyond the scope of this Article. However, the use of Congress' economic goals—its distributive and efficiency

concerns—can be illustrated relatively easily. The next section of this Article briefly analyzes a horizontal merger resulting in a firm with monopoly power. This simplified analysis considers the differences that might arise if redistributive goals, in addition to or instead of efficiency goals, were taken into account in antitrust decisionmaking.

Comparison of Efficiency and Wealth Transfer Goals: Analysis of a Horizontal Merger

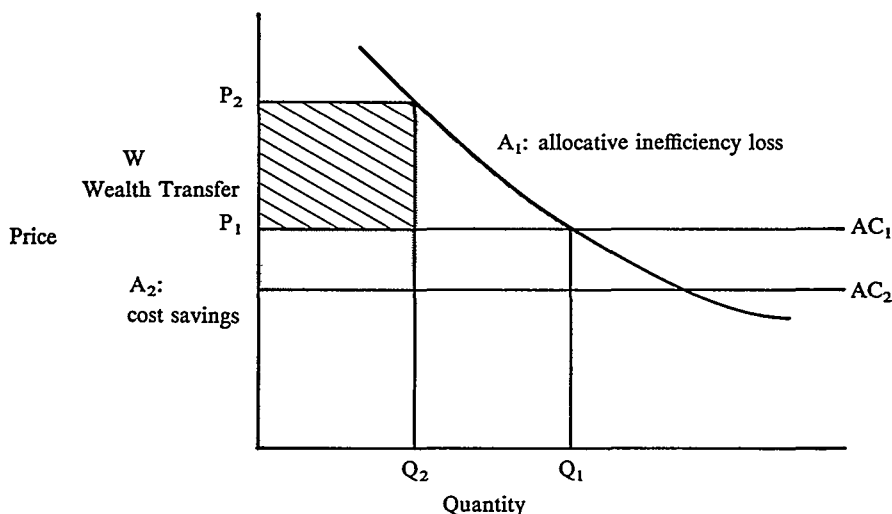
Distributive and efficiency goals often work in perfect harmony. Monopoly pricing causes both allocative inefficiency and transfers of wealth from consumers to producers; therefore, firms acquiring monopoly power are viewed negatively from either a distributive or efficiency perspective, at least initially. Similarly, business practices that do not give rise to or take advantage of market power and thus do not harm consumers would not be prohibited under either view of the goals of the antitrust laws.²⁸⁷ Nevertheless, it often makes a considerable difference whether wealth transfer goals, in addition to or instead of efficiency goals, are ascribed to the antitrust laws.

An illustration of these differences is provided by a brief examination of the economic consequences of a horizontal merger.²⁸⁸ Suppose the FTC, or a court, is deciding whether to prohibit a horizontal merger, and there is a significant chance that this merger might give the resulting firm substantial, persistent monopoly power. If the new firm were able to restrict output and to charge monopoly prices, both allocative inefficiency and the transfer of wealth from consumers to the mo-

287. This assumes that the practices neither harm consumers as a group nor "unfairly" redistribute property rights among consumers.

288. This analysis omits any explicit consideration of the effects of the merger on small businesses or on the social and political power of trusts or monopolies. The discussion is based upon an analysis first proposed by Professor Williamson in *Economies as an Antitrust Defense: The Welfare Trade-Offs*, 58 AM. ECON. REV. 18 (1968) [hereinafter cited as Williamson, *Economies*]. It is often used by advocates of an efficiency orientation to the antitrust laws as a guide to focus attention on the relevant issues. For example, Judge Bork stated that this form of analysis "can be used to illustrate all antitrust problems, since it shows the relationship of the only two factors involved, allocative inefficiency and productive efficiency. The existence of these two elements and their respective amounts are the real issues in every properly decided antitrust case. They are what we have to estimate—whether the case is about the dissolution of a monopolistic firm, a conglomerate merger, a requirements contract, or a price-fixing agreement." R. BORK, *supra* note 2, at 108. For a more detailed discussion of the maximization of allocative and productive efficiency in a horizontal merger context, see *id.*, ch. 5, and Muris, *supra* note 249, at 384-93. For a cogent analysis of the influence of politics on antitrust enforcement, see Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587 (1982).

nopolist would result.²⁸⁹ Further, suppose that the merger would also create significant efficiencies in production. The wealth transfer and efficiency effects of this merger can be illustrated by the following well-known diagram:²⁹⁰



Under the theory that Congress was motivated by efficiency considerations alone, Judge Bork interpreted the diagram, explaining that

[t]he diagram assumes that the merger reduces the long-run average costs of the two firms from AC_1 to AC_2 but that the increased market power created by the merger results in a restriction of output so that the rate moves from Q_1 to Q_2 . We then see that consumers have lost output—for which they would have been willing to pay an amount above cost equal to the area labeled A_1 —and have gained in resource savings an amount equal to the area A_2 . Obviously, if A_2 , the cost savings, is larger than A_1 , the dead-weight loss, the merger represents a net gain to all consumers. If A_1 is larger than A_2 , a net loss results.²⁹¹

Two additional points concerning this diagram should be explained. First, Judge Bork wrote that the area A_2 represents a gain to consumers. The direct effects of the merger, however, will not produce

289. See *supra* notes 30-36 & accompanying text. This analysis assumes the existence of significant barriers to entry, and ignores, for the sake of simplicity, many topics such as incentives to innovate. For a detailed exposition of these assumptions and other issues involved in the tradeoff, see Fisher & Lande, *supra* note 39, at —.

290. For a more detailed explanation of this diagram, see R. BORK, *supra* note 2, ch. 5 (citing Williamson, *Economics*, *supra* note 288).

291. *Id.* at 108.

this result. Because the monopolist charges the monopoly price P_2 , and because A_2 is below this line, all of the cost savings directly accrue to the monopolist. Consumers might, of course, receive some of these benefits indirectly,²⁹² or in the long run,²⁹³ but it is also possible that part or all of these benefits will be wasted by the monopolist in an effort to obtain or protect its monopoly.²⁹⁴ The direct effect of the merger, however, is to give the cost savings, shown as A_2 , to the monopolist as part of its monopoly profits.

More importantly, Judge Bork's discussion does not consider the wealth that, without the merger, would have been consumer surplus, but was transferred to the monopolist as a result of the merger.²⁹⁵ In the diagram, the striped rectangle, W , represents the property that, under the theory espoused by this Article, Congress meant to provide

292. The area, A_2 , which directly accrues to the monopolist, represents another component of its monopoly profit. This portion of the monopoly profit, however, can be said not to "cost" consumers of the product anything, unlike area W , because it did not exist before the merger. It represents a loss to consumers only if the productivity gains could be realized (perhaps after some period of time) without the merger. Moreover, since area A_2 represents efficiency gains, fewer resources will go into making the product. These resources will be freed for other uses and will accrue to society as a whole. Of course, it is not possible to be sure that all or even most of the A_2 benefits will be passed on to consumers of the product in question, or even to similarly situated consumers. Nevertheless, it would be fair to say that part of the A_2 benefits should indirectly be passed on to some consumers. See *id.* at 107-10.

293. See *infra* note 305. Further, consumers will be directly benefited if the efficiencies are so large that prices decrease.

294. Judge Posner wrote: "[T]he expected profits of the merger will generate an equivalent amount of costs as the firms vie to make such mergers or, after they are made, to engross the profits generated by the high postmerger price through service, competition or whatever." Posner, *supra* note 57, at 821. If this did happen, then the rectangle A_2 should not be counted as a benefit of the merger. See Muris, *supra* note 249, at 392 n.41 for a discussion of Posner's arguments.

295. Judge Posner argues that because firms will compete to obtain monopoly profits, part or all of this monopoly profit could be dissipated by wasteful non-price competition to achieve or protect the monopoly. See *supra* note 54 & accompanying text. If the decisionmaker believed that this were likely to occur, part or all of area W should be counted as an efficiency loss. If, as this paper asserts, "consumers' surplus" was intended by Congress to be the entitlement or property of consumers, and if, as a practical matter, compensating side payments cannot be made, any merger analysis that only considered efficiency would violate Pareto optimality. The consumers will suffer the allocative inefficiency losses, area A_1 and the loss of wealth, area W . The monopolist, and, indirectly, consumers, and still other members of society will obtain the productive efficiency gains. See R. BORK, *supra* note 2, at 108. Since these groups are not identical, even if area A_2 exceeded the combined area of A_1 and W , if the decisionmaker were to allow the merger, one result of this welfare tradeoff would be to give wealth to some people and take wealth away from others. Since, as a practical matter, no compensating side payments will ever be made, the tradeoff calculation proposed by this model would violate Pareto optimality. We might still, of course, subjectively wish to allow such a merger despite the fact that it violates Pareto optimality.

to consumers, but that was obtained by the monopolist as a result of the merger.

If a court viewed maximum economic efficiency as the only goal of the antitrust laws, the merger would be prevented if and only if area A_1 , the allocative efficiency loss, exceeded area A_2 , the productive efficiency gain.²⁹⁶ Alternatively, if the decisionmaker believed that Congress cared only about preventing "unfair" transfers of wealth from consumers to producers caused by market power, the probable existence of area W would always require prohibiting the merger.

A number of approaches, however, consider both efficiency and redistribution, thus remaining faithful to Congress' design. For example, the total "negative effects" of the merger—the allocative inefficiency (A_1) plus the redistribution of wealth (W)—could be balanced against the "positive" effects of the merger—the productive efficiency gains (A_2). The merger would be prevented only if the negative effects of the merger were likely to outweigh its positive consequences.²⁹⁷

Another decisional rule that finds considerable support in the antitrust laws' legislative histories would use the price paid by consumers as the standard and condemn any merger likely to lead to higher prices for consumers. A price standard would probably come closest to faithfully carrying out legislative intent, since Congress' overriding concern was with preventing consumers from paying supracompetitive prices.²⁹⁸ In cases where price is unlikely to increase there would be no wealth transfer from consumers to firms with market power. This standard would consider only those efficiency gains that accrued directly to consumers. Such gains would occur only when the efficiency gains were so large that they resulted in downward price pressure greater than the upward pressure resulting from increased market power.²⁹⁹ This rule would not consider any benefits of the merger directly retained by the monopolist. If it were applied in the merger hypothetical,

296. This conclusion ignores Posner's contributions, *supra* notes 54 & 295. If the decisionmakers were persuaded that Posner was correct a high proportion of the time and that the conversion of monopoly profits to costs was significant and long lasting, area A_2 would not be entered into the analysis as a positive factor because both areas A_2 and W would instead be counted as losses to society. The merger would, accordingly, be stopped in any case in which the decisionmaker believed that area A_1 , A_2 , or R was likely to exist.

297. Moreover, this balancing could be done in a number of ways. If the decisionmaker believed that Congress cared equally about efficiency and redistribution, they should be weighed equally. If, as this Article asserts, it was believed that Congress cared much more about wealth transfers, efficiency concerns could only be counted to break a tie or when the wealth transfer was uncertain.

298. See *supra* notes 80-82, 180-81, 240-41 & 267-72.

299. See Fisher & Lande, *supra* note 239, at —.

the resulting increase in productive efficiency, A_2 , would not be counted because these benefits accrue directly to the monopolist. Therefore, if either of the negative consequences of the merger, areas A_1 or W , are likely to arise, the merger would be prevented. More concretely, if the product's price is likely to increase, the merger should be prohibited. If the price to consumers is unlikely to increase, however, the merger would be allowed.³⁰⁰

These are not the only possible ways to implement efficiency and wealth transfer considerations in merger analysis. The important point is to emphasize that the decision as to which goals are important is crucial, and that the holdings in merger cases and other types of anti-trust actions will vary considerably under the different approaches.³⁰¹ Professor Williamson, commenting upon the horizontal merger example, points out that "[i]nasmuch as the income distribution which occurs is usually large relative to the size of the dead-weight loss, attaching even a slight weight to income distribution effects can some-

300. This would mean that those mergers creating market power which would result in efficiencies so large that they lead to lower prices for consumers should be permitted. The resulting monopoly profits would be allowed because they were not extracted from consumers, who were made better off by the merger. In these cases the merging firms would be allowed to keep all of their efficiency gains. Adoption of this standard would imply that even though a more complex tradeoff might in some circumstances be warranted, because Congress considered these other circumstances unlikely or too difficult to predict or analyze, for simplicity it used prices-to-consumers as the standard. As a practical matter, of course, this approach is best implemented when merger guidelines are established, not on a case-by-case basis.

One critical determination would be of the proper burden of proof. For example, if one believed that the redistributive concerns of the statute were paramount and that an efficiency defense was appropriate, the very heavy burden of proving efficiency benefits from a merger could be placed upon the defending party. As has been proposed by Areeda and Turner, the decisionmaker could only count efficiency gains when they exceed some threshold level. 4 P. AREEDA & D. TURNER, *supra* note 4, at 148-50. Alternatively, if one believed, contrary to the arguments presented in this Article, that the efficiency goals of the statute were central, redistribution could only be permitted to count, for example, as a "tipping" factor when the competing allocative and productive efficiency considerations were roughly equal.

301. For example, tying arrangements and attempts to monopolize produce obvious redistributive and efficiency effects. Tying arrangements are sometimes used by monopolists as a way to price discriminate and thereby acquire purchasers' surplus. See R. POSNER, *supra* note 4, at 176-80. A particularly dramatic monopolization illustration would occur if a firm monopolized the insulin market because this could result in virtually no allocative inefficiency yet create a large wealth transfer. The results of actions in these areas of anti-trust concern would change substantially if distributive concerns were included in the decisionmakers' analysis.

More generally, other types of economic regulation might not be in the public interest if only efficiency goals were considered, but would be in society's interest if distributive goals were also a concern.

times influence the overall valuation significantly.”³⁰² Judge Bork also acknowledges that if distributive effects were counted in a horizontal merger analysis, “the results of trade-off calculations would be significantly altered.”³⁰³ Indeed, even if the wealth transfer is only assumed to be twice as large as the allocative inefficiency, a very conservative assumption, the inclusion of this factor in antitrust analysis would have a profound effect. A rule that includes only efficiency considerations would permit far more mergers than one considering both efficiency and redistributive effects. Conversely, an approach considering only redistributive effects would prevent far more mergers.

This analysis contains only a summary of the most direct and obvious efficiency and distributive effects of a horizontal merger.³⁰⁴ A realistic merger enforcement policy must consider severe and potentially overwhelming implementation problems. This is particularly true when enforcers attempt to implement a case-by-case application of theoretical economic concepts to real-world situations that are extremely conjectural. These difficulties include problems in estimating how high the monopoly might be able to raise its prices, how much more efficient the resulting firm might be, what kinds of problems might arise from the uncertainty and unavailability of data,³⁰⁵ and de-

302. Williamson, *Economies*, *supra* note 288, at 28. Professor Williamson later wrote that “a product-specific claim that user and producer interests should be weighted unequally . . . does not vitiate the partial equilibrium model. It merely requires that the appropriate weights be specified. To the extent that purchaser interests are given greater weight than supplier interests, the economies burden is increased, *ceteris paribus*.” Williamson, *Economies Revisited*, *supra* note 40, at 711. Although Williamson recognizes that his model could certainly incorporate distributive concerns, he states his belief that these concerns should be ignored. *Id.* at 710-11.

303. R. BORK, *supra* note 2, at 110.

304. Indirect, long-run, or dynamic effects also could be examined if the decisionmaker believed that this would further Congress’ ultimate goals. Differences in outcomes under the approaches might be particularly pronounced if, in application, only direct effects are considered. Yet, consideration of indirect, long-run or dynamic factors would vastly, and perhaps impossibly, complicate the analysis. For example, if the problem were considered in a dynamic context it would be necessary to compare the present value of resource savings that would occur due to the efficiency gains in a competitive situation with the present value of the net efficiency gain ($A_2 - A_1$) that would occur if the firms merge and produce a monopoly. These savings are affected over time by the rate at which entry occurs or the monopoly power erodes, the expenditure of resources by the monopolist to prevent the erosion of its monopoly power, *see supra* notes 54 & 295, the possibility that the monopoly will, on the average, engage in less than the socially optimal level of research and innovation, *see supra* note 55, and the amount of resources that the monopolist might waste due to X-inefficiency, *see supra* text accompanying note 54. Similarly, the decisionmaker might want to ask why the same efficiencies could not be achieved by means of internal expansion, how soon this might happen, and a large number of other questions.

305. For example, it would seem to be virtually impossible to measure the area of any of

cisions concerning which economic assumptions to apply.³⁰⁶ These difficulties occur to varying degrees under each of the approaches that explicitly consider efficiency and/or transfers of wealth. At best, they significantly weaken the soundness and predictability of the analyses; at worst, they transform all of these analyses when applied on a case-by-case basis into mere theoretical exercises.

These practical problems support arguments against employing a rule-of-reason analysis to evaluate mergers³⁰⁷ or many other types of antitrust violations. The better approach is to develop rules that give rise to simplified and predictable antitrust analysis,³⁰⁸ incorporating

the triangles or rectangles presented in the diagram. As one commentator said, "One might assert a *general* theory of the second best as follows: 'If a state of affairs is the product of n variables, and you have knowledge of or control over less than n variables, if you think you know what's going to happen when you vary "your" variables, you're a booby.' That is, in complex processes (which most social processes are) a move in the right direction is not necessarily the right move. To pick a simple illustration, if I am on a desert island, subsisting solely on coconuts and oysters and beginning to hate it a lot, and across the bay from me there is another island, lush and fertile, I do not improve my position in life by swimming half way across." Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 476 (1974); see R. BORK, *supra* note 2, at 125-27.

306. Conventional microeconomic analysis necessarily rests upon a large number of assumptions. Precise, well-developed prescriptive as well as descriptive models taking these factors into account are a necessity before any analysis can begin, for the violation of any of these assumptions renders the analysis, to some degree, invalid. These assumptions, which are crucial to the competitive operation of the free market, involve the presence or absence of perfect information, the working of the capital market, barriers to entry, economies of scale, immobility of resources, product differentiation, and externalities. The presence of any of these factors complicates economic analysis, and a failure to take them into account can render an economic analysis useless. See generally 2 P. AREEDA & D. TURNER, *supra* note 4, at 282-318 for a summary of the debate regarding the theoretical and empirical significance of these and similar factors.

307. These practical considerations do not, however, mean that a direct consumer impact characterization of the goals of the antitrust laws, perhaps with price to consumers as its benchmark, cannot be implemented, or that its implementation would be more difficult than the implementation of an efficiency-based analysis. A rule that considered both efficiency and distribution concerns would be no more complex than a rule that only considered efficiency, since both would require the same prediction concerning market power and economies. Further, an approach that only considered redistributive effects, or an approach that considered efficiency effects only when they were directly passed on to consumers, would be relatively simple. It would not, in the merger example, at least, involve a balancing of competing considerations. If, and only if, the decisionmaker determined that there was a significant chance that the merger might result in a significant transfer of wealth from consumers to a monopolist, *i.e.*, if and only if there were a significant chance that prices to consumers would be raised, would the merger be prevented.

308. Professor Turner concluded in his seminal 1965 article, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313 (1965): "In theory, the ideal regulatory policy would be one that discriminated carefully on a case-by-case basis between those mergers that threaten substantial anticompetitive consequences and those that do not. In

both efficiency and distributive considerations into the formulation of the merger guidelines.

Despite the critical problem of developing administrative approaches to antitrust analysis, it must be recalled that "when the law-making power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts."³⁰⁹ Congress never promised that the administration of the antitrust laws would be easy.³¹⁰ It had definite goals that it wanted to accomplish when it enacted the antitrust laws. The primary obligation of the FTC and the courts is determining Congress' basic objectives. Only then does their task become that of formulating

fact, it seems almost impossible to carry out any such policy and still have an effective anti-merger statute. . . .

"Taken literally, section 7 asks for a predictive economic judgment, a conclusion as to the probability of various possible economic consequences of a merger, and an assessment of the substantiality of those effects. Except in the most obvious cases, economic theory simply does not permit confident judgments on these issues even when all the economically relevant facts have been duly assembled. Thus, broadening the range of factual inquiry in each case beyond certain limits gives little or no hope of promoting rational decisionmaking. But even if this were not so, the effectiveness of the statute would largely be destroyed if the outcome of cases turned on a review of all the economic facts. With limited enforcement resources, few cases could be brought. With a wide variety of fact situations, the precedential value of particular decisions—their value as guides to the legality of other mergers—would be limited. Inevitably, the number of mergers with substantial anticompetitive effects would tend to increase. Consequently, there is little to be lost and much to be gained by directing the law toward rationally based general rules that are framed in terms of what seem to be particularly significant factual issues, capable of easy resolution." *Id.* at 1318-19 (footnote citing Professor Bok's article, *supra* note 249, omitted).

309. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 340 (1897). The Court also reasoned: "[W]e are asked to read into the act by way of judicial legislation an exception that is not placed there by the lawmaking branch of the Government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This we cannot and ought not to do. That impolicy is not so clear, nor are the reasons for the exception so potent as to permit us to interpolate an exception into the language of the act, and to thus materially alter its meaning and effect. It may be that the policy evidenced by the passage of the act itself will, if carried out, result in disaster to the roads and in a failure to secure the advantages sought from such legislation. Whether that will be the result or not we do not know and cannot predict." *Id.*; *cf.* R. BORK, *supra* note 2, at 69: "There must surely be a canon of statutory construction holding that, other things being equal, courts should attribute to the legislature a policy intent which, because of the scope and nature of a body of law, makes that law *effective in achieving its goals*, renders the law internally consistent, and makes for ease of judicial administration." (Emphasis added.)

310. Senator Cummins, for example, anticipated difficulty in analysis performed under § 5 of the FTC Act: "I have not a bit of doubt of the difficulty of the cases. We have never . . . accomplished anything good yet without great difficulty. If those who passed the anti-trust law and those who passed the interstate commerce law had been appalled because they were difficult of administration, we would have yet been without any regulation of interstate commerce." 51 CONG. REC. 11,106 (1914).

implementation approaches that come as close as is practicable to carrying out these goals. Thus, decisionmakers have latitude in deciding precisely how to incorporate both efficiency and distributive considerations in antitrust analysis. To ignore either, however, would contravene congressional desires.

This Article suggests that both distributive and efficiency considerations are meant to play a role in antitrust analysis. Because many antitrust violations cause both economic inefficiency and wealth transfer from consumers to firms with market power, in many antitrust cases no conflict between these goals would arise. Conversely, if the firm or firms in question were unlikely to achieve market power, the activity in question probably would not violate the antitrust laws under any view of the antitrust laws' goals. Nevertheless, the merger example presented in this section illustrates the sort of case in which antitrust results depend greatly upon the goals employed in the analysis.

Conclusion

This examination of the legislative histories of the antitrust laws shows that Congress had a limited number of specific goals. The same small list provides the underpinnings of each of the Acts. The examination of each Act's legislative history in light of the relevant social and economic context has attempted to shed some light on these goals.

Each antitrust law grew in part out of a desire to define and protect consumers' property rights, an antipathy toward corporate aggregations of economic, social, and political power, and a concern for small entrepreneurs. The concern at the end of the nineteenth century focused on the excessive power of trusts and of the industrialists who controlled them, primarily as this power was used to harm consumers. Congress also had efficiency goals and resented trusts because they had the power to determine whether or not individuals had a fair opportunity to compete. Discontent existed over the potential political power resulting from control over thousands of jobs and billions of dollars in assets and over potential disruptions to society that might occur unless these aggregations of power were curbed.

As the United States entered the twentieth century, great increases in industrial concentration occurred, despite the prohibitions of the Sherman Act. The FTC and Clayton Acts were intended to refine and extend the Sherman Act and better implement its basic goals by filling in the gaps in its coverage. In particular, the FTC was given a mandate to prevent "unfair methods of competition." Congress intended this phrase to include such disparate acts as fraud and monopolization pri-

marily because each caused "unfair" transfers of wealth from consumers to producers.

The Celler-Kefauver amendment was born largely in the shadow of World War II. Reminded of the high and rising level of industrial concentration, Congress believed it was necessary to strengthen the Clayton Act. Congress recognized the need for efficient, large-scale economic production, but feared the social unrest, or worse, that could be precipitated by concentrated corporate power. The dramatic statements in the legislative history of the Celler-Kefauver Antimerger Act probably reflect less a fear of imminent fascism than a desire to curb increases in industrial concentration for a large number of social and political reasons.

These congressional value judgments were the motivations underlying the antitrust laws. The effects of market power on allocative efficiency caused little or no concern in even the most recent major antitrust statutes. Of course, in every one of the antitrust laws' legislative histories Congress applauded the productive efficiency of modern corporations. Stressing the benefits resulting from free competition, Congress wanted to provide incentives that would help firms compete vigorously. Congress wanted to encourage economic efficiency and to ensure that the fruits of this efficiency were passed on to consumers, but efficiency was never its primary goal. Congress attempted to accomplish its overriding redistributive aims in such a way that the benefits of modern productivity would still be substantially realized. The evidence does not suggest, however, that Congress wanted the antitrust laws to allow increases in corporate efficiency at the cost of undermining its basic redistributive goals.

The antitrust laws were enacted to become broad and flexible economic mandates to improve "consumer welfare," as Congress defined this term. Recent advances in economic theory provide the methodology that can help determine when market power is likely to harm consumers, as opposed to those times when free market forces that will best ensure consumers' protection are operating. This sophistication should lead to increasingly precise implementations of Congress' commands that all purchasers, whether consumers or businesses, be given the right to purchase products priced at no more than the competitive level and that all sellers be given the right to compete against products priced at no less than that level.

