COMMENTS

"AFTER CHICAGO": AN EXAGGERATED DEMISE?

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Professor Herbert Hovenkamp recently published *Antitrust Policy After Chicago,*[1] an important critique of the ascendant Chicago School of antitrust analysis. For more than seventy pages Professor Hovenkamp battered away at the weaknesses in the Chicago story. Yet when the dust had settled, we were left with only a handful of cases that Professor Hovenkamp would decide differently from the Chicagoans. Although I am a fellow skeptic, I fear that Professor Hovenkamp's analysis of these cases is vulnerable to powerful criticism—criticism that may eliminate wholly the decisional differences between Professor Hovenkamp and the Chicago School. If no meaningful damage results from such a major critical onslaught, Professor Hovenkamp's effort may testify ironically to the strength, not the weakness, of his target.

Antitrust Policy After Chicago should not be dismissed so easily. In support of Professor Hovenkamp's critique, I offer an interpretation that emphasizes his disagreement with the Chicagoans over the goals of antitrust policy rather than his disagreement with their analysis of strategic conduct. Thus interpreted, Professor Hovenkamp's work joins a growing body of scholarship critical of an efficiency goal—but not necessarily of efficiency reasoning.

I. IS CHICAGO IGNORANT OF STRATEGY?

Professor Hovenkamp faults the Chicagoans for failing "to take strategic behavior seriously."[2] He defines strategic behavior generally as conduct designed to reduce the attractiveness of offers against which the firm must compete.[3] This expansive definition faces a great problem: a firm can most easily reduce the attractiveness of its competitors' offers by

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1. Hovenkamp, *Antitrust Policy After Chicago,* 84 MICH. L. REV. 213 (1985).
2. *Id.* at 261.
3. *Id.* at 260.

making a better offer itself. The definition therefore condemns the very competitive process that antitrust policy is supposed to promote.

Realizing the debilitatingly expansive sweep of this definition of "strategy," Professor Hovenkamp immediately qualifies it; strategy is harmful only when it reduces the attractiveness of competing offers "*without* producing substantial gains in productive efficiency to the strategizing firm."[4] The Chicago School, however, is unlikely to dispute the general notion that antitrust policy ought to attack predatory conduct that has no efficiency justification.[5] Professor Hovenkamp thus must mean that the Chicagoans do not fairly account for inefficient strategic behavior in particular cases. To support this thesis, Professor Hovenkamp cites the recent Supreme Court decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[6] I think that *Aspen Skiing* illustrates something—but not exactly what Professor Hovenkamp claims.

A. Aspen Skiing Co. v. Aspen Highlands Skiing Corp.

Professor Hovenkamp analyzes the conduct at issue in *Aspen Skiing* as "an example of strategic behavior that both raised a rival's costs disproportionately to those of the defendant [Ski Company] and reduced the relative attractiveness of the rival's market offering while simultaneously producing no efficiency gains to the defendant."[7] Professor Hovenkamp thus offers the decision to illustrate the Chicago School's myopia. I believe that *Aspen Skiing* instead provides a good demonstration of both the flexibility of standard Chicagoan analysis and the Supreme Court's lack of enthusiasm for it.

In *Aspen Skiing* the Court held that Ski Company violated the Sherman Act by withdrawing from a joint ticketing venture with Aspen Highlands, the only other ski-slope operator in Aspen.[8] The joint venture had sold a six-day pass that enabled purchasers to ski at Ski Company's three Aspen mountains as well as at Highlands' mountain, and had split these ticketing revenues between Ski Company and Aspen Highlands. These six-day, four-mountain tickets thus permitted skiers to avoid ticket lines in Aspen and yet retain the daily option to ski at the

4. *Id.* at 261.

5. Judge Bork's treatment of Lorain Journal Co. v. United States, 342 U.S. 143 (1951), illustrates this point. *See* R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 344-45 (1978). Judge Bork also agrees about the anticompetitive character of other forms of strategic behavior that Professor Hovenkamp identifies. *Compare id.* at 347 ("Predation by abuse of governmental procedures . . . presents an increasingly dangerous threat to competition.") *with* Hovenkamp, *supra* note 1, at 276-77 (discussing litigation and lobbying).

6. 105 S. Ct. 2847 (1985).

7. Hovenkamp, *supra* note 1, at 282 (footnote omitted).

8. *Aspen Skiing*, 105 S. Ct. at 2856-62.

Aspen mountain of their choice.[9]

I expected the Chicago School to respond with something like the following reasoning to the Court's condemnation of Skiing Company's conduct.[10] Ski Company may have sought to make the transition from competitor in a local ski-resort market to competitor in the national market. To do that, one must advertise nationally. But a ticketing arrangement that divides any resulting increase in revenue with a local competitor saps the incentive to go forward with the marketing strategy. If Ski Company invests in advertising to bring more skiers from across the nation to Aspen, Highlands will reap a part of the return on that investment. This Chicago story emphasizes that Highlands' free riding on Ski Company's advertising costs hampers Ski Company's ability to compete in the national market. The story thus identifies a possible justification for Ski Company's decision to terminate its joint venture.

The Chicago School has used logic like this to construct efficiency justifications for the conduct at issue in *United States v. Topco Associates,*[11] *Continental T.V., Inc. v. GTE Sylvania, Inc.*[12] and a host of other decisions.[13] I expect that Chicagoans would observe that the facts reported in *Aspen Skiing* lend some support to this free-rider hypothesis: that Ski Company advertised nationally only *after* it had withdrawn from the joint ticketing venture.[14] I likewise expect that the possibility of "less restrictive alternatives" to Ski Company's termination of the joint ticketing venture would do little to cause the Chicagoans to reject the hypothesis. There are less restrictive alternatives to most business practices—but

9. *Id.* at 2850-51.

10. I have not been disappointed. While this comment was in editing, Judge Frank Easterbrook published a typically pungent deconstruction. *See* Easterbrook, *On Identifying Exclusionary Conduct,* 61 NOTRE DAME L. REV. 972, 975-76 (1986), *see also* Easterbrook, *Workable Antitrust Policy,* 84 MICH. L. REV. 1696, 1710-11 (1986). *Cf.* Olympia Equip. Leasing Co. v. Western Union Tel. Co., 802 F.2d 217, 219 (7th Cir. 1986) (separate statement of Judges Flaum and Bauer) (scolding litigant with temerity to suggest that Judge Richard Posner "has seized an opportunity to preempt [*Aspen Skiing*] and emasculate its principles while purporting to give the case careful and respectful consideration").

From a different perspective, Professors Krattenmaker and Salop also have commented upon *Aspen Skiing. See* Krattenmaker & Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price,* 96 YALE L.J. 209, 212-13, 291 (1986).

11. 405 U.S. 596 (1972).

12. 433 U.S. 36 (1977).

13. *See, e.g.,* R. BORK, *supra* note 5, at 430-34.

14. The Court noted that

> [a]s far as Ski Co. was concerned, the all-Aspen ticket [joint venture with Highlands] was dead. In its place Ski Co. offered the 3-area, 6-day ticket featuring only its mountains. In an effort to promote this ticket, Ski Co. embarked on a national advertising campaign that strongly implied to people [that Ski Co.'s mountains] were the only ski mountains in the [Aspen] area.

Aspen Skiing, 105 S. Ct. at 2852.

always at a cost. In this case, the most obvious less restrictive alternative would have been for Ski Company to ask Highlands to contribute a fair share of the advertising costs. Presumably this alternative would have increased Ski Company's costs by forcing it to do a number of bothersome things: negotiate with Highlands on the nature and extent of the ad campaign; determine Highlands' "fair" contribution, perhaps through continued or added market research; accept the loss of flexibility that committee decisionmaking brings; and police the general product quality of the firm to whose reputation it is now wedded by national advertising. These costs to Ski Company of combating Highlands' free riding might be as great as the costs of simply accepting it. Moreover, the added costs could have the same effect as the free riding: that of deterring Ski Company's national advertising and national competitive presence.

By asserting a free-rider problem, the predicted Chicago School analysis implies two objections to Professor Hovenkamp's treatment of *Aspen Skiing*. First, Professor Hovenkamp asserts that ending the joint venture caused overall demand for Aspen skiing to fall.[15] The Chicago School free-rider analysis, however, predicts a relative *increase* in overall demand for Aspen skiing after the joint venture was terminated. If Ski Company's national marketing strategy worked as planned, the free-rider analysis would anticipate that Ski Company's promotional efforts would win it a larger share of the national market.[16]

I make no constructive effort to test these Chicago hypotheses with an econometric analysis of post-1978 skiing demand. But I am happy to take the lazy route of throwing rocks at Professor Hovenkamp's work. He concludes that demand for Aspen skiing in fact did fall because the *Aspen Skiing* opinion recited evidence—mainly surveys and anecdotes—showing that some consumers preferred a four-slope ticket to a three-slope ticket.[17] This conclusion is a non sequitur. Nearly everybody will say, if asked, that they would like more of nearly everything. But that does not show that even one person valued a four-way option enough to quit skiing in Aspen because the choice had shrunk to a three-way option. In any event, a four-way choice remained available to anyone passionate enough to stand in separate ticket lines; this factor makes it particularly unlikely that a significant drop in demand greeted Ski Company's withdrawal from the joint venture. Finally and most importantly, Professor Hovenkamp's explanation of reduced demand neglects entirely the influx of new skiers that presumably would result from Ski Company's national advertising—the very benefit to Ski Company (and con-

15. Hovenkamp, *supra* note 1, at 281.
16. *See* Easterbrook, *supra* note 10, at 979.
17. Hovenkamp, *supra* note 1, at 281 & n.312 (citing *Aspen Skiing*, 105 S. Ct. at 2859-60).

sumers) that a Chicagoan would say suffices to offset any heartfelt consumer dissatisfaction.

This last thought brings me to the second objection a Chicagoan would make to Professor Hovenkamp's analysis: market definition. A free-rider analysis would explain Ski Company's conduct as an attempt to improve its position in the national skiing market. That analysis thus would presume the relevant geographic market to be the nation, not the Aspen area.[18] On this score, the Chicago School can count Professor Hovenkamp as an ally against himself, for he states that "[t]here is good reason to believe . . . that the [*Aspen Skiing* geographic] market was defined too narrowly."[19]

The predicted Chicago School analysis is not bulletproof (or even rockproof) by any stretch of the imagination. It suffers the disadvantage common to many Chicago School explanations: even when litigation pressure was strongest, Ski Company never offered a free-rider justification for its withdrawal from the joint ticketing venture. Chicagoans have replied to this concern.[20] Until they are proven, however, the Chicago School's hypotheses (or "fitness fairy tales," as some evolutionary biologists derisively label similar theorizing) remain only inventive possibilities. Doubters will demand empirical verification that the free-rider explanation *truly* accounted for the defendant's conduct, and it is just this sort of dogged empirical verification that I (and the Chicago School) have declined to pursue.

Like most good legal fights, this one boils down to the question of who bears the burden of proof. Should business actions be presumptively illegal, escaping condemnation only if defendants can disprove fears of harm by convincingly justifying their behavior? Or should commercial conduct be presumptively legal, falling to legal attack only when plaintiffs can negative favorable interpretations of defendants' acts by proving how they are harmful? I have not spoken to this question.

My first conclusion about *Aspen Skiing* thus must be very limited; neither the Supreme Court nor I confidently can declare the "real" effect

18. The jury found the relevant geographic market to be the Aspen area, a conclusion that Ski Company failed to dispute in the Supreme Court. *Aspen Skiing*, 105 S. Ct. at 2854 & n.20.

19. Hovenkamp, *supra* note 1, at 281 n.311. *See also* P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 518.1h (Supp. 1986) (criticizing *Aspen Skiing*'s market definition); Campbell, *The Antitrust Record of the First Reagan Administration*, 64 TEX. L. REV. 353, 360 (1985) (*Aspen Skiing*'s market definition is "open to question"); Easterbrook, *supra* note 10, at 979 ("Aspen is not a market . . . .").

20. *See* Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211, 220-21 (1950) (arguing that economists "can predict the more adaptable or variable types of economic interrelationships . . . even if individuals themselves are unable to ascertain them"); Easterbrook, *supra* note 10, at 975 ("To award victory to the plaintiff because the defendant has failed to justify the conduct properly is to turn ignorance . . . into prohibition.").

of Ski Company's conduct. I have explained why I doubt that Professor Hovenkamp's article explains that conduct any better. The resulting uncertainty about the "true" nature of Ski Company's practices may be enough for some to conclude that they properly were damned. But Chicagoans are on record as supporting corporate freedom "when no affirmative case for intervention is shown."[21] This fundamental predisposition is the most basic reason they will reject Professor Hovenkamp's assertion that *Aspen Skiing* illustrates strategic behavior that they wrongfully ignore.

My second conclusion is that, *Aspen Skiing*'s rhetoric notwithstanding,[22] *Aspen Skiing*'s result proves that the Supreme Court has yet to undergo an impressive conversion to Chicago thinking.[23] This conversion has been so often hailed in the past that even critics like Professor Hovenkamp are beginning to agree. But a Supreme Court that is not significantly Chicagoan in its approach to antitrust must make one pause before analyzing the direction of antitrust "after Chicago."

B. Alcoa's *Price Squeeze.*

Professor Hovenkamp claims to uncover a second example of the Chicago School's ignorance of strategy by disputing its critique of the price squeeze in *United States v. Aluminum Co. of America.*[24] Alcoa, the aluminum monopolist, squeezed independent aluminum fabricators by charging them high prices, integrating vertically into fabrication, and selling fabricated aluminum at prices too low to permit the independents to earn a "living profit."[25] Chicagoans generally conclude that this conduct raises no efficiency, and hence no antitrust, problem.[26] Professor Hovenkamp faults Chicagoans for analyzing the problem under the unrealistic assumption that the independent fabricators faced no sunk or fixed costs.[27] Under more realistic assumptions, he argues, a squeezing monopolist can extract an independent but vertically related firm's "return on the fixed-cost part of its investment."[28]

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21. R. BORK, *supra* note 5, at 133; Easterbrook, *supra* note 10, at 975 & n.10. *Cf.* Hovenkamp, *Rhetoric and Skepticism in Antitrust Argument,* 84 MICH. L. REV. 1721 (1986) (replying to Judge Easterbrook).

22. *See Aspen Skiing,* 105 S. Ct. at 2860-61 (discussing lack of an "efficiency justification").

23. This is abundantly clear from other recent decisions. *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984); Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982).

24. 148 F.2d 416 (2d Cir. 1945).

25. *Id.* at 436-442.

26. *See* R. POSNER & F. EASTERBROOK, ANTITRUST: CASES, ECONOMIC NOTES, AND OTHER MATERIALS 874-75 (2d ed. 1981); Bork, *Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception,* 22 U. CHI. L. REV. 157, 163-65 (1954).

27. Hovenkamp, *supra* note 1, at 269 & n.271.

28. *Id.* at 269.

Chicagoans will ask, so what? Their standard argument will be that such distributive concerns do not have efficiency consequences. I understand Professor Hovenkamp to reply that the wealth appropriation causes inefficiency, not in the current case, but rather in the future—when the prospect of unremedied appropriation will chill efficient investment.[29]

This argument is clever but not convincing. The idea is that antitrust judges should look out for firms too short-sighted to avoid industrial vulnerability so that future consumers can secure the benefits of these firms' long-run investments. In short, to ensure that fools continue to take risks, the proposal is to make the wisdom of hindsight the basis for an antitrust claim. Even if this notion is exhilarating enough to sweep aside its disquieting implications, Chicagoans will fault Professor Hovenkamp for failing to provide any reason to believe that the chill on efficient investment is in fact significant. At least one firm will always have an investment incentive unaffected by the risk of a lurking opportunistic monopolist: the monopolist itself. And if vertical integration is less efficient than independent production, the Chicagoans reply, the monopolist may gain by trading with independent, vertically related firms. Accordingly, the monopolist will have an incentive to split a benefit with an independent by offering the independent long-term contractual protection against the monopolist's opportunism.[30] Finally, to Professor Hovenkamp's point that "not every situation conducive to taking advantage of sunk cost commitments can be foreseen,"[31] the Chicagoans would reply that no investment chill occurs when firms foresee no threat of opportunism. The Chicagoans thus will lampoon Professor Hovenkamp's complaints about the *Alcoa* squeeze as resting either upon an efficiency problem that firms can eliminate if it is efficient for them to do so, or upon no credible problem at all.[32]

C. Bonjorno*'s Supply Squeeze.*

Professor Hovenkamp continues his critique of conventional Chicago School wisdom by arguing that the Chicagoans' failure to condemn firms for attempting price squeezes ignores a second inefficiency: facilitated horizontal collusion.[33] He uses *Bonjorno v. Kaiser Aluminum &*

29. *Id.* at 267-68.

30. *See, e.g.,* United States v. General Dynamics Corp., 415 U.S. 486, 499-502 (1974); Klein, Crawford & Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process,* 21 J.L. & ECON. 297, 302-07 (1978).

31. Hovenkamp, *supra* note 1, at 267.

32. A similar criticism would extend to Professor Hovenkamp's analysis, *id.* at 267-70, of Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69 (1979).

33. Hovenkamp, *supra* note 1, at 268-74.

Chemical Corp.[34] to illustrate his point. In *Bonjorno* the United States Court of Appeals for the Third Circuit condemned Kaiser Company for squeezing Columbia Co., an independent fabricator of aluminum drainage pipe. According to Professor Hovenkamp, oligopolistic aluminum manufacturers (including Kaiser) tacitly divided product markets in pursuit of monopoly pricing. To prevent buyers from disrupting their cartel, the manufacturers tried to force exclusive-dealing contracts upon their independent downstream customers. In particular, Kaiser applied a classical price squeeze to pressure Columbia into an exclusive-dealing arrangement. When Columbia still refused, Kaiser squeezed harder—and Columbia died.[35] Thus interpreted, *Bonjorno* demonstrates a sensible judicial reaction to an anticompetitive strategy that Chicago analysis has overlooked.

Chicagoans are apt to fault Professor Hovenkamp's strategic explanation of the *Bonjorno* price squeeze as puzzlingly circular. In essence, Professor Hovenkamp maintains that Kaiser sought exclusive-dealing contracts to facilitate horizontal collusion, but used horizontal collusion to compel exclusive dealing. Professor Hovenkamp thereby uses the inefficient *consequence* of the price squeeze as a *premise* to explain how Kaiser could threaten Columbia with exclusive dealing or death. Suppose Kaiser's motive truly were to collude with other manufacturers. Rather than plead with or threaten customers until they accepted exclusive dealing, it would seem far simpler for the manufacturers to refuse concertedly to sell to each others' customers. Professor Hovenkamp does not explain why a manufacturers' cartel would bother entreating unwilling customers to help accomplish an objective that the manufacturers could achieve entirely on their own. If some such reason did exist, moreover, it is unclear why Kaiser would threaten Columbia with the relatively mild tactic of a price squeeze when Kaiser's complete refusal to deal with Columbia makes the same coercive threat with greater force and possibly less legal risk.[36]

A standard doubting Thomas from the Chicago School would argue that "[i]t is important to see that [Kaiser] must offer something to [Columbia] to get [Columbia] to sign requirements contracts . . . which means . . . creation of efficiency."[37] Professor Hovenkamp's explanation of the "something" that Kaiser offers is an *inefficient* threat: "Sign up or else I will squeeze you out of business." If Kaiser can truly count on the

34. 752 F.2d 802 (3d Cir. 1984), *cert. denied,* 106 S. Ct. 3284 (1986).

35. *See* Hovenkamp, *supra* note 1, at 271-72.

36. *Cf.* United States v. Colgate & Co., 250 U.S. 300, 307 (1919) (Sherman Act does not restrict manufacturer's right to exercise discretion as to parties with whom it will deal).

37. R. BORK, *supra* note 5, at 304-05.

cooperation of its rivals, however, the purpose that Professor Hovenkamp would assign to its conduct—cooperation between Kaiser and its competitors—has already been achieved. Conversely, if Kaiser cannot count on its rivals' cooperation, then its strategy of gaining that cooperation through a price squeeze will probably fail. Kaiser can squeeze Columbia out of business only if Kaiser can be assured that its rival manufacturers will honor their tacit agreement to divide the market for their products. Otherwise Kaiser's rivals will profit from Kaiser's blustering by stepping into its shoes as Columbia's supplier. Because this "inefficient threat" argument makes little sense, the Chicagoans would argue that another, presumably efficient explanation is likely to account for Kaiser's action. This Chicago School story concludes that *Bonjorno*—like *Alcoa*—made more uncomprehending law by condemning presumably efficient (or at least not demonstrably inefficient) conduct.

Once again, I am not arguing that the Chicagoans really are right; I have not done the work necessary to establish the real reasons for Kaiser's behavior. Rather, I make the weaker point that critics of the Chicago School must come up with more convincing or elaborated explanations of why cases like *Bonjorno* were properly decided. If critics fail to explain why predictable variations of basic Chicago School themes do not apply in certain cases, one's first reaction is to assume that these themes have not been considered adequately or that they *do* apply—a reaction that tends to establish quite the opposite of the critic's objective.

II. CHICAGO SCHOOL GOALS, NOT CHICAGO SCHOOL STRATEGIC ANALYSIS

Professor Hovenkamp's critique is strongest where it is the most basic: his attack on the Chicagoan position concerning the proper goals of antitrust policy. He pummels the Chicagoans, as other heavy hitters have before him, for their audacious and implausible claim that economic efficiency is the only goal of consequence to antitrust policy.[38] Professor Hovenkamp repeats his argument that antitrust policy cannot

38. Hovenkamp, *supra* note 1, at 244-55. *See also* Kaplow, *The Accuracy of Traditional Market Power Analysis and a Direct Adjustment Alternative,* 95 HARV. L. REV. 1817 (1982); Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged,* 34 HASTINGS L.J. 65 (1982); Scherer, *The Posnerian Harvest: Separating Wheat from Chaff* (Book Review), 86 YALE L.J. 974, 977-79 (1977). My favorite remark about the Chicago School efficiency argument comes from economist Kenneth Elzinga, who describes it as "ingenious and appealing, not only because of the pristine conclusion it reaches. But like King Agrippa after hearing the Apostle Paul, one remains only 'almost persuaded.'" Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?,* 125 U. PA. L. REV. 1191, 1192 n.2 (1977).

legitimately or logically ignore distributive concerns.[39] Other critics of the Chicago School have argued that a reading of the legislative history of the antitrust laws points to a goal that is distributive in character: the goal of preserving the wealth that ultimate or household consumers would realize by engaging in transactions in rivalrous markets. On this reading, antitrust policy aims to block producer efforts to appropriate an entitlement properly belonging to consumers.[40] The language of economic theory can restate this analysis precisely: the goal of antitrust policy is to maintain or increase the size of consumers' surplus, not, as the Chicagoan would argue, to maximize the *sum* of consumers' and producers' surplus.[41]

This conflict between an efficiency and a consumer-surplus goal sounds more contentious than it really is in most cases. *If* Professor Hovenkamp agrees with my predicted Chicago criticisms of his analyses of *Aspen Skiing, Alcoa,* and *Bonjorno,* then those cases would be resolved the same way under either the goal of economic efficiency or the goal of distributive justice for consumers. Under either view, all three cases would be decided in favor of the defendant.

This operational congruence between different goals might seem surprising. But it should not be, if we accept that consumers generally benefit from efficient producer conduct in competitive markets. A typical decision aiming to serve distributive justice for consumers will thus find Chicago School analysis to be of continued relevance. The efficiency goal and the goal of ensuring consumers their distributive share do diverge in some areas.[42] But these areas are the exception rather than the rule, and may be of more theoretical than practical concern.[43]

The consumer wealth goal should not be equated with a populist goal embodying simple hostility to big business, for conflict can also exist between these two goals. For instance, notable merger precedents of the Warren Court era[44] are difficult to defend in terms of a consumer surplus goal. On the basis of increased industrial concentration, the Court invali-

39. Hovenkamp, *supra* note 1, at 244-49. *See also* Hovenkamp, *Distributive Justice and the Antitrust Laws,* 51 GEO. WASH. L. REV. 1 (1982).

40. *See, e.g.,* Lande, *supra* note 38, at 93-96.

41. *See, e.g.,* Leibeler, *Market Power and Competitive Superiority in Concentrated Industries,* 25 UCLA L. REV. 1231, 1231 (1978) ("Antitrust should permit maximization of the sum of the consumer and producer surplus.").

42. *See, e.g.,* Fisher & Lande, *Efficiency Considerations in Merger Enforcement,* 71 CALIF. L. REV. 1580, 1592, 1626-36 (1983).

43. *Cf. id.* at 1677 ("A system that considered all relevant facts in the hope of achieving a better merger decision would almost certainly produce judicial chaos.").

44. *See* United States v. Pabst Brewing Co., 384 U.S. 546 (1966); United States v. Von's Grocery Co., 384 U.S. 270 (1966); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

dated mergers that promised efficiency benefits for consumers[45] even though the proposed mergers were extremely unlikely to induce the evil associated with industrial concentration—that is, horizontal collusion among firms that is harmful to consumers.[46] This conflict between populist and consumer-surplus goals is not inevitable. It is quite possible to interpret the populist distaste for big business as decisive *only* when business becomes so concentrated that it threatens the material welfare of consumers. This limited version of populism would not fit comfortably with the frankly antiefficient populism of the Warren Court.[47] My point here, however, is simply that antitrust decisions that are consistent with a consumer surplus goal can be harmonized with both the classical Chicago School's efficiency beacon and at least one version of the populist goal frequently acknowledged by antitrust decisionmakers.

One might dismiss this general congruence among goals of efficiency, consumer surplus, and a limited form of populism as a testament to the insignificance of the debate over proper goals. If the cases mostly come out the same, what's the difference? The difference is that critics like Professor Hovenkamp give us compelling arguments against the legitimacy of using the antitrust laws solely to promote economic efficiency. That problem of legitimacy vanishes, however, if we recognize that virtually the entire Chicago School toolbox of analytical gadgets is relevant to his discussion of a distributive goal, particularly that of defending consumers' wealth entitlement. For all his professed criticism, Professor Hovenkamp may thus appear to the Chicagoans like a blessing in disguise.

45. *See, e.g., Von's Grocery,* 384 U.S. at 278 (regarding "competition" as preservation of small businesses, without regard to consumer welfare); *Pabst Brewing,* 384 U.S. at 552-53 (same); *Brown Shoe,* 370 U.S. at 344 (observing that "some results of large integrated or chain operations are beneficial to consumers," but citing likelihood of increased efficiency as ground for *invalidating* merger).

46. *Cf.* R. AXELROD, THE EVOLUTION OF COOPERATION 180-81 (1984) (repeated competitive interaction between a pair of players can lead to collusive behavior). *But see* R. Boyd & P. Richerson, The Evolution of Reciprocity in Sizeable Groups 23 (February 6, 1987) (unpublished manuscript) (reciprocity is likely to evolve only when number of players is quite small).

47. *See, e.g.,* FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967) (offering one merger partner's "substantial advantages" in marketing as reason to condemn merger).