YEAH, ITS A LITTLE WEIRD HAVING THEM BACK THERE, BUT WHAT'S THE HARM TO CONSUMER WELFARE?

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I. INTRODUCTION

Given a country founded on principles of anti-monopoly and the decentralization of power, an antitrust revival in the United States may have been inevitable. Today's revival, which dates from the later parts of the Obama Administration, shows signs of being broader than that of the 1990s. It is marked so far by broad shifts in academic and congressional discourse and even an apparent hunger by parts of industry for change. The larger question is whether change reaches the enforcement agencies in lasting form, the judiciary and ultimately, the law.

Among the forerunners of the current movement is the famed Robert Pitofsky, who warned in the late 1970s that "it is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws."[2] In 2008 he argued that "[b]ecause extreme interpretations and misinterpretations of conservative economic theory (and constant disregard of facts) have come to dominate antitrust, there is reason to believe that the United States is headed in a profoundly wrong direction."[3] More and more have come to agree with that assessment.

Among those who generally agree with Pitofsky's statement, however, there are really two schools. Both are committed to antitrust revival, generally speaking. Both are also broadly opposed to what can be described as the extremes of the Chicago school, as represented by the work and influence of Aaron Director and Robert Bork. The difference between the groups can be discerned their reactions to the so-called "consumer welfare" standard, which since the 1980s has been widely described as setting the goal for antitrust law. The first group believes that the standard has been abused and misused, but nonetheless retains its utility as the anchor of antitrust law and policy. The second group believes that antitrust cannot be fully recovered without first jettisoning the premise that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[4]

The goal of this short piece is to answer the question: would, in fact, abandoning the "consumer welfare" standard make the antitrust law too unworkable and indeterminate? This concern is well captured by Judge Doug Ginsburg, who is willing to admit doubt that Congress really intended maximization of "consumer welfare" to be the Sherman Act's goal, but who argues that the alternatives used for most of the 20th century created too much leeway and unpredictability. As he complains, "[c]ourts were freely choosing among multiple, incommensurable, and often conflicting values."[5]

I argue that there is such a thing as a post-consumer welfare antitrust that is practicable and arguably as predictable as the consumer welfare standard. I say that in part because, in practice, the consumer welfare standard has not set a high bar. Decades of practice have shown that the promised scientific certainty of the Chicago method has not materialized, for economics does not yield answers, but arguments.

I argue that the leading alternative standard, the "protection of competition" is at least as predictable, and arguably more determinate than the exceeding abstract consumer welfare test, while being much truer to the legislative intent underlying the antitrust laws. More concretely, we should return to asking, in most antitrust cases, the following question: Given a suspect conduct (or merger): Is this merely part of the competitive process, or is it meant to "suppress or even destroy competition?"[6] This standard actually already forms a part of antitrust doctrine. What changes is eliminating "consumer welfare" as a final or necessary consideration in every case.

Here is why the protection standard might be more practical than consumer welfare was. There is a fundamental and important difference between a law that seeks to maximize some *value*, and one that is designed to protect a *process.* The maximization of a value, particularly one as abstract as "welfare," necessarily puts enforcers and the judiciary in a challenging position, given that welfare is abstract and ultimately unmeasurable. In contrast, the protection of competition standard puts the antitrust law in the position of protecting the competitive process, as opposed to trying to achieve welfare outcomes that judges and enforcers are ill-equipped to measure. In that sense, it makes the antitrust law akin to the "rules of the game," and make enforcers and judges referees, calling out fouls and penalties, with the goal of ultimately improving the state of play, by protecting a competitive process that actually rewards firms with better products. Beside this practical benefit, as a policy matter,

2 Pitofsky, *The Political Content of Antitrust,* 127 U. Pa. L.R. 1051, 1051 (1979).

3 Pitofsky, *Introduction: Setting the Stage,* in How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust 1, 6 (Pitofsky ed., 2008) [hereinafter Pitofsky, How the Chicago School Overshot].

4 *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

5 Ginsburg, *Bork's "Legislative Intent" and the Courts,* 79 Antitrust L.J. 941, 950 (2014).

6 *Chicago Board of Trade v. United States,* 246 U.S. 231, 238 (1918).

this relatively small change would do much to give antitrust room to achieve its historic goals, and generally make antitrust far more attentive to dynamic harms.

II. TWO REVIVALIST SCHOOLS

As I have suggested, there are really two revivalist schools active in the United States right now. Here we can take a closer look at each.

The first group presents a critique that is primarily though not exclusively economic. Its members are more likely to be economists or lawyers with significant experience with contemporary antitrust practice (many of the members of this group would previously be described as members of the "post-Chicago" school of antitrust.[7]) This group tends to take as a principal problem with current antitrust law the misuse and oversimplification of economics. Christopher Leslie (who is not exclusively of this school) writes that "Bork's legacy is an oversimplified economics that often rests on unfounded or disproven assumptions. Yet the very simplicity that renders Bork's descriptions and prescriptions hollow is what makes them so dangerously attractive."[8] As Jonathan Baker and Carl Shapiro write with respect to merger enforcement: "some courts and enforcers have taken flexibility too far, allowing mergers to proceed based upon dubious economic arguments about concentration, entry, expansion, and efficiencies."[9] Daniel Rubinfeld, while crediting the Chicago school for improvements in our understanding of the economics of antitrust, makes the following critique:

> [C]onservative economics has overshot the mark in a number of ways. It has worried more about false positives (bringing the wrong case) than false negatives (failing to bring the right case). It has been too quick to dispense with troubling vertical issues (both price and non-price restraints). And, it has fostered a tendency to downplay enforcement in dynamic technological industries in which innovation issues play a significant role.[10]

This school believes that newer economic tools, used more carefully, can yield a body of law that gains from the sophistication and rigor of economics, but escapes the many errors of omission that are the Chicago school's legacy.

The second antitrust revival group — the school of progressive, or Neo-Brandeisian antitrust — makes a more foundational critique. The second school seeks a return to antitrust's original goals, particularly as enumerated during the Progressive era and the midcentury. The school believes that the correct ends of antitrust have been lost or deliberately discarded — in the words of Barak Orbach, that antitrust has "lost its goal."[11] Less likely to be economists, and more likely to be historians, legal academics, or policy advocates, this group is particularly critical of Robert Bork's premise that the maximization of consumer welfare is the "exclusive" goal of antitrust.

As antitrust scholars know, Bork famously discovered in 1966 that the 1890 Congress had intended the Sherman Act to be what he later termed a "consumer welfare prescription."[12] As Bork put it, courts must be "guided exclusively by consumer welfare and the economic criteria which that value premise implies."[13] In later years, the weight of scholarship regards this discovery as both an implausible reading of the legis-

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7 A representative series of essays is Pitofsky, How the Chicago School Overshot, supra note 3.

8 Leslie, *Antitrust Made (Too) Simple,* 79 Antitrust L.J. 917, 939 (2014).

9 Baker & Shapiro, *Reinvigorating Horizontal Merger Enforcement,* in Pitofsky, How the Chicago School Overshot, supra note 3.

10 Rubinfeld, *Conservative Economic Analysis and Its Effects,* in Pitofsky, How the Chicago School Overshot, supra note 3.

11 Orbach, *How Antitrust Lost Its Goal,* 81 Fordham L. Rev. 2253 (2013).

12 Bork, *Legislative Intent and the Policy of the Sherman Act,* 9 J.L. & Econ. 7 (1966); see also Bork, The Antitrust Paradox: A Policy at War with Itself 66 (1978) [hereinafter Bork, The Antitrust Paradox] (describing Congress' vision for the Sherman Act as a "consumer welfare prescription.").

13 Bork, *Legislative Intent and the Policy of the Sherman Act,* supra note 12.

lative history, and a suspicious echo of Bork's own theories.[14] As Herbert Hovenkamp later concluded, "Bork's analysis of the legislative history was strained, heavily governed by his own ideological agenda. . . . Not a single statement in the legislative history comes close to stating the conclusions that Bork drew."[15] Nonetheless, over the 1980s through 00s, the argument found a receptive audience in a federal judiciary eager for more clarity and a simpler tool useful for deciding difficult antitrust cases.[16]

The progressive school, in contrast to the first group, begins by demanding the rejection of Bork's oversimplification based on its raw incompatibility with Congressional intent as expressed in 1890 (the Sherman Act), 1914 (the Clayton and FTC Acts) and 1950 (the Anti-Merger Act). Rhetorically, this school takes as more faithful to the original intent of the antitrust laws other statements of antitrust's goals, such as the Supreme Court's statement, in 1904, not long after the law's passage, that the law "has prescribed the rule of free competition among those engaged in . . . commerce." Or the statement by Justice Douglas that the "the philosophy and the command of the Sherman Act" is that "[i] ndustrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self- appointed men...." As far as an accurate statement of legislative intent, the second school is more like to credit the famous summary of the law's goals by Judge Learned Hand, then writing for the Supreme Court in the *Alcoa* decision:

> "[Beyond the problem of monopoly pricing, the Sherman Act was enacted based on a belief that] possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.... We have been speaking only of the economic reasons which forbid monopoly; but, as we have already implied, there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results.... [A]mong the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them....Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other."[17]

At some level the two schools are talking past each other, or fixated on different problems. The first is suggesting that the consumer welfare standard and associated economic tools are useful, as a means, for detecting truly anticompetitive behavior, but that their usage must be improved. The second school suggests that the problem is not economic but legal – that is, is a failure to defer to the actual intent of Congress, and that it is necessary to recover the original purposes of the laws.

III. HARD QUESTIONS FOR EACH SCHOOL

The hardest question for the first school is this. Can antitrust do everything it was intended to under a consumer welfare standard, or is that standard, as its critics charge, inherently too restrictive and static to faithfully execute the law's intent? The hardest question for the second school is this: what, in practice, would it really mean to move beyond a consumer welfare standard?

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14 See, e.g. Fox, *The Modernization of Antitrust: A New Equilibrium,* 66 Cornell L. Rev. 1140, 1182 (1981) (rejecting the single-purpose consumer welfare position as ahistorical, and arguing that the major historical purposes of the antitrust laws are "(1) dispersion of economic power, (2) freedom and opportunity to compete on the merits, (3) satisfaction of consumers, and (4) protection of the competition process as market governor."); Grandy, *Original Intent and the Sherman Antitrust Act: A Re-Examination of the Consumer- Welfare Hypothesis*, 53 J. Econ. Hist. 359, 373 (1993); Hovenkamp, *Antitrust's Protected Classes,* 88 Mich. L. Rev. 1, 22 (1989); Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged,* 34 Hastings L.J. 65, 91 (1982) [hereinafter Lande, *Wealth Transfers*] ("Congress enacted the Sherman Act largely to prohibit and condemn them. Clearly, the chief economic concern was not productive efficiency; if Congress' main goal was to encourage that form of industrial organization that was, in 1890, most efficient, it would have praised the trusts, not condemned them. Rather, the Sherman Act was intended to insure that consumers obtained their 'fair share' of the benefits of free competition."); Pitofsky, *The Political Content of Antitrust,* supra note 2, at 1060-65 (arguing that legislative history, particularly that of the Clayton Act, undermines arguments that Congress viewed antitrust as a purely economic or efficiency-maximizing enterprise during the Progressive Era).

15 Hovenkamp, *Antitrust's Protected Classes,* 88 Mich. L. Rev. 1, 22 (1989).

16 See, e.g. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398 (2004); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

17 *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429 (2d Cir. 1945) [hereinafter *Alcoa*].

The first question is not trivial. It one assumes that the law did and does have broad goals, the consumer welfare standard, in practice, has proven a narrow lens that suffers from many well-documented infirmities.[18] Despite the often brilliant ability of economists to make consumer welfare arguments, the emphasis on measurable harms to consumers still tends to bias the law toward a focus on static harms and, especially, on prices. Such "price fixation" inevitably tends to marginalize parts of the antitrust law concerned with dynamic harms – harms like the blocking of potential competition, slowing of innovation, loss of quality competition, and overall industry stagnation. Stated differently, price fixation makes it harder to fight exclusionary practices, both unilateral and collusive, even though, as Jonathan Baker argues, exclusion should be the "core competition concern,"[19] and as Wu and Hemphill argue, parallel exclusion may last longer than parallel pricing.[20] In theory, such effects are measurable under a consumer welfare standard, but in practice, and particularly before the judiciary, the importance of demonstrated price effects has weakened the law's ability to deal with some of the most serious anticompetitive harms.

Another critique of the consumer welfare driven antitrust is its indeterminacy. Originally sold as providing greater certainty, the highly abstract nature of "welfare" or "efficiency" means it has not delivered the scientific certitude promised. Moreover, as an economic abstraction, it means that only experts (economists, and the occasional lawyer pretending to be one) can make credible consumer welfare arguments in all but the simplest of cases. That leads to what Spencer Weber Waller and Henry First call "antitrust's democratic deficit."[21] As they charge, it yields "an antitrust system captured by lawyers and economists advancing their own self-referential goals, free of political control and economic accountability."[22] It is hard to deny that, as a general matter, the dominance of the consumer welfare standard has led enforcers to place an emphasis on price-fixing cases or horizontal mergers that can be shown to have clear price effects over more complex, but potentially much more important cases.[23]

Meanwhile, perhaps the greatest challenge facing the the progressive revival of antitrust, is the question indeterminacy. Bork, especially in *The Antitrust Paradox*, described antitrust as incoherent, and offered to eradicate messiness and complex balancing of multiple factors in exchange for a simpler, disciplined and single-pointed theory that promised straightforward answers. Bork, a brilliant litigator, well appreciated the judicial appetite for practicality and administrability. The simple question that Bork posed for every doctrine was this: does it clearly prevent harm to consumers? Have you proven it? Or might there, plausibly, be an economic explanation that doesn't imply harm, and if so, what is it?[24] The challenge for the second school is coming up with some standard of at least roughly similar clarity.

A. After Consumer Welfare

In the progressive revivalist school, there are a few reactions to this critique. Some believe an antitrust with multiple objectives – as described by Learned Hand – is worthy and appropriate, and that the judiciary's very role is the balancing of multiple competing values, otherwise known as exercising judgment. By this view, Chicago School antitrust has simply given the judiciary an excuse not to do their jobs. In the 1960s, in direct response to Bork's 1966 proposal for an exclusive object for antitrust ("consumer welfare") Columbia professors Harlan M. Blake and William K. Jones commented that "Trying to measure a three-dimensional world with a one-dimensional yardstick must be terribly frustrating."[25] Others

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18 Hovenkamp, The Antitrust Enterprise 35-36 (2005) (noting that the Chicago School's conceptions of efficiency, which underlie the consumer welfare paradigm, stand on oversimplified understandings of market dynamics and individual economic behavior); Fox, *The Modernization of Antitrust: A New Equilibrium*, supra note 14, at 1173-174 (the pure consumer welfare approach "fails to reflect producers' potential to achieve lower costs or to deliver the new, the imaginative, and the yet unconceived. It fails to consider opportunities for reversing an anticompetitive trend or for inviting untested competition at the margins. It fails to capture individuality of producers and consumers or to grasp the dynamic qualities of an open enterprise system."); Lemley, *Industry-Specific Antitrust Policy for Innovation,* 2011 Colum. Bus. L. Rev. 637, 637-38 (2011 Milton Handler Lecture) ("We benefit from market competition in existing products, but we benefit far more from the development of new products. . . . IP is more important [than the current static efficiency-maximization function of antitrust] because it stands for dynamic efficiency, which is simply more important to our society than static efficiency.").

19 Baker, *Exclusion as a Core Competition Concern,* 78 Antitrust L.J. 527 (2013).

20 Hemphill & Wu, *Parallel Exclusion,* 122 Yale L.J. 1182, 1222 (2013).

21 First & Weber Waller, Antitrust's Democracy Deficit, 81 Fordham L. Rev. 2543 (2013). Available at: http://ir.lawnet.fordham.edu/flr/vol81/iss5/13.

22 Id. at 2544; see also K. Sabeel Rahman, *Democracy Against Domination,* (2016).

23 *Alcoa,* 148 F.2d at 429.

24 See generally Bork, The Antitrust Paradox, supra note 12.

25 Blake & Jones, *Toward a Three-Dimensional Antitrust Policy,* 65 Colum. L. Rev. 422, 422 (1965).

have seen embracing multiple goals as faithful to what Congress asked the courts and executive branch to do.[26] Even a brief look at the Congressional record surrounding the Sherman or Clayton Acts reveals a variety of intentions, not all of which are necessarily consistent. As antitrust has spread overseas, other nations have tended to also highlight a multiplicity of goals. For example, when the International Competition Network first surveyed its members to identify what they viewed as the goals of antitrust, some of the answers included "Ensuring an effective competitive process;" "Promoting consumer welfare;" "Enhancing efficiency;" "Ensuring economic freedom;" "Ensuring a level playing field for small and mid-sized enterprises;" "Promoting fairness and equality" and others.[27]

It is true that the original arguments against antitrust's multiple goals have not aged well. Robert Bork charged that judges like Learned Hand had assigned an illegitimate "value-choosing role to the federal judiciary."[28] Yet choosing one value to maximize (a narrow conception of consumer welfare) is an even more extreme version of "value-choosing," and one that, moreover, elevates the judiciary over Congress. A fair reading of Congressional intent, it all of its contradictions, makes it hard to dispute that judges like Learned Hand were more faithful to the Sherman Act's mixture of goals.

Nonetheless, we live in an age where we seem to need the goal of any statute, or seemingly of any human endeavor, to be single-pointed.[29] If an antitrust with multiple goals might be more historically accurate and more faithful to congressional intent, the courts and the institutions of antitrust have clearly developed an appetite — even a need — for there to be a unifying purpose for the antitrust law.[30] As such the strongest argument in favor of single or simple standards is administrative and even managerial. The combined bar and judiciary is large; law is practical, and various standards can be hard for litigants and some courts to manage.

A single-pointed goal also does have value for enforcers. Antitrust investigations are challenging and intense, and it is important to have a sense of priorities or goals to guide the mission. But as stated previously consumer welfare, while a single goal, is not an ideal guide for enforcers, given that it is so abstract and unmeasurable in practice. The standard does have an appeal to economists, but that does not seem a good enough reason to support its continued usage; and in any event, the skills of the economist will be needed under any chosen standard.

B. Preservation of Competition

Some have begun to argue that the "preservation of competition" should be re-recognized as the "end" of antitrust. Even some members of the judiciary have so stated. Without much fanfare, Justice Stephen Breyer, in condemning so-called "pay for delay" settlements in the pharmaceutical industry, did so based on the "potential for genuine adverse effects on competition."[31] Richard Posner writes that "The purpose of antitrust law, at least as articulated in the modern cases, is to protect the competitive process as a means of promoting economic efficiency."[32]

As a legal matter, the "protection of competition" standard has the advantage of much greater support from congressional intent and earlier precedent. It is a challenging, even absurd exercise, to pick a modern economic standard out of the language of the Sherman, Clayton, or Anti-Merger Acts or their legislative histories. The idea that Congress was concerned with "allocative efficiency" in 1890 or even 1914 or

26 See, e.g. Pitofsky, *The Political Content of Antitrust,* supra note 2; Schwartz, "Justice" and Other Non-Economic Goals of Antitrust, 127 U. Pa. L. Rev. 1076 (1979).

27 Int'l Competition Network, Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies 90 (2007).

28 Bork, *Legislative Intent and the Policy of the Sherman Act,* supra note 12, at 10.

29 This is a feature of our times that later historians may understand better than we do.

30 In another oddity, it is also sometimes assumed that the various statutes need share a similar goal, when Congress could easily have intended one set of goals for the Sherman Act, another the Clayton Act, and so on.

31 *FTC v. Actavis, Inc.*, 570 U.S. 136, 153 (2013) (*citing FTC v. Indiana Fed'n of Dentists,* 476 U.S. 447, 460 (1986)).

32 *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1437 (7th Cir. 1986).

1950 is an economic version of anthropomorphism.[33] In contrast, it is no great stretch to say that Congress was interested in the preservation of competition. The Congressional Record does not contain the words "allocative efficiency," "consumer welfare" or "wealth transfer" but it does repeatedly discuss the choice between competition and monopoly. Here, as just one typical example, is Representative Dick Thompson in 1914: "the one thing we wish to maintain, and retain and sustain, is competition. We want to destroy monopoly and restore and maintain competition."[34]

These considerations suggest a return to the "protection of competition" as the recognized goal of American antitrust law. It is a return, for, as Barak Orbach makes clear, protection of competition was, from the 1890s through 1970s, the accepted and restated goal of the antitrust laws.[35] The point was repeated over the decades: In 1904 the Supreme Court said in *N. Sec. Co. v. United States* that the Sherman Act "has prescribed the rule of free competition among those engaged in . . . commerce."[36] In the 50s, it stated in *Standard Oil Co. v. FTC*, "The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.'"[37] And in 1978, the Court observed that "Congress . . . sought to establish a regime of competition as the fundamental principle governing commerce in this country."[38] In short, to use the "protection of competition" standard is not to break new ground but to return to previous practice.

C. Protection of the Competition in Practice

This leads us, finally, to our question: is "protection of competition" or "protection of the competitive process" too indeterminate a standard? I think the answer is "no," because it draws on tests already in use in antitrust law and practice. Nonetheless, I think that its development will require much further work and practice to arrive at practicable standards. Indeed, this short writing surely does not represent the author's final thoughts on the matter. What I describe here is a beginning of what I think is an important and indeed essential project for the future of the law.

In nearly any antitrust case, I suggest the law should focus on one question: is the complained-of conduct (or merger) merely part of the competitive process, or is it meant to "suppress or even destroy competition?"[39]

This is a test primarily focused on protection of a *process*, more specifically, which is different than the maximization of a *value.* It is based on the premise that the legal system often does better trying to protect a process than the far more ambitious goal of maximizing an abstract value like welfare or wealth. The former asks the legal system to eliminate subversions and abuses; the latter, in contrast inevitably demands some exercise in social planning, and ascertaining values that can be exceeding difficult, if not impossible, to measure.

We might analogize the economy to a complex competitive sport, like American football, with rules set by custom and the legal system. It would be very different to ask the referees to enforce the rules in an effort to maximize "fan welfare," as opposed to telling them to protect the process of competitive from any gross distortions or subversions. The former creates a near-impossible undertaking – who can measure fan welfare? – in which a failing to calls fouls (false negative) would seem inevitable. The latter objective puts the referees in the more realistic position of penalizing what seem like deviations and abuses that threaten to ruin the game, by providing an end-run around competition on the merits. I think its more realistic to ask enforcers and judges to act like referees, calling out fouls and penalties, with the goal of ultimately protecting the quality of play, which in this case means an economy that does not allow size, market power, or anticompetitive agreements to be used as weapons, and instead seeks to reward the firms with better products.

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33 Lande, *Wealth Transfers,* supra note 14, at 109 (stating that the argument that consumer welfare maximization was the purpose of the Sherman Act "is not supported by the record. Familiarity with allocative efficiency did not increase substantially from 1890 to 1914, even among economists, who had little influence on the passage of the Act, much less among legislators. No mention of any concept resembling allocative efficiency appears in the legislative history of the FTC Act.").

34 Rep. Dick Thompson Morgan, 51 Cong. Rec. 9265 (1914).

35 Orbach, *How Antitrust Lost Its Goal,* supra note 11.

36 *N. Sec. Co. v. United States,* 193 U.S. 197, 331 (1904).

37 *Standard Oil Co. v. FTC,* 340 U.S. 231, 248 (1951).

38 *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 398-399 (1978).

39 *Chicago Board of Trade v. United States,* 246 U.S. 231, 238 (1918).

At its best, protection of competition can and should draw on more than a century of economics that have sought to better understand how markets actually work in practice, as opposed to in theory. That means understanding that the competitive process includes both competition on quality and price, that it can be disrupted by market entry and the development of new technologies (yielding firms that may compete for instead of in the market), and that competition can be suppressed or impaired by collusion, by barriers to competition or entry, by the raising of rivals costs, and myriad other means. To repeat the point, what the law need do is separate fair and foul – allow competitive but deter and penalize undue suppression, distortion or subversion of that process. That includes suppression by very familiar means: conduct designed to negate price or quality competition, or designed to block or exclude challengers, which can be collusive or unilateral, and exclusionary or related to price or quality.

The protection of competition also calls for a more realistic assessment of firms at different stages of their life cycle. The Sherman Act did not take all firms as equal, but was premised on the concern that that monopolies and mergers to monopoly tended to suppress the competitive process. The law should also recognize that there are such things as long-standing incumbents, that is, firms that have held considerable market share for some time, as well as entrants, challengers and mavericks, firms that are either new to the market, or in some way attempting to gain market share. There are long-standing oligopolies who may want to exclude outsider. Firms can be in ascendance or on the decline and that this may influence their incentives and the goals of their mergers. To be sure, identity isn't destiny, and not all new firms are innovative, nor are all monopolists or incumbents committed to the protection of their empires. However, we have more than a century of observed tendencies, and it is not unreasonable to suspect that a long-standing monopolist with outdated technology facing a challenge from an innovative competitor may, in fact, have the incentive to try and exclude the challenger. Hence the particular scrutiny of monopolies and those with market power.

The main advantage of a "protection of competition" standard is that, unlike threats to "consumer welfare," potential threats to the competitive process are far more obvious: it is the allegation that a powerful or unethical firm is seeking to disable the process of competition on the merits. Such episodes do not go unnoticed, and indeed are already what spark the interest of enforcers when such conduct is complained of.

There is classic complaint about the protection of competition goal: that it can become protectionism, protecting the inefficient against the efficient. This is captured in often misused slogan that "antitrust is meant to protection competition, not competitors." Before going further, it should first be admitted that Congress is actually free to protect any class of firms if it wants to – for slogans, even if popular among antitrust lawyers, do not actually have the status of Constitutional law. But I want to face the argument on its merits. I think the charge of protectionism actually displays a lack of faith in the competitive process. If the antitrust law serves to eliminate distortions in competition, then, in theory, the firms with better quality goods and cheaper prices will win out. But that must be distinguished from the Chicago school's bad habit of finding any conceivable efficiency in an anti-competitive practice and pronouncing it part of the competitive process. The problem with the protectionism argument is that it can be wrongly used to describe situations where lack of antitrust enforcement is what is actually protecting the competitor – namely, the incumbent, who is actually weak, but is able to keep competitors at bay using means that should, in fact, be condemned. For at bottom, removing bottlenecks and subversions of competition does not afford protection for the weak, but exposing those whose weakness is disguised by the building of barriers to disguise that fact.

IV. FRAMEWORK OF ANALYSIS

Here is an example of the considerations that ought to be used by an enforcer whose aim is the protection of the competitive process. Leaving aside price-fixing cases (where consumers truly are the victims), antitrust complaints usually involve one party (the aggressor) seeking to inflict some economic damage to another party, or set of parties. That, of course, can be a legitimate part of market competition, much as inflicting blows is part of boxing. Yet it nonetheless remains the enforcers' task to distinguish between strategies and attacks that represent the competitive process (actual blows), as opposed to its subversion (low blows). Hence the basic question is whether the complained-of conduct is competition on the merits, or, rather, an effort to disable or subvert the competitive process? That is, I think, the question that should be front of mind for law enforcement, and ultimately, over time, begin to inform the substantive judicial tests, including the rule of reason, the tests surrounding Section 2 of the Sherman Act, and even, to some degree, merger review.

Given some complained-of conduct, the enforcer should ask the following questions:

1. Who is the complainant? An incumbent or a challenger? An entrant with at least a putatively better product, a price-cutting maverick, or an incumbent facing decline and possible displacement?

2. Who is the alleged lawbreaker? An entrant, or a long-standing monopolist, an incumbent who has been losing market share? Does the firm appear to have sufficient market power to actually affect the process of competition?

3. What is the complained-of conduct? It is competition on the merits (i.e. a better or cheaper product) or a potentially illegitimate methods (sabotage, exclusionary deals, tying, predation, manipulation of a standards process, and so on). It is here that any procompetitive justification for the conduct is considered.

4. Is there some evidence of distortion or suppression of the competitive process — anticompetitive effects, exclusion, or the raising of rivals' costs — as defined by competition on the basis of price and quality? It is here that potential harm to consumer welfare might be considered, but it is ultimately suppression of competition that is the concern.

5. Does the complained-of conduct or merger tend to implicate important non-economic values, particularly political values? Might it tend to preserve a long-standing, politically influential oligopoly, or preserve the position of a longstanding monopolist insulated from competition by the power of the state?

This kind of analysis attempts to capture far more of the dynamics of the competitive process then does existing analyses, and also implicate political considerations as well. And as I've suggested, this manner of thinking is not actually really new to contemporary antitrust analysis. It is reflected, for example, in Section 2's jurisprudence of exclusionary conduct versus "procompetitive justifications" in opinions like *Microsoft*.[40] Echoes of a similar concern with the competitive process can also be found in the concern with the elimination of "mavericks" that is a feature of merger analysis.[41]

This manner of thinking also reverts to the original versions of the rule of reason which were more clearly concerned with the competitive process. In *Chicago Board of Trade*, Justice Brandeis' primary concern was whether the restraint in question was something designed to promote the process of competition, or whether it was meant to suppress or even destroy competition.[42] As he wrote, "[t]he true test of legality is whether the restraint imposed is such as merely regulates, and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition… The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."[43] Only in later years did the test morph into a supposed balancing test of harms and benefits, a balancing which, in practice, is almost never performed anyhow,[44] given the difficulty of actually measuring matters like market power and market harms.

Here is where the process-driven approach is really different from a consumer welfare standard. The former differs in the sense that it is not ultimately tied to arguments about whether, in the final analysis, consumer welfare has been served or not.

40 *U.S. v. Microsoft,* 253 F.3d 34 (D.C. Cir. 2001).

41 U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 2.1.5 (2010).

42 *Chicago Board of Trade v. United States,* 246 U.S. 231, 238 (1918).

43 Id.

44 See Baye & Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & Econ. 1 (2011) (presenting an empirical analysis of the effect of antitrust cases' complexity on appeal rate, and concluding that district judges lack the economic understanding necessary to evaluate evidence bearing on the consumer welfare effects of a practice or merger). See also Stucke, *Reconsidering Antitrust's Goals;* 53 B.C. L. Rev. 551 (2012) ("There is no empirical evidence that courts and antitrust enforcers systematically optimize efficiency across industries through the vague rule-of-reason standard.").