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CHICAGO'S FALSE FOUNDATION:
WEALTH TRANSFERS
(NOT JUST EFFICIENCY)
SHOULD GUIDE ANTITRUST

ROBERT H. LANDE*

My role today will be comparable to the small child's in the classic story of the Emperor's new clothes; I too have a simple truth to tell. The sole goal of antitrust is not to enhance economic efficiency. Increased economic efficiency is not even the primary goal of the antitrust laws. The main purpose of the antitrust laws is to prevent firms from acquiring and using market power to force consumers to pay more for their goods and services. Congress was primarily concerned that corporations would use market power "unfairly" to extract wealth from consumers. These wealth transfers were of much more concern to Congress than economic efficiency.¹

The Chicago School's preoccupation with efficiency arises from its correct judgment that antitrust's overriding concern is with the economic effects of market power. But market power leads to a major economic effect in addition to allocative inefficiency: a transfer of wealth from consumers to the firm or firms with market power. The allocative inefficiency effects of market power are difficult to understand² and were not

* Assistant Professor, University of Baltimore School of Law. I am grateful to Carson Bays, Susan DeSanti, Alan Fisher, Kenneth Kelly, and William Kovacic for useful insight into many of the issues in this paper.

¹ This view of congressional concerns leading to enactment of the antitrust laws is developed in more detail in Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982).

² To raise prices, a monopoly reduces output from the competitive level. The goods no longer sold are worth more to would-be purchasers than they would cost society to produce. This forgone production of goods worth more than their cost is pure social loss and constitutes the "allocative inefficiency" of monopoly. For example, suppose that widgets cost \$1 in a competitive market (their cost of production plus a normal profit). Suppose a monopolist would sell them for \$2. A potential purchaser who would have been willing to pay up to \$1.50 will not purchase at the \$2 level. Since a competitive market would have sold him widgets for less than they were worth to him, the monopolist's reduced production has decreased the consumer's satisfaction without producing any countervailing benefits for anyone. This pure loss is termed "allocative inefficiency." For an extended discussion

a concern to Congress. The transfer effects are relatively straightforward and constitute the main reason why Congress passed the antitrust laws.

Before I explain why the goals of the antitrust laws are better articulated in terms of wealth transfers than efficiency, I would like to stress what I am not going to assert. I am not going to argue that the primary purpose of the antitrust laws is to achieve a variety of social and political goals, such as to protect small businesses from the competition of multinational conglomerates. We have all attended debates between the "big is bad/small is good" view of antitrust and the efficiency view. As you know, the efficiency view has almost always won those debates. The "big is bad/small is good" school of antitrust has been thoroughly defeated, and I will not attempt to defend or resurrect it.³

I will instead attempt to establish that both of these views are substantially incorrect. The primary purpose of the antitrust laws is to prevent consumers from paying prices that exceed competitive levels. Congress in effect gave consumers the property right⁴ (or entitlement) to purchase competitively priced goods and therefore declared that higher-than-competitive prices constitute unfair takings or extractions of consumers' property. The antitrust laws mandate that these fruits of American capitalism—competitively priced goods—belong to consumers, not cartels.⁵

and formal proof that monopoly pricing creates allocative inefficiency, see E. MANSFIELD, *MICROECONOMICS: THEORY AND APPLICATIONS* 277-82 (4th ed. 1982).

³ I am not suggesting that Congress intended non-economic values to play no role in antitrust, but I believe its assigned role to be quite limited. The legislative history suggests that Congress intended the antitrust laws to protect small businesses only to the extent possible without harming consumers. Let me give an example of when such protection would be appropriate. Suppose a firm attempting to monopolize an industry through predatory pricing discovered to its dismay that, when it attempted to raise prices above the competitive level, new firms quickly entered the market. This failed predation scheme would have harmed small businesses (that would have been destroyed by the predatory prices), but not consumers (since consumers would never have to pay supracompetitive prices). I believe such a scenario was meant to be a violation of the antitrust laws. Businesses have a right to compete against firms charging prices no lower than the competitive level, just as consumers have a right to pay no more than the competitive level. Similarly, a merger that created a firm with enough monopsony power to force suppliers to accept less than competitive prices for their goods should be forbidden even if consumers would be unaffected. To discuss this subject in detail, however, would obscure my overall message. For a more detailed explanation, see Lande, *supra* note 1, at 101-05, 120-21, 139-40.

⁴ The "property rights" articulation of the goals of the antitrust laws was expressed by the Supreme Court in *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979); see *infra* note 13.

⁵ Congress did not pass the antitrust laws in an attempt to achieve the optimal distribution of wealth in our economy. The antitrust laws merely defined certain property rights, awarded them to consumers, and attempted to prevent their extraction by firms with market power. Since I want to emphasize that antitrust is not concerned with the overall question of income distribution, I will speak of "wealth transfer" goals rather than "distributive" goals.

I. THE EFFICIENCY ORTHODOXY

Today the dominant belief is that economic efficiency is the sole legitimate concern of antitrust. Although everyone in the antitrust world has for years agreed that efficiency is very important,⁶ the Chicago School position that efficiency is antitrust's only true concern has become dominant only in the past ten to fifteen years. This has occurred in substantial part because most high-level Reagan appointees were enthusiastic proponents of the efficiency view of antitrust. Not only have my fellow panelists Rick Rule⁷ and Terry Calvani⁸ stated their belief that efficiency is the sole goal of antitrust, so have William Baxter,⁹ J. Paul McGrath,¹⁰ James C. Miller, III,¹¹ and Daniel Oliver.¹²

While the efficiency-only view is widespread, the struggle for the soul of antitrust is, fortunately, not yet over. The Supreme Court has never said that only efficiency counts, although it has stated on many occasions that efficiency is extremely important.¹³ This article will explain why we

⁶ See, e.g., Remarks of Michael Pertschuk, Chairman, Federal Trade Commission, Eleventh New England Antitrust Conference (Nov. 18, 1977) [hereinafter Remarks of Michael Pertschuk].

⁷ Rule & Meyer, *An Antitrust Enforcement Policy to Maximize the Economic Wealth of All Consumers*, 33 ANTITRUST BULL. 677 (1988). Mr. Rule is a former Assistant Attorney General, Antitrust Division, Department of Justice, who served during the Reagan Administration. He has not submitted a paper for publication in this issue.

⁸ Calvani, *Consumer Welfare Is Prime Objective of Antitrust*, Legal Times, Dec. 24/31, 1984, at 14, col.1. Mr. Calvani is a member of the Federal Trade Commission.

⁹ Baxter, *Responding to the Reaction: The Draftman's View*, 71 CALIF. L. REV. 618, 619-20 (1983). Mr. Baxter also was an Assistant Attorney General, Antitrust Division, Department of Justice during the Reagan Administration.

¹⁰ McGrath, *60 Minutes with J. Paul McGrath, Assistant Attorney General, Antitrust Division*, 54 ANTITRUST L.J. 129, 131 (1985).

¹¹ See FTC: Watch, Pub. No. 158, *Cost-Benefit Analysis, Miller Style*, 1, 1-5 (Jan. 14, 1983). Dr. Miller was Chairman of the Federal Trade Commission for a period during the Reagan Administration.

¹² Oliver, *60 Minutes with Daniel Oliver, Chairman, Federal Trade Commission*, 57 ANTITRUST L.J. 235, 237 (1988).

¹³ The case cited by Mr. Rule as "most clearly on point" to show the Supreme Court's view that only economic efficiency counts in antitrust analysis is *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). Mr. Rule noted the Supreme Court's statement there that the Sherman Act's legislative history "suggest[s] that Congress designed the Sherman Act as a 'consumer welfare prescription.'" Rule & Meyer, *supra* note 7, at 693. (The Court cited the work of Judge Bork for this conclusion.) The Court's subsequent analysis demonstrates, however, that it was not equating "consumer welfare" with total economic efficiency. If anything, *Reiter* implies that the antitrust laws contain a strong preference for consumers rather than for firms that might want to extract consumers' wealth by using market power to raise price:

It is in the sound commercial interest of the retail purchasers of goods and services to obtain the lowest price possible within the framework of our competitive enterprise system. . . . Here, where petitioner alleges a wrongful deprivation of her money because the price of the hearing aid she bought was artificially inflated

should not accept the implicit conclusions about congressional intent that underlie the efficiency-only view of antitrust.

A. THE ORIGIN OF THE EFFICIENCY VIEW

In 1966, then-professor Robert Bork wrote the first and best articulation of the view that Congress cared only about efficiency when it passed the Sherman Act.¹⁴ Analyzing dozens of quotations from the legislative debates, Bork undertook a "strict constructionist" analysis of the legislative history of the Sherman Act to attempt to ascertain Congress' true motives. Bork revealed Congress' principal concern that firms, through cartels, mergers, and other means, might achieve the power to raise prices to consumers.¹⁵ Any open-minded reader of the legislative record would agree with Bork's conclusion: Congress' primary concern was that certain practices could lead to, increase, or protect corporate market power.

Bork then asked "what's wrong with market power?" According to Bork and other Chicago School proponents, the only evil from market power is that it leads to a form of economic inefficiency that we today term "allocative inefficiency." Since Congress' overriding concern was market power, and the "only" problem with market power is that it leads to allocative inefficiency, Bork concluded that Congress' overriding goal was to increase allocative efficiency.¹⁶

The only other goal Bork found significantly evidence of in the debates was that of preserving and increasing firms' productive efficiency.¹⁷ He correctly pointed out that Congress applauded corporate productive efficiency and wished to encourage it.¹⁸ By adding the congressional concern with corporate productive efficiency to that of increasing allocative efficiency, Bork concluded that the sole goal of the antitrust laws is to increase overall economic efficiency.¹⁹

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.

Reiter, 442 U.S. at 341-43.

¹⁴ Bork, *Legislative Intent and the Policy of The Sherman Act*, 9 J.L. & ECON. 7 (1966) [hereinafter Bork article].

The scope of my article will be to focus upon the goals of the Sherman Act. For evidence that the primary purposes of the FTC Act, Clayton Act, and Celler-Kefauver Act also were to prevent wealth transfers from consumers to firms with market power, see Lande, *supra* note 1, at 112-14, 128, 135-36.

¹⁵ R. BORK, *THE ANTITRUST PARADOX* 15-16 (1978).

¹⁶ *Id.* at 10, 16, 90-91.

¹⁷ *Id.* at 26-31. Bork article, *supra* note 14, at 26-31.

¹⁸ *Id.*

¹⁹ R. BORK, *supra* note 15, at 10, 16, 90-91.

B. PROBLEMS WITH THE EFFICIENCY VIEW

There are at least five flaws with the argument that efficiency was the only goal of the framers of the Sherman Act. First, the fact that market power leads to economic inefficiency was virtually unknown, even within the economics profession, in 1890. Economists did not develop anything resembling our modern understanding that market power causes allocative inefficiency (or is in any similar way undesirable) until the 1930s.²⁰

Second, economists had no significant influence on the passage of the Sherman Act.²¹ If they had been consulted, it is unclear that a majority would have supported the Act's passage,²² and they would have been unable to explain to Congress in any case why market power causes economic inefficiency and why this is undesirable. But this is largely irrelevant because the Sherman Act was conceived and shaped by politicians without the help of the economics profession.

Third, there is nothing even remotely resembling a concern with allocative inefficiency in the Sherman Act's legislative history.²³ It would have been remarkable if Congress had implicitly or explicitly intuited the concept before the economics profession, and there is no evidence that such a remarkable phenomenon occurred. Even scholars like Bork, with every incentive to marshal such evidence, have been unable to point to any remarks from the legislative debates that even remotely suggest a concern with any concept close to allocative efficiency.²⁴

Fourth, the trusts of the period were extremely efficient. I am not aware of anyone ever accusing John D. Rockefeller of running his busi-

²⁰ The observations of Nobel Laureate Paul Samuelson are illuminating. Describing the state of economic knowledge just prior to path-breaking work in the 1930s by Abba Lerner on the undesirable effects of supracompetitive prices, Samuelson has stated: "I can testify that no one at Chicago or Harvard could tell me in 1935 exactly why $P = Mc$ was a good thing, and I was a persistent Diogenes." Samuelson, *A.P. Lerner at Sixty*, 31 *REV. ECON. STUD.* 169, 173 (1964).

²¹ Professor Hofstadter has explained 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 the legislators. But if they had been, they would have given mixed and uncertain advice." R. HOFSTADTER, *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 200 (1965).

²² *Id.* Professor Stigler has concluded: "A careful student of the history of economics would have searched long and hard [in 1890] . . . for any economist who had ever recommended the policy of actively combatting collusion or monopolization in the economy at large." Stigler, *The Economists and the Problem of Monopoly*, 72 *AM. ECON. ASS'N PAPERS & PROC.* 1, 3 (1982).

²³ Nor is there such evidence in the legislative history of the FTC Act, Clayton Act, or Celler-Kefauver Act. See Lande, *supra* note 1, at 108-12, 127-35.

²⁴ See Bork article, *supra* note 14; and R. BORK, *supra* note 15. Nor have other Chicago School scholars, even those who have analyzed the antitrust laws' legislative histories and concluded that only efficiency mattered, found such evidence. *E.g.*, Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 30 *CASE W. RES. L. REV.* 381 (1980).

ness inefficiently or of organizing the oil industry inefficiently. In fact, during the Sherman Act debates Congress admitted the trusts were very efficient,²⁵ but nevertheless condemned them for other reasons. If Congress' sole goal had been to encourage the most efficient form of industrial organization in 1890, it would have praised the trusts, not attempted to outlaw them.

II. EXTRACTIONS OF CONSUMERS' WEALTH BY FIRMS WITH MARKET POWER

The fifth flaw with the efficiency interpretation is that it ignores the main thrust of the legislative debates. Bork's conclusion that Congress did not like the higher prices that resulted from market power is correct. But since Congress was unaware that supracompetitive prices cause allocative inefficiency, there must have been something else about market power to cause concern. The answer, of course, is the transfer effects of market power. Let me repeat some quotations from the Sherman Act debates that demonstrate this point. In a recent law review article, Mr. Rule noted the observations of Senator Sherman and other Congressmen that the trusts were:

making consumers "unfortunate victims" from whom wealth was "unfairly" extracted. Their conduct represented "extortion which makes the people poorer"; their overcharges constituted "robbery" by which were "stolen untold millions from the people." And the "profits of the producer" were increased "at the cost of the consumer."²⁶

Mr. Rule has selected typical quotations from the record. Many other statements in the legislative history also condemned supracompetitive pricing in a tone suggesting that Congress believed the trusts were robbing consumers.²⁷

Congress' use of terms like "robbery" to describe monopolistic overcharges is no accident. To illustrate how appropriate the term is, assume that I walked over to Mr. Rule and stole his wallet. Why would this be bad? The Chicagoist answer is that it would be inefficient for me to steal his wallet. I certainly agree that this would be inefficient,²⁸ but inefficiency

²⁵ For citations, see Bork article, *supra* note 14, at 26-28; Lande, *supra* note 1, at 90-91.

²⁶ Rule and Meyer, *supra* note 7, at 689 (citations omitted).

²⁷ Senator Sherman referred to monopolistic overcharges as "extorted wealth." 21 CONG. REC. 2461 (1890). Congressman Wilson complained that the beef trust "robs the farmer on the one hand and the consumer on the other." *Id.* at 4098. Senator Hoar complained that the trusts were "extort[ing] from the community . . . wealth which ought to be generally diffused over the whole community." *Id.* at 2728. Representative Fithian complained that the trusts were "impoverishing" consumers through "robbery." *Id.* at 4103.

²⁸ If I were to take Mr. Rule's property, his incentives to work hard could diminish, he might hire a guard for protection, or he might shoot me. Each of these reactions would

is not the reason we prohibit theft. We prohibit theft for a simpler, more fundamental reason. After we define a property right—in this case, after we determine that the wallet belongs to Mr. Rule—we attempt to prevent others from unfairly taking this property. Our goal is to prevent this transfer as an end in itself, not because it causes inefficiency.²⁹

This reasoning applies to antitrust as well. When Congress passed the antitrust laws it in effect determined that consumers should have the property rights that we today term “consumers’ surplus.” The formation and use of market power to force consumers to pay supracompetitive prices constituted the “stealing” of their property that so angered Congress in 1890.

Antitrust’s concern with preventing this transfer is different from a concern with the overall distribution of wealth in society. To return to the stealing analogy, if we are attempting to determine whether I can take Mr. Rule’s wallet, it doesn’t matter whether Mr. Rule is wealthier than I am. The rich are entitled to have their property protected, and the poor have no right to steal it. Similarly, all consumers, rich and poor, have the right to purchase competitively priced goods. No cartel—even if its stockholders are poor and its customers are rich—has a right to steal by charging supracompetitive prices. There are no such exceptions in the antitrust laws, so we should not waste effort inquiring into producer and consumer wealth when we are attempting to analyze the legality of various business arrangements.

III. WHY WAS THE ANTITRUST WORLD LED ASTRAY?

The primary purpose of antitrust is so simple and obvious that one might be puzzled as to how the efficiency-only story ever came to rule.

constitute inefficiencies that could arise if we repealed the laws against theft. *See generally* R. POSNER, *ECONOMIC ANALYSIS OF LAW*, ch. 7 (3d ed. 1986).

²⁹ If you still have any doubt that Congress passed the antitrust laws more out of a concern with wealth transfers than with economic efficiency, I urge you to perform a simple experiment on a friend whose mind hasn’t been polluted by too much training in antitrust or economics. Ask your friend “what’s wrong with cartels,” and you will almost certainly get the reply that the problem with cartels is that they raise prices for consumers. Then ask, “what’s wrong with higher prices?” This could cause your friend to hesitate, since it might seem obvious that higher customer prices are undesirable. If you keep asking for an answer, however, your friend will probably say that higher prices mean that consumers have to pay more for their goods and services—in other words, that the cartel is unfairly taking money from consumers. If you asked this question of ten friends, not even one is likely to respond that a cartel’s higher prices are bad because they cause economic inefficiency. The answers given by your friends will almost certainly contain more insights about the probable intent of Congress in passing the antitrust laws than is found in all of the scholarly articles on the subject authored by Chicago School antitrust lawyers and economists.

At the risk of oversimplification, there are two reasons for its triumph—the first caused by conservatives, and the second by liberals.³⁰

A. "TRICKLE DOWN" ANTITRUST SOLD DECEPTIVELY

The first reason is Bork's brilliant but deceptive choice of the term "consumer welfare" as his talisman, instead of a more honest term like "total welfare," "total utility," or just plain "total economic efficiency."³¹ After all, who can be against "consumer welfare"? If even Bork and his followers believe that the whole purpose of antitrust is to help "consumer welfare," how can the rest of us object? The problem, of course, is that few are aware how counterintuitively Bork defined the term,³² and what an Orwellian term it is. "Consumer welfare," as Chicago School antitrust lawyers conventionally define the term, has little or nothing to do with the welfare of real consumers.

Bork's choice of the term "consumer welfare" deceptively implies that he is concerned about the welfare of consumers *as opposed to producers*. Under his definition, however, a cartel counts as a consumer, and thus if the cartel gains, "consumer welfare" increases. In contrast, the economics profession generally uses the term "total utility" or "total welfare" to describe what Bork believes is the proper focus of antitrust—the sum of "producer welfare" and "consumer welfare."³³ Economists typically—and much more straightforwardly—say that economic efficiency is maximized when total utility or total welfare is maximized, not when "consumer welfare" is maximized.³⁴

The view that we help consumers by first allowing cartels to help themselves is the "trickle down" theory of antitrust. Perhaps it sometimes is true that if we allow cartels to charge higher prices in the short run,

³⁰ For a more detailed explanation, see Lande, *The Rise and (Coming) Fall of Efficiency As the Ruler of Antitrust*, 33 ANTITRUST BULL. 429, 450–54 (1988).

³¹ Bork defines maximum "consumer welfare" as the "maximization of consumer want satisfaction." Bork article, *supra* note 14, at 7. Bork explicitly excludes wealth transfers from his definition: "Antitrust thus has a built-in preference for material prosperity, but it has nothing to say about the ways prosperity is distributed or used." R. BORK, *supra* note 15, at 90.

³² The fact that the concepts are so difficult to understand and explain also helped the Chicago School's ascendancy. Chicago School lawyers often have better economics training than their non-Chicagoist counterparts, some of whom may have been intimidated and declined to enter into the very complex economic battle.

³³ The distinction between "consumer welfare" and "producer welfare" is crucial because the welfare of consumers and producers is often at odds, and there are times when we want to choose the welfare of one group over that of the other.

³⁴ E. MANSFIELD, *supra* note 2, at 51–52; F.M. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* ch. 2 (2d ed. 1980).

real consumers could benefit somewhat in the long run.³⁵ Regardless, the antitrust laws were passed out of a belief that the consumers are entitled to purchase competitively priced goods. Arguments that consumers should be forced to pay higher prices today because they might somehow benefit even more in the long run should be taken to the legislature.

B. THE FALSE DICHOTOMY: EFFICIENCY V. MUSH AND CHAOS

Overzealous liberals provided the second reason why the efficiency view has virtually captured the antitrust world. Let me read you a passage from one of then-FTC Chairman Michael Pertschuk's most famous (or infamous) speeches, his 1977 New England Antitrust Conference presentation. After acknowledging that efficiency considerations were "important," he stated that antitrust was also concerned with "other social objectives, such as the dispersal of power. . . ."³⁶ He explained:

In 1977, no responsive competition policy can neglect the social and environmental harms produced as unwelcome by-products of the marketplace: resource depletion, energy waste, environmental contamination, worker alienation, the psychological and social consequences of marketing stimulated demands.³⁷

Such smorgasbord lists of social/political concerns appeared in many speeches and articles by liberal members of the antitrust community and were especially prevalent before the Reagan Administration began.

Chicago School proponents who have honestly tried to interpret the antitrust laws could only have horrified reactions to such lists. They probably reasoned that:

(1) Concerns like preventing resource depletion, energy waste, environmental contamination, and worker alienation are not part of the antitrust laws' legislative histories. No one has ever presented any significant evidence that these were important reasons why Congress passed the antitrust laws.

(2) This view of antitrust will lead to mush and chaos. It is completely unadministrable. It is hard enough to predict a merger's probable eco-

³⁵ Suppose, for example, a group of firms wants to undertake a practice that will force consumers to pay \$100 more for their products, but that the firms in question will gain \$105 due to the net efficiencies of the arrangement. The efficiency view of antitrust would bless this cartel, since net efficiency will rise by \$5 even though consumers will, in the short term, pay \$100 more. Of course, it is possible that in the long run \$50 of the \$105 will somehow return from the stockholders of the cartel back to consumers. It is not impossible that \$104 eventually will trickle down to consumers in some indirect manner, but the extent of this flow is extremely difficult to trace or predict.

³⁶ Remarks of Michael Pertschuk, *supra* note 6.

³⁷ *Id.*

conomic impact; as a practical matter, it is impossible also to predict a merger's probable effects on resource depletion, etc., and then to balance these effects against the merger's economic effects. Under the Pertschukian view of antitrust's goals, businesses would have no way to predict whether their merger likely would be legal, and there would be no principled standards under which they could be judged.

(3) The only alternative is Bork's efficiency model. The efficiency view at least is concerned with market power and is capable of producing relatively administrable rules. It is far better to have a relatively predictable legal system than the uncertainty that would result from the dizzying list of factors proposed by various liberals.

I certainly understand how intellectually honest members of the antitrust community thought they had to choose between economic efficiency and a social/political swamp. And I can understand that, given the choice, they chose the economic efficiency viewpoint.³⁸

My plea to the Chicago School is that now it is time to compromise. The economic efficiency/"big is bad, small is good" dichotomy is a false one. It is possible to accept antitrust's concern with wealth transfers as well as efficiency without being swept into a social/political morass. The wealth transfer view is at least as administrable as the efficiency view,³⁹ and both center around the same general concern—market power. Moreover, it is obvious that Congress was concerned with more than economic efficiency in 1890, and the wealth transfer view comes much closer to reflecting congressional populist intent than does an exclusive focus on efficiency.

³⁸ Not only did liberal members of the antitrust community overreach on the subject of goals, they also put too little effort into translating their social/political concerns into clear, predictable standards. See *supra* note 3 for examples of how a limited concern for protecting small businesses could be incorporated into antitrust analysis in an administrable manner.

³⁹ For example, price is actually more workable than economic efficiency as a merger standard because its modeling is more straightforward. Under the price standard, one needs to describe the industry and identify the values of a few underlying parameters to determine how large cost savings would have to be to prevent price from rising or output from falling. A model based on the economic efficiency standard, however, is even more complex and requires vastly more information to solve. Because the postmerger socially optimal output could fall under this standard, a trade-off analysis would require one to know the values for the marginal cost and marginal revenue schedules over the relevant output ranges. This requirement is in addition to all the information that one would need to analyze a merger under the price standard.

Empirically, the price standard has an additional advantage. It is sometimes possible to observe after the fact *whether* price rose and output fell. By contrast, the trade-off under the economic efficiency test—whether marginal costs fell *sufficiently* to offset the adverse effects of reduced output—eludes hindsight as well as foresight. See A. Fisher, F. Johnson, & R. Lande, *Price Effects of Horizontal Mergers*, forthcoming in the CALIF. L. REV.

IV. DIFFERENCES IF ANTITRUST INCORPORATES WEALTH TRANSFERS

No one knows how much difference it will make if antitrust analysis incorporates wealth transfer effects.⁴⁰ The antitrust community has been performing sophisticated policy-oriented efficiency analysis for more than twenty years,⁴¹ and the wealth transfer approach is very new, so it is far too soon to ascertain the magnitude of the differences between the approaches. But some generalizations are possible.

Many areas of antitrust will be completely unaffected. If a business arrangement leads to significant market power but no potentially offsetting efficiencies, it should be condemned under either an efficiency approach or a wealth transfer approach. A naked cartel, for example, both leads to allocative inefficiency and extracts wealth from consumers, so it would be treated identically under both approaches.

Conversely, if a practice leads to no market power, it should cause no problems under either approach.⁴² A merger that would lead to no

⁴⁰ Commissioner Calvani's conclusions about the importance of this debate, in *Rectangles & Triangles: A Response to Mr. Lande* ("Response") *infra* this issue, at 657, are unwarranted. He attempts to belittle the issues by translating them into triangles and rectangles and then deriding them as a mere "debate about shapes." His response is especially ironic since he frequently uses sophisticated economic analysis, including triangles and rectangles, whenever doing so lends support to the positions he is advocating. His own paper on the subject of antitrust goals, which he cites in his Response, includes a graph that contains both a triangle and rectangle. Calvani, *supra* note 8.

Commissioner Calvani raises two specific areas where the transfer/efficiency issue might seem likely to make a difference, but concludes that the differences are insignificant. He defines the first area as "perfect" price discrimination, and says that this area is important only in theory since he has never actually seen it. The transfer/efficiency debate, however, would be extremely important in any case involving price discrimination, regardless of whether the discrimination is "perfect." Less-than-perfect price discrimination is quite common, especially in Robinson-Patman Act cases, and in many tying cases as well. See, e.g., *IBM v. United States*, 298 U.S. 131 (1936) and a significant percentage of all other tying cases. Many of these cases could be affected dramatically if the transfer effects of market power are considered.

Commissioner Calvani's second example involves mergers. He writes: "Since 1983, there has been only one merger case before the Federal Trade Commission where the established gains in production efficiencies probably exceeded the predicted losses to allocative efficiency." I am delighted that he viewed the proffered efficiency claims with such skepticism. Not everyone, unfortunately, is so discerning. Either the FTC's Bureau of Competition or Bureau of Economics (or both) found the efficiency claims significant in 27% of recent above-Guideline mergers. See text accompanying note 43 *supra*. Thus, the "triangle/rectangle" debate could be important in a significant percentage of merger enforcement decisions.

⁴¹ For example, Williamson's path-breaking efficiency-based merger analysis first appeared slightly more than twenty years ago. Williamson, *Economics as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968).

⁴² The only exceptions would be situations where, out of a need for predictable and clear rules, we condemn practices even though no market power might be present. Price fixing, for example, cannot be justified by defendants demonstrating that they had no market power.

significant probability of market power, for example, poses neither a threat to allocative efficiency nor a threat to the prices consumers pay.

If business arrangements lead to both market power and efficiency, however, some kind of trade-off must be made before we can ascertain the practice's legality. The efficiency approach only considers the allocative inefficiency losses and productive efficiency gains created by particular business practices. The framers of the antitrust laws also wanted wealth transfers from consumers to firms with market power to be counted as losses.

To ascertain the likely dramatic differences in outcome in many cases if wealth transfer effects were included, one should note that the wealth transfer effects of market power are probably at least twice as large as the allocative inefficiency effects.⁴³ This means that the market power side of any trade-off will be approximately trebled after we add the transfer effects to the allocative inefficiency effects of market power. A trebling of the "bad" side of every trade-off is bound to lead to tighter rules for many types of antitrust cases.

For example, economists Alan Fisher and Frederick Johnson and I are attempting to determine how different merger policy might be if the current efficiency paradigm were replaced by a policy that blocked any merger significantly likely to lead to consumers paying higher prices. Our research shows that such a switch should lead to significantly tighter merger enforcement, either through the use of relatively stricter Herfindahl-Hirschman Index standards in merger enforcement or through a higher burden for those who would justify a merger by demonstrating enhanced efficiency.

Those scholars who analyze mergers under an efficiency standard generally conclude that a two percent gain in productive efficiency caused by a merger would almost always outweigh any adverse (i.e., inefficiency) effects of market power likely to arise from that merger.⁴⁴ If mergers were instead blocked whenever they were significantly likely to lead to higher prices, a far higher cost savings would be necessary to justify the merger, since only a relatively large cost savings would prevent the price-increasing effects of market power. Our preliminary research suggests that if a higher-price standard were used instead of an efficiency stan-

⁴³ See Easterbrook, *Panel Discussion*, 55 ANTITRUST L.J. 123, 126 (1986); F.M. SCHERER, *supra* note 34, at ch. 17, especially pp. 464, 471.

⁴⁴ E.g., Williamson, *Economies as an Antitrust Defense Revisited*, 125 U. PA. L. REV. 699, 709 (1977); Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 30 CASE W. RES. L. REV. 381, 420 (1980). A rare exception is Areeda and Turner, who would require an efficiency gain of 5%. P. AREEDA & D. TURNER, 4 ANTITRUST LAW ¶ 946e (1980).

dard, cost savings of up to nine percent would be required if the firms in the relevant market would likely behave non-collusively after the merger, while cost savings of approximately ten percent to fifty percent would be required if the merger were likely to trigger industrywide collusion.⁴⁵

As a practical matter, it would make little difference whether one required a cost savings of two percent, nine percent, or fifty percent to justify a merger likely to lead to increased market power, if antitrust enforcers and courts rarely found efficiency claims convincing in any case. Some skeptics—and I include myself in this group—believe that one rarely can predict significant efficiencies in advance of a merger.⁴⁶ Others, however, are more easily convinced. An internal FTC study evaluated the seventy horizontal mergers that the agency examined between June 14, 1982 (the date the Reagan Administration issued its first Merger Guidelines) and the end of 1986 involving a “second request” for additional information because Merger Guidelines standards had been triggered. The staff of either the Bureau of Competition or the Bureau of Economics found defendants’ efficiency arguments convincing in nineteen out of the seventy cases (i.e., twenty-seven percent of the time).⁴⁷ Thus, in a large percentage of all recent above-Guidelines merger cases, the size of the cost savings required for a successful efficiencies defense could have been an important factor in the merging firms’ efforts to convince the Commission not to challenge a merger.⁴⁸

Even greater differences could arise in those antitrust areas that involve price discrimination. Price discrimination often has ambiguous or benign efficiency effects, yet results in a significant transfer of wealth from consumers to the firm employing the price discrimination. Since price discrimination frequently arises in cases involving tying arrangements, non-price vertical restraints, and potential Robinson-Patman Act viola-

⁴⁵ See A. Fisher, F. Johnson, & R. Lande, *supra* note 39. The numbers we generate are not precisely comparable to the numbers generated under the efficiency standard since some of the underlying assumptions differ. For example, the efficiency-based models often assume specific price increases following a merger without any model explaining why they are likely. We instead base our price increases on models explicitly involving competitive, oligopolistic, or collusive behavior.

⁴⁶ For example, former Assistant Attorney General Douglas H. Ginsburg observed: “I did not find the efficiencies claim persuasive in any of the admittedly few merger reviews where the point was argued. . . .” Letter from Judge Douglas H. Ginsburg to Robert H. Lande (Feb. 3, 1988).

⁴⁷ See A. Fisher, F. Johnson, & R. Lande, *supra* note 39. The staffs of both bureaus found the efficiency arguments convincing in 9 cases (13%). (I am grateful to Dr. Malcolm Coate for this data).

⁴⁸ Of course, many factors other than efficiency also were important in the Bureaus’ and the Commission’s enforcement decisions.

tions, decisions in many cases in each of these areas could be altered if wealth transfers were included in the analysis.⁴⁹

V. CONCLUSION

I hope these preliminary thoughts in two areas do not distract from my primary message. A new regime for antitrust is dawning. Wealth transfers should—and will—be recognized as important to antitrust decisions. I believe this ultimately will result in significant differences for many areas of antitrust, but all I ask is that the antitrust community keep an open mind concerning how important these will be, and that we began to do the difficult work involved in figuring out what these differences are.

⁴⁹ The author is working on an article that will attempt to integrate wealth transfer considerations into tying analysis. A. Fisher & R. Lande, *Untangling Tying* (unpublished manuscript).