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Looking at the Monopsony in the Mirror

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LOOKING AT THE MONOPSONY IN THE MIRROR

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INTRODUCTION

Although still a distant second to monopoly, buyer power and monopsony are hot topics in the competition community.[1] The Organisation for Economic Co-operation and Development (OECD),[2] International Competition Network (ICN),[3] and American Antitrust Institute (AAI)[4] have studied monopsony and buyer power recently. The U.S. Department of Justice and Federal Trade Commission pay more attention to buyer power in their 2010 merger guidelines than they did in their earlier guidelines.[5] With growing buyer concentration in commodities such as coffee, tea, and cocoa, and among retailers, buyer power is a human rights issue.[6]

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[1] Org. for Econ. Co-operation & Dev. [OECD], *Monopsony and Buyer Power*, at 255, OECD Doc. DAF/COMP(2008)38 (Dec. 17, 2009), *available at* http://www.oecd.org/dataoecd/38/63/44445750.pdf ("Buying power is an increasingly hot topic within the competition community.").

[2] *Id.* at 208.

[3] TASK FORCE FOR ABUSE OF SUPERIOR BARGAINING POSITION, INT'L COMPETITION NETWORK, ICN SPECIAL PROGRAM FOR KYOTO ANNUAL CONFERENCE: REPORT ON ABUSE OF SUPERIOR BARGAINING POSITION 3 (2008), *available at* http://www.jftc.go.jp/en/international_relations/icn/kyoto-materials/pdf/ASBP_1.pdf.

[4] *E.g.*, AM. ANTITRUST INST., THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE'S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT 95 (Albert A. Foer ed., 2008) [hereinafter AAI TRANSITION REPORT], *available at* http://www.antitrustinstitute.org/~antitrust/content/next-antitrust-agenda; Albert A. Foer, *Introduction to Symposium on Buyer Power and Antitrust*, 72 ANTITRUST L.J. 505, 505 (2005); Gregory T. Gundlach & Albert A. Foer, *Buyer Power in Antitrust: An Overview of the American Antitrust Institute's Invitational Symposium on Buyer Power*, 53 ANTITRUST BULL. 233 (2008).

[5] *See* Peter C. Carstensen, *Buyer Power and the Horizontal Merger Guidelines: Minor Progress on an Important Issue*, 14 U. PA. J. BUS. L. 775, 780 (2012). *Compare* DOJ & FTC, HORIZONTAL MERGER GUIDELINES § 0.1, at 3 (1992), *available at* http://www.ftc.gov/bc/docs/horizmer.shtm (noting in one short paragraph that "to assess potential monopsony concerns, the Agency will apply an analytical framework analogous to the framework of these Guidelines"), *with* DOJ & FTC, HORIZONTAL MERGER GUIDELINES §§ 8, 12 (2010) [hereinafter 2010 MERGER GUIDELINES], *available at* www.justice.gov/atr/public/guidelines/hmg-2010.pdf (including an extended discussion of buyer power).

[6] OLIVIER DE SCHUTTER, BRIEFING NOTE 3, ADDRESSING CONCENTRATION IN FOOD SUPPLY CHAINS: THE ROLE OF COMPETITION LAW IN TACKLING THE ABUSE OF BUYER POWER 1 (2010), *available at*

As this Article discusses, both monopolies and monopsonies have significant market power. A monopolist typically is characterized as the only or dominant seller in town.[7] (Think of the only gasoline station along a long highway stretch, which despite its low costs charges outrageously high prices.) The monopolist can raise its price above competitive levels. The monopolist can also reduce, contrary to its customers' wishes, the quality of its products and services, product variety, and innovation. A monopsonist, on the other hand, is typically characterized as the only or dominant buyer in town.[8] (Think of the factory in the one-factory town where you either work on the company's terms or you are on your own.) The monopsonist can lower the price below competitive levels for the goods and services it buys.[9] The monopsonist can also reduce the quality of products it purchases and the amount of innovation that an otherwise competitive market would foster.[10] As one state supreme court recently commented:

> The antitrust laws are as concerned about abuse of monopsony power to pay prices below a competitive level as they are about abuse of monopoly power to charge prices above a competitive level. The seller to the monopsony has been harmed as much as the buyer from the monopoly.[11]

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http://www.srfood.org/index.php/en/documents-issued/briefing-notes; Aravind R. Ganesh, *The Right to Food and Buyer Power*, 11 GERMAN L.J. 1190, 1190 (2010); *see also* LIZ DODD & SAMUEL ASFAHA, S. CTR. & TRAIDCRAFT, REBALANCING THE SUPPLY CHAIN: BUYER POWER, COMMODITIES AND COMPETITION POLICY 4 (2008), *available at* http://unctad.org/Sections/ditc_ccpb/docs/ditc_ccpb0009_en.pdf (expressing concern about the impact of buyer power on vulnerable food producers); Duncan Green, Oxfam, Conspiracy of Silence: Old and New Directions on Commodities (June 2005) (unpublished manuscript), *available at* http://policy-practice.oxfam.org.uk/publications/conspiracy-of-silence-old-and-new-directions-on-commodities-112554 ("Not only has corporate concentration diminished the slice of final retail value accruing to developing country producers, it has shifted the balance of power against small-scale farmers.").

7 *See, e.g.*, United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (defining monopoly power as "'the power to control prices or exclude competition,'" which "ordinarily may be inferred from the predominant share of the [relevant] market" (quoting United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956))).

8 Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 320 (2007) ("Monopsony power is market power on the buy side of the market. As such, a monopsony is to the buy side of the market what a monopoly is to the sell side and is sometimes colloquially called a 'buyer's monopoly.'" (citation omitted)).

9 OXERA, BUYER POWER IN A REGULATORY CONTEXT: MYTH OR REALITY? 1–2 (2012), *available at* http://www.oxera.com/Publications/Agenda/2012/Buyer-power-in-a-regulatory-context—myth-or-reali.aspx.

10 W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 104 (3d Cir. 2010) (noting that monopsony in depressing reimbursement rates "tends to diminish the quality and availability of hospital services"); *accord* Warren S. Grimes, *The Sherman Act's Unintended Bias Against Lilliputians: Small Players' Collective Action as a Counter to Relational Market Power*, 69 ANTITRUST L.J. 195, 210 (2001) ("The very nature of monopsony or oligopsony power is that it tends to suppress output and reduce quality or choice.").

11 Mueller v. Wellmark, Inc., 818 N.W.2d 244, 265 (Iowa 2012).

Monopsony and buyer-power claims are likely to arise in several important industries, including agriculture,[12] health insurance,[13] and retail.[14] Recently, for example, the DOJ and U.S. Department of Agriculture (USDA) examined buyer power in the seed, hog, livestock, poultry, and dairy industries.[15] The DOJ and USDA deserve credit for setting up their workshops. Professor Peter Carstensen, among others, expressed relief:

> For years many of us who follow agricultural competition issues have lamented the failure of both antitrust enforcement and market facilitating regulation to deal with continuing problems that farmers and ranchers confront in both the acquisition of inputs and the marketing of their production.[16]

Over 4,000 people attended the public workshops in Iowa, Alabama, Wisconsin, Colorado, and Washington, D.C.[17] The DOJ received over 18,000 public comments.[18] Participants complained that the lack of antitrust

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12 *See, e.g.*, Allen v. Dairy Farmers of Am., Inc., 748 F. Supp. 2d 323, 331 (D. Vt. 2010) (describing plaintiffs' allegation of defendants' "unlawful creation of monopsony and monopoly power in the milk distribution system by tying up access to milk bottling plants in the Northeastern United States through unlawful exclusive supply agreements and then using that monopsony power to force independent farmers to join DFA or to market their raw milk through its marketing affiliate"); *Crisis on the Farm: The State of Competition and Prospects for Sustainability in the Northeast Dairy Industry: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 7 (2009) (statement of Christine Varney, Assistant Att'y Gen. for Antitrust, Department of Justice) (noting the concern among dairy producers over monopsony power, how "[p]arts of the dairy industry have experienced extensive consolidation in recent years, with fewer processors and, therefore, fewer buyers of dairy products," and how as "a result of consolidation, the potential for an exercise of buyer power is increased").

13 *See, e.g.*, *W. Penn Allegheny Health Sys., Inc.*, 627 F.3d at 103–04 (describing hospital system's suit against area's dominant hospital system and dominant health insurer under Sherman Act and state law, and alleging that insurer had "substantial monopsony power" with medical providers having very few alternative purchasers for their services).

14 OECD, *supra* note 1, at 20, 62, 69–71, 175, 222, 255, 261–62; DOJ, COMPETITION AND AGRICULTURE: VOICES FROM THE WORKSHOPS ON AGRICULTURE AND ANTITRUST ENFORCEMENT IN OUR 21ST CENTURY ECONOMY AND THOUGHTS ON THE WAY FORWARD 7 (2012), *available at* www.justice.gov/atr/public/reports/283291.pdf (describing the concern by some participants that "retailers are extracting a greater and greater share of the consumer food dollar, leaving producers with an ever decreasing share, and at the same time imposing price increases on consumers"). A trend toward monopsony on the retail level can spur concentration on the wholesale level. Carstensen, *supra* note 5, at 789; Timothy A. Wise & Sarah E. Trist, *Buyer Power in U.S. Hog Markets: A Critical Review of the Literature* 19 (Global Dev. & Env't Inst., Working Paper No. 10-04, 2010), *available at* http://www.ase.tufts.edu/gdae/Pubs/wp/10-04HogBuyerPower.pdf.

15 *Division Update Spring 2011*, U.S. DEPARTMENT JUST., http://www.justice.gov/atr/public/division-update/2011/ag-workshops.html (last visited July 1, 2013).

16 Peter C. Carstensen, *Comments for the United States Departments of Agriculture and Justice Workshops on Competition Issues in Agriculture* 1–2 (Univ. of Wis. Law Sch., Legal Studies Research Paper No. 1103, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1537191.

17 *Division Update Spring 2011*, *supra* note 15.

18 *Id.*

enforcement enabled "a severely concentrated marketplace in which power and profit are limited to a few at the expense of countless, hard working family farmers" and that "high input prices, low commodity prices, or other hardships, hav[e] invested particular suppliers or buyers with greater market power."[19] Many, the DOJ observed, "specifically raised the issue of monopsony power," and some expressed concern that the enforcers, courts, and competition laws were "inattentive to the monopsony problem."[20] Participants complained how processors "depress[ed] the prices of crops or animals below competitive levels."[21] Others raised social and moral concerns, such as the environmental toll from monopsonies.[22] The U.S. livestock industry, observed several states, is more concentrated today than in 1921, when Congress enacted the Packers and Stockyards Act to respond to a market the "Big Five" packers controlled "and to ensure fair competition and fair trade practices in the marketing of livestock, meat and poultry."[23] One account of the hearings stated, "What applies across the board—in cattle ranching and dairy and hog farming—is the stark and growing imbalance of power between the farmers who grow our food and the companies who process it for us, and how this imbalance enables practices unimaginable in any competitive market."[24]

Despite these concerns, the larger jurisdictions, to date, have challenged few mergers or conduct cases that target monopsony or buyer power.[25] The

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19 DOJ, *supra* note 14, at 5 (internal quotation marks omitted); *see also* AAI TRANSITION REPORT, *supra* note 4, at 308 (describing antitrust enforcement in the agricultural markets as "lamentable").

20 DOJ, *supra* note 14, at 8, 16 (recognizing "that, historically, farmers and others have voiced concern about the level of merger enforcement in the agricultural sector" and that as "a result of the workshops, the Division has redoubled its efforts to prevent anticompetitive agricultural mergers and conduct" so that "[t]he workshops have enhanced the Division's efforts to enforce the antitrust laws").

21 *Id.*

22 *See id.* at 8 ("[I]t's the monopsony power of these concentrated purchases of farm goods that are stressing the people and the natural systems that are producing food . . . ." (internal quotation marks omitted)).

23 Steve Bullock et al., *Comments Regarding Competition in the Agriculture Industry*, U.S. DEPARTMENT JUST. 6 (Mar. 11, 2010), http://www.justice.gov/atr/public/workshops/ag2010/016/AGW-15683.html (providing comments from the attorneys general of various states).

24 Lina Khan, *Obama's Game of Chicken*, WASH. MONTHLY, Nov./Dec. 2012, at 32, 35–36.

25 FTC, HORIZONTAL MERGER INVESTIGATION DATA: FISCAL YEARS 1996–2011, at 7 tbl.1 (2013) (showing that of the 464 horizontal mergers where the FTC issued a second request, nine mergers focused on monopsony and buyer power issues); Peter C. Carstensen, *Buyer Power, Competition Policy, and Antitrust: The Competitive Effects of Discrimination Among Suppliers*, 53 ANTITRUST BULL. 271, 272 (2008) (observing how "the merger enforcement decisions by the courts and agencies have failed to appreciate the buyer power issues presented in some merger cases").

DOJ and USDA workshops ended with a whimper.[26] And one recent DOJ monopsony case yielded an unusually weak behavioral remedy.[27]

Nonetheless, the DOJ under the Obama administration promised "[v]igorous antitrust enforcement" after "redoubl[ing] its already active enforcement activities."[28] The DOJ, said one official, "is concerned about monopsony harm and is willing to go to court to prevent such harm."[29] In Europe, monopsony power is also a significant issue, especially where a few supermarkets dominate the industry.[30] Consequently, the monopsony problem is not simply an academic exercise.

If prosecutions of monopsonies increase, one challenge, given the infrequent prosecutions, is that the legal standards for monopsony claims are less developed than for monopoly claims. In recent years, courts, competition

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26 David Andrews, *Antitrust Efforts Have Gone in Dustbin of History*, NAT'L CATHOLIC REP. (Kansas City), Mar. 2, 2012, at 23; Khan, *supra* note 24, at 38 ("Worse, the administration's silent retreat amounts to a form of moral failure. Having amply documented the outrageous abuse of fellow citizens, it decided it was not worth expending more political capital to right this wrong.").

27 In challenging an acquisition, the United States originally asked the court to divest assets sufficient to restore competition in the affected chicken processing market and to enjoin the defendant from further ownership and operation of the assets acquired as part of the transaction. Complaint at 13, United States v. George's Foods, LLC, No. 5:11-cv-00043 (W.D. Va. May 10, 2011), *available at* http://www.justice.gov/atr/cases/georgefood.html. But the DOJ later settled for a behavioral remedy, namely requiring the defendant to make several capital improvements to its Harrisonburg chicken processing plant. The defendant had to (i) install an individually frozen freezer, (ii) install "a whole leg or thigh deboning line with the capacity to debone a minimum of fifty legs per minute or new automated lines with similar capacities," and (iii) repair the processing plant's roof. Competitive Impact Statement at 7–8, United States v. George's Foods, LLC, No. 5:11-cv-00043 (W.D. Va. June 23, 2011), *available at* http://www.justice.gov/atr/cases/georgefood.html. The settlement, the DOJ asserted, was in the public interest; it significantly increased the number of chickens that George's would process, thereby increasing the demand for grower services and averting the likely anticompetitive effects arising from the acquisition. Response of Plaintiff United States to Public Comment on the Proposed Final Judgment at 4–5, United States v. George's Foods, LLC, No. 5:11-cv-00043 (W.D. Va. Oct. 25, 2011), *available at* http://www.justice.gov/atr/cases/georgefood.html. Carstensen and a former FTC official objected to both the remedy's scope and duration. They argued that among other things the consent decree should require the DOJ to reassess the transaction's competitive effects in three to five years and, if necessary, revise the remedy. *Id.* at 6–7. The DOJ rejected their concerns, expressing "confiden[ce] that the effectiveness of the proposed Final Judgment obviates the need for requiring undefined 'additional remedies.'" *Id.* at 7–8.

28 DOJ, *supra* note 14, at 23.

29 Sharis A. Pozen, Acting Assistant Attorney Gen., U.S. Dep't of Justice Antitrust Div., Developments at the Antitrust Division & the 2010 Horizontal Merger Guidelines—One Year Later 24 (Nov. 17, 2011), *available at* http://www.justice.gov/atr/public/speeches/277488.pdf.

30 *See, e.g.*, *Commission Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe*, at 3–5, COM (2013) 37 final (Jan. 31, 2013) [hereinafter *EC Green Paper on Unfair Trading Practices*]; TOM BJÖRKROTH ET AL., FINNISH COMPETITION AUTH., STUDY ON TRADE IN GROCERIES: HOW DOES BUYER POWER AFFECT THE RELATIONS BETWEEN THE TRADE AND INDUSTRY? 8 (Jaana Aho trans., 2012); OECD, *supra* note 1, at 20, 62, 69–71, 175, 222, 255, 261.

agencies, and scholars began their analysis with a simple premise: Monopsony is the mirror image of monopoly.[31] In the leading monopsony case, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, the Supreme Court's initial premise was that monopoly and monopsony power were economically similar and shared a close theoretical connection.[32] Given the "kinship" between monopoly and monopsony power, the Court suggested "that similar legal standards should apply" to monopolization and monopsonization claims.[33] But, as this Article argues, developing the legal standards for evaluating monopsonization claims will be more complex than simply mirroring the monopolization standards.

First, monopsonies, as Part I describes, can impose significant economic, social, and moral harms. Thus, courts do not want to needlessly immunize monopsonies' anticompetitive behavior. Part II discusses the first significant risk in assuming monopsonies to be the mirror image of monopolies: The agencies and courts may require the same market-share thresholds for both monopsonization and monopolization claims. A plaintiff challenging a monopsony (or monopoly) under § 2 of the Sherman Act[34] must first show that

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31 Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 321–22 (2007); Todd v. Exxon Corp., 275 F.3d 191, 202 (2d Cir. 2001) (noting that because "the equation for measuring market power in monopsony is a mirror image of the relationships that create market power in a seller[,] . . . [a] greater availability of substitute buyers indicates a smaller quantum of market power on the part of the buyers in question" (citation omitted) (internal quotation marks omitted)); GMA Cover Corp. v. Saab Barracuda LLC, No. 4:10-CV-12060, 2012 WL 642739, at *6 (E.D. Mich. Feb. 8, 2012), *adopted by* No. 10-CV-12060, 2012 WL 639528 (E.D. Mich. Feb. 28, 2012); Sprint Nextel Corp. v. AT&T Inc., 821 F. Supp. 2d 308, 324 (D.D.C. 2011); *In re* Se. Milk Antitrust Litig., 801 F. Supp. 2d 705, 724 (E.D. Tenn. 2011); Addamax Corp. v. Open Software Found., Inc., 888 F. Supp. 274, 280 n.9 (D. Mass. 1995); FTC & DOJ, IMPROVING HEALTH CARE: A DOSE OF COMPETITION ch. 6, at 13 (2004) [hereinafter HEALTH REPORT]; OECD, *supra* note 1, at 245; Marius Schwartz, Econ. Dir. of Enforcement, U.S. Dep't of Justice Antitrust Div., Buyer Power Concerns and the *Aetna-Prudential* Merger (Oct. 20, 1999), *available at* http://www.justice.gov/atr/public/speeches/3924.pdf ("The textbook case of monopsony is the mirror image of monopoly."); *see also* OECD, *supra* note 1, at 256; Dennis W. Carlton & Mark Israel, *Proper Treatment of Buyer Power in Merger Review*, 39 REV. INDUS. ORG. 127, 128 (2011); Roger G. Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589, 589 (2005). *But see* Carstensen, *supra* note 25, at 273 (noting that the mantra that buyer power is the mirror image of seller power obscures the need for differentiating market power in buyer and seller situations).

32 549 U.S. at 321–22.

33 *Id.* ("'[A]symmetric treatment of monopoly and monopsony has no basis in economic analysis'" (alteration in original) (quoting Noll, *supra* note 31, at 591)). The Court noted the "strikingly similar allegations" involving predatory pricing and predatory bidding. *Id.* Given the "general theoretical similarities of monopoly and monopsony combined with the theoretical and practical similarities of predatory pricing and predatory bidding," the Court applied its two-pronged predatory-pricing test to predatory-bidding claims. *Id.* at 325. Nonetheless, the Court erred. *See* ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY IN LAW AND ECONOMICS 77–78 (2010) (describing how predatory buyer can purchase other significant inputs at a competitive price so that its output price is above total cost).

34 15 U.S.C. § 2 (2006).

the defendant possesses monopsony (or monopoly) power. Thus, if a 50% market share is insufficient for monopolization claims, agencies and courts may similarly conclude that a 50% market share is insufficient for monopsonization claims. Requiring high market-share thresholds for monopsony claims increases the risk of false negatives, chills enforcement, protects monopsony abuses, and enables mergers to monopsony.

Part III examines a second significant risk in assuming a monopsony to be the mirror image of monopoly: The agencies and courts will require consumer harm as a threshold screen for monopsony claims. Among the principles the D.C. Circuit observed from "a century of case law on monopolization under § 2" is that a monopolist's act must "harm the competitive *process* and thereby harm consumers."[35] Although the courts, over the past thirty years, have called the Sherman Act a "'consumer welfare prescription,'"[36] Part III discusses why a consumer welfare screen, contrary to its aim, increases, rather than decreases, the risks and costs of false negatives. It also promotes greater subjectivity and reduces predictability and transparency. The deficiencies of a consumer welfare screen are compounded when one shifts from the neoclassical economic theory's assumption of economic self-interest to the more realistic economic findings of consumers' other-regarding behavior and concerns over fairness.

Consequently, as this Article argues, courts and agencies cannot solely rely on market-share thresholds because firms can exercise monopsony power at relatively lower market shares. This Article, consistent with the DOJ's enforcement actions, provides courts with a sliding scale that they can use to assess whether a firm possesses monopsony power. Nor should the agencies and courts add a superfluous consumer welfare screen. Instead, plaintiffs should prevail after showing that the buyer willfully attained or maintained its

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35 United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (per curiam).

36 *See, e.g.*, NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 107 (1984) (stating that "Congress designed the Sherman Act as a consumer welfare prescription" (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979)) (internal quotation marks omitted)). The Court in *Reiter* quoted ROBERT BORK, THE ANTITRUST PARADOX 66 (1978). 442 U.S. at 343. The problem is that Bork's consumer welfare is concerned more with total welfare than consumers' welfare. *See* Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 134 (2011) (observing that "academic confusion and thoughtless judicial borrowing led to the rise of a label [consumer welfare] that 30 years later has no clear meaning"); Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The* True *Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336, 347 (2010) (noting the confusion over meaning of "aggregate" and "consumer" welfare standards); J. Thomas Rosch, Comm'r, FTC, The Next Challenges for Antitrust Economists 18 (July 8, 2010), *available at* http://www.ftc.gov/speeches/rosch/100708neraspeech.pdf (noting that many different ideas exist as to how to promote consumer welfare).

monopsony with exclusionary or predatory conduct, even when the ultimate consumer is unaffected.

I. MONOPSONY & BUYER POWER

A. *Monopsony*

Monopsony often is characterized as the mirror image of monopoly.[37] The monopsonist purchases fewer widgets than buyers otherwise would purchase in a competitive market. As a result, the monopsonist forces down the price of the sellers' widgets.[38] The sellers have little, if any, market power.[39] They decide how many widgets to sell at the per-unit price.[40] The widget industry's aggregate supply curve is upward sloping, in that sellers will produce more widgets if offered a higher price to cover the increase in their marginal cost.[41] The monopsonist profits more by buying fewer widgets at the lower price per unit and selling less of its final product than in buying more widgets, albeit at a higher price, and selling more output.

B. *Buyer Power*

Buyer power has different definitions.[42] One definition is the "[a]bility of one or more buyers, based on their economic importance on the market in question, to obtain favourable purchasing terms from their suppliers."[43] Buyer

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[37] *See supra* note 31 and accompanying text.

[38] OECD, *supra* note 1, at 255–56; Zhiqi Chen, *Defining Buyer Power*, 53 ANTITRUST BULL. 241, 243 (2008) ("The defining characteristic of monopsony power . . . is the depression of quantity purchased by a buyer."); Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669, 672 (2005). The monopolist, in contrast, normally reduces its output below competitive levels to raise its service's or product's price above competitive levels. *Glossary of Terms Used in EU Competition Policy*, at 32 (July 2002) [hereinafter *EC Glossary*], *available at* http://ec.europa.eu/competition/publications/glossary_en.pdf (defining "monopoly").

[39] OECD, *supra* note 1, at 256; Chen, *supra* note 38, at 242. The price can be competitive but provide economic rent on the supply side of the market. As Noll points out, the company has little incentive to become a monopolist if there is no consumer surplus to capture. Noll, *supra* note 31, at 592. "Likewise, rent is present in a market if, in the aggregate, suppliers of the product receive more revenues than are necessary to induce them to provide the quantity of goods that is sold." *Id.* That is certainly true. The monopsonist (like the monopolist) appropriates wealth from the seller (customer) to itself. The more surplus to be had, the greater the potential profits.

[40] Noll, *supra* note 31, at 594. The monopsonist pays a single price per unit; it pays the same price for the first and last widget it purchases that year. *See* Carlton & Israel, *supra* note 31, at 129.

[41] OECD, *supra* note 1, at 256; Chen, *supra* note 38, at 243.

[42] Chen, *supra* note 38, at 241; Noll, *supra* note 31, at 589 (noting that the term is "rarely precisely defined").

[43] *EC Glossary*, *supra* note 38, at 7.

power is about superior bargaining position and terms relative to rivals and the competitive norm.[44] This can occur when a purchaser obtains a lower net price or better terms compared to its rivals. The terms *buyer power* and *countervailing power* are used favorably, such as when "powerful buyers may discipline the pricing policy of powerful sellers, thus creating a 'balance of powers' on the market concerned."[45]

This Article focuses on the dark side of *buyer power*: "Where a strong buyer faces weak sellers, for example, the outcome can be worse than where the buyer is not powerful."[46] The buyers, in offering contracts on a "take-it-or-leave-it" basis,[47] depress below the competitive level the prices they pay, as in the case of "the cattle, hog, or poultry farmer who faces the buying power of the relatively few processors of agricultural commodities."[48]

C. Traditional Economic Concerns of Monopsony and Buyer Power

Under the textbook economic definition, the monopsonist, in depressing the price of widgets, transfers wealth from the widget suppliers to itself. The monopsonist will not pass along the lower input price to its downstream

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[44] OECD, *supra* note 1, at 201 (offering the definition of "buyer power" in Korea); *id.* at 246 (noting the definition of "buyer power" in the United States is "the ability of a buyer to negotiate a favourable price that is nevertheless *above* the competitive level" (emphasis added)); *id.* at 256 (noting the definition of "buyer power" in the European Commission guidelines is "where a purchasing agreement accounts for a sufficiently large proportion of total volume of a purchasing market so that prices can be driven down *below* the competitive level" (emphasis added) (internal quotation marks omitted)).

[45] *EC Glossary*, *supra* note 38, at 7; *see also* Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C 31) 6, 12 [hereinafter EC Horizontal Merger Guidelines]; INTERNATIONAL COMPETITION NETWORK, UNILATERAL CONDUCT WORKBOOK CHAPTER 3: ASSESSMENT OF DOMINANCE 33–37 (2011) (discussing both the possibilities and limitations of countervailing customer buyer power). Mergers among buyers can yield efficiencies and lower input prices without increasing buyer power. *See* 2010 MERGER GUIDELINES, *supra* note 5, § 12 (noting that mergers between buyers may not "enhance market power on the buying side of the market [but] can nevertheless lead to a reduction in prices paid by the merged firm, for example, by reducing transactions costs or allowing the merged firm to take advantage of volume-based discounts"). Alternatively, powerful buyers can constrain sellers from exercising market power. *Id.* § 8 (noting that merging parties' ability to exercise market power is constrained "if powerful buyers have the ability and incentive to vertically integrate upstream or sponsor entry, or if the conduct or presence of large buyers undermines coordinated effects"); Michael E. Porter, *The Five Competitive Forces That Shape Strategy*, HARV. BUS. REV., Jan. 2008, at 78, 84 (observing that powerful buyers "can credibly threaten to integrate backward and produce the industry's product themselves if vendors are too profitable").

[46] *EC Glossary*, *supra* note 38, at 7–8.

[47] Lynn A. Hayes, Farmers' Legal Action Grp., Inc., Issues in Litigation on Behalf of Poultry and Livestock Producers Under the Packers and Stockyards Act as Amended by the 2008 Farm Bill 1–2 (Sept. 25–26, 2009), *available at* http://www.justice.gov/atr/public/workshops/ag2010/001/AGW-00067-h.pdf.

[48] Carstensen, *supra* note 25, at 277.

consumers.[49] Moreover, because fewer widgets are produced and sold, society suffers a deadweight welfare loss.[50]

Problems arise once one deviates from the textbook definition. In illustrating when buyer power "may be beneficial for competition," the European Commission stated that when the powerful buyer "lowers input costs without restricting downstream competition or total output, then a proportion of these cost reductions are likely to be passed onto consumers in the form of lower prices."[51] This is not always true. Contrary to the Commission's generalization, consumers or society do not necessarily benefit when powerful buyers lower their input costs without restricting downstream competition or total output. As the U.S. competition agencies recognize, significant buyer power, even to the point of monopsony, does not always lead to less output of the sellers' or monopsonist's goods.[52] Consumers do not necessarily benefit with lower prices when a powerful buyer depresses the sellers' price without affecting total output. This can be important when evaluating competitive effects.

First, the supply curve of the sellers' widgets may be inelastic. The beef industry, for example, has a "very inelastic supply over any intermediate time period given the long time it takes to bring a calf to slaughter weight."[53] Here buyer power depresses the farmers' price for their cattle but not the total amount of cattle. So, unlike the textbook monopsony, society does not bear a

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49 BLAIR & HARRISON, *supra* note 33, at 47; DE SCHUTTER, *supra* note 6, at 2; John B. Kirkwood, *Powerful Buyers and Merger Enforcement*, 92 B.U. L. REV. 1485, 1498 (2012).

50 *See* BLAIR & HARRISON, *supra* note 33, at 43–45; HEALTH REPORT, *supra* note 31, ch. 6, at 13–14 ("When a monopsonist reduces purchases of inputs to reduce input prices, society foregoes the production of output whose value to consumers exceeds the resource costs of associated inputs, thereby creating a welfare loss to society.").

51 EC Horizontal Merger Guidelines, *supra* note 45, at 11.

52 *See* 2010 MERGER GUIDELINES, *supra* note 5, § 12, at 32–33 ("The Agencies do not view a short-run reduction in the quantity purchased as the only, or best, indicator of whether a merger enhances buyer market power."); *see also* Carstensen, *supra* note 5, at 780 ("[T]he fact that output may remain unchanged is also not necessarily a basis to conclude that the merger has no adverse effect on competition.").

53 AAI TRANSITION REPORT, *supra* note 4, at 296 (noting the beef industry's concentration); *see In re* Beef Indus. Antitrust Litig., 600 F.2d 1148, 1154 (5th Cir. 1979). Supply can be inelastic in the short term in other agricultural industries. *See* Allen v. Dairy Farmers of Am., Inc., No. 5:09-CV-230, 2012 WL 5844871, at *4 (D. Vt. Nov. 19, 2012) (alleging that "milk is a fungible product for which the supply is inelastic meaning that it responds slowly and insubstantially to fluctuations in price"); *see also* Wise & Trist, *supra* note 14, at 8 ("[Hog] [f]armers are particularly vulnerable to buyer power because many are selling perishable goods (e.g. live animals) or products that would require large storage capacity (e.g. several tons of corn). For hog farmers, this can be particularly problematic because they operate on very tight margins, rely on selling their animals at optimum weight, and need to bring in the next litter on a fixed schedule.").

deadweight loss.[54] There is, however, a wealth transfer from the farmers to the powerful buyers, and consumers do not necessarily benefit from the exercise of buyer power.[55] Thus, the Canadian competition authority concluded that "[c]ases where the supply curve is perfectly inelastic, such that a price decrease below competitive levels does not result in a decrease in output but only a wealth transfer, may also give rise to concerns."[56]

Second, a monopsonist, like a monopolist, can price discriminate to get a non-cost-justified price decrease—namely paying each farmer only the minimum amount needed for that farmer to produce the product.[57] As economist Roger Noll discusses, the monopsonist can target (i) more efficient suppliers and extract from them their incremental profits (Ricardian rents),[58] (ii) suppliers with lower short-run costs and extract from them their quasi-rents,[59] and (iii) any *supra*-competitive profits earned by the suppliers.[60] Under these scenarios, the more efficient suppliers are punished. A fluid milk processing monopsony, for example, can demand a lower price from the more efficient dairy farmers who obtained through their investments more milk, at a lower cost, from better cows. The farmer is not rewarded for her efficiency. The monopsonist milk processor simply appropriates the efficient farmer's extra profits for itself. Similarly, the monopsonist milk processor can squeeze the dairy farmers so that they do not earn in the short-term a competitive return on their milking equipment.[61] Eventually, when the equipment breaks down, the farms close.[62]

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54 *Glossary of Statistical Terms*, OECD, http://stats.oecd.org/glossary/detail.asp?ID=3187 (last updated Aug. 12, 2002) (defining deadweight welfare loss as "a measure of the dollar value of consumers' surplus lost (but not transferred to producers) as a consequence of a price increase").

55 *See* BLAIR & HARRISON, *supra* note 33, at 50; *see also* OECD, *supra* note 1, at 141 & nn.1–2 (discussing that buyer power "results in a decrease in the overall quantity of the input produced or supplied in a relevant market" except "where the supply curve is perfectly inelastic such that a price decrease below competitive levels does not result in a decrease in output but only a transfer" or where output deteriorates not in quantity "but rather in terms of quality").

56 COMPETITION BUREAU CAN., MERGER ENFORCEMENT GUIDELINES 32 n.47 (2011), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-meg-2011-e.pdf/$FILE/cb-meg-2011-e.pdf.

57 Carstensen, *supra* note 5, at 784 (noting the greater difficulty "for a seller to engage in arbitrage in the ways that a buyer can" which can facilitate buyers' price discrimination among sellers).

58 *See* Noll, *supra* note 31, at 593.

59 *See id.* (describing quasi-rents as "the difference between a supplier's total revenues and short-run total costs").

60 *See id.* at 593–94, 603.

61 *See* Hayes, *supra* note 47 (describing a similar problem that occurs in the poultry industry); *see also* Wise & Trist, *supra* note 14, at 12 ("Generally, the terms of the contract do not guarantee income for the useful life of the equipment needed to produce hogs. Producers may gain the security of a guaranteed buyer for the animals on their farms, but that security does not extend for the life of their investments, nor their debt

Buyers can also price discriminate by using all-or-nothing contracts, whereby the farmer must commit to selling a specific volume at a specified price (that captures the above-described rents) or the monopsonist refuses to purchase anything.[63]

Buyers also price discriminate by shifting costs and risk to suppliers.[64] For example, one court found that the contract terms of the largest poultry integrator in Oklahoma shifted many risks and costs to the growers, and could punish or reward farmers with the chicks it provided:

> Prior to entering into a contract with a grower, OK requires the grower to first obtain financing and build chicken houses to specifications set by OK. In exchange for a grower's expenditure of money to build the requisite chicken houses, OK signs a letter of intent, agreeing to enter into a broiler contract with the grower upon satisfactory completion of the chicken houses. One chicken house can cost a grower nearly $160,000, not including the cost of land and equipment.
>
> All the broiler contracts are materially identical; they are standard contracts drafted by OK and are not subject to negotiation. Under the standard contract, a grower agrees to use only chicks, feed, and medicine supplied by OK. OK is not liable, however, for any loss

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obligations. This leaves producers under additional pressure to accept the contract terms dictated by the packer when it comes time to renew the contract. As one poultry producer testified, 'When you have that kind of debt load over you, of course, you're going to choose to sign the contract. You feel that there's no other option when you owe . . . a half a million or a million dollars.'" (alteration in original) (citation omitted)).

62 *See* Carstensen, *supra* note 5, at 807; Kirkwood, *supra* note 49, at 1497.

63 *See* White Mule Co. v. ATC Leasing Co., 540 F. Supp. 2d 869, 890 n.14 (N.D. Ohio 2008); OECD, *supra* note 1, at 246 (explaining how the monopsonist can price discriminate with all-or-nothing contracts); Carstensen, *supra* note 5, at 795, 807; Ganesh, *supra* note 6, at 1216–19. As *White Mule* explains:

> An all or nothing supply case allows a monopsony buyer to purchase the maximum quantity a supplier will make available at a particular price when the supplier's alternative is to sell nothing. In such a situation, colluding buyers—or a buyer with an exclusivity agreement—could obtain a privately optimal quantity at the supplier's lowest price point. This is to the buyer's benefit because, in contrast to the classic monopsony model in which the monopsonist must reduce the quantity purchased to lower prices, a monopsonist "would prefer to pay the lower price without reducing the quantity purchased."

540 F. Supp. 2d at 890 n.14 (citations omitted).

64 *See* Carstensen, *supra* note 5, at 798–99 (discussing how buyers can price discriminate by shifting risk to sellers); Letter from Timothy A. Wise, Dir., Tufts Univ. Global Dev. & Env't Inst. Research & Policy Program, to Eric Holder, Attorney Gen., Dep't of Justice, and Tom Vilsack, Sec'y, Dep't of Agric. 8 (Aug. 23, 2010), *available at* http://www.ase.tufts.edu/gdae/Pubs/wp/GDAECommentsDOJ-USDAAugust2010.pdf ("Buyer power can affect not only the price producers receive for their products but also the conditions under which they produce, the quality of the contracts they receive for production or marketing, and the distribution of risk between the buyer and the seller.").

> a grower incurs as a result of OK's failure to provide feed and supplies; nor is OK liable for birds condemned due to certain diseases. The contract also provides that a grower may not sell its chickens to poultry integrators other than OK and may not transfer its broiler contract to other potential growers without OK's prior approval. Under the terms of the contract, OK agrees to provide the grower with only one flock of chicks, which typically takes a grower seven weeks to raise. Thereafter, OK may provide the grower with replacement flocks "from time to time." In addition to deciding when to deliver replacement flocks, OK determines the breed of chicken, the number of chicks per flock, and the number of flocks. Furthermore, at the end of each growing cycle, OK may require that a grower update its houses to meet OK's most recent specifications before it will place another flock of chicks with the grower. These required changes result in significant costs to growers.[65]

In the above case, the broiler contracts were materially identical and not subject to negotiation. In other cases, powerful processors can discriminate further by varying the contract terms (with more onerous terms for farmers with fewer outside options) and by requiring farmers to keep these contract terms secret.[66]

A third concern is that a monopsony can hinder innovation and dynamic efficiency. Facing less income and increased uncertainty over future earnings, suppliers may have less incentive to innovate or invest in their equipment.[67]

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65 Been v. O.K. Indus., 495 F.3d 1217, 1222–23 (10th Cir. 2007) (footnote omitted). Another example is powerful retailers who require suppliers to stock the retailers' shelves and take returns. *See* CATHERINE NICHOLSON & BOB YOUNG, CONSUMERS INT'L, THE RELATIONSHIP BETWEEN SUPERMARKETS AND SUPPLIERS: WHAT ARE THE IMPLICATIONS FOR CONSUMERS? 6, 10 (2012), *available at* http://www.consumersinternational.org/media/1035301/consumer%20detriment%20briefing%20paper%20sept2012.pdf. On unfair practices that shift commercial risk from the retailer to the supplier, see generally *EC Green Paper on Unfair Trading Practices*, *supra* note 30, at 18–19; OECD, *supra* note 1, at 237; and PETER FREEMAN ET AL., U.K. COMPETITION COMM'N, THE SUPPLY OF GROCERIES IN THE UK MARKET INVESTIGATION 12 (2008), *available at* http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2008/fulltext/538, which found that "the principal manner in which excessive risks or unexpected costs could be transferred from grocery retailers to suppliers was through retailers making retrospective adjustments to the terms of supply" and also expressed concern that as a result of the transfer of risk "the retailer has less incentive to minimize that risk."

66 *See* Wise & Trist, *supra* note 14, at 11 ("Strict confidentiality clauses in contracts prevent growers from sharing the terms and conditions of contracts with other producers. The packer, of course, knows the terms of all the contracts it is signing, leaving farmers at a disadvantage." (citation omitted)).

67 *See* DODD & ASFAHA, *supra* note 6, at 12; FREEMAN ET AL., *supra* note 65, at 12 (finding that "the transfer of excessive risks or unexpected costs by grocery retailers to their suppliers is likely to lessen suppliers' incentives to invest in new capacity, products and production processes" and "if unchecked, these practices would ultimately have a detrimental effect on consumers"); NICHOLSON & YOUNG, *supra* note 65, at 13–14; Kirkwood, *supra* note 49, at 1550.

Quality and consumer choice can also deteriorate,[68] especially when the buyer enjoys market power downstream.[69] With the concessions it obtains, a powerful buyer may seek the quiet life, with less incentive to innovate or become more efficient.[70]

A fourth economic concern is the "commodity problem," whereby buyer power depresses price by increasing, rather than decreasing, total output. Farmers—faced with buyer power and lower prices—increase the supply of agricultural commodities.[71] This is unusual. Neoclassical economic theory predicts that monopsony power leads to less output.[72] What appears to drive this behavioral anomaly is that each farmer seeks a target income; by producing more, the farmers collectively depress price further. One example is coffee.[73] Coffee growers in some countries have few alternatives. Coffee is best cultivated on hilly land in high altitudes,[74] which limits other alternative crops.[75] The development of alternatives is further inhibited by "limited access to markets for other commodities, the perennial nature of coffee plants (and the

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68 W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 104 (3d Cir. 2010) (noting that the payment of depressed reimbursement rates poses the risk of reduced quality); Ariel Ezrachi & Koen de Jong, *Buyer Power, Private Labels and the Welfare Consequences of Quality Erosion*, 5 EUR. COMPETITION L. REV. 257, 258 (2012) (discussing how buyer power may pressure sellers "to sell at near loss" and degrade quality "[s]ubject to the nature of the product and to the extent that reduction in quality cannot easily be detected by the final consumer"); Kirkwood, *supra* note 49, at 1547, 1553 (describing how buyer power reduces consumer choice); Press Release, U.S. DOJ, Blue Cross Blue Shield of Michigan and Physicians Health Plan of Mid-Michigan Abandon Merger Plans 1 (Mar. 8, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/256259.pdf (alleging that Blue Care Networks of Michigan's plan to acquire Physicians Health Plan of Mid-Michigan "would have given Blue Cross-Michigan the ability to control physician reimbursement rates in a manner that could harm the quality of health care delivered to consumers").

69 *See* Ganesh, *supra* note 6, at 1210 (stating that where the monopsonist is "also dominant in the downstream market, the welfare of end consumers will be adversely affected"); Porter, *supra* note 45, at 84 ("Intermediate customers gain significant bargaining power when they can influence the purchasing decisions of customers downstream. Consumer electronics retailers, jewelry retailers, and agricultural-equipment distributors are examples of distribution channels that exert a strong influence on end customers.").

70 *See* Kirkwood, *supra* note 49, at 1551.

71 DODD & ASFAHA, *supra* note 6, at 10.

72 OECD, *supra* note 1, at 9, 234.

73 DE SCHUTTER, *supra* note 6, at 2; Nicolas Petit, *Ethiopia's Coffee Sector: A Bitter or Better Future?*, 7 J. AGRARIAN CHANGE 225, 251 (2007).

74 *See Coffee from Around the World*, NAT'L COFFEE ASS'N USA, http://www.ncausa.org/i4a/pages/index.cfm?pageid=75 (last visited July 1, 2013); *The Optimal Coffee Environment: Best Climate Conditions for Growing Coffee Beans*, COFFEERESEARCH.ORG, http://www.coffeeresearch.org/agriculture/environment.htm (last visited July 1, 2013).

75 *See* Ganesh, *supra* note 6, at 1196. In some countries, farmers can more readily produce other cash crops on the terrain, but the law forbids it. *See* Karol C. Boudreaux & Puja Ahluwalia, *Cautiously Optimistic: Economic Liberalization and Reconciliation in Rwanda's Coffee Sector*, 37 DENV. J. INT'L L. & POL'Y 147, 152 (2009) ("[T]he government may have refused to modify the law because of coffee's role as the major source of export revenue and a lack of readily available, viable substitutes.").

investment they represent), [and] strong cultural attachment to coffee or 'adding-up' problems (if different countries diversify into the same products)."[76] Coffee growers may also face obstacles in vertically integrating downstream to process their coffee.[77] In the coffee value chain, economic power has shifted from coffee growers to the trading houses (five of which account for 40% of green coffee imports), roasters (ten of which account for 60%–65% of processed coffee sales), and retailers.[78] So while coffee importers, roasters, and retailers may compete for a share of the rents, they "combine to ensure that few of these [rents] accrue to producer countries."[79] When coffee growers faced declining prices from concentrated buyers, they produced "even more coffee in an attempt to earn short-term income to meet daily expenses, and thereby cause[d] oversupply and further depression of coffee prices, even below the average cost of production."[80] In 2002, coffee prices collapsed to a 100-year low,[81] and 8% more coffee was produced than consumed.[82]

Some argue that the exercise of monopsony power "usually results in higher prices downstream."[83] This is clearly so when the monopsonist also monopolizes the output market.[84] The economic harm, for example, of the monopsonist milk processor that is also a monopolist is twofold. The monopsonist extracts wealth from the dairy farmers. It also extracts wealth from consumers by charging them higher prices for the fewer gallons of milk it sells.[85] This concern of simultaneous monopolistic and monopsonistic effects

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76 Petit, *supra* note 73, at 252; *see also* Green, *supra* note 6 (noting barriers to diversification in countries dependent on a small number of agricultural commodities).

77 *See* Green, *supra* note 6.

78 *See* Petit, *supra* note 73, at 230–31; *see also* Green, *supra* note 6 (noting how in the early 1990s coffee exporting countries earned about $10 to $12 billion in U.S. dollars, whereas retail coffee sales, mostly in large industrialized countries, were about $30 billion in U.S. dollars, and that by 2002, retail sales exceeded $70 billion in U.S. dollars, whereas coffee producing countries received only $5.5 billion in U.S. dollars).

79 Green, *supra* note 6.

80 *See* DE SCHUTTER, *supra* note 6, at 3; *see also* DODD & ASFAHA, *supra* note 6, at 10 (noting that commodity producers "continue to produce even when the market price is below their cost of production," and attempt to "compensate for low prices by producing more, exacerbating oversupply"); Ganesh, *supra* note 6, at 1196 (stating that the lack of ready alternatives for coffee growers forces them to produce more when prices fall, even when the price falls below the cost of production).

81 *See* Petit, *supra* note 73, at 225.

82 *See* CHARIS GRESSER & SOPHIA TICKELL, OXFAM, MUGGED: POVERTY IN YOUR COFFEE CUP 2 (2002), *available at* http://www.oxfamamerica.org/files/mugged-full-report.pdf.

83 OECD, *supra* note 1, at 9.

84 *See id.* at 246.

85 *See* Consol. Edison Co. of N.Y. v. FERC, 823 F.2d 630, 632 (D.C. Cir. 1987) ("During the Depression, the few pipelines that existed exerted double-edged control over the natural gas market. As both

recently arose when the health insurer Blue Cross Blue Shield of Michigan sought to acquire its primary competitor, Physicians Health Plan of Mid-Michigan, and would thereby have controlled nearly 90% of the commercial health insurance market in the Lansing, Michigan area.[86] The acquisition, the DOJ said, would have harmed both consumers ("higher prices, fewer choices, and a reduction in the quality of commercial health insurance plans purchased by Lansing area residents and their employers") and sellers (acquisition would give "Blue Cross-Michigan the ability to control physician reimbursement rates").[87] The parties abandoned the merger after the DOJ threatened to sue.[88]

A related concern is that buyer power can lead to downstream market power and ultimately a monopsony/monopoly.[89] A firm may exercise its buyer power to (i) reduce prices downstream, eliminating smaller competitors;[90] (ii) encourage sellers to raise their price charged to other, less powerful buyers (raising rivals' costs);[91] (iii) extract price cuts such that sellers charge higher prices to other, less powerful buyers (the waterbed effect);[92] or (iv) otherwise foreclose its rivals.[93]

Alternatively, consumers can pay higher prices even when the monopsonist lacks market power downstream. Suppose, for example, four monopsony milk processors supply the same broader geographic market, the greater New York region. Suppose each monopsonist produces less milk, as it buys less milk

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monopsonists and monopolists, the pipelines could buy and sell natural gas according to their own whims, with producers and consumers caught in the resultant squeeze, both as to price and supply."); AAI TRANSITION REPORT, *supra* note 4, at 283 (discussing how "consumers are paying higher and higher prices for food products because the bottlenecks in the process of moving food from the farm to the retail market have allowed processors and retailers to exploit both producers and consumers"); OECD, *supra* note 1, at 246; Noll, *supra* note 31, at 596 ("[T]he lower input price and higher output price raise the income of the monopsonist at the expense of sellers in the monopsonized market and consumers in the final goods market.").

86 *See* Press Release, U.S. DOJ, *supra* note 68, at 1.

87 *See id.*

88 *See id.*

89 *See* John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should* Brooke Group *Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?*, 72 ANTITRUST L.J. 625, 648–49 (2005).

90 *See id.*; *see also* Kirkwood, *supra* note 49, at 1546–47.

91 *See* Kirkwood, *supra* note 49, at 1537–43 (explaining the principle of "raising rivals' costs").

92 *See* Paul W. Dobson & Roman Inderst, *The Waterbed Effect: Where Buying and Selling Power Come Together*, 2008 WIS. L. REV. 331, 333 (describing the "waterbed effect" where "better supply terms for powerful buyers . . . lead to a worsening of the terms of supply for smaller or otherwise-less-powerful buyers, which might then have an adverse consequence for consumers if downstream competition is lessened").

93 *See* EC Horizontal Merger Guidelines, *supra* note 45, at 11 ("Competition in the downstream markets could also be adversely affected if, in particular, the merged entity were likely to use its buyer power vis-à-vis its suppliers to foreclose its rivals.").

from the dairy farmers in its local market. With each monopsony following this strategy, barring entry by another milk processor, less milk will be delivered to supermarkets, cafeterias, and other buyers in the greater New York region, causing milk prices to rise.

The harder case is when buyer power directly harms the sellers but not the ultimate consumers. Suppose local farmers sell their veal calves to the local monopsony meat packer. After slaughtering the calves, and after processing and packaging the finished cuts of veal, the meat packer sells the veal cutlets nationwide. The local farmer has few options of where to sell its calves. The calves "have a very short time frame of a few weeks when they are market ready, so their optimum value quickly drops if they are not sold in a timely manner."[94] Suppose then the relevant geographic market where the farmer can sell his calves is several hundred kilometers.[95] Unlike the farmer's limited geographic area where he can sell, the meat packer selling the selected cuts of veal and the retailers and institutions that buy the veal can turn to a broader geographic area (perhaps thousands of kilometers).[96] The meat packer enjoys a monopsony in buying calves from local farmers, but lacks market power in selling its packaged veal, since it competes with other meat packers across the United States. The monopsonist supplies fewer selected cuts of veal. But suppose that other meat packers sell more veal cutlets so that market output remains the same. This is a big assumption.[97] But if the same amount of veal is sold, are consumers who buy the veal cutlets harmed?

Perhaps. One potential inefficiency is if other veal calf farmers outside the monopsonized market replace the lost production at a higher cost.[98] Other meat packers are increasing output with incremental input that is less efficiently

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94 E-mail from Patrick Kilsdonk to ATR-Agricultural Workshops (Dec. 29, 2009, 9:07 AM), *available at* www.justice.gov/atr/public/workshops/ag2010/comments/255233.pdf; *see also* BLAIR & HARRISON, *supra* note 33, at 81 (discussing inelasticity of supply for perishable goods); *cf.* HEALTH REPORT, *supra* note 31, ch. 6, at 16 ("Seller switching costs for physicians can be significant because: (1) a physician's time is perishable and (2) it can be difficult for a physician to quickly replace lost patients.").

95 *Cf.* Carstensen, *supra* note 25, at 278.

96 *See* OECD, *supra* note 1, at 246.

97 As Jack Kirkwood reminded me:

> That assumes the other packers are as efficient as the monopsonist and have the excess capacity to make up the lost output at a marginal cost below the market price. That could happen, but it would not be common. It assumes that supply is perfectly elastic in this market—that any increase in price will immediately provoke a compensating increase in supply.

Memorandum from Jack Kirkwood to author (July 31, 2012) (on file with author).

98 *See* Carlton & Israel, *supra* note 31, at 129 n.5; *see also* Noll, *supra* note 31, at 595–96.

procured.[99] Suppose, for example, farmers in other states with a less hospitable climate—higher temperatures and humidity—start raising more calves, albeit at a higher cost.[100] If consumer demand for veal is relatively inelastic, consumers are harmed when the higher costs from raising the calves are passed to them as higher retail prices. A second inefficiency is the opportunity cost of suppliers who now devote resources in competitive markets to produce more of the output (veal calves) when they could have profitably devoted their inputs (such as land) to other uses (such as raising chicken).[101] A third inefficiency is when the sellers (the veal calf farmers) in the monopsonized market are squeezed of their Ricardian rents and quasi-rents.[102] The farmers now have less money to purchase goods and services. In a competitive market, some veal calf farmers would have the profits to purchase a new novel, see a movie, and dine at a restaurant. In the monopsonized market, they forego these purchases, as their income barely covers basic expenses.[103] The wealthier monopsonist will not take up the slack by purchasing more copies of the same book. To the extent that consumers also produce these goods and services, they will be harmed.

But the downstream harm to consumers is less clear when the end product competes closely with other products or when "the monopsonist employs a different technology, using different inputs, than its output-market rivals."[104]

D. Other Economic, Social, and Moral Concerns About Monopsony

A competitive process is not a complete and self-sufficient end. Competition helps us achieve higher ends of human progress, namely, greater justice and well-being, better quality of life, and a more humane ordering of social relationships.[105] Accordingly, competition and economic efficiency are

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99 *Cf.* Carlton & Israel, *supra* note 31, at 129 n.5.

100 *See* OECD, *supra* note 1, at 144 (observing "that an output decrease in response to monopsony power in one relevant upstream market that results in output increases in other relevant upstream markets is typically the result of inefficient substitution towards less efficient producers").

101 *See* Noll, *supra* note 31, at 595.

102 *See id.* at 593 (discussing the effects of monopsony on Ricardian rents and quasi-rents).

103 *Cf.* Dan Fesperman & Kate Shatzkin, *The Plucking of the American Chicken Farmer*, BALT. SUN, Feb. 28, 1999, at 1A ("A new chicken farmer today can expect an annual net income of only $8,160—about half the poverty level for a family of four—until he has paid off the 15-year loan he took to get into the business, and even that estimate may be overly optimistic. Fewer than half of Delmarva's chicken farmers say they're making enough to meet expenses.").

104 OECD, *supra* note 1, at 246.

105 Maurice E. Stucke, *Should Competition Policy Promote Happiness?*, 81 FORDHAM L. REV. 2575 (2013).

subservient to, and can never supplant, the higher ends of human progress. The citizens' dignity and well-being remain paramount.[106]

Although competition policy is generally not considered a human rights issue, courts have long recognized that concentrated economic power tends to impoverish individuals of their livelihood, and it threatens inclusive growth that enhances human and institutional capacity.[107] Whereas the OECD characterized economic growth as "the most powerful engine for poverty reduction and development,"[108] monopsonies and monopolies, as courts have long recognized, can thwart human development.[109] Workers, who earn a living for themselves and their families, "will of necessity be constrained to live in idleness and beggary."[110] Monopsonies and monopolies "deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves."[111]

Also of concern are the sellers' loss of economic liberty and basic human rights, such as the right to food, work, and development.[112] Participants at the

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106 Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497, 527–29 (discussing the ethical concerns of monopolies).

107 *See, e.g.*, Case of Monopolies, (1602) 77 Eng. Rep. 1260 (K.B.) 1263.

108 OECD, FRAMEWORK FOR AN OECD STRATEGY ON DEVELOPMENT 3 (2011).

109 Case of Monopolies, 77 Eng. Rep. at 1263.

110 *Id.*; *see also* Mitchel v. Reynolds, (1711) 24 Eng. Rep. 347 (Ch.) 350 (explaining that monopolies deprive the public of useful members).

111 United States v. Addyston Pipe & Steel Co., 85 F. 271, 280 (6th Cir. 1898) (quoting Alger v. Thacher, 36 Mass. (19 Pick.) 51, 54 (1837)), *aff'd as modified*, 175 U.S. 211 (1899).

112 *See* Charles A. Ramsay Co. v. Associated Bill Posters, 260 U.S. 501, 512 (1923) (stating that competition laws "secure equality of opportunity and . . . protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade"); United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945) (stating that "[i]t is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few"); DE SCHUTTER, *supra* note 6, at 4; Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 384 (1965) (observing that antitrust laws aimed "to expand the range of consumer choice and entrepreneurial opportunity by encouraging the formation of markets of numerous buyers and sellers, assuring ease of entry to such markets, and protecting participants—particularly small businessmen—against exclusionary practices"). The U.S. District Court for the Northern District of Iowa recently quoted Justice Douglas:

> Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. The fact that they are not vicious men but respectable and social minded is irrelevant. That is the philosophy and the command of the Sherman Act.

United States v. Vandebrake, 771 F. Supp. 2d 961, 1000–01 (N.D. Iowa 2011) (quoting United States v. Columbia Steel Co., 334 U.S. 495, 536 (1948) (Douglas, J., dissenting)), *aff'd*, 679 F.3d 1030 (8th Cir. 2012).

agricultural hearings, a senior DOJ official recounted, raised the "human costs of declining rural economies, including bankruptcies, foreclosures, and even suicides."[113] Workers facing financial distress and poverty can impose risk and costs on others.[114] Buyer power can encourage a race to the bottom for wages, health benefits, working conditions, child labor, and schooling.[115] One account of the coffee crisis concluded:

> Families dependent on the money generated by coffee are pulling their children, especially girls, out of school. They can no longer afford basic medicines, and are cutting back on food. Beyond farming families, coffee traders are going out of business. National economies are suffering, and some banks are collapsing. Government funds are being squeezed dry, putting pressure on health and education and forcing governments further into debt.[116]

So to the extent a jurisdiction treats human dignity as inviolable, its competition law cannot ignore the sellers' welfare. Its law must foster a competitive process that promotes (or at least does not hinder) many market participants' access to food, work, and a livable wage.[117] A competition policy that ruins the environment,[118] increases inequality and poverty, and decreases

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[113] Christine A. Varney, Assistant Attorney Gen., U.S. Dep't of Justice Antitrust Div., Joint DOJ and USDA Agriculture Workshops: Concluding Remarks (Dec. 8, 2010), *available at* http://www.justice.gov/atr/public/speeches/264911.pdf.

[114] *See* Stephan J. Goetz & Hema Swaminathan, *Wal-Mart and County-Wide Poverty* 11–12 (AERS, Staff Paper No. 371, 2004), *available at* http://aers.psu.edu/research/centers/cecd/research/wal-mart-and-county-wide-poverty/full-study/view (suggesting that the Wal-Mart chain, through paying lower wages, creates costs to taxpayers in the form of greater local poverty than would occur absent local Wal-Mart stores).

[115] *See* DE SCHUTTER, *supra* note 6, at 2 (noting how small-hold cocoa farmers in Cote d'Ivoire resorted to child labor); *see also* Green, *supra* note 6 ("In some commodities such as bananas, palm oil and tea, NGOs claim that the downward pressure on prices has triggered a 'race to the bottom' in wages and working conditions on plantations, including casualisation of labour, the use of child labour, increased workloads, reduced benefits such as health provision, schooling and housing.").

[116] GRESSER & TICKELL, *supra* note 82, at 2.

[117] *See* Ganesh, *supra* note 6, at 1229–30.

[118] Monopsonies can promote the environment. If manufacturing widgets significantly degrades the environment, then the monopsonies, in demanding fewer widgets, can reduce the environmental toll. But monopsonies can also pose significant environmental risks that undermine sustainable development. Their downward pressure on the sellers' price increases the risks of negative externalities. To reduce their costs, more farmers, for example, dispense waste without the necessary precautions. *See* DE SCHUTTER, *supra* note 6, at 2. Sustainability and environmental concerns of increased soil erosion, reduced biodiversity, deforestation, and water, soil, and air pollution arise. *See* Green, *supra* note 6 (manuscript at tbl.2); *see also* Petit, *supra* note 73, at 253 (describing environmental degradation in Ethiopia); *Declaration of the European Parliament on Investigating and Remedying Abuse of Power by Large Supermarkets Operating in the European Union*, EUR. PARLIAMENT (Feb. 19, 2008), http://www.europarl.europa.eu/sides/getDoc.do?reference=P6_TA%282008%290054&language=EN (declaring that powerful retailers' buyer power has "negative knock-on effects on both quality of employment and environmental protection").

many citizens' well-being is hardly worth promoting. The ultimate policy aim, the OECD recently discussed, is "achieving sustainable economic growth, addressing inequality and poverty, and identifying pathways to social and economic well-being."[119]

II. LEGAL IMPLICATIONS OF MONOPSONY POWER

The economic, social, and moral concerns of monopsony and buyer power, which Part I discussed, can be attacked on different fronts. The country, for example, can (i) assign buyer-power problems in specific industries to a regulatory agency[120] and (ii) design laws, as in Japan and Korea, that specifically address common complaints about powerful buyers in particular sectors.[121] On the competition law front, plaintiffs can enjoin mergers that tend to create a monopsony or significantly increase the anticompetitive risks from buyer power.[122] They can prosecute group boycotts and collusion among

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119 OECD, *supra* note 108, at 3 (emphasizing how "[n]ew sources of growth must be created to ensure a strong, jobs-rich and greener world economy"); *see also Commission Report on Competition Policy 2010*, at 7, 11, COM (2011) 328 final (Oct. 6, 2011) ("At the same time, competition policy has supported the main objectives of the Union as set out in the Treaties: a competitive market, economic, social and territorial cohesion and sustainable development.").

120 OECD, *supra* note 1, at 10. The U.K. Competition Commission, for example, has twice investigated the grocery market. ANTONY SEELY, SUPERMARKETS: COMPETITION INQUIRIES INTO THE GROCERIES MARKET 1 (2012), *available at* www.parliament.uk/briefing-papers/SN03653.pdf. Its first inquiry, completed in 2000, resulted in a "Code of Practice" to regulate the relationship between the largest supermarkets and their suppliers. *Id.* "However, the [Office of Fair Trading] received many complaints that the Code was not preventing supermarkets exploiting some of their suppliers, and putting many small shops out of business." *Id.* In 2008:

> [T]he Commission completed its inquiry, concluding that in many respects UK grocery retailers were "delivering a good deal for consumers" but that action was "needed to improve competition in local markets and to address relationships between retailers and their suppliers," including a strengthened and revised Code of Practice, to be enforced by an independent ombudsman.

Id.

121 OECD, *supra* note 1, at 192–96, 203–04 (describing Japan's Antimonopoly Act and Korea's Fair Subcontract Transaction Act). The Chairman of the Japan Fair Trade Commission "emphasized the importance of fairness . . . . [and] indicated his view that competition law should protect the rights of the players on a level playing field as well as consumers." *Id.* at 191. The country's laws address common complaints by specifically prohibiting powerful retailers from engaging in acts such as the unjust return of goods, unjust price reductions (after purchasing the product), and unjust assignment of work to employees of suppliers. *Id.* at 194–95. Similarly, the primary purpose of the Packers and Stockyards Act of 1921, 7 U.S.C. §§ 181–229 (2012), was "to assure fair competition *and* fair trade practices in livestock marketing and in the meatpacking industry." Schumacher v. Tyson Fresh Meats, Inc., 434 F. Supp. 2d 748, 751 (D.S.D. 2006) (quoting H.R. REP. NO. 85-1048 (1957)) (internal quotation marks omitted).

122 Sprint Nextel Corp. v. AT&T Inc., 821 F. Supp. 2d 308, 327 (D.D.C. 2011); United States v. Aetna, Inc., No. 3-99 CV 1398-H, 1999 WL 1419046, at *15 (N.D. Tex. Dec. 7, 1999) ("Aetna's acquisition of Prudential will also consolidate its purchasing power over physicians' services in Houston and Dallas,

buyers.[123] This Part focuses on illegally maintaining or attaining a monopsony under § 2 of the Sherman Act. Section 2 prohibits any person from "monopoliz[ing], or attempt[ing] to monopolize, or combin[ing] or conspir[ing] with any other person or persons, to monopolize any part of the trade or commerce."[124] Since § 2 addresses the evils of concentrated economic power across many industries,[125] it is a good starting point for evaluating monopsony claims.

A. Proving Monopsony Power

To prevail under § 2, the plaintiff first must prove that the defendant possesses monopsony power.[126] Having buyer power does not satisfy this

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enabling the merged entity to unduly reduce the rates paid for those services."); Kirkwood, *supra* note 49, at 1513.

123 *See, e.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 209 (1959) (discussing a retailer using "its 'monopolistic' buying power to bring about" an illegal group boycott); Sony Elecs., Inc. v. Soundview Techs., Inc., 157 F. Supp. 2d 180, 187–88 (D. Conn. 2001); Gould v. Control Laser Corp., 462 F. Supp. 685, 691–92 (M.D. Fla. 1978) (declining to dismiss complaint alleging concerted refusal to buy; observing that an agreement not to take a license except under terms agreed by the group "unquestionably restrained the freedom of each group member to act as an individual producer in the laser market, free to contract or not contract with whom it chooses"; and concluding that "competitive consequences of such collaborative decision making cannot be determined on the basis of the pleadings").

124 15 U.S.C. § 2 (2006).

125 United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927) ("[W]hatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition."); *see also* United States v. Von's Grocery Co., 384 U.S. 270, 274 (1966) ("From this country's beginning there has been an abiding and widespread fear of the evils which flow from monopoly—that is the concentration of economic power in the hands of a few."); United States v. Line Material Co., 333 U.S. 287, 309 (1948) ("Monopoly is a protean threat to fair prices."); United States v. Se. Underwriters Ass'n, 322 U.S. 533, 553–54 (1944) ("'Trusts' and 'monopolies' were the terror of the period. Their power to fix prices, to restrict production, to crush small independent traders, and to concentrate large power in the few to the detriment of the many, were but some of numerous evils ascribed to them." (footnote omitted)); United States v. Am. Linseed Oil Co., 262 U.S. 371, 388 (1923) ("The Sherman Act was intended to secure equality of opportunity and to protect the public against evils commonly incident to monopolies and those abnormal contracts and combinations which tend directly to suppress the conflict for advantage called competition—the play of the contending forces ordinarily engendered by an honest desire for gain."); Charles A. Ramsay Co. v. Associated Bill Posters, 260 U.S. 501, 512 (1923) ("The fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade.").

126 United States v. Grinnell Corp., 384 U.S. 563, 570 (1966); *see also In re* Se. Milk Antitrust Litig., 801 F. Supp. 2d 705, 724 (E.D. Tenn. 2011) (setting out the same elements for monopsony claim under § 2 of the Sherman Act). A defendant, while lacking monopsony power, can still be liable under § 2 for attempting to monopsonize the market. *See, e.g.*, M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160, 168 (4th Cir. 1992) (en banc) (observing that "[c]ompelling evidence of an intent to monopolize or of anticompetitive conduct reduces the level of market share that need be shown" for an attempt claim).

element. All monopsonists (like monopolists) have buyer (market) power, but not all firms with buyer (market) power are monopsonists (monopolists).[127] Firms with buyer power enjoy more power than a price taker in a perfectly competitive market but less power than a monopsonist. For example, the Coca-Cola Company increases its market power by acquiring a smaller competitor, Dr. Pepper. While the merger enables Coca-Cola to exercise market power (e.g., raise price, or diminish quality, service, innovation or another important facet of competition), Coca-Cola, given the competition from PepsiCo among others, is not a monopolist. The difficult question then is how much buyer power is necessary to be a monopsonist.[128]

Plaintiffs can prove monopsony power with direct evidence that the buyer depressed prices below the competitive level by withholding purchases of goods and services.[129] The problem is that direct evidence of monopsony (or monopoly) power is rare.[130] As the German competition authority has observed, "[T]he simple monopsony model often does not adequately reflect the reality of procurement markets."[131]

Plaintiffs typically prove defendants' market power circumstantially, with evidence of market share in a properly defined market protected by entry barriers.[132] Courts, when reviewing monopolization claims, typically require

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127 Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481 (1992) ("Monopoly power under § 2 [of the Sherman Act] requires, of course, something greater than market power under § 1."); EC Horizontal Merger Guidelines, *supra* note 45, at 5 (noting that both suppliers and buyers can have market power, but, for clarity, using "market power" to refer to a supplier's market power and "buyer power" to refer to a buyer's market power).

128 *Remarks on Single Firm Conduct*, 15 GEO. MASON L. REV. 1205, 1210 (2008). Dennis Carlton, the Deputy Assistant Attorney General for Economic Analysis, noted the difficulty in making this distinction: "I mean, you can say that monopoly power is a lot of market power, but then what do you mean by a lot? And it's not a very precise distinction and that can cloud issues." *Id.*

129 Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 (3d Cir. 2007) ("The existence of monopoly power may be proven through direct evidence of supracompetitive prices and restricted output.").

130 OECD, *supra* note 1, at 34 ("In rare instances, when a firm has already exercised monopsony power, there might be direct evidence of its exercise."); *see also* United States v. Microsoft Corp., 253 F.3d 34, 51 (D.C. Cir. 2001) (en banc) (per curiam) (observing that because direct proof of monopoly power is "rarely available, courts more typically examine market structure in search of circumstantial evidence of monopoly power"). The D.C. Circuit also declined to adopt a rule requiring direct evidence to show monopoly power in any market. *Id.* at 57. One reason is that rarely is there a line that clearly demarcates what a defendant would or would not do if it possessed (or lacked) monopoly or monopsony power. *Id.*

131 OECD, *supra* note 1, at 176.

132 *See, e.g.*, *Microsoft*, 253 F.3d at 51; ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 229 (6th ed. 2007).

defendants' market share to be very large—often 70% or more.[133] If courts and agencies assume that monopsony is the mirror image of monopoly, and that a 50% market share is insufficient for monopolization claims, should they similarly conclude that a 50% market share is insufficient for monopsonization claims?

Some agencies and courts fall in this trap. One U.S. district court recently dismissed a § 2 claim because the market share of around 40% did not meet "the threshold of what it takes to establish monopoly or monopsony power."[134] The European Commission's vertical guidelines also treat buyers' and sellers' market power similarly. The guidelines state that the sellers' and buyers' market shares are "decisive" in determining if the block exemption applies.[135] So if the seller's or buyer's share in the market where it sells or purchases goods or services is 30% or less, its conduct, except for certain hardcore restrictions of competition, is presumptively legal.[136]

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133 *See* Smith Wholesale Co. v. Philip Morris USA, Inc., 219 F. App'x 398, 409 (6th Cir. 2007) (56% market share insufficient); Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 201 (3d Cir. 1992) (55% share insufficient); Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1430–31, 1443 (6th Cir. 1990) (finding 19%–29% market shares insufficient and noting that "[t]here is substantial merit in a presumption that market shares below 50 or 60 percent do not constitute monopoly power" (internal quotation marks omitted)); Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am., 885 F.2d 683, 694 n.18 (10th Cir. 1989); United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945) (observing that "it is doubtful whether sixty or sixty-four percent" is sufficient "and certainly thirty-three per cent is not"); *In re* Se. Milk Antitrust Litig., 801 F. Supp. 2d 705, 725 (E.D. Tenn. 2011) (noting that *Byars v. Bluff City News Co.*, 609 F.2d 843, 850 (6th Cir. 1979), found that "75–80 percent or greater is a 'starting point' in assessing monopoly power"); R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 199 F. Supp. 2d 362, 394 (M.D.N.C. 2002) ("Seventy to seventy-five per cent is generally considered the minimum market share necessary to support a finding of monopoly power."), *aff'd sub nom.* RJ Reynolds Tobacco Co. v. Philip Morris USA, Inc., 67 F. App'x 810 (4th Cir. 2003); ABA SECTION OF ANTITRUST LAW, *supra* note 132, at 231–32 ("[C]ourts virtually never find monopoly power when market share is less than about 50 percent."); 3 PHILLIP AREEDA & DONALD TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 803 (1978) ("While the Supreme Court has refused to specify a minimum market share necessary to indicate a defendant has monopoly power, lower courts generally require a minimum market share of between 70% and 80%."). *But see* Reazin v. Blue Cross & Blue Shield of Kan., Inc., 899 F.2d 951, 968 (10th Cir. 1990) ("[M]arket share percentages may give rise to presumptions, but will rarely conclusively establish or eliminate market or monopoly power."); Broadway Delivery Corp. v. United Parcel Serv. of Am., 651 F.2d 122, 128 (2d Cir. 1981) (stating that "exclusive focus on market share percentages can produce a distorted picture of market power"); Kolon Indus., Inc. v. E.I. du Pont de Nemours & Co., No. 3:11cv622, 2012 WL 1155218, at *11 (E.D. Va. Apr. 5, 2012) (considering besides market share defendant's "ability to maintain power over pricing and competition 'for a significant period without erosion by new entry or expansion'" (quoting 2B PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 501, at 111 (3d ed. 2007))).

134 *In re Se. Milk Antitrust Litig.*, 801 F. Supp. 2d at 727.

135 *Commission Guidelines on Vertical Restraints*, at 28, SEC (2010) 411 (emphasis omitted), *available at* http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf.

136 *Id.* at 9–10.

One important distinction between monopoly and monopsony is the market share needed to infer significant power.[137] Retailers with a 20% market share can enjoy significant buyer power over sellers.[138] In *Toys "R" Us, Inc. v. FTC*, the market shares fell below the ordinary thresholds for monopolization claims: The retailer Toys "R" Us accounted for "20% of the national wholesale market and up to 49% of some local wholesale markets."[139] The affected toy manufacturers collectively accounted for about 40% of the traditional toy market.[140] Nonetheless, the FTC found, and the circuit court affirmed, that the group boycott, which the retailer orchestrated, was having its intended anticompetitive effect.[141] Toys "R" Us "was remarkably successful in causing the 10 major toy manufacturers to reduce output of toys to the warehouse clubs, and that reduction in output protected [Toys "R" Us] from having to lower its prices to meet the clubs' price levels."[142] One could distinguish *Toys "R" Us* as a group boycott, rather than a monopsony case. Moreover, Toys "R" Us was not the textbook monopsonist that bought fewer toys to depress the wholesale price. Nevertheless Toys "R" Us, despite its relatively low market share, had enough buyer power to accomplish its anticompetitive plan. The retailer—without a large market share—wielded its buyer power to coerce the toy manufacturers to raise the costs of Toys "R" Us's rivals, the warehouse clubs.

B. Rather than Rely on Market Share Thresholds Alone to Find Monopsony Power, Courts and Agencies Should Consider Several Interrelated Factors that Suggest Coercion

If firms can enjoy monopsony power with a market share below 50%, then agencies and courts cannot reflexively apply the monopolization cases' market-share thresholds. Doing so shields monopsonies' harmful conduct from antitrust liability. The U.S. competition authorities recognize the difficulty, "in

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137 *See* AAI TRANSITION REPORT, *supra* note 4, at 292–94 (providing an example of the monopoly/monopsony market-share distinction in the pork industry); Carstensen, *supra* note 25, at 295–96 (providing several recent cases in which the retailers needed relatively modest market shares to exercise significant buyer power over their suppliers compared to the larger market shares required in monopoly cases); Kirkwood, *supra* note 49, at 1515–18 (explaining that "coordinated monopsony pricing may occur at lower concentration levels, or be easier to sustain at moderate concentration levels, than coordinated supracompetitive pricing").

138 Carstensen, *supra* note 25, at 295.

139 221 F.3d 928, 937 (7th Cir. 2000).

140 *Id.*

141 *Id.*

142 *Id.*

the abstract, to state market share thresholds for such monopsony concerns."[143] Rather than rely on market-share thresholds alone to find monopsony power, they encourage the courts to consider several interrelated factors:

> (1) a large market share on the part of the purchaser; (2) an upward sloping or somewhat inelastic supply curve in the input market; and (3) an inability or unwillingness for new purchasers to enter the market or current purchasers to expand the amount of their purchases in the market.[144]

This is the correct approach. In explaining why reliance on market share alone can be misleading,[145] Professors Blair and Harrison apply the following formula to measure the degree of buyer power (i.e., the percentage deviation from the competitive result):

$$s \,/\, (\varepsilon + \eta\,(1 - s))$$

where s is the buyer's market share, η is the elasticity of demand of the fringe buyers, and ε is the overall elasticity of supply.[146] From this formula, one can see that market share is one of several interrelated factors that determine buyer power. Indeed, in defining the relevant monopsony product and geographic markets, one should account for both η and ε.[147]

In assessing whether the defendant possesses monopsony power, the competition authority and court should consider first its market share, s, namely the percentage share in either dollars or units of the defendant's purchases of that input.[148]

Next is the elasticity of fringe demand, η, which is the capacity of alternative buyers to purchase the goods or services "without undue delay, risk,

143 HEALTH REPORT, *supra* note 31, ch. 6, at 17.

144 *Id.*

145 BLAIR & HARRISON, *supra* note 33, at 60–61; *see also* Cory S. Capps, *Buyer Power in Health Plan Mergers*, 6 J. COMPETITION L. & ECON. 375, 382–83 (2010) (discussing how assessing buyer power in health insurance cases on the basis of shares of patients may understate the risk of harm, given the difference in reimbursement levels from commercially insured patients and Medicare and Medicaid patients); Ganesh, *supra* note 6, at 1223 (arguing that the *de minimis* market-share threshold of 15% set by the European Commission's 2010 vertical restraints guidelines is inadequate based on a 2000 finding that U.K. grocery retailers with as little as 8% of the total market had substantial buyer power over sellers).

146 BLAIR & HARRISON, *supra* note 33, at 58.

147 HEALTH REPORT, *supra* note 31, ch. 6, at 15 (noting that the key factor in "defining monopsony product and geographic markets" is "whether the buyers of the input in the putative market successfully would be able to lower the price they pay for the input or whether, instead, the sellers have sufficient realistic alternatives to allow them to circumvent the price decrease").

148 BLAIR & HARRISON, *supra* note 33, at 58.

or cost."[149] The greater the widget sellers' difficulty in turning to other buyers to purchase their widgets, the greater the defendant's buyer power.[150] One factor is entry barriers. If the defendant attempts to exercise monopsony power by offering too low a price, would other buyers likely enter the market to timely defeat the exercise of monopsony power?

Third is the elasticity of supply, ε, namely the sellers' ability and incentive to switch to selling other goods or services.[151] Buyer power depends in part on the captivity of the sellers in producing and selling that particular product.[152] An apple orchard owner, facing a powerful buyer, may have fewer options than a carrot farmer, who may more readily switch to another crop (such as beets or turnips) the following year. A related factor is whether the seller "invested in dedicated facilities to serve the existing downstream buyer(s), such as rail infrastructure," which reduces the seller's ability to switch to other buyers.[153]

To illustrate, consider two firms in two different industries: Firm *A* has a 60% market share; Firm *B* has a 40% market share. If η and ε are the same in both industries, then we can conclude that Firm *A* enjoys more buyer power in its industry than Firm *B* in its industry. But if we change the values of η and ε, then Firm *B*, despite its lower market share, can enjoy greater buyer power.[154]

Suppose in Firm *A*'s industry:

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149 Carstensen, *supra* note 25, at 278; *see also* BLAIR & HARRISON, *supra* note 33, at 59 (explaining that buyer power declines with increases in the elasticity of fringe demand); 2010 MERGER GUIDELINES, *supra* note 5, at 32–33 ("In defining relevant markets, the Agencies focus on the alternatives available to sellers in the face of a decrease in the price paid by a hypothetical monopsonist.").

150 If "the equation for measuring market power in monopsony is a mirror image of the relationships that create market power in a seller," then a "greater availability of substitute buyers indicates a smaller quantum of market power on the part of the buyers in question." Sprint Nextel Corp. v. AT&T Inc., 821 F. Supp. 2d 308, 324 (D.D.C. 2011) (quoting Todd v. Exxon Corp., 275 F.3d 191, 202 (2d Cir. 2001)) (internal quotation marks omitted).

151 BLAIR & HARRISON, *supra* note 33, at 58–59.

152 2010 MERGER GUIDELINES, *supra* note 5, at 33 ("Market power on the buying side of the market is not a significant concern if suppliers have numerous attractive outlets for their goods or services.").

153 OXERA, *supra* note 9, at 2; *see also* Adams v. Pilgrim's Pride Corp., No. 2:09-CV-397, 2011 WL 5330301, at *2 (E.D. Tex. Sept. 30, 2011) (noting that a chicken "grower without a buyer for its services is more economically vulnerable than an employee of an integrator [because] [t]he independent grower, unlike an employee who works for a poultry complex, has incurred the expense of constructing or purchasing physical facilities beneficial to only the integrator in exchange for compensation for grower services").

154 *See* BLAIR & HARRISON, *supra* note 33, at 60–61 (demonstrating that depending on the values of η and ε, an industry with a lower market share can actually have greater buyer power).

- $\eta = 2$, in that the elasticity of demand of the fringe buyers is greater as they are willing to buy more of the sellers' products should Firm *A* lower its purchase price, and
- $\varepsilon = 2$, in that sellers, if Firm *A* lowers its price, can more readily switch from producing widgets to other things.

Since the elasticity of demand of the fringe buyers and the elasticity of supply are lower in Firm *B*'s industry (e.g., both η and ε in Firm *B*'s industry equal 1) than in Firm *A's* industry, Firm *B*, despite its lower market share, now enjoys greater buyer power than Firm *A*.

These three interrelated factors were evident in a recent DOJ action. In 2011, George's Foods acquired Tyson Foods's Harrisonburg, Virginia chicken processing plant.[155] George's and Tyson Foods were two of the region's three chicken processors that competed in producing, processing, and distributing chickens raised for meat products ("broilers").[156] Post-acquisition, George's would control "approximately 43% of chicken processing capacity in the Shenandoah Valley, with only one other remaining competitor, Pilgrim's Pride Corporation."[157] The DOJ alleged that the acquisition would lead to monopsony power.[158] George's could reduce below competitive levels the prices it paid to Shenandoah Valley-area farmers who raised chickens for processors such as Tyson Foods and George's.[159]

To prevail under § 7 of the Clayton Act, a plaintiff must prove that the effect of the merger "may be substantially to lessen competition, *or* to tend to create a monopoly."[160] In alleging the former, the plaintiff need not prove a merger to monopsony. But in *George's Foods*, the DOJ alleged a merger to monopsony, and did so without relying on market share alone.[161] If the competition agency and court simply assumed that monopsonies were the mirror image of monopolies, they would have concluded that George's, with a post-merger 43% market share, was not a monopsony. But the DOJ properly

155 Complaint, *supra* note 27, at 2.

156 *Id.* at 2–3.

157 *Id.* at 3.

158 Competitive Impact Statement, *supra* note 27, at 6 ("[I]n short, the Transaction would lead George's to exercise monopsony power.").

159 *See id.*

160 15 U.S.C. § 18 (2006) (emphasis added).

161 *See* Complaint, *supra* note 27, at 11–13.

considered the other interrelated factors. It first considered the industry's inelastic supply:

> In order to enter the chicken growing business, growers make significant investments that are highly specific to broiler production. They must build chicken houses that may cost from $100,000 to $300,000, and have a 30-year economic life. Many growers take out substantial loans in order to make these investments. Chicken houses have no practical alternative use. If a grower were to stop raising chickens, his or her best option would likely be to raze the chicken-raising facilities because converting a chicken house to a house suitable for another use involves substantial expense. For instance, converting a chicken house to one suitable for turkey growing can cost more than $100,000. Most chicken farmers would not abandon their investments in chicken houses in response to small decreases in the prices and other contract terms they receive for their services.[162]

Next the DOJ considered the inelasticity of demand of fringe buyers.[163] Post-acquisition the market's remaining processor lacked "sufficient capacity to take on significant numbers of growers if George's were to depress payments to growers."[164]

Finally the DOJ considered the difficulty in entering the broiler chicken processing industry:

> New entry into the production and sale of broiler chickens is costly and time consuming. Construction of a large-scale chicken processing facility would require investment of at least $35 million and take two or more years to obtain necessary permits, plan, design, and build. In addition, there are significant costs and inefficiencies associated with the start-up period of a new chicken processing facility. Repositioning by firms or facilities that slaughter primarily turkeys would require additional capital investment. Moreover, a turkey processor seeking to add chicken products to its offering would first need to find customers for its output prior to contracting with growers.[165]

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162 *Id.* at 7–8.
163 *See id.* at 4, 11.
164 *Id.*
165 *Id.* at 12.

Entry therefore would be neither likely, timely, nor sufficient to defeat the small but significant, nontransitory decrease in the price George's paid farmers for broiler chickens.[166]

Consequently, courts and agencies can lessen the risk of false negatives by looking beyond market-share thresholds. Depending on the elasticity of demand of the fringe buyers (η) and overall supply (ε), firms with relatively low market shares can enjoy as much, if not greater, buyer power as firms with higher market shares. Although George's market share may not suggest monopsony power (if one simply applied the thresholds used in monopolization cases), George's nonetheless could "decrease prices or degrade contract terms to farmers for grower services in that region."[167]

One can argue that market-share thresholds are arbitrary for both monopsony and monopoly claims. Indeed, the same factors to show George's monopsony power, despite its relatively low market share, could show its monopoly power. In other words, when the elasticity of supply by fringe sellers and the elasticity of consumer demand are both low, a firm with a 43% market share could also exercise monopoly power. Plaintiffs, however, rarely challenge the monopolization caselaw's market-share thresholds per se. Instead the litigants typically debate whether the market should be defined more broadly or narrowly.[168]

Nonetheless, even in properly defined markets, buyers with low market shares at times can exert tremendous power. Maybe buyers, in their ability to decide when, whether, from whom, and how much to buy a perishable product, have relatively more power than sellers; thus, buyers in these industries can discipline sellers more effectively from exercising market power than sellers can discipline buyers.[169] It may also be that sellers in some industries are more dependent on the buyers than the buyers are dependent on the sellers. For

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166 *Id.*

167 *Id.* at 4.

168 *See, e.g.*, Chem-Nuclear Sys., Inc. v. Waste Mgmt., Inc., No. C82-812C, 1982 WL 1320, at *2 (W.D. Wash. July 16, 1982) ("The critical battle in antitrust litigation is often the definition of the product market. And it is standard practice for a party asserting an antitrust claim to try to define the relevant market as narrowly as possible and for the Defendant to define it as broadly as possible."); *cf.* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 917 (2007) (Breyer, J., dissenting) ("The Court's invitation to consider the existence of 'market power,' for example, invites lengthy time-consuming argument among competing experts, as they seek to apply abstract, highly technical, criteria to often ill-defined markets." (citation omitted)).

169 *See, e.g.*, Carstensen, *supra* note 5, at 786–87 (discussing why high-volume retailers have significant leverage over their suppliers).

example, suppose a local supermarket accounts for a significant percentage of moist snuff sales for a smokeless tobacco manufacturer; also suppose that the moist snuff category accounts for a relatively small percentage of the supermarket's overall sales and profits.[170] One can see that it is more important for the smokeless tobacco manufacturer to have its moist snuff in that supermarket than it is for the supermarket to carry that particular brand of smokeless tobacco.

The issue of false positives, however, remains. Monopsonists can have low market shares, but many buyers with low market shares are not monopsonists. Likewise all monopsonists possess buyer power, but not all firms with buyer power are monopsonists. "Indeed," observed the U.S. competition authorities, "because one of the purposes of managed care is to lower prices closer to a competitive level, it can be difficult to determine when a managed care purchaser is exercising monopsony power."[171] Reduction in sellers' output is not the telltale mark of monopsony, as buyers, for example, can price discriminate. Quantifying η and ε can be elusive, difficult, and contentious.[172]

Therefore in assessing monopsony claims, agencies and courts should use a sliding scale: The lower the alleged monopsonist's market share, the greater the plaintiff's burden in showing (i) the fringe buyers' inability to acquire more of the sellers' output and (ii) the sellers' inability to easily and cheaply produce and sell other products, in other locales, or to other buyers.[173] Granted this is, at times, a matter of degree. The defendant can be a "hard-nosed actor in the market,"[174] but not a monopsonist. So a rule of thumb is the buyer's coercion. Coercion implicitly incorporates both η and ε: As the sellers' price is depressed, there remain few alternative buyers or alternative selling opportunities to rescue the exploited sellers from their captivity to the buyer. Although market power "ordinarily is inferred from the seller's possession of a predominant share of the market,"[175] the Supreme Court found that underlying market power is coercion, namely "the power 'to force a purchaser to do something that he would not do in a competitive market.'"[176] The more the

[170] Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 776–77 (6th Cir. 2002) (relying on expert testimony that "many retailers consider moist snuff a small category and give it little attention," and as a result delegate "category management responsibilities to a [moist snuff] manufacturer").

[171] HEALTH REPORT, *supra* note 31, ch. 6, at 18.

[172] BLAIR & HARRISON, *supra* note 33, at 66.

[173] *See id.* at 64–67.

[174] *In re* Se. Milk Antitrust Litig., 801 F. Supp. 2d 705, 727 (E.D. Tenn. 2011).

[175] Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 464 (1992).

[176] *Id.* (quoting Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14 (1984)).

evidence shows that the defendant is forcing sellers to do things that they would not otherwise do in a competitive market, the more likely the defendant is a monopsonist, even when the defendant's market share is relatively low.[177] The stronger the evidence of the buyer's coercion, the stronger the inference of monopsony.

III. USING CONSUMER WELFARE TO SCREEN MONOPSONY CLAIMS

Part II addressed one significant risk in assuming monopsony as the mirror image of monopoly, namely in assessing the defendant's monopsony power, courts will impose the monopolization caselaw's high market-share thresholds. Part II sought to mitigate this risk by offering courts a sliding scale and rule of thumb. This Part addresses a second significant risk if agencies and courts assume monopsony to be the mirror image of monopoly, namely they may require plaintiffs to prove that the monopsony's actions harm consumers downstream.

In bringing a § 2 claim, the plaintiff must prove not only the defendant's monopsony power, but also "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[178] Here agencies and courts consider whether the monopsonist is attempting to exclude rival purchasers or captivate sellers on some basis besides efficiency.[179] Because few cases have been brought, what constitutes exclusionary and predatory monopsony behavior remains largely unexplored.[180] For monopolization cases, courts and agencies, under the belief that the Sherman Act is a consumer welfare prescription, typically require proof that the monopolist's willful conduct harmed consumers downstream.[181] This makes sense when the

177 Richard M. Steuer, *The Simplicity of Antitrust Law*, 14 U. PA. J. BUS. L. 543, 543 (2012) ("Properly applied, antitrust law focuses simply, and entirely, on combating two of the most innate proclivities in human nature—bullying and ganging up—when such conduct harms competition.").

178 United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

179 *Cf.* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985).

180 As this Article discusses, monopsony is not the mirror image of monopoly. So one can also expect unique monopsonization theories, such as "naked overbuying," where the defendant raises its rivals' costs by purchasing (or manipulating the purchase price of) an input that its rivals, but not the defendant, use in their production process. *See* Salop, *supra* note 38, at 683–84 (raising and discussing naked overbuying).

181 *See, e.g.*, Phillips Getschow Co. v. Green Bay Brown Cnty. Prof'l Football Stadium Dist., 270 F. Supp. 2d 1043, 1047–48 (E.D. Wis. 2003) ("As the antitrust laws protect competition rather than competitors, whether the injury to a competitor is really antitrust injury often may be ascertained by looking for related harm to consumers. The antitrust injury doctrine essentially requires a plaintiff to show that its loss comes

monopoly is abusing its power downstream on consumers. But a consumer harm requirement does not make sense for monopsony claims, since the monopsony directs its power *upstream* on its sellers. Nonetheless some courts make this fundamental mistake.[182]

In devising any legal standard for evaluating monopsony claims, the critical threshold issue is what harm counts. As the German Bundeskartellamt observed, one must discuss abuses of buyer power "in terms of the basic objectives of competition law."[183] The issue then is whether courts and agencies should reconcile abuse of monopsony power claims with a consumer welfare objective. Must plaintiffs prove not only that the defendant willfully maintained its monopsony, but also that its conduct ultimately harmed downstream consumers?

The OECD and European Commission say yes.[184] They propose that agencies and courts use consumer harm to screen buyer-power claims.[185] As the OECD explained, "Reductions in input prices in the case of bargaining power are typically beneficial, so requiring an explanation of how increases in bargaining power would harm downstream consumers will help to avoid

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from acts that reduce output or raise prices to consumers."). But the Seventh Circuit rejected the notion that antitrust injury always relies on a showing of consumer harm:

> We have found no case (and none has been cited to us) in which the Supreme Court has put the burden on a plaintiff to isolate and demonstrate the consumer impact of a particular purported antitrust violation not directed at the consumer level. While antitrust law may be moving in the direction of being construed as a "pure" consumer protection measure, cases such as *Otter Tail* strongly suggest that in the natural monopoly area, at least, the Supreme Court has not embraced this approach. The Court has instead stressed that the antitrust laws seek to protect competition, as well as to protect those activities that will promote competition. The antitrust laws are concerned with the competitive *process*, and their application does not depend in each particular case upon the ultimate demonstrable consumer effect. A healthy and unimpaired competitive process is presumed to be in the consumer interest.

Fishman v. Estate of Wirtz, 807 F.2d 520, 536 (7th Cir. 1986) (footnotes omitted) (citations omitted).

182 *See, e.g.*, Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp., 908 F. Supp. 1194, 1203 (W.D.N.Y. 1995) ("The problem with this type of monopsony power, then, is that ultimately it can injure consumers by forcing up the price of the end product. Where the risk of that happening is slight or nonexistent, however, monopsony power *per se* does not create an antitrust concern.").

183 OECD, *supra* note 1, at 175.

184 *Id.* at 9–10, 306.

185 *See id.* at 10.

inadvertently deterring pro-competitive behaviour."[186] The European Commission states that "the ultimate end user of any product—the consumer—should be at the centre of competition law."[187] The OECD believes that predicting whether an increase in buyer power will have positive or negative effects is difficult.[188] To avoid chilling a monopsonist's pro-competitive behavior, agencies and courts should use consumer harm as a screen, namely that the upstream buyer's conduct harms the end consumer. Some, within the United States, argue for a consumer welfare screen.[189]

Consumer welfare is indeed a popular competition policy objective.[190] Thirty of thirty-three countries in a 2007 International Competition Network (ICN) survey identified promoting consumer welfare as an objective for their monopolization statutes.[191] The European Commission noted how, "over the past two decades, the Commission's antitrust and merger policy . . . more effectively placed the emphasis on consumer welfare, notably through an increasingly refined economic analysis."[192]

But there are many problems with consumer welfare as competition policy's primary or sole goal. Monopsony only highlights the infirmities.

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[186] *Id.* at 9 (emphasis omitted).

[187] *Id.* at 255; *see also Commission Staff Working Document on Competition in the Food Supply Chain*, at 18, SEC (2009) 1449 (Oct. 28, 2009) [hereinafter *Food Supply Chain*] ("Abuses of buyer power are contrary to EC competition law where there is a proven detriment to downstream consumers.").

[188] OECD, *supra* note 1, at 9–10, 306–07.

[189] John D. Shively, *When Does Buyer Power Become Monopsony Pricing?*, ANTITRUST MAG., Fall 2012, at 87.

[190] *See* J. Thomas Rosch, *Monopsony and the Meaning of "Consumer Welfare": A Closer Look at* Weyerhaeuser, 2007 COLUM. BUS. L. REV. 353, 353–54; Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 570–71 (2012).

[191] *See* UNILATERAL CONDUCT WORKING GRP., INT'L COMPETITION NETWORK, REPORT ON THE OBJECTIVES OF UNILATERAL CONDUCT LAWS, ASSESSMENT OF DOMINANCE/SUBSTANTIAL MARKET POWER, AND STATE-CREATED MONOPOLIES 9 (2007) [hereinafter ICN REPORT], *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf. Consumer welfare was the second most popular antitrust goal, trailing the goal of ensuring an effective competitive process, and ahead of the goals of maximizing efficiency and ensuring economic freedom. *Id.* at 2.

[192] *Commission Report on Competition Policy 2010*, *supra* note 119, at 5.

A. *Why Doesn't the Key Proponent of the Consumer Welfare Objective Use a Consumer Welfare Screen?*

Some United States courts[193] and scholars[194] in the past thirty years have been cheering globally for some measure of economic welfare as competition

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193 *See, e.g.*, Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221 (1993) (noting "the antitrust laws' traditional concern for consumer welfare and price competition"); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 107 (1984) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979))); Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 538 (1983) (observing that antitrust laws "assure customers the benefits of price competition"); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308 (3d Cir. 2007) (noting the "primary goal of antitrust law is to maximize consumer welfare by promoting competition among firms"); L.A.P.D., Inc. v. Gen. Elec. Corp., 132 F.3d 402, 404 (7th Cir. 1997) ("Antitrust law is designed to protect consumers from the higher prices—and society from the reduction in allocative efficiency—that occurs when firms with market power curtail output."); Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1444–45 & n.15 (9th Cir. 1995) (characterizing allocative efficiency as synonymous with consumer welfare and as "the central goal of the Sherman Act"); J. Allen Ramey, M.D., Inc. v. Pac. Found. for Med. Care, 999 F. Supp. 1355, 1364 (S.D. Cal. 1998); Ginzburg v. Mem'l Healthcare Sys., Inc., 993 F. Supp. 998, 1015 (S.D. Tex. 1997) (noting the "purpose of antitrust law is the promotion of consumer welfare" (quoting Reazin v. Blue Cross & Blue Shield of Kan., Inc., 899 F.2d 951, 960 (10th Cir. 1990)) (internal quotation marks omitted)).

194 Scholars, as one recent symposium on the goals of competition law reveals, continue to debate after Robert H. Bork's influential book, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978), over antitrust's goals. Even among those who advocate an economic welfare objective, it is unsettled whether welfare should reflect consumer welfare or total welfare, what those terms mean, and the extent to which it makes any difference. *See, e.g.*, Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 FORDHAM L. REV. 2497, 2499 (2013) (arguing that "total welfare rather than consumer welfare . . . should drive antitrust analysis"); Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 FORDHAM L. REV. 2471, 2471 (2013) ("One welfare concern that has dominated debates over U.S. antitrust policy over the last several decades is whether antitrust should adopt a 'consumer welfare' principle rather than a more neoclassical 'total welfare' principle."); David A. Hyman & William E. Kovacic, *Institutional Design, Agency Life Cycle, and the Goals of Competition Law*, 81 FORDHAM L. REV. 2163, 2163–64 (2013) ("Post–Chicago School enthusiasts accept the importance of efficiency but argue that the antitrust laws also exist to achieve other economic ends, including the protection of consumer choice and the prevention of unfair transfers of wealth from consumers to producers."); John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 FORDHAM L. REV. 2425, 2453 (2013) (addressing and critiquing total welfare standard); Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 FORDHAM L. REV. 2349, 2360 n.54 (2013) (noting Bork's "deceptive use of the term 'consumer welfare,' instead of the more honest term 'total welfare,' was a brilliant way to market the efficiency objective"); Alan J. Meese, *Reframing the (False?) Choice Between Purchaser Welfare and Total Welfare*, 81 FORDHAM L. REV. 2197, 2198 (2013) (noting how the term *consumer welfare*, while a popular goal, "means different things to different people"); Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253, 2273 (2013) (noting that "[f]or Bork, the phrase 'consumer welfare' meant 'allocative efficiency'" but a "few years after Bork presented his thesis of the legislative intent of the Sherman Act, the phrase 'consumer welfare' acquired a popular [and different] cultural meaning referring to the buyer's well being: the benefits a buyer derives from the consumption of goods and services, or more casually, the individual's well being"); Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2406 & n.10 (2013) (arguing, on the one hand, that the "promotion of economic welfare as the lodestar of antitrust

policy's primary objective. But in the United States over the past thirty years, the quest for a single economic objective was, as I discuss elsewhere, a failure.[195] One need only look at monopsony power to see why.

Shortly after the Sherman Act's enactment, the U.S. courts recognized harm to sellers, independent of any harm to downstream consumers. One early prosecution was brought against stockyard owners that bought and slaughtered livestock into fresh meats for human consumption.[196] The defendants directed their purchasing agents at the stockyards "to refrain from bidding against each other when making purchases of such livestock, and by these means inducing and compelling the owners of such livestock to sell the same at less prices than they would receive if such bidding were competitive."[197] The fact that consumer surplus increased did not excuse the bid-rigging:

> Indeed, combination that leads directly to lower prices to the consumer may, within the doctrine of these cases, even as against the consumer, be restraint of trade; and combination that leads directly to higher prices, may, as against the producer be restraint of trade. The statute, thus interpreted, has no concern with prices, but looks solely to competition, and to the giving of competition full play, by making illegal any effort at restriction upon competition. Whatever combination has the direct and necessary effect of restricting competition, is, within the meaning of the Sherman [A]ct as now interpreted, restraint of trade.[198]

Likewise, in 1948 the Court held that the Sherman Act applies to buyer cartels that only injure sellers, not customers or consumers.[199] According to the Court:

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laws—to the exclusion of social, political, and protectionist goals—transformed the state of the law and restored intellectual coherence to a body of law," while declining, on the other hand, to elaborate "whether the appropriate standard is aggregate economic efficiency, often referred to as the total welfare standard or 'true' consumer welfare (in the economic sense of a consumer surplus) standard" and how policy makers would choose between the two welfare standards without referencing social and political goals (footnote omitted)). *But see* Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2544 n.5 (2013) ("We take as a given that antitrust has political goals and reflects political value judgments.").

195 Stucke, *supra* note 190, at 563–95; *see also* Jonathan B. Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 FORDHAM L. REV. 2175, 2180 (2013) (discussing why it is of "no surprise that after decades of doctrinal elaboration under an economic approach, the antitrust community has not reached a durable consensus over the economic goal that antitrust enforcement should pursue"); Orbach, *supra* note 194, at 2275 ("While offered as a remedy for reconciling confusion and contrasts in antitrust, the introduction of the consumer welfare standard effectively placed antitrust at war with itself.").

196 United States v. Swift & Co., 122 F. 529 (C.C.N.D. Ill. 1903), *modified*, 196 U.S. 375 (1905).

197 *Id.* at 530.

198 *Id.* at 534.

199 *See* Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235–36 (1948).

> [The Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.[200]

Several U.S. courts rejected a consumer welfare screen for evaluating a monopsony's behavior.[201] As one lower court said:

> This contention—questionable even in the monopoly context—certainly cannot apply to monopsony claims.
>
> In contrast to a monopoly, in a monopsony the buyer uses its market power to damage competition among upstream market participants. In such a situation, the direct victims are competitors and suppliers rather than competitors and customers.[202]

Similarly, the U.S. antitrust agencies do not use consumer harm to screen mergers.[203] To dispel any uncertainty, the 2010 merger guidelines include an illegal merger that does not directly harm consumers:

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200 *Id.* (citations omitted).

201 *See, e.g.*, W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 105 (3d Cir. 2010) ("Highmark's improperly motivated exercise of monopsony power, like the collusive exercise of oligopsony power by the cheese makers in *Knevelbaard*, was anticompetitive and cannot be defended on the sole ground that it enabled Highmark to set lower premiums on its insurance plans."); Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co., 305 F.3d 1124, 1133–34 (10th Cir. 2002) (rejecting the defendant's claim that a monopsony is not actionable unless it injures consumers by forcing up the price of the end product as inconsistent with the Court's treatment of monopsony cases that "strongly suggests that suppliers . . . are protected by antitrust laws even when the anti-competitive activity does not harm end-users"); Dyer v. Conoco, Inc., No. 93-2801, 1995 WL 103233, at *5 (5th Cir. Feb. 21, 1995) ("Our cases have recognized that sellers to a monopsony or oligopsony can establish antitrust injury. They can do so because '[i]n the monopsony or oligopsony price fixing case . . . the seller faces a Hobson's choice: he can sell into the rigged market and take the depressed price, or he can refuse to sell at all.'" (alteration in original) (citation omitted) (quoting *In re* Beef Indus. Antitrust Litig., 600 F.2d 1148, 1158 (5th Cir. 1979))); Mountain States Tel. & Tel. Co. v. FCC, 939 F.2d 1035, 1043 (D.C. Cir. 1991) (recognizing monopsony as an exception to an antitrust consumer welfare goal); Allen v. Dairy Farmers of Am., Inc., 748 F. Supp. 2d 323, 352 (D. Vt. 2010) (asserting that defendants' "coercive acts perpetuated the monopoly and monopsony, disciplined those that sought to challenge it, cowed those who might venture a similar challenge, and produced the allegedly artificially depressed fluid raw milk prices that Plaintiffs received and which allegedly caused them injury"); *In re* NCAA I-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144, 1151 (W.D. Wash. 2005) (finding that "[i]njury to competition can occur by monopsony just as it may result from monopoly").

202 White Mule Co. v. ATC Leasing Co., 540 F. Supp. 2d 869, 888 (N.D. Ohio 2008) (citations omitted).

203 *See, e.g.*, 2010 MERGER GUIDELINES, *supra* note 5, § 12, at 33 ("Nor do the Agencies evaluate the competitive effects of mergers between competing buyers strictly, or even primarily, on the basis of effects in the downstream markets in which the merging firms sell."). The guidelines do state that efficiencies must be "sufficient to reverse the merger's potential to harm customers in the relevant market." *Id.* § 10, at 30. But assuming that this applies to mergers between buyers, a consumer-oriented efficiencies defense does not mean

> *Example 24*: Merging Firms A and B are the only two buyers in the relevant geographic market for an agricultural product. Their merger will enhance buyer power and depress the price paid to farmers for this product, causing a transfer of wealth from farmers to the merged firm and inefficiently reducing supply. These effects can arise even if the merger will not lead to any increase in the price charged by the merged firm for its output.[204]

The U.S. agencies prosecute mergers to monopsony that affect solely suppliers, and not consumers:

> In *Cargill*, the Division challenged a merger that would have created a monopsony purchaser of grain in some local markets. The merging companies, however, sold grain in world markets, in which they faced competition from many other grain sellers. Thus, even if the merged firms imposed a loss on farmers by cutting back the quantity of grain they bought from them, consumers of the merging companies would not be harmed because they had numerous other sources of supply. The harm in the upstream market, however, was sufficient to prompt the Division to challenge the merger.[205]

So the United States—a leading cheerleader of the consumer welfare objective—does not use consumer welfare to screen buyer-power claims. Several reasons exist.

First, the Sherman and Clayton Acts, like some other jurisdictions' competition laws, do not identify consumer welfare as the primary objective or require the agencies and courts to use consumer welfare as a screen.[206]

Second, the U.S. legislators were concerned about buyer power's adverse impact on sellers, apart from any injury to consumers.[207] In arguing for a federal competition law, Senator Sherman said:

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that the Clayton Act prohibits only mergers that harm consumers. The latter does not follow from the former, and there is no need for symmetry between the two. The efficiencies defense simply elevates the harm to consumers over potential efficiency benefits to producers in mergers; the efficiencies defense is not intended to discount the harm (or possibility of harm) to other producers arising in mergers.

[204] *Id.* § 12, at 33.

[205] HEALTH REPORT, *supra* note 31, ch. 6, at 19–20 (footnotes omitted); *accord* Complaint, United States v. Cargill, Inc., No. 1:99CV01875 (D.D.C. July 8, 1999), *available at* http://www.justice.gov/atr/cases/f2500/2552.pdf.

[206] *See* INT'L COMPETITION NETWORK, COMPETITION ENFORCEMENT AND CONSUMER WELFARE: SETTING THE AGENDA 2, 15 (2011) [hereinafter 2011 ICN SURVEY], *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc857.pdf (noting that 24% of the fifty-four agencies responding to the survey reported that legislation does not mention consumer welfare and 28% responded that legislation indirectly refers to consumer welfare).

> These trusts and combinations are great wrongs to the people. They have invaded many of the most important branches of business. They operate with a double-edged sword. They increase beyond reason the cost of the necessaries of life and business, and they decrease the cost of the raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy and increase the price of what they sell. They aggregate to themselves great, enormous wealth by extortion which makes the people poor. Then, making this extorted wealth the means of further extortion from their unfortunate victims, the people of the United States, they pursue unmolested, unrestrained by law, their ceaseless round of peculation under the law, till they are fast producing that condition in our people in which the great mass of them are the servitors of those who have this aggregated wealth at their command.[208]

Third, a consumer welfare screen produces anomalous results. If the U.S. courts required the plaintiff to prove consumer harm in cases involving buyer power, otherwise per se illegal and criminally prosecuted behavior would become per se legal. A bid-rigging cartel composed of ultimate buyers, for example, would be per se legal, while its counterpart sellers, if they colluded, would be incarcerated and fined. Not surprisingly the United States does not distinguish between buyer and seller cartels; it actively prosecutes buyer cartels without considering their impact on consumer welfare.[209]

Recent buyer-power cases, to the extent they state a specific goal, describe it as protecting suppliers from artificially low prices.[210] Although U.S. courts

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[207] *See* 21 CONG. REC. 2461 (1890) (statement of Sen. John Sherman); *see also* Kirkwood, *supra* note 194, at 2434 (discussing how "Congress also intended to stop buyers from engaging in similar anticompetitive behavior in order to exploit small sellers like farmers and ranchers"); Gregory J. Werden, Essay, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L.J. 707, 714 (2007) ("The legislative history leaves no doubt that Congress intended to protect sellers victimized by trusts and other conduct within the scope of the Sherman Act's prohibitions.").

[208] 21 CONG. REC. 2461 (1890) (statement of Sen. John Sherman).

[209] OECD, *supra* note 1, at 247 (noting how the DOJ "brought 70 criminal cases against buyer cartels" from 1997–2006); *see also* Vogel v. Am. Soc'y of Appraisers, 744 F.2d 598, 601 (7th Cir. 1984) ("[B]uyer cartels, the object of which is to force the prices that suppliers charge the members of the cartel below the competitive level, are illegal per se."); Int'l Outsourcing Servs., LLC v. Blistex, Inc., 420 F. Supp. 2d 860, 865 (N.D. Ill. 2006) ("[T]he complaint sets forth a horizontal price fixing scheme among buyers to fix the prices of an input—shipping costs for coupons—below its competitive cost. [The plaintiff's] claim sufficiently alleges conduct prohibited *per se* by the Sherman Act.").

[210] For example, the Ninth Circuit recently quoted earlier caselaw of how "'Congress designed the Sherman Act as a consumer welfare prescription.'" California *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118, 1132 (9th Cir. 2011) (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979)). But the court recognized that harm transcends the consumer:

and agencies mention consumer welfare as a competition policy objective, in reality, they are more concerned about preserving competition.[211] This raises other issues, including what is competition, as the term is not self-defining, and what are the goals of competition law.[212] But monopsony cases show that competition policy is principally concerned about promoting a competitive process that promotes material well-being and quality of life factors, along with political, moral, and social values.

B. Disagreement over Consumer Welfare

One can reply that the fact that the United States does not apply a consumer welfare screen does not mean the screen is undesirable. The United States simply is misguided.

As I elaborate elsewhere, consumer welfare remains one of competition policy's most abused terms.[213] No consensus exists in the United States or globally on what *consumer welfare* actually means, who the consumers are, how to measure consumer welfare (if it is indeed measurable), or how to design legal standards to further this goal.[214] Although one recent ICN survey of its member countries found some agreement on a consumer welfare

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> Congress sought to ensure that competitors not cut deals aimed at stifling competition and at permitting higher prices to be charged to consumers than would be expected in a competitive environment, or permitting lower prices to be paid to those from whom competitors bought materials than a fair market rate.

Id. Judge Reinhardt, in a separate opinion, bluntly rejected the defendants' justification that driving down their workers' compensation was somehow a pro-competitive benefit: "The Supreme Court has made clear, however, that because antitrust law operates to correct all distortions of competition, it condemns market actors who distort competition, whether on the buyer side or seller side." *Id.* at 1161 (Reinhardt, J., dissenting in part and concurring in part); *see also* W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 105 (3d Cir. 2010) ("[P]aying [the plaintiff] artificially depressed reimbursement rates was an anticompetitive aspect of the alleged conspiracy.").

211 In *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000), the court rejected the argument that collusive bid rigging was somehow legal because lower consumer prices ensued. The Ninth Circuit recalled "that the central purpose of the antitrust laws, state and federal, is to preserve competition." *Id.* The fact that the Supreme Court referenced at times an antitrust objective of achieving low prices did not mean that the courts should tolerate buyer cartels. *Id.* Instead, the Court's central interest, explained the Ninth Circuit, is "in protecting the economic freedom of participants in the relevant market." *Id.* (quoting Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 538 (1983)) (internal quotation marks omitted); *see also* Cascades Computer Innovation LLC v. RPX Corp., No. 12-CV-01143 YGR, 2013 WL 316023, at *10 (N.D. Cal. Jan. 24, 2013) (stating that "[a]nticompetitive conduct need not harm consumers specifically in order to cause antitrust injury").

212 *See* Maurice E. Stucke, *Reconsidering Competition*, 81 MISS. L.J. 107, 111–20 (2011).

213 Stucke, *supra* note 190, at 570–77.

214 *Id.*

objective,[215] the ICN surveys also found that most countries did "not specifically define consumer welfare and appear[ed] to have different economic understandings of the term."[216] The ICN surveys suggest that the phrase "promoting consumer welfare," provides little guidance in informing competition policy.[217] A former FTC Chair concluded the same:

> [T]he concept of "consumer welfare" and the principle of protecting "competition, not competitors" are so open-ended that their true meaning in practice depends on how they are applied. It is a relatively barren exercise for EU and US officials to invoke these phrases without taking the further difficult step of achieving agreement on what these phrases mean.[218]

Consequently, it is illogical to advocate a consumer welfare screen given the current disagreement over what consumer welfare means, whether the agencies "examine effects on *either* or both of the direct customers and the final consumers,"[219] and how consumer welfare is promoted.[220]

C. Risk of False Negatives Under a Consumer Welfare Screen

Even if competition authorities could overcome these obstacles, could agree on a definition of consumer welfare (say maximizing consumer surplus), and could identify the consumer whose surplus should be maximized, applying the consumer welfare screen remains problematic. Proving consumer harm is often difficult on the selling side—especially for intermediary goods.[221] Proving buyer power's adverse impact on the ultimate consumer is even more problematic and difficult.[222]

A consumer welfare screen, when actually applied, gives an incomplete and distorted measure of consumer harm. Antitrust enforcers typically consider the

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[215] 2011 ICN SURVEY, *supra* note 206, at 14.

[216] ICN REPORT, *supra* note 191, at 9; *see also* 2011 ICN SURVEY, *supra* note 206, at 4.

[217] 2011 ICN SURVEY, *supra* note 206, at 3 (noting the "connection between consumer welfare and the practical enforcement of competition law is not always straightforward" and that "there may be a considerable gap between policy statements and practice").

[218] William E. Kovacic, Chairman, U.S. Fed. Trade Comm'n, Competition Policy in the European Union and the United States: Convergence or Divergence? 9 (June 2, 2008), *available at* www.ftcgov/speeches/kovacic/080602bateswhite.pdf.

[219] 2010 MERGER GUIDELINES, *supra* note 5, at 2 (emphasis added).

[220] *See* OECD, *supra* note 1, at 182 (noting "there is intensive discussion about what this concept really means").

[221] Stucke, *supra* note 190, at 573–77.

[222] *See* OECD, *supra* note 1, at 187.

challenged behavior's immediate effect on prices.[223] If retail prices remain unchanged (or decline), then the competition authority, under a consumer harm screen, would likely conclude that the challenged practice is competitively neutral or pro-competitive. They would not investigate further the complaints over buyer power, and would likely dismiss any non-price concerns as too tenuous or speculative.[224]

This brings us to the fundamental difficulty in measuring consumer welfare. As subparts I.C and I.D discuss, buyer power can harm consumers, albeit indirectly. Upstream sellers are also consumers, such as farmers with less money to purchase goods. Consumer welfare is further reduced when negative externalities increase, such as when farmers with tighter margins cut corners by polluting more, engaging in less sustainable farming, allowing a more dangerous workplace, and hiring underage workers or illegal aliens.

Competition authorities generally do not consider these other harder-to-quantify harms, which may exceed the short-term benefits from lower prices.[225] The authorities are not willfully ignorant. Rather they lack the tools to assess the short- and long-term harms arising from buyer power (e.g., less variety and innovation).[226] Thus if a Wal-Mart depresses wages in a local community, which in turn increases the taxpayers' costs, would that be factored in the agency's consumer welfare screen? Unlikely.

Accordingly, given the difficulty in proving and quantifying consumer harm, the courts and agencies would use a simple, but incomplete, screen. They may simply assume that monopsony power "usually results in higher prices downstream."[227] Absent evidence of *supra*-competitive retail prices, the court and agency would erroneously conclude that the challenged behavior is pro-competitive or competitively neutral. Their heuristic—assessing the restraint's short-term impact on retail prices—increases the risk of false negatives. It also leaves many consumers, who are also sellers, unprotected: "If competition policy is consistently focused on the welfare of the end consumer,

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[223] 2011 ICN SURVEY, *supra* note 206, at 4; OECD, *supra* note 1, at 258 (describing the European Commission suggestion that a monopsony, in withholding demand and lowering output, "would also restrict sales downstream, leading to negative welfare effects as prices rise and/or quality or choice is sacrificed").

[224] *See* DE SCHUTTER, *supra* note 6, at 5 (expressing concern over consumer welfare standard); DODD & ASFAHA, *supra* note 6, at 20.

[225] 2011 ICN SURVEY, *supra* note 206, at 23–24.

[226] *Id.* at 42–44; Stucke, *supra* note 190, at 574–77.

[227] OECD, *supra* note 1, at 9 (emphasis omitted).

those suppliers disadvantaged by buyer power could now and then find themselves in a rather defenceless position."[228]

D. Rule of Law Concerns of a Consumer Welfare Screen

As subpart III.C has shown, a consumer welfare screen, if narrowly applied, increases the risk of false negatives in protecting monopsonies and their abusive behavior. One risk is that courts and agencies, confronted with a monopsonist's unfair and abusive conduct, will construe consumer welfare so loosely that it serves more as a general principle than a standard to guide the instant analysis.[229] In reducing rather than increasing accuracy, administrability, predictability, objectivity, and transparency, the welfare screen flunks most of the OECD's criteria for an ideal legal test.[230]

One economist stated that in most cases, "monopsony harms consumers because the distortions it creates in an input market reduce efficiency in final goods markets."[231] The OECD, among others, agrees.[232] If true, then a consumer welfare screen is superfluous. If the court finds that the defendant is a monopsony, and if monopsony power and its willful maintenance usually harm downstream consumers, then the key issue is whether the defendant is a monopsony. The absence of direct evidence of consumer harm is not determinative if one assumes that monopsony power and its willful maintenance ultimately harm consumers. Consumers are (or will be) harmed, but the harm is not readily observable or measurable. So in finding that the defendant has sufficient buyer power to be a monopsonist and that the defendant's behavior is capable of significantly contributing to its attaining or maintaining monopsony power, then the court or agency can conclude that consumers are somehow harmed. The screen serves no real function.

But monopsonies, while harming sellers, do not always harm consumers. Even here, courts, concerned about a monopsonist's abusive behavior, can

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[228] *Id.* at 182.

[229] *Id.*

[230] OECD, *Competition on the Merits*, at 23, OECD Doc. DAF/COMP(2005)27 (Mar. 30, 2006), *available at* http://www.oecd.org/dataoecd/7/13/35911017.pdf (the exception is applicability).

[231] Noll, *supra* note 31, at 613.

[232] Brown v. Pro Football, Inc., 50 F.3d 1041, 1061 (D.C. Cir. 1995) (Wald, J., dissenting) ("So, even proceeding from the premise that antitrust laws aim only at protecting consumers, monopsonies fall under antitrust purview because monopsonistic practices will eventually adversely affect consumers."), *aff'd*, 518 U.S. 231 (1996); OECD, *supra* note 1, at 9 ("Monopsony . . . will result in a quantity distortion and loss of efficiency in the input market that will usually harm not only upstream suppliers, but also downstream consumers.").

hypothesize a string of future events leading to consumer harm: The exercise of buyer power enables the defendant to lower its wholesale price, which significantly disadvantages the defendant's competitors, prompts their exit from the market, lessens competition over the long term, and harms consumers.[233] Alternatively, the court can rely on the waterbed effect as its theory of consumer harm: Buyer power nets lower prices or better terms for some firms but results in higher wholesale prices (or worse terms) for less powerful buyers, which in turn causes prices to increase downstream to the detriment of consumers.[234]

One problem is predicting the subsequent anticompetitive consequences. A defendant may use its buyer power to raise its rivals' costs and increase its retail price accordingly; alternatively, the defendant may lower its retail price to squeeze out its competitors and take greater profits later. So buyer power may cause retail prices in the short-term to decrease, increase, or remain unchanged.[235]

Courts and agencies can plausibly find consumer harm from the exercise of buyer power in the form of less innovation, lower quality goods, and less variety.[236] With smaller margins, sellers have less incentive and ability to invest.[237] If the powerful buyer captures Ricardian rents from the more efficient sellers, these sellers will likely testify about their disincentive to innovate, which thereby harms downstream consumers. Agencies and courts can reasonably find that "[l]ower input prices may slow the rate of innovation and the adoption of socially desirable product improvements."[238] With all-or-nothing contracts, "the inability to capture gains from innovative contributions

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[233] *See* OECD, *supra* note 1, at 11, 176 (describing this as the "spiral effect").

[234] *Id.* at 11, 176–77; Carstensen, *supra* note 25, at 284.

[235] OECD, *supra* note 1, at 11 (noting that buyer power may lead "to lower downstream market prices that decrease the profitability of a buyer's competitors, leading to their exit and an increase in its downstream market power, harming final consumers; or (ii) the lower wholesale prices obtained from this conduct by a buyer with market power results in an increase in the wholesale price to other buyers—a so-called waterbed effect—that results in an increase in prices to downstream consumers").

[236] *See, e.g.*, Sony Elecs., Inc. v. Soundview Techs., Inc., 157 F. Supp. 2d 180, 185 (D. Conn. 2001) ("The all-or-nothing price set by these colluding purchasers can depress the price below the optimal price that would obtain if usual market forces of supply and demand were at work. The price to consumers does not decrease, but there may be social welfare consequences in the long run, because suppliers will leave the industry (or, as Soundview has it, will cease to innovate and invent).").

[237] OECD, *supra* note 1, at 177, 269–70.

[238] *Id.* at 260.

to efficiency in production creates a disincentive to enter, expand, or innovate within the production sector."[239]

Other courts and agencies plausibly could conclude the opposite. By squeezing its suppliers and retarding innovation upstream, a monopsonist can increase the risk of being displaced by a superior innovation.[240] Also attempts to squeeze sellers of their Ricardian rents increase the sellers' incentives to differentiate their products and increase consumer demand for their branded product.[241] The prospect of smaller margins would encourage sellers to invest in innovations or advertising that lessen their dependence on powerful buyers. Moreover, a powerful buyer, if rational, would want sellers to invest in innovations that likely increase the buyer's profits.[242] Or to the extent powerful buyers face rival technologies or competitors, they would not want to squeeze sellers' margins below competitive levels. Ford, for example, would not want to squeeze its component suppliers' margins, if doing so disadvantages Ford competitively against General Motors and Toyota.

Consequently, jurisdictions should not use consumer welfare to screen monopsony claims. Contrary to its aim, a consumer welfare screen, when applied, increases, rather than decreases, the risks and costs of false negatives. Rather than bring the monopsony legal standards closer to the rule of law, the screen promotes subjectivity, reduces predictability and transparency, and increases the difficulty for a generalist court to predict with confidence the eventual effects on consumer welfare.[243]

E. Behavioral Economics and Monopsony

Subparts III.C and III.D showed several practical difficulties in using consumer welfare to screen monopsony cases. The screen's deficiencies are compounded as courts' and agencies' thinking evolves from the dated assumption of economic self-interest under neoclassical economic theory to the more realistic premise, namely consumers' other-regarding behavior and concerns over fairness.

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[239] Carstensen, *supra* note 25, at 299.

[240] OECD, *supra* note 1, at 260.

[241] *See id.* at 177 (noting that while "it is generally assumed that the use of buyer power reduces the suppliers' opportunities for investment and innovation because it reduces their profits. . . . the economic literature has developed some explanations on why, under certain circumstances, buyer power can also have investment incentive effects, and thus positive welfare effects").

[242] *Id.*

[243] *See id.* at 12.

In its consumer welfare screen, the European Commission equates consumers' welfare with the prices, services, or quality of goods consumers receive.[244] No doubt price, service, and quality are important; people likely do not shop at Wal-Mart for some greater social or moral objective.

But the Commission's assumption reveals another problem with the consumer welfare screen: One simply cannot equate consumer welfare with economic self-interest. Although consumers enjoy lower prices, it is not altogether clear that consumers are only interested about getting the lowest possible price. Consumers, if selfish, would be ambivalent about whether an Indonesian coffee grower receives a fair price for her harvest, has safe working conditions, enjoys a living wage, and has the right to organize. Consumers would not care whether the farmers' families can "eat better, keep their kids in school, improve [their] health and housing, and invest in the future."[245] They would not differentiate between "Fair Trade" coffee and regular (exploited farmer) coffee. If consumers cared only about their material well-being, then companies would not devote time and resources to ensure that the upstream coffee farmers earned higher than the minimum wage, received paid sick leave, had their school-age children attending school, had not converted any natural forest habitat to coffee production areas, used organic matter or cover crops to improve or maintain soil fertility, or processed waste so as to not contaminate the local environment.[246] Responding to self-interested consumers, companies would require only the minimum acceptable quality inputs at the lowest possible cost. A coffee house, for example, would not pursue a goal of having all of its coffee to be third-party verified or certified (through "Coffee and Farmer Equity (C.A.F.E.) Practices," "Fair Trade," or another externally audited system)[247] when selfish consumers simply want a cheaper latte.

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[244] The European Commission asserts:

> Abuses of buyer power are contrary to EC competition law where there is a proven detriment to downstream consumers.
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> . . . EC antitrust law is not concerned with particular outcomes of contractual negotiations between parties unless such terms would have negative effects on the competitive process and ultimately reduce consumer welfare.

Food Supply Chain, *supra* note 187, at 18. For the European Commission, this "encompasses prices, diversity and quality." *Id.*

[245] *Vision Statement*, FAIR TRADE USA, http://fairtradeusa.org/about-fair-trade-usa/mission (last visited July 1, 2013).

[246] *See Coffee*, STARBUCKS, http://www.starbucks.com/responsibility/sourcing/coffee (last visited July 1, 2013).

[247] *Goals and Progress: Coffee Purchasing*, STARBUCKS, http://www.starbucks.com/responsibility/global-report/ethical-sourcing/coffee-purchasing (last visited June 26, 2013).

Consequently, for many consumers, the price they pay, the service they receive, and the quality of the goods they receive, while important, do not necessarily determine their welfare. Put simply, lowering prices does not necessarily increase consumer welfare, if many consumers know that children are exploited and the environment is harmed in order to make the item inexpensive. It is naïve, and contrary to marketplace realities, to assume that consumers' welfare is unaffected (or enhanced) when monopsonies exploit their sellers.

Consumer welfare accordingly is broader than the prices, services, or quality of goods consumers receive. What is welfare, but "the state of doing well especially in respect to [a] good fortune, happiness, well-being, or prosperity standard."[248] However defined, economic definitions of welfare typically extend beyond static price competition or efficiencies to subjective well-being.[249] And promoting consumer surplus, with lower priced goods, does not necessarily promote consumers' well-being.[250]

Today fairness and other-regarding behavior are hot topics among economists.[251] The psychological and experimental economic data show that many people care about treating others, and being treated, fairly.[252] This

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248 *Welfare*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/welfare (last visited July 1, 2013).

249 *See, e.g.*, JOHN BLACK, A DICTIONARY OF ECONOMICS 502 (2d ed. 2002); *Economics A-Z Terms Beginning with W*, ECONOMIST, http://www.economist.com/economics-a-to-z/w#node-21529313 (last visited June 26, 2013) ("Economists use it to describe the well being of an individual or society, as in 'Are tax cuts welfare-enhancing?'"); OECD, *Glossary of Industrial Organisation Economics and Competition Law*, OECD 29, www.oecd.org/dataoecd/8/61/2376087.pdf (last visited June 26, 2013) ("Consumer welfare refers to the individual benefits derived from the consumption of goods and services. In theory, individual welfare is defined by an individual's own assessment of his/her satisfaction, given prices and income.").

250 *See* Stucke, *supra* note 105.

251 *See, e.g.*, Maurice E. Stucke, *Is Intent Relevant?*, 8 J.L. ECON. & POL'Y 801, 822–28 (2012) (collecting some of the literature); *see also* LYNN A. STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE 238–40 (2011) (discussing how societal norms of fairness and prosocial behavior are both common in, and necessary for, a market economy); Thomas J. Horton, *Unraveling the Chicago/Harvard Antitrust Double Helix: Applying Evolutionary Theory to Guard Competitors and Revive Antitrust Jury Trials*, 41 U. BALT. L. REV. 615, 653–54 (2012) (citing research on how "'fairness evolved as a stable strategy for maintaining social harmony' in our economic relationships" and how "[n]eurobiological studies have found that 'the sense of fairness fundamental to distributive justice' is rooted in humans' emotional processing" (quoting JOAN ROUGHGARDEN, THE GENIAL GENE: DECONSTRUCTING DARWINIAN SELFISHNESS 160 (2009); MICHAEL SHERMER, THE MIND OF THE MARKET: COMPASSIONATE APES, COMPETITIVE HUMANS, AND OTHER TALES FROM EVOLUTIONARY ECONOMICS 11 (2008))).

252 *See* MORAL SENTIMENTS AND MATERIAL INTERESTS: THE FOUNDATIONS OF COOPERATION IN ECONOMIC LIFE (Herbert Gintis et al. eds., 2005); Yochai Benkler, *The Unselfish Gene*, HARV. BUS. REV., July-Aug. 2011, at 77, 79 ("In no society examined under controlled conditions have the majority of people consistently behaved selfishly."); Ming Hsu et al., *The Right and the Good: Distributive Justice and Neural*

"strong reciprocity" in human behavior entails "a predisposition to cooperate with others and to punish those who violate the norms of cooperation, at personal cost, even when it is implausible to expect that these costs will be repaid either by others or at a later date."[253] Likewise, in the behavioral experiments, many people care about resources being equitably distributed, not solely about resources going to those with the greater use.[254] The experiments in bargaining settings, economist Samuel Bowles summarized, systematically show "that substantial fractions of most populations adhere to moral rules, willingly give to others, and punish those who offend standards of appropriate behavior, even at a cost to themselves and with no expectation of material reward."[255]

Jens Hainmueller of MIT and Michael J. Hiscox of Harvard recently studied consumer demand for several clothing items labeled with information about environmental and fair labor standards.[256] Their field study was conducted in 111 Banana Republic Factory Stores "located in suburban and ex-urban outlet malls that cater to price-sensitive customers looking for good deals."[257] They focused on three recently introduced clothing items: $130 women's linen suits (including a blazer, skirt, and trousers); $18 women's yoga pants; and $12 men's fashion t-shirts, all of which were produced in factories that complied with Gap Inc.'s social and environmental criteria.[258] While the price remained the same across the discount outlet stores, two

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Encoding of Equity and Efficiency, 320 SCIENCE 1092 (2008). Employers, for example, may not reduce wages during times of deflation as workers perceive this wage reduction as unfair, and retaliate by working less hard. MORAL SENTIMENTS AND MATERIAL INTERESTS, *supra*, at 3, 32. So rather than self-interest, employers appeal to fairness concerns. GEORGE A. AKERLOF & ROBERT J. SHILLER, ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM 19–25, 107–15 (2009); Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 729 (1986) ("A central concept in analyzing the fairness of actions in which a firm sets the terms of future exchanges is the *reference transaction*, a relevant precedent that is characterized by a reference price or wage, and by a positive reference profit to the firm.").

253 Herbert Gintis et al., *Explaining Altruistic Behavior in Humans*, 24 EVOLUTION & HUM. BEHAV. 153, 154 (2003). These authors argued that "the evolutionary success of our species and the moral sentiments that have led people to value freedom, equality, and representative government are predicated upon strong reciprocity and related motivations that go beyond inclusive fitness and reciprocal altruism." *Id.*

254 Matthew Rabin, *A Perspective on Psychology and Economics*, 46 EUR. ECON. REV. 657, 665 (2002).

255 Samuel Bowles, *Policies Designed for Self-Interested Citizens May Undermine "the Moral Sentiments": Evidence from Economic Experiments*, 320 SCIENCE 1605, 1606 (2008).

256 Jens Hainmueller & Michael J. Hiscox, *The Socially Conscious Consumer? Field Experimental Tests of Consumer Support for Fair Labor Standards* (Mass. Inst. of Tech. Political Sci. Dep't, Working Paper No. 2012-15, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2062435.

257 *Id.* at 8.

258 *Id.*

different display signs promoted these items. One version emphasized "the fashion attributes of the product, the other version conveyed a message that focused instead on how the product was made and the company's commitment to promoting fair and safe working conditions."[259] For the lower-priced yoga pants and t-shirts, neither the fairness nor fashion displays had a statistically significant impact on sales. But the fairness display had a substantial positive effect on sales for the more expensive women's linen suit.[260] As the authors found:

> [E]ven in a setting in which customers are focused on prices and so are far less likely to respond to information about ethical product attributes than those in other (retail) contexts, we can identify a segment of shoppers willing to support fair labor standards by voting with their shopping dollar.[261]

Consumers will punish corporate behavior perceived as intentional, unfair, and motivated by greed.[262] Even where consumers can economically benefit personally, many nonetheless consider whether the firm intentionally exploits others[263] and object to such exploitation.[264] Some online retailers track consumer's location, purchasing behavior, and other personal data to charge

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[259] *Id.* at 9.

[260] *Id.* at 11–12 (finding that "for the women's linen suit, the fairness message increased dollar sales by about 14% on average with a .90 confidence interval of [2%; 26%] (p-value = .06) compared to sales in the control group stores where the suit was sold without a message").

[261] *Id.* at 2.

[262] Ellen Garbarino & Sarah Maxwell, *Consumer Response to Norm-Breaking Pricing Events in E-Commerce*, 63 J. BUS. RES. 1066, 1067 (2010); Horton, *supra* note 251, at 655–56 (collecting additional studies); Thomas M. Tripp & Yany Grégoire, *When Unhappy Customers Strike Back on the Internet*, MIT SLOAN MGMT. REV., Spring 2011, at 37, 43 (noting that experiment and survey results "showed that inference of motive was the *key* belief that drove anger and any consequent desires for revenge or reconciliation"); Lan Xia & Kent B. Monroe, *Is a Good Deal Always Fair? Examining the Concepts of Transaction Value and Price Fairness*, 31 J. ECON. PSYCHOL. 884, 891 (2010).

[263] Garbarino & Maxwell, *supra* note 262, at 1067 (arguing that a pricing norm violation will likely reduce "consumers' trust in the firm's intention to behave in the customer's best interest"); Stucke, *supra* note 251, at 834–36; Stephan M. Wagner et al., *Effects of Suppliers' Reputation on the Future of Buyer–Supplier Relationships: The Mediating Roles of Outcome Fairness and Trust*, J. SUPPLY CHAIN MGMT., Apr. 2011, at 29, 32; *see also* Lisa E. Bolton et al., *How Do Price Fairness Perceptions Differ Across Culture?*, 47 J. MARKETING RES. 564 (2010); Stephanie Clifford, *Some Retailers Reveal Where and How That T-Shirt Is Made*, N.Y. TIMES, May 9, 2013, at A1.

[264] During the financial crisis in 2009, a majority of consumers surveyed in five (Belgium, Denmark, France, Spain, and Poland) of six European countries felt that "supermarkets should pay a price that enabled suppliers to pay their workers a fair wage, even if it resulted in consumers having to pay more." CONSUMERS INT'L, CHECKED OUT: ARE EUROPEAN SUPERMARKETS LIVING UP TO THEIR RESPONSIBILITIES FOR LABOUR CONDITIONS IN THE DEVELOPING WORLD? 10 (2010), *available at* http://www.consumersinternational.org/media/394236/checkedout-english-02.pdf. Greek consumers were the exception: 70% agreed that retailers should "[e]nsure [the] lowest prices by paying minimum to suppliers." *Id.* at 18.

consumers with fewer options a higher price.[265] Consumers, however, in a couple of studies objected to such price discrimination as ethically wrong,[266] were less trusting of the discriminating firm, and were less willing to purchase from the firm.[267] Even where the study's participants personally received a better price than others who were exploited, many still perceived the retailer as behaving unfairly, were less inclined to purchase from that retailer again, and were less willing to recommend the retailer to a friend.[268]

Ordinarily, other-regarding consumers, if they believe that a monopsony is exploiting its workers or suppliers, can punish the abusive behavior by taking their business elsewhere.[269] Indeed, Senator Sherman assumed that competition checked the selfishness of firms and their disregard of consumers' interests.[270] In competitive markets with many other-regarding consumers, firms would be sensitive to fairness concerns, and promote employee behavior that abided by these values.[271] A positive reputation can provide a competitive advantage.[272] We see this with consumers' willingness to pay more for the increasing number of "Fair Trade" products.[273]

Consequently, the consumer welfare screen becomes less administrable and accurate when one recognizes the marketplace realities of other-regarding

[265] JOSEPH TUROW ET AL., OPEN TO EXPLOITATION: AMERICAN SHOPPERS ONLINE AND OFFLINE 8–10 (2005), *available at* http://repository.upenn.edu/cgi/viewcontent.cgi?article=1035&context=asc_papers; Jennifer Valentino-DeVries, Jeremy Singer-Vine & Ashkan Soltani, *Websites Vary Prices, Deals Based on Users' Information*, WALL ST. J., Dec. 24, 2012, at A1.

[266] TUROW ET AL., *supra* note 265, at 4 (finding that most people surveyed "overwhelmingly object[ed] to most forms of behavioral targeting and all forms of price discrimination as ethically wrong," including 76% who agreed that "it would bother me to learn that other people pay less than I do for the same products," 87% who disagreed that "it's OK if an online store I use charges people different prices for the same products during the same hour," and 72% who disagreed that "if a store I shop at frequently charges me lower prices than it charges other people because it wants to keep me as a customer more than it wants to keep them, that's OK").

[267] Garbarino & Maxwell, *supra* note 262, at 1069.

[268] Xia & Monroe, *supra* note 262, at 891.

[269] Jill Gabrielle Klein et al., *Why We Boycott: Consumer Motivations for Boycott Participation*, J. MARKETING, July 2004, at 92, 96.

[270] 21 CONG. REC. 2457 (1890).

[271] Wagner et al., *supra* note 263, at 43 (noting that to secure competitive advantage, companies, among other things, should "ensure that fairness and trust are part of the training expectations among company representatives that work face-to-face with customers").

[272] *Id.* at 30.

[273] David Reinstein & Joon Song, *Efficient Consumer Altruism and Fair Trade Products*, 21 J. ECON. & MGMT. STRATEGY 213, 214 (2012) (collecting some of the research showing the willingness of a "significant subset of consumers . . . to pay a premium for products labeled as 'Fair Trade' . . . and a preference for retailers that are seen to be more generous to their suppliers and employees, domestically and internationally").

behavior. Every economy likely has a mix of other-regarding consumers and selfish consumers.[274] To the extent the agencies and courts believe that many consumers, consistent with the recent empirical economic literature, have a propensity toward fairness and willingness to punish unfairness, how then do the agencies and courts assess the welfare of other-regarding consumers? If a monopsonist exploits its workers and suppliers and if this is public knowledge, then it suggests that other-regarding consumers, like the sellers, cannot effectively punish the monopsony. Consumers may be unable to target the monopsony (like the monopsony meat packer that sells its beef along with other packers' beef to supermarkets, who sell the beef under their private labels). Consumers may lack viable alternatives. The fact that other-regarding consumers would punish the monopsony, but cannot, suggests that their welfare was reduced.

If courts and agencies insist on a consumer welfare screen, then the screen must account for the welfare of other-regarding consumers, who value the fair treatment of others, including upstream suppliers. The consumer welfare screen, to be realistic, must assess how a monopsonist's exploitive behavior affects consumers' actual well-being; this further complicates the legal analysis and undermines the screen's intended purpose of promoting transparency and objectivity.

F. Shared Value

Subpart III.E assumed fairness as demand driven: self-interested firms respond to consumer pressure to treat upstream suppliers fairly. If unchecked by consumers or competition, firms naturally would exploit their suppliers. But business professor Michael Porter and consultant Mark Kramer recently discussed fairness as a supply-driven response to yield greater profits.[275] Under the neoclassical approach, companies "commoditize and exert maximum bargaining power on suppliers to drive down prices—even when purchasing from small businesses or subsistence-level farmers."[276] So the monopsonist,

[274] *See, e.g.*, Devesh Rustagi et al., *Conditional Cooperation and Costly Monitoring Explain Success in Forest Commons Management*, 330 SCIENCE 961, 962 (2010) (finding fewer altruists (15 of 679 participants) and self-interested free riders (78 participants) among forty-nine forest user groups in Ethiopia and finding that most were either other-regarding conditional cooperators (231 participants) or weak conditional cooperators (79 participants)).

[275] *See* Michael E. Porter & Mark R. Kramer, *Creating Shared Value*, HARV. BUS. REV., Jan.-Feb. 2011, at 62, 77.

[276] *Id.* at 70.

given the opportunity, would extract Ricardian rents from its more efficient suppliers and quasi-rents from its suppliers with lower short-run costs.

One conundrum is that exploiting one's suppliers over the long run makes little sense.[277] In extracting these rents, the monopsonist can retard investment and innovation and jeopardize its long-term competitiveness. This exploitation, Porter and Kramer explain, destroys shared value. Rather than zero-sum competition, whereby the monopsonist gains when its suppliers' profits dwindle, they argue that greater profits can be achieved in "creating economic value . . . for society by addressing its needs and challenges" and "enhanc[ing] the competitiveness of a company while simultaneously advancing the economic and social conditions in the communities in which it operates."[278] Under their concept of shared value, powerful buyers realize that exploiting suppliers is inconsistent with the buyers' long-term viability and profitability. In promoting shared value, powerful buyers grasp:

> [T]hat marginalized suppliers cannot remain productive or sustain, much less improve, their quality. By increasing access to inputs, sharing technology, and providing financing, companies can improve supplier quality and productivity while ensuring access to growing volume. Improving productivity will often trump lower prices. As suppliers get stronger, their environmental impact often falls dramatically, which further improves their efficiency.[279]

In the context of buyer power, Porter and Kramer turn to the coffee sector and its challenges of a reliable supply:

> Most coffees are grown by small farmers in impoverished rural areas of Africa and Latin America, who are trapped in a cycle of low productivity, poor quality, and environmental degradation that limits production volume. To address these issues, Nestlé redesigned procurement. It worked intensively with its growers, providing advice on farming practices, guaranteeing bank loans, and helping secure inputs such as plant stock, pesticides, and fertilizers. Nestlé established local facilities to measure the quality of the coffee at the point of purchase, which allowed it to pay a premium for better beans directly to the growers and thus improve their incentives. Greater

277 *See, e.g.*, Sony Elecs., Inc. v. Soundview Techs. Inc., 157 F. Supp. 2d 180, 186 (D. Conn. 2001) (observing that although the "monopsonist purchaser's interests are not served by reducing the numbers of suppliers, business conduct is not always rational, and economic actors do not always have access to perfect information, the utopian ideal of economics").

278 Porter & Kramer, *supra* note 275, at 64, 66.

279 *Id.* at 70.

> yield per hectare and higher production quality increased growers' incomes, and the environmental impact of farms shrank. Meanwhile, Nestlé's reliable supply of good coffee grew significantly. Shared value was created.
>
> Embedded in the Nestlé example is a far broader insight, which is the advantage of buying from capable local suppliers. Outsourcing to other locations and countries creates transaction costs and inefficiencies that can offset lower wage and input costs. Capable local suppliers help firms avoid these costs and can reduce cycle time, increase flexibility, foster faster learning, and enable innovation. Buying local includes not only local companies but also local units of national or international companies. When firms buy locally, their suppliers can get stronger, increase their profits, hire more people, and pay better wages—all of which will benefit other businesses in the community. Shared value is created.[280]

Consequently, shared value, like consumers' other-regarding behavior, can promote capitalism. Rather than fearing regulatory dictates to prevent them from exploiting suppliers (and lobbying governments on measures to promote such exploitation),[281] enlightened firms will see how profits can be attained, not through exploitation, but through collaboration and trust, and in better helping suppliers and consumers solve their problems. Sustainability, rather than a cost, provides an opportunity to improve the sellers' and powerful buyers' productivity and societal welfare.

CONCLUSION

Given the competition agencies' interest in, and industry complaints over, monopsonies, courts should expect more antitrust challenges. When they get these monopsony cases, courts will likely hear that monopsony is the mirror image of monopoly. But as this Article contends, courts should be careful when importing monopolization standards for monopsony cases. What works for monopolization claims will not necessarily work for monopsony claims.

First, courts and agencies should not screen monopsony claims with the monopolization caselaw's high market-share thresholds. Rather, this Article offers a simple rule of thumb for assessing monopsony claims, namely the degree of coercion. The greater the evidence that the defendant forces sellers to

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280 *Id.*

281 *See, e.g.*, DARON ACEMOGLU & JAMES ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY (2012).

do things that they otherwise would not do in competitive markets, the more likely the defendant is a monopsony.

Second, courts should not require the plaintiff to prove how the monopsonist's conduct harms consumers downstream. The plaintiff should prevail after showing that the buyer's willful exclusionary or predatory conduct is capable of significantly contributing to its attaining or maintaining its monopsony power, even when the ultimate consumer is unaffected.

Accordingly, monopsony and buyer power reach beyond consumer surplus, and touch on fairness and economic freedom. In discussing buyer power, Japan's senior competition official, Kazuhiko Takeshima, "emphasized the importance of fairness, adding that when fairness is excluded, it means protecting the big players."[282] As he indicated, "[C]ompetition law should protect the rights of the players on a level playing field as well as consumers."[283] The U.S. Attorney General Eric Holder agreed:

> [T]he overriding concern we have in the Justice Department is maintaining fairness. Doesn't mean we're going to put our thumb on the scale. We want everybody to have a fair shot. . . . As [the Assistant Attorney General for the Antitrust Division] indicated, you know, big is not necessarily bad, but big can be bad if the power that comes from being big is misused, and that is simply not something that this Department of Justice is going to stand for. We will use every tool that we have to ensure fairness in the marketplace.[284]

The challenge for the competition agencies is to develop the legal standards in a way that deters abuses of monopsony power, promotes consumers' concerns of fairness, and is aligned with the rule of law.

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[282] OECD, *supra* note 1, at 191.

[283] *Id.*; *see also* C. Robert Taylor, *The Many Faces of Power in the Food System*, U.S. DEPARTMENT JUST. (Feb. 17, 2004), http://www.justice.gov/atr/public/workshops/docs/202608.pdf ("[T]he central economic issues facing the food system have little to do with economic efficiency, but a lot to do with fairness and economic freedom for farmers and ranchers.").

[284] *Public Workshops Exploring Competition Issues in Agriculture: A Dialogue on Competition Issues Facing Farmers in Today's Agricultural Marketplace*, U.S. DEPARTMENT JUST. 56 (Mar. 12, 2010), http://www.justice.gov/atr/public/workshops/ag2010/iowa-agworkshop-transcript.pdf.