

COUNTER-INTUITIVE FAIRNESS IN ANTITRUST: PROTECTING THE MONOPOLIST AND BALANCING AMONG COMPETING CLAIMS

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ABSTRACT

Antitrust originated in popular resistance to 17th century Royal Grants and 19th century economic power. This article contends that much of the guiding force of today's antitrust policy stems from these early sentiments, applied to thoroughly different legal and economic circumstances. Specifically, "monopolists" constrained by antitrust law are very different today from their historical counterparts, sharing a name but little else. Modern antitrust, with its focus on price-theoretic micro-models, treats all bearers of market power alike—despite markets being narrowly defined and economic and political effects differing greatly among them. Antitrust, as practiced today, infringes upon rights to property and freedom of contract and "gets away with it" simply by defining those constrained as "monopolists." The implicit assumptions that this article challenges are that monopolists as such deserve no protection and that by mere virtue of their monopolistic status can be constrained whenever it is in society's (or consumers') interest to do so. I examine the rights monopolists might justifiably claim, as well as counter-arguments to such claims, within the framework of Rawls' theory of justice and his "veil of ignorance" thought experiment. These allow for going beyond current biases to examine what a just society would demand of its economic actors, and when justice demands protection of those limited by today's antitrust policy.

JEL: D42; G18; K21; N11; N12

I. INTRODUCTION

The origins of antitrust law can be traced back along two routes. One strand originates with the common-law treatment of contracts restraining trade, beginning as far back as 15th century England. The other deals with Royal Grants of monopoly, which bestowed upon their recipients the sole right to deal in a particular good or service, usually due to a special investment or special relationship with the King or his entourage.¹ A typical case of the

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¹ See e.g., William Letwin, *The English Law Concerning Monopolies*, 21 U. CHI. L. REV. 355 (1954); Thomas B. Nachbar, *Monopoly, Mercantilism & the Politics of Regulation*, 91

first strand would be an employment contract where the employee promises not to compete in the same business (or town) after employment has been terminated.² In the guild system then common, this made the employee's commercial future dependent upon the employer's good will, and thus all but perpetuated their relative positions. Usually, non-competition clauses would not preclude *all* competition, but would limit the geographical area in which the employee may operate, the specific types of goods he might offer, or some similar market division. Overly broad restrictions were frowned upon by the courts and often declared void under common law.³ What is important to note, though, is that such restrictions serve not only to limit trade, but also to facilitate prior cooperation that otherwise might not take place. Employers fearing that a current employee will become a future competitor would be hesitant to train him (historically it was usually him, rather than her), and especially fear entrusting him with trade secrets or specific knowledge central to the employers' comparative advantage in the local marketplace. Thus without contractual restraints on the worker's use of such knowledge, it would be protected by the employer—keeping it to himself. The benefit of division of labor and growth of business through expanding the workforce depends (at least in part) on the ability to invest in workers' human capital without fearing that they will quickly replace their benefactor, thus the inefficiency a system lacking protection of trade secrets is clear.⁴

Restraints of trade operated in contracts between actual and potential competitors as well. In such cases, the parties' gain from restraining their freedom of trade was the mutual commitment of their counterpart, thus allowing each a position of market power in the portion of the market allotted to him, and with it the ability to increase price without the fear of undercutting by competitors. Today, these restraints might be called

VA. L. REV. 1313 (2005). Yale Brozen famously made the argument that this dynamic of governmental creation of monopoly persists over time and changes mostly in name and form. Yale Brozen, *Is Government the Source of Monopoly?*, 5 INTERCOLLEGIATE REV. 67 (1968-69). Royal Grants were often decreed specifically to guilds, or craft companies, rather than to individuals. Jonathan E. Scott, *Limitations of Guild Monopoly*, 22 AM. HIST. REV. 586 (1917).

² *Darcy v. Allein*, 77 Eng. Rep. 1260 (K.B. 1603).

³ See Letwin, *supra* note 1; ERNEST GELLHORN, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL ch. 1 (West Group 1994). Common law is often relied on as a basis for modern antitrust jurisprudence as well, though with obvious changes over time. Still, the broad and ambiguous terms employed by the Sherman Act were argued to draw from terms at common law, and interpreted accordingly. See HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 51 (2d ed., Thomson West 1999). Senator Sherman himself, while proposing and explaining the act to bear his name, said the law "applied old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government." 21 Cong. Rec. 2456 (Mar. 21, 1890).

⁴ See Harry First, *Trade Secrets and Antitrust Law*, in THE LAW AND THEORY OF TRADE SECRECY: A HANDBOOK OF CONTEMPORARY RESEARCH 332 (Rochell C. Dreyfuss & Katherine J. Stranburg eds., Edward Elgar Publishing Ltd. 2011).

“plain-vanilla cartels” targeted by antitrust intervention. Still, in the early development of antitrust, it is interesting to note that the method for analyzing such non-competition clauses was that of private law, focusing on the parties to a contract rather than “the public.” The common denominator of early judicial cases discussing such cases was the *parties’* freedom to trade, rather than the interests of an outsider to the contract or the resulting price.⁵ Such a clause could be found, based on specific facts to the case, to be oppressive in nature or an essential part of the economic value of the business interaction (employment, joint venture, sale of business, and so forth). Thus, the courts in England distinguished between “reasonable restraints” necessary for commerce and bad ones deemed oppressive. Analysis of the parties’ interests, though, ignored social consequences and externalities imposed on others beyond the contractual relations.

The *social* price that monopoly creates was recognized through the second strand of antitrust antecedents, the Royal Grant. As early as 1602, courts in England dealt with the issue of monopoly by grant, voiding a patent monopoly granted by the Queen as contradicting common law.⁶ That case, though being cited as antitrust’s first, revolved mostly around constitutional issues and separation of powers in the parliamentary kingdom, as the same patent monopoly granted by the Queen and declared void by the court was subsequently granted to a local guild by Parliament.⁷ Not a great victory for competition, though Parliament gained both stature and influence. The recognition that the general public was affected by restriction of trade, and competition was both needing and deserving of protection, had to wait a while longer.

Much has been written of the history of antitrust and its goals. Part II of this article is a brief reminder of how we got to where we are, and what connotations were publicly associated with the terms we still use. Part III reviews the different goals that antitrust is argued to achieve (or at least aim for). Part IV shows the implicit assumptions on which antitrust policy still relies, and it connects between current doctrine and antitrust history. Part V raises conceptual counter-arguments to the main thesis expounded here, that antitrust, as it is practiced today, infringes upon monopolists’ right to property and freedom of contract and should be subject to a balancing test incorporating all affected parties’ rights and interests. In order to examine whether monopolists truly have recourse to arguments of justice and fairness, Part VI resorts to Rawls’ theory of justice and asks what antitrust principles we would have voted for in the Original Position. Part VII concludes with a note regarding practical application.

⁵ See GELLHORN, *supra* note 3, ch. 1.

⁶ See *Darcy*, 77 Eng. Rep. 1260.

⁷ See Letwin, *supra* note 1, at 367. Others have argued that King and Parliament actually agreed as to the monopoly granted, and it was actually the commercial interests represented by the House of Lords that they both battled with. See Chris R. Kyle, “*But a New Button on an Old Coat*”: *The Enactment of the Statute of Monopolies*, 19 J. LEGAL HIST. 203 (1998).

A word of warning is necessary regarding terminology. I use the term “monopoly” and “monopolistic practices” as broad categories rather than the currently accepted terms of art. This is due both to historical sources inadequately separating between different abuses of the competitive process, and to my own wish to focus on the extreme contention that even clear-cut monopolists may argue that current doctrine discriminates against them by negating their natural (or state-granted) rights. Where a distinction between monopoly and other antitrust-limited practices is necessary, I address the issue directly. Where the argument is general in nature and may apply to all victims of antitrust (or subjects thereof, to choose a less contentious term), I retain the general term “monopolist” for brevity’s sake.

II. THE HISTORY OF ANTITRUST AND ITS GOALS

A. Early American Sentiment

The Royal Grant met its fiercest opposition in the American colonies, where markets were often monopolized by those granted royal favor, at the expense of the “little people” prevented from trade and forced to purchase at monopoly prices. The issue became so central in colonial American political thought, that in 1641, the Massachusetts Body of Liberties stated unequivocally: “No monopolies shall be granted or allowed amongst us.”⁸ Similar effects created through different means were also central in American resistance to English rule, as in the case of the Navigation Acts enacted by the English Parliament.⁹ These forced colonial goods through English ports and vessels, creating a bottleneck monopoly and inducing open rebellion by American colonists, who found themselves commercially constrained. The fact that these acts were a part of an English power play in the context of international maritime trade did nothing to dispel their monopolistic effects on the already-discontented colonists, who found themselves limited in marketing their goods outside English ports.

Resistance to monopoly by Royal Grant was fierce in colonial America, as attested by the strong language in state declarations and constitutions. For example, the Maryland constitution enacted in 1776 stated that “monopolies are odious, contrary to the spirit of a free government and the principles of commerce.” The North Carolina Declaration of Rights stated that “perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed.” Both the Virginia Declaration of Rights and the Massachusetts constitution included identical language expounding the principle for such anti-monopoly sentiments: “no man nor corporation or

⁸ *The Massachusetts Body of Liberties*, reprinted from 7 OLD SOUTH LEAFLETS 261-67 (Directors of the Old South Work), available at <http://history.hanover.edu/texts/masslib.html> (last visited Dec. 2011).

⁹ See Nachbar, *supra* note 1, at 1325.

association of men have any other title to obtain advantages, or particular and exclusive privileges distinct from those of the community, than what rises from the consideration of services rendered to the public.”¹⁰

All in all, distaste for monopoly in early American political thought is clear and was sufficiently central to appear in the primary legal documents and political proclamations of the time.¹¹ What should be remembered, though, is what the term “monopoly” meant at this time: the grant of exclusivity in trade to one person or group by Regal authority, usually in the interest of a political and economic elite (indeed, cementing these as one). This distaste for monopoly carried over onto monopolies created through associations of trade or wealth irrespective of Royal (or even state) authority, though, as we shall see below, the rhetoric and focal points of discussion evolved over time.

B. Shifting Focus: From Grants to Trusts

As time progressed and the industrial revolution generated economies of scale at an ever-increasing rate, economic power began to be seen as real a problem as political power. Economies of scale, the increased efficiency garnered from increasing production or centralizing management, make larger enterprises more efficient and thus able to drive the smaller, less efficient ones out of business. This may be due to lower costs leading to lower prices and ultimately benefits consumers. It may also be due to the large enterprises controlling essential inputs (including transportation or marketing avenues)—depriving competitors of a needed lifeline. Since real life is messy, it is reasonable to assume that most cases of economic concentration include a mixture of both efficient and inefficient mechanisms. Obviously, extreme cases lead to a monopoly that can afford to raise prices without excessively curbing residual demand—leading to high prices. Still, the public hatred of monopolies was not inhibited by fancy economic analysis pointing out the benefits of size. Brandeis declared war on “the Curse of Bigness,” and public sentiment was largely convinced.¹² As commerce evolved, and firms of increasing size became prominent, the populist view declared them large behemoths abusing their power and requiring state action to curb their appetite for profit.¹³

¹⁰ See Eric Daniels, *Reversing Course: American Attitudes about Monopolies, 1607-1890*, in *THE ABOLITION OF ANTITRUST* (Gary Hull ed., 2006).

¹¹ For example, “monopolies in trade [will be] granted to the favorites of government, by which the spirit of adventure will be destroyed, and the citizens subjected to the extortion of those companies who will have an exclusive right.” 13 *Documentary History of the Ratification of the Constitution* 482, in DANIEL A. CRANE, *THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT* ¶ 7 n.23 (Oxford Univ. Press 2010).

¹² See LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY: AND HOW THE BANKERS USE IT* ch. 8. (Frederick A. Stokes Company 1914).

¹³ See ERIC FONER, *GIVE ME LIBERTY! AN AMERICAN HISTORY* ch. 17 (W.W. Norton & Company 2006).

Nowhere is this dynamic more apparent than in the classic trusts that gave the Sherman Act its public resonance—and antitrust law its common name. The most famous example is Standard Oil, which began as an Ohio corporation in the oil business and quickly saw economic benefit in increasing its purview to the railroads transporting its product, as well as to out-of-state refineries and oil companies.¹⁴ In economic parlance that later became standard antitrust terminology, Standard Oil was led by John D. Rockefeller in both vertical and horizontal expansion—vertically towards businesses that previously supplied inputs or consumed Standard Oil products, and horizontally towards would-be competitors producing similar products. Since Ohio prohibited its companies from owning stock in out-of-state companies, a novel business arrangement was used, using the long-standing legal mechanism of the trust as a vehicle by which the shares of many companies could be controlled in unison by the trustees.¹⁵ Essentially, owners of large blocks of shares would entrust them to the management of Rockefeller and his “crew,” in return for certificates granting them the right to share in the profit of common assets.

The legal trust created efficiencies as well as less legitimate profit opportunities. Economies of scale and benefits of central management, achievable when forty refineries were operated as one giant enterprise, were passed on in part to consumers enjoying lower prices as well as innovative products (for example, what is today known as “Vaseline” started out as a synthetic petro-chemical derivative competing with then-popular beeswax). On the other hand, Standard Oil became known for aggressive moves against competitors, who often complained not just of being priced out of the market, but also of outright bullying.¹⁶ The fact that the trust allowed for vertical expansion also became central, as railroads controlled by the trust (as well as other suppliers of transport services, wary of losing large contracts) were instructed to refuse passage to competitors of Standard Oil. In short, shrewd business combined with economic power created profitable opportunities for the trust’s beneficiaries as well as hardship and frustration for those enjoined from competing effectively. The result was increasing public

¹⁴ See RON CHERNOW, *TITAN: THE LIFE OF JOHN D. ROCKEFELLER SR.* ch. 6, 7 (Random House 1998).

¹⁵ The state of New Jersey has also been named culprit in leading the “race to the bottom” among states eager for local incorporation (with accompanying income and influence) in allowing holding companies which facilitated the Standard Oil trust. See, e.g., CRANE, *supra* note 11, ¶ 11; RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW* ¶ 8 (Revised ed., Oxford Univ. Press 1996).

¹⁶ For a contemporary popular account, see Henry Demarest Lloyd, *The Story of a Great Monopoly*, *ATLANTIC MONTHLY*, Mar. 1881. See John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 *J.L. & ECON.* 137 (1958), for an argument that the record does not support the commonly leveled charge of predatory pricing, and, somewhat surprisingly, that such conduct would have *improved* aggregate welfare due to its economizing on the costs of monopolization that ultimately occurred, borne by consumers.

outcry, witnessed and fanned by stories such as Ida Tarbell's series of articles in McClure's magazine, which was later assembled as *The History of the Standard Oil Company*, published in 1904.¹⁷

For those familiar with antitrust law, the Standard Oil name is invariably connected with the 1911 Supreme Court case that required dissolution of the company into 34 separate companies with separate boards of directors (unwittingly increasing their aggregate share price and bestowing upon Rockefeller a windfall profit).¹⁸ Beyond its legal significance, Standard Oil still looms large in the collective memory of what antitrust is about—and even more so, in the history that prompted the Sherman Act's enactment and the popular support for its ideals. Most telling is Chief Justice White's remark within his *Standard Oil* opinion: "It is remarkable that nowhere at common law can there be found a prohibition against the creation of monopoly by an individual."¹⁹

While originally monopoly was assumed to originate in Royal decree alone, modern times have witnessed the expansion of this term to include various economic effects, even when created through (imperfect) market mechanisms. As a result, antitrust evolved to encompass various limitations on individuals' and firms' business behavior, aimed at curtailing economic power used to drive out competitors or harm consumers. In contrast to early times, antitrust law today is commonly assumed to protect primarily public interests rather than those of individual plaintiffs. "[L]egislative history illuminates congressional concern with the protection of competition, not competitors," Chief Justice Warren famously expounded, and this focus on society's gain from competition will loom large in the discussion below.²⁰

III. NORMATIVE BACKDROP: THE GOALS OF ANTITRUST

The goals of antitrust are often stated, and even more often presumed—but rarely used as deciding factors in real-world implementation. Many have written on the subject and especially on the shift from normative deliberation towards the modern-day focus on efficiency, and a common assumption seems to be that, despite normative distinction, both strands suggest similar policies.²¹ In this part, I do not presume to offer a full review of the matter, but hope to provide some context for the discussion that follows.

¹⁷ IDA M. TARBELL, *THE HISTORY OF THE STANDARD OIL COMPANY* (McClure, Phillips & Co. 1904).

¹⁸ See Michael Reksulak, William F Shughart, Robert D Tollison & Atin Basuchoudhary, *Titan Agonistes: The Wealth Effects of the Standard Oil (N.J.) Case*, 21 RES. L. & ECON. 63 (2004).

¹⁹ *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 55 (1911).

²⁰ *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 320 (1962).

²¹ For arguments regarding the Sherman Act abounded since the act's inception, see J.H. Benton, *The Sherman or Anti-trust Act*, 18 YALE L.J. 311 (1909). For debates regarding its goals persisted over time, leading to numerous symposia and public discourses, see, e.g., Robert Bork, *The Goals of Antitrust: A Dialogue on Policy*, 65 COLUM. L. REV. 363 (1965);

Antitrust is often said to serve several goals simultaneously, and though some dwell on the different sources of these goals, and their relative importance, most assume that they do not contradict each other in theory or practice, thus avoiding a need to select between them. Present antitrust scholarship stresses economic efficiency, which reflects aggregate welfare to society at large. Some go as far as arguing that this is (or should be) the *sole* goal of antitrust, yet other goals are expounded as well. Some focus not on aggregate measures, but on distinct groups that may be harmed by monopoly and require intervention by the state. Protection of consumers is often cited, protection of competitors less so (although this used to be an accepted goal as well), and some mention workers and local communities as well. Some focus on aggregate concerns yet avoid economic measures, such as stressing appropriate social *processes* rather than end results. Protection of democracy comes to mind (as monopoly is thought to create concentrations of power threatening the state's sovereignty), as does the Jeffersonian ideal of facilitating a society of entrepreneurs and independent businessmen, rather than allowing an economic agglomeration in which large firms employ many workers who labor under centrally owned-and-controlled management. Protection of competition itself, as an independent goal reflecting the importance granted to this economic process, is often used as a place-holder for a variety of interests, from innovation and market dynamics inducing

John J. Flynn, *Antitrust Jurisprudence: A Symposium On the Economic, Political and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1182 (1977). These later distilled into "schools of thought" associated with different universities such as Chicago, Harvard, and Virginia as leading contenders. For an interesting review of the scene over time, see a series of Herbert Hovenkamp's writings: Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1 (1982); Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 U. MICH. L. REV. 214 (1985); HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* (Harvard Univ. Press 2005). For more varied and recent critique, see *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST* (Robert Pitofsky ed., Oxford Univ. Press 2008), which discusses the predominant focus on economic effects and price-theory analysis. Arguments against economic efficiency as the primary goal of antitrust are laid out in Edwin J. Hughes, *The Left Side of Antitrust: What Fairness Means and Why It Matters*, 77 MARQ. L. REV. 265 (1994). The classic argument that Congress intended antitrust to be a consumer-protection measure rather than maximizing aggregate efficiency is laid out in Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982). Other notable contributions to historical analysis are Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263; PERITZ, *supra* note 15; Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1 (1999). A review of the competing historical and normative claims can be found in William Page, *Ideological Conflict and the Origins of Antitrust Policy*, 66 TUL. L. REV. 1 (1991). Maurice Stucke recently argued that economic efficiency was never successful as a unifying goal for antitrust, and that a non-unitary "blended" approach makes for a better policy tool as well as more accurately defining what society "wants" from its antitrust endeavor. Maurice Stucke, *Reconsidering Antitrust's Goals*, B. C. L. REV. (forthcoming).

growth, to the social ideal of a free marketplace in which each can earn his own and vie for a bigger slice of the pie. While competition may be seen as a separate and independent goal of antitrust, it is often used as a proxy—beneficial due to its results rather than its inherent worth. If in practice it is used as a proxy for value-judgments as well as for economic ones, antitrust retains the normative and populist appeal from its early days.²² Whether this is appropriate is the subject of our investigation.

Broadly speaking, we may divide the goals that antitrust law is said to serve into two general categories: the protection of individuals and firms harmed by suspect business practices and the enhancement of total societal welfare (however that may be measured). The first focuses on individuals: the state protects some from the power of others, thus invoking “fairness” considerations. The second focuses on aggregate concerns that are thought to be of interest to all community members alike and form the base of society as a collective endeavor. This category is easiest exemplified by “efficiency,” but aggregate concerns go further. Economic efficiency is aggregate in nature since each individual’s utility is measured and taken into consideration (or rather, approximated, as we are far from being able to truly measure all relevant indicators). But beyond efficiency, other societal goals exist as well. For instance, the view that antitrust law is important in order to counteract tendencies towards concentration of economic power focuses on aggregate society-wide concerns, though political-democratic concerns are emphasized rather than economic ones. Similarly, the Jeffersonian ideal that society is improved through the division of labor between small businessmen and entrepreneurs extols antitrust as a force against the ever-increasing role of large firms in the modern economy.²³ Also, the view that competition generates more innovation or social mobility when guarded by a fierce antitrust policy stems from a concern with aggregate concerns and the type of society we want to live in, rather than the benefit of any specific group harmed by monopoly.

All in all, antitrust is seen by many (indeed, most) practitioners and scholars as simultaneously achieving multiple goals, and rare is the occasion

²² Some describe modern-day litigation as defining “good versus evil” positions, based on competitive versus anticompetitive characterizations. See CRANE, *supra* note 11, at 100.

²³ Justice Peckham famously remarked: “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 . . . having no voice in shaping the business policy of the company and bound to obey orders issued by others.” *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 322-23 (1897). These words resonate with Learned Hand’s ideological statement that antitrust aims to “perpetuate and preserve, *for its own sake and in spite of possible cost*, an organization of industry in small units which can effectively compete with each other.” *United States v. ALCOA*, 148 F.2d 416, 425 (2d Cir. 1945) (emphasis added). Of course, these sentiments do not guide current antitrust policy, nor do they fit well with striving for aggregate economic efficiency as the key goal of antitrust.

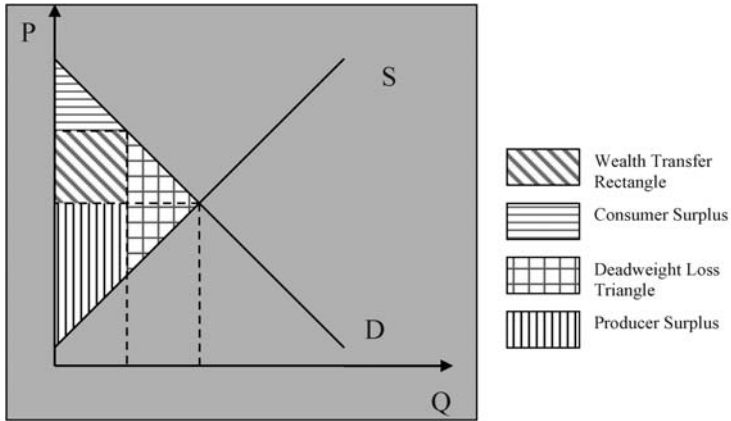


Figure 1. The welfare effects of monopoly

when these are presented as contradicting each other. “Antitrust is both fair and efficient” seems to be the *bon-ton*, allowing those supporting efficiency analysis to join with those intent on achieving distributive justice. Nowhere is this clearer than in the standard microeconomic explication of the problem of monopoly through graphs of supply, demand, and monopoly surcharge. Figure 1 below is so familiar to antitrust scholars that reprinting it here seems superfluous, yet I shall do so for clarity of exposition and graphically stressing my main thesis: that by focusing on wealth transfers we assume consumer ownership of competitive results (contrary to their not having created them), and that by focusing on deadweight loss we measure monopolists by standards inapplicable to other property-owners (that the sole purpose of their existence is to benefit others).

Since raising price both reduces output (creating inefficiency through the deadweight loss triangle), and redistributes the benefits of trade (moving the wealth transfer rectangle from consumers’ surplus to producers’), the view that antitrust is both fair and efficient is appealing. I hope to show below that life is more complicated than that. That monopolistic phenomena are *sometimes* efficient (or at least that allowing them is more efficient than trying to (imperfectly) combat them) is today considered obvious in circumstances exhibiting natural monopolies, increasing returns to scale, network effects, and other such characteristics. That line of research is replete with counter-examples to the deadweight loss triangle, bringing to attention benefits of coordination, rent-seeking incentives which create aggregate wealth, and societal costs of creating state-run agencies tasked with combating suspect practices.²⁴ None of these is my focus here. In this article, I focus

²⁴ See generally THE CAUSES AND CONSEQUENCES OF ANTITRUST (Fred S. McChesney & William F. Shughart eds., Univ. of Chicago Press 1995).

on the fairness concerns rather than the economic ones, and hope to show that the wealth transfer rectangle itself is an ideological choice, resting on an implicit assumption that this surplus “belonged” to consumers prior to it being usurped by the producer-monopolist.²⁵ Graphically, we draw the rectangle to show the distinction between competition and monopoly, assuming the former *should* exist and feeling a need to intervene where the latter appears. We draw the deadweight-loss triangle based on a similar comparison, assuming society deserves the extra production, and monopolists are somehow stealing when they forgo it. Both rely on a conception of *what should have been* to justify state intervention into individual business practices due to the inadequacy of *what is*, and both assume that monopolists take what is not theirs and that state power is needed to rectify the injustice. As will be shown below, these are common, but not obviously necessary, assumptions at the heart of current antitrust doctrine.

Antitrust law varies across both nations and time, thus no one ideology may be said to pertain to all enacted regimes. Still, widespread agreement exists regarding most common aims of antitrust (if not their relative importance).²⁶ Different regimes enact antitrust laws for different reasons and apply different reasoning to their implementation, but almost all relate to the general terms of protecting consumer welfare and enhancing competition (even if the meaning ascribed to these general terms occasionally varies).

Modern antitrust law is a worldwide phenomenon, and multinational corporations (as well as national ones marketing or producing internationally) created a necessity of cooperation between antitrust agencies worldwide. The result is a drive towards “harmonization” of antitrust law to facilitate enforcement as well as create a common basis upon which firms can effectively plan their international operations.²⁷ The international harmonization movement is mostly led by the United States and the European Union, competing for dominance in shaping smaller countries’ antitrust policy in their own form

²⁵ Again, the fact that market power is exercised by a monopolistic producer or a combination of sellers is irrelevant for the general argument. Where single-firm monopoly is the target of enforcement action, section 2 of the Sherman Act is employed; where multi-firm collaboration is targeted, section 1 of the Sherman Act is used; where prevention of economic power is sought, merger control is used through the Clayton and Federal Trade Commission Acts. In all cases, the underlying assumptions regarding what consumers “deserve” are similar, and these will bear the brunt of our scrutiny below.

²⁶ See generally, *COMPETITION LAWS IN CONFLICT: AT JURISDICTION IN THE GLOBAL ECONOMY* (Epstein & Greve eds., AEI Press 2004); Int’l Competition Network Unilateral Conduct Working Group, Report on the Objectives of the Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies, presented at the 6th Annual Conference of the ICN, Moscow (May 2007), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf>.

²⁷ See Spencer W. Waller, *The Internationalization of Antitrust Enforcement*, 77 B. U. L. REV. 343 (1997); for a more reserved view, see Diane P. Wood, *International Harmonization of Antitrust Law: The Tortoise or the Hare*, 3 CHI. J. INT’L L. 391 (2002).

and flavor. International organizations, such as the International Competition Network (ICN) and the Organization for Economic Cooperation and Development (OECD), play a role as well, both as fields where the United States and the European Union interact and as independent actors with a stake in the game.²⁸

While implementation and practical significance are important, the discussion below begins with the normative, assessing what is *morally right* rather than describing current law or policies.²⁹ After investigating philosophy we can turn to politics, and after understanding the intellectual basis of antitrust, we can discuss implementation of its principles in the real world. Obviously, the scope of one article is insufficient for extensive discussion of all of these issues, thus I will focus on raising questions as to current doctrine's implicit assumption and offering themes for revising the way we think about the subject. The limited purpose that this article aims to achieve is instigating rebellious thought, not offering complete solutions.

IV. THE IMPLICIT ASSUMPTIONS OF ANTITRUST

Revisiting the commonly accepted goals of antitrust allows extrapolation of their implicit assumptions. *Societal goals* of antitrust posit that legal intervention in the marketplace is allowed, indeed morally worthy, in order to protect society from the pitfalls of monopoly. Whether monopoly power is targeted directly through outlawing active efforts at acquiring (or maintaining) monopoly status, or constraining collaboration among (potential and actual) competitors, the state limits practices thought to enhance market power. The former is commonly referred to as section 2 enforcement,³⁰ and the latter as section 1 (both of the Sherman Act),³¹ but more broadly, the regulation of mergers, standard-setting organizations, and more are all justified by the general maxim that society at large benefits from antitrust

²⁸ See Stucke, *supra* note 21, at 20.

²⁹ This is despite Hebert Hovenkamp's admonition that "antitrust is an economic, not a moral, enterprise." HOVENKAMP, *THE ANTITRUST ENTERPRISE*, *supra* note 21. As set out in the text, I find the moral questions regarding antitrust no less interesting than the economic ones, and I see them as complimentary. If antitrust *were* merely about economics, we would still have much to worry about, as Dan Crane pointed out: "For a system that is supposed to be about economic efficiency rather than morality, fairness, or populist sentiment, the U.S. enforcement system seems inefficient." CRANE, *supra* note 11, at 3. Of course, it may be that scholars' focus on efficiency serves a guiding beacon according to which coherent policy might be formulated, but popular support for antitrust (as well as actual enforcement) stems from non-economic values at least as much as from economic ones. If this is true, some of what seems to be inefficiency in enforcement may actually stem from the pursuit of other goals.

³⁰ Sherman Act, ch. 647, 26 Stat. 209, 15 U.S.C. § 2 (1890).

³¹ 15 U.S.C. § 1.

enforcement (via the Sherman Act as well as the Clayton and Federal Trade Commission Acts), and thus these laws are morally appropriate.

Similarly, the *fairness-oriented goals* of antitrust implicitly assume that the victims of monopoly power have a right to be protected from exploitation, a right that the state steps in to enforce. The fact that monopoly's victims are harmed is seen as sufficient proof that something has occurred which is wrong—and which the state should protect against. Antitrust scholars, jurists, and practitioners who stress efficiency as the overriding goal naturally dismiss the harm to monopoly's victims as a side-effect of the general problem, but still use harm to consumers as a symptom of harm to society at large. Monopolistic practices are thus considered “bads” to be prevented, while society strives for production of “goods” through economic markets. But is the characterization of monopoly as a “social bad” really so obvious? In this part, I explore the implicit assumptions which make it so, and cast doubt on some of these assumptions.

A. The Assumption That Monopoly Is Allowed Only When Others Benefit

Nowhere is this assumption made clearer than in the “efficiencies defense” long-debated in the context of merger regulation. As far back as 1968, Oliver Williamson famously argued that even a small increase in productive efficiency will outweigh a large increase in market power, to the point that even a merger to monopoly will likely enhance overall efficiency if it allows the merging firms to combine production or marketing efforts or to save on common overhead costs.³²

The 2010 Horizontal Merger Guidelines, a joint production by the federal government's two antitrust enforcement agencies, states that:

The Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market. To make the requisite determination, the Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market, e.g., by preventing price increases in that market. In conducting this analysis, the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies. The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly substantial, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive. In adhering to this approach, the

³² Oliver E. Williamson, *Efficiencies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968).

Agencies are mindful that the antitrust laws give competition, not internal operational efficiency, primacy in protecting customers.³³

The agencies thus make clear that efficiencies attained by the merging parties are a relevant consideration, but only insofar as these are passed on to consumers. If consumers or competition are harmed, then profit gained by the merging parties will not be considered as a merger-specific benefit to be compared with the attending harms. The parties thus have no *right* to merge their economic holdings, and no *right* to maximize their profits—they have a right to attend to their property only in such a way that *others* gain from it as well.³⁴

Of course, this is not to say that a person or firm (more on that distinction later on) has no right to property or to attaining profits from their property. But it does show that (at least in the context of horizontal mergers) economic considerations by profit-maximizing firms are constrained by a necessity to share in the proceeds with their consumers. Outside the context of mergers, the implicit assumption is similar: those striving for market power in order to raise prices and increase profit are limited by the doctrines of monopolization and restraint of trade, and forbidden from acts which will be beneficial to them yet harmful to their consumers. Protection of other affected actors is heatedly debated, as some would protect small competitors' interests in participating in the market, and others would protect variety and not merely prices (to say nothing of protecting democracy or some conception of it)—but all of antitrust is based on the assumption that those with monopoly power should be barred from using it in ways detrimental to others, and those without monopoly power should be barred from actively pursuing it.³⁵ Monopoly itself is not forbidden, but severely

³³ U.S. DEP'T. OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 10 (2010).

³⁴ See, e.g., Jan Narveson, *Democracy and Economic Rights*, in ECONOMIC RIGHTS (Ellen Frankel Paul, Fred D. Miller & Jeffrey Paul eds., Cambridge Univ. Press 1992). Interestingly, outside of antitrust, associating the right to property with the right to profit thereof is considered obvious. See Richard Epstein, *Private Property and the Public Domain: The Case of Antitrust*, in ETHICS, ECONOMICS AND THE LAW, NOMOS XXIV 57 (J. Roland Pennock & John W. Chapman eds., New York Univ. Press 1982).

³⁵ Monopoly pricing, in itself, is not considered such an abuse of power in American antitrust jurisprudence (though in the European Union, statutory language expressly condemns it, and modern case law and scholarship debate the issue). One might use this as a counter-point to argue that monopolists are free to seek profit for their own sake (rather than consumers' benefit). Yet, careful reading of *Verizon v. Trinko*, where this point was made, shows that the U.S. Supreme Court stressed consumer benefit rather than monopolists' rights—it is dynamic considerations incentivizing investment and competitive processes that favor allowing monopoly pricing (more precisely, avoid forbidding it), not property rights a monopolist might have in its profit. See also Hovenkamp, *Antitrust Policy After Chicago*, *supra* note 21, at 237 (arguing that the Court declined to intervene since the suit was based on general antitrust law, while *Trinko* was subject to specific regulatory supervision). The issue was thus one of comparative institutional advantage rather than substantive antitrust law.

constrained by antitrust doctrine that sees consumers (and sometimes others) as the rightful beneficiaries of market participation. Those with market power are thus implicitly viewed as means—instrumental in attaining the good of others, not as ends in and of themselves.

B. The Justification That Harm to Victims Outweighs Harm to Monopolists

The focus in antitrust doctrine on “harm to consumers” posits that these are the ultimate beneficiaries of legal intervention. But intervention in the marketplace does not come without cost, and these costs are deemed justified when they protect monopoly’s victims from harm. Debate persists as to the justifiability of intervention where its cost (to society) exceeds its benefit (to specific consumers), such as cases where the chilling effect due to fear of litigation deters firms from efficient competitive practices, or cases where the costs of enforcement are so large as to outweigh any realistic benefits.³⁶ Still, when juxtaposing merely the beneficiaries of enforcement with those suffering its direct harms, firms prevented from monopolistic profit are not considered at all.

The 2010 Horizontal Merger Guidelines are clear in this respect as well:

[T]he Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies. The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers.

In other words, it is insufficient to show that the benefit to the merging parties is greater than the harm to consumers; without passing on a sufficiently large share of the merger-specific profits to consumers, the merger will be seen as harmful—regardless of its profitability for the merging firms. Even aggregate measures of total welfare or economic efficiency are a necessary but far from sufficient condition to justify a proposed merger. Similarly, firms seeking to cooperate via contractual means will be liable for section 1 violations regardless of the benefit they achieve and how small the harm they pose to consumers. If no harm at all comes to consumers, a competitive problem does not arise, thus presumably no section 1 violation occurred, but it is sufficient to show *some* harm to consumers to negate *any* benefit claimed by the parties themselves (assuming of course, the relevant consumer harm falls under the extremely broad language of “restraint of trade” or “unfair methods of competition”). In economic parlance, not only is consumer harm granted more weight than harm to monopolists in the state’s

³⁶ See McChesney & Shughart, *supra* note 24; Robert W. Crandall & Clifford Whinston, *Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence*, 17 J. ECON. PERSP. 3 (2003).

utility function, but this is true to such an extent that preferences may be argued to be lexical.

Two caveats must be mentioned here. First, I stress benefits and harms to consumers and monopolistic firms only as clear examples for the larger issues at stake. Consumers are not the only victims of monopoly, and monopolistic firms are far from the only ones limited by current antitrust doctrine. Second, as stated above, harm to competition goes beyond harm to monopoly's victims—those benefiting from competition and suffering from its demise. Insofar as competition serves goals broader than the protection of consumers (and others), it may be argued that it is not the harm to victims which outweighs the harm to monopolists, but harm to society at large. In either case, the main point here stands true: that harm to monopolists from intervention remains invisible to antitrust doctrine, irrelevant (or relatively worth less) as long as some other group can argue that it is harmed by the monopolistic conduct. The overriding assumption implicit in all antitrust doctrine is that monopoly in itself is a “social bad,” and no person or firm deserves to profit from its monopolistic position.

It is interesting in this regard to observe that the common objection to wealth transfers relies on an assumption that this wealth belonged to consumers and was expropriated by the monopolist. Graphically, this rectangle, denoted in Figure 1 above, signifies consumer surplus which turned into producer surplus, and the comparison of competitive to monopolized markets shows supposedly clear evidence of a taking (not to use the word “theft”). What evades perception, though, is that this surplus (both the consumers' and the producer's) *did not exist* prior to the trade between the parties, and is created via the very transaction that divided wealth between them. Thus treating the surplus as preexisting and its distribution as independent from its creation is a mistake. The consumer agreeing to terms of trade both accepts the price and facilitates production at once. It may be that consumers *deserve* competitive production and producers are obliged to facilitate consumers' preference for low prices and extensive production, but this posits producers as operating for consumers, rather than for their own gain. Furthermore, every market is different in its production and demand functions. In some cases, consumers pay a very high price in the presence of monopoly, as their demand is relatively inelastic. In other cases elasticity of demand forces producers to settle for low profit margins, and monopolization “helps” them only somewhat. Treating *every* market as equally subject to identical antitrust laws puts consumers as beneficiaries without taking into account how large this benefit is, and what price is borne by producers in order to create it.

C. The Assumption That Economic Efficiency Is Sufficient Justification for Government Taking

Especially for those contending that economic efficiency is the sole (or central) justification for antitrust law, the idea that the state can impede business behavior and individual profit maximization in the name of aggregate efficiency is taken for granted within the realm of antitrust. When viewed in a larger context, this idea seems surprising. Let us assume for the moment that antitrust law indeed separates efficient (competitive) from inefficient (monopolistic) trade practices.³⁷ Does this necessarily justify governmental intervention?

Antitrust entails blocking some firms from business practices which generate profit for them, and the efficiency justification implicitly assumes that if a business practice does not generate aggregate benefits exceeding the costs, it can be justifiably prohibited. Essentially, the state tells the (actual or potential) monopolistic firm: “your profit is allowed only insofar as society benefits” and “your property exists in order to satisfy public wants, and not your own.” Why is this so? By limiting monopolistic practices, the state constrains the individual’s use of his or her property. Aggregate efficiency trumps personal gain, and the individual (or firm) must justify any profit he or she makes by appealing to simultaneous public gain. If monopoly profit comes at the expense of aggregate loss, this is seen as sufficient (or presumptive) evidence that the process creating that profit is illegitimate. Some might argue that monopoly profit is not expressly forbidden, and U.S. antitrust policy (differently from EU policy) allows excessive pricing by monopolies.³⁸ Indeed, *Verizon v. Trinko* held precisely that, but it is useful to remember the context in which monopoly pricing was allowed.³⁹

In *Trinko*, the U.S. Supreme Court dismissed charges of monopolization based on excessive pricing while holding that such prices are often indicative of dynamic competition for monopoly—that is, that high current prices entice future competitors and are part of the current monopoly’s return for previous investment in attaining market dominance. It is not then the monopolist’s property or right to profit that was protected—but market mechanisms acting for the benefit of all. Monopoly pricing was allowed since it promotes long-run aggregate efficiency, albeit at

³⁷ Such a presumption is strong indeed. Antitrust enforcement is obviously neither mistake-free nor cost-free. The costs of enforcement are large, both as to direct expenditures (including agency budgets, litigation costs, opportunity costs of firms engaged in litigation rather than production and innovation, and more) and as to indirect costs (including strategic litigation by competitors, chilling effects inhibiting efficient practices, lobbying efforts aimed at garnering political support to limit agency enforcement, and more).

³⁸ Michal S. Gal, *Monopoly Pricing as an Antitrust Offense in the U.S. and the EC: Two Systems of Belief About Monopoly*, 49 ANTITRUST BULL. 343 (2004).

³⁹ *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

expense of interim static loss and current consumers' paying high prices.⁴⁰ It is useful to remember that most antitrust litigation and scholarship focuses on the *process* of competition rather than the end-result of prices. The focus here on monopoly pricing is illustrative of the "profit-as-property" argument, while focusing on the limitation of business conduct, which is the brunt of antitrust, would rest on freedom of contract rhetoric. Both, though, are helpful in pointing out the way antitrust law treats individuals and firms differently than other realms of law.

Outside the realm of antitrust, holding that property exists only in order to satisfy aggregate concerns would generate much controversy. We generally do not see individual property owners as custodians for the state, but allow them to further their own goals, limiting contractual freedom and profit opportunities only in severe circumstances. At the extreme, consider an individual with a strange fetish for destruction of luxury cars. Such a person, if his funds allowed, would undoubtedly be allowed to purchase and destroy cars at will, with neighboring society perhaps perplexed by his preferences (and perhaps appalled by the waste), but as long as the remains were properly disposed of (for environmental protection reasons) would be allowed to do with his property as he willed. The same individual, though, if he purchased all local luxury car dealerships (assuming entry barriers or delivery costs) and reduced output (by destroying cars, raising price, or limiting production), would be deemed a monopolist subject to antitrust litigation (at least insofar as his acquisition of monopoly). Viewed *ex post*, perhaps the holding in *Trinko* would protect him, but even then it would be under the assumption that the dynamic competitive process is alive and kicking, rather than a clear statement of his right to do with his property as he wishes. In short, inefficient practices are not condemned *per se*, but within the framework of antitrust, they suddenly become inherently actionable.

A more general claim I am willing to make is this: most supporters of antitrust's efficiency focus would not be so favorable towards generalizing

⁴⁰ *Id.* at 407 ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct."). Note that it is charging monopoly *prices* which the Court condoned, and in no small part due to its positive effect on *competition*. The fact that monopoly subjects its holder to different (stricter) *conduct* rules was never disputed or overruled. As shown above, European competition law takes a very different direction that is more favorable to regulation of monopoly pricing. Elhauge argued that this distinctly European strand of competition law, regulating prices and not merely facilitating competition, can be seen as a requirement that those who profited from illegal monopolization disgorge their profits, thus bringing the American and European paradigms one step closer. See Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 ANTITRUST L.J. 501 (2009).

the same idea, that the state should intervene in transferring property to the hands of “the most efficient user” or forcing less-efficient property holders to use it in ways benefiting society at large. Economic efficiency is treated within antitrust as value-neutral, a framework benefitting all members of society, which allows scholars and practitioners to agree on objective criteria for intervention without delving into different conceptions of justice and individual rights. This, however, is a mistake. When efficiency is treated as a reason for intervention, we treat all members of society as equal in forcing upon them identical rules, but this affects them unequally. Furthermore, when economic efficiency is sufficient reason for limitation of personal rights, as property and freedom of contract are constrained in the antitrust arena whether we analyze it as governmental taking or otherwise, those being limited are treated as means for facilitating benefit for others. These others are sometimes identifiable individuals and sometimes society as an aggregate construct. In either case, the limitation of “monopolists” is carried out in a manner juxtaposing their rights with others’ benefit. Enhancement of efficiency is thus not value-neutral, but a choice preferring one side’s rights over the others. This choice is not necessarily wrong, but describing it as efficiency rather than morality avoids the difficult question.

Outside of antitrust, inefficiency is seen as a personal right, or at least an unfortunate-yet-acceptable result of private property. Within antitrust, inefficiency is seen as a reason for intervention. Were the intellectual tenets of antitrust accepted outside of it, we would see much more state action and governmental taking than currently exists, as well as arguments that such policies infringe upon individual rights and require just compensation—precisely what I contend we should assess within antitrust.

Of course, it is possible to view this issue through a different lens—that property in itself is a creation of the state, and the competitive process is the determinant of what the right to property covers, a much broader argument, which I turn to below. It is worth pointing out, though, that support for governmental intervention in inefficient practices is almost universal within antitrust scholarship, while implementation of the same ideas in as to property generally seems much more problematic.

V. COUNTER-ARGUMENTS: THE SOURCES OF PROPERTY AND COMPETITION

The focus up to this point was on showing that antitrust treats monopolists (in the general sense of the term) very differently than other property owners are treated, and that implicit assumptions present in antitrust are not as readily accepted elsewhere. To this one might reply that antitrust *is* different from other contexts, and that its justification relies on the special circumstances surrounding it. It cannot be merely efficiency-seeking that justifies antitrust, as efficiency is not considered a worthy enough social goal to allow

governmental taking of private property as a general rule. Indeed, even where efficiency justifies governmental taking (public works and goods come to mind), the original owner is deemed worthy of protection as well, and the Fifth Amendment to the U.S. Constitution demands “just compensation” be awarded.⁴¹ Similarly, even when the state intervenes to protect one class of individuals from another’s superior strength, the rights of the strong are considered as well, and courts routinely balance between conflicting claims made on behalf of the different groups. In antitrust, no such balancing occurs—observe the lack of consideration merging parties’ profits are afforded when concomitant (yet smaller!) harm befalls consumers, as well as the *per se* condemnation of price fixing (regardless of effect or benefit to cartel members), monopoly tying (deemed illegal regardless of benefit to monopolist), and more.

Antitrust treats monopolistic profits and business practices differently than general property and constitutional law (governing state intervention) treat the right to property and freedom of contract in other contexts. This, though, may be due to these interests relying on justifications incompatible with monopoly generally, thus their disparate treatment within antitrust is a symptom of their underlying rationale. I therefore explore two general arguments that could be made in this vein: that property itself is a result of competition (thus anticompetitive use of property is an oxymoron) and that monopolists implicitly accept antitrust as part of the rules-of-the-game that come with market participation. Both arguments have much to commend them, though I find them lacking as general justifications of current antitrust doctrine.

A. The Justification That Property Stems from Competition

Some argue that property is not in itself a coherent concept, but stems from underlying justifications implicitly referred to when protecting it and cannot be understood apart from these values.⁴² According to this view, the strong protection of property rights is afforded as a proxy for the values underlying it, such as individual autonomy, efficiency, and more. In specific cases where private property *fails* to promote these values, the initial justification (for protecting property) is absent. In such cases, claiming a property right affords the claimant little or no protection at all. Applying this view to antitrust might produce an argument along these lines: The reason society

⁴¹ Note that even in *Kelo v. City of New London*, 545 U.S. 469 (2005), where the Court allowed governmental taking in order to transfer property to a private party developer, the requirement of just compensation to the original owner was never in question. Thus, even if we see negation of monopoly as due to efficiency reasons, compensation to the owner/monopolist may be in order. Of course, one need not accept the view that monopolists *own* their market power or profits thereof, which is precisely the argument I turn to next.

⁴² HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* (Oxford Univ. Press 2011).

protects private property is because it serves as a proxy for societal benefit from efficient mechanisms governing utilization of resources. Competition is seen as a social good because it allows everyone an equal opportunity in offering their services to all other individuals and vying for their appreciation as expressed in payment. When monopolistic practices aim to subvert this process, they undermine the very process which generated their property to begin with, thus limiting such conduct is not a constraint on their right to property and freedom of contract. Rather, antitrust should be seen as protecting the source of property, including that of the monopolists.

According to this view, property stems from competition and the social agreements generating it, thus inherent in the concept of property is the competitive process underlying it. Monopolists cannot coherently argue to be harmed by the state's protection of competition, as their property was initially brought to life with limitations, such as that it would not be used to harm competition.⁴³ If this is true, governmental limitations on use of property (such as not merging to create market power, not combining to create cartels, and the like) are not infringing upon a right, but are the manifestation of this right's true nature—a personal benefit created by a societal process and subject to that process' continued existence and protection.

This view has much to commend it, though is insufficient to dispel the general objection to antitrust outlined above. That many would reject the argument is not in itself an argument for its rejection (that would be confusing politics with philosophy and the wisdom of the crowds with truth). That many of antitrust's supporters would reject it, though, *is* an argument against it as the underlying principle which antitrust is said to serve.

One might point out that property rights as currently understood and practiced are not related in any clear way to competition or competitive markets.⁴⁴ Many of our real-world markets are far from competitive, and not just for reasons related to antitrust. Natural monopolies abound; resources are scarce and often differentiated by quality and characteristics creating local and niche monopolies; resource allocation in our society is far from egalitarian and many start life from positions of advantage (or disadvantage) that persist over time and generations. Market failures of many varieties plague real-world scenarios—and few would argue that property thus

⁴³ This view is reminiscent of the debate between Justices Pitney and Brandeis in *Int'l News Service v. Associated Press*, 248 U.S. 215 (1918). There, Pitney regarded property as bestowing on its owner a natural right to the fruits of labor, while Brandeis viewed property as state-created, and thus its content subject to legislative balancing of interests. See the discussion in PERITZ, *supra* note 15, at 70-72.

⁴⁴ See Rudolph J. Peritz, *The "Rule of Reason" in Antitrust Law: Property Logic in Restraint of Competition*, 40 HASTINGS L.J. 285 (1989) (arguing that property and competition were seen as competing paradigms for understanding the Sherman Act during its inception and early implementation, and that competition was seen then as disparate from efficiency, stressing its social effects and philosophical underpinning rather than its economic effects).

created and transferred is not “real.” In short, competition may be a good model for explaining the benefits of property, but it is far from necessary to confer property rights respected by the state.

Furthermore, if we are to deconstruct property to its underlying justifications, competition is but one relevant factor and not necessarily the most important one. Property rights serve purposes of creating order in society, aside from the justice associated with it (or not), and such social order is beneficial to many (if not all) members who rely on it to prevent incessant squabbling. One need only look to societies where property rights in land are disputed and observe blood feuds and tribal factions lasting generations, to appreciate stability as an independent value. Property rights allow for investment, which creates a positive-sum-game for all—even if distribution is unequal or even unfair. There are many reasons why one would prefer living in a society with clearly defined and protected property rights, and competition is but one of them. Arguing that without competition, property loses its meaning is a narrow definition of property indeed.

Lastly, even if we were to assume the counter-argument’s correctness that property is defined by the competition creating it, this would not justify antitrust as currently practiced for two reasons. First, even misuses of basic rights are protected up to a point determined by a constitutional balancing test. Second, if property includes inherent limitations on its misuse, these would be better described by the concept of economic power than by current antitrust conceptions of market power. The first I will attend to presently, the second will be deferred to the next part, to be (hopefully) better explained by the Rawlsian framework developed therein.

B. Constitutional Balancing in Extreme Situations: The Skokie Example

Assume for the sake of argument that property stems from competition and that monopolistic practices (that is, those that promote monopoly or constrain competition) are misuses of the right to property and freedom of contract. Assume further that monopolistic practices harm other users of society-generated infrastructure or personal rights, so that they have a strong claim to protection by the state. Would current antitrust doctrine be then justified? Given that society intervenes by preventing monopolistic practices *irrespective of the benefit to monopolists and the extent of harm to their victims*, my answer would have to be qualified dissent. Qualified, because I do not contend that antitrust as such is inherently wrong or that intervention is unjustified. Rather, my argument is more subtle, that intervention is warranted subject to a balancing test, assessing both harm to monopoly’s victims from state inaction and harm to monopolists from state intervention. Such balancing tests are common in constitutional law, which routinely deals with clashing interests of different segments of society, yet unheard of in antitrust, which focuses

on aggregate economic efficiency and the rights and interests of consumers. I shall thus lead with an example to clarify the line of reasoning employed.

Consider the case of a small political party whose members believe in the superiority of a fascist regime over the existing democratic state. These fascists attempt to convince others of their views, both in order to convert “new believers” and in order to gain the political clout necessary to bring about the change desired by them.

We assume that the democracy in which they live has rules respecting the right to free speech and that the anti-democratic group wishes to rely on these rules in order to gain access to the public “marketplace of ideas.” If the aims of this group contradict the democratic structure, may we automatically assume that it has forfeited its right to participate in democratic debate? This question has been debated heatedly by many, most famously during the *Skokie* case in the United States.⁴⁵ In *Skokie*, a mainly Jewish community, a group of Neo-Nazis applied for a permit to march on the anniversary of their ideological leader’s birthday, Adolph Hitler. Without delving too deeply into the specifics of the case, legal debate focused on their right to free speech (including the right to march in public wearing Nazi uniforms and insignia), as it is guaranteed by state laws and the federal constitution. Some argued that a democratic society must respect even those views found most abhorrent, at least as far as allowing their freedom of speech. Others argued that a group such as this should not be allowed to march through a community of Holocaust survivors—a measure aimed not at political speech but rather at antagonizing those most vulnerable to emotional distress. The march was finally allowed by the court, with the argument for free speech triumphing over all other considerations. The sole reason that would justify limiting free speech was held to be a “clear and present danger” posed to others around them.

Of course, one may disagree with the Court’s decision in that case, or the balancing test that justified it. What is important is accepting the *possibility* of such groups to argue for their right to speech, or any other right for that matter. I submit merely that such a claim must be thoroughly analyzed before a decision is made, and offhand dismissal is not an option—regardless of the group’s moral and legal position.

The question at this point is not whether a monopolist should categorically be allowed to act unhindered (indeed, sometimes severe limitations are necessary). The question is merely whether monopolists *as such* may claim rights to be considered along with their victims’. In this context, there is no reason to ignore possible moral claims that monopolists might raise. Therefore such claims must be compared with contradicting claims made by other parties (the various victims) through some method of balancing the

⁴⁵ *Village of Skokie v. Nat’l Socialist Party of Am.*, 69 Ill.2d 605, 373 N.E.2d 21 (1978); *Collin v. Smith*, 578 F.2d 1197 (1978), *cert. denied*.

clashing rights. It is this that the *Skokie* example clarifies in a most extreme and counter-intuitive setting—that those using society’s gift of free speech deserve initial respect and protection, even if their ultimate aim is detrimental to society or members thereof, and even if they aim to abolish the very right they currently claim. It is not that anti-democratic elements deserve to prosper; it is that speech is sufficiently important that constraining it be relegated to extreme situations where, unless carried out, sufficiently worrisome harm might occur. Limiting speech, like limiting uses of property or contract, is permissible—but only after balancing the effects on both sides to the debate and determining the extent of harm to each. The “clear and present danger” criterion is not necessarily appropriate in the antitrust context (or the speech context, for that matter), but the *need for a balancing criterion* is.⁴⁶ Regardless of the ultimate balancing test chosen, it is out of respect for the rights of all involved that balancing occurs. By holding monopolistic practices as inherently bad and demanding consumer benefit to legitimize them, the current doctrines of antitrust discriminate in favor of one group at the expense of another. They justify harm to monopolists even when that harm is large and the benefit to consumers (or other affected parties) is small. They are, in effect, a symptom of *a priori* dismissal of monopolists’ claims as irrelevant to the matter at hand.

C. The Counter-Argument That Monopolists Implicitly Agreed to Antitrust Limitations

Another counter-argument to the proposed “antitrust infringes upon monopolists’ rights” theme raised here is that monopolists have implicitly agreed to the current competitive framework, and thus are enjoined from arguing against it. Obviously, most people and firms subject to antitrust scrutiny have never been asked their opinion of the law and have not given their assent, yet the argument holds as a theoretical construct. If monopolists can be seen to have given (hypothetical and implicit) agreement to the competitive framework governed by antitrust, they cannot complain once it limits them. This is

⁴⁶ Indeed, many have argued for different balancing tests allowing for more governmental intervention. See generally LAWRENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 189-90 (Harvard Univ. Press 1985). The “clear and present danger” doctrine was first articulated by Justice Oliver Wendall Holmes in *Schenck v. United States*, 249 U.S. 49, 39 S. Ct. 247 (1919), though it must be noted that despite the fact that Holmes wrote for the court, the “clear and present danger” standard was his alone, with others agreeing to the ruling and not its justification. In *Abrams v. United States*, 250 U.S. 616, 40 S. Ct. 17 (1919), Holmes elaborated on his test, while dissenting from majority opinion. His test was finally accepted in majority opinion only in *Whitney v. California*, 274 U.S. 357, 47 S. Ct. 641 (1927). Agreement on terminology, though, does not guarantee agreement on implementation. In what is now known as the Vinson-Hand test, these two justices used the same words but stated that where danger is great, even remote possibilities might justify limiting speech. *Dennis v. United States*, 341 U.S. 494, 71 S. Ct. 857 (1951).

related (but not identical) to the previous point regarding property as stemming from competition. Accepting the rules of the game is implicit in accepting the game itself, or the results it generates. Of course, this is true only where an option existed *not to accept* the game, or when exit is possible.⁴⁷

On an individually realistic level, none of us truly has the option to exit the social order into which we were born. Even if exiting to another society were possible (one existed that was both different in respect to the relevant rules and was willing to accept us), the cost (both real and psychic) would be prohibitively high. Still, one might generate a hypothetical thought-experiment to compare the world we live in with the alternative in which the rules of antitrust were forgone. If it could be shown that the alternative is clearly inferior, we might construe a hypothetical implicit agreement on behalf of monopolists to current antitrust doctrine, and thus negate the argument that they are improperly treated. One prevalent framework for examining such scenarios is the Rawlsian “original position,” though as this is examined in the next part below, I focus for now on two alternative conceptions for deducing monopolists’ agreement to antitrust rules: historical and game-theoretic.

The historical argument goes as follows: since all current producers entered the market knowing that antitrust rules govern the legal and economic arena, they are enjoined from arguing against it. A caveat might be in order, as some existing firms (or economic institutions) preceded the antitrust laws. Such firms cannot be said to have agreed to game-rules that have so drastically been changed in mid-game. Quite the contrary, this type of argument could be used *against* antitrust, since consumers and other players in the pre-antitrust day entered the economic arena knowing that those of superior economic power use it freely, thus *their implied agreement* is to markets free of state intervention on their behalf.

Furthermore, even if a would-be monopolist entered the game at a later stage, this is not to say that all game-rules are *just*. If antitrust is to rely on fairness arguments, we must come up with something better than saying “we were here first.” Antitrust as the safe-keeper of competition may promote the welfare of some, but it cannot be said that all participants in the market benefit from its existence, and those suffering from it cannot be said to have implicitly agreed to its reign. Here again the exit/voice paradigm is relevant: those who would prefer the market with no antitrust regulation have no viable exit option. Since they are not allowed to create alternative markets unbridled by the antitrust laws, they cannot

⁴⁷ See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (Harvard Univ. Press 1970) (arguing that as the opportunities for exit from a society increase, so does the loyalty owed to that society by individuals who declined to exercise their exit options and chose to participate in it).

be said to implicitly agree by mere fact of participation in the only option open to them.

The game-theoretic conception of implicit agreement relies on coordination costs, and society's members implicitly agreeing to governmental solutions to coordination problems. In situations where a prisoner's dilemma can be discerned, there is a strong argument in favor of external intervention to "force" all parties to make the collectively superior choice. This coordination would lead not only to efficiency being achieved, but the maximal satisfaction of the parties' individual interests.⁴⁸ But is the coordination argument appropriate for the antitrust context? For it to be so, such coordination must be of value both to producer and to consumer. Furthermore, for such an account to justify an implicit agreement theory it must be in principle applicable to *all* consumers and producers—otherwise it cannot be said that their consent is implied.⁴⁹

What do producers gain from the antitrust laws? Not much, actually. They are limited in business conduct, perpetually pressured by competition, and must devote serious consideration to avoiding actions that, while competitive, might raise the suspicion of antitrust enforcement agencies. On the other hand, every firm seriously contending to be a monopoly surely buys several inputs from other firms. If asked whether it would prefer (forgive the anthropomorphizing) the chance of extolling monopoly profits with the risk of paying monopoly price, or antitrust laws precluding both—the choice is far from obvious. Surely some would be found to gladly assume the risks together with rewards, and some would be in a position to enjoy the "freedom to monopolize" much more than competition in their input markets would benefit them.

Another aspect of the gain to producers from antitrust laws is not in horizontal relationships, but rather than vertical input markets. The possibility of attaining monopoly profit drives many a firm to large expenditures in the hope of achieving such a position. This is exactly the basis for the "rent-seeking rectangle" argument assessed above.⁵⁰ What drives firms to

⁴⁸ See DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, *GAME THEORY AND THE LAW* 31-35 (Harvard Univ. Press 1994); RICHARD A. EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD* 44-47 (Perseus Books 1998); Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 957-59 (1985).

⁴⁹ Here, we diverge from the standard game theoretical models used in efficiency analysis. There, the aggregately superior result is sufficient for justifying a solution. In the implicit agreement model, though, we attempt to prove that those *limited* would themselves opt for this solution in a perfect world. Only by securing their interest maximization will *fairness* constraints be thus justified.

⁵⁰ See generally RICHARD A. POSNER, *ANTITRUST LAW* 17-21 (2d ed., Univ. of Chicago Press 2001) (arguing that the classic study of monopoly's social cost [Arnold C. Harberger, *Monopoly and Resource Allocation*, 44 AM. ECON. REV. 77 (1954)] is grossly understated); Epstein, *supra* note 34, at 52; Mark Glick, *Is Monopoly Rent Seeking Compatible with Wealth*

“go for gold” are reasons of the prisoner’s dilemma prototype. Aggregately, it seems to make no economic sense. Separately, though, it is a completely different ballgame. Each firm invests X , assuming that, with probability p , it will achieve monopoly profits M . If entry barriers, or strategic options, exist so that monopoly may be maintained over time, $pM > X$ is a very real possibility, holding that discounted monopoly profits are larger than investment in their attainment. Allowing for N firms, $NX > M$ is also possible, holding that collective investment in the race-for-monopoly exceeds monopoly’s gain. If both inequalities hold true, the race for monopoly is both individually rational, and aggregately inefficient.

Individually, a firm is interested in the first inequality alone, as aggregate effects are successfully externalized. In order to secure an argument for implied agreement of *all* firms, pMX must be shown. But if that is true, will rent seeking be attempted?

It might. The fault with the above analysis is its static setting. It assumes that the firms enjoy competitive returns, C , and merely decide whether to invest in rent-seeking or refrain from it. A more realistic model would include two periods. In the first period, a firm chooses whether to act competitively, enjoying returns C , or to invest in rent-seeking and receive first-period returns of $C - X$. In the second period, returns are determined by first-period investments, so that those who did not invest in rent-seeking receive F , returns for fringe firms in a monopolized market, and first-period investors in rent-seeking expect $pM + (1 - p)F$, the first term denoting monopoly profit (discounted by their chance of achieving it), and the second term denoting the alternative of receiving the fringe-firm’s profit.

If $F < pM + (1 - p)F - X < C$ holds true, first-period investment in rent-seeking is individually rational for all firms, while a cooperative limitation on such rent-seeking would be to *all* firms benefit. Competitive returns are higher than expected returns from rent-seeking (taking into account probability of success), and both in turn are higher than the fringe firm’s expected profit. Thus firms *would* invest in an option they prefer *ex ante* to be unavailable to them—on the condition that it be unavailable to *all* firms and just to them alone.

This is the effect of a classic prisoner’s dilemma. In contrast to the standard rent-seeking-rectangle argument reviewed above, here *even the successful monopolist* would have preferred precluding rent-seeking *ex ante*. It is only due to the fear of another firm attaining monopoly that the race started in the first place. Thus, in cases such as these, coordination mechanisms unite the interests of *all* players, attaining aggregate efficiency to boot. Of course, this argument is neither universal (one can surely imagine cases where specific

Maximization?, 1994 BYU L. REV. 499 (1994) (arguing that rent-seeking expenditures, while real, are not to be regarded as a social cost).

circumstances render the assumptions untrue), nor is it relevant to *consumer* protection. The implicit agreement that can be read from this account is between producers, so that when analyzing fairness considerations dealing with *competitors*, the argument may be used.

What is more interesting is that prisoner's dilemma analysis might prove quite detrimental to *consumers'* interests, since the horizontal coordination mechanism which is most appropriate is not *competition*, but *collusion*.⁵¹ Were the competitors to collude in order to share monopoly profits, the prisoner's dilemma would be solved and the *relevant* players better off. This, of course, is due the current focus on those suffering from a coordination problem—as it is their implicit agreement the counter-argument sought to deduce. The argument for producers' implicit agreement to the current doctrines of antitrust thus fails.

VI. WHAT WOULD RAWLS DO?

Exploring the underlying justifications of antitrust *a priori* is difficult given that we have lived with current doctrine and might take for granted its implicit assumptions. The dominant world view regarding antitrust assumes it to be both “right” (morally) and efficient, and enjoys almost-complete consensus among the relevant professional communities (both scholars and practitioners) as well as the general populace (and the lawmakers representing them).⁵² Of course, there are exceptions to every rule, but these are few and

⁵¹ Thus allowing not multiple investments in rent-seeking for one firm attaining monopoly profits, but investment in collusion (which may very well prove to be lower than unilateral rent-seeking) by all firms, and sharing of monopoly profit. Furthermore, an industry-wide cartel, if successful, would be able to extract full monopoly profit, while one monopolist in a market with fringe competition may be constrained. If we follow through with the argument that a prisoner's dilemma justifies intervention and state-mandated cooperation, a legally binding cartel is thus justified—cutting down on enforcement costs and maintaining stability of monopoly power.

⁵² Robert Lande and others documented the popular support for antitrust in its incipiency, *supra* note 21, and Richard Hofstadter asked where popular debate regarding the subject disappeared, as far back as 1966. He ascribed this lack of public interest to a change in the way Americans viewed big business: from fear and distrust in the early 20th century to a reliance on business interests to promote economic growth in post-war years. See Richard Hofstadter, *What Happened to the Antitrust Movement?*, in RICHARD HOFSTADTER, *THE PARANOID STYLE IN AMERICA POLITICS* (Knopf 1966). Dan Crane documented the relative lack of public and political attention to antitrust in recent decades, and concluded that a professionally run scientific application of antitrust rules is less politically enthralling than emotional appeals regarding size and economic control which characterized the early days of antitrust. See Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159 (2008). Both, though, document an American acceptance of antitrust as a consensual matter. Herbert Hovenkamp states this unequivocally in the first line of his latest book: “After decades of debate, today we enjoy more consensus about the goals of the antitrust laws than at any time in the last half century.” HOVENKAMP, *THE ANTITRUST ENTERPRISE*, *supra* note 21, at 1.

far between where the basic view regarding antitrust is concerned.⁵³ Of course, *within* the current framework there are many debates and schools of thought regarding details of its application or scope, but as mentioned above, these usually focus either on the fairness versus efficiency debate (taking for granted that fairness favors consumers) or on whether specific practices are (or are not) truly efficient.⁵⁴

It is difficult, to say the least, to extract ourselves from this web of agreement in order to truly reassess the position of antitrust in our society and the implicit assumptions on which it relies. Under these circumstances, an appealing framework for facilitating discussion is John Rawls' "thought experiment" of imagining ourselves in an "original position" behind a veil of ignorance.⁵⁵

The idea is both subtle and simple, essentially positing ourselves in a hypothetical situation where any knowledge of our personal circumstances was erased, while all worldly knowledge of general matters and scientific understanding were retained. Essentially, the thought experiment goes as follows: imagine yourself, together with all members of the relevant society (here, all citizens or world inhabitants, depending on the generality sought through the thought experiment), magically transformed to a contemplative state, looking on our world from above. Here, members of society need to deliberate rules which will govern life "down there" once deliberation ends. None of the deliberating individuals knows which body "down there" is theirs, thus into which social situation he or she will be transported once the game-rules are agreed upon. Of course, each proposed rule can benefit or harm (or both!) different individuals according to their social position and particular needs, thus such "blind deliberation" forces us to assimilate all effects and take into consideration all affected persons—as one of them might be us.

Rawls uses this "veil of ignorance" (as to our particular circumstances) to determine the values that should govern our society in real life. The assumption is that the rules agreed upon in such a state approximate true justice, as they reflect our true conceptions, free from personal bias. The driving force of this analysis is that when choosing core values and instrumental applications, we divest ourselves from their influence on our own well-being, taking into account that we may be the highest or lowest in social pecking-order, healthy or sick, rich or poor, industrialist or employee.

How can antitrust benefit from such a framework? If we seek to truly assess our core assumptions, positing ourselves behind such a veil of

⁵³ See, e.g., DOMINICK T. ARMENTANO, *ANTITRUST POLICY: THE CASE FOR REPEAL* (Cato 1986); RICHARD B. MCKENZIE & DWIGHT R. LEE, *IN DEFENSE OF MONOPOLY: HOW MARKET POWER FOSTERS CREATIVE PRODUCTION* (Univ. of Michigan Press 2008); *THE ABOLITION OF ANTITRUST* (Gary Hull ed., Transaction Publishers 2005).

⁵⁴ See *supra* note 21 and accompanying text.

⁵⁵ JOHN RAWLS, *A THEORY OF JUSTICE* (2d ed., Oxford Univ. Press 1999).

ignorance allows for stepping away from biases generated by living in a world dominated by current doctrine. The question posed is what antitrust principles would be agreed upon. Specifically, what would be the main focus of an antitrust regime enacted behind the veil of ignorance? I dare not tackle the issue in its entirety in one article, but one main issue I hope to convince readers of is simple: that such an antitrust doctrine requires a balancing test to compare the benefits and harms accruing to the different parties influenced by intervention (or lack of it), and that without such context-specific balancing, the state errs in infringing upon protected rights.

Generally, the veil of ignorance framework allows us to ask which rules we would choose to govern the marketplace and under what circumstances we would want the government to step in. One could go back to first principles to examine conceptions of property and such (as Rawls does), but given our specific focus, I shall assume private property and freedom of contract as a baseline. Of course, one might argue that private property and free markets would not be chosen at all, but that argument will be left for others to tackle.⁵⁶ Here I focus on one main question: would those behind the veil of ignorance choose an antitrust regime that focuses on enhancement of economic efficiency (or protection of consumers), without context-specific balancing of rights and interests of all affected parties?

Antitrust as practiced today operates according to general rules. We seek to separate *per se* offenses from rule-of-reason analysis, and we apply the rule of reason according to the efficiency criterion or the effect of the suspected practice on consumers. Current antitrust doctrines do not separate between different types of goods or according to classes of consumers or other affected parties (unless their characteristics affect economic analysis, for example, network effects, potential for innovation, and the like). This is justified by a belief that antitrust can operate in an objective fashion, devoid of value judgments, and that this allows for scientific analysis employing economic tools. The value of objectivity requires no elaboration, and the fact that different markets are treated identically hopefully allows for predictability which allows

⁵⁶ Rawls posited that property and trade would be allowed in order to achieve Pareto optimality in societal use of resources, albeit subject to a “maximin principle.” Human beings, he assumed, are generally risk-averse (especially as to basic needs), thus would be willing to sacrifice some efficiency and some benefit in better-than-average states of the world in order to protect themselves from the downfalls of worse states of the world. *See id.* at 144. Given that behind the veil of ignorance we do not know which state of the world will apply to *us*, we would choose to maximize the well-being of those worse off in society, which he called the “maximin principle” (similar to the game-theoretic concept). Thus, equality is not called for (thus private property allowed) due to its limiting effect on attaining efficiency, but distributive concerns dominate near the low end of the social-benefit spectrum. For critique of Rawls’ assumptions regarding the ability of achieving equal liberty for all while allowing unequal economic (and thus social) positions, see Norman Daniels, *Equal Liberty and Unequal Worth of Liberty*, in *READING RAWLS* 253 (Norman Daniels ed., Stanford Univ. Press 1989).

for streamlining business planning, enhancing efficiency. It seems, then, that this scientific view of antitrust has much to commend it, and members of society in the Original Position would value it highly.

Two main objections can be raised to this account: first, that antitrust is not value-neutral, as it intervenes on behalf of consumers to the detriment of monopolists; and second, that this focus on objective criteria is more attractive to antitrust specialists than it is to other members of society. The first objection could be answered by stressing that we are all consumers; thus, this is not a choice benefiting one group at the expense of another. This issue was addressed above, and I will not bore the patient reader with repetition. I will add, though, that the Original Position does not *equalize* social positions, but merely makes us blind to our own. It is thus possible that even behind the veil of ignorance one would choose to risk the unequal distribution of benefits generated by monopolistic phenomena, in the hope that luck posits us in the favorable position of power once the veil is lifted.⁵⁷ Furthermore, “protection of consumers” seems like a good general proposition, but once differentiated into its disparate effects within distinct markets and contexts, it loses some of its seemingly obvious appeal. This moves us into discussion of the second objection raised above.

Is an “objective and scientific” antitrust policy more attractive to specialists than to the general populace? As an antitrust aficionado myself, I confess to preferring quantitative economic analysis as a basis for debate, as this creates common language and allows for coherence over multiple implementations.⁵⁸ Yet imagining what would be chosen behind the veil of ignorance raises additional concerns. If the aim of antitrust is economic efficiency alone, we return to the issue of rights and the unequal status of efficiency within antitrust versus outside of it. As per what would be chosen behind the veil of ignorance, it is worthwhile considering the multiple contexts in which antitrust operates using identical tools of economic modeling and empirics. Markets analyzed can include those for luxury items as well as those for essential goods. Consumers (as well as monopolists) can be rich or poor, individuals or firms, truly under duress or merely using antitrust as a strategic device.⁵⁹ Current antitrust doctrine employs micro-market analysis,

⁵⁷ This is similar, but not identical to, the “monopoly as investment incentive” rhetoric in the *Trinko* decision. See *supra* note 40. The difference is that there, the focus is on aggregate benefits of “competition for the market” reminiscent of Schumpeter, and here at issue is a risky choice on the part of individuals. Rawls famously posited that people would be risk-averse in the Original Position, but this assumption is not free from criticism.

⁵⁸ For an account of antitrust as shifting more and more in this direction, see Crane, *supra* note 52.

⁵⁹ This is especially so given the “indirect purchaser doctrine” of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). While some state laws reject the doctrine and the Antitrust Modernization Commission suggested repealing it, the rule denying standing to indirect purchasers who suffered antitrust harm still stands today as to federal litigation. See U.S. ANTITRUST MODERNIZATION COMMITTEE, REPORT AND RECOMMENDATIONS ch.

whether through traditional market definition or through more adaptable econometric techniques of assessing associated demand functions to focus analysis.⁶⁰ Such analysis focuses on effects within a relevant market, but with no distinction as to the market's importance or the special circumstances affecting producers and/or consumers within it, thus can be characterized as non-contextual.⁶¹

What would residents of the Original Position vote for? This is very difficult to say, and given the hypothetical nature of the examination, different people might have different predictions. I will thus give my own knowingly subjective and imperfect assessment. The mere fact that, in the real world, society hated monopoly enough to vilify it in constitutional documents and criminalize it in federal law, shows that something is amiss. The main question of interest is whether this sentiment transfers from the historical to the hypothetical—whether it would be agreed upon behind a veil of ignorance as well. I believe it would, but in a form closer to the historical than current practice. I believe that in the Original Position we would agree to competition in the marketplace as our guiding economic framework, and we would agree also to government protection and intervention in the case of market failures. Still, we would be wary of governmental intervention, given that government is as imperfect as markets are and mistakes are unavoidable, thus we would forgo intervention except for the most pressing cases.⁶² I believe further that when taking into account that state action constrains individual rights (a view more easily seen behind the veil of ignorance where we avoid personal bias stemming from our own position as consumers), intervention would be more acceptable in some markets than others. The current micro-market analysis that posits that monopoly is always harmful (sufficiently so that attempting to achieve it is criminalized!) regardless of context and actual effect does not seem to hold up to this standard.

An antitrust policy accepted in the Original Position would probably distinguish between markets for essential goods from those for luxury items, and focus on harm to the process of competition rather than static analysis of wealth transfers. From antitrust's history, we see that public discourse was

III.B. (2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (last visited Dec. 2011).

⁶⁰ See Louis Kaplow, *Why (Ever) Define Markets*, 124 HARV. L. REV. 437 (2010).

⁶¹ Some exceptions exist, such as the special attention given to media markets (due to their centrality in affecting democratic discourse), but even then it is not antitrust that adapts, but other fields of law that interject. See, e.g., Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?* 94 CAL. L. REV. 371 (2006).

⁶² Frank Easterbrook famously expounded the types of mistakes possible in antitrust litigation and argued that we should prefer negative mistakes of non-intervention over positive ones of excessive state action. See Frank Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); Frank Easterbrook, *Allocating Antitrust Decision-making Tasks*, 76 GEO. L.J. 305 (1987).

more about cases where economic effects were large and affected all of society, and especially where economic size led to political influence. Economic power, rather than market power, would have been the main issue of an antitrust policy chosen to protect democratic society—especially when the former interacted with political or regulatory power.

Furthermore, intervention that constrains personal freedoms (such as with whom to do business, under which terms to sell, how to bundle products, and so forth) would be agreed upon as a general matter, but subjected to contextual analysis taking into account the specific benefits and costs accruing to specific affected parties. In short, a balancing test would be required in order to show that the harm prevented outweighs the harm caused by each intervention sought. Which balancing test would be used (for example, the “clear and present danger” familiar from free speech doctrine or a less restrictive one such as “harmful tendency”) is less clear, but the lexical ordering employed today positing *any* consumer harm as decisive regardless of the extent of producer benefit would (in my opinion) be rejected once we see ourselves as potential monopolists and consider which exceptions justify state action.

Governmental and private enforcement differ here, although identical antitrust doctrine holds true for both. When state agencies choose whether to intervene, they are likely to consider context and effect on the general populace, as enforcement resources are limited and enforcement must be optimized. Private enforcement, on the other hand, depends on the interests of those choosing to bring suit, thus is expected to depend less on public interest than personal gain. Private enforcement may thus be deemed more problematic, thus more justifiably constrained than state action and perhaps subject to screening mechanisms. That current doctrine applies to both private and public antitrust litigation stems from the belief that antitrust as such is justified and the pursuit of economic efficiency or consumer welfare are sufficient reasons for court relief.⁶³ Going back to the Original Position and taking into account the rights of monopolists (alongside consumers and others) requires reassessment of these assumptions, or at least a more inquisitive look for exceptions to the rule. These are but initial thoughts, as my focus is on the general framework and not its precise application. Still, raising the questions is important even when the answers are (still) unclear.

⁶³ Indeed, Dan Crane sees this as a reason courts constrained the application of general antitrust principles, as they were trying to curb the increase in private litigation. See CRANE, *supra* note 11, at 63. If so, antitrust’s substance was limited not due to internal fault, but due to the lack of a procedural solution to a growing problem.

VII. CONCLUSION

This article aims at theoretical analysis, rather than pragmatic application. Still, I find the two intertwined, and those seeking practicalities are within their rights to ask, “So what? How will this change antitrust?” I therefore conclude with a few thoughts on application both to avoid misunderstandings as to what it is I preach, and to show how theory might affect reality, and how much we can learn from history.

Our society hated monopoly enough to have criminalized it, but the monopoly they had in mind was different from the one constrained today. Antitrust was enacted in order to use the state’s power to overcome privilege protected by might, whether the king’s might or firms’ economic power later on. Today we as a society enforce laws against a town-monopoly in a local newspaper under the same framework as a monopoly in steel, or software. Contextualized analysis means asking whether the public benefit the law purports to achieve is present in the specific case before us. In a way, it is taking the rule of reason further to truly assess all effects of the suspected practice, going beyond economic analysis to enquire as to the values promoted. It is obviously less precise in application, as it takes of account of more parameters, and some that deny quantification. It is the messy reality of people and rights, beyond economic effects. Some might rightly complain that the rule of reason as practiced today is already too broad, and predictability is necessary. Contextual application is less precise—but only as to the economic goals of current micro-models. These are subject to second-best problems of both theory and application, and aim at best for economic efficiency, which is blind to social and moral issues. Of course, expanding the rule of reason or requiring a public benefit screening of antitrust claims come with a cost, both in potential mistakes and in transactions costs. We might thus conclude that categorical analysis is cheaper and perhaps optimal, but then let our categories reflect our values. And we might decide practicalities are sticky and change is slow and costly, thus inaction is preferred. But then let it be conscious passivity, choice with recognition of prices.

Vehemence against monopoly, which played (and perhaps still plays) an important role in justifying antitrust generally and its criminalization specifically, was aimed at monopolies whose size and reach threatened society. Would the same support for antitrust have occurred were it explained to the populace that “this will enhance efficiency”? I believe not, either in historical times or in a hypothetical Original Position. Efficiency is important, but criminalization comes from moral indignation, not economic analysis.

Translating theory into practical application requires attention to each antitrust offense, and to the varying conditions under which it could be practiced. It also means that as antitrust professionals, we have a duty to be careful with our historical inheritance. The criminal codification of antitrust and its public support stem from historical attention to economic power and

state (or royal) protectionism. The way the laws are applied has shifted from a focus on powerful firms and “the little guy” to economic analysis identically applied to all markets large and small. One might worry that we have misused public trust, as a (historical and hypothetical) vote for one kind of policy is used to support another.

I suggest that antitrust be subjected to a balancing test, that we ask in each case whether this type of activity is truly the one which a hypothetical public would have voted for as sufficiently vile to be criminalized. And I suggest that efficiency, although very important, is never enough. And if it is, let us be intellectually honest enough to call for its application in other fields in a similar fashion. Herbert Hovenkamp posited that “[a]ntitrust is an economic, not a moral, enterprise.”⁶⁴ I suggest otherwise, and I suggest that were it merely an economic enterprise, it would garner less support than it currently does, and that its criminalization would be aberrant.

An outsider looking at antitrust might conclude that we hate monopoly so much as to fine or throw in jail anyone who attempts to achieve or protect it. This article aimed to tease out this sentiment, explore its prevalence as an implicit assumption in antitrust policy, and examine its justification. Criminalization of antitrust shows that society views these issues as important, not as valueless technocracy, but as a moral matter. Values are inherent to antitrust, whether it is the value of scientific application by experts, aggregate wealth maximization, protecting “the little guy,” or protecting democracy from excessive growth of economic power.

The populist past of antitrust began with a “let’s kill the giants” rhetoric, both in bringing down the King’s charters and in dismantling the conglomerates of Rockefeller and friends. I suggest that this reflects the popular support for antitrust, and that the scientific advances in the science of antitrust came with a price. We use micro-models that can be applied to almost every market (and make other micro-models for analyzing exceptions), but this fixates our focus to one specific (narrowly-defined) market at a time, treating the action of combination or monopolization as if it is a coherent concept, equally problematic in every circumstance regardless of size or contextual differences. The values which guided antitrust’s beginning and cemented public support for it revolve around economic power and social effects. They do not support the universal application of micro-market power analysis, but stem from specific circumstances whose lessons do not necessarily apply to all (antitrust) markets equally. Monopolization, it might be said, depends on circumstance.

Efficiency, which is the dominant theme in modern antitrust application, is not value-neutral, and is not applied coherently across legal fields. State intervention in business practices of the type common in antitrust is treated very differently under other legal paradigms, and the distinction between the

⁶⁴ See HOVENKAMP, *THE ANTITRUST ENTERPRISE*, *supra* note 21, at 10.

fields is not always as obvious as first glance suggests. Antitrust—if it is to survive critical inquiry as state policy that must live up to moral, and not merely economic, criteria—requires deeper thought which takes into account context of application and effect on all parties concerned. To put it in populist jargon: even monopolists have rights, and although these certainly may recede in favor of other rights and societal interests, such a result requires balancing among the competing values. It is towards a balancing test within antitrust that this article is aimed.

What the balancing test should be depends on the context of its application and spelling out what society aims to achieve. Its specific content requires further elaboration and thought, but its guidance comes from constitutional discourse developed to handle precisely such issues. The extreme example of protecting free speech for those least deserving of it was given, not as an argument that antitrust is the same, but as a useful metaphor for thinking about these difficult issues. If those aiming to suppress speech have not voided their right to use it, perhaps those aiming for monopoly have not voided their claims for freedom of contract and property protection either.

After examining a number of counter-arguments and relying on Rawls' analysis of a hypothetical Original Position, my tentative conclusion is that the current *a priori* nullification of monopolists' potential claims is unfounded. We must contend with the possibility that antitrust infringes upon the rights of monopolists both real and potential, and the tools we must use are drawn from moral and political philosophy no less than from economics. It is not my intention to argue that antitrust is immoral, but it is my contention that current (often-implicit) assumptions regarding monopoly as evil are mistaken. We must return to the difficult and messy task of balancing among competing claims and asking which social goals are attained with each intervention—and at what price.