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A Post-Chicago Debate: Is Protecting the Competitive Process Antitrust's Overarching Goal?

BY WARREN GRIMES

AMONG POST-CHICAGO SCHOLARS, there is disagreement about the central goal of antitrust. One group holds to protection of the competitive process as the central goal of antitrust policy. A second group continues to urge that consumer welfare goals are at the core of antitrust. The second group often defines consumer welfare goals broadly to include protection of all players in the distribution system, preventing abusive wealth transfer, preserving choice and quality, and valuing innovation. There is little difference in how the two groups would decide cases. Both stand against narrow interpretations of antitrust favored by Chicago analysts.

There are compelling reasons why antitrust should push aside the consumer welfare rhetoric in favor of protecting the competitive process. Competition is a dynamic process involving players at all levels of the distribution process and players in adjacent markets as well. The focus of consumer welfare leads to an unfortunate focus on consumers at one end of the process. That rhetoric is misleading and inappropriate for antitrust policy that, for more than a century, has protected exploited consumers, input providers, and entrepreneurs at all levels of distribution.

Discussion of the central purpose of the Sherman Act begins with the Act's wording. Congress intentionally chose general language for key terms, enabling courts to pursue common law development. Whatever direction legal and economic analysis may take, antitrust policy cannot totally ignore the underlying statutory mandate. In 1890, Congress used sweeping words—restraint of trade and monopolize—to proscribe conduct deemed harmful to competition. There was nothing in these core Sherman Act provisions to suggest that consumers would be favored over farmers, workers, or small businesses. Subsequently, Congress chose variants of the word "compete" in key provisions of the Clayton and Federal Trade Commission Acts. Over the past century, the Supreme Court has largely honored this statutory anchor. The Court has said, for example, that the Sherman Act "protects competition, not competitors."[1]

Writing in 1965, Carl Kaysen and Donald Turner identified a number of purposes of antitrust law, but selected protection of the competitive process as the most salient.[2] In Europe, the goal of protecting the competitive process also has venerable roots.[3] Surveying multiple antitrust goals linked to such a standard, in his 1978 book, Robert Bork proposed a sharp turn to delimit the reach of antitrust—a sole focus on what Bork described as "consumer welfare."[4] That turn had enormous influence. It succeeded in limiting the reach of antitrust but, in the process, created much mischief.

Bork's consumer welfare standard turned out to be confusing and deceptive in a number of ways. It did not genuinely protect the welfare of consumers. The Bork standard was focused on output and, hence, unless there was a related output loss, would not directly protect consumers from wealth transfer loss. The value of consumer choice among products and services also went unrecognized. And innovation was at best awkwardly included in Bork's static analysis of output measures. Finally, the use of the word "consumer" did not fit with traditional antitrust case law that protected small sellers from buyer power abuse and the many intermediate players in the distribution chain from anticompetitive conduct targeting them.

Bork's approach was quickly attacked by post-Chicago scholars, who argued that wealth transfer loss, not output loss, was central to the Sherman Act's purpose.[5] Additional scholarship challenged Bork's failure to deal with consumer choice and quality.[6] A great deal of post-Chicago scholarship was defensive in nature, accepting Bork's consumer welfare terminology but arguing that most traditional antitrust abuses directly or indirectly harmed consumers. Thus,

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prominent scholars argued that buyer power abuses were proper enforcement targets because in all or most cases, these abuses also harm consumers.[7]

Over the next four decades, antitrust scholarship moved well past Bork's narrow vision. During the Trump administration, Assistant Attorney General Makan Delrahim argued in favor of a consumer welfare standard, crediting Bork with this standard,[8] but broadened it beyond anything that Bork had envisioned. Accepting post-Chicago insight, the Delrahim definition of consumer welfare directly embraced choice, quality, and innovation among the supplementary goals of antitrust.[9]

Today, support for the narrow Bork standard has dissipated. Many post-Chicago scholars, however, cling to the consumer welfare terminology as a tool for dealing with possible conflicts between the interests of consumers and upstream players.[10] This view, however, has lost ground to advocates for a return to a competitive process standard that applies equally to all players in the competitive system, whether they be input suppliers, intermediate players in distribution, or end consumers.[11] There is nothing in the Sherman Act that suggests that consumers are more important than other players in our economic system. Farmers, fishermen, laborers, small businesses, large or small manufacturers, and all intermediate players in the distribution system are disciplined by competition, and should be protected by competition, to the same degree as consumers. Indeed, the distinction between consumers and other players in the economic system is blurred since any input supplier must both buy products to consume and sell products in order to run the business. Other uncertainties are generated when firms or individuals engage in barter transactions. In *NCAA v. Alston*, the Supreme Court treated monopsony affecting student athletes in a comparable fashion to monopoly affecting consumers (equating monopsony's suppressed input and prices to monopoly's suppressed output and higher prices).[12]

There are two notable objections to the competitive process standard. The first is that it might inadequately delimit antitrust, leading to false positives and frivolous litigation against an efficiently competitive firm. But a return to a pre-Borkian world is exceedingly unlikely. Both before and after Chicago, the precedent system has offered the primary tool for limiting antitrust and constraining change to the incremental.

In the years since Bork's 1978 book, antitrust has adopted or reinforced requirements that an antitrust plaintiff establish standing and antitrust injury. Contractual limitations on class actions or class arbitration have further limited small business access to antitrust remedies.[13] Substantive antitrust requirements have also increased the burden on plaintiffs as the per se rule has been eliminated in vertical restraints claims and exceptions have been recognized for formerly per se unlawful horizontal conduct.[14] Other traditional claims, such as predatory pricing or price squeeze actions, have been narrowed or eliminated.[15] Antitrust litigation has become far more expensive and difficult to pursue, as the cost of obtaining expert economic analysis is now a prohibitive hurdle for small antitrust plaintiffs. Current procedural and substantive burdens have, in the view of most post-Chicago scholars, substantially undermined antitrust enforcement, making false negatives a greater concern than false positives.

Restoring the competitive process standard could bring clarity and greater simplicity to competitive analysis. Instead of requiring complex economic testimony that links every classic antitrust abuse to harm to consumers, litigation could focus on a process question—was the competitive process distorted by power abuse? This approach is a sound step toward making antitrust for both judges and litigants simpler to understand and apply.[16] Chicago has fostered a healthy reliance on economic analysis to aid in understanding when a power-based abuse has occurred. The consumer welfare standard, in either its narrow or extended application, offers less clarity and simplicity of analysis when all conduct must be forced into a consumer centric pigeon hole. Instead, it invites visions of Ptolemaic astronomers who, believing the earth was the center of the universe, drew complex and convoluted charts of the movement of the planets and stars in earth-centric patterns. Consumers are a critical part of antitrust values, but neither they nor other distribution players are the center of the dynamic competition universe.

This leads to a second concern: whether a competitive process standard can resolve potential conflicts between consumers and other participants in the distribution system. If consumers are the center of the antitrust universe, all potential conflicts could theoretically be resolved simply by assessing the net consumer impact of conduct, no matter where it occurs in the distribution chain. Thus, conduct abusive to input suppliers such as farmers, ranchers, or laborers might be excused if, on balance, it resulted in lower prices for consumers

Competition is a dynamic process affecting players up and down the distribution chain. Some distortions in competition target small input suppliers or laborers. Others target mid-level participants in the distribution chain. These players are entitled to protection from competitive distortions just as much as consumers. Competition supports efficient and undistorted allocation of available resources at all levels, but guarantees neither low prices for consumers nor high prices for input suppliers.

Using the net impact on consumers as a conflict resolver can be easily reduced to absurd and socially unacceptable results. The approach reflects a value judgment, nowhere found in the text of the Sherman Act, that the welfare of consumers is somehow more important than the welfare of a nurse, a farmer, or a fisherman. In *NCAA v. Alston*, the Court declined to decide whether conduct beneficial to consumers could override anticompetitive effects on student athletes.[17] In over a century of case law, however, the courts have decided buyer power cases without looking to

effects on consumers.[18] More recent cases involving hospital non-compete clauses in the hiring of nurses or other medical personnel have also been decided without any requirement that the plaintiff demonstrate a net harm to consumers.[19]

Meanwhile, overlooking a century plus of case law, the Supreme Court has recently invoked the primacy of consumer injury as an excuse for allowing a credit card firm to prohibit merchants from steering customers to lower cost credit cards.[20] The Court's decision has generated a flurry of criticism.[21] The holding stands as a warning that an obsession with consumer injury can distort and undermine Sherman Act values and the competitive process that it was designed to protect.

Returning to a competitive process standard is not a panacea for antitrust. It will not smoothly resolve every conflict. The language and approach of consumer welfare will continue to be used by litigants and judges. Indeed, a showing that a monopolist is abusing consumers by limiting output and raising price will always be relevant for antitrust.

A competitive process standard, as the overarching antitrust goal, is nonetheless critical for antitrust to begin the process of disentanglement from rigid consumer welfare language. It offers a focus on process—not on results for particular parties. It can simplify antitrust analysis and lower litigation costs. It offers the hope of restoring a balance in which false positives and false negatives may still occur, but with an equitable balance of unlikelihood. ■

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1 Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962). *See* Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 Antitrust L.J. 713, 726–43 (2014) (reviewing cases in which the Court has viewed antitrust as a protector of competition or the competitive process).

2 Carl Kaysen & Donald F. Turner, Antitrust Policy: An Economic and Legal Analysis 44–45 (1965) (postulating that there are four general goals for antitrust policy but selecting the protection of competitive processes as the most desirable goal and further explaining that protecting the competitive processes could best be achieved through restraints on market power except when such restraints were "incompatible with efficiency and progressiveness.").

3 Warren Grimes, *Adam Smith, the Competitive Process, and the Flawed Consumer Welfare Standard*, 69 GRUR Int'l, vol. 69, No. 1 (Jan. 2020) (describing the evolution of the competitive process standard in the U.S. and Europe).

4 Robert Bork, The Antitrust Paradox (1978).

5 Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L.J. 65 (1982).

6 Robert H. Lande & Neil W. Averitt, *Using the 'Consumer Choice' Approach to Antitrust Law*, 74 Antitrust L.J. 175 (2007).

7 Roger G. Noll, "*Buyer Power" and Economic Policy,* 72 Antitrust L.J. 589 (2005)(concluding that buyer power abuses would also harm consumers); Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 Indiana L.J. 1031, 1063 (2019) (concluding that the consumer welfare standard focused on monopolistic reductions in output is well suited to address buyer power abuses). Other scholars continued to use consumer welfare rhetoric, but read the words "consumer welfare" to include the welfare of input providers, favoring a symmetric welfare standard. John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 Fordham L. Rev. 2425, 2429 (2013) (in the case of buyer power abuses, the welfare that matters is the welfare of suppliers); Robert H. Lande, *supra* note 5, at 105 ("All purchasers, whether consumers or businesses, were given the right to purchase competitively priced goods. All sellers were given the right to face rivals selling at competitive prices.")

8 Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dept. of Justice, Remarks at the The Federalist Society Conference Celebrating the 40th Anniversary of The Honorable Robert Bork's The Antitrust Paradox*:* Antitrust 40 Years After the Paradox: No Longer "A Policy at War with Itself" (June 22, 2018).

9 Makan Delrahim, Assistant Att'y Gen., Antitrust Div. of the U.S. Dept. of Justice, Remarks at the Jevons Colloquium in Rome: All Roads Lead to Rome: Enforcing the Consumer Welfare Standard in Digital Media Markets, 13–16 (May 22, 2018). Although allocating subsidiary status to these factors, Delrahim acknowledged that the Supreme Court and other courts have recognized that "innovation, consumer choice, and product quality constitute competitive effects that merit consideration in an antitrust analysis."

10 *See supra* note 7 (citing sources).

11 Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 Cornell L. Rev. 1140, 1167 (1981); Barak Orbach, *The Consumer Welfare Controversy*, Antitrust Chron. 23, 29 (Nov. 2019); Tim Wu, *After Consumer Welfare, Now What? The 'Protection of Competition" Standard in Practice*, Competition Pol'y Int'l (2018); C. Scott Hemphill & Nancy L. Rose, *Mergers That Harm Sellers*, 127 Yale L. Rev. 2078, 2093–05 (2018) (describing a trading partner welfare standard). For a summary of where post-Chicago scholars stand on the competitive process standard, see Warren Grimes, *Breaking Out of Consumer Welfare Jail: Addressing the Supreme Court's Failure to Address the Competitive Process*, 15 Rutgers Bus. L. Rev. 49 (2020), revisions and addendum available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3711097.

12 Nat'l Collegiate Athletic Ass'n v. Alston, slip op. at 14 (June 21, 2021) (No. 20-512), https://www.supremecourt.gov/opinions/20pdf/20-512_gfbh.pdf.

13 Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).

14 See, *e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2008); State Oil Co. v. Khan, 522 U.S. 3 (1997); Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979).

15 Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438 (2010); Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

16 Wu, *supra* note 11 (expressing a similar view).

17 *Id*. at 14–15.

18 *See, e.g.*, United States v. Griffith, 334 U.S. 100 (1948) (defendant theater chain used monopsony power over distributors to suppress competition with rival theaters); Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219 (1948) (buying cartel that sought to suppress the price paid for sugar beets); Standard Oil Co. v. United States, 221 U.S. 1 (1911) (Standard Oil used monopsony power over railroads to dictate the terms on which railroads dealt with oil company rivals); Swift & Co v. United States, 196 U.S. 375 (1905) (buying cartel by meat processors).

19 For a survey of the case law, see Iona Elena Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?* 105 Cornell L. Rev. 1343, 1362–74 (2020).

20 Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018) (Using a consumer centric standard, the Court explained that plaintiffs could show direct proof of anticompetitive effects, which could include "reduced output, increased prices, or decreased quality in the relevant market").

21 John B. Kirkwood, *Antitrust and Two-Sided Platforms: The Failure of* American Express, 41 Cardozo L. Rev. 1805, 1851 (2020) (describing the benefits to competition from steering); Herbert Hovenkamp, *Platforms and the Rule of Reason, The* American Express *Case*, 2019 Colum. Bus. L. Rev. 35, 44 ("'Steering' is fundamental to competition of any kind.").