2011

Comment: Anticompetitive Effect

Daniel R. Shulman

Response

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This Comment will respond to the article *Anticompetitive Effect*, by Richard Cudahy and Alan Devlin (Article).[1] At the outset, one must say that it is an honor to be asked to respond to what is an important, insightful, and elegantly presented piece of scholarship, commentary, and analysis. The issue addressed, anticompetitive effect, is central both to understanding antitrust jurisprudence and to its productive future development and application. The central conclusion of the Article, that "an aggregate welfare approach to competition" and anticompetitive effect is preferable to a "consumer welfare" approach, is unassailable and well supported, in my view.

There are, however, two aspects of the Article that warrant expansion and further comment. The first is the Article's review of the history of antitrust jurisprudence since the passage of the Sherman Act, the changes over time in judicial attitudes and analysis, and the conclusions to be drawn therefrom. The second is the practical ramifications of what is at stake in the debate between whether to apply a total welfare or consumer welfare standard, and, in particular, what this means in terms of antitrust enforcement and actual antitrust litigation practice.

With regard to the Article's discussion of the history of antitrust, what the Article reveals, if not quite declares, is that through the political process and politicization of antitrust jurisprudence, the very aggregations of concentration and economic

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1. Hon. Richard D. Cudahy & Alan Devlin, *Anticompetitive Effect*, 95 MINN. L. REV. 59 (2010).

power that the antitrust laws were originally meant to attack and confine have now gained control of antitrust jurisprudence. Moreover, they have in fact used antitrust laws to aggrandize and insulate their power and prerogatives from attack, not only substantively, but procedurally.

As to the practical ramifications of the Article, the choice of an aggregate welfare measure of anticompetitive effect versus a consumer injury measure will have profound consequences in terms of whether there will be effective antitrust enforcement and by whom. Choosing consumer injury as the standard will have the effect of further emasculating enforcement and preserving the power of those who now have control of the system, the very interests the antitrust laws were enacted to challenge and limit.

The Article is perceptive and profound in recognizing the pivotal issue in antitrust today as being whether anticompetitive effect should be defined based on impairment of the competitive process at whatever level that impairment occurs (i.e., the aggregate or total welfare standard), or whether anticompetitive effect should turn on impairment to consumer interests alone, and hence require a showing of higher prices, lower output, poorer quality, or reduced choice for consumers (i.e., the consumer-welfare standard). What the Article could have explicated further—which this Comment will endeavor to do—is (1) the underlying historical power struggle that has brought antitrust to the point where the definition of anticompetitive effect has become so critical to antitrust's continued viability, and (2) the very serious practical consequences, in terms of public and private enforcement, of choosing one definition of anticompetitive effect over the other.

I. THE HISTORY OF ANTITRUST

The history of antitrust traced in the Article is substantially accurate, except for a few minor points to be addressed hereafter. There are, however, two areas where the Article could have gone farther. The first is the conclusions to be drawn from the underlying historical facts so ably set forth by the Authors, specifically that the regulated have now become the regulators and how they got there. The second area, which the Article does not touch, is the profound procedural changes that have occurred contemporaneously with changes in the substantive law of antitrust, and how they have been equally instrumental in allowing the regulated to become the regulators.

In tracing "the evolving concept of 'anticompetitive' behavior," the Article correctly observes, "Congress passed the Sherman Act at a time of powerful public aversion to the trusts that had enveloped the economy."[2] The Authors also advert to Learned Hand's citing with approval, in *United States v. Aluminum Co. of America*,[3] the comments of Senator Sherman in the legislative history of the Sherman Act:

> The popular mind is agitated with problems that may disturb social order, and among them all 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.[4]

Judge Hand himself expressed similar sentiments and concerns:

> Be that as it may, that was not the way that Congress chose; it did not condone 'good' trusts and condemn 'bad' ones; it forbad all. Moreover, in so doing it 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. These considerations, which we have suggested only as possible purposes of the Act, *we think the decisions prove to have been in fact its purposes.*[5]

The Authors correctly observe, "From this perspective, it was not the inefficiency of monopoly that invoked antitrust's wrath, but the sociopolitical power that such dominance bestowed on its holder."[6] The Authors add, "It is not at all clear that the first fifty years of antitrust jurisprudence was based on a misconception of original legislative intent."[7] They conclude that "the legislature likely sought to facilitate a vigorous process of competition that would promise to bring about a variety of benefits, which might include the diffusion of economic

2. *Id.* at 67.

3. 148 F.2d 416, 428 n.1 (2d Cir. 1945).

4. 21 CONG. REC. 2460 (1890); *see also* 21 CONG. REC. 2598 (1890). The term "Briarean arms" refers to Briareus, a giant of Greek mythology with one hundred arms and fifty heads.

5. *Aluminum Co. of Am.*, 148 F.2d at 427 (emphasis added).

6. Cudahy & Devlin, *supra* note 1, at 68.

7. *Id.*

power, reduced levels of concentration, and free access to markets and consumers, as well as efficiency gains."[8] Indeed.

In this regard, the legislative history is particularly instructive, as traced by Professor Herbert Hovenkamp in *Antitrust's Protected Classes*.[9] Professor Hovenkamp rejects and persuasively rebuts the claims of Robert Bork and Judge Frank Easterbrook, leading proponents of the Chicago school of economics, that the Sherman Act was passed in order to protect consumers from high prices.[10] Rather, the primary concern of Congress was the immense concentration of economic power in the trusts existing at the time and their consequent ability to exclude small competitors. For example:

> Much of the wrath of the Sherman Act's framers was directed at the sugar trust and at Standard Oil Company of Ohio, then facing a forced dissolution and reorganization under the corporate law of New Jersey. Were the real complaints about the sugar trust and Standard Oil directed at their high prices? Hardly. From 1880 through 1890, the price of refined petroleum in the United States fell by sixty-one percent, by far the largest decrease in a decade of generally decreasing prices, and there was over the same period an almost four-fold increase in output. The Standard Oil Company was responsible for much of this, and some members of Congress knew it. . . .
>
> The sugar trust, Congress' other big target and the subject of the Supreme Court's first Sherman Act decision in 1895, showed the same kind of performance, although the price decreases were not as dramatic. . . .
>
> One might suggest that although prices in fact fell during the 1880s, the common belief was that prices were rising and Congress was responding to this perception. But that does not seem to be the case either. Most of the contemporary evidence established without controversy that prices were indeed falling, a fact that contemporary economists readily confirmed. In fact, "ruinous competition" was perceived to be a much bigger threat than high prices.
>
> So to posit that Congress' principal concern in enacting the Sherman Act was high consumer prices is to suggest that Congress was dealing with a problem that did not exist. To be sure, economists had already developed a predatory pricing theory that dominant firms might use temporary periods of low pricing in order to drive out competitors and charge higher prices later. But as of 1890 the trusts had not succeeded in doing this. The principal victims of the trust movement of the 1880s—certainly of the trusts that appeared most frequently on Congress' hit list—were inefficient small firms, rather

8. *Id.* at 68–69.

9. Herbert Hovenkamp, *Antitrust's Protected Classes,* 88 MICH. L. REV. 1, 23–24 (1988).

10. *Id.* at 22–30.

> than consumers. Competitors were the principal protected class of the Sherman Act.[11]

The foregoing perspective is important because it is historically supported and accurate, and indeed informs Supreme Court antitrust jurisprudence through the Warren Court. Those who have rejected and criticized it, such as Bork and Easterbrook, have done so based on misrepresentation of the historical record, as well as on the so-called free-market economics of the Chicago school, now discredited by the events of the current worldwide economic crisis, about which more later. It is important here to stress the historical underpinnings of the Sherman Act in order to truly understand the forces behind the fundamental change in antitrust jurisprudence over the last four decades. In particular, the cover story propounded by the advocates of change—that antitrust law is returning to the true intent of Congress to protect consumers from high prices and abandoning the misguided populism of the Warren Court—is a myth, and needs to be recognized as such. Instead, something else has occurred: those with power who were meant to be regulated have taken over the regulatory process and become the regulators.

Continuing their historical survey, the Authors comment that "[p]erhaps surprisingly, the story of early U.S. antitrust law is one of inaction," and that "[a]ntitrust enforcement came of age in the celebrated 1911 case of *Standard Oil*."[12] With all due respect, the period from 1890 to 1911 contained a number of significant antitrust decisions by the Supreme Court, among them *United States v. Trans-Missouri Freight Ass'n*,[13] *Addyston Pipe & Steel Co. v. United States*,[14] and *Northern Securities Co. v. United States*.[15] Of particular importance is the language in *Trans-Missouri*, decided only seven years after passage of the Sherman Act, stressing the importance of preserving small businesses and a diverse marketplace:

> It takes time to effect a readjustment of industrial life so that those who are thrown out of their own employment, by reason of such changes as we have spoken of, may find opportunities for labor in other departments than those to which they have been accustomed. It is a misfortune, but yet in such cases it seems to be the inevitable accompaniment of change and improvement.

11. *Id.* at 28–29.
12. Cudahy & Devlin, *supra* note 1, at 69.
13. 166 U.S. 290 (1897).
14. 175 U.S. 211 (1899).
15. 193 U.S. 197 (1904).

> It is wholly different, however, when such changes are affected by combinations of capital, whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold, the effect being to drive out of business all the small dealers in the commodity and to render the public subject to the decision of the combination as to what price shall be paid for the article. In this light it is not material that the price of the article may be lowered. It is in the power of the combination to raise it, and the result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others. 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.[16]

Equally noteworthy is the *Trans-Missouri* Court's comment:

> Trade or commerce under those circumstances 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.[17]

The Supreme Court thereafter thought the statements important enough to quote them twice, in decisions in 1941 and 1966, a half century and more later.[18] One cannot pretend that this language does not exist or that the Supreme Court did not know what it was talking about in 1897 when it expostulated the purposes of the Sherman Act.

In their historical review, the Authors next give *Aluminum Co. of America*[19] its usual bashing, for the usual reason: Hand is condemning Alcoa only for doing what a vigorous competitor is supposed to do, compete vigorously. One must admit that the oft-quoted language about how Alcoa anticipated every increase

16. *Trans-Missouri*, 166 U.S. at 323–24.

17. *Id.* at 323.

18. United States v. Von's Grocery Co., 384 U.S. 270, 274–75 (1966); Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457, 467 (1941).

19. 148 F.2d 416 (2d Cir. 1945) (Hand, J.).

in demand and was prepared to supply it, etc.,[20] appears to support the Authors' position. Nonetheless, a full and close reading of the opinion reveals that Alcoa was not necessarily more sinned against than sinning, and provides some cover for Hand. Alcoa originally achieved its monopoly through contracts that required suppliers of electricity to not deal with competitors and also by forming cartels with foreign manufacturers that agreed to withhold ingot imports from the United States.[21] Even after government decrees ended these practices, Alcoa entered into a similar agreement to limit imports in 1936[22] and entered into an arrangement with a French competitor building an American plant, which left "no doubt that they were not to be competitors at arms length."[23] Notwithstanding *Pacific Bell Telephone v. Linkline Communications*, *Inc.*,[24] which will be discussed later, Alcoa's price squeeze—selling ingot to sheet rollers at prices that made it impossible to match Alcoa's sheet prices—cannot be termed honestly industrious, procompetitive, or innocent, when Alcoa knew full well the effects of this practice.[25]

Nor can Hand be accused of being out to get Alcoa, or even of ignoring his own statements that a monopoly achieved through "superior skill, foresight, and industry" is blameless. Time and again throughout the opinion, he defers to the findings of the trial judge that Alcoa acted with innocent intent or for good faith business reasons in implementing practices challenged by the government. Time and again, Hand reiterates that it is not the place of an appellate court to second-guess the trial court's appraisal of the credibility of witnesses and the weight to be given their testimony—a deference rarely seen in the present Supreme Court—and sustains trial court findings in Alcoa's favor.[26] Finally, the Supreme Court, in whose stead Hand was acting,[27] thought enough of his decision to quote it at length with approval at the earliest opportunity.[28]

20. *Id.* at 431.
21. *Id.* at 422.
22. *Id.* at 444.
23. *Id.* at 431.
24. 129 S. Ct. 1109 (2009).
25. *Aluminum Co. of Am.*, 148 F.2d at 438.
26. *Id.* at 433–35, 439, 441.
27. *Id.* at 421.
28. Am. Tobacco Co. v. United States, 328 U.S. 781, 813–14 (1946).

I have proffered a somewhat differing view of *Alcoa* because the Authors of the Article transition in their history from *Alcoa* to the Warren Court's antitrust decisions as if *Alcoa* were somehow the portal through which the Warren Court passed into an antitrust Neverneverland, divorced from sound, basic economics and legislative intent. According to the Authors:

> [T]he Warren Court embraced a highly interventionist reading of the Clayton and Sherman Acts, employing the Acts to strike down many mergers with de minimis market effects and finding a host of business practices to be per se illegal. . . . Perhaps most notable during this era was the Court's hostility to efficiency as a goal of the Sherman Act.[29]

Here, the Authors could be reminded of their own admonition, with which they begin their Article: "[W]hen a legislature builds an area of law around a fundamental, yet ill-defined, concept, it becomes difficult to craft doctrine without relying on conclusory labels. And conclusory labels fall prey to hopeless circularity."[30] "Efficiency" is just such a conclusory term that cries out for definition if it is to be part of the scaffold on which antitrust doctrine is built. The Authors fail to provide such a definition except in the dubious context of consumer harm. They correctly observe that, in the Warren Court's view, "[s]uch . . . unconstrained competition was seen to yield a panoply of benefits, including freedom of choice on the part of consumers, liberal access to markets by prospective sellers, and dispersion of power."[31] In the absence of a definition of efficiency, however, one must take issue with the Authors' conclusion that the Court's merger decisions "cannot be reconciled with an economic-efficiency approach,"[32] unless, that is, the Authors are equating efficiency with consumer harm, as used by the Chicago school (i.e., price-output effects). If so, the Authors are giving credit to politics masquerading as economic theory, and bad economic theory at that, as will be discussed *infra*.

One must also take issue with the Authors' view that the Warren Court condemned out of hand tying arrangements and exclusive dealing agreements.[33] Although characterized as per se violations, tying arrangements required a showing of market power in the tying product,[34] which is still the law, with the ex-

29. Cudahy & Devlin, *supra* note 1, at 71.
30. *Id.* at 59.
31. *Id.* at 71–72.
32. *Id.* at 73.
33. *Id.* at 72.
34. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 6 (1957).

ception that market power is no longer presumed based on intellectual property.[35] In addition, the Warren Court treated exclusive dealing agreements under the rule of reason, requiring a showing of substantial market foreclosure, just as courts do today.[36]

The Authors' criticism of the Warren Court culminates with their statement, "But if the preceding per se rules adopted by the Court can be questioned from an economic perspective, the Justices' merger rulings were completely irreconcilable with such an approach," with particular opprobrium for *United States v. Von's Grocery Co.* and *Brown Shoe Co. v. United States*.[37] Again, the questions one must ask are "whose economics?" and "is conformance with Chicago school economics the proper purpose of United States antitrust laws?"

The Authors provide a limited answer to these questions in their footnote ninety-five: "Although the antitrust jurisprudence of the Warren Court was anathema to many economists, it may in fact have been the most faithful to congressional intent."[38] But they then dismiss this entirely accurate statement with a stunning non sequitur: "Since the Sherman Act is a common-law statute, however, original legislative intent—assuming that it can even be discerned with any accuracy—is of little, if any, importance."[39]

There are two huge problems I see in this statement. First, as shown, original legislative intent can in fact be discerned with accuracy. Certainly, the Supreme Court had no trouble discerning that intent in the first half century after the Sherman Act's passage nor did Professor Hovenkamp in his research. Second, the Chicago school advocates that have successfully revolutionized—one is tempted to say undermined—antitrust law in the past four decades, such as Bork and Easterbrook, have done so largely on the basis of a misrepresenta-

35. Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31 (2006).

36. *See, e.g.*, Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

37. Cudahy & Devlin, *supra* note 1, at 73. The Authors comment that *Von's* and *Brown Shoe* "cannot be reconciled with an economic-efficiency approach," *id.*, and add in a footnote, "Judge Posner has colorfully characterized the antitrust jurisprudence of the Warren Court era as an 'intellectual disgrace,'" *id.* at n.93. Perhaps the authors were not aware that Judge Posner not only was the first lawyer on the brief for the United States in *Von's*, but also "argued the cause for the United States" in the Supreme Court. United States v. Von's Grocery Co., 384 U.S. 271, 271 (1966).

38. Cudahy & Devlin, *supra* note 1, at 73 n.95.

39. *Id.*

tion of original legislative intent. They have falsely claimed that the primary intent of Congress in passing the Sherman Act was consumer welfare, allocative efficiency, and protecting consumers from high prices. If antitrust is to be rewritten on the basis of what Congress intended, then that intent is indeed important and needs to be accurately stated. The Authors should not so blithely dismiss the issue and yield the field to those who would usurp it under false pretenses.[40]

Indeed, the Authors themselves fall back on Supreme Court precedent explicating the original intent underlying the Sherman Act in order to justify their advocacy of a total welfare standard to preserve the competitive process, rather than a consumer welfare standard:

> We believe that such an approach most faithfully comports with long-established, and never-overruled, Supreme Court precedent. . . . For one, we consider that such an approach comports most closely with the one, transcendent principle that has characterized the history of U.S. antitrust enforcement—namely, that competition itself is of primary concern.[41]

The Authors' review of the past four decades of antitrust law and the Chicago school revolution is entirely accurate and unexceptionable, beginning with their comment, "The jurisprudence of the Warren Court is now considered discredited by those of an economic persuasion."[42] A number of the Authors' statements summarize what has happened in antitrust as well as anyone could put the matter:

40. A final point on which I take the Authors' review of the Warren Court to task is their statement that although "*Brown Shoe* is often cited today for its applauded assertion that antitrust law protects competition rather than competitors[,] . . . [t]hose citing the decision often miss the irony that the outcome in *Brown Shoe* was antithetical to this asserted principle." Cudahy & Devlin, *supra* note 1, at 73 n.92. There was in fact no irony to the decision. To understand what the Supreme Court was saying, one needs to view the entire reference to competitors and competition:

> 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 occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962). Obviously, everything after the first sentence has been conveniently ignored by those quoting the "competition, not competitors" language.

41. Cudahy & Devlin, *supra* note 1, at 87 (citing Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 236 (1948)); *id.* at 89.

42. *Id.* at 75.

> [Chicago] School succeeded in convincing the courts and enforcement agencies that political concerns such as limiting concentration and ensuring ease of access to markets were in themselves irrelevant and, indeed, often diametrically opposed to the only relevant factor, which is efficiency.[43]
>
> Having largely adopted the Chicago school's view that antitrust law should be concerned with maximizing consumer welfare, the Supreme Court has reversed course on a vast array of per se rules.[44]
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> . . . [V]ast swathes of other conduct are assessed under the rule of reason to measure how they comport with notions of economic efficiency, centered in particular on consumer welfare . . . .[45]

What is unstated, perhaps because it is so obvious, is that virtually every one of these changes in antitrust law has favored defendants and has made both public and private enforcement more difficult. For example, following *Eastman Kodak Co. v. Image Technical Services, Inc.*[46] and *Hartford Fire Insurance Co. v. California*,[47] and until *American Needle, Inc. v. National Football League*,[48] the Supreme Court granted certiorari in fourteen consecutive cases where an antitrust plaintiff had prevailed in the lower court, and reversed each one.[49]

Where the Authors truly shine, in my view, is in their frank recognition that the driving force behind this sea change in antitrust has been politics just as much as, if not more than, economics:

> During the Sherman Act's 120-year reign, the fundamental concept of what that legislation proscribes has proven highly unstable. It has

43. *Id.*
44. *Id.* at 76.
45. *Id.* at 77.
46. 504 U.S. 451 (1992).
47. 509 U.S. 764 (1993).
48. 130 S. Ct. 2201 (2010).
49. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109 (2009); Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877 (2007); Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264 (2007); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007); Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006); Texaco Inc. v. Dagher, 547 U.S. 1 (2006); Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2006); F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999); State Oil Co. v. Khan, 522 U.S. 3 (1997); Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993). The only exception to this string was *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), decided a week after *Brooke Group*.

> unquestionably been an evolving concept—one that mirrors the prevailing political mood of the day.[50]
>
> . . . .
>
> . . . Prevailing political mood also played an important role in the rise of the Chicago school, since its emergence largely coincided with a rightward movement during the 1980s. Ronald Reagan's appointment of leading conservative judges helped to cement the adoption of Chicago principles within the law.[51]
>
> As the preceding section explained, the nature of the conduct proscribed by the Sherman Act has evolved in tandem with the larger sociopolitical climate of which antitrust policy is merely a part.[52]
>
> . . . .
>
> As has been noted, the purposes and impact of the Sherman Act have shifted over its history to implicate larger political and economic concerns. . . . [53] It was not difficult to persuade believers in the wondrous powers of free markets that competition at the consumer level should be the sole concern of antitrust.[54]

If anything, this point needs to be made even more strongly, because the Authors have correctly and precisely described what has happened to antitrust in the last four decades. A political ideology, implacably hostile to the antitrust laws, has been able to transform those laws through the medium of a congenial and sympathetic school of economic theory, the premises of which have been aptly summarized by FTC Commissioner J. Thomas Rosch: ". . . [t]hat antitrust law is concerned with maximizing societal welfare; that markets are generally perfect; that, if imperfect, they can and will correct themselves; that, accordingly, rational businesspeople will not engage in predatory conduct (because it is not profit-maximizing since markets will correct themselves)."[55]

Commissioner Rosch, however, has also come to the view

> That the "ideology of the free-market fundamentalists" is arguably "bankrupt"; that markets cannot be as efficient and self-correcting as orthodox Chicago school economists would have it because information is imperfect and human beings do not always act rationally; that there is a need for government intervention to control speculative bubbles; and that monopolies are not the most efficient distributor of resources. . . . . . .[and] that vigorous antitrust enforcement could and

50. Cudahy & Devlin, *supra* note 1, at 77.

51. *Id.* at 77 n.121.

52. *Id.* at 78.

53. *Id.* at 84.

54. *Id.*

55. J. Thomas Rosch, *The Redemption of a Republican*, FTC: WATCH (Wash. Regulatory Reporting Grp., Springfield, Va.), June 1, 2009, at 2.

> should play a substantial role in whatever government intervention is appropriate.[56]

The current worldwide economic crisis, which is the result of deregulation and the unfettered market run wild, supports Commissioner Rosch's conclusions and discredits the economic philosophy that has informed the recasting of the antitrust laws over the last four decades. But just as it is important to recognize that the changes in antitrust law have been politically motivated, and that the Chicago school of economics, which was used to lend credibility to these changes, has been found wanting by recent events, it is important to question who advocates for and who benefits from this view of antitrust. The answer is that the major proponents and beneficiaries are the very holders of concentrated economic power that the antitrust laws were originally meant to curb. The term "regulatory capture" applies here, to antitrust law, with a vengeance. With efficiency now the summum bonum of antitrust, economic power is secure and in charge.

The Authors deserve great credit for pointing out the crucial link between politics and antitrust, and at least beginning a public dialogue that I believe is long overdue.

There is, however, one area of antitrust that the Authors have not touched, which I believe should be briefly discussed in order to understand fully what is at stake in making the decision whether to adopt an aggregate welfare or consumer welfare definition of anticompetitive effect. This is the procedural side of antitrust practice today, and what has happened in the realm of procedure during the same period that the Chicago school became ascendant in shaping the substance of antitrust law. Procedurally, exactly the same type of transition has occurred, with the deck becoming heavily stacked against plaintiffs and Federal Rule of Civil Procedure 1[57] becoming more or less a dead letter for plaintiffs.

Before *Continental T.V., Inc. v. GTE Sylvania Inc.*,[58] which the Authors see as the "turning point" in the change of direction for substantive antitrust law,[59] the procedural landscape was far different from what it is today. The sufficiency of the

56. *Id.*

57. "These rules . . . should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1.

58. 433 U.S. 36 (1977).

59. Cudahy & Devlin, *supra* note 1, at 75.

complaint was governed by *Conley v. Gibson*,[60] a minimal notice pleading standard. *Poller v. Columbia Broadcasting System, Inc.* dictated that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."[61] Indeed, according to the Supreme Court, "the right to trial by jury applies to treble damage suits under the antitrust laws, and is, in fact, an essential part of the congressional plan for making competition rather than monopoly the rule of trade . . . ."[62] There were no heightened or special proceedings for ruling on the admissibility of expert testimony. Although *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[63] had just been decided, concepts of antitrust injury and standing were largely inchoate and undeveloped, if not downright liberal.[64] Finally, if plaintiffs could not obtain a remedy in federal court, state courts frequently proved hospitable and had the freedom to provide redress forbidden under federal antitrust laws if authorized by their legislatures.[65]

What has happened since that time procedurally is that antitrust litigation has turned into an obstacle course for plaintiffs, with substantial hurdles at every stage of the proceedings. In a series of decisions that can be characterized as granting lower courts a hunting license to eliminate plaintiffs and their claims, the Supreme Court has (1) created heightened pleading standards for complaints,[66] so that no case now proceeds without a rule 12(b)(6) challenge; (2) *sub silentio* overruled *Poller*,[67] and has authorized, if not encouraged, trial courts to grant summary judgment in antitrust cases; (3) instructed trial courts that they are the "gatekeepers" of expert testimony, which they are required and encouraged to exclude if they find it wanting after special motion practice and hearings subject to

60. 355 U.S. 41 (1957).

61. 368 U.S. 464, 473 (1962).

62. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504 (1959).

63. 429 U.S. 477 (1977).

64. *See, e.g.*, Perkins v. Standard Oil Co. of Cal., 395 U.S. 642, 648–50 (1969); Radovich v. Nat'l Football League, 352 U.S. 445, 453–54 (1957).

65. California v. ARC Am. Corp., 490 U.S. 93, 100–06 (1989).

66. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554–63 (2007).

67. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585–88 (1986).

an extremely deferential standard of review;[68] and (4) developed vague and convoluted rules of standing and antitrust injury,[69] which has the effect of authorizing further dismissal of antitrust cases. Finally, Congress passed the Orwellian-named Class Action Fairness Act of 2005[70] to ensure that most state court class actions will be litigated in federal courts.

Especially worthy of comment are the Supreme Court's decisions in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.* and *Bell Atlantic Corp. v. Twombly*, which import into antitrust law the requirement that claims be "plausible" in terms of making economic sense.[71] There are three enormous problems concealed within this plausibility standard. The first is that plausibility is inherently a subjective judgment that the trial judge is authorized, indeed required, to make—a judgment that will necessarily rest on and be guided by each judge's beliefs, experiences, and prejudices. The second problem is that the requirement of plausibility assumes, on the basis of no evidence whatsoever, that every federal judge is competent to make a determination of what is economically plausible, and invests the federal judiciary with economic competency whether they have it or not. The third problem is that the decisions requiring economic plausibility provide no guidance as to whose economic theories are to be deemed plausible. Although one might conclude that the Court has endorsed the Chicago school, the current economic crisis would counsel against a too ready embrace of that discredited orthodoxy. The predictable result of the diktat "to go forth and be plausible" is that the wolves on the bench have been turned loose on the antitrust sheep.

Thus, at the same time that the substantive law of antitrust has swung heavily in favor of the defense side, so too has antitrust's procedural aspects, with public and private enforcement becoming increasingly difficult as a practical matter in the federal courts. The hostility of courts to antitrust over the past four decades has mirrored a corresponding hostility to enforcement litigation; the politics informing the constriction of antitrust law similarly inform the progressive closing of the courthouse doors and denial of access to justice. The closing of

68. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147–49 (1999); Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589–595 (1993).

69. Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535–46 (1983).

70. 28 U.S.C. §§ 1332(d), 1453, 1711–1715 (2005).

71. *Twombly*, 550 U.S. at 564–70; *Matsushita*, 574 U.S. at 587–88.

the procedural vise on antitrust plaintiffs is as significant as the closing of the substantive vise in understanding what is at stake in choosing aggregate welfare over consumer welfare as the standard for measuring anticompetitive effect.

II. CHOOSING THE STANDARD; WHAT IS AT STAKE

The Authors argue thoroughly, systematically, and persuasively for selecting aggregate welfare over consumer welfare as the appropriate standard for determining anticompetitive effect. Aggregate welfare means finding anticompetitive effect if there is an impairment to the competitive process at any level or stage of that process, while consumer welfare means looking only to see if there are effects at the level of consumers, in terms of higher prices, reduced output, lower quality, or diminished choice, as the Authors repeatedly make clear.

What is implicit in their argument, but not made express, is that the choice of aggregate welfare or consumer welfare will have an enormous and decisive impact on who can sue, and hence on the effectiveness of antitrust enforcement. Choosing aggregate welfare as the measure of anticompetitive effect will empower a wide range of plaintiffs to bring private enforcement actions, not merely consumers, but also competitors, suppliers, resellers, and potentially anyone else whose ability to compete is impaired. As the Authors point out, this would be fully consistent with prior expressions by the Supreme Court that the protection of the antitrust laws is not limited but extends to all who may be injured by a violation.[72]

Such an expansive definition of anticompetitive effect is also fully consonant with the Supreme Court's frequent assertions of the importance of private antitrust enforcement.[73]

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72. Cudahy & Devlin, *supra* note 1, at 87 ("The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." (citing Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 236 (1948) (citations omitted))).

73. Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 572 n.10 (1982) ("[P]rivate suits are an important element of the Nation's antitrust enforcement effort: 'Congress created the treble-damages remedy . . . precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.'" (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344)); Reiter, 442 U.S. at 344 (1979); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S.

Equally significant is that a competitor is likely to sustain injuries much greater in dollar amount than an individual consumer and to have the resources necessary to support antitrust litigation than an individual consumer. In other words, a competitor is more likely to have both the incentive and the means to pursue private antitrust enforcement than an individual consumer. The same is undoubtedly true for suppliers and resellers. Selecting aggregate welfare is thus all but assured of yielding a vigorous climate of private antitrust enforcement.

On the other hand, the choice of consumer welfare as the measure of anticompetitive effect will, as a practical matter, yield but a single enforcer, one that is subject to unremitting political pressure and constraints on its resources—the federal government.

I believe that the federal government will in effect be the only enforcer of the antitrust laws under a consumer welfare standard for two reasons. First, because the standard requires finding adverse effects at the consumer level, other market participants, such as competitors, will experience the courts determining with increased frequency that they lack standing to raise claims of consumer injury—or that their injuries are not antitrust injuries—because they are not consumer injuries. Thus, the types of plaintiffs able to bring private antitrust actions will drastically diminish. One must assume that the proponents of the consumer injury definition are well aware of this and desire it.

The second reason is that I believe that private consumer enforcement actions are neither independent of the government nor especially effective as a means of securing redress for injury or deterring future violations. By far the most common manifestation of consumer enforcement is the consumer class action. By far the most common impetus for the filing of a consumer class action is a government investigation, grand jury, indictment, or conviction. In sum, private class actions are essentially pilot fish that swim with the government shark, which they depend on for their sustenance. They pursue their quarry

100, 130–31 (1969) ("Moreover, the purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws."); Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 139 (1968) ("[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.").

only so long as the government does. When the government abandons the hunt, too often so does the private class action bar.

In terms of effectiveness, the private plaintiffs class action bar has developed a regrettable reputation for enriching itself at the expense of its putative clients—U.S. consumers. Even a full recovery is likely to net class members relatively small compensation compared to what class counsel receive as attorney fees. Unfortunately, this is what makes the violation so attractive to the defendants in the first place: these defendants are able to amass vast illicit profits by stealing a pittance from each of millions of consumer class members. It does not change the public perception, however, of lawyers profiting unconscionably while their clients gain little. This adverse perception has sadly been exacerbated by such devices as coupon settlements. The deterrent effect of private class actions also appears negligible, as many defendants are serial offenders and recidivists going from one price-fixing conspiracy to the next. Almost none of the consumer class actions ever proceed to trial. No state court action brought under the Class Action Fairness Act has ever been tried to judgment.

Indeed, the advocates of the consumer injury standard are no doubt content with confining private enforcement to consumer class actions, which are now constrained by their dependence on government enforcement, changes to Federal Rule of Civil Procedure 23, the Class Action Fairness Act, and what is anticipated to be the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*.[74]

These constraints leave the federal government as the primary, if not only, enforcer of the antitrust laws. This would no doubt be more than satisfactory to advocates of the consumer welfare standard for two principal reasons. First, as the Supreme Court observed in *Reiter v. Sonotone Corp.*, there are only "limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations."[75] Given the rise of the Tea Party and the composition of the current Congress, those resources are unlikely to increase and are like-

74. 603 F.3d 571 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 795.

75. *Reiter*, 442 U.S. at 344; *see also In re* High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 664 (7th Cir. 2002) ("The Justice Department has limited resources; in the entire decade of the 1990s, it brought fewer than 200 civil antitrust cases . . . ."); Consol. Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 260 (2d Cir. 1989) ("The government, with its limited resources, cannot be relied upon as the sole initiator of enforcement actions. That is why Congress authorized private enforcement of the antitrust laws.").

ly to be even more limited, particularly if the government threatens to intensify its enforcement efforts.

Second, as shown, the Authors have accurately focused on and described the political forces and pressures underlying the historical vicissitudes of antitrust jurisprudence. Government enforcement not only is subject to political influence and pressure in its functioning, but it is also a creature of politics, the primary purpose of which is to advance the political agenda of the administration it serves. The advocates of the consumer injury standard are no doubt well satisfied with this situation, particularly in view of the Supreme Court's recent decision in *Citizens United v. FEC*,[76] which prohibits limits on corporate spending in support of favored political causes and sympathetic politicians. Indeed, *Citizens United* may turn out to be one of the most influential decisions on antitrust enforcement since the passage of the Sherman Act. The more resources a defendant is able to throw against the reelection of the current administration, the less likely the administration may be to bring an antitrust enforcement action against that corporation. This is the real world in which enforcers choose to enforce, or not to enforce.

It is also a compelling reason why it is crucial to the viability of future antitrust enforcement to adopt, as the Authors urge, an aggregate welfare definition of anticompetitive effect, rather than a consumer welfare definition.

Finally, in my mind, there is one additional important reason for adopting the aggregate welfare standard. This involves the definition of anticompetitive conduct, as distinguished from anticompetitive effect. One could simply say that anticompetitive conduct is conduct that produces an anticompetitive effect, and then look at aggregate effects or consumer effects depending on the applicable standard. To do so, however, would be to ignore significant decisions of the Supreme Court, which point strongly in favor of the aggregate welfare standard, in particular *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[77]

In *Aspen Skiing*, the Supreme Court defined predatory conduct by saying, "[I]f a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory."[78] Perhaps the formulation

76. 130 S. Ct. 876, 896–99 (2010).

77. 472 U.S. 585 (1985).

78. *Id.* at 605 (quoting ROBERT H. BORK, THE ANTITRUST PARADOX 138 (1978)).

may be deceptively simple, but no one can claim it to be outside the comprehension of the ordinary juror. A number of courts have employed it.[79] "Efficiency" as used by the Supreme Court in its language in *Aspen Skiing* obviously connotes conduct not honestly industrious or undertaken for a good faith business justification (i.e., conduct that would not be undertaken except for its tendency to exclude rivals). In focusing on the conduct's tendency to exclude rivals, moreover, the Supreme Court is saying that effects on competitors matter, and is pointing strongly in the direction of an aggregate welfare standard.

CONCLUSION

Plaintiffs' antitrust counsel, including this one, never tire of quoting the words of Justice Marshall in *United States v. Topco Associates, Inc.*:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.[80]

The Article *Anticompetitive Effect* is important because it deals with an issue both fundamental and crucial to whether Justice Marshall's words will continue to have meaning. It is

79. Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 783 (6th Cir. 2002); M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160, 166 (4th Cir. 1992); Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 188–91 (2d Cir. 1992); Pac. Express, Inc. v. United Airlines, Inc., 959 F.2d 814, 818 (9th Cir. 1992); Universal Analytics, Inc. v. MacNeal-Schwendler Corp., 914 F.2d 1256, 1258 (9th Cir. 1990); Gen. Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795, 803 (8th Cir. 1987); Drinkwine v. Federated Publ'ns, Inc., 780 F.2d 735, 739 (9th Cir. 1985); Catch Curve, Inc. v. Venali, Inc., 519 F. Supp. 2d 1028, 1036 (C.D. Cal. 2007); Compuware Corp. v. Int'l Bus. Machs., 366 F. Supp. 2d 475, 486 (E.D. Mich. 2005); Minn. Mining & Mfg. v. Appleton Papers Inc., 35 F. Supp. 2d 1138, 1145–46 (D. Minn. 1999); Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 883 F. Supp. 1247, 1257 (W.D. Wis. 1995), *aff'd in part, rev'd in part on other grounds*, 65 F.3d 1406 (7th Cir.); Sunshine Cellular v. Vanguard Cellular Sys., 810 F. Supp. 486, 497 (S.D.N.Y. 1992); Tasty Baking Co. v. Ralston Purina, Inc., 653 F. Supp. 1250, 1273–74 (E.D. Pa. 1987); Reazin v. Blue Cross & Blue Shield of Kan., Inc., 635 F. Supp. 1287, 1332–33 (D. Kan. 1986), *aff'd*, 899 F.2d 951 (10th Cir. 1990); Willamette Dental Grp., P.C. v. Or. Dental Serv. Corp., 882 P.2d 637, 641 (Or. Ct. App. 1994).

80. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

also laudable for speaking in candid terms about the original legislative intent behind the Sherman Act, the historical battle over who shall control the interpretation and application of the antitrust laws, and the political underpinnings of that battle. Finally, it identifies a question—the definition of anticompetitive effect—that will determine which way the battle for the future of antitrust will turn. Although the Authors speak in the technical language of aggregate welfare versus consumer welfare, what is at stake is not the resolution of an esoteric economic debate, but instead the practical outcome of whether those who were meant to be regulated by the antitrust laws will themselves become the regulators and then use those very laws to entrench and perpetuate the inequalities of power and wealth that originally prompted Congress to enact them in 1890.

This Comment has tried to show that the Authors are right in their advocacy of an aggregate welfare standard, and that the argument and its resolution are far more important than even the Authors, in their modesty, claim.