

Fall 2006

Always Low Prices, Always at a Cost: A Call to Arms Against the Wal-Martization of America, 40 J. Marshall L. Rev. 267 (2006)

Justin R. Watkins

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Antitrust and Trade Regulation Commons](#), [Business Organizations Law Commons](#), [Commercial Law Commons](#), [Consumer Protection Law Commons](#), [Courts Commons](#), [Judges Commons](#), and the [Legislation Commons](#)

Recommended Citation

Justin R. Watkins, Always Low Prices, Always at a Cost: A Call to Arms Against the Wal-Martization of America, 40 J. Marshall L. Rev. 267 (2006)

<https://repository.law.uic.edu/lawreview/vol40/iss1/6>

This Comments is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

ALWAYS LOW PRICES, ALWAYS AT A COST: A CALL TO ARMS AGAINST THE WAL-MARTIZATION OF AMERICA

JUSTIN R. WATKINS*

*Bigness is no crime, although "size is itself an earmark of monopoly power. For size carries with it an opportunity for abuse."*¹

INTRODUCTION

Every thirty-six hours Wal-Mart, Inc. rolls out the red carpet for a brand new Wal-Mart Supercenter,² the combination retail/grocery store that has become the cornerstone of shopping centers across the nation.³ By the end of January 2005, there were 1713 of these goliaths⁴ nationwide.⁵ However, that is only half the

* The author dedicates this article to his loving wife, Haley B. Watkins, for providing the constant support and encouragement without which the article would not have been possible, and to his parents Debra A. Anderssen and Mark R. Watkins for teaching him that through hard work and perseverance it is possible to prevail against even great odds.

1. *United States v. N.Y. Great Atl. & Pac. Tea Co.*, 173 F.2d 79, 87 (7th Cir. 1949) (quoting *United States v. Paramount Pictures*, 334 U.S. 131, 174 (1948)).

2. See WAL-MART, 2005 ANNUAL REPORT 17, available at <http://www.walmartstores.com/Files/2005AnnualReport.pdf> [hereinafter WAL-MART 2005] (indicating that Wal-Mart, Inc. opened 242 new Supercenters in FY 2005, or approximately one new Supercenter every thirty-six hours). Journalist John Dicker estimates the rate is one new Supercenter every thirty-eight hours. JOHN DICKER, *THE UNITED STATES OF WAL-MART 2* (2005). However, Dicker relied on information gleaned from Wal-Mart, Inc.'s Annual Report for 2004 and his rate is therefore slightly dated. *Id.* at 2 n.1.

3. Only five states in the Union can boast of the absence of a Supercenter within their borders: Alaska, Hawaii, New Jersey, North Dakota and Vermont. WAL-MART 2005, *supra* note 2, at 53. However, there are thirty-four states with more than ten Supercenters, twenty-eight with more than twenty, and fourteen with more than fifty. *Id.* Texas takes the cake with an incredible 219 Supercenters statewide. *Id.*

4. Each Supercenter demands about 187,000 square feet of space in order to conduct operations. WAL-MART, 2004 ANNUAL REPORT 18, available at http://www.walmartstores.com/Files/annualreport_2004.pdf [hereinafter WAL-MART 2004]. Notably, the Wal-Mart Supercenter is about twice the size of the vintage Wal-Mart Discount Store, which averages a comparatively modest 98,000 square feet. *Id.*

5. WAL-MART 2005, *supra* note 2.

story — or rather, less than half. As of 2005, Wal-Mart, Inc. operates 1353 discount stores, 551 Sam's Clubs and 85 Neighborhood Markets along with the 1713 Supercenters nationwide, for a grand total of 3702 stores rolling back prices on a daily basis.⁶ These numbers equate to an extremely powerful position within the United States retail and grocery markets, a position fraught with opportunity for abuse.

Recently, the Great Atlantic & Pacific Tea Company ("A&P") has been graced by one commentator with the honorary title of "the Wal-Mart of its day."⁷ Such a reference is indicative of the level of historical prominence to which Wal-Mart, Inc. has risen.⁸ Unfortunately for Wal-Mart, Inc., this does not present an occasion for celebration. The success A&P realized during the early half of the 20th century⁹ and, more importantly, the manner in which A&P realized that success, had serious consequences — namely, a damaging antitrust lawsuit in the latter part of the 1940s.¹⁰

This comment will explore the powerful position Wal-Mart, Inc. occupies within the United States' retail and grocery markets and the consequences emerging from the abuse of that position. Part I discusses Wal-Mart, Inc. — past, present, and future. Part II provides a brief overview of the history and present state of antitrust jurisprudence in the United States. Part III engages in a cost-benefit analysis of the powerful position occupied by Wal-Mart, Inc., scrutinizing the social costs and social benefits under the competing conceptions of antitrust jurisprudence. Finally, Part IV proposes that Wal-Mart, Inc. is the modern manifestation of the fears underlying the principles embodied in the Sherman

6. *Id.* at 53. Wal-Mart, Inc. also operates 1587 international stores. *Id.*

7. DICKER, *supra* note 2, at 161; see also Steve Lohr, *Is Wal-Mart Good for America?*, N.Y. TIMES, Dec. 7, 2003, at 1 (referring to A&P as "the Wal-Mart of its time"); Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 1011, 1087-89 (2005) (noting similarities between public sentiment toward Wal-Mart, Inc. today, and toward A&P in the 1920s and 1930s).

8. See Anthony Bianco & Wendy Zellner, *Is Wal-Mart Too Powerful?*, BUS. WK., Oct. 6, 2003, at 100 (asserting that Wal-Mart, Inc. is bigger than any retailer has ever been); Steven Greenhouse, *Wal-Mart, a Nation Unto Itself*, N.Y. TIMES, Apr. 17, 2004, at 7 (declaring that the reach and influence of Wal-Mart, Inc. is greater than that of any other retailer in history).

9. See DICKER, *supra* note 2, at 161 (noting that by the mid-20th century "[A&P] had become the largest retailer in the world, bested only by General Motors as the nation's largest corporation").

10. *United States v. N.Y. Great Atl. & Pac. Tea Co.*, 67 F. Supp. 626 (1946), *aff'd* 173 F.2d 79 (7th Cir. 1949); *N.Y. Great Atl. & Pac. Tea Co.*, 173 F.2d 79. *But cf.* ROBERT S. TEDLOW, *NEW AND IMPROVED: THE STORY OF MASS MARKETING IN AMERICA* 224-25 (1990) (noting that even though the antitrust litigation against A&P had the potential to utterly destroy it, A&P walked away from the litigation largely intact, entering into a consent decree with the more congenial Eisenhower administration in 1954).

Antitrust Act, and accordingly, should be held accountable for violation of the antitrust law. This comment insists that in order to avoid the Wal-Martization of America, both antitrust scholars and courts must adopt an antitrust jurisprudence that recognizes the important role non-economic values played in the passage of the Sherman Antitrust Act.

I. WAL-MART, INC. – PAST, PRESENT, AND FUTURE

A. *The Birth of the Bentonville Behemoth*

The first “Wal-Mart” opened in Rogers, Arkansas in 1962.¹¹ However, Wal-Mart’s creator Sam Walton laid the foundation for Wal-Mart, Inc. seventeen years earlier in nearby Newport, Arkansas with the success of a novel concept applied to the sale of panties:¹² “Buy low, sell low, and as a result sell more.”¹³ Though it was unclear at the time how fundamental this concept would later become to the daily operations of Wal-Mart, Inc.,¹⁴ the success it achieved with the sale of panties planted the seed for what has become the maxim of Wal-Mart, Inc. – “Always Low Prices. Always.”¹⁵

In 1945, Sam Walton, creator of Wal-Mart, Inc., became the proprietor of a Ben Franklin five-and-dime franchise owned by the Chicago-based Butler Brother’s¹⁶ in the town of Newport.¹⁷ From

11. SAM WALTON WITH JOHN HUEY, *Sam Walton: MADE IN AMERICA* 57-58 (Bantam Books 1993) (1992); DICKER, *supra* note 2, at 43; Walmartstores.com, *The Story of Wal-Mart*, <http://www.walmartstores.com> (follow “Our Company” hyperlink; then follow “Student Research Information” hyperlink; then follow “The Story of Wal-Mart” hyperlink) (last visited Sept. 23, 2006).

12. See WALTON WITH HUEY, *supra* note 11, at 32. (“If you’re interested in ‘how Wal-Mart did it,’ this is one story you’ve got to sit up and pay close attention to.”); see also DICKER, *supra* note 2, at 34 (stating that “Panty-ology” was merely the first success on the road to the mantra of the Wal-Mart, Inc. business strategy “Everyday Low Prices”).

13. DICKER, *supra* note 2, at 34. As Walton explains, “say [a businessman buys] an item for 80 cents. [He finds] that by pricing it at \$1.00 [he can] sell three times more of it than by pricing it at \$1.20. [He] might make only half the profit per item, but because [he is] selling three times as many, the overall profit was much greater. Simple enough.” WALTON WITH HUEY, *supra* note 11, at 32-33. Another successful Arkansan might have put it more directly, “It’s the volume, stupid.” DICKER, *supra* note 2, at 34.

14. See WALTON WITH HUEY, *supra* note 11, at 32 (averring that it was Walton’s experiment with panties that first got Walton thinking along the lines of what eventually became the foundation of Wal-Mart, Inc.’s philosophy); DICKER, *supra* note 2, at 34 (suggesting that though Walton had no idea how powerful this concept would become, the seed had been sown).

15. This mantra, or a variation, is likely to be seen on the façade of every Wal-Mart Discount Store and Supercenter, every price tag, sale sign, banner, receipt, and nearly anything else boasting the Wal-Mart logo.

16. See DICKER, *supra* note 2, at 33 (reporting that the Ben Franklin chain was a rapidly growing franchise store in the postwar era that carried a variety

the outset, Walton chafed at corporate policy,¹⁸ defying it whenever possible¹⁹ and implementing his own ideas. Chief among these ideas was cutting deals directly with small wholesalers in order to undercut the prices offered through the warehouses of Walton's corporate sponsor.²⁰ It was this ruse which led to Walton's panty experiment. Seeking the best deal, Walton arranged for the supply of satin, elastic-waist panties at two dollars a dozen, fifty cents less than he was paying Butler Brother's.²¹ Cheap panties in hand, Walton undercut the Butler Brother's price of three for a dollar with a steal at four for a dollar.²² Needless to say, panties sold at a premium.²³ As the volume of panty sales rose, so did profits, profits that would not have been realized but for the low prices.²⁴ In short, if Wal-Mart were a religion, Book II of the Bible of Wal-Martology would open

of low-priced goods — from toys and games to health and beauty supplies — and was a staple of southern and mid-western towns in 1945).

17. WALTON WITH HUEY, *supra* note 11, at 29; DICKER, *supra* note 2, at 33.

18. Butler Brothers required all Ben Franklin operators to purchase eighty percent of their stock directly from the company. DICKER, *supra* note 2, at 34. Moreover, Butler Brothers left very little to the discretion of the operator, dictating "what merchandise to sell, how much to sell it for, and how much they would sell it to [the operator] for." WALTON WITH HUEY, *supra* note 11, at 30. Butler Brothers wanted operators to do things by the book; they had their own accounting system and provided manuals to operators telling them what to do. Operators had merchandise statements, accounts-payable sheets, profit-and-loss sheets, ledger books used to compare the current year's sales with the last year's sales on a day to day basis — everything an independent operator needed. *Id.*

19. See WALTON WITH HUEY, *supra* note 11, at 31 (asserting that at the very beginning, Walton ran the store by the book, but that it did not take him long to start experimenting — it was in his nature); see also *id.* at 61 (declaring that in contrast to some of Walton's other core values — church, family, civic leadership and politics — where he was a self-proclaimed "pretty conservative guy," when it came to business, he was "driven to buck the system").

20. See WALTON WITH HUEY, *supra* note 11, at 31 (noting that Walton would haggle with manufacturers, telling them he wanted to buy from them directly and avoid paying Butler Brothers twenty-five percent more for the same goods). Walton went to great lengths to cut the deal, often crossing the state line and traveling into Tennessee, only to return with a car and trailer stuffed with whatever goods he could find for a deal. *Id.*; DICKER, *supra* note 2, at 34-35.

21. WALTON WITH HUEY, *supra* note 11, at 32.

22. *Id.*; DICKER, *supra* note 2, at 34.

23. See DICKER, *supra* note 2, at 34 (averring that the panties "flew out the door").

24. *Id.*; see also WALTON WITH HUEY, *supra* note 11, at 33 (proclaiming that a retailer earns far more profit by selling an item at a cheap price, than by selling it at a higher price as a consequence of the increased volume of sales the cheaper price stimulates).

with, “Low prices begat increased Sales, increased Sales begat Profits . . .”²⁵ and increased profits begat expansion.

Expansion, however, would not spring from Newport. After losing the lease on his Newport Ben Franklin store,²⁶ Walton sought to ply his business acumen elsewhere: enter Bentonville, Arkansas.²⁷ “Walton’s 5¢ and 10¢”²⁸ became a laboratory for more experiments.²⁹ Most important to the future of Walton’s business endeavors — and frankly, to the future of retail — was self-service.³⁰ Having gleaned the idea off two Ben Franklin stores in Minnesota,³¹ Walton successfully employed it in his Bentonville operation.³² By the mid-fifties, Walton was deploying his proven business skills across the state of Arkansas, opening Ben Franklin

25. See DICKER, *supra* note 2, at 34 (stating that “volume begat profits”). The opening of Book I might read: First Sam made profits from low prices, and Sam saw that the profits were good. Then Sam said “Let there be a place where the consumer can find low prices everyday,” and there was such a place, and Sam called it Wal-Mart.

26. The success of Walton’s Ben Franklin franchise raised a lot of eyebrows, particularly those of Walton’s landlord. Impressed with the success of the store and knowing that there was nowhere else in Newport to move the store, Walton’s landlord decided not to renew the lease on the property where the Ben Franklin was located, deciding to give the store to his son instead. WALTON WITH HUEY, *supra* note 11, at 38.

27. See WALTON WITH HUEY, *supra* note 11, at 40-41 (noting that the loss of the Ben Franklin was probably a blessing, giving Walton a chance for a new start, and that Bentonville was the right place for Walton to prove that he could succeed all over again).

28. “Walton’s 5¢ and 10¢” is now a museum devoted to Wal-Mart, Inc., and is one of the only businesses that remains open in Bentonville’s town square. DICKER, *supra* note 2, at 41.

29. *Id.* at 42. It might be more appropriate to refer to his “experiments” as “bootlegged concepts,” many of them having been merely plagiarized from other retailers. *Id.* at 41; see also *infra* text accompanying notes 57-58. Walton himself preferred they be called “borrowed” ideas. WALTON WITH HUEY, *supra* note 11, at 102. Either way, “[Walton] was like that kid in class who always had the latest toy a good month before anyone had even heard of it.” DICKER, *supra* note 2, at 42.

30. In the 1950s, retail stores used clerks to serve customers directly, pulling requested merchandise off shelves behind long counters, similar to the remaining vestige of this practice found in the jewelry and cosmetic sections of modern department stores. DICKER, *supra* note 2, at 42. Employing self-service was indeed a radical move in the 1950s — when Walton did so at his Bentonville store — it became only the third self-service store of its kind in the whole country. WALTON WITH HUEY, *supra* note 11, at 43.

31. After reading an article about the brand new concept introduced by the two Ben Franklins in Minnesota, Walton hopped a bus and made the 600-mile trek north to Minnesota to check it out for himself. DICKER, *supra* note 2, at 42. Liking what he saw, he decided to deploy the concept at his Bentonville store. WALTON WITH HUEY, *supra* note 11, at 42.

32. See WALTON WITH HUEY, *supra* note 11, at 43 (“The [customers] turned out, and they kept coming . . . [T]hat store took off just like Newport had and turned into a good business right away.”).

stores in Little Rock, Siloam Springs, and Fayetteville.³³ By 1960, Walton's Ben Franklin operation had grown to fifteen stores across Arkansas and neighboring Kansas.³⁴ Then, a red letter day in retail: July 2, 1962, Samuel Walton opened Wal-Mart Discount City in Rogers, Arkansas.³⁵ The rest, as they say, is history.

B. From Successful Retailer to Retail Exemplar

From its fifteen acre complex in Bentonville, Arkansas,³⁶ Wal-Mart, Inc. utilizes some of the most advanced technology in the retail market³⁷ combined with the largest private satellite system in the world³⁸ to ensure that operations across all 3702 stores run according to plan.³⁹ For instance, if a Supercenter in Aurora, Colorado finds itself suddenly subjected to unseasonal below-freezing temperatures, techies in Bentonville will ensure that the temperature inside the store does not change;⁴⁰ if an unwelcome customer is peddling a stolen credit card at the seven discount stores in the "Biggest Little State in the Union,"⁴¹ Bentonville will be notified via satellite;⁴² and, if a Supercenter in Valparaiso, Indiana suddenly experiences an influx in the demand for ping pong balls, Bentonville will ensure supply is there to meet

33. DICKER, *supra* note 2, at 42.

34. WALTON WITH HUEY, *supra* note 11, at 52-53. Walton's regional chain of fifteen stores made him Ben Franklin's largest franchisee. DON SODERQUIST, *THE WAL-MART WAY 3* (2005).

35. WALTON WITH HUEY, *supra* note 11, at 57. 1962 was indeed a red-letter year for retail. Not only did Arkansas give birth to Wal-Mart, Inc., but Michigan birthed a chain known as Kmart, Dayton Hudson brought Target to Minnesota, the New York-based Woolworth's debuted Woolco, and in Argentina, the world witnessed the birth of a new kind of beast when France introduced Carrefour, the colossal hybrid grocery/retail store that would be the progenitor of the Wal-Mart Supercenter. DICKER, *supra* note 2, at 43.

36. WALTON WITH HUEY, *supra* note 11, at 114. The Wal-Mart, Inc. complex is becoming the centerpiece of what could be termed a corporate village, as Benton county is now home to hundreds of Wal-Mart, Inc.'s suppliers that have migrated to what has become one of the fastest growing counties in America in order to "service the account." DICKER, *supra* note 2, at 70.

37. See SODERQUIST, *supra* note 34, at 143-45 (reporting that the Wal-Mart, Inc. information database is the largest commercial or private database in the world, storing the information for all Wal-Mart, Inc. systems); DICKER, *supra* note 2, at 69 (suggesting that Wal-Mart, Inc.'s database "contains more data than the entire internet").

38. DICKER, *supra* note 2, at 68.

39. See SODERQUIST, *supra* note 34, at 147 ("The Wal-Mart Information Systems Division [supports] every single department in the company and is the information and communication backbone of virtually all that [Wal-Mart does].").

40. DICKER, *supra* note 2, at 68.

41. WAL-MART 2005, *supra* note 2, at 53.

42. DICKER, *supra* note 2, at 68.

demand.⁴³ Indeed, Wal-Mart, Inc.'s tremendous success in the retail and grocery markets has as much to do with its use of technology as its maniacal devotion to everyday low prices.⁴⁴

In 1977, Wal-Mart, Inc. made a revolutionary commitment to the use of technology to streamline its business.⁴⁵ This commitment took the form of a computer network run through private phone lines that connect the company's stores and distribution centers to a 16,000 square foot nerve center in Bentonville in a continuous loop of sales, payroll information, bank deposits, personnel records, and warehouse inventory.⁴⁶ Eventually, Wal-Mart, Inc. brought nearly all of its suppliers into the system that came to be known as "Electronic Data Interchange" (EDI), tremendously increasing the efficiency of its merchandising operations.⁴⁷

The commitment continued with the debut of "point of sale" scanners at registers in twenty-five stores in 1983, scanners which ring up the price of an item by scanning the little black lines of an Universal Product Code (UPC) affixed to the item.⁴⁸ Moreover, in 1991, Wal-Mart, Inc. developed a software program called "Retail Link," which gives suppliers remote access to the extensive Wal-Mart, Inc. database.⁴⁹ This technology helps Wal-Mart, Inc. tailor merchandising efforts on a store-by-store basis.⁵⁰ This commit-

43. See SODERQUIST, *supra* note 34, at 145 (maintaining that the mass of information contained in the Wal-Mart database permits Wal-Mart, Inc. "to merchandise each store according to the specific needs of the customers who shop in that particular store," and according to seasonal fluctuations unique to each store). Indeed, Wal-Mart, Inc.'s advanced database is capable of meeting a sudden demand for mops in Texas after heavy rains, or for pop-tarts in Florida in preparation for a hurricane — the database can even recognize that men buying diapers after work on Fridays were also taking home six-packs of beer, and accommodate the need accordingly. DICKER, *supra* note 2, at 70.

44. DICKER, *supra* note 2, at 65.

45. *Id.* at 64.

46. *Id.* Today, Wal-Mart, Inc. has done away with the private phone lines, using the internet instead. *Id.* at 65.

47. See SODERQUIST, *supra* note 34, at 143 (stating that the integration of suppliers into EDI has considerably reduced time, errors, and costs by enabling Wal-Mart, Inc. to transmit purchase orders for merchandise directly to the manufacturers, and then receive its confirmation and invoices electronically).

48. DICKER, *supra* note 2, at 67.

49. SODERQUIST, *supra* note 34, at 146.

50. "Retail Link" helps increase efficiency and maximize performance across the Wal-Mart, Inc. world by enabling suppliers to monitor the sales of their items across the nation at varying levels of geographic specificity and over different periods of time. *Id.* Moreover, the system employs thousands of "traits" or variables to map out a profile of all 3702 Wal-Mart, Inc. stores nationwide, which Wal-Mart, Inc. associates, as well as suppliers, can then utilize to merchandise more effectively. DICKER, *supra* note 2, at 69.

ment to technology continues today,⁵¹ and Wal-Mart, Inc. is leading the way in the implementation of radio-frequency identification (RFID),⁵² the same technology that permits drivers to pass through toll-ways without stopping,⁵³ and that has the potential to revolutionize retail in a manner reminiscent to the introduction of the barcode.⁵⁴

In the 1980s, Wal-Mart, Inc. grew in stature from a mere regional chain of 276 stores to a national player with 1528 stores — a period of growth which catapulted sales from \$1.2 to \$26 billion.⁵⁵ There can be little doubt that Wal-Mart, Inc.'s commitment to the use of technology to streamline operations played as much a part in this success as its commitment to everyday low prices. Moreover, by streamlining operations and increasing efficiency, Wal-Mart, Inc. was able to expand operations, moving into markets in desperate need of a Wal-Mart makeover.⁵⁶ In 1983, Wal-Mart, Inc. created a wholesale club division with the opening of the first Sam's Club.⁵⁷ In 1988, Wal-Mart, Inc. dove headlong into the grocery business with the

51. Wal-Mart, Inc. shows no sign of complacency, indeed, it reminds its associates of this everyday at the David Glass Technology Center as they walk into the lobby and read the sign stating: "We must be inventing and implementing faster than the competition is stealing." DICKER, *supra* note 2, at 73.

52. See SODERQUIST, *supra* note 34, at 144 (stating that Wal-Mart, Inc.'s Information Systems Division is "at the forefront of encouraging the retail industry to invest in (RFID)").

53. RFID Journal, *RFID Consumer Applications and Benefits*, <http://www.rfidjournal.com/article/articleview/1332/1/129/> (last visited Dec. 28, 2006).

54. RFID has many potential time-saving and cost-saving applications for retailers, such as: tracking lost or stolen assets, managing inventory, improving supply chain efficiency, and, scanning multiple items or even the contents of entire shopping carts at once during checkout. RFID Journal, *RFID Business Applications*, <http://www.rfidjournal.com/article/articleview/1334/1/129/> (last visited Dec. 28, 2006).

55. DICKER, *supra* note 2, at 73.

56. See *id.* (noting that the spike in food prices in the 1980s, a consequence of the makeup of a grocery market comprised largely of regional chains, could not have been more fortuitous for the grocer in Wal-Mart, Inc., who was able to undercut prices and learn the grocery business simultaneously).

57. WALTON WITH HUEY, *supra* note 11, at 255-56. Sam's Club was also a bootlegged concept, gleaned from Sol Price's "Price Club" operation. *Id.*; see also *supra* note 29 and accompanying text.

introduction of its hybrid grocery/retail store, the Wal-Mart Supercenter.⁵⁸ In 1998, Wal-Mart, Inc. unveiled the Neighborhood Market, a chain with the modest goal of primarily serving the grocery market.⁵⁹ Efficiency has bred expansion, and expansion has bred great success.

Today, Wal-Mart, Inc. is not only the biggest company nationwide in terms of sales,⁶⁰ but it is also the biggest company worldwide by that measure.⁶¹ With close to \$209 billion in domestic sales in 2004,⁶² Wal-Mart, Inc. already controlled nearly ten percent of the United States' retail market.⁶³ Wal-Mart, Inc. is now the nation's largest grocer — commanding nineteen percent of the market share — the nation's largest toy-seller, largest furniture retailer, and the third largest pharmacist.⁶⁴ Wal-Mart, Inc. commands about thirty percent of the U.S. market in household staples such as toothpaste, shampoo, and paper towels; fifteen to twenty percent of all CDs, videos, and DVDs; as well as fifteen percent of all single-copy sales of magazines.⁶⁵ Moreover, with \$285 billion in sales during fiscal year 2005, Wal-Mart, Inc. is more than four times the size of its largest domestic rival Home Depot;⁶⁶ five and a half times the size of Costco;⁶⁷ and six times the size of Target.⁶⁸ In the decades since the first Wal-Mart Discount

59. DICKER, *supra* note 2, at 13.

60. See Lohr, *supra* note 7 (asserting that with \$245 billion in sales in 2002, Wal-Mart, Inc. was the largest corporation in America by that measure). Wal-Mart, Inc. has since increased sales from \$245 billion in 2002 to \$285 billion in 2005. With \$256 billion in sales in Fiscal Year 2004, Wal-Mart, Inc. was already the world's largest company by that measure. *How Big Can It Grow? — Wal-Mart*, ECONOMIST, Apr. 17, 2004 [hereinafter *How Big Can It Grow?*]. In Fiscal Year 2005, Wal-Mart increased that measure by almost \$29 billion. WAL-MART 2005, *supra* note 2, at 11.

61. See Bianco & Zellner, *supra* note 8 (asserting that in terms of sales, Wal-Mart, Inc. was the world's largest company in 2002); see also text accompanying note 60.

62. WAL-MART 2004, *supra* note 4, at 19.

63. *Id.* at 2.

64. Bianco & Zellner, *supra* note 8.

65. *Id.*

66. DICKER, *supra* note 2, at 24. In fiscal year 2004 (ending January 30, 2005), Home Depot did \$73 billion in sales. Home Depot, 2004 ANNUAL REPORT 24, available at http://ir.homedepot.com/downloads/HD_2004_AR.pdf (last visited Dec. 28, 2006).

67. In fiscal year 2004, Costco estimated over \$47 billion in sales, which increased ten percent to nearly \$52 billion in fiscal year 2005. Costco.com, COSTCO WHOLESALE CORPORATION REPORTS AUGUST, FOURTH QUARTER AND FISCAL YEAR 2005 SALES RESULTS, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=83830&p=irol-newsArticle&ID=751438&highlight=> (last visited Dec. 28, 2006).

68. In 2004, Target estimated \$46 billion in sales. Targetcorp.com, 2004 ANNUAL REPORT 37, available at http://targetcorp.com/targetcorp_group/investor-relations/investor-relations.jhtml (follow "Annual Reports" hyperlink;

City opened in Rogers, Arkansas, Wal-Mart, Inc. has become the industry standard — a force to be reckoned with.

C. Wal-Mart, Inc. IS the Future

On the twenty mile stretch of road between Scottsdale and Surprise, Arizona, the future of American retail has arrived. Indeed, on this single stretch of American thoroughfare, the casual observer will notice six giant Wal-Mart, Inc. stores, all doing reasonable business.⁶⁹ However, for this small area in the Valley of the Sun, six Wal-Mart stores are simply not enough and within a few miles south and east of the thoroughfare, shoppers have fourteen more Wal-Mart, Inc. stores at their disposal.⁷⁰ In the words of Wal-Mart, Inc.'s chief financial officer, Tom Schoewe, the area "shows you what can happen."⁷¹

Wal-Mart, Inc. is the future — the future of retail, the future of groceries and, more pointedly, the future of the United States. Wal-Mart, Inc. estimates that the country can handle nearly 4000 more Wal-Mart Supercenters before the market reaches saturation — more than tripling the current number.⁷² The share of the U.S. retail and grocery markets that would shift to Wal-Mart, Inc. as a result of this expansion alone is not clear, but what is clear is that Wal-Mart, Inc. intends to find out.⁷³ More surreptitiously, Wal-Mart, Inc. is expanding into more than just the grocery market,⁷⁴ seeking out footholds in the gasoline,⁷⁵ banking,⁷⁶ car-rental,⁷⁷

then follow "2004 Annual Report" hyperlink) (last visited Dec. 28, 2006).

69. *How Big Can It Grow?*, *supra* note 60.

70. *Id.* The twenty Wal-Mart Superstores in this small area of desert account for less than one-third of the Wal-Mart stores in the Grand Canyon State. Wal-Mart, Inc. operates a total of sixty-seven Wal-Mart stores in Arizona: eighteen Wal-Mart Discount Stores, thirty-three Wal-Mart Supercenters, eleven Sam's Clubs, and five Neighborhood Markets. WAL-MART 2005, *supra* note 2, at 53.

71. *How Big Can It Grow?*, *supra* note 60.

72. WAL-MART 2005, *supra* note 2, at 12.

73. *See id.* (downplaying Wal-Mart, Inc.'s success in order to emphasize how much room the company has to grow both in the U.S. and around the world); *How Big Can It Grow?*, *supra* note 60 (highlighting Wal-Mart, Inc.'s recent establishment of a reputation task-force, introduction of new personnel procedures, hiring of extra lobbyists in Washington, D.C., creation of an office of diversity, and launching of new public-relations and advertising campaigns as actions of a company with no intention of getting smaller).

74. *See supra* notes 58-59 and accompanying text (discussing Wal-Mart, Inc.'s expansion into the grocery market with the introduction of the Supercenter in 1998).

75. *See* DICKER, *supra* note 2, at 12 (reporting that Wal-Mart, Inc.'s parking lots across the nation are now host to hundreds of gas stations generating rents and increased traffic).

76. *See id.* (remarking that Wal-Mart, Inc. stores will cash checks and wire money for consumers at well below the market rate).

77. *See id.* (observing that in Birmingham, Alabama, Budget operates its

MP3,⁷⁸ and caffeine⁷⁹ markets. The United States of Wal-Mart⁸⁰ may not be a forgone conclusion, but it is certainly a potential reality.

II. ANTITRUST LAW — CONFLICTS AND CONTRADICTIONS

A. The Patent and Latent Ambiguity of Sections 1 & 2 of the Sherman Antitrust Act of 1890

Antitrust law in the United States begins and ends with the text of the Sherman Antitrust Act of 1890.⁸¹ Unfortunately, everything in between is left up for debate.⁸² Section one of the Sherman Act proclaims:

Every contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation⁸³

Section two of the Sherman Act proclaims:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation⁸⁴

Thus, the plain language of the Sherman Act makes “every contract, combination . . . , or conspiracy in restraint of trade” a felony, and deems every person who does or seeks to “monopolize” a felon. However, the ambiguous phrases “in restraint of trade” and “monopolize” are left undefined — in essence, the Act defines prohibited conduct without specifying what kind of conduct is

car rental service within the friendly confines of a Wal-Mart, Inc. store).

78. See Walmart.com, Music Downloads, <http://www.walmart.com/catalog/catalog.gsp?cat=4104> (offering 88¢ music downloads on over one million songs) (last visited Dec. 28, 2006).

79. See DICKER, *supra* note 2, at 12 (reporting that in a Wal-Mart, Inc. store in Plano, Texas, customers can have freshly brewed “Kicks Coffee” hand delivered to them in the aisles while they shop).

80. DICKER, *supra* note 2.

81. See HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 48 (2d ed. 1999) (“[T]he Sherman Act . . . has always been the driving force in American antitrust policy.”).

82. See *id.* at 48-49 (stressing that the ambiguous and open-ended language that comprises the legislative history of the Sherman Act is not very helpful in clearing up the ambiguity inherent in the Act itself).

83. 15 U.S.C. § 1 (2000).

84. 15 U.S.C. § 2 (2000).

prohibited.⁸⁵ The judiciary, then, is left with the thankless task of discerning the meaning of these phrases from Congressional intent.⁸⁶

Determining the Congressional intent underlying the Sherman Antitrust Act requires an examination of the Act's legislative history. Though such a task is beyond the scope of this comment, it is not an endeavor that has been left ignored by academia. The pursuit for ultimate Congressional intent has not, however, resulted in uniformity of thought among antitrust jurists. Rather, the search has drawn a line in the proverbial sand between two competing "camps of thought" regarding the proper formulation of Congressional intent.⁸⁷ The first camp is home to those who view allocative efficiency as the exclusive goal of antitrust policy and might aptly be termed the "Efficiency Camp."⁸⁸ The second camp would subordinate efficiency goals to other consumer values and might broadly be termed the "Protectionist Camp."⁸⁹ A brief examination of these

85. HOVENKAMP, *supra* note 81, at 47; *see also* EARL W. KINTNER, AN ANTITRUST PRIMER: A GUIDE TO ANTITRUST AND TRADE REGULATION LAWS FOR BUSINESSMEN 15-16 (2d ed. 1973) (averring that though the Sherman Act clearly sets forth the result it seeks to prevent, it fails to further define the specific types of behavior which are affirmatively forbidden).

86. *See* KINTNER, *supra* note 85, at 15-16 (noting that the task of defining the meaning of the Sherman Act was left to the judiciary, to be resolved on a case-by-case basis).

87. Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1, 1 (1982).

88. *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 90-91 (Free Press 1993) (alleging that the objective of antitrust is to "preserve, improve, and reinforce the powerful economic mechanisms that compel businesses to respond to consumers"); RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 4 (1976) (claiming that the only goal of antitrust law should be the promotion of efficiency).

89. *See* Albert A. Foer & Robert H. Lande, *The Evolution of United States Antitrust Law: The Past Present, and (Possible) Future*, 16 NIHON UNIV. COMPARATIVE L.J. 149 (2004), available at <http://www.antitrustinstitute.org/archives/files/64.pdf>, at 18 (asserting that a proper antitrust policy promotes not only efficiency and innovation, but also seeks to protect consumer choice and prevent consumers from paying artificially high prices; referring to their model as the "consumer protection regime"); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1178 (1980) (rejecting the claim that the exclusive concern of antitrust law should be efficiency as contrary to antitrust jurisprudence); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 96 (1982) (arguing that the principal concern underlying the passage of the Sherman Antitrust Act was preventing unfair transfers of wealth — such as denying consumers the right to competitively priced products — away from consumers by firms with market power); Louis B. Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076, 1076 (1979) (recognizing that a broad range of legislative history instructs against the premise that

two camps will shed some light on the current state of antitrust jurisprudence.⁹⁰

1. The Efficiency Camp

Possibly one of the most influential examinations of the legislative history of the Sherman Antitrust Act was performed by now Judge Bork while he was a professor at Yale Law School.⁹¹ Based on his examination of the Congressional Record, Bork concluded that the sole intent of Congress in enacting the Sherman Antitrust Act was the maximization of “consumer welfare.”⁹² Within the Efficiency Camp, maximizing consumer

efficiency is the exclusive goal of antitrust law and advocates in favor of deference to non-economic goals).

90. Dividing antitrust jurisprudence into two general camps is appropriate insofar as it serves the purpose of presenting a general overview of antitrust thought, however, such a division is not meant to be dispositive of antitrust jurisprudence — indeed, there are several theories regarding the proper formulation of the Congressional intent underlying the Sherman Act which do not find themselves within the confines of the two camps discussed. See WILLIAM F. SHUGHART, II, ANTITRUST POLICY AND INTEREST GROUP POLITICS 11-12 (1990) (discussing the position that the Sherman Act was a victory for the non-consumer interests of farmers). See also generally George L. Stigler, *The Origin of the Sherman Act*, 14 J. LEGAL STUD. 1, 7 (1985) (presenting evidence that the passage of the Sherman Act was influenced, at least in part, by the non-consumer interests of small business).

91. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. ECON. 7 (1966). Bork’s examination was a response to what he perceived as “irresponsibility in the judicial process” hallmarked by the application of non-economic values as a *deus ex machina* for the difficult, but proper application of the economic analysis and judgment the Sherman Act requires. *Id.* at 7-8. The examination was essentially a follow up to a previous article written at a time when Bork “seriously underestimated the clarity of the legislative intent behind the Sherman Act which a closer study of the full record reveals.” *Id.* at 7 n.1. See generally Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 829-47 (1965) (defending consumer welfare as the proper standard for the administration of the Sherman Act).

92. BORK, *supra* note 88, at 7. It is unfortunate that Bork chose to give meaning to ambiguity with a term that itself reeks of ambiguity. At first glance the singular concept of consumer welfare is susceptible to definitions distributive in nature. Indeed, the identification of a particular group as the beneficiary of a policy meant to increase the welfare of that group at the expense of others is essentially distributive. Hovenkamp, *supra* note 87, at 5. However, the concept is also susceptible to conflicting definition as an efficiency goal — a mechanism for improving the welfare of society as a whole. Simply stated, because all members of society are consumers, a policy goal of advancing consumer welfare is in essence an efficiency goal. *Id.*

In order to clarify the matter, Bork later defined consumer welfare as “the wealth of the nation.” BORK, *supra* note 88, at 90. Significantly, by adopting the definition of consumer welfare as an efficiency goal, Bork and others within the “Efficiency Camp” effectively remove consumer welfare from the conflicting realm of distributive justice, an inefficient concept. See *id.* (claiming that antitrust law has nothing to say about the distribution of

welfare is synonymous with the achievement of economic efficiency.⁹³ Economic efficiency is maximized by increasing allocative efficiency⁹⁴ without decreasing productive efficiency⁹⁵ to such an extent that “no gain or a net loss” in the wealth of society results.⁹⁶ According to the Efficiency Camp, the Congressional intent underlying the Sherman Antitrust Act is the maximization

wealth); POSNER, *supra* note 88, at 4 (contending that the protection of small business is the only other goal identified by the legislative history of the Sherman Act, but that such a goal cannot be realized under the principles and procedures of antitrust law).

Yet even clarified as merely a simile for the welfare of society as a whole, the concept of consumer welfare remains couched in ambiguity. This becomes abundantly clear when one considers the reality that consumer welfare frequently is defined by consumer citizens on the basis of different and often conflicting consumer values (such as quality versus low price), inevitably leading to outcomes in which policy decisions improve the welfare of one group of consumers at the expense of others. See Hovenkamp, *supra* note 87, at 5-8 (discussing the inadequacy of the definition of consumer welfare as the wealth of society as a whole). Thus, Bork’s clarification of consumer welfare as the wealth of society as a whole merely begs the question, leaving the concept open to conflicting interpretations.

93. See Hovenkamp, *supra* note 87, at 4 (clarifying that those who claim that the principle goal of the antitrust laws is the maximization of consumer welfare are merely advancing the proposition that the exclusive goal of the antitrust laws should be the promotion of economic efficiency).

94. Allocative efficiency as a concept refers to the arrangement of resources that benefits society the most; thus, it “refers to the welfare of society as a whole.” HOVENKAMP, *supra* note 81, at 74. Scholars do not agree on the proper definition, or rather, the proper arrangement of allocative efficiency. However, for the purposes of this paper, allocative efficiency is best defined in utilitarian terms. Thus, an increase in allocative efficiency occurs when the total value of the gains accruing from a policy decision are greater than the total losses. In economic terms, this is referred to as “potential Pareto-efficiency.” See *id.* at 74-75 (discussing the concept of allocative efficiency as defined by potential Pareto-efficiency, a derivative concept of Pareto-optimality and Pareto-superiority).

95. Productive efficiency, at its most basic, is simply a ratio of a business’ outputs to inputs. For example, a business that produces an output valued at ten dollars from an input valued at eight dollars is more efficient than a business that produces an output valued at ten dollars from an input valued at nine dollars. See HOVENKAMP, *supra* note 81, at 74 (providing an example of a productive efficiency ratio). In order to increase productive efficiency, a business must either increase the value of the product or decrease the cost of production, or both. Increased productive efficiency is generally achieved through research and development. *Id.* at 60-61, 74.

96. See BORK, *supra* note 88, at 91 (“The whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare”); POSNER, *supra* note 88, at 4 (claiming that the consequences of monopoly pricing — the result of artificially reducing productive efficiency to drive price up — provides a prima facie case for antitrust law).

of net efficiency gains.⁹⁷ In essence then, the Congressional intent is utilitarian in nature.

The Efficiency Camp corresponds with what is known as the “Chicago School” model of antitrust policy.⁹⁸ According to the Chicago School, “[a]ntitrust enforcement should be designed in such a way as to penalize conduct” only to the extent that “it is inefficient.”⁹⁹ In general, “markets attain optimal allocative efficiency when . . . price equals marginal cost,”¹⁰⁰ in which case the market is said to be competitive.¹⁰¹ However, the incentive to increase profits inevitably motivates a company to increase productive efficiency through research and development.¹⁰² Increases in a firm’s productive efficiency may lead to reductions in allocative efficiency as the firm increases its market power and price beyond marginal cost, e.g. “monopoly pricing.”¹⁰³ If the reduction in allocative efficiency is greater than the increase in productive efficiency — resulting in a net loss in economic efficiency, or rather, consumer welfare — antitrust law corrects the situation.¹⁰⁴ Conversely, if increases in productive efficiency are greater than decreases in allocative efficiency — resulting in a net efficiency gain — proper antitrust policy would militate against intervention.¹⁰⁵ Such a situation would exist where a firm obtains monopoly power but does not institute monopoly prices; that is, where the efficient firm maintains prices at or near marginal cost.¹⁰⁶ Accordingly, the Sherman Antitrust Act may be read as guarding against inefficiency — conduct is violative of sections one and two of the Act only when inefficiency results.¹⁰⁷

97. Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 226 (1985).

98. *See id.* at 215 (acknowledging that allocative efficiency is the exclusive goal of antitrust law under the Chicago School model of antitrust policy).

99. HOVENKAMP, *supra* note 81, at 62.

100. *Id.* at 61.

101. *Id.*

102. *Id.*

103. *Id.*

104. *See supra* notes 94-96 and associated text.

105. *See* Hovenkamp, *supra* note 97, at 231 (confirming that the Chicago School supports policy initiatives that result in net efficiency gains).

106. *See* Bork, *supra* note 91, at 30 (propounding that monopoly by efficiency is more beneficial to consumers than other policy alternatives, and that breaking up a monopoly by efficiency would impose high costs on the consumer); POSNER, *supra* note 88, at 22 (arguing that where the preservation of monopoly would promote efficiency to the benefit of social welfare, not only should monopoly be tolerated, it should be encouraged).

107. An important aspect of the Chicago School worth noting here is the belief that markets tend to be self-correcting. Where a monopoly exists, as the argument goes, the higher monopoly profits will attract new entrants into the monopolized market, eroding the monopolist’s market power and thus eliminating the monopoly. HOVENKAMP, *supra* note 81, at 61. Accordingly, under the Chicago School model, antitrust merely serves the purpose of

2. The Protectionist Camp

The Chicago School model of antitrust analysis assumed dominance within antitrust jurisprudence during the 1970s and 1980s.¹⁰⁸ Since then, both the model and the Efficiency Camp promoting it have been under attack by those who would subordinate economic efficiency to other non-economic goals.¹⁰⁹ This offensive has been spurned by a refutation of Bork's supposition that the Congressional intent underlying the Sherman Antitrust Act was exclusively the maximization of economic efficiency.¹¹⁰ Contrary to Bork, many antitrust scholars have drawn from the legislative history a multi-valued, "protectionist"

speeding up the process of self-correction. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2 (1984).

108. See HOVENKAMP, *supra* note 81, at 68 (associating the revision of antitrust policy that took place in the 1970s and 1980s with the emergence of the Chicago School as the prevailing economic model of antitrust analysis); see also Foer & Lande, *supra* note 89, at 18 (referring to the antitrust policy prominent in the 1970s and 1980s as the "efficiency regime").

109. See HOVENKAMP, *supra* note 81, at 69 (affirming the growing prevalence of "post-Chicago" theories of antitrust analysis); Hovenkamp, *supra* note 97, at 216 (maintaining that critics of the Chicago School model, not its apologists, assumed the mantle of "cutting edge" within antitrust jurisprudence during the mid-1980s); see also Foer & Lande, *supra* note 89, at 18 (recognizing the need for government action to protect markets in order to facilitate the economic goal of efficiency, as well as the non-economic goals of innovation and consumer choice, while avoiding artificially high prices); Fox, *supra* note 89, at 1180-83 (discarding efficiency as the ultimate goal of antitrust law and presenting it as an intermediate goal utilized to promote other non-efficiency values by serving as a limiting principle, preventing the application of antitrust law in a manner that threatens long-run consumer interests); Lande, *supra* note 89, at 68 (asserting that Congress passed the Sherman Antitrust Act primarily to further objectives of a distributive nature, as opposed to the exclusive promotion of efficiency); Schwartz, *supra* note 89, at 1077 (formulating the contention that the collective message of Congressional legislation following the Sherman Antitrust Act portrays a public interest in favor of small businesses, which must pervade the antitrust laws).

110. Indeed, several antitrust scholars have been quick to point out that even a cursory review of the historical context which inspired the passage of the Sherman Antitrust Act makes it clear that Bork's supposition, at best, stands on tenuous ground. See Hovenkamp, *supra* note 87, at 19 (rebuffing the description of allocative efficiency as the exclusive concern underlying the legislative history of the Sherman Act as an "extraordinarily narrow and unrealistic view of the political process in our congressional system"); Fox, *supra* note 89, at 1154 (evaluating the claim that efficiency is the exclusive goal of antitrust law as "weak at best," and arguing that the basis on which scholars within the Efficiency Camp have rejected non-efficiency values, such as power dispersion, economic opportunity, and competition, cannot withstand scrutiny); Lande, *supra* note 89, at 87-88 (averring that no basis exists whatsoever for the position espoused by those within the Efficiency Camp that Congress was concerned exclusively with the promotion of allocative efficiency).

approach to antitrust enforcement.¹¹¹ Scholars that fall into the Protectionist Camp recognize that efficiency concerns played a role in the passage of the Sherman Antitrust Act,¹¹² but contend that the central concern of Congress was the promotion of other non-economic consumer values¹¹³ such as: preventing unfair transfers of wealth away from consumers,¹¹⁴ protecting small businesses from large competitors,¹¹⁵ curbing the accumulation of social and

111. See generally Fox, *supra* note 89, at 1176-83 (framing the view that efficiency — defined in terms of long run consumer interests — is the central purpose of antitrust law, but that socio-political values generally regarded as non-efficiency goals do not conflict with the promotion of efficiency so defined); Lande, *supra* note 89, at 67-106 (arguing that Congress passed the Sherman Antitrust Act with the intention of subordinating all other concerns to the general concern of protecting consumer interests against incursions from firms with market power); Schwartz, *supra* note 89, at 1078-81 (stressing the importance of congressional adherence to non-economic and non-qualitative goals of justice, procedural fairness, and equal protection under the law in the interpretation of the antitrust laws).

112. See Fox, *supra* note 89, at 1192 (concluding that a proper antitrust policy should give due regard to the promotion of efficiency, but noting that such regard should be tempered by a recognition of the “multivalued, flexible charter” underlying antitrust law); Lande, *supra* note 89, at 105 (admitting it was a central goal of Congress to promote efficiency, particularly when the benefits passed to the consumer, but emphasizing that efficiency concerns alone cannot explain why Congress passed the Sherman Act).

113. See Lande, *supra* note 89, at 105-06 (pointing out that Congress condemned even efficient conduct in favor of non-economic values, and that monopoly conduct was not to be permitted on the mere basis that the monopolist would benefit from efficiency gains).

114. *Id.* at 68. An unfair transfer of wealth occurs when a firm with market power unfairly acquires wealth rightfully entitled to consumers. *Id.* at 70. Specifically, this entails the acquisition by firms of the consumer surplus, the difference between the maximum amount a consumer would pay for a good and the price actually paid. *Id.* at 70 n.18. Professor Lande provides a simple example:

Suppose that widgets are priced at \$2.00, the competitive price. Marginal consumers of widgets would be willing to pay only this amount. Some consumers, however, would particularly desire widgets and willingly pay more — as much as \$3.00. These consumers receive \$1.00 in consumers’ surplus when they purchase the competitively priced widgets. If a monopolist gained control of the widget market and raised the price of widgets to \$3.00, marginal consumers would no longer purchase widgets, and nonmarginal consumers would lost [*sic*] their surplus. The widget monopoly would acquire \$1.00 of monopoly profits at the expense of widget consumers.

Id.

115. See Fox, *supra* note 89, at 1153-54 (maintaining that the interests of entrepreneurs and small businesses alike have been the “heart and lifeblood of American free enterprise,” and have been recurrent throughout the passage of antitrust laws); Lande, *supra* note 89, at 104 (declaring that a desire to maintain an economic environment in which small businesses could survive underlies the passage of the Sherman Act).

political power by large corporations,¹¹⁶ promoting consumer choice,¹¹⁷ and the general promotion of justice in business practices.¹¹⁸ Thus, from within the Protectionist Camp, the Sherman Antitrust Act may be read as subordinating economic efficiency to the generalized concern of preventing firms from directly harming consumer interests¹¹⁹ — conduct violative of sections one and two would include the inefficient conduct condemned by the Chicago School, but would also include efficient conduct that ultimately harms consumer interests more than it benefits consumer interests.

B. The Judicial Camp — Antitrust Law in Flux

In general, the protectionist formulation accords more precisely with the history of antitrust law than the Chicago School formulation.¹²⁰ In fact, “[t]o this day, the Supreme Court has not

116. See Fox, *supra* note 89, at 1153 (declaring that the principle underlying antitrust law is not the exclusive promotion of efficiency, but rather the sustained dispersion of private power, and stressing that “distrust of power is the one central and common ground that over time has unified support for antitrust statutes”); Lande, *supra* note 89, at 106 (confirming that the Sherman Act was a culmination of an effort to restrict the influence of private interests with regard to economic, social, and political decision-making); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979) (insisting that “political values,” such as guarding against the excessive concentration of economic power, enhancing individual and business freedom, and preventing the domination of the economy by a few giant corporations so as to necessitate government intrusion into economic affairs, were meant to play a role in the interpretation of antitrust laws).

117. See Foer & Lande, *supra* note 89, at 18 (maintaining that a proper antitrust policy values markets that provide a range of consumer choices).

118. See Schwartz, *supra* note 89, at 1078 (suggesting that Congressional concern for preserving competition may properly be viewed as a concern for the non-economic goal of “‘justice,’ in the sense of fair and equal treatment of persons in like situations”).

119. Lande, *supra* note 89, at 68-69; Fox, *supra* note 89, at 1190.

120. See, e.g., *United States v. Von's Grocery Co.*, 384 U.S. 270, 274-75, n.7 (1966) (“Throughout the history of [the antitrust] statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve . . . in spite of possible cost, [small business].”) (quoting *United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945)); *Brown Shoe v. United States*, 370 U.S. 294, 344 (1962) (stressing the responsibility of the Court to give effect to the Congressional appreciation that “occasional higher costs and prices might result from the maintenance of fragmented industries and markets” and the decision by Congress to resolve “these competing considerations in favor of decentralization”); *Fashion Originators' Guild of America v. FTC.*, 312 U.S. 457, 467 (1941) (“[A] monopoly contrary to [the] policies [of the Sherman and Clayton Acts] can exist even though a combination may temporarily or even permanently reduce the price of the articles manufactured or sold.”); *Standard Oil Co. v. United States*, 337 U.S. 293, 309 (1949) (stressing that “the theory of the antitrust laws [is] that the long-run advantage of the community depends upon the removal of restraints upon competition” even in the face of greater efficiency and lower costs in the

come close to saying that economic efficiency is the exclusive concern of the antitrust laws”¹²¹ Moreover, in one of the first major Sherman Antitrust Act cases, Chief Justice White declared:

The debates . . . conclusively show . . . that the main cause which led to the [Sherman Act] was the thought that it was required by the economic condition of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.¹²²

Thus, early in the 20th century, the Supreme Court plainly recognized the underlying purpose of the Sherman Antitrust Act as a means to combat the concentration of economic power in the hands of the few. Nevertheless, the antitrust goals regarded as inconsistent today — the primary achievement of economic efficiency versus preventing unfair wealth transfers, preserving small business, curbing the centralization of power, and protecting consumer choice — were historically regarded as complimentary.¹²³ The position that particular goals could only be advanced at the expense of others was notably absent.¹²⁴

short-run); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359 (1933) (“The purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor.”); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 409 (1911) (declining to follow the common law rule permitting resale price maintenance — a contractual agreement between a manufacturer and retailer requiring the resale of a product at a specified price — in favor of a policy recognizing that the “public is entitled to whatever advantage may be derived from competition in the subsequent traffic”).

121. HOVENKAMP, *supra* note 81, at 69; *see also* Lande, *supra* note 89, 67 n.2 (commenting that the Supreme Court has determined that there are a variety of goals underlying the antitrust laws).

122. *Standard Oil Co. v. United States*, 221 U.S. 1, 50 (1911); *see also* *United States v. American Tobacco Co.*, 221 U.S. 106, 179 (1911) (maintaining that the Sherman Act “embraced [the prohibition of] acts or contracts or agreements or combinations which operated to the prejudice of the public interests”).

123. *See* James May, *The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust Policy*, 59 ANTITRUST L.J. 93, 104 (1990) (contrasting current perspectives regarding the conflicting goals of antitrust law with the belief during the formative era that antitrust law “simultaneously could protect economic opportunity, efficiency, competition, fair distribution, and political liberty through a process of largely nondiscretionary adjudication”).

124. William E. Kovacic, *The Sherman Act: The First Century: Comments and Observations*, 59 ANTITRUST L.J. 119, 122 (1990).

Importantly, these considerations are not meant as an endorsement of a history of antitrust law in which economic ideology did not play a role in shaping antitrust adjudication; on the contrary, it is undeniable that economics has played a central role in the course of antitrust law since its inception.¹²⁵ Consequently, the body of antitrust law exhibits a history in flux, constantly adapting to changes in the economic context while more or less reflecting the dominant conceptions of economic theory.¹²⁶ However, the fact that antitrust law has maintained close ties with prevailing economic doctrine does not mean that antitrust law blindly follows prevailing economic doctrine.¹²⁷ Even in the wake of revisions made to antitrust jurisprudence that may be linked to the rise of the Chicago School model of antitrust analysis in the 1970s and 1980s, the Court has not eliminated non-economic concerns from its antitrust analysis.¹²⁸ Accordingly, it might be said that the judiciary maintains a certain degree of independence from economic theory in the formulation of antitrust law, employing prevailing economic theory as a tool in the decision

125. See Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019, 1065 (1989) (stressing the historically close relationship between the antitrust laws and economic policymaking).

126. See Foer & Lande, *supra* note 89, at 16-18 (citing MARC ALLEN EISNER, *Regulatory Politics in Transition* (1993)) (identifying four distinct "regimes" of antitrust jurisprudence that have emerged since the inception of antitrust law in response to changes in the economy and within economic theory and asserting that modern antitrust jurisprudence has entered into a fifth regime as a consequence, in part, of the decline in prominence of the Chicago School).

127. See HOVENKAMP, *supra* note 81, at 59 (noting that antitrust policymakers do not merely toe the economic theory line, Hovenkamp states that policy makers have also "sometimes applied economics ineptly, sometimes gravitat[ing to] the fringes of economic theory rather than the center, and sometimes push[ing] good points too far").

128. See, e.g., *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451, 486 (1992) (reversing summary judgment for Kodak on a claim alleging that the firm had violated section one of the Sherman Act through an unlawful tying arrangement by refusing to sell replacement parts for photocopiers except in connection with in-house repair services even though, as pointed out by the Dissent, Kodak lacked substantial market power, a modern requirement of tie-in law); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (refusing to recognize an unqualified right to refuse to deal with a competitor and affirming a finding of a violation of section two of the Sherman Act where the dominant firm refused to continue to participate in a joint venture preferred by consumers); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) (affirming a finding of a violation of section one of the Sherman Act by a manufacturer based on sufficient evidence of a "common scheme" to set resale prices even though the evidence was consistent with independent pricing behavior). For a discussion of the apparent economic incongruity of these cases see HOVENKAMP, *supra* note 81, at 293-95, 397-99, 460-65.

making process rather than as a formula for making a decision.¹²⁹ The end result, however, is a body of law often as ambiguous as the statutory law it is meant to interpret.¹³⁰

III. THE DARK SIDE OF THE ROLLBACK SMILEY¹³¹

A. *The Cost-Benefit Paradox: A Society at War with Itself*

Consider *Pulp Fiction*, Quentin Tarantino's tale of the interwoven lives of two mob hit men, a boxer, a gangster's wife, and a pair of diner bandits, delivered in four tales of violence, drug abuse, sexual deviance, and redemption.¹³² At BestBuy.com, *Pulp Fiction* may be purchased for \$14.99;¹³³ at Target.com it may be purchased for \$14.99 as well;¹³⁴ but, at Walmart.com, the savvy consumer may acquire the Tarantino classic for the low-low price of \$14.88.¹³⁵ This \$0.11 savings that Wal-Mart, Inc. brings consumers on the purchase of *Pulp Fiction*, though small, is a prime example of the firm's zealous commitment to everyday low prices.¹³⁶ However, this simple example begs the question: how is

129. See HOVENKAMP, *supra* note 81, at 68 ("The public purpose of economics is not to eliminate political concerns from policy making,[but] [r]ather, it is to enable policy makers to make judgments about the costs or effectiveness of a particular policy.").

130. Indeed, the governing "rule of reason" standard adopted by the Court in the *Standard Oil* and *American Tobacco* cases of 1911, and applied thereafter so that only unreasonable restraints of trade would constitute a violation of sections one and two of the Sherman Act, was itself criticized for "render[ing] the Sherman Act too vague and general" and making it difficult to predict the legality of a proposed action. KINTNER, *supra* note 85, at 12 (1973); see also *Standard Oil, Co. v. United States*, 221 U.S. 1, 61-62 (1911) (establishing the rule of reason as the applicable standard for determining whether a violation of sections one or two of the Sherman Act has occurred); *American Tobacco Co.*, 221 U.S. at 178-80 (re-affirming the application of the rule of reason to sections one and two of the Sherman Act).

131. For those unfamiliar with the "Rollback Smiley," the mascot of Wal-Mart, Inc. is a cheerful character bearing a remarkable resemblance to Pac-Man who can be seen rolling back prices throughout the aisles of Wal-Mart, Inc. Discount Stores and Supercenters across the nation. The Rollback Smiley has even been known to dress up in a Zorro costume while performing its daily task of slashing prices for the benefit of the everyday Wal-Mart, Inc. shopper.

132. PULP FICTION (Buena Vista Home Entertainment 2002).

133. BestBuy.com, *Pulp Fiction*, <http://www.bestbuy.com/site/olspage.jsp?skuId=47114189&type=product&id=54497> (last visited Dec. 28, 2006).

134. Target.com, *Pulp Fiction*, http://www.target.com/gp/detail.html/sr=8-7/qid=1130792852/ref=sr_8_7/601-0924831-8455313?%5Fencoding=UTF8&asin=B000068DBC (last visited Dec. 28, 2006).

135. WalMart.com, *Pulp Fiction*, http://www.walmart.com/catalog/product.do?product_id=1875179 (last visited Dec. 28, 2006).

136. Wal-Mart, Inc.'s commitment to everyday low prices can be seen across the entire spectrum of goods available within the confines of the Wal-Mart, Inc. universe; in fact, the average Wal-Mart Supercenter offers prices fourteen percent below those of competitors. Bianco & Zellner, *supra* note 8.

Wal-Mart, Inc. able to pass on the \$0.11 savings to consumers on the cost of a mass market DVD sold at other major retailers who are in direct competition with Wal-Mart, Inc.? The most obvious answer might be that Wal-Mart, Inc. has simply mastered the economics of productive efficiency.¹³⁷ While this answer seems obvious, even logical, it misses the mark, utterly failing to present a complete picture of the many negative externalities flowing from Wal-Mart, Inc.'s presence in the retail and grocery markets.

1. Positive and Negative Externalities

In economic terms, an externality is, at its most basic level, an anti-condition that inevitably flows from the existence of a condition.¹³⁸ For example, the presence of Wal-Mart, Inc. in the retail market, in combination with its commitment to everyday low prices, places pressure on other retailers to cut prices in order to compete, or rather, in order to survive.¹³⁹ Consumers, as a consequence, obtain savings not only from Wal-Mart, Inc.'s everyday low prices, but also from lower prices from Wal-Mart, Inc.'s competitors, prices that would not exist but for Wal-Mart, Inc.'s presence in the retail market. The savings consumers obtain from the lower prices Wal-Mart, Inc. engenders in competitors is an externality; more precisely, a positive externality — a benefit.¹⁴⁰ Since the benefit of lower competitor prices naturally redounds to all consumers, and since all members of society are consumers, this positive externality may logically be termed a social benefit. Combine this with the low prices Wal-Mart, Inc. provides within the confines of its own stores, and the benefit of low prices passed on to consumers is twofold, adding up to incredible savings for the consumer.¹⁴¹

137. Indeed, there can be no doubt that Wal-Mart, Inc. is well adept at increasing productive efficiency, squeezing billions of dollars in cost efficiencies out of its retail supply chain over the years, and passing the resultant savings onto its customers in the form of low prices. *Id.*; see also *supra* Part I.B.

138. Benedict Sheehy, *Corporations and Social Costs: The Wal-Mart Case Study*, 24 J.L. & COM. 1, 17 (2004). Externalities are derived from the logical concept that "the existence of a thing precludes the non-existence of that same thing," a mutually exclusive relationship out of which externalities are created. *Id.*

139. See DICKER, *supra* note 2, at 173 (reporting that the entrance of Wal-Mart, Inc. into a new community reduces competitor prices on everyday items by five to ten percent); Lohr, *supra* note 7 (observing that grocery prices decrease by ten to fifteen percent upon the entrance of Wal-Mart, Inc. into a new community).

140. Sheehy, *supra* note 138, at 17-18.

141. Indeed, it is estimated that Wal-Mart, Inc. alone saved consumers \$20 billion in 2002 — factor in price cuts competitors must make in order to survive, and the total savings in 2002 approach \$100 billion. Bianco & Zellner, *supra* note 8.

The natural compliment of a positive externality is, of course, a negative externality — a cost.¹⁴² As a corollary to the positive externality of lower competitor prices, Wal-Mart, Inc. creates a flood of negative externalities that echo throughout society. Returning to a generalized version of the question presented earlier — how is Wal-Mart, Inc. able to undercut the prices of competitors in direct competition with the firm — a more complete picture of Wal-Mart, Inc.'s version of “mastering the economics of productive efficiency” may now be presented.

2. Negative Externalities and the Supplier Pinch

As a retailer/grocer, Wal-Mart, Inc. operates in both downstream markets, interacting with consumers, and upstream markets, interacting with suppliers. In order to pass savings on to downstream consumers, Wal-Mart, Inc. actively seeks to reduce its upstream costs by demanding lower prices from suppliers and placing enormous pressure on them to drive product costs down.¹⁴³ In reality, Wal-Mart, Inc.'s market power erases any bargaining power suppliers might have when dealing with other buyers.¹⁴⁴ This point cannot be overstated: Wal-Mart, Inc. does not merely demand efficiency from suppliers,¹⁴⁵ Wal-Mart, Inc. *dictates* efficiency, exerting intractable influence over supplier operations, from delivery schedules and inventory levels to product

142. Sheehy, *supra* note 138, at 17.

143. See DICKER, *supra* note 2, at 27 (reporting that Wal-Mart, Inc. places burdensome demands on suppliers, requiring annual “points of improvement” ranging from adding cost efficiencies to making the supply line more efficient to more consistent clothing sizes); Charles Fishman, *The Wal-Mart You Don't Know*, FAST COMPANY, Dec. 2003, at 68, available at <http://www.fastcompany.com/magazine/77/walmart.html> (reporting that Wal-Mart, Inc. will insist that suppliers annually reduce the price of products that are the same from year to year under threat of seeking alternative, lower priced versions from competing suppliers); Bianco & Zellner, *supra* note 8 (reporting that Wal-Mart, Inc. is all about driving the price of a product down). *But cf.* Lohr, *supra* note 7 (pointing out that many analysts feel Wal-Mart, Inc. is merely leading the way in a drive to make suppliers more efficient).

144. Quite pointedly, “the only thing worse than doing business with Wal-Mart [is] not doing business with Wal-Mart” — no laughing matter when 7.5 cents out of every dollar spent in stores across the United States go into Wal-Mart, Inc. registers, thus making a contract with the firm critical for even the largest suppliers. Fishman, *supra* note 143.

145. To be fair, there can be no doubt that Wal-Mart, Inc. does engender efficiency within the operations of its suppliers. However, as one commentator relates, “the ability to operate at peak efficiency only gets you in the door at Wal-Mart. Then the real demands start[, and] there is nothing genial about the process by which Wal-Mart gets its suppliers to provide [goods] at every day low prices.” Though Wal-Mart may be legendary for forcing its suppliers to become more efficient, “[i]t is also legendary for quite straightforwardly telling them what it will pay for their goods.” *Id.*

specifications and profit margins.¹⁴⁶ The supplier is faced with a simple choice: conduct business on Wal-Mart, Inc. terms, or risk the consequences of not doing business with the largest company in the world.¹⁴⁷ Inevitably, suppliers are forced into a zero-sum game — although, that is really only the best case scenario.

The externalities flowing from Wal-Mart, Inc.'s presence in the upstream market toll an insufferable price on society in the form of social costs. Suppliers who have little choice but to bow to the "Always Low Prices. Always." diktat of Wal-Mart, Inc. must make serious changes to their business operations in order to remain in the black. This is not to say that suppliers do not have options. Indeed, there are several, but none reverberate to the benefit of the consumer.

One option is for a supplier to cannibalize itself.¹⁴⁸ Cannibalization will occur when a supplier undercuts its own products in other markets,¹⁴⁹ or simply gives up other markets in order to meet Wal-Mart, Inc. demands — in both scenarios the sacrificed market is generally more profitable.¹⁵⁰ During the 1980s, Huffy Bicycle Co., a division of Huffy Corp., chose the latter method of cannibalization.¹⁵¹ Having made a commitment to supply Wal-Mart, Inc. with as many low-end, low-margin bikes as Wal-Mart, Inc. needed, the President woke up one morning to an order for 900,000 bikes, twice the production output his factories

146. See Bianco & Zellner, *supra* note 8 (reporting that Wal-Mart, Inc. controls delivery schedules, inventory levels, and aggressively influences product specifications); Fishman, *supra* note 143 (maintaining that it is not unusual for Wal-Mart, Inc. to demand to scrutinize a supplier's private records, and to insist that high margins must be cut).

147. See Bianco & Zellner, *supra* note 8 ("[I]n the end, many suppliers have to choose between designing goods their way or the Wal-Mart way."); Fishman, *supra* note 143 (suggesting that "supplying Wal-Mart is like getting into the company version of basic training with an implacable Army drill sergeant").

148. Sheehy, *supra* note 138, at 36.

149. The marriage of Levi Strauss to Wal-Mart, Inc. paved the way for a textbook illustration of this form of business cannibalization scenario. In 2003, Levi-Strauss ended a 150 year streak of survival without Wal-Mart, Inc., entering into an agreement to stock the firm's shelves with its iconic brand name jeans. Fishman, *supra* note 143. Unfortunately, Levi-Strauss did not actually have any clothes cheap enough to sell at Wal-Mart, Inc. *Id.* Levi-Strauss was forced to expand its operation to include a low-end "Levi-Strauss Signature" brand, which has since flown off Wal-Mart, Inc. shelves. *Id.* However, it is likely that any success Levi-Strauss realizes from its Signature brand will be offset by decreased sales of its premium brands, thus effectively cannibalizing its own sales. *Id.* Moreover, the shift in operations sacrifices quality for price, leaving consumers with cheap goods produced by outsourced labor. *Id.*

150. See Sheehy, *supra* note 138, at 36 (asserting that cannibalization of a suppliers' own products in other markets often entails the cannibalization of much more profitable markets); see also *infra* notes 151-155 and associated text.

151. Fishman, *supra* note 143.

could handle.¹⁵² Rather than renegotiate, as might have been possible with other retailers, the President shifted operations, handing over designs for four of the companies higher-end, higher-margin bikes to competitors and freeing up resources to meet Wal-Mart, Inc.'s demands.¹⁵³ Cannibalization, however, is a zero-sum game, and ultimately Huffy lost by moving out of more profitable markets and exclusively into the everyday low prices market.¹⁵⁴ The consequence of such cannibalization is that suppliers are left to cautiously balance the line between black and red as profit margins dip dramatically,¹⁵⁵ while consumers are left to witness the sacrifice of product quality and consumer choice at the altar of everyday low prices.¹⁵⁶

A second option available to suppliers looking to stay in the black is simply to cut labor costs.¹⁵⁷ In order to meet the demands dispensed by the everyday low prices market, manufacturers are often forced either to lay off employees or merely export operations to the low-cost labor centers in China and beyond.¹⁵⁸ The appeal of this option is its versatility; even cannibals like Huffy Bicycle Co., which has not manufactured a bike in the United States since 1999, can employ it.¹⁵⁹ While Wal-Mart, Inc. is certainly not the only driving force behind the outsourcing of American jobs, there can be no question that Wal-Mart, Inc., accounting for nearly ten

152. *Id.*

153. *Id.*

154. *See id.* (underscoring the zero-sum nature of cannibalization is the fact that even though Huffy was the number three seller of bikes in the United States in 2003, during three of the five preceding years Huffy Corp. was unable to make a profit); *see also* Sheehy, *supra* note 138, at 36 (confirming that Wal-Mart, Inc. induced cannibalization is zero-sum: the shift in operations from a profitable market to the Wal-Mart, Inc. market has no net gain to the supplier).

155. *See* Sheehy, *supra* note 138, at 36 (pointing out the advantages and disadvantages of having Wal-Mart, Inc. as a customer: on the one hand, the supplier's sales will increase dramatically; on the other hand, the supplier's profit margins dip dramatically, placing ever increasing pressure on the business).

156. *See* Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Buyers' Competitive Conduct*, 56 HASTINGS L.J. 1121, 1123 (2005) (commenting that drastic dips in profitability may force suppliers to reduce their output of goods and services, harming consumers in the end).

157. *See* DICKER, *supra* note 2, at 27 (relating that the Wal-Mart, Inc.'s demands for low prices make it difficult for suppliers to offer livable wages and good working conditions to their employees); Piraino, *supra* note 156, at 1123 (remarking that suppliers are often forced to either outsource operations or limit domestic operation in order to survive the demands of Wal-Mart, Inc.).

158. Lohr, *supra* note 7; Fishman, *supra* note 143.

159. Fishman, *supra* note 143. Levi-Strauss has also taken advantage of the versatility of the labor cutting option, closing the last of its sixty domestic plants in 2004 in favor of cheap off shore labor and thus combining outsourcing with cannibalization in a move to cut costs for the everyday low prices market. *Id.*; *see also supra* note 149.

percent of all Chinese exports to the United States, is helping accelerate the process.¹⁶⁰ Outsourcing negatively impacts everyone by placing a greater burden on the government to provide support for the unemployed, a burden that is inevitably shouldered by all.¹⁶¹ Being that everyone is a consumer,¹⁶² all consumers must absorb the impact of this negative externality. Moreover, the obvious effect felt by the consumer whose job has been outsourced illustrates the impact most pointedly: you can't buy low-priced goods from Wal-Mart, Inc. if you don't have a job.¹⁶³

The last option available to the supplier is simply to refuse to elect any of the preceding options. Regrettably, when dealing with Wal-Mart, Inc., failure to elect one of these options is not an option. While it may not be the black letter policy of Wal-Mart, Inc. to force suppliers to cut costs through cannibalization, lay offs, or outsourcing,¹⁶⁴ the reality is that such a policy is not necessary. As the President of Huffy Bicycle Co. recounts regarding his decision to abandon the company's high-end production, "Wal-Mart didn't tell me what to do They didn't have to."¹⁶⁵ Wal-Mart, Inc. knows that if one supplier cannot deliver everyday low prices, there is another supplier waiting on deck that will, and Wal-Mart, Inc. will not hesitate to remind recalcitrant suppliers of

160. Fishman, *supra* note 143; see also Bianco & Zellner, *supra* note 8 (suggesting that the zealous pursuit of everyday low prices is at least partly to blame for the acceleration of outsourcing to China and other low-cost labor centers throughout the world).

161. See William P. Quigley, *The Right to Work and Earn a Living Wage: A Proposed Constitutional Amendment*, 2 N.Y. CITY L. REV. 139, 165-66 (asserting that the costs of unemployment felt by society as a whole exceed those felt by the unemployed individuals themselves) (citing PHILIP HARVEY, SECURING THE RIGHT TO EMPLOYMENT: SOCIAL WELFARE POLICY AND THE UNEMPLOYED IN THE UNITED STATES, 51-53 (1989)); Erika Kinetz, *Who Wins and Who Loses as Jobs Move Overseas*, N.Y. TIMES, Dec. 7, 2003 Late Edition — Final, at 5 (reporting the observations of prominent economists substantiating the existence of broad negative effects of outsourcing that reach beyond the individual whose job is outsourced); see also Sheehy, *supra* note 138, at 40 (claiming that unemployment results in a loss of security and stability, costs that are ultimately born by the friends and family of the unemployed, as well as the state).

162. See *supra* note 92.

163. Indeed, in July 2003, some 5,000 workers employed in the Pillowtex textile factory lost their jobs as a consequence of pressures placed on the Dallas-based company to cut labor costs. In 2004, more than a third of the laid-off workers were still unemployed, and thus unable to take advantage of the low prices offered by Wal-Mart, Inc. DICKER, *supra* note 2, at 114-15.

164. See Ann Zimmerman, *Defending Wal-Mart*, WALL ST. J., Oct. 6, 2004, at B1 (quoting Wal-Mart, Inc. CEO Lee Scott regarding the perception that Wal-Mart, Inc. is partly responsible for the outsourcing of American jobs, Scott was "not familiar with the idea that Wal-Mart brings anyone in and says you need to take this item offshore. I can't say it never happened, but I can say that is not our policy").

165. Fishman, *supra* note 143, at 68.

this reality.¹⁶⁶ In a world in which doing business with Wal-Mart, Inc. is a forgone conclusion, suppliers banned from the temple of everyday low prices are effectively given the kiss of death — left only with the hope that their plot in the graveyard of Wal-Mart, Inc. victims has a nice view.¹⁶⁷ Thus, suppliers have only two options: cut costs using one of the aforementioned methods, or walk into the light and hope a friend will be kind enough to place roses at their tombstone now and again. Either way, consumers lose.

3. Negative Externalities and the Consumer Pinch

Suppliers may find solace in the fact that they are not the sole victims of the Wal-Mart, Inc. machine. Indeed, the negative externalities flowing from Wal-Mart, Inc.'s presence in the retail and grocery markets come in a variety of forms. The most conspicuous manifests itself everywhere Wal-Mart, Inc. opens its doors, for whenever Wal-Mart, Inc. opens its doors, inevitably, doors close elsewhere.¹⁶⁸ As a corollary of the everyday low prices mentality, Wal-Mart, Inc. effectively saturates every community it enters with low prices, putting small, locally-owned stores that cannot compete out of business.¹⁶⁹ Moreover, no longer is it merely the small, locally-owned stores drowning in the wake of Wal-Mart, Inc., both Kmart and FAO Schwartz have been forced to seek

166. *See id.* (illustrating this concept and its impact on the Vlastic pickle company). Vlastic experienced the broadside of this reality in relation to its supply of pickles to Wal-Mart, Inc. For years, Vlastic supplied Wal-Mart, Inc. with a gallon jar of pickles sold by Wal-Mart, Inc. for the extremely low price of \$2.97. *Id.* The gallon jar was a “devastating success,” selling at eighty jars a week on average in every store, accounting for thirty percent of Vlastic’s business. *Id.* Unfortunately, as Vlastic’s profit margins dipped, so did their profits, plummeting some twenty-five percent as a consequence. *Id.* When Vlastic went to Wal-Mart, Inc. to beg for relief, the firm responded with a threat to take its business elsewhere. *Id.* Eventually, Wal-Mart, Inc. eased off after realizing the negative impact resonating throughout the pickle industry. *Id.* Notably, however, Wal-Mart, Inc.’s change of heart apparently came too late, as Vlastic filed for bankruptcy shortly after the pressure was released. *Id.*

167. *See id.* (relating the downfall of the Lovable company, a lingerie manufacturer that had been in the Wal-Mart, Inc. business since the beginning). Nonetheless, when Lovable could not meet the demands of the everyday low prices market, Wal-Mart, Inc. pulled its business. *Id.* Three years later, Lovable closed. *Id.*; *see also* Pinairo, *supra* note 156, at 1123 (confirming that many Wal-Mart, Inc. suppliers unable to make a reasonable profit under the regime of everyday low prices are often forced out of business).

168. *See* DICKER, *supra* note 2, at 60 (reporting that, for every Supercenter that opens, two grocery stores close); WAL-MART: THE HIGH COST OF LOW PRICE (Bravenew Films 2005) (detailing the negative consequences of Wal-Mart, Inc.’s descent upon several cities in rural America; namely, the closure of independent local stores).

169. Piraino, *supra* note 156, at 1124.

refuge in Chapter 11,¹⁷⁰ while Toys R Us has been forced to take a chapter out of the supplier survival book, cannibalizing itself by shifting operations to its Babies R Us division.¹⁷¹ The result is that consumers are left with fewer retail and grocery alternatives other than Wal-Mart, Inc., while detrimental community effects, including unemployment, decreased consumer choice, and reduced small business, intensify without end, unavoidably harming the consumer citizen.¹⁷²

It is quite natural to expect aftershocks to resonate from the epicenter of an earthquake for some time after the initial tremor. With Wal-Mart, Inc., the aftershocks felt by a community after the initial effects run their course are unending, and potentially of much greater intensity. It is no secret that Wal-Mart, Inc. opposes labor unions with a ferocity that is reminiscent of the late 19th century when the Sherman Antitrust Act itself was used to break up unions.¹⁷³ Indeed, a Waltonism treasured by management proclaims that Wal-Mart, Inc. is not anti-union, Wal-Mart, Inc. is

170. See Michael Barbaro, *Wal-Mart Triggers Tumult in Toyland: Independent Stores Can't Match Chain's Buying Power*, WASH. POST, May 31, 2004, at E01 (reporting that fierce competition with Wal-Mart, Inc. was the chief reason FAO Schwartz filed bankruptcy in 2004); Leslie Earnest & Greg Johnson, *K-Mart Seeks Bankruptcy Protection*, L.A. TIMES, Jan. 23, 2002, at Bus. 1 (detailing Kmart's path to bankruptcy and noting that its decline stemmed largely from fierce competition with Wal-Mart, Inc., as well as Target Corp.); see also Susan Chandler, *Will Bigger be Better? Retail Experts Not Sold on Wisdom of Combining 2 'Broken' Companies*, CHI. TRIB., Nov. 18, 2004, at C1 (discussing the background and possible reasoning underlying the merger between Kmart and Sears).

171. See Michael Barbaro, *Toys R Us Restructuring: After Losing Market Share, Company May Sell Divisions*, WASH. POST, Aug. 12, 2004, at E01 (reporting an announcement made by Toys R Us regarding its plan to separate its Toys R Us division from its Babies R Us division in 2005, a move the company felt was necessary in the face of fierce competition by discounters led by Wal-Mart, Inc.).

172. See Sheehy, *supra* note 138, at 36 (suggesting that when Wal-Mart, Inc. establishes a new store in a community, several detrimental effects can be expected to follow, including: "decreased community involvement, decreased community building efforts, decreased small business, decreased labor opportunities, and increased commercial vacancies").

173. See Randolph T. Holhut, *The Wal-Martization of the American Economy*, AM. REP., Sept. 2004, at 10 (proclaiming that Wal-Mart, Inc. "has perhaps the most aggressive union-busting operation of any major U.S. corporation . . ."); WAL-MART: THE HIGH COST OF LOW PRICE, *supra* note 168 (describing Wal-Mart, Inc.'s plan of attack in the face of an organization drive, which includes the operation of a 24-hour hotline, the dispatching of a rapid response team to supervise store activity during organization drives, an anti-union camera package for tracking union activities, the use of an undercover spy-cam, as well as the showing of vehemently anti-union videos); see also DICKER, *supra* note 2, at 93-97 (discussing Wal-Mart, Inc.'s unwavering commitment to its union-prevention program, often blurring the line between legal and illegal anti-union activities).

pro-associate.¹⁷⁴ While such a truism is dripping with a sense of pride and respect for Wal-Mart, Inc. “associates,”¹⁷⁵ it does not accord with the high associate turnover rate requiring Wal-Mart, Inc. to replace nearly half of its beloved associates on an annual basis.¹⁷⁶ Nor does it accord with the massive, even record breaking class action lawsuits filed for associate mistreatment.¹⁷⁷ In reality, upon a second look, Wal-Mart, Inc.’s “pro-associate policy” is anything but, and that is without considering the pervasive use of overseas sweatshops in China and India.¹⁷⁸

In addition, the oft-repeated “Wal-Mart provides good jobs” mantra¹⁷⁹ is in disharmony with the reality that Wal-Mart, Inc.’s “good jobs” are subsidized by the consumer, but not through the purchase of Wal-Mart, Inc.’s low priced goods. In 2001, the

174. See Cora Daniels, *Up Against the Wal-Mart; Think Your Job is Tough? Meet the People Whose Task it is to Unionize the World’s Biggest Company*, FORTUNE, May 17, 2004, at 112 (noting that Wal-Mart, Inc. maintains a policy toward unionization of being “pro-associate, not anti-union”); Steven Greenhouse, *Trying to Overcome Embarrassment, Labor Opens a Drive to Organize Wal-Mart*, N.Y. TIMES, Nov. 8, 2002, at 28 (noting that Wal-Mart, Inc. adopts a persona of being pro-associate rather than presenting a negative attitude towards unionization).

175. See, e.g., Daniels, *supra* note 174, at 112 (noting that, in company parlance, Wal-Mart, Inc. workers are referred to as associates, rather than employees).

176. See DICKER, *supra* note 2, at 30 (placing the Wal-Mart, Inc. associate turnover rate at forty-four percent for 2003, down from fifty-six percent just two years earlier).

177. See *Braun v. Wal-Mart Stores, Inc.*, Nos. 3217, 3757, 2005 Phila. Ct. Com. Pl. LEXIS 551, at *1 (Pa. Ct. Com. Pl., Dec. 27, 2005) (certifying a class action involving potentially 150,000 current and former Wal-Mart, Inc. associates claiming damages from missed breaks and “off the clock” work); *Dukes v. Wal-Mart*, 222 F.R.D. 137 (N.D. Cal. 2004) (certifying a class action on behalf of over one million current and former female associates claiming unequal wage and promotion policies); DICKER, *supra* note 2, at 106 (citing *Dukes v. Wal-Mart* as “the largest class-action lawsuit in American history”); see also WAL-MART: THE HIGH COST OF LOW PRICE, *supra* note 168 (reporting that Wal-Mart, Inc. was facing lawsuits in thirty-one states in 2000 regarding wage and hour abuses).

178. See DICKER, *supra* note 2, at 107-12, 118-20 (recounting the scandalous history surrounding Wal-Mart, Inc.’s association with sweatshop operations overseas and describing Wal-Mart, Inc.’s endeavors to avoid disclosure concerning employment conditions in overseas factories); WAL-MART: THE HIGH COST OF LOW PRICE, *supra* note 168 (detailing Wal-Mart, Inc.’s violation of labor standards and the policy of informing Chinese factories in advance of pending labor inspections, and coaching employees on how to respond to inspectors regarding work conditions).

179. See DICKER, *supra* note 2, at 29 (describing Wal-Mart, Inc.’s unwavering response when confronted with negative information regarding employment practices: “Wal-Mart provides good jobs”); see also WAL-MART 2004, *supra* note 4, at 1, 4-7 (relating the stories of a diverse group of Wal-Mart, Inc. associates who have benefited from the “good jobs and good careers” Wal-Mart, Inc. provides).

average in-store associate made roughly \$8.23 an hour, or about \$13,800 a year,¹⁸⁰ well below equivalent employees' wages elsewhere.¹⁸¹ After six months of working full-time at this wage, a Wal-Mart, Inc. associate is eligible for health insurance, that is, if the associate can afford it.¹⁸² According to a report from the House of Representatives' Committee on Education and the Workforce, a single Wal-Mart, Inc. associate "could end up spending around \$6,400 out-of-pocket — about 45% of her annual full-time salary — before seeing a single benefit from the health plan."¹⁸³ Not surprisingly, many Wal-Mart, Inc. associates turn away from the exorbitantly high Wal-Mart, Inc. healthcare plan and seek aid from none other than the consumers they are employed to serve, signing up en masse for state and national public welfare programs.¹⁸⁴ Indeed, the annual cost to consumer taxpayers is an estimated \$1.5 billion dollars to support Wal-Mart, Inc.'s underpaid employees.¹⁸⁵ Consequently, less funding is available for other public services and programs.

Wal-Mart, Inc.'s exploitation of the consumer taxpayer does not end with support for its own associates. The power Wal-Mart, Inc. wields is not limited to the private domain. In fact, Wal-Mart, Inc. extracts large subsidies from federal and state governments seeking to induce Wal-Mart, Inc. to open its doors in a particular locality and dreaming of future revenue or an answer to urban

180. REP. GEORGE MILLER, DEMOCRATIC STAFF OF THE COMM. ON EDUC. AND THE WORKFORCE, 135TH CONG., EVERYDAY LOW WAGES: THE HIDDEN PRICE WE ALL PAY FOR WAL-MART 4 (2004) [hereinafter EVERYDAY LOW WAGES].

181. *Id.* at 4 (contrasting the average Wal-Mart, Inc. sales clerk wage of \$8.23 an hour with the average supermarket employee wage of \$10.35 an hour).

182. Notably, in order to qualify as a full-time associate, the associate must work thirty-four hours a week, up from the former threshold of twenty-eight hours a week that had placed approximately one-third of Wal-Mart, Inc. associates in the part-time category. DICKER, *supra* note 2, at 83. Moreover, a part-time associate must put in two years as a Wal-Mart, Inc. associate before earning eligibility for health insurance. *Id.*

183. EVERYDAY LOW WAGES, *supra* note 180, at 7.

184. See WAL-MART: THE HIGH COST OF LOW PRICE, *supra* note 168 (listing the number of Wal-Mart, Inc. associates and dependents enrolled in public welfare programs in several states: 3864 children of Wal-Mart, Inc. associates in Alabama; 3971 Wal-Mart, Inc. associates in Arkansas; 2700 Wal-Mart, Inc. associates in Arizona; 824 Wal-Mart, Inc. associates in Connecticut with children enrolled; 12,300 Wal-Mart, Inc. associates and dependents in Florida; 10,261 children of Wal-Mart, Inc. associates in Georgia; 4172 Wal-Mart, Inc. associates and dependents in Massachusetts; 9617 Wal-Mart, Inc. associates in Tennessee; 4363 children of Wal-Mart, Inc. associates in Texas; 1252 Wal-Mart, Inc. associates and dependents in Wisconsin).

185. *Id.*

blight.¹⁸⁶ Over the years, it is estimated that Wal-Mart, Inc. has extracted subsidies amounting to at least \$1.008 billion in the form of free or reduced-price land, tax breaks, rebates and credits, infrastructure assistance, special zoning status, general grants, and job training and worker recruitment funds.¹⁸⁷ In fact, according to a Wal-Mart, Inc. official, the firm seeks subsidies for nearly one-third of its retail projects.¹⁸⁸ The consequence is obvious, communities suffer because fewer resources are available for necessary public services such as police and fire personnel, as well as education.¹⁸⁹ The real slap in the consumer's face, however, does not come until Wal-Mart, Inc. abandons the subsidized building, leaving behind a building too large for any other firm to realistically occupy.¹⁹⁰

As if it was not enough that consumer citizens pay for the low priced Wal-Mart, Inc. products twice, first at the cash register and second at the tax register, Wal-Mart, Inc. dictates what products consumer citizens may purchase at those registers.¹⁹¹ Absent from the aisles of Wal-Mart stores are any music CD's with parental

186. PHILLIP MATTERA & ANNA PURINTON, GOOD JOBS FIRST, SHOPPING FOR SUBSIDIES: HOW WAL-MART USES TAXPAYER MONEY TO FINANCE ITS NEVER-ENDING GROWTH 7, 8 (2004), available at <http://www.goodjobsfirst.org/pdf/wmtstuds.pdf>; see also DICKER, *supra* note 2, at 27 (charging conservatives with advancing the argument that the construction of Wal-Mart, Inc. stores in low income areas is a solution to urban blight); WAL-MART: THE HIGH COST OF LOW PRICE, *supra* note 168 (comparing the disparate treatment independently owned retail stores receive from the government, as exemplified by the Esry's IGA store formerly operated by Red Esry in Hamilton, Missouri, compared to the unending stream of subsidies Wal-Mart, Inc. receives).

187. MATTERA & PURINTON, *supra* note 186, at 7-9.

188. B. John Bisio, *Platteville Provided Wal-Mart Assistance*, TELEGRAPH HERALD (Dubuque, IA), Mar. 30, 2001, at a4.

189. See WAL-MART: THE HIGH COST OF LOW PRICE, *supra* note 168 (charging Wal-Mart, Inc. with responsibility for the shortage of police and fire personnel in Cathedral City, California as a consequence of failing to follow through with tax commitments made after the city invested \$1.8 million in the company); *id.* (noting that the \$1.7 million subsidy Wal-Mart, Inc. received in 2005 from Denver, Co. was enough to keep open three schools closed during the Spring of that year).

190. See *id.* (documenting the existence of 26,699,678 sq. ft. of empty Wal-Mart stores nationwide (approximately 260 vacant Wal-Mart Supercenters), or enough space to build 29,666 classrooms and educate 593,326 kids). Cathedral City, CA. provides a stinging example of the "business purposes" that might underlie a Wal-Mart, Inc. decision to abandon a subsidized Wal-Mart Supercenter and Sam's Club merely to open new stores two miles from the now vacant buildings, just outside of the city limits and just as the city was to begin receiving %100 of the sales tax profits according to the original subsidy deal. *Id.*

191. See DICKER, *supra* note 2, at 148 (advancing the contention that, "[u]nder the banner of responding to customer concerns and ensuring a family-friendly environment, Wal-Mart has become a [powerful] cultural gatekeeper . . .").

advisory warnings¹⁹² or anti-Wal-Mart lyrics,¹⁹³ so called “lad-magazines” *Maxim*, *FHM*, or *Stuff*,¹⁹⁴ pregnant Barbie dolls,¹⁹⁵ the morning after pill Previn,¹⁹⁶ and Jon Stewart’s *America: The Book*.¹⁹⁷ While it is undoubtedly the right of Wal-Mart, Inc. to sell only what it chooses, Wal-Mart, Inc. has shirked such economically efficient principles as supply and demand¹⁹⁸ in favor of donning the crown of cultural gatekeeper not merely as a legal right, but as a means to restrict consumer choice and advance its own political and cultural agenda.¹⁹⁹ Indeed, the arbitrary and hypocritical manifestations of Wal-Mart, Inc.’s right to choose what it sells²⁰⁰ raises the specter of the Wal-Martization of American culture — a clockwork orange of positive reinforcement meant to solidify the Wal-Mart, Inc. version of what is morally reprehensible and what is not.²⁰¹

The conclusion is inevitable: the social benefit of low prices comes with an increasingly high price tag. Deftly hidden from the consumer behind what is in essence a façade of low prices, the high price tag essential to the creation of Wal-Mart, Inc.’s everyday low prices is billed to the consumer citizen in the form of

192. *Id.* at 152.

193. *See id.* at 155 (commenting on Wal-Mart, Inc.’s ban of a CD recorded by Sheryl Crow based on the apparently offensive lyrics, “Watch out sister / Watch out brother / Watch our children as they kill each other / with a gun they bought at the Wal-Mart discount stores”).

194. *Id.* at 148.

195. *Id.* at 154.

196. *Id.* at 148.

197. *Id.* at 155.

198. *See id.* at 154-55 (noting the popularity of such banned entertainers as Eminem and Jon Stewart among consumers whom Wal-Mart, Inc. targets, yet denies the ability to purchase all they seek to buy).

199. *See Sheehy, supra* note 138, at 42 (proclaiming that the underlying reason for cultural restraints Wal-Mart, Inc. places on consumer choice is to prevent opposition from the consumer citizen to the political agenda Wal-Mart, Inc. seeks to advance); *see Bianco & Zellner, supra* note 8 (asserting that Wal-Mart, Inc.’s cultural gatekeeping narrows the offerings of mainstream entertainment and imparts a conservative tilt upon it).

200. *See DICKER, supra* note 2, at 156 (pondering the apparent incongruity between saying no to stocking such products as emergency birth control, CD’s with lewd music lyrics, and lad magazines while saying yes to the products of Paris Hilton, Michael Moore, and Quentin Tarantino). Indeed, Paris Hilton’s *CONFESSIONS OF AN HEIRESS*, Michael Moore’s *FAHRENHEIT 9/11*, and Quentin Tarantino’s *PULP FICTION* can all be found in stock at Wal-Mart, Inc. stores across the country. *Id.* at 144, 158; *see also supra* note 135.

201. *See DICKER, supra* note 2, at 155 (drawing an analogy between Wal-Mart, Inc.’s merchandising decisions and the cruel state sponsored positive reinforcement tactics employed in Anthony Burgess’ novel *A CLOCKWORK ORANGE*); *see also Greenhouse, supra* note 8 (quoting Nelson Lichtenstein, a history professor at the University of California: “In short, [Wal-Mart, Inc.’s] management legislates for the rest of us key components of American social and industrial policy”).

negative externalities. Nevertheless, even in the face of these teeming social costs, Wal-Mart, Inc. has become a “template industry,” setting the bar for competitors.²⁰² However, rather than raising the bar, Wal-Mart, Inc. is lowering it, pulling competitors’ operating standards down to dangerously low levels.²⁰³ As retailers and grocers across the country are forced to convert to Wal-Martology in a bid to level the competitive playing field according to the diktat of everyday low prices, the negative externalities flowing from Wal-Mart, Inc.’s presence in the retail and grocery markets will multiply exponentially. As the high cost of low prices increases without end, the Wal-Martization of America becomes a looming reality.

*B. Wal-Mart, Inc.: “Efficient Monopolist” or
“Wolf in Sheep’s Skin” — a Matter of Perspective*

The final determination of whether Wal-Mart, Inc. should be showered with praises or cut down in ignominy will depend, as many things do, on who frames the issue. No matter who does the framing though, one pivotal issue will conclude the success or failure of either position. Governing the outcome is the consumer, or rather the consumer’s conduct. Every time a consumer crosses the threshold of a Wal-Mart, Inc. store to take advantage of the undeniably attractive low prices, the consumer registers a vote in favor of Wal-Mart, Inc.²⁰⁴ Considering that consumer welfare is the quintessential goal of both antitrust camps, who is better suited to judge the extent of consumer welfare than the consumer? Ultimately then, the significance of consumer reaction to Wal-Mart, Inc.’s presence in the retail and grocery markets plays a

202. See DICKER, *supra* note 2, at 116 (citing University of California professor Nelson Lichtenstein for the proposition that Wal-Mart, Inc. has indeed become “a template industry”).

203. See *id.* at 104-05 (describing the series of events that ensued within the California grocery market after Wal-Mart, Inc. announced plans to open forty Supercenters across California: wage concession demands by the grocers Safeway, Albertsons, and Kroger; the breakdown of collective bargaining negotiations and rejection of the grocers’ final offer; a strike kicked off by an employee walkout and eventual lock-out; and, the eventual settlement on contract terms little better than the grocers’ original final offer); see *id.* at 89 (documenting the inducement St. Paul, Minnesota gave Target Corp. by waiving the application of its living wage ordinance to a new downtown store and providing Target Corp. with a \$6.3 million subsidy to open the store); WAL-MART: THE HIGH COST OF LOW PRICE, *supra* note 168 (reporting that Wal-Mart, Inc. drives down retail wages a total of \$3 billion every year).

204. See Hovenkamp, *supra* note 87, at 26 (elucidating the view that a proper measure of consumer preference looks only at what consumers buy in the marketplace); see Greenhouse, *supra* note 8 (quoting historian James Hoopes who commented that “[p]eople are voting with their feet and with their dollars by shopping at Wal-Mart”).

definitive role in assessing Wal-Mart, Inc.'s status under the antitrust laws.

With over 100,000,000 consumers crossing the threshold on a weekly basis, Wal-Mart, Inc. and its apologists have an exceptionally strong foundation on which to construct an argument in favor of making Wal-Mart, Inc. the gold standard.²⁰⁵ Without a doubt, it is not a far leap to the proposition that Wal-Mart, Inc.'s increases in productive efficiency are greater than any decreases in allocative efficiency, resulting in a net efficiency gain for consumer welfare and militating against antitrust law intervention.²⁰⁶ The proof, as they say, is in the pudding: if consumer welfare was not benefiting from Wal-Mart, Inc., consumers would not be flocking to Wal-Mart, Inc. stores. Moreover, from the perspective of the Efficiency Camp, Wal-Mart, Inc. has increased productive efficiency not at the expense of allocative efficiency, but in its favor by lowering prices and bringing them closer to marginal cost.²⁰⁷ Indeed, the Efficiency Camp has already paved the way for the likes of Wal-Mart, Inc., carving out space within the Chicago School for the "efficient monopolist" that passes its efficiency gains on to the consumer in the form of lower prices.²⁰⁸

Any opposition to Wal-Mart, Inc. that might flow from the Protectionist Camp must contend with the apparent consumer preference for Wal-Mart, Inc. However, to the rank and file opposition, the combination of Wal-Mart, Inc.'s efficiency with the consumer reaction to its presence in the retail and grocery markets poses nothing less than a logical dilemma — a philosophical haymaker with the ability to end discussion on the matter in two different ways, both in favor of the "efficient monopolist." First, as the Efficiency Camp contends, if the central concern of antitrust law is efficiency, Wal-Mart, Inc. is a template industry and should be celebrated. Nevertheless, even if efficiency concerns are subordinate to other non-economic values, as the Protectionist Camp contends, Wal-Mart, Inc. remains on solid ground.

205. See Bianco & Zellner, *supra* note 8 (noting that "138 million shoppers" visit Wal-Mart stores on a weekly basis). Indeed, it was estimated that eighty-two percent of American households made at least one purchase from Wal-Mart, Inc. in 2002. *Id.*

206. See *supra* note 105 and accompanying text.

207. See Piraino, *supra* note 156, at 1172 (proposing that Wal-Mart, Inc.'s success is a consequence of keeping its production costs to a minimum and passing along the savings to the customer).

208. See Bork, *supra* note 91, at 26-31 (arguing that Congress intended to exempt the efficient monopolist from the strictures of the Sherman Act to the benefit of consumer welfare); POSNER, *supra* note 88, at 22 (maintaining that the efficient monopolist would increase consumer welfare, and thus should not only be tolerated, but encouraged).

Recall that it is the fundamental tenet of the Protectionist Camp that antitrust law is not concerned solely with efficiency concerns, but rather is meant to promote other non-economic values preferred by the consumer.²⁰⁹ The problem with this argument as applied to Wal-Mart, Inc. is evident immediately. Before any negative externalities may be admitted as evidence that non-economic values favored by consumers are being harmed by Wal-Mart, Inc., the Protectionist Camp must establish that non-economic consumer interests are to be given greater weight than efficiency concerns. However, the ultimate non-economic consumer interest, consumer preference, undeniably favors Wal-Mart, Inc.²¹⁰ While those within the Protectionist Camp will forcefully contend that Wal-Mart, Inc. is in essence a “wolf in sheep’s skin” — championing low prices for the benefit of the consumer, while using them as a façade for high consumer cost — until the wolf turns on the consumer and raises prices, it is unlikely that consumer preference will change.²¹¹ So long as consumer preference favors Wal-Mart, Inc., any argument that consumers allegedly prefer non-economic values over the proliferation of the efficient monopolist is undercut by the reality of consumer preference. Thus, viewed from within either camp of antitrust jurisprudence, the facts favor Wal-Mart, Inc. and modern antitrust law is left on the sidelines as a cheerleader for the efficient monopolist, with a consumer stamp of approval.

IV. RECONCILIATION AND RESTRAINT — STEMMING THE TIDE OF THE WAL-MARTIZATION OF AMERICA

While it would be inimical to assert that a statement of one Senator on the floor of the Senate could reconcile the conflict between the Efficiency Camp and the Protectionist Camp, the words of Senator John Sherman considered independent from the two camps might provide some insight on how Wal-Mart, Inc. should fare under the antitrust act bearing his name:

The popular mind is agitated with problems that might disturb social order, and among them none is more threatening than the inequality of condition of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition.²¹²

209. See *supra* notes 113-119 and accompanying text.

210. See *supra* note 205 and accompanying text.

211. See Greenhouse, *supra* note 8 (quoting historian James Hoopes who observes that “[i]f anybody is proposing that they’re going to solve what they see as the Wal-Mart problem by urging people not to think of themselves as consumers, they’re barking up the wrong tree”).

212. 21 CONG. REC. 2598 (1890); *accord id.* at 2460 (endorsing Senator Sherman’s concern, Senator George mused: “Is production, is trade, to be

In 1890, the concentration of power that Sherman and his colleagues feared was manifest in industries dominated by the likes of the sugar, lead, and oil trusts.²¹³ There was a concern that such divisive concentration would spread, manifesting itself elsewhere as the trust mentality infected others.²¹⁴ History has proven the concern acute. The emergence of A&P as the dominant force in the grocery market in the 1930s exemplifies the ability of the contagion to spread.²¹⁵ Wal-Mart, Inc. exemplifies its mutation.

Contrasted with the trusts and monopolies of the past, Wal-Mart, Inc. is undeniably its own breed of behemoth. Indeed, rather than achieve dominance in a single market, Wal-Mart, Inc. has effectively achieved dominance in the dual retail and grocery markets.²¹⁶ Wal-Mart, Inc., though, has achieved dominance not by utilizing the historical method of illegal combination, but through unrivaled internal efficiency.²¹⁷ Moreover, Wal-Mart, Inc.'s combination of efficient domination with a concurrent devotion to low prices has produced undeniable social benefits, a catalyst for further Wal-Martization.²¹⁸ Consequently, antitrust scholars have been hard pressed to accuse Wal-Mart, Inc. of

taken away from the great mass of the people concentrated in the hands of a few men who, I am obliged to add, by the policies pursued by our Government, have been enabled to aggregate to themselves large, enormous fortunes?" Senator Hoar confirmed this sentiment:

The complaint which has come from all parts and all classes of the country of these great monopolies, which are becoming not only in some cases an actual injury to the comfort of ordinary life, but are a menace to republican institutions themselves, has induced Congress to take the matter up.

Id. at 3146

213. See 21 CONG. REC. 4101 (1890) (naming the trusts controlling the sugar, oil, and lead markets as examples of the harmful consequences of market concentration); KINTNER, *supra* note 85, at 8 (affirming the identification of the oil, sugar, and lead trusts as examples of the "great trusts" in existence by 1887).

214. See 21 CONG. REC. 2460 (1890) (demonstrating the immediacy of the danger presented by the trusts, Senator Sherman declared: "Congress alone can deal with them, and if we are unwilling or unable there will soon be a trust for every production and a master to fix the price for every necessity of life"); Foer & Lande, *supra* note 89, at 18 (arguing that the impetus for the Sherman Antitrust Act was a society concerned about the spreading of "trusts" throughout important industries).

215. See generally TEDLOW, *supra* note 10, at 189-214 (detailing the rise to dominance of A&P in the grocery market during the early 20th century).

216. In fact, Wal-Mart, Inc. prefers not to place any restrictions on the scope of its dominance, expanding into every conceivable market amenable to a Wal-Mart, Inc. makeover. See *supra* notes 75-79 and accompanying text.

217. See *supra* Part I.B.

218. See *supra* Part I.C.

violating the Sherman Act.²¹⁹ However, to conclude that the subsistence of low prices alone determines the innocence of Wal-Mart, Inc. permits those low prices to act as a smoke screen for the considerable social costs flowing from the operation of Wal-Mart, Inc.²²⁰ Even further, this conclusion flatly ignores concerns that drove the passage of the Sherman Antitrust Act.²²¹

A proper judgment of Wal-Mart, Inc.'s status under the Sherman Antitrust Act would be reached by balancing the social benefits of low prices against the illimitable social costs flowing from Wal-Mart, Inc.'s presence in the retail and grocery markets. The scales of such a balance seem poised to do nothing but give in to the heavy burden imposed by the social costs emanating from Wal-Mart, Inc.²²² No matter how seductive Wal-Mart, Inc.'s low prices are, to permit such a concentration of power in the hands of one company is "destructive of the public welfare" and will culminate in nothing less than market tyranny — grinding market tyranny.²²³

Nonetheless, before the Wal-Martization of America can be addressed under the Sherman Antitrust Act, and before a proper remedy can be tailored to curb its progression,²²⁴ change must ring

219. See Piraino, *supra* note 156, at 1182 (2005) (arguing through a hypothetical but realistic scenario that the benefit to consumers of Wal-Mart, Inc.'s low prices outweighs any harmful effects the firm has on competition); Bianco & Zellner, *supra* note 8 (quoting Harry Frist, professor of law at New York University: "When Wal-Mart comes in and people desert downtown because they like the selection and the low prices, it's hard for people in the antitrust community to say we should not let them do that.").

220. See *supra* Part III.2-3.

221. See *supra* notes 110-119 and accompanying text.

222. See *supra* Part III.A.

223. 21 CONG. REC. 2726 (1890). Senator Edmunds' statement in context is revealing:

Although for the time being the sugar trust has perhaps reduced the price of sugar, and the oil trust certainly has reduced the price of oil immensely, that does not alter the wrong of the principle of any trust. . . because in the long run, however seductive they may appear in lowering prices to the consumer for the time being, all human experience and all human philosophy have proved that they are destructive of the public welfare and come to be tyrannies, grinding tyrannies

Id. A similar understanding was expressed by Representative Mason:

Some say that the trusts have made products cheaper, have reduced prices; but if the price of oil, for instance, were reduced to [one] cent a barrel it would not right the wrong done to the people of this country by the 'trusts' which have destroyed legitimate competition and driven honest men from legitimate business enterprise.

Id. at 4100.

224. The issue of proper remedy will require a level of inquiry far beyond the scope of this paper. However, it might be useful to identify two sub-issues that must be considered in order to formulate a remedy that will effectively restrain the conduct of Wal-Mart, Inc. in contravention of the Sherman Act.

throughout antitrust jurisprudence. Painted in broad strokes, the history of antitrust jurisprudence is auspiciously aligned with the Protectionist Camp.²²⁵ However, the Supreme Court has recently indicated a willingness to narrow the focus of antitrust analysis more along the lines espoused by the Efficiency Camp.²²⁶ Confronted with retail and grocery markets in which Wal-Mart, Inc. is merely the sentinel of a form of business operation latently, but inherently harmful to the consumer, such a move would merely add insult to injury.²²⁷ Even ignoring the constitutional

First, Wal-Mart, Inc. is the world's largest business, with annual sales approaching \$300 billion. Thus, holding Wal-Mart, Inc. liable for the maximum pecuniary damages available under sections one and two of the Sherman Act may not serve as a sufficient deterrent to continued violation. See 15 U.S.C. §§ 1-2 (2000) (providing a maximum monetary penalty of \$100,000,000 for corporate violators of the Sherman Act). *But cf.* 15 U.S.C. § 15 (2000) (providing treble damages, and attorneys' fees and costs for private parties injured in their business or property by an antitrust violation).

Second, unlike the trusts and monopolies of the past, Wal-Mart, Inc.'s market power derives from its operation as a single entity. Consequently, formulating injunctive measures to prevent further violation will be more difficult, and may ultimately require division of Wal-Mart, Inc. into separate and independent entities in order to be effective. See *United States v. E.I. Du Pont de Nemours & Co.*, 366 U.S. 316, 329 (1961) ("[D]ivestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control . . ."); *International Boxing Club v. United States*, 358 U.S. 242, 252 (1959) (affirming the position that a judgment formulated to remedy a violation of the Sherman Act "should (1) put an end to the combination or conspiracy when that is itself the violation; (2) deprive the antitrust defendants of the benefits of their conspiracy; and (3) *break up or render impotent* the monopoly power which violates the Act" (citing *Schine Chain Theatres v. United States*, 334 U.S. 110, 128-29 (1948)) (emphasis added) (internal quotation marks omitted)).

225. See *supra* notes 120-122 and accompanying text.

226. See *California Dental Ass'n v. FTC*, 526 U.S. 756, 780-81 (1999). The Court discussed with approval a method of analysis resembling a "sliding scale" approach to challenged restraints on trade, and stated that:

[W]hat is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint [and] [t]he object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.

Id. Notably, in discussing the fact sensitive "sliding scale" approach in *California Dental*, the Court cited with approval the work of Thomas A. Piraino, Jr. See *id.* at 780 n.15 (citing Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 VAND. L. REV. 1753 (1994)). As a follow up, Piraino outlined a continuum approach "consistent with *California Dental*" to buyer conduct challenged under the Sherman Act that allegedly "will prevent anti-competitive conduct and encourage efficiency-enhancing behavior." Piraino, *supra* note 156, at 1127-28.

227. Moreover, placing a stamp of approval on the business philosophy of Wal-Mart, Inc. would expedite the adoption of Wal-Martology by competitors,

concerns intrinsic in the sidestepping by an unelected judiciary of the non-economic values elemental in the passage of the Sherman Antitrust Act, the adoption of an antitrust jurisprudence tailored by the Efficiency Camp would be irresponsible in its own right. Granting Wal-Mart, Inc. a free pass to unchecked market domination by adopting such a formulation would hail an era of consumer disparity overrun with negative externalities flowing from the alleged source of consumer welfare.²²⁸ Nevertheless, the Protectionist Camp is ill-positioned to confront Wal-Mart, Inc. and unable to maneuver around the doctrine of everyday low prices.²²⁹ Accordingly, in order to meet the challenge presented by Wal-Mart, Inc., reconciliation must be reached between the Efficiency and Protectionist Camps. Yet, the need for reconciliation spurned by Wal-Mart, Inc. represents nothing less than an opportunity for the formulation of an antitrust jurisprudence that accords efficiency goals a proper role while giving due regard to the non-economic values vital to the passage of the Sherman Antitrust Act.

The first step on the path to reconciliation entails recognition of the market failures inherent in consumerism that make it impossible to judge market conduct solely on the basis of consumer preference. Specifically, two realities must be recognized: (1) information asymmetry erects a barrier to informed choice; and (2) consumers able to penetrate the information cost barrier are subjected to the sharp temptation of free-riderism. In the first instance, consumers lack sufficient information on which to base an informed choice according to abstract preferences, thus creating the potential for inconsistency between preference and choice.²³⁰ In the second, individual consumers possessing individually trivial influence are plagued by a "What can one person do?" rationale, often times answering: "Nothing." This creates a group of informed consumers making choices inconsistent with preferences on the belief that others will advance their abstract preferences for them.²³¹ Inevitably, the interaction of these two market failures leads to the construction of an inaccurate picture of consumer

and speed up the race to the bottom precipitated by Wal-Mart, Inc. *See supra* notes 202-203 and accompanying text.

228. *See supra* Part III.A.2-3.

229. *See supra* Part III.B.

230. *See* Sheehy, *supra* note 138, at 49-50 (arguing that information asymmetry permits corporations to enjoy the benefits of particular conduct while passing the costs onto the community, costs the community would otherwise choose not to endure).

231. *See* Hovenkamp, *supra* note 87, at 26 (explaining that abstract consumer preferences are often inconsistent with expressed consumer preferences because consumers will often "free ride on the preferences of others" — making purchasing decisions inconsistent with abstract preferences — on the belief that their individual choice is insignificant in the ultimate advancement of their abstract preferences).

preference based on consumer choice. Thus, market conduct cannot be adjudged by a simple inquiry into consumer preference, because consumer conduct is fundamentally flawed.

The second step towards reconciliation derives from the first, and requires the Efficiency Camp to abandon Judge Bork's narrow definition of consumer welfare.²³² While this step would ostensibly sound the death knell of the Chicago School of antitrust analysis, this step does not require Efficiency Camp scholars to abandon economic efficiency as the ultimate, or even exclusive goal of antitrust law. Instead, it merely requires a broader conception of what factors should be taken into account when calculating allocative efficiency gains and losses.²³³ Rather than presuming that prices are the only measuring stick of consumer welfare,²³⁴ a proper formulation would consider the full panoply of consumer values: low prices, consumer choice, small business, preventing the concentration of social and political power, and justice in business practices.²³⁵ This broader conception of allocative efficiency will permit a more acute comparison to productive efficiency.²³⁶ Moreover, it would permit the Protectionist Camp to remove economic efficiency from a subordinate position on the list of consumer values,²³⁷ and thus facilitate a proper consideration of the benefits of productive efficiency by scholars within the Protectionist Camp.²³⁸ The ultimate result would be a calculus for net efficiency capable of advancing consumer welfare in accordance with the vision codified by the Sherman Antitrust Act.

Taking these steps will eliminate the line in the sand between the Efficiency Camp and the Protectionist Camp to the benefit of the consumer. Recognizing that United States markets frequented by uninformed and free-riding consumers are improper forums in which to hold "vote with your feet" elections²³⁹ forces an important

232. See *supra* notes 92-96 and accompanying text.

233. Considering that allocative efficiency is synonymous, in the context of antitrust jurisprudence, with "the welfare of society as a whole," and that all individuals in society are consumers, it is merely a matter of course that a broader conception of consumer welfare requires a broader conception of allocative efficiency. See *supra* notes 91, 94 and accompanying text.

234. See *supra* notes 99-106 and accompanying text.

235. See *supra* notes 113-118 and accompanying text. As a practical matter, by broadening the conception of consumer welfare beyond the narrow consideration of prices, a definition in line with the logical import of "consumer welfare" would be achieved. See *supra* note 92.

236. See *supra* notes 93-96 and accompanying text.

237. See *supra* notes 112-119 and accompanying text.

238. See 21 CONG. REC. 2456 (1890) (confirming the importance of avoiding an outright disregard of the benefits of productive efficiency, Senator Sherman stated, "[the courts] will distinguish between lawful combinations in aid of production and unlawful combinations to prevent competition and in restraint of trade . . .").

239. See *supra* notes 204-205 and accompanying text.

concession: namely, that Congress is the only forum in which consumer values can be ordered and defined.²⁴⁰ Thus, great deference must be given to the proxy votes cast by consumers through their duly elected representatives. By incorporating into a definition of consumer welfare the reality that the almighty dollar alone cannot define abstract consumer valuations, antitrust scholars would properly align the concept of consumer welfare with the consumer values that inspired the Sherman Antitrust Act. More importantly, the courts would be given a workable concept true to the legislative intent underlying the Sherman Antitrust Act and capable of dealing with the dangerous presence of Wal-Mart, Inc. in the consumer market.²⁴¹

240. See Hovenkamp, *supra* note 87, at 30-31 (reminding scholars that the political process is meant to give effect to majority preferences, and that though consumer values are diverse, the political process is designed to consider them all). Indeed, in a democratic society in which consumers register two sets of inconsistent votes, the inconsistency must be reconciled in favor of the democratic process. See *id.* at 31 (arguing that courts must effectuate the congressional intent underlying a statute, even when the congressional intent discounts economic values in favor of other, non-economic consumer values).

241. While this paper offers a conceptual regime capable of addressing the harmful latent effects of Wal-Mart, Inc. under the Sherman Act, it does not presuppose that Wal-Mart, Inc. falls within the jurisdictional bounds of section one and two of the Act. Two considerations are worth noting. First, it is unlikely that Wal-Mart, Inc. actually possesses market power sufficient to qualify it as a monopoly, and thus Wal-Mart, Inc. does not fall within the opening clause of section two. See, e.g., *Holleb & Co. v. Produce Terminal Cold Storage Co.*, 532 F.2d. 29, 33 (7th Cir. 1976) (holding that plaintiff's failure to prove that defendant had a dominant market share exceeding sixty percent precluded recovery under section two); *Sulmeyer v. Coca Cola Co.*, 515 F.2d. 835, 850 (5th Cir. 1975) (holding that a bottling company's ability to effectively control only twenty-two percent of the market share was insufficient to establish monopolization); *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d. 968, 974 (8th Cir. 1968) (holding that twenty percent market share is insufficient to establish monopoly power). *But cf.* Warren S. Grimes, *Buyer Power and Retail Gatekeeper Power: Protecting the Atomistic Seller*, 72 ANTITRUST L.J. 563, 563-64 (2005) (arguing that a retailer can exercise anticompetitive power with ten percent or less of the market share).

Second, Wal-Mart, Inc.'s operation as a single entity ostensibly precludes a finding of the "concerted activity" necessary to bring Wal-Mart, Inc. under the contract, combination, or conspiracy clauses of section one and two. See KINTNER, *supra* note 85, at 26 (asserting that the terms contract, combination, and conspiracy refer generally to concerted activity). In effect, this would remove Wal-Mart, Inc. from the jurisdictional reach of the Sherman Act. See, e.g., *Copperweld v. Independence Tube Co.*, 467 U.S. 752, 777 (1984) (holding that a parent company is incapable of conspiring with its wholly owned subsidiary). Nevertheless, the requisite concerted activity may be derived from the relationships between Wal-Mart, Inc. and its suppliers. See *supra* notes 143-67 and accompanying text. Whether the relationships are the result of voluntary or coerced agreement, they are established in furtherance of the harmful Wal-Martization of America, and thus provide the concerted activity necessary to bring Wal-Mart, Inc. within the strictures of the

V. CONCLUSION

To be sure, the success of Wal-Mart, Inc. in both the retail and grocery markets is impressive beyond contention. As the largest business in the world, there is no doubt that Wal-Mart, Inc. represents the height of efficiency and is a model of aspiration for all business ventures. Thus, the size of Wal-Mart, Inc. alone is no basis for an antitrust lawsuit. However, the adverse manner in which Wal-Mart, Inc. wields the vast power flowing naturally from its success cannot be permitted to be clouded by the social benefit of Wal-Mart, Inc.'s continued devotion to low prices. It is Wal-Mart, Inc.'s abuse of power and not its size that places it in violation of the Sherman Antitrust Act:

The statement that size is not a crime is entirely correct when you speak of it from the point of motive. But size may become such a danger in its results to the community that the community may have to set limits. A large part of our protective legislation consists of prohibiting things which we find are dangerous, according to common experience. Concentration of power has been shown to be dangerous in democracy, even though that power may be used beneficently.²⁴²

Indeed, it would be unfortunate to permit such non-economic values to be accorded secondary status and dismissed by a commitment to efficiency.

Limiting the object of antitrust law exclusively to the maximization of net efficiency gains may well be proper in theory, even commendable from the perspective of free market capitalism. However, an economic concept proper in theory is not necessarily workable in reality.²⁴³ The reality that consumers "are people with many values, low prices being only one,"²⁴⁴ militates against restricting the conception of consumer welfare to the maximization of net efficiency gains. Moreover, to assert such a position flatly

Sherman Act. See *Copperweld*, 467 U.S. at 765-66 (affirming that concerted activity may be established by a coerced agreement between defendant and plaintiff or by a coerced agreement between defendant and third party (citing *Perma Life Mufflers v. Int'l Parts Corp.*, 392 U.S. 134, 142 (1968))); see also *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939) (holding that a competitor's acquiescence in a plan the ultimate consequence of which is the unlawful restraint of trade is sufficient to establish unlawful conspiracy).

242. LOUIS D. BRANDEIS, *THE WORDS OF JUSTICE BRANDEIS* 133 (Soloman Goldman ed., 1953).

243. For instance, the Coase Theorem, which essentially proffers that individuals in a costless environment will resolve disputes efficiently, provides a prime example of an economic concept proper in theory but often unworkable in reality. See Sheehy, *supra* note 138, at 20, 23-24 (noting several assumptions on which the Coase Theorem relies which do not exist in reality, such as implied assumptions that all individuals own property and possess equal bargaining power).

244. Hovenkamp, *supra* note 87, at 20.

ignores the reality that non-economic concerns played a central role in the passage of the Sherman Antitrust Act. Application of the Efficiency Camp's Chicago School of antitrust analysis would therefore require the courts to do nothing less than legislate from the bench, a far cry from the authority granted to the judiciary under Article III.

