Study B-750 February 16, 2023

# First Supplement to Memorandum 2023-11

## Antitrust Law: Presentation

Professor Thomas Greene made a slide presentation to the Commission at the February 16, 2023 meeting, discussing the consumer welfare standard in antitrust law. Professor Greene gave permission to reproduce his slides. They are attached.

Respectfully submitted,

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# Consumer Welfare and Antitrust Injury

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California Law Revision Commission

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UC Law San Francisco

# Disclaimer

*The views expressed are those of the presenter and do not necessarily represent the views of the U.S. Department of Justice.*

# Today's Agenda

- Overview of Opinions about the Primary Purpose(s) of the Federal Antitrust Laws
    - Robert Bork and the "Consumer" Welfare standard
    - Wealth Transfer Concerns
    - Consumer Choice Concerns
    - Modern Consumer Welfare, broadly defined to include innovation and other attributes
    - Citizen Welfare, citizens should be broadly protected from corporate power
- Other perspectives that can affect interpretation of competition law
    - Priors, assumptions about how the economy and judges work
    - Historical perspectives about how the economy works
- Why are these perspectives important?
    - In interpreting federal law
    - Particular importance for general enactments
    - Implications for your work
- Antitrust Injury: Case study of intent driving results

# Competing Opinions about the Primary Purpose(s) of Federal Antitrust Law

# Rich Legislative History: Examples

- Senator Sherman argued that: “It is sometimes said of these combinations [the trusts] that they reduce prices to the consumer by better methods of production, but all experience shows that this saving of cost goes to the pockets of the producer.” 21 Cong. Rec. 2460 (statement of Senator Sherman).

- Senator Hoar opined that monopolistic pricing was "a transaction the only purpose of which is to extort from the community … wealth which ought … to be generally diffused over the whole community.“ 21 Cong . Rec. 2728 (statement of Senator Hoar)

- Senator George stated simply, the trusts “aggregate to themselves great, enormous wealth by extortion.“ 21 Cong. Rec. 1768 (statement of Senator George)

- Senator Pugh argued that: trusts effectively "destroy[] competition in production and thereby increase prices to consumers.“ 21 Cong Rec. 2558 (statement of Senator Pugh)

# Robert Bork and the "Consumer" Welfare Standard

- In a major article and a book, then-Professor Robert Bork argued that the legislative history of the Sherman Act conclusively indicated that the Act's drafters were concerned only with what he called "consumer welfare*."*
    - Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. L. & Econ. 7 (1966)
    - Robert H. Bork, *The Antitrust Paradox* 61-66, 98 (Basic Books, 1978)
- For example, in *The Antitrust Paradox,* Bork argued that the "legislative history of the Sherman Act, the oldest and most basic of the antitrust statutes, displays the clear and exclusive policy intention of promoting consumer welfare." *Paradox* at 61.
- What this meant, according to Bork, was that the Sherman Act, and presumably all later antitrust laws, "should not interfere with business efficiency." *Id*. at 62.

# The "Consumer Welfare" Standard is a Misnomer

- Among the many problems with Bork's "consumer welfare" standard is that it is a misnomer. Specifically, the focus on economic efficiency translates into what is usually called the "aggregate economic welfare standard," which can also be referred to as the "efficiency" or the "total surplus" standard.

    - *See* Steven C. Salop, *Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 Loyola Cons. L. Rev. 336 (2010).

- Despite its name, Bork's "consumer" welfare standard,

    "…would condemn conduct only if it decreases the sum of the welfare of consumers (i.e. buyers) *plus producers* (i.e. sellers plus competitors); and *without regard to any wealth transfers*. Thus efficiencies such as cost savings can trump demonstrable consumer injury." *Id.* (emphasis in original).

# Example of Borkian "Consumer" Welfare and (True) Consumer Welfare

- "Suppose, for example, that [a] joint venture produces significant gains in production costs, say, $100; however, it also facilitates a price fix that raises the overall price level by $80. In that case the joint venture would be efficient under total welfare criteria because the productive efficiency gains exceed the allocative efficiency losses (to consumers) that result from the collusion. The gains to the firms are described as 'productive' efficiency gains because they result from economies in producing or distributing. The losses to consumers in this case are described as "allocative" efficiency losses because they result from a decrease in market competitiveness. In this situation, the general welfare criterion would approve the restraint because gains are larger than losses, while the consumer welfare criterion would condemn it because consumers are worse off." Herbert Hovenkamp & Phillip E. Areeda (late), *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 114a (4th & 5th Editions 2018-2022).

# Judicial Confusion about the "Consumer" Welfare Standard

- The U.S. Supreme Court in *Reiter v. Sonotone*, 442 U.S. 330, 343 (1979) wrote that antitrust is a "consumer welfare prescription," citing *The Antitrust Paradox* at 66.

However, it not clear that the Court understood that:

  - "As long as a business arrangement does not shrink the size of the consumer's share more than it increases total wealth, consumers as a whole are better off." Charles F. Rule & David L. Meyer*, An Antitrust Enforcement Policy to Maximize the Economic Welfare of All Consumers*, 33 Antitrust Bull. 677, 686 (1988).

- However, the "consumer" welfare standard can be a "Trojan Horse for the policy preferences of its advocates." Vaughn R. Walker, *Moving the Strike Zone: How Judges Sometimes Make Law*, 2012 U. Ill. L. Rev. 1207, 1215-1217 (2012).

# Technical Critiques of Bork's Formulation

- Professor Bork was not an economist, which has led to critiques of his "consumer" welfare standard as a matter of economics and practicality, e.g.

    - Bork's work represents a "jumble of welfare concepts"
        - Mark Glick, *The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust*, 63 Antitrust Bull. 455, 485 (2018).

        - Bork misreads a basic graph contained in the work of a foundational scholar in economic theory and misunderstands a standard model of a market, which he asserts is a "consumer welfare diagram." *Id.* at 486-487.

    - Bork's total welfare standard could not be practically applied by courts. Herbert Hovenkamp & Phillip E. Areeda (late), *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 114c ("If true quantification of deadweight consumer losses and producer gains were required, antitrust would be far outside its competence.")

# Other perspectives that can affect interpretation of competition law

# Purposes of the Sherman Act: Defeating Wealth Transfers

- Based on the quotes noted earlier, many scholars share the view that:
  - "the congressional debates and committee reports show that the antitrust laws primarily were enacted to prevent higher prices and wealth transfers from consumers to firms with market power."
    - Robert Lande, *The Goals of Antitrust: A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice, 81 Fordham L. Rev. 2349 (2013).*
  - This perspective leads to a conclusion articulated as the "true consumer welfare standard" that:
    - "…the true consumer welfare standard would condemn conduct if it reduces the welfare of buyers, irrespective of it impact on sellers. Efficiency benefits count…but only if there is evidence that the efficiency benefits pass through to consumers." Salop, supra, 22 Loyola Cons. L. Rev. at 336-337.

# Purposes of the Sherman Act: Protecting Consumer Choice

- Scholars also argue that a key value embedded in the Sherman Act is consumer choice, e.g.

    - "[A] 'restraint' of trade also could distort the competitive array of offerings in the market, not just the market's price offerings. A fair reading of the Sherman Act suggests that every aspect of competition important to consumers - price, quality, variety, etc. – was meant to be the concern of the antitrust statutes.
        - Lande, *supra*, 81 Fordham L. Rev. at 2391.

- *Example:* Assume there is a merger of all media—newspaper, radio and television news operations. Cost savings by eliminating different news operations could be substantial but the loss of choice, in this case a the loss of news "voices," would be substantial.
    - *See Id*. at 2391-2392.

# Modern Perspectives on "Consumer Welfare"

- Modern antitrust policy makers articulate the policy goals of antitrust broadly, e.g.
  - "[T]he core principle guiding antitrust enforcement in the United States that has served us well for many years: *antitrust is about protecting the competitive process so consumers receive the full benefits of vigorous competition.*
    - Carl Shapiro, *Antitrust in a time of populism*, 61 Int'l J. of Indus. Org. 714, 745 (2018) (emphasis in original), *but see* Marshall Steinbaum & Maurice Stucke*, The Effective Competition Standard: A New Standard For Antitrust*, 87 U. Chi. L. Rev. 595 (2020) (significantly broader standard using similar nomenclature).
- *A broad perspective is reflected in the 2010 Merger Guidelines:*
  - "Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. Such nonprice effects may coexist with price effects, or can arise in their absence. When the Agencies investigate whether a merger may lead to a substantial lessening of non-price competition, they employ an approach analogous to that used to evaluate price competition." U.S. DOJ & FTC, Horizontal Merger Guidelines, § 1 (2010)

# Modern Consumer Welfare: Examples of Policy Directions

- *Relying on a broad version of the consumer welfare standard and the latest economics, specific initiatives stand out:*
    - Stricter cartel enforcement
    - Stricter merger enforcement
    - Controlling exclusionary conduct by dominant firms
    - Reducing entry barriers and promoting competition
        - Carl Shapiro, *Antitrust in the time of populism*. 61 Int'l J. Industrial Org. 714, 737-744 (2018).
- *Other reformers focus on specific kinds of conduct within these broad categories, in particular exclusionary conduct in its various forms.*
    - Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. Pa. L. Rev. 1843 (2020), Jonathan B. Baker, *The Antitrust Paradigm* (Harvard Univ. Press 2019)

# Citizen Welfare Standard

- The debates leading to the passage of the Sherman Act contain significant language about protecting citizens from large corporations.
- This has led to arguments that Citizen Welfare be understood as the overriding purpose of the antitrust laws. *See, e.g.* Sandeep Vaheesan, *Resurrecting, "A Comprehensive Charter of Economic Liberty:" The Latent Power of the Federal Trade Commission*, 19 U. Pa. J. Bus. Law 645, 673-674 (2017).
- Under this standard, the legislative history is understood to support: "1) protection of consumers and sellers (such as farmers) from wealth transfers due to firm market power, 2) the preservation of open markets, and 3) the dispersal of private economic and political power." *Id.* at 676.
- This standard explicitly challenges the economics-centric approaches of antitrust reformers who embrace updated economic thinking and broad versions of consumer welfare. See e.g. Nell Abernathy, Mike Konczal & Katy Milani, *Untamed: How to Check Corporate, Financial and Monopoly Power (Roosevelt Institute, Jun. 6, 2016), https://rooseveltinstitute.org/publications/untamed-corporate-financial-monopoly-power/,* Sandeep Vaheesan, *Twilight of the Technocrats' Monopoly on Antitrust (Yale L. J. Forum, Jun. 4, 2018), https://www.yalelawjournal.org/forum/the-twilight-of-the-technocrats-monopoly-on-antitrust.*
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# Citizen Welfare Standard: Policy Examples

- Reject the rule of reason, and substitute series of presumptions against conduct understood to "injure consumers and producers, exclude rivals and concentrate private power." Vaheesan, *Comprehensive Charter,* 19 Pa. J. Bus. L. at 676.
- For horizontal and vertical mergers, strong presumptions against mergers of a certain size. *Id. at 678-79.*
- For dominant firm conduct, (1) reduce market share requirements under current monopolization law and (2) create rebuttable presumptions against conduct like tying or exclusive dealing. *Id. at 680-81.*
- Make resale price maintenance (A.K.A. vertical price fixing) and exclusive dealing presumptively illegal. *Id. at 683-84.*
- Eliminate or truncate the current bad conduct requirement for monopolization, i.e. no-fault monopolization. *Id. at 686.*
- Largely eliminate conduct remedies in favor of structural remedies. *Id. at 687-88.*
- Eliminate or truncate efficiency defenses as contrary to congressional intent. *Id. at 688-89, see also* Lina Khan & Sandeep Vaheesan, *Market Power And Inequality: The Antitrust Counterrevolution And Its Discontents,* 11 Harv. L. & Pol'y Rev. 235 (2017).

# Other Influences on Antitrust

# Priors (or Assumptions)

- Assumptions about how the economy works can be powerful forces controlling antitrust developments. Examples of 1970's Chicago School assumptions:
    - Efficiencies are of primary importance
    - Most markets are competitive, even if there are few firms competing
    - Monopoly power is not durable, since high profits will induce entry
    - Barriers to entry are less significant than previously thought
    - Monopoly leveraging or vertical restraints are not sensible strategies because there is only one monopoly rent.
    - Antitrust enforcement is only appropriate when there is a substantial likelihood that intervention will increase social welfare.
        - *See* Daniel L. Rubinfeld, *On the Foundations of Antitrust Law and Economics*, *in* How the Chicago School Overshot the Mark (Robert Pitofsky, ed. 2008).
- Flexing any of these circa 1970's economic assumptions changes how cases should be considered. *See* Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. Pa. L. Rev. 1843 (2020).

# Competing Historical Priors

*"[P]redatory pricing schemes are rarely tried, and even more rarely successful"*

- *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 574, 589 (1986) (quoting John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J. L. & Econ. 137 (1958)), *cited with approval in*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209, 226 (1993).

**<u>BUT</u>**:

*"McGee's article is a theoretical polemic masquerading as an empirical case study."*

- Christopher R. Leslie, *Revisiting the Revisionist History of Standard Oil*, 85 So. Cal. L. Rev. 573, 599 (2012)

*""A large body of empirical research has found that predatory pricing can be an attractive anticompetitive strategy."*

- Sandeep Vaheesan, *Reconsidering Brooke Group: Predatory Pricing in Light of the Empirical Learning*, 12 Berkeley Bus. L. J. 81, 82 (2015)

*"In cases of monopolization or attempted monopolization, such 'above-cost predation' may be more plausible and prevalent than below-cost predation."*

- Aaron S. Edlin, *Stopping Above-Cost Predation*, 111 Yale L.J. 941, 942 (2001)

# Why Might These Considerations Be Important to the CLRC?

# Real World Effects of Perceived Legislative Intent: FTC Act Example

- **Issue**: Does the unfairness standard in FTC Act, § 5 mean that this law is broader than the Sherman Act and other federal antitrust laws?

- Yes, according to FTC, *Policy Statement Regarding the Scope of Unfair Methods of Competition under Section 5 of the Federal Trade Commission Act* (Nov. 10, 2022) (16-page analysis of legislative history of the FTC Act and early decisions), https://www.ftc.gov/legal-library/browse/policy-statement-regarding-scope-unfair-methods-competition-under-section-5-federal-trade-commission.

    - Note: The FTC Act was passed in 1914, so intent is important even a century after the Act was passed.

# Major Federal Antitrust Laws Particularly Sensitive to Assumptions about Intent, Priors, and History

- "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

- "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court." 15 U.S.C. § 2.

- "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C. § 45(a)(1).

# Implications for the Commission's Work

- Your policies, priors and other indicia of intent will be important 5, 50, and 100+ years from now.

- This will be particularly important insofar as you rely on general statements of intent, e.g., something to be judged under an unfairness standard.

    - Example: Legislative history less important for violations of California speed law w/respect to school zone which are highly detailed vs. assessing violations under California's basic speed law

- Generally, the more specific you are about what you want, the less important legislative history will be. However, the more specific you are affects how flexible and useful your proposals may be in the future.

# Antitrust Injury

# *Brunswick Corp. V. Pueblo Bowl-O-Mat, Inc.,429 U.S. 477 (1977):* Antitrust Injury

***Plaintiff**: 3 bowling centers owned by Treadway Cos.*

**Defendants**: Brunswick, a major manufacturer of bowling equipment, and an operator of bowling centers, purchases the failing bowling centers

***Alleged Violation:** Clayton Act, §7*

***Putative Injury**: Pueblo alleges "loss of income that would have accrued had the acquired centers gone bankrupt"*

# Issue Presented

*"… whether antitrust damages are available where the sole injury alleged is that competitors continued in business, thereby denying respondents an anticipated increase in market shares."*

# Focus on “competition,” “not competitors” widely quoted

- Most famous quote:

> “At base, respondents complain that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration. The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for “the protection of competition not competitors,” *Brown Shoe Co. v. United States*, 370 U.S., at 320, 82 S.Ct., at 1521. It is inimical to the purposes of these laws to award damages for the type of injury claimed here.” (at 488 (emphasis added))

- Widely cited for the proposition that competitors have little or no place in antitrust but the facts of the case are often ignored.

# Other Major Cases Limiting Federal Damage Actions

# *Associated General Contractors v. California State Counsel of Carpenters*, 459 U.S. 519 (1983): Antitrust Standing

***Plaintiff**: Labor Union*

***Defendants**: Multiemployer Association and its business members*

***Allegation**: Defendants combined to coerce members to contract with non-union firms; appears to be a boycott theory*

***Putative Injury**: Union got fewer members, so less income*

# Question Presented

*"…whether the complaint sufficiently alleges that the unions have been 'injured in [their] business or property by reason of anything forbidden in the antitrust laws' and may therefore recover treble damages under §4 of the Clayton Act."*

# *Assoc. Gen'l Contractors: Antitrust Standing*

*Court admits §4 broad enough to encompass claim but must understand 1890 context.*

- Law at the time built on "doctrines such as foreseeability and proximate cause, directness of injury, certainty of damages and privity of contract."

The Court quotes *McCready*, as cited in a state *parens* action, *Hawaii v. Standard Oil*:

- "It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." (at 535 (emphasis added))

# Union Denied Standing: *AGC* Factors

*The causal connection between the antitrust violation and injury to the plaintiff, and whether the injury (to the plaintiff) was intended*

*The nature of the injury, including whether the plaintiff is a consumer or competitor in the relevant market*

*The directness of the injury and whether the claimed damages are too speculative*

*The potential for duplicative recovery and whether apportioning damages would be too complex*

*The existence of more direct victims (at 537)*

# *Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977):* Limiting Damages to Direct Purchasers

*Facts:*

- Manufacturers of concrete blocks allegedly engaged in price fixing.

- Direct purchasers
  - Block makers sold their products to contractors so the contractors were direct purchasers of the blocks

- Indirect purchaser (Illinois)
  - Contractors, in turn, sold freeway and building structures to the State of Illinois that contained the allegedly price fixed blocks

  - Illinois alleged that the overcharges from the price-fixing were passed on to it and its taxpayers.

# SCOTUS Decides on a Direct Purchaser Limit on Federal Damages

Refuses to overturn *Hanover Shoe*

- "[C]onsiderations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." 431 U.S. at 736

Concerned about "massive efforts" to apportion damages among different groups of purchasers

Asserts that this prudential policy will encourage "vigorous private enforcement of the antitrust laws."

# Dissent: Brennan, Blackmun

Two policies in § 4:

- "to compensate victims and to deter future violations" 431 U.S. at 748

Commentators "almost unanimously" conclude that "§ 4 should be construed to authorize indirect purchasers to recover upon proof that increases were passed on to them." Id. at 753 n. 10.

Result "goes far to frustrate Congress' objectives in creating the treble-damages action" Id. at 745

"[E]stimating the amount of damages passed on to indirect purchaser is not different from and no more complicated that estimating what the middleman's selling price would have been absent the violation." Id. at 758-9

# *California v. ARC America Corp.*, 490 U.S. 93 (1989): State Law Workaround

*Facts:*

- Post-*Illinois Brick*, California and other states enacted *Brick* repealers for their state antitrust laws
- Multistate investigation uncovered a price fixing cartel organized by the Portland cement industry, using industry trade associations
- California and other states filed damage claims under federal law and claims under the state's Cartwright Act, which had a *Brick* repealer
- California alleged that cement overcharges were passed on to the State through contractors building roads, freeways and bridges
- California lost in the trial court and before the 9th Circuit

# *Question Presented*

Whether this rule [*Illinois Brick*] limiting recoveries under the Sherman Act also prevents indirect purchasers from recovering damages flowing from violations of state law, despite express state statutory provisions giving such purchasers a damages cause of action?"

# Analysis

"The state indirect purchaser statutes are not preempted by the federal antitrust laws. There is no claim of express preemption or of congressional occupation of the field. The claim that the state laws are inconsistent with, and stand as an obstacle to, effectuating the congressional purposes identified in *Hanover Shoe* and *Illinois Brick* misunderstands these cases, which merely construed the federal antitrust laws"

Held: "When viewed properly, *Illinois Brick* was a decision construing the federal antitrust laws. The congressional purposes on which *Illinois Brick* was based find no support for a finding that state indirect purchaser statutes are preempted by federal law." (at 105-106)

# Effects of *ARC America*

Plaintiffs representing indirect purchasers would either:

- File state class actions in state court, or
- File indirect purchaser damage claims under state law in federal court as pendent or ancillary claims (See Sidebar 8-5)

Indirect purchaser class actions in state courts were one of the rationales for the Class Action Fairness Act (CAFA) so usually litigated in federal court

Arguably, broadly immunizes state antitrust law from federal preemption

# Thank You; Questions?