



**United States of America  
Federal Trade Commission**

# Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get

**Christine S. Wilson\***  
**Commissioner, U.S. Federal Trade Commission**

Luncheon Keynote Address at  
George Mason Law Review 22<sup>nd</sup> Annual Antitrust Symposium:  
Antitrust at the Crossroads?

Arlington, VA

February 15, 2019

---

\* The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner. Many thanks to my Attorney Advisor, Tom Klotz, for assisting in the preparation of these remarks.

## I. Introduction

It is delightful to join you today at the George Mason University Antonin Scalia Law School. Many thanks to the George Mason Law Review and the Law and Economics Center for inviting me. As always, they have put together a great program.

Before launching into the substance, I must provide the standard disclaimer: The views I express today are my own, and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

With the administrative details out of the way, I would like to spend my time this afternoon discussing the appropriate welfare standard for antitrust enforcement. This topic was the subject of two panels at the FTC's Hearings on Competition and Consumer Protection in the 21st Century in November 2018.<sup>1</sup> The discussion of whether we should continue to rely on the consumer welfare standard, which has long underpinned our approach to antitrust, arises in the context of a larger debate. According to some critics, lax antitrust enforcement has led to historic levels of consolidation and concentration, which have led to greater income inequality, stagnant wages, and reduced innovation.<sup>2</sup> These observers recognize that the consumer welfare standard, the yardstick used to evaluate mergers and competitive conduct for more than 40 years, is an intellectual barrier for their desired approach to enforcement.

Under the consumer welfare standard, business conduct and mergers are evaluated to determine whether they harm consumers in any relevant market. Generally speaking, if consumers are not harmed, the antitrust agencies do not act. But critics would have us adopt a different approach.

This topic is an important one for us to discuss for at least two reasons. First, as they say in business school, what you measure is what you get. The standard we select will drive the results that we get. What results do we want? And second, agreement among stakeholders regarding the goals of antitrust law and policy will generate confidence in antitrust enforcement outcomes, a goal I'm sure we all agree is worthy.

In discussing this issue today, I will cover three topics. First, I will provide a very brief historical perspective on the Sherman Act. Second, I will review criticisms of the consumer welfare standard and identify alternatives that have received much attention recently. And third, I will discuss the total welfare standard, which I believe has received too little attention.

---

<sup>1</sup> See FTC Hearings on Competition and Consumer Protection in the 21st Century (Nov. 1, 2018), *available at* [https://www.ftc.gov/system/files/documents/public\\_events/1415284/ftc\\_hearings\\_session\\_5\\_transcript\\_11-1-18.pdf](https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_session_5_transcript_11-1-18.pdf).

<sup>2</sup> See, e.g., Senate Democrats, *A Better Deal: Cracking Down on Corporate Monopolies*, at 1 (2017) [hereinafter *A Better Deal*], <https://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf> (“Over the past thirty years, growing corporate influence and consolidation has led to reductions in competition, choice for consumers, and bargaining power for workers. The extensive concentration of power in the hands of a few corporations hurts wages, undermines job growth, and threatens to squeeze out small businesses, suppliers, and new, innovative competitors.”).

## II. Historical Perspective

The political origins of the Sherman Act reflect the concerns of small businesses and farmers who blamed the trusts of the 1880s for many economic woes.<sup>3</sup> The populist fear of market concentration that ultimately led to the passage of the Sherman Act is demonstrated in the legislative history.<sup>4</sup> Consequently, language in the legislative history includes statements that are consistent with the view that the framers of this legislation were concerned with more than economic competition and economic efficiency.<sup>5</sup> Of course, the language of the Sherman Act itself says nothing about welfare standards.

Early Supreme Court cases reflected those broader concerns of protecting small businesses. For instance, in *United States v. Trans-Missouri Freight Ass'n*,<sup>6</sup> the Court was concerned with protecting “small dealers and worthy men.”<sup>7</sup> Similar concerns were expressed in *Brown Shoe*<sup>8</sup> and *Alcoa*.<sup>9</sup>

Thus, critics of the consumer welfare standard are correct that goals other than consumer welfare and economic efficiency are part of antitrust’s history. But that history did not end in the 1940’s, 50’s, and 60’s. The Supreme Court has explained that Congress intended the Sherman Act to develop as common law, explicitly grounded in economics. In *Kimble v. Marvel Entertainment, LLC*,<sup>10</sup> the Court explained:

Congress . . . intended [the Sherman Act’s] reference to “restraint of trade” to have “changing content,” and authorized courts to oversee the term’s “dynamic potential.” We have therefore felt relatively free to revise our legal analysis as economic understanding evolves and . . . to reverse antitrust precedents that misperceived a practice’s competitive consequences. . . . [B]ecause the question in those cases was whether the challenged activity

---

<sup>3</sup> See generally Ilene Knable Gotts, *Back to the Future: Should the “Consumer Welfare” Standard Be Replaced in U.S. M&A Antitrust Enforcement*, \_\_\_ ANTITRUST REPORT 1-2 (forthcoming 2019).

<sup>4</sup> See, e.g., 21 Cong. Rec. 2457 (1890), available at [http://www.appliedantitrust.com/02\\_early\\_foundations/3\\_sherman\\_act/cong\\_rec/21\\_cong\\_rec\\_2455\\_2474.pdf](http://www.appliedantitrust.com/02_early_foundations/3_sherman_act/cong_rec/21_cong_rec_2455_2474.pdf) (Senator Sherman stating “It is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances. This is industrial liberty, and lies at the foundation of all rights and privileges.”).

<sup>5</sup> Herbert Hovenkamp, *Antitrust’s Protected Classes*, 88 MICH. L. REV. 1 (1988).

<sup>6</sup> 166 U.S. 290 (1897).

<sup>7</sup> *Id.* at 323.

<sup>8</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) (antitrust protects “small, locally owned businesses”).

<sup>9</sup> *United States v. Aluminum Co. of America*, 148 F.2d 416, 428-29 (2d Cir. 1945) (antitrust law exists to “put an end to great aggregations of capital because of the helplessness of the individual before them”).

<sup>10</sup> 135 S. Ct. 2401 (2015).

restrained trade, the Court’s rulings necessarily turned on its understanding of economics.<sup>11</sup>

Much ink has been spilled about the evolution of economic analysis and its impact on antitrust jurisprudence.<sup>12</sup> Consequently, I will not delve into the details here. Instead, I will highlight some key milestones.

As others have explained,<sup>13</sup> Robert Bork examined and provided an interpretation of the Sherman Act’s legislative history that concluded that Congress intended mainly to protect consumers from the harm done by cartels without undermining efficiency. He argued that Congress valued only consumer welfare<sup>14</sup> and concluded that “[t]he Sherman Act was clearly presented and debated as a consumer welfare prescription.”<sup>15</sup>

At about the same time, economic research found benign explanations for highly concentrated markets, which broke from prior work that was suspicious of concentration. For example, economists concluded that some firms were winning competitive battles and achieving large shares not for pernicious reasons but because they were more efficient than other firms, and that other firms with significant shares benefitted from economies of scale.<sup>16</sup> In addition, new theoretical and empirical economic learning provided procompetitive explanations for certain business practices like vertical restraints.

Reflecting both of these developments, the Supreme Court shifted its focus from a mix of economic, social, and political goals to the market impact of an alleged restraint. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,<sup>17</sup> the Supreme Court stated without caveat that the “antitrust laws . . . were enacted for ‘the protection of competition, not competitors.’”<sup>18</sup> Similarly, in

---

<sup>11</sup> *Id.* at 2412-13 (citations omitted).

<sup>12</sup> See, e.g., HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* (2006); D. Daniel Sokol, *The Transformation Of Vertical Restraints: Per Se Illegality, The Rule Of Reason, And Per Se Legality*, 79 ANTITRUST L.J. 1003 (2014); William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1 (2007).

<sup>13</sup> See, e.g., Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835 (2014).

<sup>14</sup> Although Bork uses the phrase “consumer welfare,” some believe the economic concepts he uses in his argument suggest he meant a total welfare standard. See Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 473 (2012); Gregory J. Werden, *Antitrust’s Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713, 718-21 (2014).

<sup>15</sup> ROBERT H. BORK, *THE ANTITRUST PARADOX* 64 (1978).

<sup>16</sup> See ERNEST GELLHORN ET AL., *ANTITRUST LAW AND ECONOMICS* 92-93 (5th ed. 2004) (citing Harold Demsetz, *Two Systems of Belief about Monopoly*, in *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* 164 (Harvey J. Goldschmid et al eds., 1974)); Richard A. Posner *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979) (summarizing this work in economics). The new economic learning challenged the basis for decisions like *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290 (1897), and *FTC v. Procter & Gamble*, 386 U.S. 568 (1967).

<sup>17</sup> 429 U.S. 477 (1977).

<sup>18</sup> *Id.* at 488.

*Reiter v. Sonotone Corp.*,<sup>19</sup> the Court again chose to interpret antitrust law to protect consumers, not small businesses, and described the Sherman Act as a “consumer welfare prescription.”<sup>20</sup>

In a particularly important decision in *Continental T.V., Inc. v. GTE Sylvania Inc.*,<sup>21</sup> the Supreme Court relied on economic reasoning to hold that territorial restraints on franchisees should be evaluated under the rule of reason, recognizing that these restrictions can enable manufacturers to compete more effectively against other manufacturers.<sup>22</sup> Notably, the Court declared that the rule of reason standard must be based upon demonstrable economic effect.<sup>23</sup> The Supreme Court’s *Sylvania* decision marked a major turning point in antitrust law. After this decision, the Court increasingly turned to modern economic theory to inform its interpretation and application of the Sherman Act.<sup>24</sup>

While the Supreme Court has endorsed an economic approach, it has not prescribed in detail the appropriate welfare standard to be applied.<sup>25</sup> On the one hand, the Court cites Bork, who argued that economic efficiency, and therefore total welfare, should be the guiding principle. But Blair and Sokol argue that “[m]ost of the Court’s opinions arguably favor [use of a] consumer welfare [standard].”<sup>26</sup>

Since *Sylvania*, lower courts have followed the Supreme Court’s instruction and have adopted an analysis based upon market effects and the impact on consumers.<sup>27</sup> In these cases, it is generally believed that federal courts and enforcers apply a consumer welfare standard.<sup>28</sup>

The consumer welfare standard equates with consumers’ surplus in economic terms—technically, the difference between what each consumer actually pays and what he or she would be willing to pay. Generally speaking, conduct is evaluated only by looking at the surplus that goes to consumers, ignoring what goes to sellers. For instance, in a merger analysis, the gains to the merging producers do not count; only the effect on consumer prices is relevant.<sup>29</sup>

---

<sup>19</sup> 442 U.S. 330 (1979).

<sup>20</sup> *Id.* at 343 (quoting ROBERT H. BORK, *THE ANTITRUST PARADOX* 66 (1978)).

<sup>21</sup> 433 U.S. 36 (1977).

<sup>22</sup> *Id.* at 52-56.

<sup>23</sup> *Id.* at 58-59.

<sup>24</sup> William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43 (2000).

<sup>25</sup> See Blair & Sokol, *supra* note 14 at 476.

<sup>26</sup> *Id.* at 480.

<sup>27</sup> See, e.g., *Schor v. Abbott Labs.*, 457 F.3d 608, 611 (7th Cir. 2006) (“[I]f a manufacturer cannot make itself better off by injuring consumers through lower output and higher prices, there is no role for antitrust law to play.”).

<sup>28</sup> Herbert Hovenkamp, *Implementing Antitrust’s Welfare Goals*, 81 *FORDHAM L. REV.* 2471, 2476 (2013) (“[C]ourts almost invariably apply a consumer welfare test.”); Jonathan M. Jacobson, *Another Take on the Relevant Welfare Standard for Antitrust*, *ANTITRUST SOURCE*, at 2 (Aug. 2015) (The “consumer welfare standard is the standard understood to be employed in practice by the federal enforcement agencies”).

<sup>29</sup> See U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, *HORIZONTAL MERGER GUIDELINES* § 10 (Aug. 19, 2010) (efficiencies).

The consumer welfare standard is generally considered to be relatively easy to administer. Under a simple rule of reason test employing the consumer welfare principle, one would have to consider whether the challenged practice creates a sufficient inference of lower market-wide output and higher prices.<sup>30</sup> If so, it is presumptively unlawful. At that time the defendants have the opportunity to show that the output model ignores efficiencies produced by the challenged practice that are of sufficient magnitude so as to drive down price to a level that is no higher than it had been before.

The simplest version of the consumer welfare test is not a balancing test in the sense that one must attempt to measure and net out productive efficiency gains and allocative efficiency losses. If consumers are harmed by reduced output, decreased product quality, or higher prices resulting from the exercise of market power, then this result trumps any amount of offsetting gains to producers or others. In this sense, the consumer welfare test is easy to administer on a case-by-case basis.<sup>31</sup>

### **III. Attacks on the Consumer Welfare Standard Are Unfounded**

Critics seeking to overhaul antitrust enforcement have leveled several criticisms against the consumer welfare standard. A careful analysis reveals that the claimed shortcomings of the consumer welfare standard are contradicted by the evidence.

#### **Critique 1: The consumer welfare standard is narrowly focused on price to the exclusion of other factors that benefit consumers.**

In fact, current analysis considers other factors as part of the competitive process. While the language of agency Guidelines and cases focuses on price, the term “price” is often shorthand for consideration of several other aspects of competition.

The Horizontal Merger Guidelines make this point clearly, stating that “for simplicity of exposition” competitive effects are generally discussed as price effects. The Guidelines explain, “[e]nhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. . . . When the Agencies investigate whether a merger may lead to a substantial lessening of non-price competition, they employ an approach analogous to that used to evaluate price competition.”<sup>32</sup>

---

<sup>30</sup> See *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018) (“To determine whether a restraint violates the rule of reason . . . a three-step burden-shifting framework applies . . . [where] the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. . .”).

<sup>31</sup> Herbert Hovenkamp, *Implementing Antitrust’s Welfare Goals*, *supra* note 28, at 2473.

<sup>32</sup> HORIZONTAL MERGER GUIDELINES, *supra* note 29, § 1; see also Carl Shapiro, Opening Statement before Senate Judiciary Committee, Subcommittee on Antitrust, Consumer Protection and Consumer Rights, at 3 (Dec. 13, 2017) (“[T]hose who say that the ‘consumer welfare’ standard is narrowly focused on price to the exclusion of other factors are simply incorrect: properly applied, the ‘consumer welfare’ standard includes a range of factors that

For instance, in hospital mergers, the analysis regularly considers price as well as non-price competition.<sup>33</sup> In hospital mergers, there are two stages of competition. In the first stage of competition, healthcare providers and commercial insurers negotiate reimbursement rates as well as other terms. In the second stage of healthcare competition, in-network providers compete with each other on a variety of non-price facets of competition to attract patients, including the length of clinic hours, the convenience of location, the availability of services, technology, and the quality of care.<sup>34</sup>

The district court deciding the Commission’s challenge of the proposed merger of Sanford Health and Mid Dakota Clinic in North Dakota found that even though there would not be a decline in quality care provided by any doctor, “the proposed transaction would eliminate the second-stage competition that currently exists . . . to provide better services at a more competitive price.”<sup>35</sup> Similarly, the FTC’s Complaint challenging a proposed hospital merger in Toledo, Ohio alleged that “the acquisition also will reduce the quality and breadth of services available in Lucas County.”<sup>36</sup>

Competition on quality is also important in the analysis of vertical restraints. For tying and resale price maintenance (RPM), the economic literature underpinning legal decisions in these areas emphasizes the importance of competition on quality and the provision of services in the competitive process.<sup>37</sup>

Moreover, even when the literature discusses price, it may mean quality-adjusted price. This kind of analysis appears frequently, for example, in hotel and airline markets.<sup>38</sup>

---

benefit consumers, not just low prices but improved product variety and quality and of course more rapid innovation. Likewise those who say that the ‘consumer welfare’ standard is overly focused on short-term outcomes are mistaken.”).

<sup>33</sup> In fact, the standard empirical and analytical models used in hospital mergers estimate willingness to pay, which is based on travel costs and non-price competition. The models effectively translate non-price effects into price.

<sup>34</sup> See, e.g., Fed. Trade Comm’n v. Sanford Health, No. 17-cv-0133, 2017 WL 10810016, at \*7 (D.N.D. Dec. 15, 2017) (“[S]econd-stage competition generally focuses on non-monetary factors which include, e.g., clinic hours, convenience of location, available services, technology, and quality. Witnesses testifying for both sides agreed that competition among providers improves the quality of services that patients receive and results in better patient outcomes. More convenient access to providers is of benefit to patients. More convenient access helps providers attract and retain patients. One provider’s improvements in convenient patient access may prompt a competing provider to also make its services more conveniently accessible to patients.”).

<sup>35</sup> *Id.* at \*13.

<sup>36</sup> Compl. ¶ 31, *ProMedica Health System, Inc.*, FTC Dkt. No. 9346 (issued Jan. 6, 2011), available at <https://www.ftc.gov/sites/default/files/documents/cases/2011/01/110106promedicacmpt.pdf>.

<sup>37</sup> See, e.g., Benjamin Klein & Kevin M. Murphy, *Vertical Restraints as Contractual Enforcement Mechanisms*, 31 J. LAW & ECON. 265 (1988).

<sup>38</sup> See Bryan Keating, Mark A. Israel, Daniel L. Rubinfeld & Robert D. Willig, *Airline Network Effects & Consumer Welfare* 12 REV. NETWORK ECON. 1 (2013).

**Critique 2: The consumer welfare standard looks only at short-term price changes and ignores effects on innovation.**

This critique is also belied by the evidence. The agencies regularly consider effects on innovation in their analysis.<sup>39</sup> The Horizontal Merger Guidelines provide that the agencies consider whether a merger is “likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger.”<sup>40</sup> Between 2004 and 2014, the FTC challenged 164 mergers and alleged harm to innovation in 54 of them.<sup>41</sup>

**Critique 3: The consumer welfare standard ignores buyer power and monopsony concerns.**

For instance, the Roosevelt Institute has asserted that large retailers such as Wal-Mart and Amazon use monopoly power to squeeze small suppliers.<sup>42</sup> Others assert that large companies exert monopsony power in labor markets to reduce wages.<sup>43</sup>

Contrary to the critique, the consumer welfare standard does address possible monopsony concerns.<sup>44</sup> For instance, FTC staff investigating Staples’ acquisition of Essendant considered whether the combined firm would be able to exercise monopsony power against office supply product manufacturers. After a careful and thorough investigation, the FTC concluded that the merged firm would not be able to exercise monopsony power.<sup>45</sup>

The agencies also apply the consumer welfare standard to labor markets. In 2010, the Antitrust Division filed a civil complaint against six high-tech companies that had agreed not to

---

<sup>39</sup> See Joshua D. Wright, Antitrust Provides a More Reasonable Regulatory Framework than Net Neutrality, (George Mason University Law & Econ. Research Paper 17-35, Aug. 2017), *available at* [https://papers.ssrn.com/so13/papers.cfm?abstract\\_id=3020068](https://papers.ssrn.com/so13/papers.cfm?abstract_id=3020068).

<sup>40</sup> HORIZONTAL MERGER GUIDELINES, *supra* note 29, § 6.4.

<sup>41</sup> See Richard J. Gilbert & Hillary Greene, *Merging Innovation into Antitrust Agency Enforcement of the Clayton Act*, 83 GEO. WASH. L. REV. 1919, 1931-32 (2015).

<sup>42</sup> Marshall Steinbaum, Eric Harris Bernstein, & John Sturm, Powerless: How Lax Antitrust and Concentrated Market Power Rig the Economy Against American Workers, Consumers, and Communities, at 42 (Roosevelt Institute, Feb. 2018), *available at* <http://rooseveltinstitute.org/wp-content/uploads/2018/03/Powerless.pdf>.

<sup>43</sup> See, e.g., Jose Azar, Ioana Marinescu, & Marshall I. Steinbaum, Labor Market Concentration (National Bureau of Economic Research Working Paper 24147, Dec. 2017), *available at* <http://www.nber.org/papers/w24147>.

<sup>44</sup> See *In re Express Scripts, Inc.*, FTC File No. 111-0210 (FTC Apr. 2, 2012) (Statement of the Federal Trade Commission Concerning the Proposed Acquisition of Medco Health Solutions by Express Scripts, Inc.), *available at* [https://www.ftc.gov/sites/default/files/documents/closing\\_letters/proposed-acquisition-medco-health-solutions-inc.express-scripts-inc./120402expressmedcostatement.pdf](https://www.ftc.gov/sites/default/files/documents/closing_letters/proposed-acquisition-medco-health-solutions-inc.express-scripts-inc./120402expressmedcostatement.pdf).

<sup>45</sup> See *In re Sycamore Partners II, L.P.*, FTC File No. 181-0180 (FTC Jan. 28, 2019) (Statement of Chairman Joseph J. Simons, Commissioner Noah Joshua Phillips and Commissioner Christine S. Wilson concerning the Proposed Acquisition of Essendant, Inc. by Staples, Inc.), *available at* [https://www.ftc.gov/system/files/documents/public\\_statements/1448328/181\\_0180\\_staples\\_essendant\\_majority\\_statement\\_1-28-19.pdf](https://www.ftc.gov/system/files/documents/public_statements/1448328/181_0180_staples_essendant_majority_statement_1-28-19.pdf).



cold call each other's employees.<sup>46</sup> In 2016, the FTC and Antitrust Division issued a joint statement explaining that "[t]he DOJ will criminally investigate allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each other's employees."<sup>47</sup> The FTC also has obtained consents involving conduct in particular labor markets.<sup>48</sup>

#### IV. Assessing Alternative Welfare Standards

There are at least five different welfare standards that could be applied in antitrust analysis.

1. **Consumer Welfare**, which we have already discussed.

2. **Total Welfare.** Total welfare seeks to measure the effect of a practice or transaction on the economic welfare of all participants in a market, including both producers and consumers. Put differently, it refers to the aggregate value created, without regard for how gains or losses are distributed. I will turn to a more complete discussion of the total welfare standard in a few minutes.

3. **Consumer Choice.** The consumer choice standard is based on the idea that the "range of options [available to consumers should not] be significantly impaired or distorted by anticompetitive practices."<sup>49</sup> The standard focuses instead on "conduct that artificially limits the natural range of choices in the marketplace,"<sup>50</sup> but is not based on any specified number of options and does not forbid all reductions in choice.

---

<sup>46</sup> See Press Release, U.S. Dep't of Justice, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements, Sept. 24, 2010, available at <https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee>.

<sup>47</sup> U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS, at 4, Oct. 2016, available at [https://www.ftc.gov/system/files/documents/public\\_statements/992623/ftc-doj\\_hr\\_guidance\\_final\\_10-20-16.pdf](https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf).

<sup>48</sup> See *In re Your Therapy Source, LLC*, FTC File No. 171-0134 (July 31, 2018) (proposed consent order), available at [https://www.ftc.gov/system/files/documents/cases/1710134\\_your\\_therapy\\_source\\_decision\\_and\\_order\\_7-31-18.pdf](https://www.ftc.gov/system/files/documents/cases/1710134_your_therapy_source_decision_and_order_7-31-18.pdf) (proposing to prohibit physical therapist staffing companies from exchanging rate information and entering agreements to lower rates paid to therapists treating patients of home health agencies); *In re Debes Corp.*, 115 FTC 701 (1992) (consent order) (prohibiting boycott of temporary nurse registry by nursing homes that reduced the price of temporary nurse services); *In re Council of Fashion Designers of America*, 120 F.T.C. 817 (1995) (consent order) (prohibiting agreements to fix price, terms or conditions of compensation for modeling or modeling agency services).

<sup>49</sup> Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft From Consumers, and Consumer Choice*, 81 *FORDHAM L. REV.* 2349 (2013); Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 *U. PITT. L. REV.* 503, 503 (2001) [hereinafter Lande, *Consumer Choice*]; Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 *HASTINGS L.J.* 65 (1982).

<sup>50</sup> Lande, *Consumer Choice*, *supra* note 49 at 503-04.

**4. Multiple Goals.** Based on the legislative history of the Sherman Act and the early cases where courts focused on the protection of small business, many observers concluded that antitrust pursued a variety of goals, including preserving a deconcentrated industry structure, dispersing economic power, and promoting fairness in economic dealings. As we have discussed, courts wisely abandoned pursuit of these multiple goals about 40 years ago.<sup>51</sup>

More recently, a similar approach has been advocated to replace the consumer welfare standard. The combination of goals in the current incarnation includes increasing fairness, reducing income inequality, and protecting jobs.<sup>52</sup>

**5. Protection of the Competitive Process.** There are two versions of this welfare standard. The first version is articulated by Greg Werden.<sup>53</sup> Under this approach, practices and transactions that interfere with competition as a process would be condemned. Practices that do not impair the competitive process would not be prohibited, even if they decrease consumer surplus.

In the second version, the competitive process standard approximates the multiple goals standard. This version, which may be likened to a public interest standard, is advocated by Tim Wu. He believes that the competitive process standard might be more practical than the consumer welfare standard.

[T]he 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 . . . [A]s a policy matter, 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.<sup>54</sup>

It is important to assess each of these various standards with respect to their predictability, administrability, and credibility of enforcement decisions.

**Predictability** assesses whether enforcement decisions are likely to be consistent in similar cases, which enables the likely outcome of a particular case to be accurately predicted.

---

<sup>51</sup> Herbert J. Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?* (working paper 2018), available at [https://scholarship.law.upenn.edu/faculty\\_scholarship/1985](https://scholarship.law.upenn.edu/faculty_scholarship/1985) (identifying the limitations of multiple goals and noting, “The important point, however, is that established antitrust tools are up to these tasks. More importantly, every story has two sides and the consumer welfare principle is the best mechanism for assessing the harm that they cause.”).

<sup>52</sup> See, e.g., *A Better Deal*, *supra* note 2.

<sup>53</sup> Werden, *supra* note 14.

<sup>54</sup> Tim Wu, *After Consumer Welfare, Now What? The “Protection of Competition” Standard in Practice*, COMP. POL’Y INT’L ANTITRUST CHRONICLE, at 2 (April 2018), available at <https://www.competitionpolicyinternational.com/wp-content/uploads/2018/04/CPI-Wu.pdf>.

Predictability is important for business planning. It also is important to ensure effective use of enforcement agency resources. For example, when businesses and legal advisors prevent obviously anticompetitive mergers from being presented to the agencies, limited enforcement resources can be leveraged to greater effect.

**Administrability** assesses whether businesses and antitrust enforcement agencies can implement the standard in a manner that is analytically cost-effective and feasible with the evidence that is likely to be available in particular cases.

**Credibility** of enforcement decisions considers whether application of the particular standard leads to outcomes that are inconsistent with legal or economic norms, or is likely to lead to Type I or Type II errors.

I will discuss the consumer choice and multiple goals standards simultaneously because the problems associated with each are similar. Moreover, to the extent that one version of the competitive process standard is only a rebranding of the multiple goals standard, it also encounters the same difficulties.

To begin, the multiple goals and consumer choice standards do not lead to predictable outcomes.

The pursuit of multiple goals necessarily requires tradeoffs among the different goals, a difficult task when there is ambiguity regarding the list of goals to be pursued. Moreover, once the list of goals is defined, advocates of this approach do not explain how to weight them. The assignment of weights necessarily makes enforcement subjective. Consequently, even if the combination of goals is the same, it is likely that different weights will be applied in different cases, by different agencies, and at different times.

If the list of goals and the weights assigned to each is indeterminate, then firms contemplating particular conduct will not be able to predict reliably whether antitrust enforcement is likely in a particular case. Without such predictability, we will unwittingly chill procompetitive transactions and conduct. Equally important, indeterminate rules are more prone to capture by rent seekers. Moreover, the indeterminacy of the goals and weights would make antitrust enforcement more susceptible to political whims and influence.

Similarly, the consumer choice standard is also unpredictable because the necessary line-drawing is subjective. To the extent that the consumer choice standard does not specify the requisite number of options and does not create bright lines for those reductions in choice that matter, outcomes are unpredictable. Consequently, implementation of the standard is necessarily

arbitrary.<sup>55</sup> Whether a reduction in choices from 100 to 99 is unreasonable or whether a reduction from five to four meets the standard is not an objective determination.<sup>56</sup>

The multiple goals and consumer choice standards also encounter problems with administrability. For the same reasons that these standards are unpredictable, they also become unadministrable. The subjectivity regarding undefined lists of goals and questions about weights assigned to those goals make implementing the standard impossible. There is no agreed method on how to proceed with the multiple goals standard. Similarly, the subjectivity of determining the line where the loss of an option to consumers is meaningful makes the consumer choice standard unworkable.

Even if we get past the subjectivity problems, the standards may become unworkable for evidentiary reasons. Many goals are unlikely to be measurable in any particular case. For instance, drawing lines about the appropriate size of firms involves value judgments and there is no agreed method to assess fairness in any particular case.

Even for factors that appear measurable, such as jobs, evidentiary standards may cause many of the proffered goals to be unworkable. Many of the advocates of this standard condemn current antitrust enforcement levels; one critique is that current enforcement credits efficiencies that are not adequately supported or verified.<sup>57</sup> Yet, if one of the multiple goals is to protect against the loss of jobs, estimates of the number of jobs at risk likely will come from the same company documents that currently are used to support efficiency claims.

Finally, the multiple goals and consumer choice standards are likely to result in outcomes that are contrary to accepted norms. When multiple goals are pursued, by definition there will be a loss of consumer welfare. If there are tradeoffs away from the current consumer welfare standard, consumers are likely to be worse off.<sup>58</sup> Similarly, as Joshua Wright and Judge Douglas Ginsburg explain, “a flaw with [the consumer choice] approach is that both economic theory and empirical evidence are replete with examples of business conduct that simultaneously reduces choice and increases welfare in the form of lower prices, increased innovation, or higher quality products and services.”<sup>59</sup>

---

<sup>55</sup> The standard does not reveal the economic forces in play when drawing the lines, and consequently, the tradeoffs and magnitudes of competitive effects being considered are hidden. See Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 *FORDHAM L. REV.* 2405, 2417-18 (2013). If the tradeoffs are hidden, then choices are unlikely to be consistent across cases.

<sup>56</sup> Jacobson, *supra* note 28, at 4.

<sup>57</sup> See, e.g., *In re Sycamore Partners II, L.P.*, FTC File No. 181-0180 (Jan. 28, 2019) (Statement of Commissioner Rebecca Kelly Slaughter in the matter of Sycamore Partners, Staples, and Essendant), available at [https://www.ftc.gov/system/files/documents/public\\_statements/1448321/181\\_0180\\_staples\\_essendant\\_slaughter\\_statement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1448321/181_0180_staples_essendant_slaughter_statement.pdf).

<sup>58</sup> LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2006).

<sup>59</sup> Wright & Ginsburg, *supra* note 55, at 2411. Wright and Ginsburg illustrate their conclusion with a discussion of the supply of non-price promotional services associated with resale price maintenance.

I will now turn to the first version of the competitive process standard, the one advocated by Greg Werden. Werden makes a compelling argument that the standard is consistent with Supreme Court case law and economics.<sup>60</sup> Yet the standard encounters problems. As Jon Jacobson says, since *Sylvania*, “proof of economic harm has been essential in any antitrust case, but saying that a practice interferes with the competitive process does not tell us what kind of economic harm is required.”<sup>61</sup> Without knowledge of the economic harm required, the standard may be quite difficult to administer in particular cases because we do not know the evidentiary requirements.

Finally, and most notably, I am concerned that the standard could easily metastasize from protection of the competitive process into the protection of competitors. Some monopolization cases already assert that maintaining competition requires the protection of competitors.<sup>62</sup> Adoption of a welfare standard expressly premised on protection of the competitive process may hasten antitrust enforcement down that slippery slope.

## V. Total Welfare Standard as an Alternative for Antitrust Enforcement

There is another alternative that has many benefits to commend it: the total welfare standard, also known as the aggregate economic welfare standard. As I previously described, the total welfare standard measures the effect of a practice or transaction on the economic welfare of all participants in a market, including both producers and consumers. Put differently, it refers to the aggregate value created, without regard for how gains or losses are distributed.<sup>63</sup>

Since I first took a graduate-level class in antitrust law and economics with Professor Roger Blair at the University of Florida almost 30 years ago, I have found the total welfare approach to be an attractive one for many reasons. When Dr. Blair introduced the Williamsonian analysis to us, I immediately found it to be a simple, elegant, and compelling concept. Unfortunately, the current dialogue regarding the appropriate welfare standard has not paid much attention to the total welfare standard. Today, I would like to suggest that we do so. In the next few minutes, I will provide some thoughts and raise some questions about this standard that I hope we can consider in the coming weeks and months.

---

<sup>60</sup> See Werden, *supra* note 14, at 726-37.

<sup>61</sup> Jacobson, *supra* note 28, at 6.

<sup>62</sup> See, e.g., <http://rooseveltinstitute.org/wp-content/uploads/2018/09/The-Effective-Competition-Standard-FINAL.pdf>.

<sup>63</sup> For a defense of the total welfare standard, see MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE* (2004); RICHARD A. POSNER, *ANTITRUST LAW* ix (2d ed. 2001); Dennis W. Carlton, *Does Antitrust Need To Be Modernized?*, 21 J. ECON. PERSP. 155 (2007); Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191 (1977); Joseph Farrell & Michael L. Katz, *The Economics of Welfare Standards in Antitrust*, 2 COMPETITION POL'Y INT'L 3 (2006); Ken Heyer, *Welfare Standards and Merger Analysis: Why Not the Best?*, 2 COMPETITION POL'Y INT'L 29 (2006); Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 N.Y.U. L. REV. 659 (2010); Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471 (2012).

## A. The Total Welfare Standard Would Maximize Efficiency, Not Determine Distribution of Surplus

If total welfare were the standard, Hovenkamp notes that antitrust would “promote[] allocative efficiency by ensuring that markets are as competitive as they can practicably be and that firms do not face unreasonable roadblocks to attaining productive efficiency, which refers to both cost minimization and innovation.”<sup>64</sup> In other words, if we were to consider and maximize only economic efficiency, we would maximize the total gains from trade. Speaking colloquially, we would expand the size of the pie.<sup>65</sup>

Maximizing efficiency would be consistent with the comparative advantage of the FTC. As an expert agency, the Commission has experience employing the tools of industrial organization economics. Evaluating efficiency is part of that toolkit. Thus, applying a welfare standard based on economic efficiency would capitalize on the comparative advantage of the Commission.

In contrast, the consumer welfare standard makes judgments about the distribution of wealth. The consumer welfare standard measures only the surplus that goes to consumers, ignoring what goes to sellers. As Hovenkamp says, “[t]he consumer welfare principle must therefore be counted as ‘distributive’ to the extent that it produces outcomes that shift wealth or resources in favor of consumers even though an alternative outcome would produce greater total wealth.”<sup>66</sup>

It is decidedly not the FTC’s comparative advantage to focus on questions of distribution. Instead, others with a different comparative advantage can address the redistribution issues. Here, Joe Farrell and Mike Katz explain that there should be

a division of labor among public policies: if antitrust enforcement and some other public policies focus on total surplus, other public policies can redistribute that surplus in accord with notions of fairness. A number of reasons suggest that antitrust policy is poorly suited as a redistribution vehicle in comparison with various tax and subsidy schemes.<sup>67</sup>

Moreover, if policymakers wish to achieve goals other than maximizing output—*e.g.*, altering distribution of wealth—there are more direct ways to accomplish these goals.<sup>68</sup> Notably,

---

<sup>64</sup> Hovenkamp, *supra* note 28, at 2471.

<sup>65</sup> To capture this concept, we could label this standard the “apple pie standard,” because free markets and economic growth are as American as apple pie.

<sup>66</sup> *Id.* at 2472.

<sup>67</sup> Joseph Farrell & Michael L. Katz, *The Economics of Welfare Standards in Antitrust*, at 10-11 (2006), *available at* <https://escholarship.org/uc/item/1tw2d426> (edited version of paper appeared in *Competition Policy International* (Oct. 2006)).

<sup>68</sup> Carl Shapiro, *Antitrust in a Time of Populism*, \_\_ INT’L J. INDUS. ORG. \_\_, \*29 (forthcoming), *available at* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3058345](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3058345) (“[W]hile antitrust enforcement does tend to reduce

if antitrust enforcement were to maximize total surplus by applying the total welfare standard, then policymakers redistributing that surplus would have a larger pie with which to work.<sup>69</sup>

Some may argue that consumers will be harmed under the total welfare standard. Yet these concerns frequently are based on flawed assumptions regarding which groups in society, *i.e.*, consumers or producers, have the greatest wealth. To make this point, Ken Heyer gives an example of a merger of automotive repair shops serving consumers who drive Mercedes-Benz cars.<sup>70</sup> In this example, the consumers are likely economically better off than the producers.

In fact, in a society characterized by an efficient division of labor, consumers in some markets are producers in other markets. As a result, consumers (and producers) wear many hats. By way of example, as a producer of legal services at the law firm of O'Melveny and Myers LLP, I represented Northwest Airlines in its merger with Delta Air Lines. During that same period, I was a frequent customer of various airlines for both personal and professional travel. Later, I became a Senior Vice President at Delta and, through various incentive programs, also became a shareholder of that company.<sup>71</sup> This example demonstrates that one person can be an input provider, a customer, an employee, and a shareholder with respect to the same relevant market.

Likewise, some home cooks also work at grocery stores, some restaurant diners work for wholesale food distributors, and some athletes work at sportswear companies. These examples demonstrate that consumers may also be employees and shareholders, either directly or through other investment vehicles like 401(k) programs. A given consumer may not wear all of these hats simultaneously, and may never wear all of these hats within a given industry, but an antitrust policy that applies this standard in the aggregate will benefit all of these interests.

Data substantiate these principles. In 2016, 49.3% of U.S. households owned stock in public corporations, either directly or indirectly, and stocks comprised 22.4% of total household assets.<sup>72</sup> While dated, Robert Hansen and John Lott also provide data emphasizing the breadth of stock ownership in the U.S.<sup>73</sup> In short, the facts do not provide a basis for valuing the consumer role over the others when assessing competitive effects in antitrust.

---

income inequality, antitrust cannot and should not be the primary means of addressing income inequality; tax policies and employment policies need to play that role. Nor can antitrust be the primary policy for dealing with the corruption of our political system and the excessive political power of large corporations; that huge problem is better addressed by campaign finance reform, a better-informed citizenry, stronger protections for voting rights, and far tougher laws to combat corruption. Trying to use antitrust to solve problems outside the sphere of competition will not work and could well backfire.”).

<sup>69</sup> Heyer, *supra* note 63, at 168.

<sup>70</sup> *Id.* at 166-67.

<sup>71</sup> Of course, to avoid conflicts of interest, I divested all stock in Delta Air Lines before being sworn in as Commissioner.

<sup>72</sup> Edward Wolff, Household Wealth Trends in the United States, 1962 to 2016: Has Middle Class Wealth Recovered, NBER working paper 24085 (Nov. 2017), available at <https://www.nber.org/papers/w24085.pdf>.

<sup>73</sup> Robert G. Hansen & John R. Lott, Jr., *Externalities and Corporate Objectives in a World with Diversified Shareholder/Consumers*, 31 J. Fin. & Quantitative Analysis 43, 53 (1996) (“as of 1990, 47.3 million Americans directly owned stock in public corporations and another 25.3 million owned stock mutual funds; if we consider the

Of course, we must ask of the total welfare standard the same questions asked of the other standards, an exercise to which I will now turn.

## **B. Would a Total Welfare Standard Be Administrable and Predictable?**

Some have claimed that a total welfare standard would be more difficult to implement than the consumer welfare standard because it would require (1) all of the steps assessing price to implement the consumer welfare standard and (2) an analysis of fixed cost and marginal cost savings that are not passed on to consumers. But this misperceives the real question, which is whether total welfare is likely to increase from a particular transaction or a given type of conduct. Ken Heyer states that in many situations, the analysis “would be able to conclude from the likely magnitude of merger-specific cost savings—whether marginal or fixed—that these benefits to society would exceed any plausible deadweight welfare loss. In such cases, a total welfare standard would likely be far easier than a consumer welfare standard to apply.”<sup>74</sup>

In fact, when the pure transfer of surplus from consumers to producers is treated as welfare neutral, which is what a total welfare standard would do, “the deadweight loss from many mergers would often be quite small relative to any significant cost savings.”<sup>75</sup>

Indeed, for many cases, implementing a total welfare standard would not be particularly difficult. For example, naked price fixing, unaccompanied by any integration of research, production, or output, produces no measurable efficiency gains and leads directly to higher prices with a corresponding output reduction and deadweight loss.<sup>76</sup> “On the other side, many purely vertical practices, including vertical territorial restraints, tying or exclusive dealing, may not result in higher consumer prices at all and have efficiency benefits that serve to explain them.”<sup>77</sup>

Moreover, we likely could streamline the analysis by using output as a proxy for total welfare. Current antitrust analysis already considers output effects so implementing the total welfare standard does not require the development of new techniques. Because changes in output provide a strong indication of total welfare effects, similar to the way that estimating price effects provides an administrable way to implement the consumer welfare standard, it appears that the total welfare standard could be administered easily.

---

ultimate owner of pension funds, these numbers would be still greater. . . . In America, 9,500 stock ownership plans covered 10 million employees in 1994.”).

<sup>74</sup> Heyer, *supra* note 63 at 163-64.

<sup>75</sup> *Id.* at 163 n.37.

<sup>76</sup> See Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, & Theft*, 5 WESTERN ECON. J. 224 (1967).

<sup>77</sup> Hovenkamp, *supra* note 28, at 2473-74.



That said, there are some thorny issues that could impact administrability. It is likely that adoption of the total welfare standard to guide antitrust analysis for the assessment of mergers and conduct would require that a competition screen be applied. That is, all conduct that reduces total welfare is not an antitrust violation. Unprofitable or ill-advised mergers are not an area for agency intervention if competition is not implicated.

Take another example. Enforcers may face a deal in which producers overseas would realize significant cost savings while U.S. consumers would experience higher prices. Under a strict application of the total welfare standard, the deal would be cleared. But is this an approach the U.S. antitrust agencies could or should embrace?

With respect to whether the standard would be predictable, under the total welfare standard, as under the current consumer welfare standard, antitrust analysis would be tethered to economic insights and evidence, thereby providing a principled framework for evaluating competitive effects and finding violations. Accordingly, it seems that this standard would provide an objective and systematic framework that could be applied consistently across cases and agencies.

### **C. To What Extent Would a Shift From Consumer Welfare to Total Welfare Be Outcome Determinative?**

It is likely that for the vast majority of cases, there would be little difference in enforcement decisions if a total welfare standard were used instead of the current consumer welfare standard. Indeed, Hovenkamp notes that “[t]he volume and complexity of the academic debate on the general welfare compared to 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.”<sup>78</sup>

Moreover, antitrust analysis already relies on an aggregate economic welfare standard to some extent. For instance, current antitrust law forbids monopsony even when ultimate consumers may not be harmed.<sup>79</sup> In *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,<sup>80</sup> a jury verdict finding a Section 2 violation was upheld. The claim was that Weyerhaeuser obtained a monopsony over red alder logs used in Pacific Northwest sawmills that excluded competing mills, even though red alder logs competed in a competitive downstream market for finished lumber.<sup>81</sup> The Court did not base its decision affirming liability on effects for consumers in the downstream market.

---

<sup>78</sup> *Id.* at 2474.

<sup>79</sup> See Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L.J. 707 (2007).

<sup>80</sup> 127 S. Ct. 1069 (2007).

<sup>81</sup> *Id.* at 1076 (“case does not present . . . a risk of significantly increasing concentration in . . . the market for finished lumber”).

In some circumstances, however, the total welfare standard could lead to significant differences in outcomes.<sup>82</sup> For example, consider a merger that leads to increased prices but also results in large fixed cost efficiencies. Under the consumer welfare standard, this transaction would be condemned; fixed cost savings typically are not passed through in the short run so consumers would face higher prices for some period. Under the total welfare standard, however, the fixed cost savings would be considered and could be sufficiently large for total welfare to increase.

Some argue that vertical restraints may be more accurately assessed under the total welfare standard. For example, for some cases involving RPM, output and total welfare could increase even though consumer surplus could fall. This outcome could arise if the loss of surplus by inframarginal consumers from the higher price exceeds the gain in surplus by marginal consumers who are attracted by increased demand-enhancing services. In this situation, assessing output under the total welfare standard could be more instructive than analyzing consumer effects.

#### **D. What Impact Would Selection of the Total Welfare Standard Have For Efficiencies Analysis?**

First, efficiencies would be more broadly cognizable than we currently permit under the Horizontal Merger Guidelines. As I have noted, fixed costs generally are not credited because they typically are not passed through to consumers in the short run.<sup>83</sup> A total welfare standard would capture cost reductions that would not be passed through in the short run.

Second, a total welfare standard would better enable the agencies to consider multi-market effects. Under the consumer welfare standard, efficiencies typically must affect the same relevant market in which the merger is likely to increase prices or reduce output. Although the Horizontal Merger Guidelines allow the agencies to engage in cross-market balancing in the exercise of their prosecutorial discretion, the dictates of *Philadelphia National Bank*<sup>84</sup> too often carry the day.<sup>85</sup> In contrast, under the total welfare standard, efficiencies that reduce costs in

---

<sup>82</sup> See Hovenkamp, *supra* note 28 at 2480-92 (“When a practice has ambiguous effects on consumers, perhaps because it harms some but benefits others, but the effects cannot be netted out and quantified, then producer gains resulting from efficiency may become relevant. These are antitrust’s hardest consumer welfare cases. In them, measurable output effects are particularly important.”). Practices that fall into this category include (1) variable proportion ties, (2) ties that result in interproduct price discrimination, (3) tying and bundled discounts of imperfect complements, (4) vertical restraints and other practices used to facilitate third-degree price discrimination, and (5) resale price maintenance which causes nominally higher prices but produces services that are more valuable to some customers than to others. *Id.*

<sup>83</sup> See HORIZONTAL MERGER GUIDELINES, *supra* note 29, § 10.

<sup>84</sup> *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321 (1963).

<sup>85</sup> See Christine S. Wilson, *Markets in the Balance: Efficiencies Analysis of Mergers Should Consider Multiple Markets*, LEGAL TIMES, Oct. 25, 1999, at 34.

other markets are considered, and could justify a merger that decreases output or increases price in one particular relevant market.<sup>86</sup>

Third, the total welfare standard would better capture dynamic efficiencies. For instance, many firm-specific efficiencies generated by a merger may, over time, spill over to the market as a whole as other firms in the sector imitate innovations and cost-saving measures themselves.<sup>87</sup>

## **E. Other Considerations**

We should consider the experience of other jurisdictions that apply the total welfare standard. It has been noted that the welfare standard employed in Canada lies somewhere between a consumer welfare and a total welfare standard.<sup>88</sup> The 1986 Competition Act of Canada expressly provides for an efficiencies defense for mergers that may increase prices for consumers.<sup>89</sup> Their experience could be instructive.

We should also consider the areas of antitrust law that could benefit from application of the total welfare standard. Ken Heyer, for example, discusses the use of the total welfare standard in the context of merger analysis.<sup>90</sup> I have discussed other areas like vertical restraints where there may be benefits to applying the standard. We should evaluate which categories of conduct could best be addressed by the total welfare approach, as well as those areas where application of the standard could result in anomalies – *i.e.*, outcomes inconsistent with legal or economic norms.

## **VI. Conclusion**

At the end of the day, I return to the business school adage that what you measure is what you get. What kinds of outcomes do we want? If I have accomplished nothing else today, I hope that I have provoked you to think about whether there is a role for the total welfare standard, which would maximize efficiency and give those who wish to engage in redistribution a larger pie to share.

I am confident that the folks in this audience have many thoughts and reactions. I look forward to hearing from the antitrust bar and the academic community in the coming weeks and months.

---

<sup>86</sup> See also Jan Rybnicek & Joshua D. Wright, *Outside In or Inside Out? Counting Merger Efficiencies Inside and Out of the Relevant Market* (March 2014), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2411270](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411270).

<sup>87</sup> See Gary L. Roberts & Steven C. Salop, *Efficiencies in Dynamic Merger Analysis*, 19 *WORLD COMP. L. & ECON. REV.* 5 (1996).

<sup>88</sup> See Heyer, *supra* note 63 at 148 n.5.

<sup>89</sup> Competition Act of Canada, Sec. 96(1).

<sup>90</sup> See Heyer, *supra* note 63.