Antitrust Decisions and Legislative Intent

David F. Shores

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Antitrust Decisions and Legislative Intent

"[T]his Court is not in a position to review the economic wisdom of Congress."


David F. Shores*

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I. INTRODUCTION

The past twenty years have witnessed dramatic, even revolutionary, change in substantive antitrust law. At its core, antitrust law is statutory law. Yet, none of this change has been the product of legislative action. Dramatic change in the meaning and effect of statutory law, without legislative action, is a development that should arouse concern. Judicial conservatives, who view the proper function of courts as interpreting and applying the law, and eschew judicial lawmaking, should be especially concerned.

Statutory reinterpretation drew the attention of the Supreme Court in the recent antitrust case of *State Oil Co. v. Khan*. Khan involved application of the rule of *Albrecht v. Herald Co.*, a thirty-year-old precedent that held maximum vertical price fixing to be a *per se* violation of the Sherman Act. In overruling Albrecht, Justice O'Connor, writing for a unanimous Court, observed that the Court is generally reluctant to overrule decisions involving statutory interpretation where "stare decisis concerns are at their acme." Nonetheless, the Court concluded that "the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress 'expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.'"

* Professor of Law, Wake Forest University School of Law. B.B.A., University of Iowa 1965; J.D., University of Iowa 1967; LL.M. (Taxation), Georgetown University 1969. The Author is grateful to his colleagues, Professors Michael K. Curtis and Joel S. Newman, for helpful comments on a draft. The Author also thanks his research assistants, Michael J. Childers and Jolie Amie Tenholder, for the many hours spent reading cases in search of references to legislative intent.

1. See John E. Kwoka, Jr. & Lawrence J. White, *The Antitrust Revolution: Economics, Competition, and Policy* I (3d ed. 1999) (“[O]ver the past twenty years, there has been a revolution in U.S. antitrust policy. This revolution has involved the ascendance of economics in antitrust policymaking, with repercussions throughout the institutions and enforcement practices of antitrust. Economic analysis now plays a crucial role in determining what cases the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission actually pursue . . . . Courts have endorsed a central role for economics in rendering their own decisions.”).

2. FTC v. Super. Ct. Trial Law. Ass’n, 493 U.S. 411, 432-33 (1990) (“The per se rules are, of course, the product of judicial interpretations of the Sherman Act, but the rules nevertheless have the same force and effect as any other statutory commands.”) (emphasis added).

5. Id. at 153.
7. Id. (citations omitted) (emphasis added).
"Less force" does not mean "no force." So, the Court recognized that the general presumption in favor of leaving legislative change for the legislature has some force with respect to the Sherman Act, and presumably the Clayton Act. Despite the broad mandate of these statutes, at some point the Court goes too far in bending antitrust legislation to its own will. The question arises at what point does the Court cease to interpret and begin to legislate, thereby calling into question the legitimacy of its decisions?

Two related questions prompted by Justice O'Connor's dicta and the broad text of the antitrust statutes are: (1) to what extent has the Court actually relied on legislative intent in resolving antitrust issues; and (2) has the extent of its reliance changed in recent years. This Article focuses mainly on these two questions, the answers to which will shed some light on the more fundamental question whether the Court's recent decisions have gone beyond its interpretative function.

A judicial shift either toward or away from reliance on legislative intent should be of interest to those who believe that legislative intent has a proper role in statutory interpretation, as well as to those who do not. To the former group,

8. It has been noted: "When a court engages in statutory interpretation, it asks 'What did the legislature intend?' When it creates common law, it asks: 'What is the best policy choice? '" Martin H. Redish, Federal Common Law and American Political Theory: A Response to Professor Weinberg, 83 NW. U. L. REV. 853, 857 (1989). To say, as Justice O'Connor did in Khan, that courts should interpret the Sherman Act by drawing on the common law tradition is not to say that antitrust is federal common law that courts legitimately can create according to their own policy choices. Federal courts "do not possess a general power to develop and apply their own rules of decision." City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981). What is often referred to as federal common law is really interpretative federal common law. The judicial authority to promulgate common law rules is derived from whatever federal statute the court is applying in a particular case. As such, the court's authority ought not to be viewed as limited only by its own policy choices. Cf. Steve H. Nickles & David G. Epstein, Another Way of Thinking About Section 105(a) and Other Sources of Supplemental Law Under the Bankruptcy Code, 3 CHAP. L. REV. 7, 11 (2000) (The authors observed that "it is possible, though not certainly clear, that federal courts enjoy some little room to make true federal common law.")

9. Many commentators take the view that legislative intent has no proper role in statutory construction. For them, legislative intent is indeterminate, and, therefore, useless at best, and possibly even mischievous. See, e.g., Antonin Scalia, A Matter of Interpretation 17 (1997) (Textualists "do not really look for substantive legislative intent."); Frank H. Easterbrook, The Role of Original Intent in Statutory Construction, 11 HARV. J.L. & PUB. POL'Y 59, 62 (1988) (The use of legislative intent as a tool of statutory construction "increases the discretion, and therefore the power, of the court."); Max Radin, Statutory Interpretation, 43 HARV. L. REV. 863, 872 (1930) ("A legislative intent, undiscoverable in fact, irrelevant if it were discovered, is the last residuum of our
a shift away from reliance on legislative intent provides a basis for questioning the legitimacy of some current antitrust developments. To the latter group, it suggests that the Court is finally setting matters right in the antitrust area by ignoring populist views embedded in the legislative intent that have distorted antitrust decisionmaking from the beginning.

While recent decisions leave no doubt that the Court has revised its view concerning the purpose or goals of the antitrust laws, exactly when the revisionist period began is less clear. Continental T.V., Inc. v. GTE Sylvania Inc.,\textsuperscript{10} was decided in the 1976-77 term. In overruling its decision in United States v. Arnold, Schwinn & Co.,\textsuperscript{11} decided just ten years earlier, the Court relied heavily on the writing of Robert Bork. Bork since has become the leading advocate for the new antitrust thinking.\textsuperscript{12} The 1976-77 Supreme Court term seems to be a reasonable point of departure. Thus, the Article will present a comparative analysis of the role of legislative intent in antitrust decisionmaking during two twenty-four-year periods. The first period is comprised of twenty-four consecutive Supreme Court terms beginning with the 1951-52 term and ending with the 1975-76 term. The second begins with the 1976-77 term and ends with the 1999-2000 term. To put the antitrust decisions in a broader context, the Article first will consider current views on the role of legislative intent in statutory interpretation and the goals of the antitrust laws.

\textsuperscript{12} The Sylvania opinion contains five citations to three scholarly articles authored by Bork. See Sylvania, 433 U.S. at 56, 66 n.8, 69 n.9, 70 n.10. Bork’s influence on antitrust developments is discussed below. See infra notes 152-90 and accompanying text.
II. LEGISLATIVE INTENT, LEGISLATIVE HISTORY, AND STATUTORY INTERPRETATION

A. In General

Should legislative intent be relevant to statutory interpretation? If so, is legislative history a proper source from which to derive legislative intent? At one time, most judges and legal scholars would have answered yes to both questions. As to the first question, most still would answer yes. However, as to the second question, that consensus has broken down, especially among legal scholars, but among judges, as well. The purpose of this Article is not to enter that debate. Rather, the competing views on the relevance of legislative history and intent to statutory interpretation will be briefly described. The Article then will proceed on the assumption that the traditional consensus still holds, at least among judges. That assumption is supported by recent literature based on empirical research.

13. According to Judge Patricia Wald:

Personal experience has revealed that the nearly universal view among federal judges is that when we are called upon to interpret statutes, it is our primary responsibility, within constitutional limits, to subordinate our wishes to the will of Congress because the legislators’ collective intention, however discerned, trumps the will of the court. The crux of the debate, therefore, concerns method: how do courts best fulfill their duty to effectuate the will of Congress?

Wald, supra note 9, at 281-82; see Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. CAL. L. REV. 845, 845 (1992) ("Until recently an appellate court trying to interpret unclear statutory language would have thought it natural, and often helpful, to refer to the statute’s ‘legislative history.’ . . . Lawyers and judges, teachers and legislators, have begun to reexamine this venerable practice, often with a highly critical eye."); Thomas W. Merrill, Textualism and the Future of the Chevron Doctrine, 72 WASH. U. L.Q. 351, 355 (1994) ("As is well known, since his arrival on the Court Justice Scalia has campaigned assiduously for the elimination of legislative history from the Court’s statutory interpretation opinions.").

14. See generally Jane S. Schacter, The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond, 51 STAN. L. REV. 1 (1998). Based on an analysis of Supreme Court decisions from the 1996 term, Professor Schacter concluded that “when measured against other empirical analyses, the 1996 Term reflects some resurgence in the use of legislative history.” Id. at 5. She also found that there has been a decline in citations to the dictionary, and consistent reliance on “judicially-selected policy norms.” Id. These developments, Professor Schacter argued, make it “difficult to sustain the basic premises of the attack on legislative history.” Id. Commenting on earlier work by Professor Thomas Merrill that proclaimed a “major transformation” in the Court’s approach to statutory interpretation, leaving “no doubt that textualism has asserted a
In general, judges have not relinquished their traditional belief that statutes ought to be interpreted to meet the objectives of the legislature, and that, when those objectives are not clear from the text of the statute, they should be illuminated through an examination of the legislative history.

1. Should Legislative Intent Be Relevant to Statutory Interpretation?

When courts and legal commentators consider what principles should govern statutory interpretation, they generally assume that the statute should be interpreted to carry out the intent of the legislature. While strong disagreements arise over what methods of interpretation best serve that principle, there is little disagreement concerning the principle itself. This notion simply reflects the basic constitutional functions of the legislative and judicial branches of government. Article I of the Constitution vests all legislative power, the power to make law, in Congress.\(^5\) Article III vests the judicial power, the power to decide specific cases, in the courts.\(^6\) Just as the legislature lacks power to decide a specific case, the courts lack power to make law. When a court decides a case arising under a statute in a manner that is incompatible with the legislature’s intent, it is effectively making law. Perhaps it is not making law in the broad sense of writing on a clean slate, as Congress might do; however, it is doing so in the narrow sense of revising a law adopted by Congress to produce a result quite different from what Congress had in mind. So, the nearly universal view is that, in light of the separation of powers between the legislative and judicial branches, courts ought to function as the honest agents of Congress by applying statutory law to the case at hand in the way Congress intended.\(^7\)

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powerful hold over the Supreme Court’s statutory interpretation jurisprudence,” Professor Schacter noted that “the data from the 1996 Term do suggest that the ‘major transformation’ heralded by Merrill has not materialized.” \(\text{Id. at 10, 17; see also Nicholas S. Zeppos, The Use of Authority in Statutory Interpretation: An Empirical Analysis, 70 Tex. L. Rev. 1073, 1103-04 (1992)}\) (“The data suggests . . . the Court has not adopted textualism as its methodology for deciding statutory cases. . . . Over time there seems to be a decline in reliance on textual sources.”).

\(^5\) U.S. Const. art. 1, § 1 provides: “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”

\(^6\) U.S. Const. art. III, § 1 provides: “The judicial Power of the United States, shall be vested in one Supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish.”

\(^7\) The notion that federal courts ought to function as honest agents of Congress has been challenged. See generally Carlos E. Gonzalez, Reinterpreting Statutory Interpretation, 74 N.C. L. Rev. 585 (1996). The “honest agent” theory of statutory construction, Mr. (now Professor) Gonzalez argued, is based on a strong belief in
2. Is Legislative History a Proper Source from Which to Determine Legislative Intent?

It is one thing to conclude that the constitutional concept of separation of powers implies that the courts should construe statutory law consistently with Congress's intent; however, it is another thing entirely to determine what that intent is. Fundamentally, the problem is to determine how, by what method, congressional intent should be discovered. It is mainly on this question of methods that doctrinal splits have arisen among legal scholars, and, to a lesser extent, among judges, as well. At its most basic level, the disagreement concerns whether congressional intent should be gleaned from the text and structure of the statute; the text, structure, and legislative history; or the text, structure, legislative history, and prior, as well as subsequent, history (legal, as well as nonlegal) that bears on how the current Congress would apply the provision in question. The first two approaches, respectively called textualism and intentionalism, have a common theme. At least as a formal matter, both focus on the intent of the Congress that

legislative supremacy that existed during and immediately after the Revolutionary War. *Id.* at 659. Under a government of legislative supremacy, only the legislature functions as an agent of the people. *Id.* Courts, having no power to act as agents of the people, are bound to carry out the will of the legislature when they interpret statutes. *Id.* By the time the Constitution was adopted in 1787, the people's faith in legislative supremacy had weakened. *Id.* The idea of a government comprised of three equal branches had taken hold and was enshrined in the Constitution. *Id.* As a coequal branch, the judiciary, like Congress, acts as an agent of the people. *Id.* Thus, Professor Gonzalez concluded, courts should interpret statutes in accordance with their own view of the people's interest, and without regard to congressional intent. *Id.* at 662-63. Professor Gonzalez stated:

[R]adically revisionary statutory interpretation methods under which the federal courts are unconstrained in reshaping and reconfiguring statutory law are ill-conceived. Just as ill-conceived, however, is the notion that rules of statutory interpretation ought to be designed with an eye towards submitting the federal courts to some slavish subservience to the command or intent of Congress . . . . Rather than honest agents of Congress, the federal courts must begin to see themselves, and in fact conduct themselves, as the Constitution's fundamental principles demand—as agents for the people. *Id.* at 730.

The dynamic approach to statutory interpretation, described *infra* notes 54-63 and accompanying text, weakens, but does not necessarily abolish the concept of courts acting as honest agents of the legislature. *See* Zeppos, *supra* note 14, at 1082 (“[D]ynamic theorists . . . believe the legitimate scope of the judicial function is too narrowly constrained by viewing the court as the loyal agent of the legislature. The concept of legitimacy must be broadened to include a judiciary responsive to the current needs of society and to how statutory law affects people today.”).
adopted the statute at issue. They disagree, however, on how that original intent should be determined.  

The third approach, usually called the dynamic theory of statutory interpretation, offers the most expansive view of judicial power. As described by a leading advocate of dynamic interpretation, statutes should “be interpreted ‘dynamically,’ in light of their present societal, political, and legal context.” Dynamic theory frees statutory interpretation from the constraints of original intent. Legislative intent is relevant only in the sense that the court might consider what the legislature would intend if it were confronted with the same issue, at the same time, and in the same context, as is the court. Viewed in that way, legislative intent is a function of judicial intent, and it imposes no genuine constraint on the court.

The similarities, as well as the differences, among the three approaches are nicely illustrated by the majority, concurring, and dissenting opinions in Green v. Bock Laundry Machine Co. The defendant, Bock Laundry Machine Co., was a manufacturer of large commercial dryers. Green, while operating one of the defendant’s products, reached into the dryer’s heavy rotating drum in an effort to

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18. Textualists derive congressional intent from the text of the statute itself. They reject the possibility that textual ambiguity can be clarified by an examination of legislative history. Intentionalists begin with the text but willingly delve into legislative history if the text appears ambiguous or produces an unacceptable result. As described by Justice Scalia, the leading judicial advocate of textualism, textualists “do not really look for subjective legislative intent. We look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris.” See Scalia, supra note 9, at 17. This represents something of a shift, albeit a modest shift, from Justice Scalia’s earlier view that the Court should not “enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective—but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times.” Pennsylvania v. Union Gas Co., 491 U.S. 1, 30 (1989) (Scalia, J., concurring in part and dissenting in part). The earlier view suggests that legislative intent is irrelevant. The current view suggests that legislative intent is relevant, but it is derived from the text by abstract reasoning and is a presumed, rather than an actual, intent. The shift seems more a matter of form than of substance.


20. See Eskridge, supra note 19, at 1479.


22. Id. at 506.
stop it.23 Instead of stopping, the drum tore off his arm.24 Green brought a product liability action against Bock, in the course of which he testified on his own behalf.25 Bock impeached Green’s testimony with evidence that Green previously had been convicted of conspiracy to commit burglary and burglary, both felonies.26 The jury rendered a verdict for defendant Bock.27 On appeal, Green argued that the trial judge erred in admitting the impeachment evidence.28 Bock claimed that Federal Rule of Evidence 609 mandated admission of the impeachment evidence.29 Thus, no error had occurred.30

Rule 609 provided, in relevant part, that evidence of a prior conviction “shall be admitted” for purposes of impeachment, if the crime was punishable by death or more than one year in prison, and the court determines that the probative value of the evidence “outweighs its prejudicial effect to the defendant.”31 Everyone agreed that Green had been convicted of a crime punishable by more than one year in prison.32 The only question was whether the clause dealing with prejudicial effect applied in a civil case in which the plaintiff testified on his own behalf.33 The Court agreed with Bock that it did not.34 Therefore, the Rule left the judge no choice but to admit the impeachment evidence.35

All of the justices agreed that, as applied to a civil case, the Rule “can’t mean what it says.”36 If it did, it would treat civil defendants more favorably than civil plaintiffs. That, Justice Scalia noted, would be an “absurd, and perhaps

23. Id.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id.
29. See id. at 505-06.
30. See id.
31. Id. at 509 (emphasis added); FED. R. EVID. 609(a) (amended 1990). As amended, Rule 609(a) makes clear that the balancing test applies only with respect to impeachment of a criminal defendant. See FED. R. EVID. 609(a) advisory comm. n. (amended 1990). The amendment codified the holding of Bock Laundry. Id. The rule recognizes that in every case in which prior convictions are used to impeach the testifying criminal defendant, the defendant faces a unique risk of prejudice in that evidence admitted solely for impeachment purposes, might be misused by a jury as evidence of a propensity to commit the crime with which the defendant is charged. Id.
32. See Bock Laundry, 490 U.S. at 506.
33. See id. at 505.
34. See id. at 527.
35. See id.
36. Id. at 511; see id. at 527 (Scalia, J., concurring), 530 (Blackmun, J., dissenting).
unconstitutional, result."[37] Under these circumstances, even Justice Scalia, the Court's most vocal advocate of textualism, thought it "entirely appropriate to consult all public materials, including ... legislative history ... to justify a departure from the ordinary meaning of the word 'defendant.'"[38] Because "defendant" as used in the Rule could not mean "defendant," the critical question of statutory construction was, what, exactly, did it mean.[39] The likely possibilities were: "defendant" means "criminal defendant," or "defendant" means "any party."[40] The majority chose the former interpretation, with Justice Scalia concurring; the dissenters, the latter.[41]

a. Textualism

Once it is determined that a statute cannot mean what it says, what is a textualist to do? According to Justice Scalia's concurring opinion, legislative history appropriately might be used for the limited purpose of determining that the legislature did not mean what it said when it said something absurd, but it may not be used for the purpose of determining what the legislature actually meant.[42] In other words, the judge's task is not to glean the subjective intent of the legislators from the legislative history. At most, legislative history can be used to rule out an absurd intent that is suggested by the text. As Justice Scalia later described, the judge's task is to determine an "'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris."[43] On this basis, Justice Scalia concluded that, as used in Rule 609, "defendant" meant "criminal defendant" because that choice did the least violence to the text, and the word "criminal" inadvertently could have been omitted.[44] Therefore, the clause relating to prejudicial effect did not apply in civil cases, with respect to either a plaintiff or a defendant. As a result, the judge was bound to admit impeachment evidence against either party without regard to prejudicial effect.

37. Id. at 527 (Scalia, J., concurring).
38. Id. (Scalia, J., concurring).
39. Id. at 511.
40. Id.
41. Id. at 523-24, 529 (Scalia, J., concurring), 530 (Blackmun, J., dissenting).
42. Id. at 527-29 (Scalia, J., concurring).
43. See Scalia, supra note 9, at 17.
44. Bock Laundry, 490 U.S. at 529 (Scalia, J., concurring).
b. Intentionalism

The majority reached the same conclusion through a very different approach, emphasizing subjective legislative intent rather than statutory text. In order to determine what the legislators were thinking when they voted on the Rule, it undertook an exhaustive examination of the Rule’s evolution and its legislative history. The majority concluded “that the Rule was meant to authorize a judge to weigh prejudice against no one other than a criminal defendant.” Acknowledging that weighing prejudice and probativeness to determine the admissibility of impeachment evidence in civil cases may be “a sensible approach,” the Court, nonetheless, precluded such weighing in light of the subjective intent of the legislators reflected in the legislative history. Intentionalist judges must adhere to the legislative decision reflected in legislative history, even when they find it unwise. That is what the majority did.

Like Justice Scalia, the majority concluded that “defendant” as used in the Rule meant “criminal defendant.” Unlike Justice Scalia, who chose that interpretation primarily because, of the plausible alternatives available, it “did the least violence to the text,” the majority chose that interpretation because the legislative history demonstrated that it was what Congress intended. Two very different approaches, one focusing on text and the other on original intent, led to the same result because each happened to point in the same direction. Had they pointed in opposite directions, the majority and Justice Scalia surely would have disagreed on the result. Indeed, Justice Scalia disparaged, and declined to join, the majority’s “lengthy discussion of ideological evolution and legislative history.”

c. Dynamic Interpretation

The third approach to statutory construction, dynamic interpretation, was employed by Justice Blackmun, with whom Justices Brennan and Marshall joined in dissent. Justice Blackmun began his analysis by observing that “[t]he

45. See id. at 523-24.
46. Id. at 511-24.
47. Id. at 521.
48. Id. at 524, 527.
49. Id. at 524. As noted above, Rule 609 has been amended to codify the holding of Bock Laundry. See supra note 31.
50. Bock Laundry, 490 U.S. at 524.
51. Id. at 529 (Scalia, J., concurring).
52. Id. at 524.
53. Id. at 529 (Scalia, J., concurring).
54. Id. at 530 (Blackmun, J., dissenting).
majority’s lengthy recounting of the legislative history ... demonstrates why almost all that history is entitled to very little weight.”\(^5\) However, the dissenters indicated that one clause of a House Conference Report was entitled to a great deal of weight.\(^6\) That clause suggested that the kind of prejudice that a court ought to be concerned with is prejudice, which “presents a danger of improperly influencing the outcome of the trial.”\(^7\) Of course, prejudice to any party to a lawsuit might affect the outcome of the trial. So, the dissent concluded, when Congress said “prejudice to a defendant,” it meant “prejudice to a party.”\(^8\)

As Justice Blackmun acknowledged, other language in the Conference Report supported the majority’s view.\(^9\) The real reason for the dissent’s conclusion seemed to be that “it [is] proper, as a general matter[,] ... to construe the Rule so as to avoid ‘unnecessary hardship,’ and to produce a sensible result.”\(^10\) In other words, the result ought to be “based on what counts today.”\(^11\) The Court’s view of a sensible result trumped original intent. Although the dissent camouflaged its approach somewhat by seizing on a bit of legislative history that happened to coincide with its view of what the law ought to be, its approach, nonetheless, comfortably fits within the dynamic category.

All of the justices agreed that, as written, the Rule made no sense, and all seemed to agree that the dissent’s interpretation made the most sense.\(^12\) However, only a dynamic approach to statutory construction provided sufficient flexibility for a judge to reach the result that made the most sense—a result plainly at odds with the text of the statute and the intent of the legislature as evidenced by the legislative history. That, of course, does not resolve the issue of which approach best fulfills the judicial function. That depends on who should decide which result is the most sensible, the court or the legislature: a matter not addressed here. As mentioned above,\(^13\) on that question, it is assumed that the traditional consensus still holds, at least among judges. Courts ought to construe statutes to carry out

\(^{55}\) Id. at 531 (Blackmun, J., dissenting).

\(^{56}\) Id. (Blackmun, J., dissenting); see H.R. CONF. REP. NO. 93-1597 (1974).

\(^{57}\) Id. at 531-32 (Blackmun, J., dissenting) (quoting H.R. CONF. REP. NO. 93-1597, at 9-10 (1974)).

\(^{58}\) Id. at 533 (Blackmun, J., dissenting).

\(^{59}\) Id. at 531 (Blackmun, J., dissenting) (“[T]he Report mirrors the Rule in emphasizing the prejudicial effect on the defendant, and also uses the word ‘convict’ to describe the potential outcome.”).

\(^{60}\) Id. at 535 (Blackmun, J., dissenting).

\(^{61}\) See Zeppos, supra note 14, at 1082 (describing the dynamic theory of statutory interpretation).

\(^{62}\) Bock Laundry, 490 U.S. at 511, 527 (Scalia, J., concurring), 530 (Blackmun, J., dissenting).

\(^{63}\) See supra text accompanying note 17.
the intent of the legislature as evidenced by statutory text viewed in the light of legislative history.

B. As Applied to Antitrust Legislation

The Khan dicta expressed the widely accepted notion that courts have broad authority in interpreting the antitrust laws.64 While the Court seemed to acknowledge that broad authority does not mean unlimited authority, it also implied that the judicial power in this area is drawn from the common law tradition and is subject to few, if any, constraints imposed by either statutory text or legislative history. Arguably, antitrust is unique, and the assumption that statutes generally should be construed in light of statutory text and legislative history does not apply to antitrust. According to this view, antitrust is federal common law, free of the usual constraints that apply to statutory law.65 Interestingly, in United States v. Trans-Missouri Freight Ass'n,66 the first Supreme Court decision construing the substantive provisions of the Sherman Act, the Court had a quite different view of the Act's relationship to the common law

64. Compare State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (The Court concluded that "the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress "expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition."). With William F. Baxter, Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law, 60 Tex. L. Rev. 661, 672 (1985) ("As the courts refine antitrust law by incorporating new insights and resolving old confusions, they act much like Congress (at least in principle) when it updates statutory law."). Contending antitrust schools agree on one critical point: that the Sherman Act cannot, and should not, be given a settled meaning derived from traditional statutory sources." Thomas C. Arthur, Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act, 74 Cal. L. Rev. 263, 267 (1986) [hereinafter Arthur, Sea of Doubt]. Professor Arthur argued that "[t]hey are all wrong." Id. This approach, Arthur claimed, "requires courts to make basic policy choices without statutory guidance, . . . [and] is fundamentally illegitimate." Id. at 327. Rather, when Congress adopted the Sherman Act, it merely "left the courts to apply to particular cases the general policy choices it had made." Id. at 290.

65. Cf. Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360 (1933). The Sherman Act, the Court stated, "has a generality and adaptability comparable to that found to be desirable in constitutional provisions." Id. at 359-60. Accordingly, judicial interpretation is "unconfined by either the 1890 Congress's basic policy choices or the Court's own precedents." Thomas C. Arthur, Workable Antitrust Law: The Statutory Approach to Antitrust, 62 Tul. L. Rev. 1163, 1188 (1988). Professor Arthur correctly claimed that this approach is "fundamentally illegitimate." See Arthur, Sea of Doubt, supra note 64, at 327.

66. 166 U.S. 290 (1897).
tradition. In a five-to-four decision grounded on a plain meaning interpretation, it held that Congress intended the Sherman Act to go well beyond the common law in condemning restraints of trade.\footnote{Id. at 327-28.} More importantly, the guiding principle of the decision was not the common law tradition, but rather was statutory text and legislative intent.\footnote{Id. at 318-20.}

Horizontal price fixing by competing railroads, the majority concluded in Trans-Missouri, had no place under the Sherman Act.\footnote{Id. at 335-36.} The dissenters would have affirmed the lower court’s decision that followed the common law tradition, under which price fixing agreements were sometimes enforceable and sometimes not, depending on the circumstances.\footnote{Id. at 374 (White, J., dissenting). Commenting on the Trans-Missouri Court’s break with the common law of trade restraints, then-professor Bork noted that Justice Peckham, writing for the Court, “saved the Sherman Act from a stultifying effort to incorporate a body of confused and inappropriate precedent.” ROBERT H. BORK, THE ANTI-TRUST PARADOX: A POLICY AT WAR WITH ITSELF 26 (1978).} In their view, the agreed-upon prices provided the railroads with no more than a reasonable return.\footnote{Id. at 367-69 (White, J., dissenting).} Pricing agreements were necessary to avoid ruinous competition that would drive prices to such low levels that the railroads could not realize a reasonable return on their very heavy sunk costs.\footnote{Id. at 373 (White, J., dissenting).} Under the circumstances of the case, the dissenting Justices insisted an agreement among competitors that set prices at a reasonable level imposed a reasonable restraint on trade.\footnote{Id. at 344 (White, J., dissenting).} Such agreements were enforceable at common law, and, the dissent argued, Congress could not have intended to forbid them.\footnote{Id. at 329.} The majority, too, emphasized legislative intent. The Court stated:

[W]e cannot see how the statute can be limited, as it has been by the courts below, without reading into its text an exception which alters the natural meaning of the language used, and . . . no sufficient reason is shown for believing that such alteration would make the statute more in accord with the intent of the lawmakers who enacted it.\footnote{Id. at 327-28.}

Rejecting the common law tradition, the Court held that neither the language nor the legislative history of the Sherman Act drew a distinction between reasonable and unreasonable restraints.\footnote{Id. at 327-28.} All restraints were banned.

67. Id. at 327-28.
68. Id. at 318-20.
69. Id. at 335-36.
70. Id. at 374 (White, J., dissenting).
The strict approach of Trans-Missouri rejected common law precedent in favor of statutory text and congressional intent. This approach appeared to be undercut by the Court's decision in Standard Oil Co. of New Jersey v. United States, which, for the first time, set out a clearly articulated rule of reason, under which only unreasonable restraints were to be held unlawful. Congressional reaction was swift. The Court, Congress believed, had gone soft on antitrust violators, and, as a result, Congress adopted the Clayton Act to put some steel in the judicial spine.

77. 221 U.S. 1 (1911).
78. Id. at 66. As later explained by the Court, the rule of reason does not mean that every restraint is tested for reasonableness on a case-by-case basis. Rather, there are:
   two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are "illegal per se"—in the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.

Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978). Horizontal price fixing is in the first category. So, the strict rule of Trans-Missouri (horizontal price fixing is unlawful regardless of the reasonableness of the price set) survived.

79. The belief that the Supreme Court had adopted a noninterpretivist approach to the Sherman Act was largely responsible for Congress's adoption of the Clayton Act. Commenting on the Court's decision in Standard Oil, the Senate Committee on Interstate Commerce stated:

   The committee has full confidence in the integrity, intelligence, and patriotism of the Supreme Court of the United States, but it is unwilling to repose in that court, or any other court, the vast and undefined power which it must exercise in the administration of the statute under the rule which it has promulgated. It substitutes the court in the place of Congress, for whenever the rule is invoked, the court does not administer the law, but makes the law. If it continues in force, the Federal courts will, so far as restraint of trade is concerned, make a common law for the United States just as the English courts have made a common law for England.

   The people of this country will not permit the courts to declare a policy for them with respect to this subject.

GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION 16 (1924) (quoting REP. OF S. COMM. ON INTERSTATE COMMERCE, at xii (Feb. 26, 1913)).

In California v. American Stores Co., the Supreme Court briefly reviewed the early history of antitrust legislation:

   The Sherman Act became law just a century ago. It matured some 15 years later, when, under the administration of Theodore Roosevelt, the Sherman Act "was finally being used against trusts of the dimension that had called it into being, and with enough energy to justify the boast that the President was using
Nonetheless, the rule of reason survived, and it cannot be doubted that Congress assigned to the courts a central role in shaping the antitrust laws. In legislative debates on the Sherman Act, Senator Sherman admitted:

that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law.  

As Senator Sherman's comments suggest, antitrust law is not common law, and, as with other statutory law, the power of the courts to form and reform antitrust law properly cannot be limited by stare decisis concerns alone. When Congress adopted the Sherman and Clayton Acts, it had in mind broadly defined goals, or, in Senator Sherman's words, "general principles." If, as is assumed here, the traditional consensus that statutory interpretation ought to be confined by both text and legislative history still holds, then these goals or principles ought to confine judicial interpretation of the antitrust statutes, just as statutory interpretation generally is confined by text and legislative history. The Supreme Court took

a Big Stick." Two of the most famous prosecutions concluded in 1911, with decisions from this Court endorsing the "Rule of Reason" as the principal guide to the construction of the Sherman Act's general language. ... In some quarters, the cases were hailed as great triumphs over the forces of monopoly; in others, they were regarded as Pyrrhic victories. Concern about the adequacy of the Sherman Act's prohibition against combinations in restraint of trade prompted President Wilson to make a special address to Congress in 1914 recommending that the antitrust laws be strengthened. Congressman Clayton, the Chairman of the House Judiciary Committee, promptly appointed a subcommittee to prepare the legislation. The bill drafted by the subcommittee contained most of the provisions that were eventually enacted into the law now known as the Clayton Act. The statute reenacted certain provisions of the Sherman Act and added new provisions of both a substantive and procedural character.


80. 21 CONG. REC. 2,460 (1889) (statement of Sen. Sherman) (emphasis added).

81. As the United States Court of Appeals for the First Circuit has observed in another context: "While we adhere to the general practice of construing statutes so as to further their demonstrated policies, we have no license to rework whole statutory schemes in pursuit of policy goals which Congress has nowhere articulated." Chapman v. Comm'r, 618 F.2d 856, 876 (1980) (rejecting an interpretation of Section 368 of the Internal Revenue Code that was without support in the language, structure, or legislative history of the statute); see also supra notes 8 (on the difference between statutory construction and the creation of common law) and 79 (on an early congressional response.
Courthas substantial latitude both in resolving ambiguities concerning Congress's goals in adopting the antitrust laws, and in determining how those goals should be achieved. However, it is not a free agent. It should not be free to reconstruct the goals according to its own vision of economic and social wisdom. In short, outcomes in specific cases should conform to congressional goals. Goals should not be adjusted, implicitly or explicitly, to conform to desired outcomes as cases are decided. Of course, the Court's interpretation of legislative history, and the antitrust goals that it reveals, need not be set in concrete. They may change over time, but when they do it is incumbent upon the Court to explain why the revised view of what Congress sought to achieve is more persuasive than the previous view.

As in other fields of statutory law, legislative history and congressional intent ought to count for something when the Court is interpreting antitrust statutes. However, two prominent commentators have concluded that: "[t]aking the legislative history of the antitrust laws as a whole, we would give it relatively little weight on the fundamental question whether economic efficiency, injury to competitors, or some alternative 'populist' goal should guide antitrust policy." 4

82. PHILLIP E. AREEDA & HERBERT HOVENKAMP, I ANTITRUST LAW 59 (2d ed. 2000). Interestingly, the authors also noted that: "[a] substantial history from sources other than the legislative debates suggests that the proponents of the Sherman Act were significantly more concerned about injury to competitors than injury to consumers." Id. at 51-52. Complaints about the oil and sugar industries played a major role in congressional concern. Id. at 52. Yet, prices in those industries had declined during the decade preceding adoption of the Act. Id. The price of refined petroleum products fell by sixty-one percent between 1880 and 1890. Id. So, the authors concluded: "Whatever the cause for Congress's complaint about Standard Oil, it was not high consumer prices." Id.

to what was viewed as a noninterpretivist approach to the Sherman Act).
Like others, they argued that the legislative history of the Sherman Act is ambiguous, and that of the later antitrust legislation is "if anything even more problematic." The problem with the legislative history of the later legislation is not its ambiguity, but that it rather clearly points in a direction the authors did not approve. For example, the authors stated:

The Robinson-Patman amendments to §2 of the Clayton Act in 1936 and the Celler-Kefauver amendments to §7 of the Clayton Act in 1950 are both dominated even more than the Sherman Act by an articulated concern to protect small business from aggressive competition by larger rivals, most generally at the expense of consumers.

Perhaps, these commentators were correct in asserting that the greater clarity of the more recent legislative history strengthens their argument that it is not helpful and ought to be ignored. Perhaps, they were incorrect. But, more importantly, like nearly all commentators addressing the question of antitrust goals, they considered the legislative history. In so doing, they implicitly acknowledged the relevance of legislative history in defining antitrust goals, even

83. See Robert H. Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 74 Yale L.J. 775, 783 (1965) ("One frequently hears talk of the original meaning of the Sherman Act or of the intent of Congress in enacting that law, but it can hardly be stressed too much that, with respect to the Sherman Act, . . . such talk of legislative intent is more than usually foolish. Congress simply had no discoverable intention that would help a court decide a case one way or the other."). Bork later, but not much later, reconsidered this view, and concluded that he had "seriously underestimated the clarity of the legislative intent behind the Sherman Act which a closer study of the full record reveals." Robert H. Bork, Legislative Intent and the Policy of the Sherman Act, 9 J.L. & Econ. 7, 7 n.1 (1966) [hereinafter Bork, Legislative Intent]. Under Bork's revised view of the legislative history, the congressional debates "were overwhelmingly in favor of the proposition that Congress intended the Sherman Act to be interpreted in accordance with the principles of consumer welfare." Id. at 21. As has been pointed out, Bork's revised view was "entirely congruent with his own policy preferences. The appeal to history for polemical purposes always presents the danger that the author's predilections will result in blindness to possibly conflicting alternative interpretations." David Millon, The Sherman Act and the Balance of Power, 61 S. Cal. L. Rev. 1219, 1234-35 (1988).

84. See AREEDA & HOVENKAMP, supra note 82, at 59.
85. See AREEDA & HOVENKAMP, supra note 82, at 70.
86. Judge Posner, however, has stated that the Sherman Act of today "means, not what its framers may have thought, but what economists and economics-minded lawyers and judges think." Richard A. Posner, Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution, 37 Case W. Res. L. Rev. 179, 209 (1986).
when they concluded that it is not helpful because it is ambiguous or fails to coincide with their notions of sound antitrust policy.

The main point of this Article is that the Court, like the commentators, ought to come to grips with the question of what the legislative history of the antitrust laws teaches about Congress’s antitrust goals and how those goals are advanced by its decisions. This obligation to explain its decisions in light of legislative history and intent is especially pronounced during revisionist periods such as that which has ensued since the 1977 Sylvania decision. Failure to do so undercuts the legitimacy of the Court’s decisions, especially if pre-revisionist decisions were more firmly grounded in legislative history and intent than are its current decisions—a question addressed in Part IV below, following a review of the competing views of antitrust goals.

III. THE GOALS OF ANTITRUST

One of the reasons his approach is so popular is that it reduces all moral puzzlement to a formula. You remove puzzlement and doubt and conflict of values, and it’s in the scientific spirit. People seem to think it will all add up, but it never does, because humans never do. 87

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87. Michael Specter, The Dangerous Philosopher, The New Yorker, Sept. 6, 1999, at 46, 55 (quoting British philosopher Bernard Williams on the views of bioethicist Peter Singer, recently appointed Ira W. DeCamp Professor of Bioethics at Princeton University). Doctor Singer’s philosophy has led him to some controversial conclusions, such as approval of infanticide under certain conditions. He has stated:

When the death of a disabled infant will lead to the birth of another infant with better prospects of a happy life, the total amount of happiness will be greater if the disabled infant is killed. The loss of happy life for the first infant is outweighed by the gain of a happier life for the second. Therefore, if killing the hemophiliac infant has no adverse effect on others, it would, according to the total view, be right to kill him.

Id. at 48. It would be wrong to conclude from this example that Singer’s formula always, or even often, produces what many would view as a heartless result. In commenting on world poverty and the distribution of wealth, Singer has stated:

In the world as it is now, I can see no escape from the conclusion that each one of us with wealth surplus to his or her essential needs should be giving most of it to help people suffering from poverty so dire as to be life-threatening. That’s right: I’m saying that you shouldn’t buy that new car, take that cruise, redecorate the house or get that pricey new suit. After all, a $1,000 suit could save five children’s lives.

Peter Singer, The Singer Solution to World Poverty, N.Y. Times, Sept. 5, 1999 (Magazine), at 60, 63.

There is a significant analogy between Singer’s approach to ethics and the currently prevailing approach to antitrust. In Singer’s world, maximizing human happiness is the
If judicial interpretation of the antitrust statutes is to be confined by general principles that reflect the goals Congress intended to achieve, those principles or goals, of course, must be identified. Then-professor Robert Bork was right when he stated that "Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals?"\textsuperscript{88} Unfortunately, neither the courts nor the commentators are in agreement concerning the goals of antitrust. However, disparate views on the subject can be grouped into three categories, referred to here as the broad view, the narrow view, and the intermediate view. Various terms have been used to label these three approaches to antitrust, but there is general agreement among commentators as to the existence and content of the three views.\textsuperscript{89} The broad view envisions antitrust as having multiple goals. It dominated antitrust thinking prior to the current touchstone of a proper ethical code. According to the currently prevailing approach to antitrust, maximizing national wealth is the touchstone of a proper antitrust law. See \textit{infra} notes 152-78 and accompanying text. Both approaches create the aura of scientific certainty by emphasizing quantitative analysis. Components of human happiness or national wealth are to be quantified. The quantum of the components are then balanced to maximize the whole. However, the problem is that national wealth (as the term is used in this context), like human happiness, cannot be quantified. See \textit{infra} notes 165-70 and accompanying text.

\textbf{88.} Bork, supra note 70, at 50. A Westlaw search reveals that since 1978, Bork's \textit{The Antitrust Paradox} has been cited by the Supreme Court in fourteen antitrust cases. Richard A. Posner, \textit{Antitrust Law: An Economic Perspective} (1976), has much in common with \textit{The Antitrust Paradox}, but it has been cited in only one antitrust case. As with Dr. Singer's philosophy, see supra note 87 and accompanying text, one of the attractions of the new approach to antitrust is that it removes much of the puzzlement, doubt, and conflict of values identified with the traditional approach. The traditional approach, Bork said, is based upon:

- a jumble of half-digested notions and mythologies. . . . Insofar as there can be said to be a theory behind the tradition, it is that efficiency should sometimes be curbed because of the social and political health supposedly engendered by the preservation of a sturdy, independent yeomanry in the business world.

. . . .

The point here is not that these ideas are dubious social policies (which they are), but rather, as our statutes now stand, that they make impossible antitrust law.

Bork, supra note 70, at 54, 56.

\textbf{89.} See Alan J. Meese, \textit{Liberty and Antitrust in the Formative Era}, 79 B.U. L. Rev. 1, 4-10 (1999) (labeling the three approaches as the populist, the efficiency, and the wealth transfer approach; describing the main distinctions among the approaches; and identifying proponents of each). What is described below as the intermediate view is a variation on the wealth transfer approach. It occupies a middle ground between the populist (broad) and the efficiency (narrow) approaches to antitrust.
revisionist period. The narrow view dominates current thinking and holds that maximizing efficiency is the exclusive concern of antitrust. As the label implies, the intermediate view is a compromise, drawing on both the tradition of the broad view and the emphasis on efficiency of the narrow view. Each view is explored below.

A. The Broad View

As noted above, Trans-Missouri, the first Sherman Act case decided on the merits, took an interpretive approach grounded in statutory language and legislative intent. It reasoned that Section 1 of the Sherman Act tolerated no distinction between reasonable and unreasonable restraints. All restraints were banned. Price fixing among competitors violated the Act, irrespective of the reasonableness of the price set. Standard Oil, decided fourteen years after Trans-Missouri, also relied upon the intent of Congress and the language of the Act, but it concluded that there was room for such a distinction after all. The statutory terms "restraint of trade" and "monopolization," the Standard Oil Court reasoned, "took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the act in question." There can be no doubt, the Court concluded, that when Congress used those terms, it had in mind their meaning under the common law. And, a survey of the common law demonstrated that:

the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions . . . led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or

90. See id. at 7. For a discussion of the broad view, see infra notes 93-151 and accompanying text.
91. Id. For a discussion of the narrow view, see infra notes 152-90 and accompanying text.
92. For a discussion of the intermediate view, see infra notes 191-232 and accompanying text.
93. See supra text accompanying note 68.
94. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 327-28 (1897).
95. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 62 (1911).
96. Id. at 50-51.
97. Id. at 51.
performed with the legitimate purpose of reasonably forwarding personal interest and developing trade.\textsuperscript{98}

This is the origin of the two great categories of trade restraints: (1) those that are judged unreasonable and, therefore, unlawful by virtue of their nature or character; and (2) those that may be reasonable or unreasonable depending on the circumstances.\textsuperscript{99} Pricing fixing among competitors was in the first category of illegal restraints—it was viewed as unreasonable by its nature, irrespective of the reasonableness of the price set.\textsuperscript{100} The holding, but not the rationale, of Trans-Missouri stood.\textsuperscript{101} And so it remains. In modern terminology, price fixing among competitors is unlawful \textit{per se}.\textsuperscript{102} The reasonableness of restraints in the second category was to depend upon the circumstances of each case.\textsuperscript{103} As later described by the Court, “[in] the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.”\textsuperscript{104} \textit{Standard Oil}, for the first time, set out these two branches of the rule of reason, which were to become known, somewhat illogically, as the \textit{per se} rule and the rule of reason.

\textit{Standard Oil} is known for its articulation of the rule of reason, but it also planted the seed of an idea that was to come to full bloom in later years. According to the Court, Congress, like the common law dealing with restraints of trade, was concerned about enhanced prices and other wrongs.\textsuperscript{105} What were these other wrongs that concerned Congress? The Court spoke of “the freedom of the individual right to contract.”\textsuperscript{106} Justice Harlan, concurring, elaborated:

All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The nation had been rid of human slavery—fortunately, as all now feel, but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from

\textsuperscript{98} \textit{Id.} at 58 (emphasis added).
\textsuperscript{100} \textit{Id.} at 689.
\textsuperscript{101} The Court noted that, insofar as the rationale of Trans-Missouri was inconsistent with that of \textit{Standard Oil}, the former was “limited and qualified.” \textit{Standard Oil}, 221 U.S. at 67-68.
\textsuperscript{102} \textit{Nat’l Soc’y of Prof’l Eng’rs}, 435 U.S. at 692.
\textsuperscript{103} \textit{See supra} note 78 and accompanying text.
\textsuperscript{104} \textit{Nat’l Soc’y of Prof’l Eng’rs}, 435 U.S. at 692.
\textsuperscript{105} \textit{See supra} text accompanying note 98.
\textsuperscript{106} \textit{Standard Oil}, 221 U.S. at 62.
aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life. Such danger was thought to be then imminent, and all felt that it must be met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong. Congress therefore took up the matter and gave the whole subject the fullest consideration. . . . Its authority to regulate such commerce [among the several states] was and is paramount, due force being given to other provisions of the fundamental law, devised by the fathers for the safety of the government and for the protection and security of the essential rights inhering in life, liberty and property.\textsuperscript{107}

One can see in this passage the origin of an idea that was to have a powerful influence on the development of antitrust law. Power to raise price and extract monopoly profits was an important congressional concern, but not the only concern. Freedom to contract, or, as put by the Court in later cases, freedom to trade\textsuperscript{108}—freedom of the small, independent business to set its prices and choose its products—was also a concern.\textsuperscript{109} That was not all. Concentration of wealth was seen as a threat to democratic government. Congress, Justice Harlan instructed, sought to inhibit the growth of plutocracy and to preserve democratic government.\textsuperscript{110} Under this broad view of antitrust, Congress's objectives included not only the economic goal of low prices and high quality brought about through competition, but also social and political ends. The most complete statement of the broad view was presented by Judge Hand in \textit{United States v. Aluminum Co. of America} ("\textit{Alcoa}").\textsuperscript{111} In examining what drove Congress to adopt the antitrust statutes, he stated:

\begin{quote}
Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to
\end{quote}

\textsuperscript{107} \textit{Id.} at 83-84 (Harlan, J., concurring in part and dissenting in part).

\textsuperscript{108} See Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 213 (1951). In holding unlawful an agreement between two suppliers in imposing maximum resale prices on their customers, the Court noted that such agreements "no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." \textit{Id.}

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} \textit{Standard Oil}, 221 U.S. at 84 (Harlan, J., concurring in part and dissenting in part).

\textsuperscript{111} 148 F.2d 416 (2d Cir. 1945).
counteract an inevitable disposition to let well enough alone. . . . [Congress] was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. These considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes.

. . . .

We have been speaking only of the economic reasons which forbid monopoly; but, as we have already implied, there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results. In the debates in Congress Senator Sherman himself . . . showed that among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them . . . . Throughout the history of these 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 which can effectively compete with each other.¹¹²

Judge Hand was not alone in his view of Congress's intent. Two weeks after his Alcoa decision, the Supreme Court granted certiorari in the tobacco monopolization cases.¹¹³ In affirming convictions of the defendants for conspiring in violation of the Sherman Act, the Court noted that the Alcoa decision was rendered by the Second Circuit "in lieu of a decision by the Supreme Court," because the Supreme Court lacked a quorum for hearing the case.¹¹⁴ It, therefore, carried additional weight as a precedent.¹¹⁵ The Court then stated: "We find the following statements from the opinion of the court in that case to be especially appropriate here and we welcome this opportunity to endorse them."¹¹⁶ Then followed extensive quotes from the Alcoa decision, including most of the above passages.¹¹⁷ In effect, Judge Hand's Alcoa decision was elevated to the status of a Supreme Court precedent.

¹¹² Id. at 427-29 (citations omitted).
¹¹⁴ Id. at 811-12.
¹¹⁵ Id. at 811.
¹¹⁶ Id. at 813 (emphasis added).
¹¹⁷ Id. at 813-15.
Alcoa set the stage for an expansive view of antitrust that came to fruition in the 1960s. In the meantime, Congress made one of its rare forays into the field by amending Section 7 of the Clayton Act. Responding to a Federal Trade Commission report and other expressions of concern that a wave of mergers following World War II was leading to unacceptably high levels of concentration in the economy, Congress sought to tighten the legal constraints on mergers. Application of Section 7 to acquisitions of assets, as well as stock, and to vertical, as well as horizontal, mergers was clarified. More importantly, in Brown Shoe Co. v. United States, the first Supreme Court decision under amended Section 7, the Court reviewed the legislative history of the 1950 amendment, and concluded that Congress meant to set a more stringent legal standard for determining the legality of a merger by emphasizing the incipiency doctrine, introduced in 1914 with adoption of the Clayton Act. Just as the legislative history of the original Clayton Act demonstrated an intent to prohibit certain enumerated practices in their incipiency, before they blossomed into violations of the Sherman Act, so the legislative history of the 1950 amendment demonstrated an intent to arrest "mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency." On the one hand, the Court recognized that the Act was intended to protect "competition, not competitors." On the other hand, the Court observed that:

we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.

We must give effect to that decision.

Like Alcoa, Brown Shoe embraced a broad view of antitrust that encompassed more than the economic goals of efficiency, low prices, and high

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119. See Brown Shoe Co. v. United States, 370 U.S. 294, 317 (1962); Derek C. Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 228 (1960).

120. 370 U.S. 294 (1962).

121. Id. at 317.

122. Id. at 319.

123. Id. at 344.
quality. While the Act expressed concern for a lessening of competition, not mere injury to competitors, its legislative history evidenced concern about excessive concentration of economic power not only for reasons related to price and quality, but for other reasons, as well. So, according to the broad view, when Congress used the term “competition” in the Clayton Act, it chose to advance a variety of values associated with a competitive system—social and political values, as well as economic ones. Giving effect to that legislative choice, as the Court saw it, required a balancing of economic and noneconomic factors. Depending on the circumstances, where economic and noneconomic factors pointed in opposite directions, either could outweigh the other. In addition, Congress further complicated the process by its embrace of the incipiency doctrine.

The broad view of competition entailing social, political, and economic values coupled with the incipiency doctrine raised difficult questions. It required the courts to strike a balance between competing values. If, in adopting the Act, Congress had been concerned exclusively with price and output, antitrust analysis would have been a good deal more straightforward. But, as viewed by the Court, the legislative history pointed in another direction.

124. Id. at 329-46.
125. Id. at 316.
126. Id. at 316-323.
127. Id.
128. Id.
129. Id. at 323 n.39.
130. Even the most severe critics of the Court’s merger decisions acknowledge that the legislative history of the 1950 amendment demonstrates “sociopolitical objections to industrial concentration.” BORK, supra note 70, at 200. However, they argue that the broad view of antitrust is neither “found in the statute’s language,” nor is it “compelled by the statute’s legislative history.” BORK, supra note 70, at 210. And, even if the legislative history were compelling, Bork would have the courts set it aside. For example, he recognized that Congress has made perfectly clear its view that certain practices such as price discrimination and vertical mergers sometimes have anticompetitive effects. BORK, supra note 70, at 409. However, according to Bork, economic theory instructs that Congress was wrong. BORK, supra note 70, at 409. Such practices are almost always beneficial. BORK, supra note 70, at 409. Bork then posed the following question and gave the following answer: “Is a court that understands the economic theory free, in the face of such a legislative declaration, to reply that, for example, no vertical merger ever harms competition? The issue is not free from doubt, but I think the better answer is yes.” BORK, supra note 70, at 409-10. In other words, where judges’ visions of economic theory collide with clear congressional intent, judges are to follow their vision. This is rather surprising advice from someone who fancies himself a judicial conservative. At a minimum, it is unseemly for a judicial conservative to criticize a court for struggling to reconcile, to its ability, conflicting values embedded in legislation. However, Bork is not
In the context of vertical restraints, the broad view expressed itself mainly in terms of preserving dealer independence or freedom to trade. In Dr. Miles Medical Co. v. John D. Park & Sons Co., 131 decided in 1911 and holding vertical price fixing to be per se unlawful, the Court expressed concern for "the freedom of trade on the part of dealers who own what they sell." 132 In United States v. Colgate & Co., 133 the holding of Dr. Miles was justified on grounds that it involved contracts that "undertook to prevent dealers from freely exercising the

alone among judicial conservatives in ignoring legislative intent that is inconsistent with his agenda. See supra note 86; infra note 152.

At the same time, these critics claim that a proper interpretation of the antitrust statutes depends upon an identification of antitrust goals. Legislative history seems the obvious place to look in identifying the goals of legislation subject to more than one interpretation. That is what the Brown Shoe Court did, and it found that the legislative history pointed decidedly in favor of social and political, as well as economic, goals. True, the Court could have simplified its task by defining "competition" as concerned with economic values alone. But, as the Court read the legislative history, that would have amounted to declining the more difficult task of balancing economic and noneconomic interests that Congress had assigned to it. Whether or not this broad view of Section 7 is compelled by statutory language or legislative history, they certainly provide it with ample support. The Brown Shoe decision is hardly the aberration that its critics would have one believe.

Justifying the broad view as a reasonable judicial attempt to carry out the wishes of Congress does not mean that the Court struck the right balance in the merger cases of the 1960s, or, for that matter, in any particular antitrust case. The excesses of the Court that led to Justice Stewart's observation that "the sole consistency that I can find is that in litigation under [Section] 7, the Government always wins," are well known. See United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting). For example, there is a strong suggestion in Brown Shoe that enhanced efficiency achieved through merger raises barriers to entry and is itself evidence of anticompetitive effect. As noted by Justice Harlan, the suggestion became explicit in the Procter & Gamble case, at least as to advertising economies, which, unlike economies in the cost of production, were found by the Federal Trade Commission "only to increase the barriers to new entry" and to be "offensive to at least the spirit, if not the letter, of the antitrust laws." FTC v. The Procter & Gamble Co., 386 U.S. 568, 603 (1967) (Harlan, J., concurring). On the other hand, as discussed below, an interpretation of Section 7 that focuses exclusively on economic effect is likely to permit a merger of competitors that produces a level of market power approaching monopoly proportions, and would permit virtually any vertical or conglomerate merger. See infra text accompanying note 176. Such a result would seem less compatible with the language and history of Section 7 than are the results of the Court's merger decisions of the 1960s.

131. 220 U.S. 373 (1911).
132. Id. at 407-08.
133. 250 U.S. 300 (1919).
right to sell."\textsuperscript{134} In Schwinn, the Court relied on Dr. Miles in concluding that a manufacturer, having sold its goods to a dealer for resale, may not impose territorial or customer restraints that limit where or to whom the dealer may sell.\textsuperscript{135} "Such restraints are so obviously destructive of competition that their mere existence is enough" to establish a violation of the Sherman Act.\textsuperscript{136} Nonetheless, manufacturers distributing their goods by consignment to dealers could impose territorial and customer restraints.\textsuperscript{137} Such restrictions on dealer consignees did not implicate noneconomic values associated with a competitive system in the same way as did restrictions on dealers who own what they sell.\textsuperscript{138} Schwinn was short-lived. After just ten years, the Court could find no "analytical support" for its distinction between sales and consignments.\textsuperscript{139} It was overruled by Sylvania, in which the Court announced that, henceforth, antitrust analysis must turn on "demonstrable economic effect."\textsuperscript{140} Explaining this apparent lack of analytical support, Justice White, concurring, observed:

\begin{quote}
While according some weight to the businessman'[s] interest in controlling the terms on which he trades in his own goods may be anathema to those who view the Sherman Act as directed solely to economic efficiency, this principle is without question more deeply embedded in our cases than the notions of "free rider" effects and distributional efficiencies borrowed by the majority from the "new economics of vertical relationships."\textsuperscript{141}
\end{quote}

\textsuperscript{134} Id. at 307-08.
\textsuperscript{136} Id.
\textsuperscript{137} Id. at 379-80.
\textsuperscript{138} Id.
\textsuperscript{140} Id. at 58-59.
\textsuperscript{141} Id. at 68-69 (White, J., concurring). The free rider theory is often used to justify vertical restraints. See Lester G. Telser, \textit{Why Should Manufacturers Want Fair Trade?}, 3 J.L. & ECON. 86, 91 (1960). It holds that a manufacturer's efforts to encourage dealers to promote its product and provide customer service can be frustrated by a competing dealer who declines to provide such promotion and service, and who passes the cost savings on to customers by charging a lower price for the product. \textit{Id}. The "bare-bones," discounting dealer is said to benefit from and, thereby, take a free ride on the promotional activities of the full-service dealer. \textit{Id}. Vertical price fixing and other restraints that limit competition among dealers are said to discourage free riding. \textit{Id}. at 91-92. Interestingly, this explanation for vertical restraints did not originate with the individuals that create them, but rather with an economist. Professor Telser acknowledged that while the free rider theory provides a rational explanation for vertical restraints, its actual significance has not been established through empirical evidence. \textit{Id}. 
So long as preserving competition entailed such noneconomic values as freedom to trade, the Schwinn distinction between consignments and sales made sense. Dealers who owned their inventory naturally would have a greater expectation of control than dealers who did not. Under the broad view, the dealer’s freedom to control his own affairs was viewed as a significant societal benefit provided by a competitive system. Restrictions that limited that societal benefit harmed competition. Sylvania redefined competition as concerned exclusively with economic effect—that is, effect on price and output. Under this new concept of competition, the old distinction made no sense. Freedom to trade, a traditional, noneconomic antitrust value that had figured prominently in earlier decisions, was ignored. Sylvania marked the beginning of a transition at 104.

142. See supra text accompanying note 131.
143. See Frank H. Easterbrook, Maximum Price Fixing, 48 U. CHI. L. REV. 886, 888 (1981) (After Sylvania, “[a]rguments about the effect of a practice on quantity and price, not arguments about freedom and autonomy, control antitrust analysis.”); see also KWOKA, JR. & WHITE, supra note 1, at 1 (“[O]ver the past twenty years, there has been a revolution in U.S. antitrust policy. This revolution has involved the ascendance of economics in antitrust policy making, with repercussions throughout the institutions and enforcement practices of antitrust.”); cf. Eleanor M. Fox, The Modernization of Antitrust: A New Equilibrium, 66 CORNELL L. REV. 1140, 1176-85 (1981) (arguing that noneconomic values have a role in antitrust analysis after Sylvania, albeit a diversified role).
144. That the distinction between sales and consignments made sense under a broad view of antitrust means only that it was rational, not that it was wise. Schwinn had few defenders, even among those who favored the broad view. See STEPHEN F. ROSS, PRINCIPLES OF ANTITRUST LAW 236 (1993).
145. For three cases (Dr. Miles, Colgate, and Schwinn) in which the Supreme Court’s antitrust analysis of vertical restraints relied heavily on the freedom to trade concept, see supra notes 131-37 and accompanying text. In Dr. Miles and Schwinn, the Court sought to protect dealers’ freedom to trade by prohibiting manufacturer-imposed restraints on dealers’ freedom to set prices and choose customers. In Colgate, the Court declined to apply Dr. Miles’s per se rule against vertical price fixing to preclude a manufacturer from announcing in advance the circumstances under which it would decline to sell its products, even if the circumstances included failure of dealers to follow resale prices “suggested” by the manufacturer.

In addition, the Court often expressed concern that horizontal agreements would limit individual freedom to trade—either by restricting the freedom of parties who may have been coerced to join the agreement or by restricting the freedom of parties who were affected by the agreement. See, e.g., Klor’s, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) (“Even when [group boycotts] operated to lower prices or temporarily stimulate competition they were banned. For ... ‘such agreements ... cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.’” (quoting Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211,
toward a more narrowly focused approach to antitrust law, an approach that increasingly emphasized economic effects to the exclusion of other values.\textsuperscript{146} Those who favor a purely economic approach to antitrust analysis deplore the fact

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213 (1951)); \textit{Kiefer-Stewart Co.}, 340 U.S. at 213 ("The Court of Appeals erred in holding that an agreement among competitors to fix maximum resale prices of their products does not violate the Sherman Act. For such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."); \textit{Associated Press v. United States}, 326 U.S. 1, 14 (1945) ("The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade."); (quoting \textit{United States v. Colgate & Co.}, 250 U.S. 300, 307-08 (1919))); \textit{Fashion Originators' Guild of Am., Inc. v. FTC}, 312 U.S. 457, 465 (1941) (Agreement among members of a manufacturers' guild "takes away the freedom of action of members by requiring each to reveal to the Guild the intimate details of their individual affairs."); \textit{Paramount Famous Lasky Corp. v. United States}, 282 U.S. 30, 41 (1930) ("The record discloses that ten competitors ... have agreed to restrict their liberty of action ... with the manifest purpose to coerce the exhibitor and limit the freedom of trade."); \textit{United States v. U.S. Steel Corp.}, 251 U.S. 417, 464 (1920) (Day, J., dissenting) ("From the earliest decisions of this court it has been declared that it was the effective power of such organizations to control and restrain competition and the freedom of trade that Congress intended to limit and control."); \textit{N. Sec. Co. v. United States}, 193 U.S. 197, 406 (1904) (Holmes, J., dissenting) ("That provision [Section 1 of the Sherman Act], taken alone, does not require that all existing competitions shall be maintained. It does not look primarily, if at all, to competition. It simply requires that a party's freedom in trade between the states shall not be cut down by contract with a stranger."); \textit{United States v. Trans-Missouri Freight Ass'n}, 166 U.S. 290, 346-47 (1897) (White, J., dissenting) ("The rudiments of the doctrine of contracts in restraint of trade are found in the common law at a very early date. The first case on the subject is reported in Y. B. 2 Hen. V. fol. 5, p. 26, and is known as \textit{Dier's Case}. ... The principle upon which this case was decided was not described as one forbidding contracts in restraint of trade, but was stated to be one by which contracts restricting the liberty of the subject were forbidden.").

These cases illustrate the Court's traditional concern for freedom to trade, irrespective of the context in which it was threatened and irrespective of whether the restraint was likely to affect price.

\textsuperscript{146} In reviewing the Ninth Circuit's decision in \textit{Sylvania}, the Supreme Court explicitly rejected an argument by Judge Browning, dissenting, that \textit{Schwim} properly reflected "the view that the Sherman Act was intended to prohibit restrictions on the autonomy of independent businessmen even though they have no impact on 'price, quality, and quantity of goods and services.' ... Competitive economies [said the Court] have social and political as well as economic advantages, but an antitrust policy divorced from market considerations would lack any objective benchmarks." \textit{Cont'l T.V., Inc. v. GTE Sylvania Inc.}, 433 U.S. 36, 53 n.21 (1977) (citations omitted).
\end{footnotesize}
that the transition is not yet complete. They acknowledge, however, that "[f]or decades the Supreme Court looked outside economic theory for the normative content of antitrust. In particular, the Court consistently held that 'trader freedom'—the autonomy of individuals and small businesses—deserved independent significance under the antitrust laws." One might add that the Court has done so, not merely for decades, but from the time of the first substantive decisions interpreting the Sherman Act—decisions rendered by the Court that sat during the years in which Congress deliberated the Act, and that were grounded in the Court's view of what the Congress of its day meant to achieve in adopting the Sherman Act.

Of course, under the broad view of the rule of reason, not every restraint that infringes freedom to trade should be held to violate the Sherman Act. Reasonableness is a matter of degree and of kind. In the common law tradition, predictability is derived from precedent. Precedent applying the per se branch of the rule of reason provides the greatest predictability. Partly for that reason, the Schwinn Court held customer and territorial restraints per se unlawful. It failed to recognize that, in many circumstances, such restraints produce economic benefits that outweigh the harm to dealer independence. Thus, Schwinn extended the per se rule beyond its proper reach—a development that led to great skepticism concerning whether noneconomic values rationally could be taken into account in deciding antitrust cases.

With the overruling of Schwinn by Sylvania, the tide turned against the broad view and toward a narrower view of competition as entailing only economic values. As always has been the case, antitrust was viewed as being concerned with preserving a competitive system; however, the reasons for favoring a competitive system were narrowed solely to economic reasons. If a competitive system for the production and distribution of goods and services is preferred to other systems solely for economic reasons, and antitrust is about preserving a

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148. Id. at 766.

149. For an early Sherman Act case in which the Supreme Court emphasized freedom to trade as an important value that Congress intended to protect, see supra note 131 and accompanying text. Concern for freedom to trade did not originate in the congressional debates on the Sherman Act or the early Supreme Court decisions involving the Act. Pre-Sherman Act cases dealing with congressional power under the Commerce Clause expressed the same concern. See Thurlow v. Massachusetts, 46 U.S. 504, 569 (1847) ("[I]t is the manifest intention of the constitution that the power of Congress over commerce between the States shall be supervisory merely, and exerted only to secure perfect freedom of trade and intercourse between the States.").

competitive system, it follows that antitrust is only concerned with economic values. Essentially, it was on this reasoning that judicial acceptance of the broad view of antitrust declined and was replaced by a new, narrower approach that focused on economic values alone—an approach that sought to "remove puzzlement and doubt and conflict of values," and to be "in the scientific spirit."\(^{151}\)

**B. The Narrow View**

Former professor and judge Robert Bork has emerged as the leading spokesman for the narrow view, often referred to as the efficiency view or the Chicago School of antitrust.\(^{152}\) For Bork, Congress was driven by a single goal when it adopted the antitrust laws. He chose to call that goal the "consumer welfare" goal.\(^{153}\) One would think that a competition law with consumer welfare as its exclusive goal would focus primarily or exclusively on distinguishing those business practices that benefit consumers from those that do not. Any activity that actually or potentially reduces the price and improves the quality of products or services should be encouraged. Any activity that actually or potentially increases

151. See *supra* note 87 and accompanying text. As set forth by Bork, the new approach removes from antitrust "a cornucopia of social values, all of them rather vague and undefined but infinitely attractive." BORK, *supra* note 70, at 50.

152. As noted above, BORK'S THE ANTITRUST PARADOX has been cited and relied upon by the Supreme Court in fourteen antitrust cases. See *supra* note 88; see also John J. Flynn & James F. Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. REV. 1125, 1136 (1987) ("The principal proponent of the view that Congress intended the antitrust laws to serve only the goal of allocative efficiency is Judge Bork. Judges Posner and Easterbrook are the principal proponents of the view that the antitrust laws ought to be interpreted with allocative efficiency as the primary goal of antitrust policy, regardless of what Congress intended.").

153. According to Bork:

Whether one looks at the texts of the antitrust statutes, the legislative intent behind them, or the requirements of proper judicial behavior, therefore, the case is overwhelming for judicial adherence to the single goal of consumer welfare in the interpretation of the antitrust laws. Only that goal is consistent with congressional intent, and equally important, only that goal permits courts to behave responsibly and to achieve the virtues appropriate to law.

BORK, *supra* note 70, at 89. It is a bit unclear from these statements whether Bork's view is derived mainly from text and history, or from his notion of "proper judicial behavior." In any event, Bork, perhaps more than any other writer, has been responsible for the Supreme Court's current view of antitrust as concerned primarily, if not exclusively, with consumer welfare. However, as will be seen, "consumer welfare," as used by the Court, means something quite different from what Bork had in mind. See *infra* note 154 and following text.
the price or diminishes quality should be discouraged or prohibited. Indeed, that
is what the Supreme Court had in mind when, citing Bork as authority, it spoke of
the Sherman Act as a "consumer welfare prescription."\(^{154}\) However, that is not
what Bork had in mind when he declared consumer welfare "the only legitimate
goal of antitrust."\(^{155}\) Indeed, it is entirely possible that under Bork's model,
consumer welfare may be enhanced even as the prices of the goods and services
consumers desire are increased with no change in quality.

To understand this apparent paradox,\(^{156}\) one must consider what Bork meant
when he spoke of consumer welfare. "Consumer welfare," according to Bork, "is
merely another term for the wealth of the nation."\(^{157}\) This statement, alone, should
alert one to the fact that something strange is being said. Society can be
envisioned as consisting of producers and consumers. It is not hard to imagine a
business practice that enriches producers at the expense of consumers. Price

\(^{154}\) Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting Bork, supra
note 70, at 66). Although the Court cited Bork, as has been noted, its analysis
demonstrates "that it was not equating 'consumer welfare' with total economic efficiency.
If anything, Reiter implies that the antitrust laws contain a strong preference for
consumers rather than for firms that might want to extract consumers' wealth by using
market power to raise price." See Robert H. Lande, Chicago's False Foundation:
Wealth Transfers (Not Just Efficiency) Should Guide Antitrust, 58 ANTITRUST L.J. 631,
633 n.13 (1989) [hereinafter Lande, False Foundation]; see also NCAA v. Univ. of
televising college football games violated the Sherman Act because "price is higher and
output lower than they would otherwise be, and both are unresponsive to consumer
(A blanket license for the performance of copyrighted music is not per se unlawful even
if it has the practical effect of eliminating competition among individual copyright holders
because it may be so efficient that it increases output and, thus, benefits consumers.).

\(^{155}\) Bork, supra note 70, at 7.

\(^{156}\) The paradox of consumer welfare being advanced while prices increase and
quality is held constant, is not the paradox to which Bork refers in the title of his book.
See generally Bork, supra note 70. Rather, the paradox to which he refers is that in
applying antitrust statutes intended to advance consumer welfare, the courts have not been
guided exclusively by efficiency concerns. He stated that:

the courts, and particularly the Supreme Court, have failed to understand and
give proper weight to the crucial concept of business efficiency. Since
productive efficiency is one of the two opposing forces that determine the
degree of consumer well-being (the other being resource misallocation due to
monopoly power), this failure has skewed legal doctrine disastrously.
Business efficiency necessarily benefits consumers by lowering the costs of
goods and services or by increasing the value of the product or service offered;
this is true whether the business unit is a competitor or a monopolist.

\(^{157}\) Bork, supra note 70, at 90.
fixing among competitors provides an example. If prices to consumers are increased through price fixing, consumers are made poorer, but producers are made richer by a corresponding amount. Consumer wealth and producer wealth are both components of national wealth. So, it might seem that national wealth is unaffected. If so, price fixing should not be of concern under an antitrust law concerned exclusively with maximizing national wealth. But, it is not so, and price fixing is one of the few practices that Bork has condemned as anticompetitive. To see why it is not so and why Bork would condemn a practice that seems to have no impact on national wealth, one must have a rudimentary understanding of what economists call allocative efficiency.\(^{158}\) Once the reason for Bork's condemnation of price fixing among competitors is understood, it is easy to see why he would approve many other practices that enhance producers' ability to transfer wealth from consumers to producers by raising prices above a competitive level and why he would do so in the name of consumer welfare.

In a competitive market, producers compete in providing goods and services desired by consumers. Competition prevents producers from charging consumers more than a competitive price—that is, a price sufficient to enable producers to recover the cost of production plus a reasonable profit. A reasonable profit is separated from an unreasonable profit by the independent decisions of competing producers. If one producer sets its price higher than another, either because it has higher costs or because it demands a greater profit, it will lose sales. Thus, competition constrains both producer costs and producer profits.

Suppose an economy consists of two products, wine and cheese, and all wine producers agree to set their price at a level ten percent above the competitive price, while cheese continues to be sold at a competitive price. What effect will the price fixing agreement have on the allocation of resources to the production of wine and cheese? As recognized by Justice Holmes:

We, none of us, can have as much as we want of all the things that we want. Therefore, we have to choose. As soon as the price of something that we want goes above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else.\(^{159}\)

Raising the price of wine will cause consumers to buy less wine. If cheese is the only other product available, they will buy more cheese. Eventually, the

\(^{158}\) Allocative efficiency concerns "the assignment or allocation of the available productive forces and materials among the various lines of industry." Bork, supra note 70, at 91 (quoting Frank H. Knight, The Economic Organization 9 (1933)). Whatever allocation maximizes consumer satisfaction maximizes allocative efficiency. For an example, see infra notes 159-63 and accompanying text.

artificially high price of wine will cause capital to be shifted from vineyards to diary herds. The allocation of resources will be different than it would have been had both products been sold at a competitive price. That difference is what economists refer to as allocative inefficiency. The allocation of resources is inefficient in the sense that it does not correspond to the allocation necessary to meet consumer preferences at competitive prices. In effect, the market response to consumer preferences is distorted by the price fixing agreement. With price fixing, the market’s performance in allocating resources to meet consumer preferences is poorer than it would have been without price fixing. In a word, price fixing diminishes the efficiency of the market in performing its vital allocative function.\footnote{160} While superficial analysis might suggest that price fixing has no impact on national wealth because it merely shifts wealth from consumers to producers, its impact on allocative efficiency makes clear that such is not the case. Price fixing impairs allocative efficiency. A diminution of allocative

\footnote{160. The inefficient allocation of resources occurs because the market for cheese is competitive, while the market for wine is not competitive due to price fixing among wine producers. But, suppose that prior to the price fixing agreement, the market for cheese was not competitive for reasons the antitrust laws do not address. For example, one cheese producer might have acquired monopoly power solely through superior efficiency, and is, therefore, able lawfully to set its price ten percent above a competitive level. So long as wine is priced competitively, there will be a misallocation of resources due to lawful monopoly pricing in the cheese market. Under these circumstances, it might be claimed that price fixing in the wine market corrects that misallocation, and an antitrust attack on such price fixing would be inappropriate. The argument would be that, ideally, the law would be applied to make both markets competitive. However, if for any reason that first-best solution is impossible, bringing an antitrust action against price fixers in the wine market to achieve the second-best solution of a competitive wine market and a noncompetitive cheese market, only would make matters worse. Antitrust commentators have used this theory of the second best in dramatically different ways. Some have argued that market failures are pervasive throughout the economy, and it is, therefore, impossible to determine whether allocative efficiency will be advanced or diminished by a particular course of conduct. Because allocative efficiency effects are unknowable, they have no proper role in antitrust analysis. Therefore, antitrust analysis ought to be guided by noneconomic values. See generally Robert G. Harris & Thomas M. Jorde, \textit{Antitrust Market Definition: An Integrated Approach}, 72 CAL. L. REV. 1 (1984); Lawrence A. Sullivan, \textit{Book Review}, 75 COLUM. L. REV. 1214 (1975). Some have argued that the theory of second best raises unanswerable questions and, therefore, must be ignored. See Bork, \textit{ supra} note 70, at 113-14; Herbert Hovenkamp, \textit{Antitrust After Chicago}, 84 MICH. L. REV. 213, 241 (1985). Others have claimed the theory can and should be a factor in antitrust analysis, at least in certain cases. See generally Peter J. Hammer, \textit{Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs}, 98 MICH. L. REV. 849 (2000); Richard S. Markovits, \textit{Monopolistic Competition, Second Best, and the Antitrust Paradox: A Review Article}, 77 MICH. L. REV. 567 (1979).}
efficiency means consumers are less well off because the market is producing less of one product and more of another than they would choose if the market were operating without the distorting effect of artificially high prices. In the above example, consumers are harmed in two ways when wine producers fix prices in this two-product economy. First, they pay more for wine than they otherwise would. Second, less wine and more cheese is produced than would be produced under competitive conditions, which means that consumer preferences are less fully satisfied due to price fixing. Only the first type of consumer harm is offset by a corresponding benefit to producers. Producers realize no benefit from the misallocation of resources. It imposes what economists call a dead weight loss on the economy. Consumers are harmed by a reduction in the quantity of wine produced with no offsetting gain to producers. National wealth is diminished. So, Bork, like other advocates of the Chicago School of antitrust, concluded that price fixing among competitors is one of the few practices that the antitrust law ought to prohibit.

It is sometimes true, however, that unlike price fixing, a particular practice can produce a double benefit to producers in much the same way that price fixing produces a double harm to consumers. Like price fixing, it might result in prices being raised above a competitive level with the effects described above—that is, a double harm to consumers (higher price and misallocation of resources), and a single benefit to producers (increased revenue due to higher price). But, unlike price fixing, it simultaneously might enhance productive efficiency, lowering the cost of production and providing a second benefit to producers.

For example, suppose two or three competing firms decide to merge, and the merger diminishes competition to a degree sufficient to enable them to raise prices ten percent above a competitive level. Most consumers would view such a merger as detrimental to their welfare. If antitrust is concerned with advancing consumer welfare as normally understood, the merger ought to be unlawful. However, under Bork’s model the merger very well may enhance consumer welfare, and, therefore, ought to be lawful. This is so because the merger might increase productive efficiency, and, thus, enrich the merged firms in two ways: first by enabling them to increase price, and second by reducing the cost of production.

The first effect, high prices, Bork has recognized, is anti-consumer for the two reasons already noted: (1) consumers must pay a higher price, and (2) the

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162. If less wine is produced, more cheese will be produced. But, the point is that, with both products competitively priced, consumers would prefer more wine and less cheese. As a result, they are less well off due to the price fixing.

163. BORK, *supra* note 70, at 405-06.
artificially high price distorts the allocation of resources. If nothing more were involved, the merger, like price fixing, should be held unlawful, even under the narrow view of antitrust. However, the second effect, enhanced productive efficiency, is pro-consumer, according to Bork’s definition of consumer welfare. An increase in productive efficiency enhances the wealth of the nation by enabling producers to create a given product or provide a given service at a lower cost per unit. Because consumer welfare is “merely another term for the wealth of the nation,”\(^{164}\) enhanced productive efficiency must be taken into account in determining the merger’s impact on consumer welfare. Furthermore, this proposition holds true without regard to whether the benefits of enhanced efficiency will be passed on to consumers in the form of lower prices. After all, a merger that creates both power over price and productive efficiencies might benefit producers to a greater extent than it harms consumers, and, therefore, enhance the wealth of the nation. If, as Bork has claimed, consumer welfare is the single goal of antitrust, and consumer welfare is another term for national wealth, it would be irrational for antitrust law to condemn a merger that enhances national wealth.

Under Bork’s approach, consumer welfare may be advanced by a merger (or any other business practice) that simultaneously benefits producers in two ways: first by enabling them to increase prices at the expense of consumers, and second by achieving productive efficiencies that lower their cost of production. Whether or not one agrees with this approach, it seems disingenuous to label it a consumer welfare approach. If an activity that is harmful to consumers and beneficial to producers is to be permitted under the antitrust laws because the benefit outweighs the harm and it results in a net increase in national wealth, then national wealth, not consumer welfare, is the exclusive goal of antitrust. However, it is unlikely that the courts would have been receptive to the notion that maximizing national wealth is the single goal of antitrust. Bork cleverly enhanced the appeal of his approach by labeling it a consumer welfare approach, thereby concealing its true nature.

It is one thing to claim, as Bork has, that a merger or any other practice that benefits producers to a greater extent than it harms consumers should be permitted under the antitrust laws. It is quite another thing to determine in a concrete case whether the benefit outweighs the harm. This practical difficulty with the theory has led Bork to go much further than a balancing of producer benefit against consumer harm would suggest. Ideally, under Bork’s national wealth approach to antitrust, one first should quantify the harm to consumers and the benefit to producers, and then should determine legality according to which is greater. If the benefit to producers outweighs the harm to consumers, the activity should be lawful; if it does not, the activity should be unlawful. However, practices that

\(^{164}\) See Bork, supra note 70, at 90.
create both power over price and productive efficiencies present for Bork an insoluble problem, which he described as "the difficult problem of the mixed case, . . . that seems likely to produce both output restriction [another term for price increases] and efficiency."³⁶⁵

The mixed case is distinguished from other cases that are easily resolved because they involve activities that either create power over price without any likelihood of enhanced efficiency or enhance efficiency without any likelihood of power over price. Price fixing among competitors is an example of activities in the former category that should be prohibited. A merger of small firms in a fragmented market is an example of activities in the latter category and should be allowed. However, the mixed case is problematic. It simultaneously harms consumers by increasing price and misallocating resources, and benefits producers by increasing price and enhancing efficiency. The direct effects of the higher price are a wash because the activity creates revenue for producers equal to the cost it imposes on consumers. National wealth is neither enhanced nor diminished. But, how does one compare the indirect effects? How does one determine whether the cost to consumers of resource misallocation is greater or less than the benefit to producers of enhanced efficiency?

Bork recognized, correctly, that any attempt to answer these questions by quantifying the harm to consumers and the benefit to producers would "plunge antitrust enforcement into 'economic extravaganzas.'"³⁶⁶ The factors simply cannot be measured. Therefore, "after the economic extravaganza was completed we should know no more than before it began."³⁶⁷ So, how does one balance power over price against enhanced efficiency, if neither can be measured?

The answer is one does not. "[T]he nature of the problem," said Bork, "shows that some degree of arbitrariness will have to be accepted as satisfactory by everyone because direct measurement of the conflicting factors cannot conceivably handle the trade-off dilemma."³⁶⁸ The trade-off dilemma arises only

³⁶⁵ BORK, supra note 70, at 123.
³⁶⁶ BORK, supra note 70, at 128.
³⁶⁷ BORK, supra note 70, at 124.
³⁶⁸ BORK, supra note 70, at 128-29. For a case in which the economic extravaganza was undertaken, see Canada Comm'r of Competition v. Superior Propane Inc., 2000 Comp. Trib. 15 (2000) (allowing a merger to proceed even though it likely would result in a price increase of eight percent, because the annual cost to consumers of allocative inefficiency created by the price increase, estimated at $6 million, was outweighed by the annual savings to the merged firms generated by enhanced productive efficiency, estimated at $30 million), available at http://www.ot-te.gc.ca/english/cases/propane/192b.pdf (last visited Nov. 17, 2001). The Tribunal's decision has been appealed to the Canadian Federal Court of Appeal. For a discussion of the case, see Brian A. Facey et al., An Efficiency Defense That Maximizes Welfare: The Canadian Competition Tribunal Gets It Right, ANTITRUST, Fall 2000, at 70; Alan
when a practice both creates power over price and improves efficiency. According to Bork, price theory instructs that many practices challenged under the antitrust laws cannot create power over price. Under such circumstances, no trade-off arises, and the practice should be allowed.169 Yet, "cases may occur, primarily in the fields of horizontal mergers and horizontal ancillary restraints, in which chances seem roughly equal that the activity is beneficial or harmful. Instances of such uncertainty should be treated like cases of behavior that is neutral. The law should not intervene."170

The result is that the antitrust laws are reduced to patrolling three categories of conduct: (1) horizontal agreements that suppress competition and are unrelated to efficiency; (2) predatory practices undertaken for the sole purpose of excluding or disciplining rivals; and (3) horizontal mergers involving very large market shares.171 The first two categories are likely to harm consumers while providing no efficiency gains for producers and, therefore, should be prohibited. Price fixing or division of markets among competitors are common examples of conduct in the first category. Predatory practices undertaken by a single firm can violate the

A. Fisher et al., Legalizing Merger to Monopoly and Higher Prices: The Canadian Competition Tribunal Gets It Wrong, ANTITRUST, Fall 2000, at 71. The article in support of the decision states that it "rebuts the claim that efficiencies should not be considered in merger analysis because their quantification can be very difficult." Facey et al., supra, at 74. However, it is unclear whether the article is referring to productive efficiencies, allocative efficiencies, or both. The article criticizing the decision addresses the problem of measuring the effect of a price enhancing merger on allocative efficiency by noting that measurement:

requires a confident estimate of . . . changes in output. It requires calculation of the deadweight loss, which in turn requires a reasonably precise calculation of all firms' demand and marginal cost curves, both pre- and post-merger, and reactions of all competitors to these changes. Since the initial changes in price and output might not be an [sic] equilibrium, the investigators would need to model the industry behavior and work out the interplay of secondary effects. It is difficult enough for agency investigators to predict whether it would be profitable for merging firms to raise prices. It is far more difficult to predict how much consumers would economize and shift their consumption in response to higher prices and how much competitors would change their prices and outputs in response to the merging parties' changes in prices and outputs.

Fisher et al., supra, at 78.

169. "If a practice does not raise a question of output restriction, . . . we must assume that its purpose and therefore its effect are either the creation of efficiency or some neutral goal. In that case the practice should be held lawful." BORK, supra note 70, at 122.

170. BORK, supra note 70, at 133.

171. See BORK, supra note 70, at 405-06.
antitrust laws only if the firm has a monopoly or is dangerously close to achieving monopoly. Bork would limit condemnation of predatory practices further to instances of "specific intent to drive others from the market by means other than superior efficiency and when the predator has overwhelming market size, perhaps 80 or 90 percent." 

The third category might involve efficiency gains, as well as harm to consumers. But, if the market shares of the merging firms are sufficiently large, Bork has indulged the presumption that the harm to consumers will outweigh the benefit to producers. In light of that presumption, national wealth is likely to be reduced by the merger, so it ought to be prohibited. As for what market share would be sufficiently large to trigger the presumption, Bork has suggested that a merger leaving fewer than three significant firms in the market would raise concerns. Furthermore, in a market in which no firm has more than a forty-percent share, mergers should be allowed to proceed up to forty percent. So, as Bork would have it, any merger that leaves the market with at least three significant firms, e.g., two forty-percent firms and a twenty-percent firm, should be per se lawful. Such a merger might harm consumers by increasing prices, as well as benefit producers through efficiency gains. It is not practical to determine whether the harm exceeds the benefit or vice versa, so the merger should be allowed. In a market with five firms of equal size, four firms could merge into two firms, each with a forty-percent share. A five-firm market with each firm having an equal share could be restructured into a three-firm market with two firms twice the size of the third, without raising an antitrust issue.

Nevertheless, there is a problem with Bork's approach—aside from the problem of the mixed case. Suppose a merger or other transaction creates power over price without enhancing productive efficiency. The above analysis suggests that the merger should be prohibited because it will harm consumers twice (higher price and inefficient allocation of resources) and will benefit producers once (higher price). But, if the product is, for example, a drug required to treat a life-threatening disease, the higher price might not affect the allocation of resources.

Generally, economic theory teaches that the quantity of a product sold (output), varies inversely with its price. That is why resources will be shifted

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173. BORK, supra note 70, at 157.
174. See BORK, supra note 70, at 133, 405-06.
175. See BORK, supra note 70, at 405-06.
176. See BORK, supra note 70, at 221-22.
from wine production to cheese production in the two-product economy in the above examples, if the price of wine is increased while that of cheese is held constant. If a life-saving drug is substituted for wine, it is entirely possible—if not probable—that the quantity sold will not be affected by the price increase. In economic terms, demand for the drug might be inelastic—that is, insensitive to price. If that is the case, price increases will not affect the quantity of the drug sold or the resources allocated to its production. Their only effect will be to transfer wealth from consumers to producers. National wealth will not be diminished, and, under Bork's approach, antitrust law should be neutral toward such transactions. Presumably, this would hold true even if price increases were the result of price fixing as national wealth will not be affected regardless of the source of the power over price. It is inconceivable that Congress intended for price fixing, or other transactions affecting power over price, to go untouched merely because demand for the product is inelastic.

It is fair to say that the Supreme Court has embraced much, but not all, of Bork's antitrust analysis. Without doubt, Sylvania jettisoned the noneconomic values encompassed by the broad view. Without doubt, recent Supreme Court decisions make clear that market power to raise price and restrict output is critical to finding a violation under either the per se rule or the rule of reason. However, they also make clear that the mixed case will not necessarily be decided in favor of the defendant, even when it arises outside the parameters of Bork's three categories. For example, in Broadcast Music, Inc. v. Columbia Broadcasting System, Inc. ("BMI"), the Court considered the legality of a blanket license for the performance of copyrighted music. BMI acted as licensing agent for its members who owned the copyrighted works. Under a blanket license, it authorized others to perform the work of any of its members and declined to offer licenses on an individual basis. Columbia Broadcasting System ("CBS"), a licensee, claimed that the blanket license arrangement eliminated price competition among the members of BMI, and, therefore, was a form of price fixing, unlawful per se under the Sherman Act. The Court agreed

178. See supra notes 139-46 and accompanying text.
180. For a description of the three categories, see supra notes 170-71 and accompanying text.
182. Id. at 4.
183. Id. at 5.
184. Id.
185. Id. at 6.
that the arrangement might involve price fixing "in the literal sense: the composers and publishing houses have joined together into an organization that sets its price for the blanket license it sells." However, in light of the reduced transaction costs and other efficiency gains inherent to blanket licensing, the Court declined to apply the *per se* rule and remanded the case to the court of appeals for evaluation under the rule of reason. If, as Bork would have it, the defendant automatically prevailed in such mixed cases, the *BMI* Court would not merely have declined to apply the *per se* rule, it would have held the efficiency enhancing horizontal agreement *per se* lawful. In mixed cases, courts still must undertake the weighing of procompetitive and anticompetitive effects that Bork eschewed. Despite the largely successful effort of proponents of the narrow view to recast antitrust as a limitation on only the most obvious and blatant forms of anticompetitive behavior, the Court has not yet gone as far as they would have it go.

"Puzzlement and doubt and conflict of values" are not removed, but they are limited to cases involving a conflict of economic values. The Court, for the most part, has accepted the notion that antitrust analysis should be directed toward a single economic goal.

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186. *Id.* at 8.
187. *Id.* at 24-25.
188. On remand, the court of appeals noted: "A rule of reason analysis requires a determination of whether an agreement is on balance an unreasonable restraint of trade, that is, whether its anti-competitive effects outweigh its pro-competitive effects." Columbia Broad. Sys., Inc. v. Am. Soc'y, 620 F.2d 930, 934 (2d Cir. 1980). It held that the blanket license did not violate the Sherman Act. *Id.*
189. Cf. *supra* note 87 and accompanying text.
190. At least one major exception exists. The *per se* rule against vertical price fixing cannot be justified on economic grounds. It is a holdover from an earlier era when dealer independence, often called "freedom to trade," was viewed by the Court as an important value that the antitrust laws were intended to protect. See Meese, *Economic Theory, supra* note 147, at 770-71. According to Meese:

The "Populist" or "trader freedom" school embraces the traditional idea that an important, perhaps central goal of antitrust doctrine is the enhancement of trader freedom, even if such enhancement occasionally occurs at the expense of consumers. The "consumer welfare" school, on the other hand, holds that one should judge restraints solely according to their effect on consumers. Although members of this school disagree about how to define "consumer welfare," there is a clear consensus that "trader freedom" should play no role in the development of antitrust doctrine. . . . Although the Court has narrowed doctrines that were premised on concern for trader freedom, it has refused to discard them altogether.

C. The Intermediate View

As discussed below, the intermediate view is partly derived from the writing of Professor Robert H. Lande. But, unlike Lande, it accepts Bork’s fundamental proposition that Congress was concerned exclusively with economic goals. Lande’s groundbreaking article on wealth transfers, first published in 1982, argued that Congress adopted the Sherman Act primarily to preclude firms with market power from raising price above a competitive level and, thereby, transferring wealth from consumers to producers.

Like Bork, Lande recognized that “Congress wanted the economy to function efficiently.” But, unlike Bork, Lande claimed that Congress was concerned with efficiency “primarily to provide consumers the benefits of free competition.” Thus, in Lande’s view, a business practice that simultaneously enhanced both productive efficiency and market power almost always should be condemned under the antitrust laws. The likelihood of price increases due to the enhanced market power would mean that only producers would be likely to benefit from an increase in productive efficiency. Consumers would be harmed by the probable price increase, and that is enough to condemn the practice. In light of Congress’s intent to “provide consumers the benefits of free competition,” no balancing of producer benefit and consumer harm is appropriate. In rare cases, the efficiency gains may be so great and the increase in market power so modest that prices are likely to be reduced despite the increase in market power. Then, and only then, should a practice that enhances market power be justified by increased efficiency.

Lande’s disagreement with Bork on the proper treatment of efficiencies is fundamental and of great practical significance to antitrust analysis. Under Lande’s approach, productive efficiencies never can be used to justify a practice that creates significant market power because it is unlikely that the benefit of those efficiencies will be passed on to consumers. Under Bork’s approach, if efficiency

191. See infra notes 192-232 and accompanying text.

192. Robert H. Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 50 Hastings L.J. 871, 874 (1999) [hereinafter Lande, Wealth Transfers] (originally published at 34 Hastings L.J. 65 (1982)). Other scholars have agreed with the main theme of Lande’s work—that the antitrust laws were adopted primarily to prevent the transfer of wealth from consumers to producers through monopolistic pricing. See Robert H. Lande, Proving the Obvious: The Antitrust Laws Were Passed to Protect Consumers (Not Just to Increase Efficiency), 50 Hastings L.J. 959, 964-65 (1999).

193. Lande, Wealth Transfers, supra note 192, at 888.

194. Lande, Wealth Transfers, supra note 192, at 888.

195. Lande, Wealth Transfers, supra note 192, at 888.

196. See infra note 219 and accompanying text.
gains to producers attributable to a particular practice exceed the cost to consumers of enhanced market power created by the practice, the practice should be permitted. In effect, gains in productive efficiency can provide a defense to a practice that creates power over price and, otherwise, would be illegal, even though consumers will realize no benefit from the enhanced efficiency. Furthermore, because of the difficulty inherent in measuring the benefit to producers derived from enhanced efficiency and the cost to consumers of inefficient resource allocation, the former is generally presumed to exceed the latter, and “the law should not intervene.” 197

Lande’s departure from Bork’s efficiency model extends beyond disagreement on the appropriate treatment of efficiencies. He also claimed that, while Congress was mainly concerned with monopoly pricing and the resultant transfer of wealth from consumers to producers, it also “believed that trusts and monopolies possess excessive social and political power, and reduce entrepreneurial liberty and opportunity.” 198 Indeed, noting that the trusts were extremely efficient and that prices declined during the years preceding 1890, Lande concluded that Congress was not concerned with improving efficiency, but “wanted to pass a law for other purposes which hampered productive efficiency as little as possible.” 199 Thus, Lande held to the traditional broad view of antitrust as embracing noneconomic, as well as economic, values. He noted:

The legislative history reveals that a major factor leading to the passage of the Sherman Act was a congressional desire to curb the power of trusts. While Congress was concerned about the uses of this power to raise prices and restrict output, it also desired, as an end in itself, the prevention of accumulation of power by large corporations and the men who controlled them. Alarm over corporate aggrandizement of economic, social, and political power pervaded the debate. The legislators feared not only the economic consequences of monopoly power, but potential social disruptions as well. 200

This view of legislative history and congressional intent, Lande pointed out, was recognized in landmark antitrust cases such as Alcoa and Standard Oil. 201 Indeed, Alcoa, widely criticized for condemning monopoly based on efficiency

197. See supra text accompanying note 170.
198. Lande, Wealth Transfers, supra note 192, at 888.
199. Lande, Wealth Transfers, supra note 192, at 895, 902-03.
200. Lande, Wealth Transfers, supra note 192, at 904 (citations omitted)(emphasis added).
201. See Lande, Wealth Transfers, supra note 192, at 905 n.138.
alone, is supported by Lande’s analysis of congressional intent. “Congressional condemnation of monopolistic extractions of wealth was so strong,” he said, “that it is even unlikely that Congress meant to provide an exception for a monopoly based solely upon superior efficiency.\textasteriskcentered\textasteriskcentered

Despite strong support in the legislative history for the broad view of antitrust, Lande emphasized that Congress’s major concern was to prevent wealth transfers through monopolistic pricing and to do so in a way that did not interfere with productive efficiency.\textasteriskcentered\textasteriskcentered In other words, noneconomic values were viewed as subordinate to economic values. Benefit to consumers was the key consideration. Lande elaborated on this point and gave it greater emphasis in a later article:

202. See Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273 (2d Cir. 1979) (describing Alcoa as a “cryptic opinion,” and “a litigant’s wishing well, into which, it sometimes seems one may peer and find nearly anything he wishes”); BORK, supra note 70, at 170.

203. See Lande, Wealth Transfers, supra note 192, at 896. If monopoly based solely on efficiency violates the Sherman Act, then monopoly is \textit{per se} unlawful, unless it is protected by another law, such as the patent law. That proposition finds support in Alcoa. As a formal matter, Alcoa recognized that the mere existence of monopoly does not violate the Sherman Act. To establish a violation, it must be shown that the defendant not only possessed monopoly power, but also intentionally achieved or maintained that power. The requisite intent is generally shown by evidence of exclusionary or predatory conduct. The question becomes whether superior efficiency is exclusionary. In a literal sense, it is because it has a tendency to exclude competitors from the market. In Alcoa, the court stated that “no monopolist monopolizes unconscious of what he is doing.” United States v. Aluminum Co. of Am., 148 F.2d 416, 432 (2d Cir. 1945). This language implies that the requisite intent is implicit to the possession of monopoly power. If so, monopoly achieved solely through superior efficiency is unlawful because exclusionary intent can be inferred from the possession of monopoly regardless of how it is achieved. However, the notion that monopoly is \textit{per se} unlawful is at odds with the Court’s statement in Standard Oil that the Sherman Act omits “any direct prohibition against monopoly in the concrete.” Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 62 (1911). The better view is that exclusionary conduct from which the requisite intent can be inferred is a term of art that includes only conduct that has no explanation other than a desire to exclude competitors. Conduct that improves efficiency has an efficiency explanation. Therefore, it is not exclusionary. In Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 603 (1985), the Supreme Court construed the Alcoa language quoted above to mean: “Improper exclusion (exclusion not the result of superior efficiency) is always deliberately intended.” It went on to observe that: “[i]f a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory.” \textit{Id.} at 605. The Court relied upon and quoted BORK, supra note 70, in support of both propositions.

204. See supra notes 193-95 and accompanying text.
The "big is bad/small is good" school of antitrust [Alcoa and Brown Shoe?] has been thoroughly defeated, and I will not attempt to defend or resurrect it . . . I am not suggesting that Congress intended noneconomic values to play no role in antitrust, but I believe its assigned role to be quite limited.205

Lande’s view is essentially a modified form of the broad view. It diminishes the role of noneconomic values, but it adheres to the traditional notion that they ought to be taken into account by the courts in deciding antitrust cases. Interestingly, Lande never has indicated exactly how they should be taken into account. In his original article on wealth transfers, he stated:

Congress was willing to forego relatively large efficiency gains in order to be very sure that it prevented corporate acquisitions of market power, unless the resulting efficiency gains would be both large and certain and the risk of significant market power slight.

The implications of Congress’ noneconomic concerns, however, are less clear. It is extremely difficult to determine how, and to what extent, to implement in an antitrust analysis the fervently expressed congressional goal of preventing corporate aggrandizement of political and social power or the congressional directive to assist small businesses in ways that do not result in artificially high prices for consumers. That determination is beyond the scope of this Article.206

Lande’s later work addressed some of the issues raised in the original work on wealth transfers, but it never came to grips with how noneconomic values should be taken into account in antitrust analysis.207 That may explain why the work, which is highly regarded by scholars, has received little attention from the courts.208 Bork, on the other hand, flatly rejected the notion that noneconomic values have a proper role in antitrust analysis.209 In doing so, he provided the courts with an analytical tool that they easily could use to decide antitrust cases.210

205. See Lande, False Foundation, supra note 154, at 632 n.3.
206. Lande, Wealth Transfers, supra note 192, at 947.
207. See Lande, Wealth Transfers, supra note 192, at 962-63.
208. The original wealth transfers article has been cited hundreds of times in the literature, and many scholars have agreed with it, but it has been cited only three times by the federal courts. See Lande, Wealth Transfers, supra note 192, at 963-66.
209. See, e.g., BORK, supra note 70, at 55-56.
210. Essentially, under Bork’s analysis, the outcome of any antitrust case is determined by the answer to one or two questions: Is the challenged practice likely to result in higher prices and reduced output? If the answer is no, that is the end of the
Perhaps for this reason, the courts have embraced much, but not all, of Bork's work. 211

The intermediate view of antitrust goals draws on both the narrow view and Lande's version of the broad view. Like the narrow view, it rejects noneconomic values and holds that only economic values should be taken into account in antitrust analysis. At the same time, it does not pursue the idea of economic values as a singular goal to its logical end, as have Bork and other adherents of the narrow view. As the narrow view makes clear, an exclusive concern for economic values implies exclusive concern for the central goal of economic analysis—facilitating the production and distribution of goods and services in a way that will maximize what economists call total utility or total welfare, or, as Bork has stated, national wealth. If maximizing national wealth is the sole goal of antitrust, any practice that benefits producers more than it harms consumers enhances national wealth and, therefore, should be permitted. But, the intermediate view rejects this conclusion. It accepts as a premise that economic values are the only legitimate antitrust concern, but it tempers the narrow view by rejecting the logical implication of that premise.

The question arises: How can the intermediate view claim that the goals of antitrust law must be defined exclusively by economic values and simultaneously reject the conclusion that antitrust, like economics, must be about maximizing national wealth? In a word, the intermediate view takes its cue from Justice Holmes famous statement: "A page of history is worth a volume of logic." 212

211. For an example of a modern case in which the Supreme Court implicitly rejected Bork's approach, see supra notes 178-88 and accompanying text.

212. N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921). In Eisner, the issue before the Court was whether the federal estate tax was a direct tax, subject to the constitutional requirement that direct taxes be apportioned among the states according to population, or was an indirect tax free of that requirement. Id. at 348. Holding the estate tax to be an indirect tax, Justice Holmes, writing for the Court, stated that the matter was resolved: "not by an attempt to make some scientific distinction, which would be at least difficult, but on an interpretation of language by its traditional use—on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax . . . . Upon this point a page of history is worth a volume of logic." Id. at 349;
If Congress was concerned exclusively with economic values when it adopted the antitrust laws, one well might conclude, as have Bork and other adherents of the narrow view, that Congress meant for the antitrust law to be applied consistently with what economic theory says about how specific practices impact national wealth. If economic theory teaches that a business practice will enhance national wealth, it should be permitted. If it teaches that a business practice will diminish national wealth, it should be prohibited. While Congress might have had such an intent, the intermediate view, drawing on the work of Lande, argues that legislative history makes clear that it did not. And, it goes without saying, that Congress is free to adopt an antitrust law for the purpose of advancing the economic goal of wealth maximization, while simultaneously expressing concern about who benefits from enhanced wealth. The intermediate view holds that that is precisely what Congress did. Indeed, it would be surprising if Congress had adopted the Sherman Act without concern for whether producers or consumers would be the principal beneficiaries of the new legislation. It is far more likely that Congress meant to advance national wealth or total welfare only so long as consumers, not merely producers, were benefitted.

In other words, according to the intermediate view, Congress intended to embrace economic values only to the extent that they involve the enhancement of consumer welfare. It envisioned consumer welfare not as Bork envisioned it,

see also Lande, Wealth Transfers, supra note 192, at 893 (“Although modern economists often eschew economic value judgments, the 1890 Congress may have been more willing to make them.”).

213. See Lande, Wealth Transfers, supra note 192, at 910.

214. For example, in advocating legislation to curb combinations, despite their productive efficiency, Senator Sherman stated:

It is sometimes said of these combinations that they reduce prices to the consumer by better methods of production, but all experience shows that this saving of cost goes to the pockets of the producer. The price to the consumer depends upon the supply, which can be reduced at pleasure by the combination. . . . The aim is always for the highest price that will not check the demand.

21 Cong. Rec. 2460 (1890) (statement of Sen. Sherman). Nonetheless, Bork argues, unpersuasively, that Congress was indifferent to whether producers or consumers benefitted from enhanced productive efficiency, and, therefore, “courts should ignore income distribution in deciding antitrust cases.” Bork, supra note 70, at 112.

215. Under the narrow view, consumer welfare is defined to include both producer and consumer welfare—in other words, national wealth. See supra notes 156-64 and accompanying text. Lande has noted that:

Bork’s choice of the term “consumer welfare” (as the exclusive goal of antitrust) deceptively implies that he is concerned about the welfare of consumers as opposed to producers. Under his definition, however, a cartel counts as a consumer, and thus if the cartel gains, “consumer welfare”
but in the way one would expect it to be envisioned—as "concerned about the welfare of consumers as opposed to producers." It accepts Lande's interpretation of legislative history so far as it concerns Congress's economic objectives, but it departs from Lande's view that Congress intended for social and political values to be taken into account by the courts in deciding antitrust cases.

On the question of social and political values, it accepts Bork's view that:

Not only was consumer welfare the predominant goal expressed in Congress but the evidence strongly indicates that, in case of conflict, other values were to give way before it. This means that such other values are superfluous to the decision of cases since none of them would in any way alter the result that would be reached by considering consumer welfare alone. For a judge to give weight to other values, therefore, can never assist in the correct disposition of a case and may lead to error. In short, since the legislative history of the Sherman Act shows consumer welfare to be the decisive value it should be treated by a court as the only value.

increases. In contrast, the economics profession generally uses the term "total utility" or "total welfare" to describe what Bork believes is the proper focus of antitrust—the sum of "producer welfare" and "consumer welfare."

See Lande, False Foundation, supra note 154, at 638.

216. Lande, False Foundation, supra note 154, at 638 (emphasis in original).

217. According to Lande, the legislative history allows some room for noneconomic values in antitrust analysis, but it is very limited and can be taken into account only when doing so will not harm consumers. The following example is provided:

Suppose a firm attempting to monopolize an industry through predatory pricing discovered to its dismay that, when it attempted to raise prices above the competitive level, new firms quickly entered the market. This failed predation scheme would have harmed small businesses (that would have been destroyed by the predatory prices), but not consumers (since consumers would never have to pay supracompetitive prices). I believe such a scenario was meant to be a violation of the antitrust laws.

Lande, False Foundation, supra note 154, at 632 n.3. Under these circumstances, it is likely that the predator's expectation of higher prices following the period of predation would be found unreasonable. If so, the predation would be lawful under the Court's decision in Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993), where the Court stated: "That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured."

218. Bork, Legislative Intent, supra note 83, at 10-11. Bork elaborated the point: I recognize that many of the legislators who voted for the Sherman Act may have had values in mind in addition to or other than consumer welfare. There was, for example, repeated expression of concern over the injury trusts and railroad cartels inflicted upon farmers and small businessmen. It by no means
As envisioned by the intermediate view, consumer welfare is the exclusive goal of antitrust, and that means that practices harmful to consumers ought to be unlawful, even if they benefit producers more than they harm consumers. For example, a merger that would both create market power and enhance productive efficiency should be unlawful. Under these circumstances, the increase in market power is likely to produce higher prices harmful to consumers, and that is all one needs to know to condemn the merger. The fact that it also may create productive efficiencies beneficial to producers is irrelevant. In light of the enhanced market power and the likelihood of increased prices, gains from productive efficiencies will not be shared with consumers and, therefore, provide no justification for the merger.219 Lande reached the same result under the economic branch of the broad

follows, however, that Congress intended courts to take such concerns into account under the statute. A legislator may be moved to vote for a statute by his perception that it will affect a range of values which are not reflected in the criteria that the law requires the courts to use.

Bork, Legislative Intent, supra note 83, at 10. Providing an example of values expressed in congressional debates that should not be taken into account by courts, Bork noted that Senator Sherman was concerned that:

the combinations “reach State authorities.” He was obviously not suggesting that, contrary to its explicit terms, the sanctions of his bill would be invoked upon proof that a trust had bribed or otherwise improperly influenced a state authority. The most that can be said of this passage is that Sherman took occasion to recount all of the sins of the trusts.

Bork, Legislative Intent, supra note 83, at 40.

219. It is conceivable that a merger (or other business transaction) that enhances both market power and productive efficiency will benefit consumers because the efficiency gains are so vast, and the market power gains so minuscule that the firm will maximize profits by reducing price. In this rare case, the intermediate view would approve a merger that enhances market power not because the benefits to producers outweigh the harm to consumers but because both producers and consumers benefit. See Lande, False Foundation, supra note 154, at 642. According to Lande:

Those scholars who analyze mergers under an efficiency standard generally conclude that a two percent gain in productive efficiency caused by a merger would almost always outweigh any adverse (i.e., inefficiency) effects of market power likely to arise from that merger. If mergers were instead blocked whenever they were significantly likely to lead to higher prices, a far higher cost savings would be necessary to justify the merger, since only a relatively large cost savings would prevent the price-increasing effects of market power.

Lande, False Foundation, supra note 154, at 642. The Merger Guidelines adopt this approach. They provide:

The Agency will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market. To make the requisite determination,
view.\textsuperscript{220} Bork reached a different result. In the interest of preserving productive efficiencies, he would condemn only "horizontal mergers producing very large market shares."\textsuperscript{221} The theory is that only under such circumstances is the harm to consumers resulting from higher prices likely to outweigh the benefit to producers of enhanced efficiency.

The intermediate view differs from Lande only with respect to the treatment of noneconomic values, and Lande has recognized that their role in antitrust analysis is "quite limited."\textsuperscript{222} Indeed, his more recent work seems to marginalize noneconomic values almost to the point of disappearance.\textsuperscript{223}

The broad, narrow, and intermediate views of antitrust represent dramatically different notions of what antitrust is about. Each has its own vision of antitrust goals. The major dichotomy lies between the broad view with its embrace of both economic and noneconomic goals, and the narrow view, which focuses exclusively on the economic goal of maximizing efficiency. The intermediate view is a refinement of the narrow view. It sees maximizing efficiency as the exclusive goal of antitrust only insofar as increased efficiency benefits consumers or, at least, is not harmful to consumers. It is not the objective of this Article to argue the merits of these competing views. Those arguments have been made many times over by others,\textsuperscript{224} and reasonable people can differ on which is most persuasive. The one point on which antitrust commentators seem to agree is that legislative history and congressional intent ought to have a substantial, if not determinative, role in defining antitrust goals. Most claim that their views are

\begin{quote}
the Agency considers whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm consumers in the relevant market, e.g., by preventing price increases in that market.
\end{quote}


\textsuperscript{220} See supra text accompanying note 195.

\textsuperscript{221} See Bork, supra note 70, at 406.

\textsuperscript{222} See Lande, False Foundation, supra note 154, at 632 n.3.

\textsuperscript{223} See Lande, False Foundation, supra note 154, at 640 ("It is possible to accept antitrust's concern with wealth transfers as well as efficiency without being swept into a social/political morass. The wealth transfer view is at least as administrable as the efficiency view, and both center around the same general concern—market power." (citations omitted)).

supported by legislative history.\textsuperscript{225} Those that do not, claim the legislative history is too ambiguous to be helpful—thereby implying that if it were more clear it would control.\textsuperscript{226}

Although expressions of concern for noneconomic values appeared in antitrust cases from the beginning, the broad view reached its zenith during the thirty-two-year period between the decisions in \textit{Alcoa} (1945) and \textit{Sylvania} (1977). \textit{Sylvania} announced that antitrust analysis "must be based upon demonstrable economic effect,"\textsuperscript{227} and post-\textit{Sylvania} decisions largely, but not exclusively, have reflected the narrow or intermediate view depending on the context.\textsuperscript{228} The judicial shift away from the broad view has resulted in some Supreme Court decisions being overruled\textsuperscript{229} and others being either implicitly or explicitly undermined.\textsuperscript{230} The practical consequences of this shift have been

\textsuperscript{225} See, e.g., BORK, supra note 70, at 61 ("The legislative history of the Sherman Act, the oldest and most basic of the antitrust statutes, displays the clear and exclusive policy intention of promoting consumer welfare."); Frank H. Easterbrook, \textit{Workable Antitrust Policy}, 84 Mich. L. Rev. 1696, 1703 (1986) ("However you slice the legislative history, the dominant theme is the protection of consumers from overcharges."); Lande, \textit{Wealth Transfers}, supra note 192, at 910 ("Congress passed the Sherman Act to further a number of goals. Its main concern was with firms acquiring or possessing enough market power to raise prices artificially and to restrict output.").

\textsuperscript{226} See supra text accompanying notes 83-86.


\textsuperscript{228} See supra notes 178-90 and accompanying text. In the context of vertical price fixing, the Court adheres to the \textit{per se} approach originally grounded in a broad view of antitrust that embraced freedom to trade as an important value. However, \textit{Sylvania} shifted the rationale for the \textit{per se} rule in that context away from the traditional emphasis on freedom to trade. See \textit{Sylvania}, 433 U.S. at 51 n.18.


enormous. Like the antitrust commentators, the Supreme Court has recognized the importance of legislative history and congressional intent in construing federal antitrust statutes. It is, therefore, worth examining the extent to which the Court has grounded its antitrust views on its understanding of what Congress was trying to achieve when it adopted the antitrust statutes.

IV. CONGRESSIONAL INTENT IN ANTITRUST DECISIONMAKING—
THE LAST FORTY-EIGHT YEARS

The role of congressional intent in Supreme Court antitrust decisions can be examined from a quantitative, as well as a qualitative, standpoint. A quantitative approach focuses on how frequently the Court has relied on congressional intent in resolving antitrust issues. However, not all references to congressional intent are equal. In some instances, it might appear that a citation to legislative history or some other source of congressional intent was added as an afterthought. In others, it might appear to have played a more significant role. Thus, while simply counting the number of references to congressional intent contained in the Court's antitrust decisions has the advantage of objectivity, it may not tell an accurate story.

A qualitative approach involves a subjective determination of how significant congressional intent was in the decisionmaking process. The significance of a citation to a source of congressional intent might be judged by the context in which it appeared, the nature of the source, the extent to which it was discussed, or by other factors. This Part undertakes to examine congressional intent in antitrust decisionmaking from both standpoints—first from a quantitative standpoint, then from a qualitative standpoint.

The inquiry examines the extent to which the Supreme Court's views of antitrust law have been influenced by congressional intent during the course of forty-eight Supreme Court terms. More specifically, the Court's reliance on congressional intent during the twenty-four-term period (beginning with the 1976-77 term and ending with the 1999-00 term), in which it largely adopted the narrow/intermediate view, will be compared with its reliance on congressional intent during the preceding twenty-four terms (the 1952-53 term through the 1975-76 term), when it embraced the broad view of antitrust. The comparison will

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decision(s) significantly increased the plaintiff's burden in establishing a violation of the antitrust laws.

231. See supra text accompanying notes 82-86.

232. The empirical study set forth below, see infra Part IV.A., demonstrates that the Court frequently references legislative history in deciding antitrust cases, although its significance as a factor in the Court's antitrust decisions has diminished in recent years.
suggest whether the Court’s antitrust decisions of one period are more firmly anchored in congressional intent than are its antitrust decisions of the other period.

The competing views of antitrust mainly relate to substantive issues. A court’s view should not affect its decision on most nonsubstantive issues, such as whether the state action doctrine applies in a particular case or whether certain conduct by an insurance company is exempt from the antitrust laws by virtue of the McCarran-Ferguson Act. Because the main purpose of the inquiry is to compare the Court’s sensitivity to congressional intent when applying the broad view of antitrust to its sensitivity to congressional intent when applying the narrow view, only citations to congressional intent for the purpose of resolving substantive issues have been considered. For example, in *California Dental Ass’n v. FTC*, the Court relied on legislative history in determining whether the Federal Trade Commission (“Commission”) had jurisdiction over a nonprofit corporation.

233. Under the state action doctrine, conduct by state governments, their subdivisions, and even private parties may be immune to antitrust liability. The doctrine was first recognized by the Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943). Its scope has been the subject of a number of more recent Supreme Court decisions. See, e.g., *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985); *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

234. 15 U.S.C. §§ 1011-15 (1994). In *Paul v. Virginia*, 75 U.S. 168, 183 (1868), the court held that the business of insurance consisted of “local transactions . . . governed by local law.” *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533, 543-45 (1944), involved whether *Paul v. Virginia* meant that the business of insurance was beyond the scope of Congress’s power to regulate under the Commerce Clause, and, therefore, exempt from the federal antitrust laws. *South-Eastern Underwriters* held that it did not and that the insurance industry was subject to the antitrust laws. *Id.* at 552. Congress responded by adopting the McCarran-Ferguson Act limiting application of the antitrust laws to the “business of insurance to the extent that such business is not regulated by State Law.” 15 U.S.C. § 1012(b) (1994). However, an activity that constitutes the business of insurance and is regulated by state law will not be exempt from the Sherman Act if it involves a boycott, coercion, or intimidation. 15 U.S.C. § 1013(b) (1994). Questions frequently arise concerning whether a particular activity is within the business of insurance, is regulated by state law, and, if so, whether it involves a boycott, coercion, or intimidation. See, e.g., *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 232 (1979) (prepayment prescription drug plan held not to constitute the business of insurance); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 555 (1978) (activities intended to coerce policyholders are not exempt under the Act); *FTC v. Nat’l Cas. Co.*, 357 U.S. 560, 562-63 (1958) (state prohibition of deceptive advertising by insurance companies exempted the advertising practices from the jurisdiction of the FTC).


236. In deciding that the Federal Trade Commission (“FTC”) had jurisdiction over a nonprofit professional organization, the Court noted:

Although the versions of the FTC Act first passed by the House and the Senate defined “corporation” to refer only to incorporated, joint stock, and share-
After holding in favor of the Commission on that issue, it considered whether the Commission’s finding of an antitrust violation, which had been affirmed by the court of appeals, was proper.237 Legislative history played no role in the Court’s determination of the latter issue. Accordingly, California Dental Ass’n is a case in which the Court did not consider congressional intent for purposes of the present inquiry—that is, it resolved a substantive antitrust issue without mentioning congressional intent.238 If the Court had considered only the jurisdictional issue, the case would have been excluded from the study because it would have provided nothing concerning the role of congressional intent in resolving substantive antitrust issues.

One nonsubstantive issue that might be influenced by how a court views the goals of antitrust is whether a private plaintiff has standing to sue for damages under the antitrust laws. Antitrust analysis under the narrow or intermediate views turns on how an activity affects price, output, and efficiency. Anyone, such as a competitor of the defendant, not adversely affected by a higher price cannot sustain an injury that the antitrust laws were intended to prevent and should not have standing to bring a treble damage action.239 Additional concerns taken into

capital companies organized to carry on business for profit, the Conference Committee subsequently revised the definition to its present form, an alteration that indicates an intention to include nonprofit entities.

Id. at 768 (citations omitted).

237. Id. at 768-74.

238. Similarly, in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), the Court considered legislative history in determining that Otter Tail did not enjoy implied immunity from the antitrust laws under the Federal Power Act. However, it did not consider congressional intent in resolving the antitrust issues. Therefore, it is categorized as a case in which the Court resolved substantive antitrust issues without considering legislative history or other sources of congressional intent.

239. See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977). Under Brunswick, a private plaintiff seeking to recover treble damages must have sustained an “antitrust injury”—that is, an injury that the antitrust laws were intended to prevent. Id. Generally, competitors of merging firms cannot meet this requirement. Even if the merger violates the antitrust laws, competitors are unlikely to sustain an antitrust injury. If the merger creates market power and leads to higher prices, competitors are not harmed. If the merger leads to lower prices, competitors may lose business, and their profits may be diminished. But, that is not the kind of loss the antitrust laws were intended to prohibit. Thus, competitors generally lack standing to challenge a merger, unless they are able to prove that the defendant is likely to engage in unlawful predatory pricing following the merger. See Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104 (1986). In Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224 (1993), the Court held that to recover on a predatory pricing claim a plaintiff must prove that a rival’s low prices were “below an appropriate measure of its rival’s costs,” and “that the competitor had a reasonable prospect (in a Robinson-Patman Act case), or,
account under the broad view, such as freedom to trade and dealer independence, suggest such persons sometimes might have standing, even if they were not harmed by higher prices.240

On the other hand, many of the standing cases, such as those involving the pass-on defense,241 the indirect purchaser doctrine,242 or other expressions of remoteness concerns,243 are less likely to be affected by the court's view of antitrust goals. Rather than evaluate the standing cases individually, leaving some out of the study and bringing some in, all were excluded. This treatment is

under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices.” Since Brooke Group, no private plaintiff successfully has sued under the antitrust laws on a predatory pricing theory.

It seems likely that the Court's decision in a case such as Reiter v. Sonotone Corp., 442 U.S. 330 (1979), involving whether a consumer purchasing goods for personal use can sue for treble damages under the antitrust laws, also might be influenced by the Court's view of antitrust goals.

240. For example, the question has arisen whether the target of a hostile takeover has standing to challenge the acquisition under Section 7 of the Clayton Act. See Anago, Inc. v. Tecnol Med. Prods., 976 F.2d 248, 250-51 (5th Cir. 1992) (denying standing to the target firm because it failed sufficiently to allege antitrust injury); cf. Consol. Gold Fields PLC v. Minoreco, S.A., 871 F.2d 252, 258-69 (2d Cir. 1989) (holding that the target had standing to sue under Section 7 to protect its right to compete independently). To have standing, a private plaintiff must allege an “antitrust injury”—that is, an injury that resulted from something that is “forbidden in the antitrust laws.” Brunswick, 429 U.S. at 488-89. Because the preservation of independent competitors is irrelevant to antitrust analysis under the narrow view, a court adhering to that view would be unlikely to adopt the approach of the United States Court of Appeals for the Second Circuit in Consolidated Gold Fields.

241. The pass-on defense contemplates a defendant claiming that a plaintiff/purchaser who was overcharged due to an antitrust violation was not actually injured because the plaintiff passed on the overcharge to its customers. See generally Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968) (rejecting the defense on the facts of the case).

242. The indirect purchaser doctrine contemplates a plaintiff/purchaser claiming that it has sustained an antitrust injury for which it is entitled to recover treble damages because it purchased goods from the defendant’s customer who was overcharged due to an antitrust violation and the overcharge was passed-on to the plaintiff. See generally Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977) (denying the plaintiff’s claim on the facts of the case). Both the indirect purchaser doctrine and the related pass-on defense have been sharply limited by Kansas v. Utilicorp United Inc., 497 U.S. 199 (1990).

243. See, e.g., Blue Shield v. McCready, 457 U.S. 465, 478-79 (1982) (holding that an insured person sustained an antitrust injury when she was denied reimbursement for payments to a clinical psychologist, and the denial was due to an unlawful conspiracy between the insurer and physicians to exclude clinical psychologists from the market).
consistent with the main objective of the Article—to analyze the Supreme Court’s reliance on congressional intent in resolving substantive antitrust issues.

A. Quantitative Analysis of Supreme Court Reliance on Congressional Intent in Antitrust Cases—Counting the Citations

1. Methods Used

Before setting forth the results of the quantitative study, it will be useful to describe the methods used in compiling the results. The first step was to run two searches on the Westlaw Supreme Court database, one for each of the periods described above. The search terms used in each search were “Sherman Act” or “Clayton Act.” Each case containing either term was reviewed to determine whether it involved a substantive antitrust issue. All cases involving substantive antitrust issues were selected for close reading by two research assistants, both third-year law students. The research assistants were asked to complete a form for each case, and to mark any reference in the opinion of the Court to legislative history, or to congressional intent or purpose. Concurring and dissenting opinions were not reviewed. The completed forms and the marked-up cases were then reviewed by the Author in compiling the results for the quantitative study and in preparing the qualitative analysis. The results of the quantitative study are presented below in Table I.

The data are divided into five categories, with subdivisions in each of the last four categories. Category I is simply the number of Supreme Court cases for each of the relevant periods that involved substantive antitrust issues. Category II includes all cases in which the Court discussed, or at least mentioned, congressional intent, whether or not it cited a source from which that intent was inferred. Thus, while it shows the frequency with which the Court referred to congressional intent, it says nothing about the intensity of the Court’s consideration. Congressional intent was discussed in sixty-eight percent of the cases decided during the earlier period when the broad view held sway and in forty-seven percent of the cases in the more recent revisionist period in which the Court embraced the narrow/intermediate view.

Category III shows the number, and the percentage, of antitrust cases in which the legislative history of the statute at issue in the case was cited. It also shows the total number of citations to legislative history. Thus, during the period starting with the 1952-53 term and ending with the 1975-76 term, the Court decided sixty-five cases involving substantive antitrust issues, and it cited legislative history in twenty, or thirty-one percent, of those cases. The corresponding figures for the more recent period beginning with the 1976-77 term are thirty-three percent, or ten, of thirty decided cases. Interestingly, while the percentage of cases in which legislative history was cited was slightly higher in the latter period, the number of citations was far greater in the earlier period,
averaging 2.5 per case in the earlier period versus one per case in the recent period. More than half of the 164 citations for the earlier period were attributable to two cases in which the Court undertook an extensive examination of the legislative history of the 1950 amendments to Section 7 of the Clayton Act. 244

It should be emphasized that Category III does not include all citations to legislative history, but only citations to legislative history of the statutory provision at issue in the case. It indicates the extent to which the Court has considered and cited legislative history in order to determine the original intent of Congress in adopting the provision in question. The Court sometimes points to the legislative history of related legislation, or to the related legislation itself, as indicating congressional approval for a particular interpretation of the provision in question. For example, in Simpson v. United Oil Co. of California, 245 the issue was whether a consignment agreement between the oil company and a lessee of its service station fixing retail prices violated the Sherman Act. 246 In holding that it did, the Court noted that "Congress has closely patrolled price fixing whether effected through resale price maintenance agreements or otherwise," 247 and cited legislation dealing with resale price maintenance agreements adopted long after adoption of the Sherman Act. 248 Such citations to related legislation, or its legislative history, do not bear directly on what Congress had in mind when it adopted the provision in question. Therefore, they are included in Category IV described below, rather than Category III. To clarify, as used in Table I and the following text, "legislative history" refers only to the legislative history of the statute at issue in the case before the Court. Category IV is a catch-all category that includes all citations to sources considered by the Court in determining congressional intent, other than the legislative history of the provision at issue. The most common citations in this category are citations to prior Supreme Court decisions in which the Court discussed congressional intent, and citations to treatises and articles discussing congressional intent. As noted above, inferences concerning congressional intent drawn from related statutory provisions or their legislative history are also included in this category, as is legislative history or

246. Id. at 14-15.
247. Id. at 17.
248. Similarly, in FTC v. Sun Oil Co., 371 U.S. 505, 514 (1963), the Court looked to Section 2(a) of the Robinson Patman Act in construing Section 2(b) of the same Act. Interestingly, after noting that "subsequent legislative materials are neither appropriate nor relevant guides to interpretation of prior enactments," the Court quoted from and discussed a Senate Report issued many years after adoption of the statute in question. Id. at 522 n.11.
statutory text of prior versions of the statute in question.249 The high number of citations in this category is largely due to string citations. Each cited authority was counted as a separate citation. However, infra and supra citations that referred generally to other citations of the same source were not counted,250 unless the reference was to a different point supported by the same source. The same method was used in counting citations to legislative history for purposes of the Category III compilation.

Category V is comprised of those cases that discuss, or at least mention, congressional intent but do not contain any citation to a source from which that intent was inferred. In some cases, congressional intent was discussed with a source cited, and, at another point in the opinion, congressional intent was discussed without citation to a source. It was often difficult to tell whether both discussions were drawn from the same source. In any event, only cases that considered congressional intent without any citation in the entire opinion to a source from which congressional intent was inferred were included in Category V. Thus, while a single case that contains citations to legislative history bearing on the original intent, as well as citations to other sources of congressional intent, will appear in both Categories III and IV, there is no overlap between Category V and Categories III and IV. However, Category V cases do appear in Category II, which includes all cases in which the Court referred to congressional intent, regardless of whether a source was cited.

As is apparent, Categories III, IV, and V are arranged in descending order of importance. Indeed, it seems questionable whether the mere mention of congressional intent without citation to any source is meaningful. Only three such case were found in the entire forty-eight-term period. Although the number of cases is small, Category V is presented in the interest of completeness.

249. See, e.g., Brown Shoe, 370 U.S. at 312-13 (where the Court considered the text and legislative history of the original Clayton Act in construing the 1950 amendments to the Act).

250. See, e.g., id. at 329 nn. 46 & 47.
Table I—Congressional Intent in Supreme Court Decisions Involving Substantive Antitrust Issues During Forty-Eight Terms

<table>
<thead>
<tr>
<th>Section</th>
<th>1952-53 Through 1975-76</th>
<th>1976-77 Through 1999-00</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Total Number of Cases Decided</td>
<td>65</td>
<td>30</td>
</tr>
<tr>
<td>II. Total Number of Cases With Discussion of Congressional Intent With or Without Citation to Any Source</td>
<td>44</td>
<td>14</td>
</tr>
<tr>
<td>A. Percentage of Cases With Discussion of Congressional Intent With or Without Citation to Any Source</td>
<td>68% (44/65)</td>
<td>47% (14/30)</td>
</tr>
<tr>
<td>III. Total Number of Cases With Citations to Legislative History</td>
<td>20</td>
<td>10</td>
</tr>
<tr>
<td>A. Percentage of Cases With Citations to Legislative History</td>
<td>31% (20/65)</td>
<td>33% (10/30)</td>
</tr>
<tr>
<td>B. Total Number of Citations to Legislative History</td>
<td>164</td>
<td>31</td>
</tr>
<tr>
<td>C. Average Number of Citations to Legislative History per Case</td>
<td>2.5 (164/65)</td>
<td>1 (31/30)</td>
</tr>
<tr>
<td>IV. Total Number of Cases With Citations to Other Sources of Congressional Intent</td>
<td>34</td>
<td>13</td>
</tr>
<tr>
<td>A. Percentage of Cases With Citations to Other Sources of Congressional Intent</td>
<td>52% (34/65)</td>
<td>43% (13/30)</td>
</tr>
<tr>
<td>B. Total Number of Citations to Other Sources of Congressional Intent</td>
<td>98</td>
<td>49</td>
</tr>
<tr>
<td>C. Average Number of Citations to Other Sources of Congressional Intent per Case</td>
<td>1.5 (98/65)</td>
<td>1.6 (49/30)</td>
</tr>
<tr>
<td>V. Total Number of Cases With Discussion of Congressional Intent Without Citation to Any Source</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>A. Percentage of Cases with Discussion of Congressional Intent Without Citation to Any Source</td>
<td>5% (3/65)</td>
<td>0%</td>
</tr>
<tr>
<td>B. Total Number of Times Congressional Intent Discussed Without Citation to Any Source</td>
<td>3</td>
<td>0</td>
</tr>
</tbody>
</table>
2. What the Data Show

Recent years have witnessed dramatic change in the substantive content of antitrust law, without the benefit of legislative action. Federal courts derive their authority to make antitrust decisions from the antitrust statutes. No matter how tenuous the connection between the statute and the issue in a case might seem, resolving the issue necessarily involves interpreting the statute. All of the recent substantive changes have been the result of statutory reinterpretations. Yet, the original congressional intent behind the applicable provisions has remained constant. One might assume that, as the passage of time removed court decisions from the legislative intent behind the statutes they construed, the Court’s reliance on congressional intent would diminish. Indeed, given the degree of change that has occurred, one might assume that the Court has come to act as a free agent in the antitrust field, implementing its own vision of economic wisdom under the guise of judicial authority to construe statutes. While the data collected in Table I fail to provide perfectly clear support for those assumptions, they point decidedly in that direction. In comparing the two periods, it seems significant that the Court discussed congressional intent more frequently in the earlier period than in the latter period, sixty-eight percent of the time versus forty-seven percent of the time. Thus, the frequency with which the Court considered congressional intent during the last twenty-four terms declined by nearly one-third compared to the previous twenty-four terms. That is, while congressional intent was discussed in sixty-eight percent of the cases during the earlier period, it was discussed in only forty-seven percent of the cases during the more recent period—a decline of twenty-one percentage points, or 30.8% (twenty-one divided by sixty-eight).

On the other hand, as Category III of Table I shows, there has been no significant change in the percentage of cases in which the Court has cited legislative history during the two periods. So, the greater frequency with which congressional intent was discussed during the earlier period (sixty-eight percent versus forty-seven percent of the time) was entirely attributable to discussions of congressional intent based on secondary sources, such as prior Supreme Court decisions, treatises, and articles—not on the legislative history itself. In a few cases (Category V cases), congressional intent was discussed without citation to any source. Aside from the text of the statute, which is not terribly helpful in the antitrust field, the most important source of congressional intent is legislative history. That the Court looked to legislative history with the same frequency in both periods undercuts the significance of the increased frequency with which the Court discussed congressional intent during the earlier period.

However, perhaps neither of these data is more important. Instead, the total number of citations to legislative history and to other sources of congressional intent might be the best data by which to gauge, through quantitative analysis, the impact of congressional intent on judicial decisionmaking. In reading the cases, it became clear that there is a powerful correlation between the number of
citations to some source of legislative history and the intensity of the Court's analysis of, and reliance upon, congressional intent. For example, in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,251 the Court referred to congressional intent in two brief (one sentence) comments.292 Each reference cited a single prior Supreme Court decision as its source. In *Brown Shoe*, the Court devoted an entire section of its opinion, spanning twelve pages, to an in-depth examination of legislative history.253 The opinion included seventy-five citations to legislative history and fifty-six citations to other sources of legislative intent. Yet, both opinions carry just the same weight in comparing the data for each period presented in Table I, other than the total number of citations. No one could read the two opinions and conclude that the Court relied on congressional intent to about the same degree in each case—at least no one other than those who believe judicial consideration of congressional intent is a facade. However, as stated at the outset, this study was undertaken with the assumption that courts act in good faith when they struggle to determine, and to be guided by, congressional intent.

If, as seems likely, the number of citations to legislative history or to other sources of congressional intent is the most important statistic in attempting to gage the Court's effort to interpret the antitrust law consistently with congressional intent, then the experience of the past forty-eight Supreme Court terms turns out to be much as one would expect. Dramatic change in statutory law without legislative action during the past twenty-four terms, indeed, means that the Court is paying less attention to congressional intent than it did during the preceding twenty-four terms. During the earlier twenty-four-term period in which the Court embraced the broad view of antitrust, it cited legislative history 164 times and other sources of congressional intent ninety-eight times. The corresponding figures for the more recent period during which the Court embraced the narrow/intermediate view of antitrust, are thirty-one and forty-nine, respectively. Thus, comparing the two periods, the number of citations to legislative history declined from 164 to thirty-one, a decrease of 133, or eighty-one percent (133 divided by 164). The number of citations to other sources of congressional history declined from ninety-eight to forty-nine, a decrease of forty-nine, or fifty percent (forty-nine divided by ninety-eight).

Obviously, some of the decline noted above was a result of the sharp decrease in the number of cases decided—sixty-five in the earlier period and thirty in the more recent period. However, comparing citations to legislative history on a per-case basis also shows a sharp decline. For the earlier period, the citations to legislative history per decided case were approximately 2.5 (164 divided by

252. Id. at 220, 224.
sixty-five) as against approximately one per case (thirty-one divided by thirty) for the recent period. So, citations to legislative history per decided case declined from 2.5 to one, a decrease of 1.5, or sixty percent (1.5 divided by 2.5).

Citations to other sources of congressional intent per decided case remained about the same during the two periods. During the earlier period, citations to other sources averaged about 1.5 (ninety-eight divided by sixty-five) per case. During the recent period, about 1.6 (forty-nine divided by thirty) per case, a modest six-percent (0.1 divided by 1.5) increase.

It might be argued that citations analysis in this context is distorted by a handful of cases in which an extraordinary number of citations appear. For example, as mentioned above, Brown Shoe has seventy-five citations to legislative history254 and fifty-six citations to other sources of congressional intent. United States v. Philadelphia National Bank255 has sixteen citations to legislative history and five to other sources. However, as is discussed below, the concentration of citations in a limited number of landmark decisions suggests that the quantitative citation analysis points in the same direction as does the subjective qualitative analysis—toward a sharply diminished role for congressional intent in antitrust decisionmaking by the Supreme Court.

B. Qualitative Analysis of Supreme Court Reliance on Congressional Intent in Antitrust Cases

The quantitative analysis presented above provides some insight into the Supreme Court's use of congressional intent in antitrust cases. However, for purposes of quantitative analysis, all citations carry equal weight, although all cases are not equal in their impact on the development of decisional law. It seems obvious that the actual effect of congressional intent on antitrust decisionmaking is more a function of context and degree than the number of citations. For example, if a case involves a statutory provision that is being considered by the Court for the first time or that involves the application of a statutory provision in a context not previously considered, one would expect the Court to be especially attentive to congressional intent. Similarly, if a case establishes or overturns a per se rule, one would expect congressional intent to figure prominently in the Court's analysis. In some instances, the Court acted consistently with these expectations. In others, it did not. As with the quantitative analysis, so it is here. No absolutely compelling picture emerges of a marked difference in the treatment of congressional intent in the two time periods being compared. Nonetheless, the analysis strongly suggests a significant diminution in the Court's reliance on legislative history and congressional intent during the more recent period.

254. See supra text accompanying note 253.
During both periods, the Court made the most extensive use of congressional intent, both in terms of the number of citations and the intensity of its discussion, in cases that raised new issues. In its 1962 Brown Shoe decision alluded to above, the 1950 amendment to Section 7 of the Clayton Act was considered for the first time. In an elaborate discussion of the factors that led Congress to act, the Court identified eight goals that Congress meant to achieve—each supported with numerous citations to legislative history. Brown Shoe is a much maligned decision. During the current period, it has been ignored by the enforcement agencies, and the Court has not had an opportunity to reconsider it. Hopefully, when that opportunity arises, the Court will explain where the Brown Shoe Court went wrong in defining the congressional objectives of the 1950 amendment to Section 7 of the Clayton Act or will take the enforcement agencies to task for ignoring its Brown Shoe decision.

Similar to Philadelphia National Bank, the Court addressed for the first time the application of the 1950 amendment to the banking industry. Again, the Court undertook an extensive examination of the legislative history of both the 1950 amendment and the Bank Merger Act of 1960. And, in Bankamerica Corp. v. United States, decided during the recent period, the Court considered for the first time whether Section 8 of the Clayton Act prohibits interlocking directorates between a bank and a competing insurance company. In holding that it does not, the Court quoted extensively from the legislative hearings, and

256. See supra text accompanying note 253.
257. There is “no credible support for the statement in Brown Shoe that Congress consciously appreciated the possible efficiency cost of attempting to preserve fragmented industries and consciously resolved the competing considerations in favor of decentralization.” Donald F. Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 HARV. L. REV. 1313, 1326, 1327-28 (1965). “It would be overhasty to say that the Brown Shoe opinion is the worst antitrust essay ever written. . . . Still, all things considered, Brown Shoe has considerable claim to the title.” Bork, supra note 70, at 210.
260. Id. at 335-55.
262. Id. at 123.
ior legislative materials nine times and other sources of congressional intent six

During both periods, the Court made extensive use of congressional intent in
deciding cases under the Robinson-Patman Act. During the more recent period,
the Court has decided four Robinson-Patman Act cases, one in favor of the
plaintiff\textsuperscript{264} and three in favor of the defendant.\textsuperscript{265} In each case, the Court cited
legislative history, and, in the three cases decided in favor of the defendant, it
appeared to rely on legislative history to a significant degree.

During the earlier period, the Court decided six Robinson-Patman Act cases,
five in favor of the plaintiff\textsuperscript{266} and one in favor of the defendant.\textsuperscript{267} In each of the
six cases, the Court made numerous references to legislative history, as well as to
other sources of congressional intent, and it undertook an extensive discussion of
the legislative materials. Undoubtedly, the greater statutory detail and complexity
of the Robinson-Patman Act, compared to the other antitrust laws, goes far to
explain the Court's attention to congressional intent in deciding Robinson-Patman
Act cases.

Interestingly, neither \textit{Albrecht} nor \textit{Schwinn}, both of which created \textit{per se}
rules of illegality during the earlier period, made any mention of congressional
intent. Similarly, neither of the cases that overruled them during the more recent
period made reference to legislative history;\textsuperscript{268} however, in overruling \textit{Albrecht},
the \textit{Kahn} Court noted that it "has long recognized that Congress intended to
outlaw only unreasonable restraints."\textsuperscript{269} While such passing references to
congressional intent were counted for purposes of the quantitative comparison
(\textit{Kahn} was included in Categories II and IV of Table I), their significance seems
doubtful.

In comparing the quality of the Court's reliance on congressional intent
during the two periods, more similarities than differences emerge. During both
periods, the Court drew heavily on congressional intent when considering new
antitrust legislation or the application of old law in a new context. In both periods,
it also drew heavily on congressional intent in applying the Robinson-Patman Act

\textsuperscript{263} See generally Bankamerica Corp., 462 U.S. 122.


\textsuperscript{265} Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983); J. Truett

\textsuperscript{266} FTC v. Fred Meyer, Inc., 390 U.S. 341 (1968); FTC v. Sun Oil Co., 371 U.S.
505 (1963); FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960); FTC v. Henry Broch &

\textsuperscript{267} Automatic Canteen Co. of Am. v. FTC, 346 U.S. 61 (1953).

\textsuperscript{268} State Oil Co. v. Khan, 522 U.S. 3 (1997) (overruling \textit{Albrecht}); Cont'l T.V.,

\textsuperscript{269} Khan, 522 U.S. at 10 (citing prior decisions).
and paid little or no attention to congressional intent when adopting or overruling per se rules.

From one perspective, this similarity of treatment seems surprising. The development of antitrust law during the twenty-four Supreme Court terms of the earlier period represented an application of the traditional broad view with its multiple goals. As discussed above, the origins of the broad view can be traced to the earliest Supreme Court decisions under the Sherman Act. Indeed, Judge Hand’s classic statement of the broad view in Alcoa, a decision that drew heavily on legislative history and congressional intent, predated the beginning of the earlier period by nearly ten years. So, during the earlier period, the antitrust law grew through an extension of established principles. Not every extension may have been wise. The resolution of conflicting values under the broad view almost inevitably would lead to at least occasional error. But, it is not entirely surprising that the Court’s resort to legislative history and congressional intent would be relatively infrequent during a period that witnessed little statutory revision, and during which the governing principles were settled. When, as in the merger cases, the Court interpreted new legislation, it relied heavily on legislative history and congressional intent.

In contrast, Sylvania and most of the significant antitrust decisions since Sylvania, represent a rejection of settled principles. Henceforth, Sylvania announced, antitrust analysis “must be based upon demonstrable economic effect.” No such statement had found its way into any prior Supreme Court decision. It was drawn entirely for the economic and legal literature on which the Court relied. In his concurring opinion, Justice White observed:

[While according some weight to the businessman’[s] interest in controlling the terms on which he trades in his own goods may be anathema to those who view the Sherman Act as directed solely to economic efficiency, this principle is without question more deeply embedded in our cases than the notions of “free rider” effects and distributional efficiencies borrowed by the majority from the “new economics of vertical relationships.” . . . The rationale of Schwinn is no doubt difficult to discern from the opinion, and it may be wrong; it is not, however, the aberration the majority makes it out to be.]

270. See supra notes 93-118 and accompanying text.
271. Alcoa was decided in 1945. United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).
272. See supra notes 256-60 and accompanying text.
274. Id. at 68-69.
Justice White was clearly correct in one respect: *Sylvania* signaled the dawning of a new day in antitrust. The shift from a broad view of antitrust goals embracing not only economic values but also political and social values, as well, toward a narrow view focused on economics alone had begun. The general principles that Senator Sherman felt the lawmakers could declare, being "assured that the courts will apply them so as to carry out the meaning of the law," were revised without so much as a glance at the legislative history. During a revisionary period, one would expect the Court to legitimize its holdings by laying a foundation for the new learning rooted in legislative history and congressional intent. Instead, its reliance on those sources has declined, in qualitative, as well as quantitative, terms. Nothing in the recent period approaches the detailed analysis of congressional intent found in the merger cases of the 1960s or in earlier decisions, such as *Alcoa*, rendered during the formative stage of the broad view.

### V. CONCLUSION

As the commentators have recognized, the legislative history of the antitrust laws may be "problematic" to the new thinking, but that does not excuse the Court from explaining how its view of antitrust is good law, as well as good economics. No matter how compelling the reasoning of the new economics might seem, it does not lift the command of the Supreme Court of an earlier day that: "[a]ny doubts as to the wisdom of the economic theory embodied in the statute are questions for Congress to resolve."  

Justice Scalia, speaking for the Court, was undoubtedly correct when he observed in *Business Electronics Corp. v. Sharp Electronics Corp.* that: "[t]he Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself and not merely the static content that the common law had assigned to the term in 1890." Senator Sherman made the same point when he spoke of the courts applying general principles declared by lawmakers to carry out the meaning of the law. But, to invoke the common law, or, as stated by Justice O'Connor in *Khan*, "to give shape to the statute's broad mandate by

275. See supra text accompanying note 80.
276. The *Sylvania* decision contains a single reference to congressional intent, in a footnote explaining why vertical price and nonprice restraints are viewed differently under the Sherman Act. See *Sylvania*, 433 U.S. at 51 n.18.
277. See supra text accompanying note 84.
280. *Id.* at 732.
drawing on common-law tradition,”281 is not to create common law. As has been observed: “When a court engages in statutory interpretation, it asks ‘What did the legislature intend?’ When it creates common law, it asks ‘What is the best policy choice?’”282 It is simply not plausible to claim that, in adopting the Sherman Act or other antitrust legislation, Congress created a federal common law of antitrust or that Congress intended for the courts to do so. Nowhere is there support for the proposition that Congress expected the courts to set the goals of antitrust law according to their view of the best policy choice.

The generality of the antitrust laws, whether the operative provision is “restraint of trade” under the Sherman Act or “may substantially lessen competition” under the Clayton Act, loosens the constraints that apply to courts’ interpreting more specific statutory language, but it ought not eliminate them. Indeed, the generality of the statutory text ought to elevate the role of legislative history and congressional intent in proper judicial interpretation. Yet, no Supreme Court decision of the current revisionist era of antitrust law has considered the legislative history of antitrust in a comprehensive fashion. Neither Sylvania nor the post-Sylvania decisions explicitly have addressed the issues of what the legislative history says about the proper goals of antitrust and why the current narrow view of antitrust more effectively meets those goals than did the earlier broad view. It is time that the Court do so.

281. See supra text accompanying note 7.
282. See Redish, supra note 8, at 857.