Consumer Welfare and the Legacy of Robert Bork

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Abstract

Writing 35 years ago in *The Antitrust Paradox,* Robert Bork observed, "Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals?" Bork proposed what he called a consumer-welfare standard, though it is what we today call a total-welfare standard. Interestingly, many of the arguments Bork offered in defense of the latter apply also to the former. Bork defended his proposed standard less on the support that it finds in economics and more on his reading of legislative intent. Although Bork's antitrust analysis drew largely on basic microeconomic theory, he believed that economists and courts were incapable of estimating competitive effects. He therefore favored bright-line rules for, particularly, proposed mergers. Whatever else one thinks of Bork, on the critical question of antitrust's fundamental purpose, his views have in large measure prevailed.

1. Introduction

Writing in 1978, Robert Bork famously stated in his classic treatise *The Antitrust Paradox,* "Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give. Is the antitrust judge to be guided by one value or by several? If by several, how is he to decide cases where a conflict in values arises? Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules" (Bork 1978, p. 50). He went on to bemoan the fact that "[d]espite the obtrusive importance of this issue, the federal courts in over eighty years have never settled for long upon a definitive statement of the law's goals. Today the courts seem as far as ever from the necessary clarity of purpose" (Bork 1978, p. 50).

Bork's writings, particularly his rigorous and compelling collection of arguments for making protection of consumer welfare the sole and proper guide for antitrust policy, sought to provide antitrust with that missing "clarity of purpose."

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His efforts to do so greatly influenced a generation of antitrust scholars and practitioners and have played a central role in the practice of antitrust to this day.

Bork's use of the term "consumer welfare" is unfortunate and confusing in this context. It is clear, as will be demonstrated below, that by consumer welfare Bork meant total welfare, which is the same as economic efficiency. To avoid confusion, I use the term "total welfare" to mean just that: total welfare (equivalent to consumer plus producer surplus and economic efficiency). I use the term "consumer welfare" to mean just that: consumer welfare (equivalent to consumer surplus). Note that the consumer may well be (and often is in antitrust analysis) an intermediate-good producer as opposed to a final consumer (for a discussion, see Heyer 2006).

It has now been 35 years since *The Antitrust Paradox* was published. And antitrust in the post-Bork world continues to struggle with an almost embarrassingly large share of difficulties and controversies—particularly in the area of single-firm conduct. That said, on the critical question of antitrust's fundamental purpose, it cannot be denied that the views expressed and advocated by Bork have in large measure prevailed.

There is some irony in this, since Bork in *The Antitrust Paradox* expressed very serious doubts that antitrust policy would ever evolve along the lines that he advocated. On this issue, however, he was wrong. Indeed, within just a few short years of its publication, antitrust policy had begun to evolve dramatically in the direction that *The Antitrust Paradox* had urged but that its author had failed to predict.[1]

Viewing the antitrust landscape today, it can be difficult to appreciate just how enormous a change has been wrought since Bork wrote in the 1970s. At that time, antitrust policy was still based on criteria such as the protection of small-business owners, and projected efficiencies were used as a reason for disapproving mergers rather than for permitting them (see Judge William O. Douglas's opinion for the Supreme Court in *Federal Trade Commission v. Proctor & Gamble,* 386 U.S. 568 [1967]). We have come quite a long way.

Bork was not the first to propose a total-welfare standard. He was, however, its most influential advocate. As applied to merger policy, the idea goes back at least to Oliver Williamson's (1968) famous article "Economies as an Antitrust Defense: The Welfare Tradeoffs." In that article, and subsequently in a series of back-and-forth exchanges with his critics, Williamson offered a controversial, and at the time quite novel, proposal that antitrust policy incorporate an efficiencies defense.

Bork featured Williamson's iconic welfare trade-off diagram prominently in *The Antitrust Paradox,* and he used it as a tool for explaining and defending a consumer-welfare standard—not only with respect to merger analysis but also with respect to antitrust in general.

[1] In an introduction to *The Antitrust Paradox*'s reissuance in 1993 (fittingly entitled "The Passing of the Crisis"), Bork was pleased to admit that the skepticism he had displayed in 1978 had not been borne out by events (Bork 1993).

Bork did not employ highly technical analysis. He was, however, an exceptionally clear and forceful writer, one whose writings took care to address explicitly the most commonly raised alternative arguments and interpretations. Whether one agreed with him or not, his work could not readily be dismissed by serious analysts and practitioners.

Bork's arguments were also infused with the utmost confidence of their author. All of this, combined with Bork's considerable intellect and direction of purpose, helped to make him an especially effective and influential proponent of a consumer-welfare standard for antitrust.

2. Legislative Intent and the Rule of Law

Bork was a lawyer and a constitutional scholar devoted to strict constructionism. In antitrust, as in other areas of jurisprudence, he was a strong opponent of judge-made law. Although Bork surely viewed a consumer-welfare standard as desirable on the basis of its positive effects on the economy, his primary reasons for advocating it rested on an interpretation of legislative intent along with the benefits of such a standard in providing clear guidance to the courts.

The language of antitrust's primary statute, the Sherman Act, is remarkably brief. Neither it nor the Clayton Act (which deals in considerable part with mergers) explicitly describes any workable standard, much less a consumer-welfare one. Moreover, the most significant language in the Sherman Act—that which makes illegal "every combination in restraint of trade"—is itself confusing and not without controversy.

The Sherman Act, it is now agreed, does not really evidence congressional intent that every elimination of actual or potential rivalry should be illegal. Such an interpretation would, as Bork explains, prohibit virtually every partnership or merger and wreak complete havoc on the economy besides. This was not, as early courts concluded and for reasons Bork describes, what the 1890 Congress really had in mind. What then did Congress have in mind?

This is not the place to revisit the entire body of evidence cited by Bork in support of his argument that Congress intended a consumer-welfare standard. And, it should be noted, his views on congressional intent have not gone unchallenged (Lande 1982, 1999). It is, however, useful to describe very briefly the logic and line of argument employed by Bork in reaching and defending his conclusions, if only to help us appreciate more fully why his advocacy was so influential.

In drawing inferences regarding congressional intent, Bork points to several "major structural features" that in his view Congress clearly did intend to build into antitrust law. He seeks to show that these features are far more consistent with a consumer-welfare standard than with competing alternatives.

Among the structural features cited by Bork are the per se rule against cartels, the distinction between cartels and mergers, and the distinction between mergers and internal growth. "The Congress that enacted the Sherman Act," Bork (1978, p. 66) states, "intended to make naked price-fixing agreements illegal per se, and the courts from the beginning have, with only occasional aberrations, faithfully adhered to that policy." A per se prohibition for naked agreements not to compete, he points out, admits to no defenses. In particular, judges are foreclosed from considering other factors such as the appeal of a shorter workday, hardships imposed on small businesses, or income distribution consequences. "The only value that the per se rule implements is consumer welfare, since it necessarily implies a legislative decision that business units should prosper or decline, live or die, according to their abilities to meet the desires of consumers" (Bork 1978, p. 67). As to congressional policy toward mergers, Bork notes that mergers eliminate rivalry between the participating firms much more effectively than do cartels. And yet neither under the Sherman Act nor under the Clayton Act did Congress ever intend to outlaw all such combinations. The disparity, Bork argues, is explainable in terms of, and only in terms of, a policy of consumer welfare. "The sole difference between these two forms of the elimination of rivalry," he argues, "is that mergers may lead to new efficiencies while cartels, which do not integrate the productive activities of their participants, have no or at best insignificant efficiency-creating potentials" (Bork 1978, p. 67).

As a final example, consider Bork's discussion of the distinction made between mergers and internal growth. Both in enacting the Sherman Act and, later, in amending section 7 of the Clayton Act, Congress "made it clear that merger to monopoly position was to be illegal but that growth to the same size, based upon superior efficiency, would be lawful" (Bork 1978, p. 67). This disparity, Bork observes, can also be explained on the basis of differing presumptions about the presence of efficiency. Merger to a monopolistic position can be motivated by the anticipation of greater market power, while internal growth to the same size demonstrates the presence of superior efficiency. "The premium thus placed upon efficiency, here as elsewhere in the structural features of the law, can rest only upon a consumer welfare policy" (Bork 1978, p. 68).

Bork argues for a consumer-welfare standard not only from evidence of legislative intent but also on grounds that such a standard "makes the law effective in achieving its goals, renders the law internally consistent, and makes for ease of judicial administration" (Bork 1978, p. 69). A consumer-welfare standard, Bork argued, is more consistent with the rule of law than are vague and often inconsistent alternative standards. Consumer welfare, for example, provides a single metric. Others, most of which generally include consumer welfare as one of several factors, require some sort of weighting by courts, with no guidance as to how such weights are to be determined. This requires judges to provide their own weights, making the application of the law arbitrary and subject to no clear standards for courts to apply and for businesses to follow.

Bork presents a credible, and in many respects a very persuasive, argument that, viewed as a totality, the evidence on legislative intent supports his interpretation of consumer welfare as the purpose of antitrust. Even he concedes, however, that the record on this issue is somewhat mixed.

3. Welfare Standards and the Application of Economic Analysis

At the time that Bork was writing, economics was far from the dominant and virtually indispensable engine for antitrust analysis that it has since become. Bork was a strong and influential figure, shepherding economics to the forefront of antitrust analysis. He described "basic microeconomic theory" as "an intensely logical subject, . . . much of [which] . . . consists of a drawing out of the implications of a few empirically supported postulates" (Bork 1978, p. 117).[2] He considered economics to be especially well suited to addressing the key questions raised by antitrust, both because he viewed antitrust questions as being inherently economic ones and also because he felt that economic analysis could be practically applied to help answer these questions.

Chapter 5 of *The Antitrust Paradox,* entitled "The Consumer Welfare Model," begins with Williamson's famous welfare trade-off diagram. "This diagram," Bork states, "can be used to illustrate all antitrust problems, since it shows the relationship of the only two factors involved, allocative inefficiency and productive efficiency. The existence of these two elements and their respective amounts are the real issues in every properly decided antitrust case. They are what we have to estimate" (Bork 1978, p. 108).

Despite his very positive view of Williamson's basic framework, however, Bork parted company with Williamson—and, it is fair to say, with many antitrust economists practicing today—as to whether one ought even attempt to estimate welfare effects in particular cases. Bork explicitly considered, and soundly rejected, the idea of trying to apply empirical analysis on a case-by-case basis.

In doing so, Bork recognized that he was taking issue with some highly qualified authorities, including Carl Kaysen, Donald Turner, and Williamson. "These commentators," he wrote, "are all entirely correct in perceiving the trade-off relationship and the crucial importance of efficiencies. There can be no rational antitrust policy that does not recognize and give weight to productive efficiency, and wide areas of present law are irrational precisely because they do not. The issue between these commentators and myself is simply the way in which efficiencies are to be given weight by the law" (Bork 1978, p. 125).

Quantifying the areas of the rectangles and triangles in Williamson's trade-off diagram would involve, Bork observed, estimating the demand curves of customers and the cost curves of producers in particular cases. Further, it would require not simply estimating them premerger but predicting them postmerger. Bork believed strongly that attempting to do this was a fool's errand. "Nobody knows

[2] Although it is only recently that game theory has begun exercising a significant influence on how economists think about antitrust policy, game theory was not a subject entirely unknown to Bork. Although he does not devote much attention to it in *The Antitrust Paradox* and in particular does not consider it in the context of homogeneous products, Bork's critique of the claim that oligopolists in the automobile industry might usefully be evaluated using game theory provides a hint as to his thinking on the subject. "The varieties both of models and features within models, not to mention price variations, are so numerous that it should be clear beyond any doubt that this game is not 'solvable.' Oligopolists who proliferate models and variations are making the 'game' of oligopolistic restriction of output impossible" (Bork 1978, p. 189).

these curves," he argued. "Even the companies involved do not" (Bork 1978, p. 126). "Passably accurate measurement of the actual situation," he insisted, "is not even a theoretical possibility" (Bork 1978, p. 125).

Regarding the ability of economists (and courts) to estimate likely productive efficiencies from a merger, Bork does not mince words: "What would a court do when faced with a management claim that a merger would improve financial efficiency and a government contention that it would not, or with a claim that the merger would improve the new firm's chances of riding out unforeseen risks and fluctuations? And how could a court attach a number to such claimed efficiencies? Worse, a crucial component in any firm's efficiency is the skill of its management. How does one quantify judgment and imagination? … This unmeasurable factor may be the most important element of efficiency" (Bork 1978, p. 127).

He goes on to observe that "[e]conomists, like other people, will measure what is susceptible of measurement and will tend to forget what is not, though what is forgotten may be far more important than what is measured" (Bork 1978, p. 127).

Bork's plea for humility and restraint among economists who attempt to evaluate empirically the welfare trade-offs in particular cases has not been widely accepted in our profession. Since publication of *The Antitrust Paradox,* the practice of antitrust has relied increasingly on empirical estimation of demand curves, cross elasticities, pass-through, and the like, and has begun to employ even more ambitious techniques such as merger simulation. The federal competition agencies' Horizontal Merger Guidelines have, since the 1980s, not simply permitted, but arguably required, case-specific consideration of efficiencies.[3]

Bork's rejection of direct estimation begs the question of how, exactly, one is to apply a consumer-welfare standard in practice. If not through estimation, how is one to use basic economic theory to measure and, where necessary, weight appropriately the potential for efficiencies against the potential for consumer harm caused by enhanced market power?

Bork's view that the trade-off between output restriction and efficiency gain cannot be studied directly (that is, estimated in particular cases) led him to propose a bright-line rule that relied greatly on presumptions rather than on direct study. Ironically, on this issue at least, Bork's view seems more in line with the view of those who are hostile to large firms in general and who view complex economic analysis as an imprecise tool used too often to justify highly concentrating mergers.

Bork was acutely aware that consumer-welfare effects in particular cases could, in principle, be missed by relying on bright-line rules. Trade-offs, he recognized, are inevitably involved, since there is potential for either harm to consumers from increased market power or benefits to consumers from what we today call merger-specific efficiencies. However, his belief that economics was inherently

[3] Even market definition, which Bork at least implicitly relies on when proposing his bright-line rules of thumb for merger enforcement, has employed highly complex empirical estimation techniques of the kind that Bork believed to be outside the range of the analyst's competence.

incapable of doing better led him to propose relatively simple and somewhat arbitrary rules.

Bork argued that mergers of firms with very small shares could not in theory plausibly lead to consumer-welfare harm. He notes, however, that in the case of, say, a merger of two firms, each having 50 percent of the market, "the motivation and effect of their act are not free from doubt" (Bork 1978, p. 219). Bork would draw his line in a different place than many others. He would not, however, be sympathetic to the argument that even highly concentrating mergers should be approved unless there is strong economic proof that they will have anticompetitive effects.

In applying his proposed welfare standard, Bork relied heavily—many would say too heavily—on theory alone. Bork recognized and addressed this objection, stating, "It makes some people uneasy to have to rely entirely on theory to infer the nature of a reality that is not directly observed. Yet I am convinced both that the theory is good enough to make the task doable and, equally important, that there is no other possible way to proceed" (Bork 1978, p. 122).

This view reflected not only Bork's confidence in the predictive power of basic economic theory and his conviction that economists are incapable of modeling and estimating empirically the many subtle, yet relevant, economic relationships. It was also, no doubt, driven by his concern that the antitrust laws be clear and administrable by judges.

Whether employed by defendants as a way to justify highly concentrating mergers or by plaintiffs to support intervention against mergers in only moderately concentrated markets, Bork would not have approved of antitrust's increased and heavy reliance on highly technical empirical analyses—merger simulation, indicies of upward pricing pressure, econometric estimation of diversion ratios, and the like.

Whether increased use of such techniques has in fact improved our ability to evaluate mergers is not entirely obvious (see Peters 2006). And although the competition agencies themselves commonly take seriously the efficiency claims of merging parties, rarely, if ever, have federal courts permitted on efficiency grounds mergers that have been shown to be anticompetitive in the absence of efficiencies.

Moreover, it is questionable whether courts have given much weight to the more complex quantitative estimations presented by economists in antitrust proceedings. When faced with complex and contradictory empirical evidence by highly qualified experts on both sides of a case, courts appear often to treat these as essentially canceling one another out and have decided the case primarily on more casual empiricism or entirely qualitative forms of evidence.[4]

[4] In the highly influential Staples merger case, for example, both sides presented considerable and sophisticated econometric evidence. The Federal Trade Commission presented also a good deal of documentary evidence, along with casual empiricism such as newspaper ads showing lower prices offered by Staples in markets with fewer office superstore competitors. These latter forms of evidence ultimately proved decisive in persuading the court. See *Federal Trade Commission v. Staples, Inc.,* 970 F. Supp. 1066 (D.D.C. 1997).

4. Current Scholarly Debates

4.1. Consumer Welfare versus Total Welfare

Bork's use of the term "consumer welfare" was, as noted earlier, somewhat confusing. Bork was advocating what we today refer to as a total-welfare standard, since he argued for giving equal weight to consumer and producer surplus. Those advocating what we today call a consumer-welfare standard argue instead that cost savings or other efficiencies should be credited only to the extent that they are passed through to end users in the form of lower prices or higher quality. Cost savings retained by the producer and not passed through to end users of the product would receive no weight under this standard, which is perhaps more accurately referred to as an end-user standard.

Antitrust law, Bork claimed, was intended to protect the competitive process in order to benefit consumers and the welfare of economic agents more generally. It is worth noting, however, that many of the arguments that Bork applied in support of this position apply equally to an end-user welfare standard. Both standards, for example, are consistent with the legislature's greater hostility to naked price fixing than to mergers per se and to what Bork contends was an absence of legislative intent to protect inefficient small businesses. Both are also consistent with legislative deference to firms that have grown internally as a result of lower costs or consumer preferences for what they have to offer.

In the years following publication of *The Antitrust Paradox* and continuing to this day, arguments have been presented both as to the desirability of employing one standard over the other as well as to what the legislature actually intended when it enacted our antitrust laws (Heyer 2006). On the issue of legislative intent, it is not at all clear that economics has any comparative, or even absolute, advantage in divining what Congress really had in mind. The economist's expertise lies less in reading congressional tea leaves than in identifying and analyzing the economic effects of different policy regimes. For economists, more interesting and relevant questions relate not so much to what Congress really intended as to what the differential effects are of employing a consumer-, rather than a total-, welfare standard and what economic theory tells us about the advantages and disadvantages of these alternatives.

The case for employing a total-welfare standard builds on the premise that society is better off if firms are permitted to squeeze the greatest value out of the economy's scarce resources. Mergers and vertical restraints, much like internally generated efficiencies, can in many cases contribute to this end.

Nevertheless, few antitrust jurisdictions employ a total-welfare standard.[5] Most, including the United States, favor an end-user standard.[6]

Many of the most commonly voiced arguments against the use of a total-

[5] Exceptions are Canada, New Zealand, and perhaps a small handful of other jurisdictions.

[6] Even the United States, however, in its Horizontal Merger Guidelines (U.S. Department of Justice and Federal Trade Commission 2010), expresses a willingness in some circumstances to credit merger-generated benefits that do not flow directly or immediately to end users.

welfare standard are laid out nicely in a submission by Steven Salop to the Antitrust Modernization Commission (Salop 2010), and in the following discussion I will focus largely on these (see also Farrell and Katz 2006).

In addition, recent work has demonstrated that even if the policy maker's objective is to maximize total welfare, use of an end-user welfare standard may be the best means of accomplishing this goal. I also discuss the reasons for this counterintuitive result, as well as its possible policy implications.

Salop (2010) begins with a lengthy discussion and descriptive analysis of what courts and the competition agencies do today. Salop concludes from his review of this body of evidence that an end-user standard is what the legislature intended and what the courts have come to apply.

Salop also recognizes, however, that regardless of what Congress may have intended or what the courts actually do, this does not settle the economic question of which standard is more desirable. "A critic could argue that current usage is misguided and that antitrust law instead should adopt the aggregate welfare standard. Congress could choose to revisit the issue and amend the legislation. Therefore, additional policy analysis to determine the better standard remains useful" (Salop 2010, p. 348).

Salop provides some of that additional analysis.[7] He begins by challenging the underlying premise that economics favors aggregate welfare. Although economic efficiency is frequently equated with total wealth, Salop observes that business conduct that increases total wealth does not necessarily increase total welfare. So long as any individual is left worse off, total utility could fall.[8] One might even define welfare as having fallen whenever anyone's welfare falls.

Only if redistribution were costless and carried out as a matter of course, Salop notes, would the Pareto criteria be met. Since neither of these conditions is satisfied in the real world, an aggregate welfare standard does not necessarily make society better off.

Although this argument is technically correct, it seems more of a debating point than a useful guide for public policy. The utility functions of individuals are not readily ascertainable, and perhaps partly for this reason economists typically shy away from even attempting to make interpersonal utility comparisons. The suggestion that perhaps antitrust policy ought to employ, or be bound in some sense by, the Pareto criterion is wildly impractical.

In addition, an end-user welfare standard for antitrust would be subject to the very same Pareto objections as a total-welfare standard. Anticompetitive mergers and cartels, for example, harm consumers (and generally reduce total welfare) while at the same time benefiting at least some producers. Indeed, application of

[7] Salop (2010) also argues that a consumer-welfare standard for antitrust is consistent with intentional torts law. I do not discuss that argument here.

[8] Under the Pareto standard, theory alone cannot even tell us that $1 in harm to one individual combined with $10 million in benefits to other individuals reduces total utility.

the Pareto criterion would arguably cut antitrust policy adrift from its economic moorings altogether.[9]

Salop also considers, and rebuts, the argument that competition and dynamic cost pass-through of efficiencies can be counted on ultimately to benefit consumers. He observes that "the diffusion of innovations through imitation and emulation is neither instantaneous nor complete" (Salop 2010, p. 349), that "rapid and complete diffusion that leads to increased price competition obviously is even less likely in markets in which there are barriers to entry" (p. 350), and that there is no empirical evidence of cost reductions being passed through to consumers in the form of lower prices and/or higher quality.

One can concede these points while still viewing total welfare to be a desirable standard. The economic case for a total-welfare standard does not assume that end users of the product where competitive concerns arise will themselves eventually be made whole. Rather, it rests on the assumption that the citizenry as a whole is better off when antitrust policy permits firms to squeeze the greatest value out of the economy's scarce resources. Whether the beneficiaries of efficiencies happen to be consumers of the product where there are competitive concerns or whether they are instead producers or current or future consumers of entirely different products is beside the point.

The case for employing an end-user, that is, consumer-welfare standard is perhaps most often made on wealth redistribution grounds. Put simply, it is claimed that the reduced welfare of end users should be counted and the increased welfare of producers ought not.[10]

Many economists believe that to the extent that wealth distribution is a social concern, the Internal Revenue Service is a better and more efficient institution for dealing with this than is antitrust policy. Salop (and others) respond by noting that the tax system itself is not immune to significant transaction costs and that it does not even seek to neutralize the effects of transfers on a case-by-case basis. According to Salop (2005, p. 17), "Because the transactions costs of neutralizing these welfare transfers are so high, it does not make economic sense to formulate an antitrust law under the opposite assumption."

This is not, however, a fully satisfying defense of an end-user welfare standard. As Bork emphasized in *The Antitrust Paradox,* all sorts of social and economic concerns are routinely (and properly!) ignored by antitrust law and are better dealt with, albeit imperfectly, through other means. Society is concerned over the health consequences of smoking and pollution, for example, and has many policies in place to reduce consumption of tobacco products and production of

[9] Note also that virtually all procompetitive business activity generates harm to third-party competitors. No serious antitrust analyst would propose that business conduct be permitted only if it leaves less efficient rivals equally well off.

[10] Or, at a minimum, consumer welfare should be counted much more than the welfare of producers. In Canada's Superior Propane merger case (*Canada [Commissioner of Competition] v. Superior Propane Inc. [C.A.]*, [2003] 3 F.C. 529 [Can.]), for example, an effort was made to weight consumer welfare based on the how many consumers were harmed, how many producers benefited, and the progressivity of the tax code.

polluting materials. It does not recruit antitrust policy to assist in this battle by, for example, permitting tobacco cartels or allowing anticompetitive steel industry mergers on the grounds that these will reduce harmful output.

It is also an open question as to whether an end-user welfare standard will actually affect wealth distribution in ways its proponents assume. Yes, stock ownership in the United States is not distributed uniformly among the citizenry. However, this is hardly sufficient to prove that an end-user welfare standard for antitrust will disproportionately benefit the poorest among us.

Producers and consumers impacted by antitrust matters are not a random draw of the citizenry, and in many cases affected customers will be wealthier than the stockholders of affected producers. In other cases, the direct customers of producers are themselves other producers, and it is the shareholders of these firms—not simply end users of the products in question—who stand to be negatively impacted. Farrell and Katz (2006, p. 12) observe, "We are aware of no evidence that the wealth distribution of shareholders varies systematically according to a firm's place in the value chain."

In sum, an end-user welfare standard will not necessarily work to the advantage of the poorer among us. And even attempting on a case-by-case basis to sort out the wealth transfer consequences of a matter under antitrust review would be exceedingly costly. This constitutes another argument for leaving distribution issues to specialized authorities who are best capable of targeting tax and subsidy policies toward those deemed by society to be most, or least, deserving.

Finally, an end-user welfare standard is often defended on grounds that it is far less complex to administer and that many, including Bork, have argued that antitrust should be indifferent to effects on competitors.[11] Leaving aside the question of whether the welfare of competitors should be counted (a fully consistent application of a total-welfare standard would require that they be), there is little doubt that trying to calculate precisely the effect of a merger or other business practice on total welfare is very costly.

"In contrast," Salop (2005, p. 23) argues, "the true consumer welfare standard would only require that the impact on consumers be gauged. Efficiency benefits and harms would be taken into the balance, but only by evaluating their net impact on consumers. This single-minded focus on consumers makes the true consumer welfare standard easier to implement, leads to fewer errors and comprises a more coherent set of rules."

Considerations of administrative complexity—with which Bork would have considerable sympathy—could, in principle, favor use of an end-user standard over a total-welfare standard. Indeed, the costs of administering the antitrust laws (and the error costs of doing so imperfectly) are just as real as any other costs—including those generated by allocative inefficiencies from enhanced market power or those incurred by not permitting mergers that would economize on

[11] See Salop (2010) for hypothetical examples of how a total-welfare standard that incorporates the welfare of competitors could reverse the outcome generated by a total-welfare standard that ignores these effects.

society's scarce resources. In this sense, then, arguments based on minimizing administrative costs are consistent with an antitrust focus on total welfare.

That said, the relative simplicity of applying a consumer-welfare standard is not self-evident. Determining the effect on consumers is not a simple chore, as it is generally difficult to separate cost savings into variable versus fixed or to determine the extent to which cost savings will be passed through to consumers. There may also be circumstances under which efficiency claims involving large fixed cost savings are relatively clear and of sufficient magnitude to warrant clearing a merger on total-welfare grounds even if modest, but uncertain, harm to consumers might obtain. Whether applying a consumer-welfare standard is in fact relatively less complex to administer, and sufficiently less complex so as to warrant using it instead of an otherwise more appealing total-welfare alternative, is a legitimate, albeit open, question.

A newer and more novel branch of economic research that has been put forward to justify a consumer-welfare standard builds on the potential gap between decision rules and objectives. This work has shown that a consumer surplus standard may actually generate greater total surplus than will a total-surplus standard.

A number of models have been developed that generate this counterintuitive result (Farrell and Katz 2006). One of the most interesting and influential is that of Lyons (2002), who argues that in order to understand the effects of applying different welfare standards, one needs to recognize that mergers that come before the competition agencies are not independent of the welfare standard that firms anticipate that the enforcement entity (and the courts) will apply.[12] Firms seek to maximize profit subject to this rule. Lyons shows that under certain conditions, the merger that a firm finds most profitable to propose under a consumer-welfare standard can actually increase total welfare by more than the merger that it finds most profitable to propose under a total-welfare standard.

Such an outcome therefore cannot be ruled out on theoretical grounds alone. Should the mere possibility of such outcomes be sufficient to warrant replacing a total-welfare standard with one based on consumer welfare?[13]

In summing up their discussion of this literature and considering whether a system-level perspective supports a consumer-welfare standard, Farrell and Katz (2006, p. 23) conclude, "Clearly, the foundations for a total surplus rule, in the

[12] Lyons applies his analysis only to mergers, although similar logic could equally be applied to other forms of business behavior subject to antitrust scrutiny, for example, decisions to employ one form of vertical restraint rather than another.

[13] There are good reasons for suspecting that we ought to be wary of doing so. Farrell and Katz (2006) observe, for example, that if all efficiencies take the form of fixed-cost savings and every merger has some adverse competitive effects, then a consumer-surplus standard would block all mergers, while a total-surplus standard would allow those that increase total surplus. They note that in this setting, a total-surplus standard would give rise to greater total surplus than would a consumer-surplus standard. There is also an issue of whether firms considering mergers typically would have attractive alternative merger partners, ones they might shift between as a function of the welfare standard being applied.

practical sense in which it would be actually used, are a good deal shakier than most economists have understood, but it is not yet time to abandon the edifice."

The consumer-welfare versus total-welfare debate, while of interest to economists and many other antitrust practitioners, is not, some contend, of great practical importance. Hovenkamp (2011, p. 9), for example, claims, "The volume and complexity of the academic debate on the general welfare vs. consumer welfare question creates an impression of policy significance that is completely belied by the case law, and largely by government enforcement policy. Few if any decisions have turned on the difference."

This is undoubtedly true, and, at least in the United States, courts have not spent much time wrestling with distinctions between consumer and total welfare. This may, however, be partly because federal competition agencies and defendants know that courts are not receptive to defenses when it appears that end users will be harmed. A more interesting question, about which we can only speculate, is whether many decisions would turn on this distinction if a total-welfare standard actually were to be employed.

4.2. *Welfare Standards and Merger Policy toward Monopsony*

Antitrust does not contain a safe harbor for mergers that create greater buyer power. This raises a question as to whether antitrust really does apply a consumer-welfare standard consistently. In cases of merger to monopsony, it is not the seller but the customer—often an intermediate firm—that benefits.

Lower prices paid by the monopsony intermediary may translate into higher prices to final consumers (since the monopsonist is purchasing fewer inputs); however, this will not occur unless the monopsonist has some market power in selling its product to final consumers. And it is by no means obvious that it will.

The sales prices of many commodities, for example, are set in a world market. And yet inframarginal suppliers of these products may have limited economic alternatives. Objecting to mergers that create monopsony power in such circumstances is fully consistent with a concern over total, rather than end-user, welfare. Indeed, it is the stated policy of the federal competition agencies to challenge such mergers, which they have done on occasion (U.S. Department of Justice and Federal Trade Commission 2010, sec. 12, example 24).[14]

5. Conclusion

In an interview shortly after Bork's death, antitrust law professor Barak Orbach had the following to say about Bork's contributions: "He built a full framework about how antitrust should be more about economic efficiency than about helping small businesses. He expanded upon this in articles and the book, *The Antitrust Paradox,* in 1978. He wrote a sentence: Congress enacted the Sherman Act

[14] Consistent with this position, the Department of Justice has challenged mergers in which it explicitly concluded that prices to final consumers would not rise. See, for example, *United States v. Cargill Inc. and Continental Grain Co.,* Complaint No. 99-CV-1875 (D.D.C., filed July 8, 1999).

as a 'consumer welfare prescription.' The Supreme Court adopted that sentence in 1979. That is the stated goal in antitrust today. It is a big deal. A huge deal. In antitrust, it's operational. Robert Bork defined it" (Matthews 2012).

Bork failed to win all of the many antitrust battles he fought during his distinguished career. Many of the strong views he held about issues such as vertical restraints and predatory pricing, for example, continue to engender spirited disagreement and, to be sure, can be shown to rely implicitly on a number of controversial assumptions. On the question of welfare standards for antitrust, however, it is harder to dispute the fact that Bork not only won the battle, he also won the war.

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