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# I Say Antitrust; You Say Anticompetitive: Why Bridging the Divide Between U.S. and EU Competition Policy Makes Economic Sense

Erik Johansen\*

## I. Introduction

Competition.<sup>1</sup> Such a basic concept: ideas in conflict produce better products, better music, better literature, better artwork, better political systems, and so on and so forth. In short, conflict creates a stronger, more enlightened society continually evolving and increasing standards of living into perpetuity.<sup>2</sup> Moreover, unfettered competition is the essence of freedom; concentrations of power, whether economic or political, lead to tyranny and oppression.<sup>3</sup> From Adam Smith's invisible hand<sup>4</sup> to Justice Oliver Wendell Holmes' marketplace of ideas,<sup>5</sup>

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\* Erik Johansen is an attorney in the Chicago office of the law firm Sandler, Travis & Rosenberg, P.A.; his practice is focused on international business transactions, customs and international trade law, and intellectual property licensing. Johansen is also a director of the Chicago-area research and development firm Scroll Laboratories, Inc.

1. For definitions of competition, see WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (College ed. 1968) (defining "competition" as "striving for the same object, position, prize . . . usually in accordance with certain fixed rules") and BLACK'S LAW DICTIONARY 278-79 (7th ed. 1999) (defining "perfect competition" as "a completely efficient market situation characterized by numerous buyers and sellers, a homogeneous product, perfect information for all parties, and complete freedom to move in and out of the market. Perfect competition rarely if ever exists, but antitrust scholars often use the theory as a standard for measuring market performance.").

2. For a robust discussion and analysis of the history of competition theory in the United States, see generally RUDOLPH J. R. PERITZ, COMPETITION POLICY IN AMERICA (1996).

3. *Id.* at 3-8.

4. ADAM SMITH, THE WEALTH OF NATIONS (1776).

5. [T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate

competition theory is the foundation of our modern society.<sup>6</sup> Upon that foundation, global trade has generally been recognized as building increased choice, more efficient production, and still greater wealth.<sup>7</sup> The rather obvious corollary proposition is that in order for international trade to act as the lever, helping to ratchet up global living standards, full and free competition must prevail. Inconsistencies, however, arise in attempts to specifically define competition from one country to the next. This issue is especially problematic with respect to the implementation of laws prohibiting anticompetitive behavior; if the contours of competition are not clearly understood by business people and their lawyers, anticompetitive behavior is harder to determine *ex ante*. Therefore, transnational deal-making and, consequently, growth is incapable of occurring at optimal levels.

In the international trade arena, understanding the application of competition laws can become complicated by the specific and nuanced goals of the particular governments. For example, at first blush EU competition laws and U.S. antitrust laws both appear to be aimed at increasing consumer welfare. Economists or attorneys practicing in the area of antitrust law<sup>8</sup> might explain that both laws are designed to prevent firms from obtaining monopoly power<sup>9</sup> and, therefore, abusing their market positions by preventing full and free competition,<sup>10</sup> increasing the social and economic costs to consumers,<sup>11</sup> and wielding too much political clout.<sup>12</sup> The rub, however, lies in the modern interpretation of the respective laws and in the “social, political, and market integration” policies underlying the need for such legislation.<sup>13</sup> It

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interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting).

6. See PERITZ, *supra* note 2, at 15.

7. See generally Sungjoon Choo, *Breaking the Barrier Between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42 HARV. INT'L L.J. 419 (2001); see RAJ BHALA, *INTERNATIONAL TRADE LAW: THEORY & PRACTICE* 1-6 (2d ed. 2001).

8. Legal concepts of monopoly power other than those relating to the area of antitrust or anticompetitive law are outside the scope of this paper, but they also include, for example, concentrations of political power.

9. See William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981).

10. The original language of Senator Sherman's antitrust bill states: “All arrangements, contracts, agreements, trusts or combinations . . . made with a view, or which tend to prevent full and free competition . . . or which tend to advance the price to the consumer . . . are hereby declared to be against public policy, unlawful, and void.” PERITZ, *supra* note 2, at 13.

11. *Id.*

12. *Id.* at 11.

13. Patrick Thieffry, *Antitrust Considerations: The Typical Case of the European Market*, in COUNSELING EMERGING COMPANIES IN GOING INTERNATIONAL 189, 190 (Alan

follows that these distinctions, whether or not subtle, create distinct wealth effects both domestically and globally. Taking into account the increasingly integrated nature of the global economy, the question is logically raised: which laws are better poised to lay the foundation for more consistent standards governing anticompetitive behavior? Ostensibly, bridging the gap between the currently divergent international standards would lead to decreased confusion in the area of transnational deal-making as well as increased levels of international growth.<sup>14</sup>

Over the past several decades, U.S. antitrust law has been dominated by the economics-based, Chicago-school approach to antitrust policy, which relies heavily on allocative efficiency models and price theory.<sup>15</sup> EU competition law, on the other hand, is less concerned with the “Kaldor-Hicks, potential Pareto sense of efficiency”<sup>16</sup> than with factors such as barriers to entry, market integration, fairness, and direct consumer welfare.<sup>17</sup> When viewed through the lens of total societal benefit in a more globally integrated marketplace, the EU approach appears to provide for greater total wealth vis-à-vis the comparatively limited U.S. approach. First, wealth includes not only income, but also intangibles such as choice and general standard of living.<sup>18</sup> Second, the historical and statutory underpinnings as well as the specific policy objectives of EU and U.S. competition laws demonstrate the EU approach is more compatible with the modern realities of an increasingly global marketplace. Third, recent court decisions illuminate the problems inherent in the application of divergent competition laws and the relative economic impact. Finally, the application of classic economic models, such as the Pareto<sup>19</sup> and Kaldor-Hicks<sup>20</sup> analysis,

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S. Gutterman ed., 1994) (differentiating between the social, political, and market integration policies underlying EU competition law and U.S. antitrust law).

14. See generally Shanker A. Singham, *Market Access and Market Contestability: Is the Difference Purely Semantics? A Business Perspective*, 25 *BROOK. J. INT'L L.* 337 (1999); William Sugden, *Global Antitrust and the Evolution of an International Standard*, 35 *VAND. J. TRANSNAT'L L.* 989 (2002).

15. See *infra* Part V(B).

16. RICHARD A. POSNER, *ANTITRUST LAW* 2 (2d ed. 2001).

17. See *infra* note 82.

18. See BHALA, *supra* note 7. For an in-depth discussion of productivity and standard of living, see Robert J. Gordon, *Two Centuries of Economic Growth: Europe Chasing the American Frontier* (National Bureau of Economic Research, Working Paper No. 10662, Aug. 2004), available at <http://www.nber.org/papers/w10662.pdf> (last visited Oct. 2, 2005).

19. Policies or transactions which lead to a distribution of resources that increase at least one person's wealth or utility and decrease no one's wealth or utility are considered to be “Pareto-superior” allocations or transactions; also referred to as a “Pareto improvement.” RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 12-13 (6th ed. 2003); JEFFERY L. HARRISON, *LAW & ECONOMICS: CASES, MATERIALS, AND BEHAVIORAL*

combined with certain aspects of the emerging *Post-Chicago* school<sup>21</sup> bolster the proposition that the EU model is better poised to facilitate greater levels of consumer welfare.

## II. Wealth

Before a discussion of the wealth effects of divergent competition policies and practices may take place, wealth must first be defined. There are two general concepts of wealth: one narrow and one more expansive. Because each model contains different values, each one produces distinct outcomes with respect to wealth creation and growth when applied to the competition problem.<sup>22</sup>

### A. *The Mercantilist Theory*

To the mercantilist and to the neo-mercantilist a nation's wealth lies in its economic power, end of story.<sup>23</sup> Whether this power lies in its stock of precious metals or in the modern equivalent – its trade surplus –

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PERSPECTIVES 50-51 (2002); Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1215 n.14 (1991). The concept of Pareto efficiency is named for the Italian economist Vilfredo Pareto (1848-1923).

20. The Paretian efficiency model more commonly used by economists, namely *Chicago* school economists, to determine whether policies or transactions lead to allocative efficiency is the Kaldor-Hicks or "potential Pareto-superiority" test. Under the Kaldor-Hicks test a distribution or reallocation which creates gains sufficient to compensate any losses created by the transaction leads to an efficient outcome; the compensation, however, is not necessarily actual, it is merely potential. See POSNER, *supra* note 19, at 13-14, HARRISON, *supra* note 19, at 59-60. Kaldor-Hicks efficiency is named for the LSE trained economists Sir John Hicks (1904-1989) and Nicholas Kaldor (1908-1986). For more information about Kaldor and Hicks, including Sir John Hicks' 1972 Nobel Prize in Economic Sciences shared with Kenneth J. Arrow for "pioneering contributions to general economic equilibrium theory and welfare theory," see ASSAR LINDBECK, NOBEL LECTURES, ECONOMICS 1969-1980 (1992), available at <http://www.nobel.se/economics/laureates/1972/hicks-autobio.html> (last visited Oct. 2, 2005); and The History of Economic Thought Website, Nicholas Kaldor, at <http://cepa.newschool.edu/het/profiles/kaldor.htm> (last visited Oct. 2, 2005).

21. The *Post-Chicago* school believes that the market is not necessarily self-correcting and that market failures are more persistent and frequent than recognized by the *Chicago* school. *Post-Chicagoans* adhere to a more complex assessment of allegedly uncompetitive practices than do the *Chicago* school. See Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219 (1995). For example, under *Post-Chicago* antitrust theory, "[m]arkets that appear competitive—by virtue, for example, of their relatively large number of small firms—may nevertheless warrant antitrust scrutiny if information gaps or other imperfections can arguably convey power on one or more firms." *Id.* at 247.

22. Purely financial concepts of wealth lead to allocative efficiency models and policy decisions that vary dramatically from those grounded in a broader view of wealth that also includes consumer choice, consumption alternatives, and the like.

23. BHALA, *supra* note 7, at 1-6 (quoting Melvin Krauss, HOW NATIONS GROW RICH: THE CASE FOR FREE TRADE, 8-11, 29-32 (1997)).

the mercantilist views wealth as the ability to invest in foreign assets and economies combined with the ability to prevent foreigners from investing in the home economy.<sup>24</sup> This rather narrow view of wealth leads to more restrictive policies with respect to growth and trade.<sup>25</sup> The mercantilist is likely to encourage exports via the use of export subsidies and to discourage imports via the use of import tariffs.<sup>26</sup> These measures in and of themselves lead to monopoly power in the subsidized home industries and a subsequent decrease in import demand.<sup>27</sup> Such policies are said to “protect” the home economy.<sup>28</sup> Under the mercantilist approach, policies are not hard to envision that also allow *firms* (as opposed to industries in general) to establish market power sufficient to prevent the entry of foreign *firms*. The premise would be that as long as such monopolies can be justified on the grounds of strengthening the home economy, the downside effects are comparatively irrelevant.<sup>29</sup>

### B. *The Classical Theory*

While economic viability is certainly one aspect of a nation’s wealth, the classical and neo-classical view<sup>30</sup> is that wealth encompasses much more. It is the standard of living of the whole of the nation’s citizens.<sup>31</sup> It is choice. It is access to information. It is the availability of consumption alternatives;<sup>32</sup> the ability, if one is so inclined, to walk to the corner store and to choose from among 200 different types of cheese.<sup>33</sup> Economic power for the sake of economic power does not

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24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 633 (quoting CARNEGIE ENDOWMENT STUDY GROUP ON INTERNATIONAL TRADE, *Reflections on Regionalism*, 11-18 (1997)); however, this type of monopoly power is outside the scope of this paper.

28. *See id.* at 517-27 (quoting Congressional Budget Office, *The Effects of Import Quotas on the Steel Industry* iii, xv-xix, 39-41, 44-47 (July 1984)).

29. While this statement is merely surmise, other myopic domestic growth policies have taken root in similarly distorted political soil. In fact, the supply-side economics policies of the Reagan and Bush I administrations (now resurrected by Pres. George W. Bush) were cast aside by economists, such as Paul Krugman, as being short on accuracy and long on politics. “Supply-siders believe that *only* the supply side matters. . . . The history of economic doctrines teaches us that the influence of an idea may have nothing to do with its quality—that an ideology can attract a devoted following, even come to control the corridors of power, without a shred of logic or evidence in its favor. Supply-side economics may have had a meteoric career in the world of politics, but it never did make any sense.” PAUL KRUGMAN, *Supply-Side’s Silly Season*, in *THE ACCIDENTAL THEORIST* 47, 48-51 (1997).

30. The founding of the classical approach to growth and trade is generally credited with the economists Adam Smith, David Ricardo, and John Stuart Mill, among others.

31. *See generally* SMITH, *supra* note 4.

32. *See* BHALA, *supra* note 7.

33. *See generally* *Economics Focus: Chasing the Leader*, *ECONOMIST*, Feb. 8, 2003,

equate to a high standard of living. In fact, mercantilist motivations (i.e., fear of foreign investment and fear of foreign goods entering the stream of commerce that may eventually lead to a decrease in economic power<sup>34</sup>) lead to policies that in reality decrease a nation's standard of living.<sup>35</sup> The creation of monopoly power in certain sectors via tariffs and subsidies, under the guise of "strengthening" the nation and increasing its wealth, actually limits the nation's consumption alternatives, thereby decreasing overall wealth. The theory that monopoly power decreases consumption alternatives also applies in most cases to private sector *firm* activities controlled by competition law.<sup>36</sup> Firms wielding monopoly power are likely to abuse that power<sup>37</sup> by charging the consumer more than the prevailing market price, producing mediocre products or services that would otherwise be forced out of the market by better innovations, decreasing consumer choice as a result of output restrictions, and the like. The divergent policies of U.S. antitrust law and EU competition law will be measured throughout this paper by this view, the classical economist's view that standard of living and consumption alternatives are what comprise a nation's wealth, not sheer economic power.<sup>38</sup>

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at 70.

34. Economists such as Melvin Krauss "scoff at these views. Trade policy . . . should be geared to increasing the nation's living standard—not some vague, loosely defined concept of economic power. What good is increasing the nation's 'power' over foreign assets if such increase lowers the nation's living standard?" BHALA, *supra* note 7, at 4.

35. *Id.* at 1-4; *see generally* SMITH, *supra* note 4.

36. [W]hen a seller produces only a small fraction of the market's total output, the change in total output brought about by a fractional reduction in his output is unlikely to be great enough to affect the market price significantly; his power over price is slight and can be ignored. . . . [However,] a "monopolist" need not worry, or at least need not worry as much, if he raises his price above what a normal competitive price would be . . . [that] the other sellers of the product will expand their output and so drive the price back down. There are no other sellers. True, the higher price will give firms in *other* markets an incentive to enter this one in order to reap the monopoly profits available there. But presumably entry into the market will take time, so . . . the monopolist will enjoy a significant though not necessarily a permanent power over price.

POSNER, *supra* note 16, at 10 (emphasis in original). While this sort of *Chicago* School analysis of output control underlies U.S. antitrust policy, it is important to note that the "price" consumers pay for products is not the only determinant of welfare associated with output. Output is also synonymous with "consumption alternatives" and, therefore, wealth. When firms wielding monopoly power restrict output to below that demanded by a competitive market, not only do prices rise, but wealth (by way of fewer consumption alternatives and reduced consumer choice, in addition to increased capital outflow as a result of higher prices) also decreases.

37. Assuming that monopoly power is not in and of itself a *per se* abuse.

38. There are exceptions to the above described use of the terms "consumer welfare and wealth" (i.e., standard of living, consumer choice, and the like); these are noted in the

### III. Statutory Purpose: History and Objectives

Whether fear of industrial cartels and the railroad's monopoly power over the agricultural sector<sup>39</sup> or the integration of disparate economies into a single common market,<sup>40</sup> the historical underpinnings and the statutory objectives of the competition laws of the U.S. and the EU provide a relevant backdrop against which the current competition problem may be considered.

#### A. Sections 1 and 2 of the Sherman Antitrust Act

The Sherman Antitrust Act was born at a time when agriculture still comprised a major portion of the United States economy, monopoly power wielded by the railroads were chief concern among farmers, and the industrial cartels were causing unease in the rest of the population.<sup>41</sup> After much debate in Congress,<sup>42</sup> the Sherman Act became law on July 2, 1890<sup>43</sup> by an overwhelming majority in both the House and Senate.<sup>44</sup>

Section one of the Act, entitled "Trusts, etc. in restraint of trade illegal,"<sup>45</sup> provides in pertinent part: "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . . ." <sup>46</sup> Section two of the Act, entitled "Monopolizing trade a felony,"<sup>47</sup> provides in pertinent part: "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any

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text and are usually used in the context of the *Chicago* school approach to antitrust. The specific meaning the *Chicago* economists, Bork and Posner in particular, attach to wealth is not entirely clear. Allocative and productive efficiency, however, are generally key components. The *Chicago* definition is found at, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 12-13 (6th ed. 2003) and ROBERT H. BORK, *Business Behavior and the Consumer Interest*, in *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (2d ed. 1993).

39. See George J. Stigler, *The Origin of the Sherman Act*, 14 J. LEGAL STUD. 1 (1985).

40. See The Treaty of Rome, *infra* note 75; see generally Barry E. Hawk, *The American (Anti-Trust) Revolution: Lessons for the EEC*, 9 EUR. COMPETITION L. REV. 53, 54-55 (1988).

41. Stigler, *supra* note 39.

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

43. E. THOMAS SULLIVAN, *THE POLITICAL ECONOMY OF THE SHERMAN ACT: THE FIRST HUNDRED YEARS* 3 (1991).

44. The House of Representatives voted unanimously in favor of the Act (242 to 0) and the Senate voted 52 in favor and 1 opposed. Stigler, *supra* note 39, at 5.

45. 15 U.S.C. § 1.

46. *Id.*

47. 15 U.S.C. § 2.



other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .”<sup>48</sup>

There is some debate as to whether the above language was created from the economic ideology<sup>49</sup> of efficiency or whether it was an attempt to restrict power and preserve competition.<sup>50</sup> In either case, commentators such as former Yale Law School professor Robert Bork<sup>51</sup> contend that the primary objective of the Sherman Act, and therefore modern antitrust policy, was the maximization of consumer welfare.<sup>52</sup> Moreover, Bork posits, the policy courts were to apply to the antitrust

48. *Id.*

49. One of the great myths about American antitrust policy is that courts first began to adopt an “economic approach” to antitrust problems in the relatively recent past—perhaps as recently as the 1970s. At most, this “revolution” in antitrust policy represents a change in economic models. Antitrust policy has been forged by economic ideology since its inception.

Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019, 1019 (1989).

50. Congress in 1890 was concerned about power, not efficiency. The legislators confronted the concentration crisis from the perspective of an ideological tradition that equated excessive economic power with political corruption as well as oppression of competitors and consumers. This tradition grew out of classical liberal assumptions about the threat to individual liberty inherent in public and private power.

David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1292 (1988).

51. Robert Bork taught at the Yale Law School from 1977-1979; he also served on the U.S. Court of Appeals for the District of Columbia from 1982-1988, and is one of the founders of the *Chicago* school approach to antitrust policy. See ROBERT BORK, *THE ANTITRUST PARADOX* (1978). For more information about Mr. Bork, including information about his Supreme Court nomination and his involvement in the so-called Watergate scandal, as well as links to other biographical material, see the Media Transparency website, <http://www.mediatransparency.org/personprofile.php?personID=10> (last visited Oct. 2, 2005).

52. “Congress’ position with respect to efficiency cannot be explained on any hypothesis other than consumer welfare was in all cases the controlling value under the Sherman Act.” Bork, *supra* note 42, at 7. Bork restates the above contention even more absolutely in *THE ANTITRUST PARADOX*:

Other commentators appear to think the question of goals essentially unsolvable, one of those ultimate value choices about which men can never be expected to agree. . . . These are positions I wish to dispute. The antitrust laws . . . have only one legitimate goal. . . . (1) The only legitimate goal of American Antitrust law is the maximization of consumer welfare; therefore, (2) “Competition,” for purposes of antitrust analysis, must be understood as a term of art signifying any state of affairs in which consumer welfare cannot be increased by judicial decree.

ROBERT H. BORK, *The Goals of Antitrust: The Intentions of Congress*, in *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 50-51 (2d ed. 1993).

The precise definition of consumer welfare maximization used by Bork is not clear, but based on its contextual use and the vague definition offered at BORK, *supra* note 38, it is closely associated with Posner’s definition explained *supra* note 38.

problem was, in modern terms, “the maximization of wealth<sup>53</sup> or consumer want satisfaction.”<sup>54</sup> What exactly consumer welfare means, with respect to the core values of the Sherman Antitrust Act, has not been expressly defined by the federal courts.<sup>55</sup> Using Bork’s definitions, *wealth maximization*<sup>56</sup> or *consumer want satisfaction*, will help to identify below some of the shortcomings of the current interpretation of antitrust law and policy in the United States. Presently, however, the inquiry is intended to identify whether the thrust of the Sherman Antitrust Act was aimed at the evils of market inefficiencies or if there were some other non-economic, social, or political policies involved.

In his article *Legislative Intent and the Policy of the Sherman Act*,<sup>57</sup> Bork contends “not once did [Senator] Sherman suggest that the courts should blunt or discourage efficient size or conduct in the interest of any social or political value.”<sup>58</sup> A careful reading of the Congressional Record and, indeed, Bork’s own references call this contention into question on two separate grounds. First, with respect to efficient size, Bork cites inconsistent passages from the Congressional Record to support his proposition. In the first such passage Senator Sherman is quoted as recognizing that there might be some utility gained from allowing, what is referred to in the economics literature as, *natural monopolies*<sup>59</sup> in certain cases.<sup>60</sup> In the second such passage, the Senator

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53. To the *Chicago* school of antitrust theory, the Kaldor-Hicks, or potential Pareto concept of efficiency is synonymous with “wealth maximization.” POSNER, *supra* note 19, at 13; POSNER, *supra* note 16, at 23.

54. Bork, *supra* note 42, at 7.

55. *Id.*

56. *See supra* note 53.

57. Bork, *supra* note 42.

58. *Id.*

59. Natural monopolies exist when the natural ebbs and flows of the market produce only one firm to serve the entire market. HARRISON, *supra* note 19, at 554. The common example of a regulated natural monopoly that benefits society, in addition to certain utilities services, is the railroad. *Id.* at 557. The rationale is this:

Railroad[s] . . . incur substantial fixed costs. Note that, in this industry, costs are falling over all relevant ranges of production. This is the essence of a natural monopoly. . . . [I]f there were more than one firm [in the railroad industry,] [c]ompetition would be fierce as the firms lowered prices in order to achieve lower costs of production and to generate revenue to cover their large fixed costs. This process would continue until only one firm was left standing. In a sense, if natural market conditions exist and more than one firm is in the market, the market will be unstable. When the market evolves to include one firm, there will be stability.

*Id.*

60. “When corporations unite merely to extend their business, *as connecting lines of a railway* without interfering with competing lines, they are proper and lawful. Corporations tend to cheapen transportation, lessen the costs of production, and bring within the reach of millions comforts and luxuries formerly enjoyed by thousands.” Bork, *supra* note 42, at n.20 (citing 21 CONG. REC. 2457 (1890)) (emphasis added).

identifies monopolistic trusts created on other productive efficiency grounds as failing to increase consumer welfare.<sup>61</sup> Second, with respect to Senator Sherman's purported failure to suggest the courts should look to social or political values when deciding antitrust cases, the following statement by the Senator is offered: "This bill, as I would have it, has for its single object to invoke the aid of the courts of the United States . . . in dealing with combinations that affect injuriously the industrial liberty of the citizens. . . . It is the right of every man to work, labor, and produce in any lawful vocation. . . . This is industrial liberty and lies at the foundation of the equality of all rights and privileges. . . ." <sup>62</sup> Building on Senator Sherman's ideal of industrial liberty, Senator John P. Jones couched his opposition to trusts in more overtly political terms by stating that if trusts were allowed to continue, "our Government is a farce and a fraud."<sup>63</sup> Senator Sherman believed that "industrial liberty" was "the foundation of the equality of all rights and privileges."<sup>64</sup> Furthermore, Sherman believed that "industrial liberty" embodied "entrepreneurial independence" and that the trust threatened the "small dealers and worthy men."<sup>65</sup> In one Senate debate over the antitrust issue Sherman stated, "They had monopolies and mortmains of old, but never before such giants as in our day. You must heed their appeal or be ready for the socialist, the communist, and the nihilist. Society is now disturbed by forces never felt before."<sup>66</sup> To the supporters of the Sherman Act, the preservation of rough competitive equality was more than an economic theorem "derived rigorously,"<sup>67</sup> it stood for "political liberty in a free

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61. It is sometimes said of these combinations [monopolistic trusts] that they reduce prices to the consumer by better methods of production, but all experience shows that this savings of cost goes into the pockets of the producer. The price to the consumer depends of the supply, which can be reduced at the pleasure of the combination.

*Id.* (quoting 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman)).

Senator Sherman describes "productive efficiency" as the economics literature does: "the ability to produce output at a lower cost per unit," HARRISON, *supra* note 19, at 41, not as Bork does: "[Productive] efficiency is one of the two [theories of efficiency] that enter into the organization of production to meet consumer preferences, and it follows that antitrust policy cannot be rational unless productive efficiency is understood and weighed in the law's process. *Productive efficiency is any activity by a business firm that creates wealth.*" ROBERT H. BORK, *Business Behavior and the Consumer Interest*, in THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 90, 104-05 (2d ed. 1993) (emphasis added).

62. PERITZ, *supra* note 2, at 14 (quoting 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman)).

63. *Id.* at 15.

64. *Id.*

65. *Id.*

66. *Id.* (quoting 21 CONG. REC. 2460 (1890)).

67. BORK, *supra* note 52, at 51.

society as well.”<sup>68</sup> Although economics was clearly an essential component of an antitrust consideration, Bork’s syllogism—consumer welfare is a function of allocative and productive efficiency,<sup>69</sup> consumer welfare maximization was the sole objective of the Sherman Antitrust Act;<sup>70</sup> therefore, efficiency was the sole objective of the Sherman Antitrust Act<sup>71</sup>—seems to be derived from a rather nebulous interpretation of the historical record and context.<sup>72</sup> While debate about the degree to which efficiency was a real influence during the antitrust debates of 1890 rages on, most commentators agree that preservation of the classical concept of the free market in the United States was the primary thrust behind enactment of the Sherman Act.<sup>73</sup> In short, the Sherman Antitrust Act intended to preserve the classical ideal of competition and in so doing, protect the little guy from the giant guy.

### *B. Articles 85 and 86 of the Treaty of Rome*

The history and objectives of European Union competition law are more readily discernible than those of its U.S. counterpart. The competition laws of the EU are a part of the treaty originally forming the

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68. PERITZ, *supra* note 2, at 15.

69. BORK, *supra* note 52, at 104-05.

70. Bork, *supra* note 42, at 7.

71. BORK, *supra* note 52, at 51.

72. From the language of the Sherman Act, its legislative history, and the history of late nineteenth century America, it is clear that Congress was concerned about those activities of trusts and monopolies that unduly restrained trade or caused a monopolization of interstate commerce. . . . The legislative history of the Sherman Act reveals a total lack of concern for allocative efficiency. . . . It is extremely unlikely that the legislators’ distaste for monopoly pricing could have been based upon its impact on allocative efficiency: the concept of allocative efficiency was, at best, on the verge of discovery by leading economic theorists when the Sherman Act was passed. . . . There is [also] little basis for suggesting that the Sherman Act was passed primarily to improve or even preserve productive efficiency; indeed, the trusts were viewed as extremely efficient.

Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 82-90 (1982).

73. See PERITZ, *supra* note 2, at 15. See also Lande, *supra* note 72 (finding that the Sherman Act was aimed at eliminating the social and political evils associated with trusts and monopolies such as excessive power and the negative impact on entrepreneurial liberty and opportunity); Hovenkamp, *supra* note 49 (arguing that although the original policy goals of antitrust law are *economic*, that economic aspect is classical competition theory, individual self-interest, self-determination, entrepreneurial opportunity, and the limitation of power); Todd R. Overton, *Substantive Distinctions Between United States Antitrust Law and Competition Policy of the European Community: A Comparative Analysis of Divergent Policies*, 13 HOUS. J. INT’L L. 315, 316-17 (1991) (arguing American antitrust laws were based on the free-market ideal with the ultimate policy goal of protecting small- to mid-sized businesses).

European Economic Community<sup>74</sup> and are, therefore, based on the same general policies; primarily, market integration and consumer welfare.<sup>75</sup>

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74. Treaty Establishing the European Economic Community, Mar. 25, 1957, arts. 85-86, 298 U.N.T.S. 11, 47-49 [hereinafter Treaty of Rome].

75. See Preamble to the Treaty of Rome *infra* Part III(B); see also Consolidated Version of the Treaty Establishing the European Community, Dec. 24, 2002, art. 2, 2002 O.J. (C 325) 33, 40:

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

*Id.* art. 2:

1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

- a. the elimination, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
- b. a common commercial policy;
- c. an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;
- d. measures concerning the entry and movement of persons in the internal market as provided for in Title IV;
- e. a common policy in the sphere of agriculture and fisheries;
- f. a common policy in the sphere of transport;
- g. a system ensuring that competition in the internal market is not distorted;
- h. the approximation of the laws of Member States to the extent required for the functioning of the common market;
- i. the promotion of coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a coordinated strategy for employment;
- j. a policy in the social sphere comprising a European Social Fund;
- k. the strengthening of economic and social cohesion;
- l. a policy in the sphere of the environment;
- m. the strengthening of the competitiveness of Community industry;
- n. the promotion of research and technological development;
- o. encouragement for the establishment and development of trans European networks;
- p. a contribution to the attainment of a high level of health protection;
- q. a contribution to education and training of quality and to the flowering of the cultures of the Member States;
- r. a policy in the sphere of development cooperation;
- s. the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development;
- t. a contribution to the strengthening of consumer protection;
- u. measures in the spheres of energy, civil protection and tourism.

*Id.* art. 3.

The Preamble to the Treaty of Rome<sup>76</sup> clearly defines the purposes behind the establishment of the European Economic Community:

DETERMINED to lay the foundations of an ever closer union among the peoples of Europe,

RESOLVED to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe,

AFFIRMING as the essential objective of their efforts the constant improvements of the living and working conditions of their peoples,

RECOGNIZING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,

ANXIOUS to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions,

DESIRING to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade,

INTENDING to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations,

RESOLVED by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts,

HAVE DECIDED to create a EUROPEAN COMMUNITY. . . .<sup>77</sup>

Section 85 of the Treaty of Rome<sup>78</sup> provides, in pertinent part: “The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention,

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76. Treaty of Rome, *supra* note 74, at Preamble.

77. *Id.*

78. *Id.* art. 85 (after renumbering, now art. 81).

restriction or distortion of competition within the common market. . . .”<sup>79</sup> Article 86 provides, in pertinent part: “Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. . . .”<sup>80</sup>

Unlike the interpretation of original policies underlying U.S. antitrust law, the objectives of EU competition law are undisputed and clearly set forth.<sup>81</sup> The primary goals of EU competition law are integration of the separate economies into the unified common market, the promotion of free trade, and consumer welfare or fairness.<sup>82</sup>

#### IV. Court Interpretations

A brief consideration of two cases in which U.S. companies encountered problems in the EU when attempting to complete mergers will serve to illustrate the application of the divergent policies. First, the 1973 decision in *Europemballage Corp. and Continental Can Co. v. Commission* (“Continental Can”)<sup>83</sup> lays the policy foundation for EU merger control as a means to promote competition. Second, the controversial 2001 decision in *General Electric/Honeywell v. Commission*<sup>84</sup> demonstrates the extent to which the principles outlined in *Continental Can* may be applied. These two cases will demonstrate

79. *Id.* Specific prohibitions include: “directly or indirectly fix[ing] purchase or selling prices or any other trading conditions,” “limit[ing] or control[ing] production, markets, technical development, or investment,” “shar[ing] markets or sources of supply,” “apply[ing] dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,” and “mak[ing] the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.” *Id.*

80. *Id.* art. 86 (now art. 82). Specific prohibitions include: “directly or indirectly impos[ing] unfair purchase or selling prices or other unfair trading conditions,” “limit[ing] production, markets or technical development to the prejudice of consumers,” “apply[ing] dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,” and “making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.” *Id.*

81. See Treaty of Rome, *supra* note 74, at Preamble. See also *id.* arts. 2-3.

82. See generally Thieffry, *supra* note 13. See also Hawk, *supra* note 40; Overton, *supra* note 73; Eleanor M. Fox, *Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness*, 61 NOTRE DAME L. REV. 981 (1986).

83. Case 6/72, *Europemballage Corp. and Continental Can Co. v. Comm’n*, 1973 E.C.R. 215 [hereinafter *Continental Can*].

84. Commission Decision COMP/M.2220, *Gen. Elec./Honeywell v. Comm’n*, 2004 O.J. (L 48) 1 (EC) [hereinafter *GE/Honeywell*].

some of the problems divergent competition standards create when applied to deals within a global marketplace.

#### A. *Continental Can*

The first acquisition case decided by the Court of Justice was *Continental Can*.<sup>85</sup> In *Continental Can*, a U.S. firm acquired other firms specializing in related product lines in what is now the EU.<sup>86</sup> The case raised the issue of “whether an acquisition that increases a dominant position can ever, for that reason alone, be an abuse of a dominant position prohibited by Article 86 [of the Treaty of Rome].”<sup>87</sup>

In order to answer the question, the court considered three sub-issues:<sup>88</sup> (1) the Treaty of Rome does not contain an express merger control provision;<sup>89</sup> (2) the Treaty of Rome requires an “abuse” or an “abusive exploitation” as related to buyers or trading partners, not a change in market structure that increases market power;<sup>90</sup> and (3) the Treaty of Rome implies there must be a causal link connecting the “dominant position” to the “abuse.”<sup>91</sup>

The Court of Justice based its decision to strike down the *Continental Can* mergers on the following reasoning: if Article 86 did not apply to mergers, firms could utilize mergers to acquire “such a dominant position as to virtually remove any serious possibility of competition, thus, “jeopardiz[ing] the proper functioning of the Common Market.”<sup>92</sup> Therefore, Article 86 does apply to mergers. The Court further reasoned, a firm could abuse its dominant position if it “strengthen[ed] that position to the point where the degree of domination achieved substantially hampers competition, so that only enterprises which in their market conduct are dependant on the dominant enterprise would remain on the market.”<sup>93</sup> In other words, the Court took a pro-competition stand in applying Article 86 to merger cases in which one of the firms already maintains a dominant market position and the merger would be an abuse of that position via increased market dominance and the resulting threat to free competition.<sup>94</sup> However, the Treaty does not seem to address mergers that *create* a dominant market position.<sup>95</sup>

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85. Fox, *supra* note 82, at 987.

86. *Continental Can*, *supra* note 83.

87. Fox, *supra* note 82, at 987.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 987-88.

92. *Id.* (quoting *Continental Can*, *supra* note 83, at 243-44).

93. *Id.* (citing *Continental Can*, *supra* note 83, at 245).

94. *See id.* at 989-90.

95. *Id.* at 990.



Perhaps in this respect, EU competition law could bend a bit to incorporate limited concepts of U.S. antitrust law.

### B. *GE/Honeywell*

On July 3, 2001, the Commission of the European Communities (“Commission”) struck down the merger of General Electric Company (“GE”) and Honeywell International, Inc. (“Honeywell”).<sup>96</sup> This was the first time the Commission blocked a U.S. merger that had already been approved by the U.S. Department of Justice and the Federal Trade Commission.<sup>97</sup> The Commission found that “the proposed merger would lead to the creation or strengthening of a dominant position on the [EU] markets for large commercial jet aircraft engines, large regional jet aircraft engines, corporate jet aircraft engines, avionics and non-avionics products, as well as small maritime gas turbine, as a result of which effective competition in the common market would be significantly impeded.”<sup>98</sup> Although, the Commission invoked different enforcement mechanism to invalidate the merger,<sup>99</sup> the underlying policy objectives were consistent with those the Court of Justice found in the *Continental Can*<sup>100</sup> decision and, indeed, with the Treaty of Rome.<sup>101</sup>

### V. Impact, in Terms of Wealth

After examining the underlying policy objectives of both the U.S. antitrust law and EU competition law and how those policies play out in the courts, it can be seen that slight differences in competition goals can

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96. Stefan Schmitz, *How Dare They? European Merger Control and the European Commission's Blocking of the General Electric/Honeywell Merger*, 23 U. PA. J. INT'L ECON. L. 325, 326 (2002).

97. *Id.*

98. Yeo Jin Chun, *The GE-Honeywell Merger Debacle: The Enforcement of Antitrust/Competition Laws Across the Atlantic Pond*, 15 N.Y. INT'L L. REV. 61, 62 (2002) (quoting GE/Honeywell, *supra* note 84, at ¶ 567).

99. While the specific enforcement mechanisms are outside the scope of this paper, to the extent it is relevant to the underlying policy, the European Merger Control Regulation (ECMR) test is worth mentioning. The GE/Honeywell merger was struck down under the two-part ECMR requirement: (1) the dominant position test, and (2) the significant impediment to competition test. Ostensibly, if the merger passes muster under the two pronged test, it is “compatible with the Common Market.” See generally Schmitz, *supra* note 96.

100. See *supra* Part IV(A).

101. [T]o promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.  
See Treaty of Rome, *supra* note 75, art. 2.

lead to widely divergent results. When a merger is either approved or struck down, each country's policy has the potential to influence dramatically the wealth of the other. In an increasingly global society, a standard level of certainty is required in order to foster transnational deal-making. To that end, the potential wealth effects of EU and U.S. policies will now be considered through the lens of the classical definition of wealth.<sup>102</sup>

A. *What is the Social Cost?*

Monopolies are bad. It would probably be difficult to find much general disagreement with this exceedingly broad statement. Why, though, is it that monopolies are, for the sake of consistency, bad?

In 1975, Richard Posner wrote an article for the *Journal of Political Economy*, titled *The Social Costs of Monopoly and Regulation*.<sup>103</sup> Posner identifies two major costs to society,<sup>104</sup> deadweight cost<sup>105</sup> and opportunity cost.<sup>106</sup> To illustrate the concept, Posner used the analogy of theft (borrowed from Becker<sup>107</sup> and Tullock<sup>108</sup>). "The transfer of wealth from victim to thief involves no artificial limitation of output (if a thief took three radios from a home and on the way out dropped one, which broke, the resulting loss would correspond to the deadweight loss of monopoly),<sup>109</sup> but it does not follow that the social cost of theft is zero. The opportunity for such transfers draws resources into thieving and in turn into protection against theft, and the opportunity costs of the resources consumed are social costs of theft."<sup>110</sup>

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102. For a discussion of the concepts of wealth see *infra* Part II.

103. Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975).

104. *Id.*

105. When market price rises above the competitive level, consumers who continue to purchase the sellers' product at the new, higher price suffer a loss exactly offset by the additional revenue that the sellers obtain at the higher price. Those who stop buying the product suffer a loss not offset by any gain to the sellers. This is the "deadweight loss" from supracompetitive pricing.

*Id.*

106. Deadweight loss is not the only social cost associated with monopolies. Opportunity cost is also a social cost of monopoly. *Id.* Posner explains that "[t]he existence of an opportunity to obtain monopoly profits will attract resources into efforts to obtain monopolies, and the opportunity costs of those resources are social costs of monopoly too." *Id.* (citing Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, WESTERN ECON. J. 5 (1967)).

107. See Gary S. Becker, *Crime & Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

108. Tullock, *supra* note 106.

109. This parenthetical was a footnote in the original text. Posner, *supra* note 103, at 808 n.1.

110. Posner, *supra* note 103, at 807-08 (citing Tullock, *supra* note 106, and Becker,

The social costs that Posner describes are analogous to the classical economists' wealth values.<sup>111</sup> Deadweight loss creates a general decrease in standard of living (increased price associated with a lack of suitable substitutes takes buyers out of the market, thereby restricting choice), and the opportunity cost associated with diverted resources creates fewer consumption alternatives (resources taken out of the production of certain goods in the hope of achieving monopoly profits in others reduces the total number of different products produced).

*B. Pareto and Kaldor-Hicks: What Does the Chicago School Say?*

To paint with a very broad brush, the *Chicago* school approach to antitrust policy is grounded almost entirely in the concept of efficiency, or as Posner says, the "potential-Pareto, Kaldor-Hicks" concept of efficiency.<sup>112</sup> Posner equates Kaldor-Hicks efficiency with "wealth maximization."<sup>113</sup> Bork declares that the sole policy goal of antitrust is consumer welfare.<sup>114</sup> Consumer welfare, Bork claims, is the same as productive and allocative efficiency.<sup>115</sup> Is this necessarily true?

One of Posner's hypotheticals might help to clarify his contention. "A is selling a wood carving to B. A values the woodcarving at \$50 and B at \$120, so that at any price between \$50 and \$120, the transaction creates a total benefit of \$70 (at a price of \$100, for example, A considers himself \$50 better off and B considers himself \$20 better off) it is an efficient transaction, provided the harm (if any) to third parties (minus any benefit to them) does not exceed \$70." The transaction would not be Pareto superior unless A and B actually compensated the third parties for any harm suffered by them. The Kaldor-Hicks concept is also suggestively called potential Pareto superiority: The winners could compensate the losers, whether or not they actually do."<sup>116</sup> This Posner calls "wealth maximization."

The concept of wealth maximization embodied in the Kaldor-Hicks allocative efficiency model is wholly at odds with the Classical concept of wealth. Kaldor-Hicks does not, as Bork posits, maximize consumer welfare. Posner's hypothetical used to illustrate Kaldor-Hicks in action might be acceptable when two guys are bargaining at a craft fair; but in the world of antitrust, there are countless third parties who are affected by the dealings of the primary parties. In Posner's hypothetical, it

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*supra* note 107).

111. *See supra* Part II.

112. *See supra* notes 19-20.

113. POSNER, *supra* note 19, at 13.

114. Bork, *supra* note 42, at 7.

115. *Id.*

116. POSNER, *supra* note 19, at 13.

appears that everyone is better off because there are only two affected parties. In a monopolistic consideration, under the Kaldor-Hicks test, if the primary parties are made sufficiently better off to compensate those made worse off, even if they do not, it is an efficient transaction and not a violation of antitrust law.

This test does not take into consideration many of the underlying values of the Sherman Act such as industrial liberty, entrepreneurial freedom, and preservation of competition. Nor does this test contemplate real “consumer welfare” in the Classical sense. There is no consideration of consumption alternatives, choice, and standard of living. The Kaldor-Hicks test is more consistent with the mercantilist and neo-mercantilist concepts of wealth than it is with the Classical view. Instead of measuring wealth in terms of increased standard of living, Kaldor-Hicks measures wealth in terms of decreased standard of living that could potentially be compensated for, but is not.

### C. *What About the Post-Chicago School?*

Paramount among the antitrust concerns of the *Post Chicago* school is efficiency. That is where the similarities with the *Chicago* school begin to taper off. The *Post Chicago* school focuses on market imperfections and the monopoly power that could be exploited therein. The *Post Chicago* school identifies these market imperfections and evaluates information gaps and switching costs for commercial significance; its belief is that markets are not entirely self correcting. As stated above, the *Post Chicagoans* may scrutinize markets which appear to be competitive by way of a relatively large number of small firms, if information gaps or other imperfections may potentially grant monopoly power in one or more firms. *Post Chicagoans* seek to repair the relevant market failures or to prevent firms from taking unfair advantage of them. The increased complexity and cost of this method of enforcement leads to a “heightened sensitivity to market dynamics and the promotion of efficiency.” The *Post Chicago* school is in opposition to the *Chicago* notion that the markets are self correcting and that allocative efficiency is wealth maximizing.

## VI. Conclusion: The Welfare Bottom Line

Welfare carries with it many meanings: Bork’s meaning,<sup>117</sup> Webster’s Dictionary meaning,<sup>118</sup> the Classical economists’ meaning,<sup>119</sup>

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117. Bork, *supra* note 52.

118. The state of being or doing well; condition of health, happiness, and prosperity; well-being. WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (College ed. 1968).

the list goes on and on. In the global marketplace, however, the maximization of welfare must be interpreted as increased standard of living.<sup>120</sup> As noted in the major world trading agreements,<sup>121</sup> this is the common goal of the world's trading partners.<sup>122</sup> As full and free competition is crucial to full and free trade, the standards by which it is regulated must be consistent with the goals of free trade. When the international standards are inconsistent or vague, *ex ante* protection measures become more difficult and are an inefficient diversion of resources. Furthermore, inconsistent standards can lead to *ex post* problems as well.<sup>123</sup>

The principles of industrial liberty, entrepreneurial freedom, and robust competition espoused by Senator Sherman in the early iterations of his bill and during the floor debates concerning the antitrust bill bearing his name<sup>124</sup> are consistent with those principles relating to the standard of living concept expressly set forth in the EU charter.<sup>125</sup> Moreover, the WTO (including former incarnations) and its 146 member nations agree that the principle goal of international trade is to increase standards of living across the globe.<sup>126</sup> Transnational deal-making of the sort regulated by antitrust and competition laws are either the result of international trade or the creators of international trade,<sup>127</sup> and should, therefore, be governed by its principles and goals. The *Chicago* school's Kaldor-Hicks test for allocative efficiency is wholly at odds with the

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119. See *supra* Part II(B).

120. See CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION (Mar. 24, 1948) (the ITO charter was created "for the purpose of realizing the aims set forth in the charter of the United Nations, *particularly the attainment of the higher standards of living*, full employment and conditions of economic and social progress and development . . .) (emphasis added); THE GENERAL AGREEMENT ON TARIFFS AND TRADE (Oct. 30, 1947) (the preamble states "Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to *raising standards of living*, ensuring full employment and a large and steadily growing volume of real income and effective demand . . .) (emphasis added); URUGUAY ROUND AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION (Apr. 15, 1994) (Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to *raising standards of living*, ensuring full employment and a large and steadily growing volume of real income and effective demand . . .) (emphasis added).

121. *Id.*

122. As of October 1, 2005, the number of WTO members stood at 148; for more information about the WTO, <http://www.wto.org>.

123. For a discussion of the consequences of merger activities being approved in one country and struck down for failure to comply with competition laws in another, see *supra* Part IV.

124. See *supra* notes 72-73. See generally *supra* Part III(A).

125. See Treaty of Rome, *supra* note 75.

126. See *supra* note 122.

127. Either because countries trade their firms do business, or firms get together and conduct business, thereby generating international trade.

generally accepted principles of international trade. The test only considers standard of living to the extent that increases are possible, whether those increases are realized is not important.

It is recognized that at least some level of convergence in the area of competition law is necessary to foster a more robust level of transnational deals.<sup>128</sup> However, the move should not be away from the European standard and toward the *Chicago* standard if the goal of international trade is to remain increasing the global standard of living. While the EU approach may need to incorporate more economic analysis into its approach,<sup>129</sup> adopting the *Chicago* standard would be a frightened retreat to the protectionist economic values of the 18th century mercantilist; rather than a step toward the shared values of 21st century global trade economics.

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128. See "Convergence"—*Antitrust Mantra*, 2 POWELL GOLDSTEIN FRAZER & MURPHY ANTITRUST BULLETIN (Dec. 2002).

129. *Id.*

