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THE ANTITRUST MARATHON

Part II: The Role of a Consumer Harm Test in Competition Policy

PHILIP MARSDEN: We've got two broad topics to cover. Adrian will address consumer harm issues and then Steve Calkins will discuss measuring power issues.

ADRIAN MAJUMDAR: My paper is about consumer harm and its role in competition policy. The first question I address is, why consumer harm? Why are we focusing on consumers as opposed to total welfare (which is what economists would normally say we should look at)? Normally, the reason you hear is that consumer harm is easier, not easy, but easier to measure than total welfare. But, actually, there's a good theoretical reason as well, for pursuing a consumer standard - that may be a better way of delivering increments in total welfare. What was the intuition there? Under the total welfare standard profits are traded off against consumer harm. So firms pursue the most profitable strategies which lead to higher prices but ultimately don't really leave too much to gain in terms of total welfare. The higher prices generate more profits, and that "offsets" the consumer harm. Under the consumer standard firms still pursue profitable strategies but they have to stop somewhere, i.e. where the consumer harm starts. At this point firms still are gaining profit and there is no harm to consumers overall - so total welfare goes up. So that's a cute theoretical reason for supporting a consumer standard. So if we accept that theory for pursuing a consumer standard, what's the link, then, between competition and consumers?

First of all, can we assume that more competition is good for consumers and then just focus on competition policy, i.e. can we say "we've safeguarded competition, so consumers are going to be okay"? Sometimes I think that's okay. That's fine, for example, in horizontal mergers - unilateral effects analysis in particular. Why do I say that? It seems to me, broadly speaking, that there is a consensus as to the issues that we should look at to understand when competition is harmed as a result of unilateral effects. We know we should look at closeness of competition, barriers to entry, and strategic responses by buyers. Those things are fairly well understood, both in theory and in an empirical analysis, so it's a reasonable approach to focus on "Is there material harm to competition?", and then stop. Because if there was harm to competition, consumers would probably be harmed as well. The problem arises when we move on to exclusionary effects, for all the reasons that we've heard this morning, false positives and so on. We can't necessarily end up finding harm to competition and inferring harm to consumers. Why? Because it's actually hard to view the two independently of each other.

Why is it hard to view them independently of each other? First of all, sometimes we have a restriction in one dimension of competition to benefit competition in another dimension. So Microsoft would be potentially an example: is it the case that there is a restriction in competition in the short run that creates incentives for firms to innovate, i.e., improves competition in another dimension in the long run? And sometimes it's just too difficult to understand whether something's anticompetitive or pro-competitive without linking this to an impact to consumers. That is to say, the analysis of one cannot take place without the analysis of the other. The final point of the paper considers the link between harm to consumers and harm to competition. Even in that wonderful world where we can identify harm to consumers, does that necessarily mean there's been harm to competition? No, not necessarily. For example, consider a regime that the UK has been developing fairly recently, the so-called market inquiry regime. The competition authorities can intervene in any market where they think consumers have somehow been harmed, and – to put it provocatively - reverse engineer a monopoly position as their excuse for intervention. So often you see industries where there were information problems complex to understand or. follow-on or aftermarket purchases made at the point of sale of a primary good. Here the authorities might say that there's a "monopoly" at the point of sale, therefore, we can intervene here. I think that we should be careful here. Is it really a monopoly? There may be a good reason to intervene, but if there is, it's not necessarily under *competition law* because there is not necessarily a clear *competition* problem.

PHILIP MARSDEN: Thank you, Adrian. What we just heard, is probably a lot more elaborate theory of consumer harm than is ever actually explained in the case law on the continent in Europe. What you see there instead is the Commission, and especially Commissioner Kroes, when she goes to the European parliament, she always uses the rhetoric of consumer harm and consumer welfare. But the actual theory of harm they use in actual cases is never really explained in robust terms of how some aspects of dominant firm conduct that many other authorities find innocuous somehow can be assumed to harm consumers by European authorities and courts. What the European view seems to be, though, and this is why we've linked these two topics together in this panel, is they have a very elaborate theory of market power but only assumptions regarding consumer harm. This comes from historical reasons that we've talked about, namely state monopolies, unintergrated markets, distrust of bigness. Spencer said, isn't it just as simple as sometimes too much power is a bad thing. What we are still trying to work out in Europe, and I think probably here as well, is 'when' are those times, and in particular, 'how' much power is a bad thing? So that might be a good time to hear from Steve about his views on this.

STEVEN CALKINS: The Modernization Commission delivered a checkup report on the US antitrust system and pronounced it almost entirely fine, with a few exceptions. In the world of Section 2, as I recall, the only imperfect areas were on bundling and maybe refusals to deal. But they glossed over an issue referenced at least in a footnote by Dennis Carlton, and that is that the whole system is fundamentally flawed, because we don't have an accepted paradigm with respect to monopoly power.

In mergers, life is good and simple and clear, and at least we know what we're talking about. You look at two firms and you presume—sometimes you worry about that—but you presume they don't have substantial monopoly power, and you're asking whether or not were they to merge, it would increase. And you'd go and you'd define a market by having your hypothetical monopolist test and a foiling concept and on and on, and you know what you're doing, and you can think about it. And collecting data is hard, proving it is hard, but at least thinking about it is fairly easy or straightforward. And the problem in a monopoly is that none of that works because, as we all know, there's the cellophane fallacy. And it may very well be that the firm we're examining is currently charging a monopoly price. And so you start doing anything that looks like what you were talking about back in terms of mergers, and it doesn't work out because the firm's already at the monopoly price, and that is why it's facing elastic demand and so on and so forth. So we don't have a paradigm that sets out how to go about deciding whether a firm has monopoly power. We don't have a paradigm that lets us know how to define markets for purposes of monopolization cases, and this really is a problem, and it's a very big problem, and it's got a whole lot of costs.

People have, I think, started to realize that we have this problem and are struggling to address it. Some folks set out and say, well, let's just try to define markets and remember there's a cellophane fallacy and be a little bit thoughtful, and they do that a little. In the *Evanston Hospital*[1] case, in the merger area, we had the interesting experience of watching a government agency first conclude that there was an anticompetitive effect and use that as its method of defining the market, an odd way to proceed, but they found it satisfactory. Others would say skip the market altogether. And where you can prove that you should be able to suggest that you should be able to skip market definition and simply prove monopoly power directly, indeed, the Third Circuit in the *Broadcom*[2] case in a footnote specifically said that that is a proper way to proceed. Others would suggest that you look at the restraint and the actual effect of what happened, and perhaps you can condemn this without proving monopoly power. Others say, no, we need to do a serious examination and listing ten different factors.

Larry White had a very good paper in the dominant firm hearings. I don't come here with the answer, but I do think we've got a very serious problem. And perhaps one of the reasons, going back to the first session, why we're hesitant to jump in and start condemning monopolists is because we have a little bit of uncertainty about whether we're doing it right and deciding who's a monopolist and who's not.

PHILIP MARSDEN: Thanks very much. Opening up the discussion on both points, defining and measuring power and assessing consumer harm, I just wanted to make one point. Adrian's says in his paper that with respect to exclusionary behavior, usually we cannot harm to consumers from harm to competition. Now, this contrasts very strongly with European case law, in which the European courts have found expressly that the presence of the dominant firm itself

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[1] *In re* Evanston Nw. Healthcare. Corp., 2007 WL 2286195 (F.T.C. Aug. 2007).

[2] Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297 (3rd Cir. 2007).

weakens competition and consumer harm need not be proven. Therefore, the dominant firm has a special responsibility to help its rivals and to assume that there's problem, and that you immediately turn the burden of proof over to the dominant firm to rebut that through some form of justification and business case. So this means that this assumption of consumer harm that Adrian is talking about is also based on a really strong view in Europe about this consumer harm paradigm which Steve is referring to that the Europeans feel they do have a grasp on, and thus don't feel they have to evidence.

PETER CARSTENSEN: Two things: First of all, Steve has again the same point that I was raising earlier about which are the monopolies we should care about? And nobody talks about the Lerner Index anymore because when you divide marginal cost into price, everybody's got enormous market power. And so that's the one really workable test that we've got out there, and it's far too inclusive. The other point that I want to make is to really question whether consumer harm, as it is being defined, is at all relevant. That is, the concern ought to be with the other part, which is the competitive process as the primary focus. And I'm particularly concerned with cases that involve significant exploitation of buyer power, which I perceive to be a very serious and substantial problem, both in the United States and, as I understand it, in Europe. But it is quite plausible that there would be no adverse consequence for consumers in terms of any of the static measures of consumer harm because of the way these markets are different between buyer and seller markets. And so it seems to me that the focus ought to be much more on adverse effect on competitive process with the caveat that where the change in the competitive process may result in significant adverse effects on consumers, one may want to step back and say, hmm, do we really want to do that? But this whole use of a static economic price theory element, consumer surplus, producer surplus, is probably not a very useful tool.

PHILIP MARSDEN: In Europe, of course, we've seen many interventions in that regard where competition authority interventions have caused prices to be increased, either through the prohibition of rebates that Simon was talking about, or mandated increased airfares in one particular German case specifically because of the fear, even if it is just speculative, that some form of less efficient, smaller competitor won't be able to survive when the dominant firm is pricing competitively. So that's definitely a strong feeling of the case law in Europe as we know.

BERT FOER: Not surprisingly, I agree with everything that Peter said and will attempt to elaborate a little bit more on the question of why do we let the neoclassical economist tell us that there is one goal for antitrust and consumer welfare? You know, why are we even locked into that as a starting point? Politically, there's some value to say that we're out there to support consumers. But, ultimately, what does that really mean? Who are the consumers? And is that just a fig leaf that we use because we're not able to clarify another reason for doing what we do? Why don't we start, for instance, the way Michael Porter[3] starts, and say, what is it that we want out of our economy? He says what we want, first of all, is growth. And there's some good reasons for that. When your economy is growing, some recent literature has elaborated, you tend to have a more socially stable system.[4] People are more likely to be to tolerant. They're more likely to feel good about the country they live in, and they'll treat each other better. That's pretty powerful stuff if it's true. How do you get growth? Well, you probably need a lot of innovation. So maybe you want to gear your system toward that which is most likely to produce innovation on a relatively consistent basis, in other words, dynamic economics taking a higher position in your hierarchy than static economics. And that thought leads to some other thoughts.

First of all, we don't know very much about what causes innovation. We have suspicions and intuitions. And I think a primary intuition that most of us would buy into is that having more competitors working on ways to get ahead of the competition is better than fewer. Schumpeter[5] didn't feel that way. His essential insights regarding the role of creative destruction in a capitalist system are correct, although he was significantly wrong to think that monopoly is the best way to produce innovation. The generalization that seems to work best is that you need a variety of firms with different strategies, and maybe

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[3] *See, e.g.*, UNIQUE VALUE, COMPETITION BASED ON INNOVATION CREATING UNIQUE VALUE FOR ANTITRUST, THE ECONOMY, EDUCATION AND BEYOND (Charles D. Weller ed., Innovation Press 2004) which includes several essays by Michael Porter.

[4] *E.g., see* BENJAMIN M FRIEDMAN, THE MORAL CONSEQUENCES OF ECONOMIC GROWTH (Knopf 2005).

[5] *See* review of THOMAS K. MCCRAW, PROPHET OF INNOVATION: JOSEPH SCHUMPETER AND CREATIVE DESTRUCTION (Belknap Press 2007), *available at* http://www.antitrustinstitute.org/Archives/mcCraw.ashx.

you'll come out better. You need some degree of market power, as opposed to pure competition, so there's money for R&D and some hope for capturing the benefits of innovating. I'm going to stop there. I wanted to put on the table the question of whether protecting against consumer harm, i.e. higher prices, should be our highest antitrust value.

What happens if we posit dynamic efficiency as a more important goal? There's a lot remaining to be said on that.

DAVID GERBER: Again, this is really just a question, and it goes back to something I said before. It goes also to the economists again. The language of process, protecting the competitive process, which has been a very big part of the European tradition, seems to be a type of language that economists simply don't like. It doesn't seem to fit very well into the current economic categories. Here economics language and legal language don't seem to cohabit very well, I just wonder if you see any ways of relating those two languages, and thus two ways of thinking about harm. I wonder whether the benefits that we have from economic analysis can be a little more effectively related to existing legal language.

ADRIAN MAJUMDAR: I think I can possibly pick up a bit of the answer to that bit of a response to Peter. Essentially, the points are well taken about static versus dynamic efficiency. And to be clear, the approach in my paper is to pick up the dynamic effects, which is one of the issues that we consider when we talk about the process of competition. When we're talking about these dynamic effects, issues may arise whereby there is potentially a restriction in one form of competition, for example, price competition, that benefits another dimension of competition, such as innovation. So what do you do there? You have to ask whether the restriction of competition is harmful. Maybe it is, but then again, competition on another dimension is a good thing. How do you balance the two? Ultimately, you need to weigh up which is going to be better for consumers. So it's just an over-arching principle. Also, I point out in the paper that while this is a good over-arching principle, unfortunately, what it doesn't do is then tell us *how* exactly we go and work out when Microsoft is behaving well or badly (or someone else). So that's point one. Point two is on buyer power. I'm quite interested to understand why we would care about buyer power as an anticompetitive harmful behavior if ultimately we didn't think that it would harm consumers. If buyer power wasn't going to harm consumers, is it not just some kind of negotiation problem that firms have in an area that competition policy shouldn't really be intervening in?

STEVE CALKINS: Towards the end of his paper, and he referenced it here, Adrian talks about consumer information and whether or not it's a good thing to have an enforcement agency identifying a problem and finding that if there's, in part, it's caused by a lack of consumer information, and then he asks whether or not a competition authority ought to do something about that. And if I read him correctly, he's expressing a certain amount of concern, hesitation, caution about doing so. And I guess I would just on that one disagree. One of the great joys of the Federal Trade Commission is that it does both competition and consumer protection and advocacy. And I think that unifying those functions makes sense. That's becoming the global model, and I think there's good reason for it. And there may well be times when competition is not working very well, and the right answer is not an antitrust suit but, rather, it is something else. It may be that looking at the mortgage markets and deciding that consumers are not getting useful information in a timely fashion, you get everything in the whole world at closing when it's too late to do any good. And perhaps we ought to change the rules so that people will actually have competition working for them. It's taking a look at the world of patents and deciding maybe the problem is not antitrust laws but it's a patent problem and trying to do something about that. It's looking at airline business and trying to change the way that gates are allocated so that entry becomes more easy. And I guess I would think that, indeed, a good agency, whether you call it a competition agency or a broader name for an agency, ought to be thinking about a variety of tools to address ways that competition is not working as well as it should.

PHILIP MARSDEN: Thank you. You know, Spencer's got this great paper which some of you may have seen which discusses the idea of Chicago School as being a virus, and that while Europe cannot completely inoculate itself against this virus it at least resistant to this virus.[6] One of the reasons why it may be so resistant is that—the idea of competition as a process rather than having to go through all the rigmarole of proving consumer harm. A large part of what may be

[6] Spencer Weber Waller, *The Chicago School Virus* (2007), *available at* http://ssrn.com/abstract=1017882.

motivating that is the fact that protecting competition as a process is more easily administrable. You just look at market share. You just look at the number of competitors. You look at some conduct, you just say that's harming entry, and you just act on that. That's something that you see the German, the Norwegian, the Austrian authorities doing in many cases. It's just easier and it's quicker. And if we're going to have an 'American' explanation of this enforcement stance the argument they use is that we need to act, otherwise there will be no competition, so we just act. And the intention may be price-raising and inefficient short-term, but we hope it's efficient long-term. So besides the fact that substantively they focus on a slightly different theory of harm in Europe, it's also just that from a procedural point of view, they want to act and act quickly. Its competition policy by the precautionary principle, competition policy as a prophylactic.

SPENCER WALLER: I want to pick up on a thread that I think was started by Bert, which is, of course, where do we start, to a large extent, determines where you end up. And if you start with the Chicago School paradigm, you end up in a certain place; and if you start with a protective process of competition, you may end up in a slightly different place. I want to pick up on another starting point, because it's a legitimate, historical starting place for this area of the law, which is that competition law is a conscious commitment to the control of corporate power. That is the historical basis that got this whole body of law started. It is the insight that goes way back before the passage of the Sherman Act or the Canadian Combines Act. It goes back to our constitutional founding, that power is corrosive in a variety of political and economic ways, and that in the same sense that physics teaches us, that the gravitational force of mass increases exponentially as the mass density, so does power.

That's why a firm that has 50 percent market share has just measurably more effect on the market than one that has 10 percent. When you're pushing 70, 80, 90, you're approaching what physicists might describe as a black hole, where it's a market that cannot sustain itself, it will just collapse into that. If that's true, then whether or not you end up in the same place as Learned Hand did in the *Alcoa*[7] case, you certainly would have to agree with the idea that no monopolist monopolizes unconscious of what they're doing, because once you're

[7] United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416 (2nd Cir. 1945).

at that place, that's just what you do. A company that dominates a market simply behaves in a way that is corrosive in a variety of contexts: Politically, economically, to a process of competition, to the future development of choices and options that ultimately would benefit consumers, assuming they actually ever came to pass. And so I think it's an important starting place. But that in no way eliminates the problem that Steve talks about. Because if you're going to recognize that the problem is power and that power is structure, to some extent, we're going back to a paradigm of structure conduct, performance, at least in this area, that has fallen out of favor. Then you ought to be quite sure about how you measure this before you either do the European approach of saying you're dominant at a much lower level, and then you have these special responsibilities; or as we've done in the past, create various presumptions again upon the proof of power, not the present approach at all. But if you're going to go anywhere near that approach and focus on the corrosive effects of power, you ought to be awfully sure that you're dealing with a firm of that nature.

PHILIP MARSDEN: It is amazing to me, and I think we've alluded to this earlier, that we've got so far in the history of competition law without actually being able to work out which of these various objectives should predominate. And, of course, the courts have not given us very much guidance at all. We've got the Supreme Court of the United States in *Trinko*, with the dicta from Justice Scalia that monopoly power is not necessarily a bad thing, and then we've got the European Court of Justice, consistently disagreeing with that approach So what guidance for the rest of the world? And I go back to the administrability point that I mentioned, that I could see other authorities saying, well, one's a very easy standard to administer. Let's just adopt that. Let's intervene without having to do all the maths of even a structured rule of reason. And that's one of the reasons why many of these other countries have ended up adopting the European standard, though I appreciate that they've been convinced to do so through use of trade treaties as well.

JOSEPH BAUER: I want to respond to some things that Steve, Bert, and Peter said, as well as some of the things that Adrian said. I'm certainly sympathetic to what Steve said, that we need to be more attentive to, concerned about, and vigilant about monopolies. The principle that we all recognize, and Christopher Leslie talked about that a lot, is the concern about false positives.

We hear arguments that certain monopolies are natural monopolies, and that as an economic proposition they benefit the consumer, and so we need to be sensitive to that concern. Going back to some things we were saying in the earlier session: Why should we treat monopoly less vigilantly than we treat cartels? That was Bert's point.

There's the learning that goes all the way back to the *Addyston Pipe*[8] case: the distinction between naked restraints and ancillary restraints. Cartels are, for the most part, naked restraints. There's no benefit to competition, there's no benefit to the consumers, from cartels. But there certainly are arguments, and I'll use the word that Justice Souter used seven times in the *California Dental*[9] case, plausible arguments, for saying that monopolies can be efficient, and that monopolies can enhance consumer welfare. If we don't at least recognize the power of that argument, we will not be as successful in responding.

Another concern is that—this is what Simon Baker was talking about—to the extent that we are more vigilant about challenging monopoly behavior or the behavior of large firms, those firms may fear that if they engage in certain behavior that will further enhance their market share, the enforcement authorities are then even more likely to come down on their heads. The argument that was made back in the '60s, and, consider the irony today, that General Motors allegedly pulled back because had they continued to be as efficient as they were then, that would have made it more likely that the Department of Justice would have challenged their market position.

Another point that Christopher Leslie made is the fact is that some monopolies do degenerate. Think of the two major challenges brought in 1968 by the Justice Department, against AT&T and IBM,. And, look at their market positions now. Think about another challenge that the Department of Justice brought, I think it was in the '80s, against Kodak and its film monopoly. Look at where they are today. So, while certainly not all monopolies are fragile, many of them are. And at least, again, we, as a group that is, as Spencer calls us, the other Chicago School, need to be responsive to the argument that the folks about six miles south would make, about the alleged fragility of monopolies.

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8 Addyston Pipe and Steel Co. v. United States, 85 F. 271 (6th Cir. 1898), modif'd and aff'd, 175 U.S. 211 (1899).

9 California Dental Ass'n v. FTC, 526 U.S. 756 (1999).

Next, Bert talked about some of the other things that the antitrust laws might do and how they might promote social welfare. Remember that in *Alcoa,* Judge Learned Hand talked about the fact that the antitrust laws have political and social goals as well as economic goals.

That had a certain resonance in 1945. I suspect it would have less resonance today, where the mantra is "consumer welfare," and then "consumer welfare," and then more "consumer welfare." And if it doesn't advance consumer welfare, then the antitrust laws don't have a meaningful role.

So finally, with respect to Peter's and Adrian's point about assessing consumer harm. I think we need to be more sophisticated than simply asking whether the consumer pays more or less as a result of the behavior under scrutiny. We also need to recognize that consumers are concerned about quality, consumers are concerned about choice. Those are less easily assessable and measurable.

DAVID GERBER: Just a quick point, analytically. When we talk about this question of protecting the competitive process and how it relates to economic categories, economists tend to treat process protection issues as dynamic efficiency issues. I'm not quite sure they're the same thing. There's a different language involved, but there's also different content behind it. And the methods by which you would talk about and apply the dynamic efficiency standard are not the same as those that have been used in analyzing harm to the competitive process. I think it's a point where there's some real potential value in more careful analysis.

ANDRE FIEBIG: In my view, the consumer welfare standard is are sufficiently relative to lead to differences between the United States and Europe. In other words, both legal systems can employ the same abstract standard and come to entirely different results which are internally and perhaps even objectively consistent. What does it mean to protect the consumer? In the United States, we tend to think that we are promoting consumer welfare by maintaining competition at a level which results in low prices. But in Europe, the long-term interests of the consumers may not be low prices. One topic of discussion in Europe is whether the rise of low-cost airlines is in the long-term interests of consumers. On the one hand, the low-cost airlines have certainly driven down the prices of air travel. However, the increased consumption of air travel has led to an increase in pollution.

Another fundamental difference is that Europeans place much more trust in government agencies to make the right decisions than we do here in the United States. In the United States, antitrust tends to be driven by the judicial system. But is an unelected judge in the position to determine what is in the best interests of the consumer? What is the standard of consumer welfare the judge is applying? A European would probably say that a holistic approach to consumer welfare is more appropriate and that government institutions are best situated to apply this standard. In this regard, I agree with the observations made earlier by David Braun.

CHRISTOPHER LESLIE: It seems to me a large part of the problem is just our over-reliance on economic models, that different people mean different things by consumer welfare. I think Adrian's paper does a really good job of teasing it out and showing how some people misuse the concept of consumer welfare. But consumer welfare has to include more than just price effects. It has to include innovation, quality, and choice. These are all elements of consumer welfare. On the value of consumers having choice, Bob Lande's[10] work is very good. I think it's great that Adrian is honest and says you have to balance off the price competition against other forms of competition and other interests. But the problem still remains, in my mind, that this static price analysis appears to be so precise. It gives this illusion of a precise quantifiable answer that you can see on a graph. But there's just no way that you can easily put quality, innovation, and consumer choice on that graph. Even when you try to have a balance between these two things, our natural bias is to give more weight to the thing that looks measurable.

I think that what we need to do in competition law is ween ourselves off of this over-reliance on the price-quantity graph just because that's the easiest thing to look at. We must acknowledge that that's only the starting point and that it can't measure all of these other components of consumer welfare that are so important. I think that a healthy skepticism when you see the price quantity graph would do a lot to help us down the road of looking at consumer welfare more

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[10] Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503 (2001).

appropriately and realizing that that graph can't incorporate everything we need to.

PHILIP MARSDEN: One of the things that we see in Europe is that the authorities and courts are very good at referring in their press releases and case summaries to the fact that the consumer welfare harm they're concerned about is one relating to choice. But they just don't describe it with a few more paragraphs that you kind of need to be able to tell that story, since by definition you're not going to be able to measure it, and, therefore, they open themselves up to all sorts of critiques that way.

STEVE SHADOWEN: Spencer has raised Congress' original idea of controlling the power of corporations, so I'll go the whole hog and raise the equally old idea of who gets to do the controlling. Congress' original idea was that juries, not judges, would make these decisions. For example, we hear a lot of talk about false positives. Every time I hear someone from the Chicago School say, well, we're not going to intervene because we're worried about false positives, I really want to stop them and point out that a decision not to intervene in the market because of a concern about false positives is the clearest kind of political decision. It is a decision that should be made by juries – not judges.

A judge who prohibits antitrust intervention because of a concern about false positives is deciding that the market is more likely to get this right than is the government. That is a pure, core political judgment, in the sense that it is informed principally by life experience and "faith" – faith in government or faith in markets – and not by discrete data or evidence. What makes a judge's judgment in such a circumstance any more compelling or legitimate than that of 12 other citizens? Why isn't that a decision for a jury?

Another instance in which jurors and judges may decide things differently is in balancing as between static efficiency and dynamic efficiency. Your answer to the question of whether low prices now are more important than *possibly* affecting innovation in the future is going to depend a lot on who you are. Are you somebody in the lower quartile of income in this country, as many jurors are, or are you in the top quartile, as all federal judges are? The way that Congress originally set this up, juries, not judges, were supposed to make these sorts of decisions.

MAURICE STUCKE: On the issue of who chooses, some view economics as a positive science that immunizes antitrust from political pressures. In fact, some warn of the dangers of introducing normative political judgments into competition policy. This is because competition authorities are ill-equipped to deal with the difficult and politicized task of weighing incompatible non-economic goals. Also non-economic goals create uncertainty and ambiguities in the competition regime. They advocate instead for a single economic goal for competition policy. By limiting the goals of antitrust to narrow economic principles such as maximizing consumer welfare, we shall immunize antitrust from these political pressures. You can first question that assumption. Once we move from a regime of zero transaction costs to one with positive transaction costs, then, as Coase noted, the legal system becomes very important.[11] Any competition policy in a world with transaction costs is built upon normative judgments. Normative judgments affect the distribution of assets, and the creation, assignment, limitation, and protection of property rights. So you cannot divorce competition policy from political judgments.

My other point is do we view competition either as a process or as an end itself? Toward what end are we striving? If competition is a process to secure a greater end, then the ranking of that end among many ends ultimately represents a normative judgment. Whether the ultimate end of competition policy is promoting allocative efficiency, consumer welfare, total welfare or some other end, you invariably will have conflicting goals, and thus political compromise as to the ranking of those goals. Politics will come into play whenever you have these trade-offs. You can't have your cake and eat it too. Sometimes consumers might want lower prices, while workers want to have their jobs protected, and small and medium-sized enterprises want the opportunity to compete, So I wonder if it's disingenuous to view antitrust as somehow immune from the political rankings of those goals. Ultimately then who should do the ranking? Should it be the jury? Should it be the legislature or should it be the Supreme Court? I'll leave it at that.

PHILIP MARSDEN: Thank you. It's a very good point, because in Europe, if you are going to make these obviously political choices and if you are in a situation where it's less reliant on juries and judges

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[11] R.H. Coase, *The Institutional Structure of Production*, 82 AM. ECON. REV. 713, 717 (1992).

and more reliant on administrators, then perhaps the administrators in their decision making should make their theory of harm much more clear in their decisions by telling a credible story setting out the evidence and being upfront and saying, look, we're making this choice because we're concerned about concentration in the industry.

SPENCER WALLER: Can I just jump in for one quick second, which is, another topic that could have been its own panel, it's actually what's starting to develop here, which is the notion of who decides, which institutions decide. And whenever I hear that question, first of all, I think it's the right question. And I also think of the work of Peter Carstensen's colleague, Neil Komesar, who writes about comparative institutional analysis where the focus is not whether there's a false positive, because every institution gets stuff wrong, everybody makes errors in different ways. The questions is, who does it better, not whether there is a potential for a mistake.

RICHARD CUDAHY: Spencer has enunciated what I call the Lord Acton School of Antitrust Law, "Power corrupts and absolute power corrupts absolutely." And I think in terms of history, of course, I think when the Sherman Act was written, they were concerned about bigness, weren't they? That was an evil. I don't think they ever heard of consumer welfare in those days. But that developed, I think, as the economists took over and the Chicago School weighed in. And I know a little bit about the Chicago School. I have to deal with them every day. I think the point about juries is that courts work differently in this country than they do in Europe. But the judges, you know, have a lot more power in this country than they have in Europe, generally, in terms of, you know, in the concept of declaring legislation unconstitutional and in a lot of other things. I think the role of courts, in general, is to assume a lot of prerogatives that they don't have in Europe. And I think that's part of the picture here with antitrust. Somebody talked about the Supreme Court as the final arbiter, and the Supreme Court, of course, decides political questions, basically, including some of these antitrust questions. So you get a lot of differences between the institutions in Europe and here that I think have application to antitrust, but I don't think it's much different than a lot of other things in the big picture as between courts in the two places.