

BORK'S "LEGISLATIVE INTENT" AND THE COURTS

DOUGLAS H. GINSBURG*

The Sherman Antitrust Act of 1890, the cornerstone of the U.S. antitrust regime, broadly prohibits contracts, combinations, and conspiracies in "restraint of trade" and makes it unlawful "to monopolize" any line of commerce.¹ The open-textured nature of the Act—not unlike a general principle of common law—vests the judiciary with considerable responsibility for interpretation, the discharge of which responsibility requires the courts to imbue the Act with a purpose by which to guide its application.

I. BORK'S CONSUMER WELFARE THESIS

In 1966, then-Professor Robert H. Bork examined the legislative history of the Sherman Act in search of the Congress's intent in passing it and, therefore, the policies the judiciary should follow when deciding cases under the Act.² Bork was candid about the "difficulties inherent in the very concept of legislative intention" and cautioned against viewing his work "as an attempt to describe the actual state of mind of each of the congressmen who voted for the Sherman Act."³ Nevertheless, he thought the undertaking justified by the need to counter the judiciary's repeated invocation of values unrelated to the debate that had informed passage of the Sherman Act and, lacking any legitimate economic rationale, were likely to produce real economic harm.

For example, in *United States v. Trans-Missouri Freight Association*, one of the first Sherman Act cases to reach the Supreme Court, the Justices

* The author, a Senior Circuit Judge, U.S. Court of Appeals for the District of Columbia Circuit, and Professor of Law, George Mason University School of Law, is grateful to the editors of *Competition Policy International* for permission to re-publish portions of an earlier version of this article, and to Zander Li for research assistance.

¹ 15 U.S.C. §§ 1–2.

² See Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

³ *Id.* at 7 n.2. Bork's caveat is an important one. After all, "It is the law that governs, not the intent of the lawgiver." Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 17 (Amy Gutman ed., 1997).

bemoaned “transferring an independent business man . . . into a mere servant or agent of a corporation.”⁴ In *Fashion Originators’ Guild of America v. FTC*, the Court counted among the policies underlying the Sherman Act protecting “the freedom of action of [Guild] members [not] to reveal to the Guild the intimate details of their individual affairs.”⁵ Indeed, no lesser light than Judge Learned Hand had asserted that the Congress intended the Sherman Act to achieve certain socio-political aims, such as minimizing the “helplessness of the individual”⁶ and ensuring the “organization of industry in small units.”⁷ Obviously these policies are highly malleable. They can be invoked (or not) to justify almost any result in any situation. Indeed, as Bork pointed out, Judge Hand went so far as to state that in enacting the Sherman Act, the Congress had “delegated to the courts the duty of fixing the standard for each case.”⁸

Bork’s examination of the text and structure of the Sherman Act against the background of preliminary proposals and draft legislation, statements by senators and representatives, and contemporaneous understandings of constitutional and common law led him to conclude: “The legislative history . . . contains no colorable support for application by courts of any value premise or policy other than the maximization of consumer welfare.”⁹ Here Bork equated “consumer welfare” with “the maximization of wealth or consumer want satisfaction,”¹⁰ known today as “total surplus,”¹¹ a concept he thought the framers of the Sherman Act clearly grasped even though they did not

⁴ 166 U.S. 290, 324 (1897).

⁵ 312 U.S. 457, 465 (1941).

⁶ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428 (2d Cir. 1945) (*Alcoa*).

⁷ *Id.* at 429.

⁸ *United States v. Associated Press*, 52 F. Supp. 362, 370 (S.D.N.Y. 1943), *aff’d*, 326 U.S. 1 (1945).

⁹ Bork, *supra* note 2, at 10.

¹⁰ *Id.* at 7.

¹¹ Bork explained that “consumer welfare,” in the sense he meant it, was “merely another term for the wealth of the nation.” ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 90 (1978). Because the “wealth of the nation” includes both consumer and producer surplus, scholars today prefer “total surplus,” “total welfare,” or the like. See N. GREGORY MANKIW, *PRINCIPLES OF ECONOMICS* 145 (6th ed. 2012) (“[T]he economic well-being of a society . . . [can be] measure[d] [as] the sum of consumer and producer surplus, which we call *total surplus*”); Herbert Hovenkamp, *Implementing Antitrust’s Welfare Goals*, 81 *FORDHAM L. REV.* 2471, 2472–73 (2013) (“Bork famously argued that antitrust law should adopt what he termed a ‘consumer welfare’ standard for illegality but then equated this standard with general welfare”); John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 *NOTRE DAME L. REV.* 191, 199–200 (2008) (By “‘consumer welfare’ (which he defines as economic efficiency) . . . [Bork meant] total welfare”); Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act*, 85 *N.Y.U. L. REV.* 659, 691 (2010) (“Bork equated ‘[consumer] want satisfaction’ with the welfare of all consumers or, in other words, society’s total welfare”); Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 *J. COMPETITION L. & ECON.* 133, 148 (2011) (“Bork explicitly equated the term ‘consumer welfare’ with ‘the wealth of the nation,’ a term that economists would understand as ‘social welfare’”) (footnote omitted).

“speak of consumer welfare with the precision of a modern economist.”¹² Bork also explained that maximization of consumer welfare is the common denominator underlying the central prohibitions of the Act—the condemnation of cartel agreements, monopolistic mergers, and predatory business tactics¹³—and that legislators used the term “monopolize” to refer only to those three prohibited activities, as opposed to a “monopoly,” which might arise from superior efficiency.¹⁴ According to Bork: “Only a consumer-welfare value which, in cases of conflict, sweeps all other values before it can account for Congress’ willingness to permit efficiency-based monopoly.”¹⁵

II. ACCEPTANCE BY THE COURTS

When Bork’s article was first published in 1966, his thesis was novel. By 1977, it had become the conventional wisdom of the federal courts. That year the U.S. Supreme Court in *Continental T.V., Inc. v. GTE Sylvania Inc.*¹⁶ repudiated the position it had taken only ten years before in *United States v. Arnold, Schwinn & Co.*¹⁷ In the earlier case, the Court had held it a per se violation for “a manufacturer [to] sell[] products to his distributor subject to territorial restrictions upon resale,”¹⁸ that is, regardless of the actual—and possibly efficient—economic effect of the restraint.

In *GTE Sylvania Inc.*, a retailer of televisions claimed a manufacturer’s limitation upon the locations at which the retailer could sell Sylvania brand televisions was a per se violation of the Sherman Act. The U.S. Court of Appeals for the Ninth Circuit, after rehearing the case en banc, had recognized that—as the Supreme Court later put it—the condemnation of “*Schwinn* [was] clearly broad enough to apply” to the facts of the case.¹⁹ Nonetheless, the Ninth Circuit had concluded *Schwinn* was not controlling, applied the rule of reason, and endorsed the manufacturer’s position that such arrangements “may in some instances *promote*, rather than impede, competition” and, in turn, efficiency.²⁰

¹² Bork, *supra* note 2, at 10.

¹³ *See id.* at 11–12, 21–26.

¹⁴ *See id.* at 12, 26–31.

¹⁵ *Id.* at 12.

¹⁶ 433 U.S. 36 (1977).

¹⁷ 388 U.S. 365 (1967).

¹⁸ *Id.* at 379.

¹⁹ 433 U.S. at 46.

²⁰ *GTE Sylvania Inc. v. Cont’l T.V., Inc.*, 537 F.2d 980, 1000 (9th Cir. 1976) (en banc), *aff’d*, 433 U.S. 36 (1977) (emphasis added). The court pointed out that Schwinn had a much larger market share than Sylvania and that “Schwinn’s territorial restrictions . . . prevented a dealer from competing for customers outside his territory,” whereas “Sylvania’s dealers could sell to customers from any area, could advertise in any area, and were limited only as to the location of the franchisee’s place of business.” *Id.* at 989–90. Four of the eleven judges rejected this attempt

More to the present point, the Ninth Circuit had relied directly and solely upon Bork to explain its changing tack and rejecting the multiplicity of “values” that the Supreme Court for decades had been reading into the Sherman Act:

Since the legislative intent underlying the Sherman Act had as its goal the promotion of consumer welfare, we decline blindly to condemn a business practice as illegal per se because it imposes a partial, though perhaps reasonable, limitation on intrabrand competition, when there is a significant possibility that its overall effect is to promote competition between brands.²¹

Two dissenters remained of the view that the legislative history of the Sherman Act “reflect[s] a concern not only with the consumer interest in price, quality, and quantity of goods and services, but also with society’s interest in the protection of the independent businessman, for reasons of social and political as well as economic policy.”²²

The Supreme Court affirmed the Ninth Circuit despite the lower court’s seeming apostasy, noting that “[p]er se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive,”²³ and concluding that “[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products.”²⁴

In thus focusing upon economic efficiency to the exclusion of other values, the Supreme Court implicitly endorsed Bork’s thesis. Indeed, in his concurring opinion, Justice White attributed to the Court the view that the Sherman Act is “directed solely to economic efficiency,” and cited Bork’s article as the source of that position.²⁵ Though it is, of course, possible that other changes in the zeitgeist made Bork’s thesis more appealing to the Court, the attribution to Bork both by the Ninth Circuit and by Justice White leave little reason to

to distinguish *Schwinn*, arguing that “the majority holds that *Schwinn* is bad law.” *Id.* at 1017 (Kilkenny, J., dissenting).

²¹ *Id.* at 1003 (footnote omitted); see *id.* at 1003 n.39 (“A study of the legislative history of the Sherman Act ‘establish[es] conclusively that the legislative intent underlying the Sherman Act was that courts should be guided exclusively by consumer welfare and the economic criteria which that value premise implies’”) (quoting Bork, *supra* note 2, at 11).

²² *Id.* at 1019 (Browning, J., joined by Wright, J., dissenting).

²³ 433 U.S. 36, 49–50 (1977).

²⁴ *Id.* at 54; cf. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379 (1967), *overruled by GTE Sylvania Inc.*, 433 U.S. 36 (“[T]o restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it . . . [is] so obviously destructive of competition” as to be a per se violation of the Sherman Act).

²⁵ *Id.* at 69 (White, J., concurring) (citing Bork, *supra* note 2, at 7). Justice White would have distinguished *Schwinn* on the ground that GTE Sylvania, unlike Schwinn, had “negligible economic power in the product market,” *id.* at 71, here referring to its “insignificant market share,” *id.* at 59, of 1 to 2 percent.

doubt that Bork's work was the proximate cause of the paradigm shift in the Court's jurisprudence.²⁶

Two years later, the Court itself made that clear in *Reiter v. Sonotone Corp.*,²⁷ where it considered a class action brought under the Clayton Antitrust Act of 1914 by plaintiffs who had purchased hearing aids from a manufacturer they alleged had fixed prices with its rivals and with its retailers. Relying this time expressly upon Bork's appraisal of the legislative history of the Sherman Act as the "predecessor" of the Clayton Act, the Court concluded the later Act, in providing a remedy to anyone injured in his "business or property," covered "pecuniary injuries suffered by those who purchase goods and services at retail for personal use."²⁸ Quoting Bork's 1978 book, *The Antitrust Paradox*, in which a version of his 1966 article appears as a chapter, the Court declared that the legislative history "suggest[s] that Congress designed the Sherman Act as a 'consumer welfare prescription.'"²⁹

In *NCAA v. Board of Regents of University of Oklahoma*,³⁰ the Court adhered to the consumer welfare thesis when it determined the National Collegiate Athletic Association's limitation on the number of televised intercollegiate football games and its fixed-price, exclusive agreements with certain broadcasters violated the Sherman Act. Although the Court noted the arrangement adversely affected competitors' "freedom to compete,"³¹ it ultimately based its decision squarely upon consumer welfare:

Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference. This . . . point is perhaps the most significant, since Congress designed the Sherman Act as a consumer welfare prescription. A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law.³²

Thus, by the mid-1980s, Bork's thesis had undeniably changed the Supreme Court's most fundamental understanding of the Sherman Act.

Although the Supreme Court has not recently reexamined the legislative history of the Sherman Act, it does make occasional references to the purpose of the Act, the most recent one of any substance being in *Leegin Creative*

²⁶ The significance of the Court's new, Borkian position cannot be overstated. As Professor Timothy Muris put it, "[T]he opinion was a ringing endorsement of the economic approach to antitrust." Timothy J. Muris, GTE Sylvania and the Empirical Foundations of Antitrust, 68 ANTI-TRUST L.J. 899, 900 (2001).

²⁷ 442 U.S. 330 (1979).

²⁸ *Sonotone*, 442 U.S. at 342–43.

²⁹ *Id.*

³⁰ 468 U.S. 85 (1984).

³¹ *Id.* at 106.

³² *Id.* at 107–08 (footnotes, citations, and quotation marks omitted).

*Leather Products, Inc. v. PSKS, Inc.*³³ Justice Kennedy, writing for five members of the Court, stated that the goal of state “fair trade” laws, which prohibited resale price maintenance in order

to protect small retail establishments that . . . might otherwise be driven from the marketplace by large-volume discounters . . . [was] foreign to the Sherman Act. . . . Divorced from *competition and consumer welfare*, they were designed to save inefficient small retailers from their inability to compete. The purpose of the antitrust laws, by contrast, is the protection of *competition*, not *competitors*.³⁴

Notably, the four dissenters, speaking through Justice Breyer, agreed with that basic premise: “The Sherman Act seeks to maintain a marketplace free of anticompetitive practices The law assumes that such a marketplace, free of private restrictions, will tend to bring about the lower prices, better products, and more efficient production processes that consumers typically desire.”³⁵ Every court of appeals has followed the Supreme Court in explicitly stating the purpose of the Sherman Act in terms either of “consumer welfare,”³⁶ the Court’s own restatement of the con-

³³ 551 U.S. 877 (2007); *see also* *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 195 (2010) (quoting 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1462b, at 193–94 (2d ed. 2003) for the proposition that the “central evil addressed by Sherman Act § 1 is the elimination of competition that would otherwise exist” (internal quotation marks and brackets omitted)).

³⁴ *Leegin*, 551 U.S. at 905–06 (first emphasis supplied, internal quotation marks omitted). In *Leegin* the Court sharpened its consumer welfare inquiry by identifying per se treatment with restraints that “decrease[] output or reduce[] competition in order to increase price.” *Id.* at 893. This focus upon efficiency stands in contrast to the Court’s earlier emphasis, when analyzing vertical restraints, upon the tradeoff between “intra-brand” and “inter-brand” competition. *See, e.g., Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51 (1977) (“The market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intra-brand competition and stimulation of inter-brand competition”) (footnotes omitted). I am indebted to Joshua D. Wright for the observation that, by coming down firmly in favor of efficiency in *Leegin*, the Court seems to be ruling out arguments that a decrease in intra-brand competition can be outweighed by a gain to efficiency from inter-brand competition. Whether, however, this reflects a considered judgment or merely a *lapsus linguae* remains to be seen.

³⁵ *Leegin*, 551 U.S. at 909 (Breyer, J., dissenting).

³⁶ *See, e.g., Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 192 (1st Cir. 1996) (“[T]he Sherman Act and the Clayton Act . . . were intended to proscribe only conduct that threatens consumer welfare”); *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59, 63 (2d Cir. 1997) (“[T]he Sherman Act’s essential purpose [is] safeguarding consumer welfare”); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 308 (3d Cir. 2007) (“The primary goal of antitrust law is to maximize consumer welfare by promoting competition among firms”); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1057 (6th Cir. 1984) (“[T]he economic policies of the antitrust laws [are] to promote efficiency, encourage vigorous competition and maximize consumer welfare”); *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir. 1989) (“Antitrust law is about consumers’ welfare and the efficient organization of production”); *Westman Comm’n Co. v. Hobart Int’l, Inc.*, 796 F.2d 1216, 1220 (10th Cir. 1986) (“[T]he purpose of the antitrust laws is the promotion of consumer welfare”); *Jacobs v. Tempur-Pedic Int’l, Inc.*, 626 F.3d 1327, 1339 (11th Cir. 2010) (“[C]onsumer welfare, understood in the sense of allocative efficiency, is the animating concern of the Sherman Act”);

cept as the preservation of "competition, not competitors,"³⁷ or a local variant.³⁸

III. REJECTION BY THE ACADEMY

Academics began seriously to challenge Bork's reading of the legislative history only after the Supreme Court had endorsed it in *Reiter*. From the near score of articles since then critical of the consumer welfare thesis, there have emerged two distinct alternative accounts of congressional intent. One, first advanced by Professor Robert H. Lande shortly after *Reiter* was decided, is that the Congress's chief objective in the Sherman Act was to prevent "wealth transfers" from consumers to business trusts, forerunners of the large corporations of today.³⁹ Though he agrees with Bork that some legislators were con-

Brown v. Pro Football, Inc., 50 F.3d 1041, 1054 (D.C. Cir. 1995) ("In an effort to give content to th[e] reasonableness standard, courts have conceived of the Sherman Act as a 'consumer welfare prescription' ") (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)), *aff'd*, 518 U.S. 231 (1996).

³⁷ *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 315 (4th Cir. 2007) ("[T]he Sherman Act does not protect competitors from being destroyed through competition; on the contrary . . . [it] was enacted to protect the freedom to compete by curtailing the destruction of competition through anticompetitive practices"); *Jebaco, Inc. v. Harrah's Operating Co., Inc.*, 587 F.3d 314, 320 (5th Cir. 2009) (rejecting argument that "the purpose of the antitrust laws is to protect small business from larger ones" because "[t]he federal antitrust laws protect competition, not competitors").

³⁸ *Mayer Hoffman McCann, P.C. v. Barton*, 614 F.3d 893, 909 (8th Cir. 2010) ("The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market" (quoting *Spectrum Sports Inc. v. McQuillan*, 506 U.S. 447, 458 (1993)); *California v. Safeway, Inc.*, 651 F.3d 1118, 1132 (9th Cir. 2011) (en banc) ("The touchstone is consumer good").

Although the Supreme Court has firmly adopted the term "consumer welfare," it has not said whether that term should be understood as total surplus, as Bork argued, or consumer surplus, as Professor Lande and others maintain. *See infra* note 43 (briefly surveying the debate). With two exceptions, the circuits have followed suit. In 2010, the Eleventh Circuit explicitly endorsed allocative efficiency—*see Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d at 1339 ("consumer welfare, understood in the sense of allocative efficiency, is the animating concern of the Sherman Act")—which implicitly comports with Bork's position because an allocatively efficient market maximizes total surplus. *See, e.g., MANKIW, supra* note 11, at 145 ("If an allocation of resources maximizes total surplus, we say that the allocation exhibits efficiency."). In 1995, the Ninth Circuit announced a peculiar test that required both allocative efficiency and consumer surplus, though a recent en banc decision seems to have moved that court toward the consumer surplus standard. *Compare Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995) ("[A]n act is deemed anticompetitive under the Sherman Act only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality."), *with California v. Safeway, Inc.*, 651 F.3d at 1132 ("Congress sought to ensure that competitors not cut deals aimed at stifling competition and at permitting higher prices to be charged to consumers than would be expected in a competitive environment, or permitting lower prices to be paid to those from whom competitors bought materials than a fair market rate. The touchstone is consumer good.").

³⁹ *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Economic Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982).

cerned with one kind of efficiency,⁴⁰ Lande maintains that, because a number of them believed large trusts were generally more efficient than small- and medium-sized businesses,⁴¹ efficiency could not have been the sole value underlying an “anti-trust” measure. Instead, he argues the Act was intended to curb the market power of large producers in order to prevent their “extract[ing] wealth from consumers.”⁴² As he would later rephrase the point, “the property right we today call consumers’ surplus was defined and awarded to consumers.”⁴³

Professor Herbert Hovenkamp contends the primary purpose of the Sherman Act was the protection of small business, not of consumers.⁴⁴ The legislative history of the Sherman Act and attendant political circumstances, he believes, “suggest that the interest groups that communicated their concerns to Congress most effectively were small producers.”⁴⁵ Hovenkamp concludes the Congress acted neither solely upon the basis of efficiency nor solely to benefit consumers, but rather to avert “various kinds of injury to competitors . . . flow[ing] mainly from the lower costs of larger, more efficient rivals.”⁴⁶ Professors Kirkwood and Lande agree that the Congress was concerned about some producers but they nonetheless reject the broad “social/political, big

⁴⁰ *Id.* at 89 (“Although the legislative history of the Sherman Act never alludes to any concept resembling allocative efficiency, it does repeatedly praise corporate productive efficiency.”).

⁴¹ *Id.* at 90.

⁴² *Id.* at 93.

⁴³ 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, 2354 (2013) (internal quotation marks deleted). In two recent articles Professor John B. Kirkwood joined Lande in arguing, albeit not very forcefully, that the courts have largely come around to the consumer surplus view: “While most decisions do not address the issue, those that do . . . clearly or likely believe that in general, the preeminent objective of the antitrust laws is to protect consumers, not enhance efficiency.” Kirkwood & Lande, *supra* note 11, at 212–13; *see also* John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 *FORDHAM L. REV.* 2425, 2442–44 (2013) (updating the survey of cases in the earlier article with Lande). Professor Hovenkamp, in characteristically more precise terms, concurs. Hovenkamp, *supra* note 11, at 2476 (“[I]f the evidence in a particular case indicates that a challenged practice facilitates the exercise of market power, resulting in output that is actually lower and prices that are actually higher, then tribunals uniformly condemn the restraint without regard to offsetting efficiencies”). Alan Meese disagrees; relying principally upon cases that invoke the notion of “competition on the merits,” he claims that, although no “court implementing section 2 has employed purchaser welfare as the operative standard . . . [section 2] courts have repeatedly adopted tests that effectively implement a total welfare approach to antitrust regulation.” Meese, *supra* note 11, at 665.

⁴⁴ *See* Herbert Hovenkamp, *Antitrust’s Protected Classes*, 88 *MICH. L. REV.* 1, 24 (1989) (“Although the drafters of the Sherman Act were concerned about injury to consumers, they were at least as concerned with various kinds of injury to competitors”).

⁴⁵ *Id.*

⁴⁶ 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 101, at 10–11 (4th ed. 2013).

business is bad, small business is good, rationale for antitrust.”⁴⁷ Rather, they argue, the legislative history supports only “a congressional desire to help protect sellers from being forced to sell at prices below the competitive level.”⁴⁸

The challenges to Bork's thesis lodged by Lande and Hovenkamp are representative of the academy as a whole. One commentator goes so far as to say Bork's interpretation “has been almost universally rejected by antitrust scholars.”⁴⁹ Yet the academy has failed to persuade the judiciary,⁵⁰ and Bork's consumer welfare thesis has become one of his many enduring contributions to U.S. antitrust law.

IV. THE CONSEQUENCES OF BORK'S THESIS

Regardless whether Bork's assessment of the legislative history of the Sherman Act is correct, the Supreme Court's endorsement of consumer welfare as the exclusive value underlying the antitrust laws has had three important consequences.

⁴⁷ Kirkwood & Lande, *supra* note 11, at 207 (criticizing the cases cited in Lande's earlier work, *supra* note 39, at 102–03 & nn.146–147, as exalting the preservation of small business, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) (“Congress[] desire[d] to promote competition through the protection of viable, small, locally owned businesses [even though] occasional higher costs and prices might result from the maintenance of fragmented industries and markets”)); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323–24 (1897) (“Trade or commerce under [circumstances of artificially reduced prices] may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein Mere reduction in the price the commodity dealt in might be dearly paid for by the ruin of such a class and the absorption of control over one commodity by an all-powerful combination of capital.”); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429 (2d Cir. 1945) (L. Hand, J.) (“Throughout the history of [the antitrust] statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units.”).

⁴⁸ Kirkwood & Lande, *supra* note 11, at 207; *see also* Kirkwood, *supra* note 43, at 2438 (“[T]he predominant goal expressed in the legislative histories of the Sherman Act and the Clayton Act is the protection of consumers and small suppliers from anticompetitive conduct.”).

⁴⁹ Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs*, 98 MICH. L. REV. 849, 905 n.150 (2000).

⁵⁰ In the 1980s, a few courts did question the exclusiveness of the consumer welfare thesis that the Supreme Court had just endorsed. *See McGahee v. N. Propane Gas Co.*, 858 F.2d 1487, 1497–98 (11th Cir. 1988) (“In passing antitrust legislation, Congress's purpose was not only an economic one, but was also a political one, a purpose of curbing the power some individuals and corporations had over the economy”); *MCI Commc'ns Corp. v. AT&T Co.*, 708 F.2d 1081, 1110 (7th Cir. 1983) (acknowledging “with approval the populist origins of the antitrust laws” but declining to consider “larger concerns about broad pro-competitive policy, economic concentration and political power” only because they were then being “effectively addressed by the [FCC] and possibly by the Congress”); *see also Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 230–31 (D.C. Cir. 1986) (Wald, J., concurring) (“I do not believe that the debate over the purposes of antitrust laws has been settled yet.”). As discussed *supra* at notes 36–38 and the accompanying text, the courts have long since resolved any lingering doubts over the purpose of the Sherman Act.

First, it has substantially ameliorated the uncertainty that prevailed when courts were freely choosing among multiple, incommensurable, and often conflicting values. The antitrust cases that reach a federal court of appeals today are more often decided by a unanimous panel.⁵¹ And, as Leah Brannon and I have shown elsewhere, most Supreme Court cases are now decided by supermajorities of seven, eight, or even a unanimous court of nine Justices.⁵² This reduction of uncertainty benefits the economy by enabling business people to make decisions knowing the antitrust standards by which their actions will be judged; because certainty in the law is the antidote to litigation,⁵³ no doubt fewer bootless antitrust cases are brought now than would be brought under the *ancien régime*. Even one of Bork's sharpest critics would have to agree: Professor Christopher Grandy, who maintains "the legislative history of the Sherman Act fails to support the consumer-welfare hypothesis," nevertheless acknowledges that Bork's thesis "provides a clear and cogent set of rules that courts can apply in antitrust cases, and no other view of antitrust accomplishes that task as well."⁵⁴

Second, and relatedly, judicial adherence to the consumer welfare standard has significantly narrowed the range of conduct within the condemnation of the Act. Business people now know nonprice vertical restraints are in effect

⁵¹ Of the 264 federal appellate cases coded by Westlaw as "Antitrust and Trade Regulation" that include the words "Sherman Act" or "Clayton Act" in the headnote and were decided in 1975 through 1978, 32 or about 12 percent drew a dissenting opinion. The same search performed for 2009 through 2012 found 146 cases and only 10 dissenting opinions, or a dissent rate of about 7 percent.

⁵² Douglas H. Ginsburg & Leah Brannon, *Antitrust Decisions of the U.S. Supreme Court, 1967 to 2007*, COMPETITION POL'Y INT'L, Autumn 2007, Vol. 3, No. 2, at 3, 14. The ten cases decided in 2004 through 2007 drew a total of nine dissenting votes, four of which were based far less upon a different economic analysis than upon the propriety of overruling a longstanding precedent interpreting the Sherman Act. See *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 929 (2007) (Breyer, J., dissenting) ("In sum, every *stare decisis* concern this Court has ever mentioned counsels against overruling here."). The prior eight decisions, which were issued in 1993 through 1999, drew a total of eight dissenting votes. Ginsburg & Brannon, *supra*, at 14. The Supreme Court has decided three substantive antitrust cases since 2007; the only dissenting votes were the three cast in *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013). See *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010); *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009) (unanimously holding a price squeeze claim is not cognizable under the Sherman Act absent a preexisting duty to deal; four Justices concurring in the judgment of reversal would have gone on to remand the case for the district court to determine whether the plaintiffs may proceed with their predatory pricing claim.).

⁵³ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 490 (8th ed. 2011) ("[V]ague standards beget disputes that require litigation over alleged violations to resolve.").

⁵⁴ Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-Examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359, 373 (1993).

per se lawful;⁵⁵ minimum⁵⁶ and maximum⁵⁷ resale price maintenance are lawful when they do not have an anticompetitive effect such as facilitating maintenance of an unlawful cartel;⁵⁸ neither aggressive price cutting of outputs nor aggressive bidding for inputs will be condemned unless they meet, respectively, the "below cost" and recoupment standards of *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*⁵⁹ or the "above revenues" and recoupment standards of *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*⁶⁰ and it is in effect per se lawful for a monopolist that has come lawfully by its market power to charge profit-maximizing prices.⁶¹

Third, judicial adherence to Bork's thesis has nearly put an end to the efforts of counsel and the propensity of lower courts, real or perceived, to manipulate outcomes by invoking highly plastic, subjective values of the sort instanced by Judge Hand. Score one for the rule of law.

In sum, judicial endorsement of the consumer welfare standard has no doubt led to a more efficient allocation of scarce resources, thereby increasing, just as Bork predicted in 1978, "the wealth of the nation."⁶²

⁵⁵ Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67, 67 (1991) (empirical study concluding that pursuant to *GTE Sylvania* "non-monopolists have been effectively freed from antitrust regulation of vertical nonprice restraints").

⁵⁶ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007).

⁵⁷ *State Oil Co. v. Khan*, 522 U.S. 3, 7 (1997).

⁵⁸ See 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1632c5, at 364 (3d ed. 2010) ("On one issue there is a substantial consensus: resale price maintenance is undesirable to the extent that it either helps manufacturers to coordinate price among themselves or helps dealers to obtain excess profit or the quiet life.").

⁵⁹ 509 U.S. 209, 222–24 (1993) ("[A] plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs [and] that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices"). *Brooke Group* effectively overruled *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), which, as the Supreme Court put it in the later case, had "often been interpreted to permit liability for primary-line price discrimination on a mere showing that the defendant intended to harm competition or produced a declining price structure." 509 U.S. at 221.

⁶⁰ 549 U.S. 312, 325 (2007) ("A plaintiff must prove that . . . the predator's bidding on the buy side . . . caused the cost of the relevant output to rise above the revenues generated in the sale of those outputs . . . [and] that the defendant has a dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power.").

⁶¹ *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 454 (2009) ("[A]ntitrust law does not prohibit lawfully obtained monopolies from charging monopoly prices"); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system").

⁶² BORK, *supra* note 11, at 90.

