



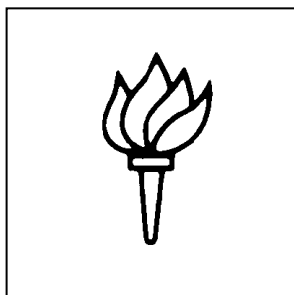
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ANTITRUST'S DEMOCRACY DEFICIT  
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**Antitrust's Democracy Deficit**

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## ANTITRUST'S DEMOCRACY DEFICIT

Harry First and Spencer Weber Waller\*

Where does America stand? . . . Since World War II, the United States has had an answer to that question. We stand for free peoples and free markets. . . . We will sustain a balance of power that favors freedom.

– Condoleezza Rice, Speech at the Republican National Convention, Aug. 29, 2012<sup>1</sup>

### Introduction

Critics of lax antitrust enforcement have long bemoaned the slide of antitrust into political irrelevance. Richard Hofstadter famously sounded the theme nearly fifty years ago. Pointing out that the political impulses animating antitrust in its first half-century had faded as the United States became comfortable with big business, he argued that postwar enforcers had transformed antitrust into a technical exercise managed by lawyers and economists. “Once the United States had an antitrust movement without antitrust prosecutions; in our time there have been antitrust prosecutions without an antitrust movement.”<sup>2</sup> Some might go even further today, arguing that we lack an antitrust movement *and* antitrust prosecutions, as cartel investigations have side-tracked antitrust from its core mission of preventing concentrations of economic and political power.

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<sup>1</sup> Transcript of the Condoleezza Rice Speech at the RNC, <http://www.foxnews.com/politics/2012/08/29/transcript-condoleezza-rice-speech-at-rnc/>.

<sup>2</sup> Richard Hofstadter, *What Happened to the Antitrust Movement?*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 188 (1957).

Many scholars have tried to explain what has caused the shift in antitrust’s political salience,<sup>3</sup> but the purpose of this article is more to describe how the shift has affected the way we now do the “antitrust enterprise” and to connect this shift to our concern for the political values that we believe underlie the antitrust laws. Thus we take guidance from two points in Secretary Rice’s speech: We connect free markets with free people, favoring open markets and the opportunity to compete as well as seeing the connection between free markets and democratic values and institutions.<sup>4</sup> As Secretary Rice also suggests (although likely with foreign policy in mind), we, too, believe that a balance of institutional power is necessary to advance the goals that free markets embody.

The institutional aspects of today’s antitrust enterprise, however, are increasingly out of balance, threatening the democratic economic and political goals of the antitrust laws.<sup>5</sup> The shift that Hofstadter first described has led to an antitrust system captured by

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<sup>3</sup> Jonathan B. Baker, *Preserving a Political Bargain: The Political Economy of the Non-Interventionist Challenge to Monopolization Enforcement*, 76 ANTITRUST L.J. 211 (2011); HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE* 1-10 (2006).

<sup>4</sup> Secretary Rice’s remarks echo the views of classical liberal economists. See, e.g., Corwin D. Edwards, *An Appraisal of the Antitrust Laws*, 36 AMER. ECON. REV. 172 (1946) (“The grounds for the laws against collusion and monopoly include not only a dislike of restriction of output and of one-sided bargaining power, but also a desire to prevent excessive concentration of wealth and power and a desire to keep open the channels of opportunity.”).

<sup>5</sup> We take as a given that antitrust has political goals and reflects political value judgments. Other papers in this Symposium engage more fully with what those goals are, further developing a rich tradition of antitrust scholarship. For earlier contributions, see, e.g., Robert Bork, Ward Bowman, Harlan Blake, & Kenneth Jones, *The Goals of Antitrust: A Dialogue on Policy*, 65 COLUM. L. REV. 363 (1965); John J. Flynn, *Antitrust Policy and the Concept of a Competitive Process*, 35 N.Y.L. SCH. L. REV. 893, 897 (1990); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); James May, *Antitrust In The Formative Era: Political and Economic Theory In Constitutional and Antitrust Analysis*, 50 OHIO STATE. L. J. 257 (1989); Louis B. Schwartz, *Justice and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076 (1979); Louis B. Schwartz, *The Schwartz Dissent*, \_ ANTITRUST BULL. 37, 38-39 (1955) (“The purpose of the antitrust laws is to preserve liberty, i.e., freedom of choice and action, first in the economic sphere but ultimately in the political sphere as well.”).

lawyers and economists advancing their own self-referential goals, free of political control and economic accountability. Some of this professional control is inevitable, of course, because antitrust is a system of legal ordering of economic relationships. But antitrust is also public law designed to serve public ends. Today's unbalanced system now puts too much control in the hands of technical experts, moving antitrust enforcement too far away from its democratic roots.

We characterize the result of this shift toward technocracy as antitrust's democracy deficit.<sup>6</sup> We draw upon the concept of a democracy deficit from the literature analyzing and critiquing the European Union and the World Trade Organization.<sup>7</sup> The term has generally been used to refer to policy making by unaccountable and non-transparent technocratic institutions far removed from democratic (or national) control.<sup>8</sup> The concern over a democracy deficit has led Europeans to develop the principle of subsidiarity, which seeks to direct law making and enforcement, where possible, to the level of government closest to the people affected by the decisions.<sup>9</sup> Similar concerns

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<sup>6</sup> Daniel Crane defines "technocracy" as "the insulation of a governmental function from popular political pressure and its administration by experts rather than generalists." DANIEL A. CRANE, *THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT* 70 (2011). *See also* Daniel A. Crane, *Technocracy and Antitrust*, 86 *TEX. L.REV.* 1159 (2008).

<sup>7</sup> *E.g.*, DAVID MARQUAND, *PARLIAMENT FOR EUROPE* 64-66 (1979); Joseph H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and Its Discontents*, 17 *NW. J. INT'L L. & BUS.* 354 (1996); Robert Howse, *How to Begin to Think About the Democratic Deficit at the WTO*, 5 *INT'L ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS* 1 (2003); Anne-Marie Slaughter, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*, 39 *GOV'T OPPOSITION* 159 (2004).

<sup>8</sup> *See* Joseph H.H. Weiler, *The Transformation of Europe*, 100 *Yale L. J.* 2403, 2466-2475 (1991) (describing the aspects of the democracy deficit in European Community institutions) For discussion in the U.S. administrative law context, *see, e.g.* Peter Straus, *Legislation That Isn't—Attending to Rulemaking's "Democracy Deficit,"* 98 *Cal. L. Rev.* 1351 (2010) (legitimacy of having unelected regulators creating "binding legal texts" through regulation).

<sup>9</sup> *See generally* GEORGE GELAUFF, ISABEL GRILO AND ARJAN LEJOUR, *SUBSIDIARITY AND ECONOMIC REFORM IN EUROPE* (2010).

have led the WTO to open its dispute resolution proceedings to participation by non-governmental organizations and other affected parties.<sup>10</sup>

The concern for democratic decision making has also been reflected in a new interest in global administrative law and the importance of basic principles of transparency and due process as a way to control the administrative state.<sup>11</sup> This interest in administrative law principles has likewise led to a closer examination of how well antitrust conforms to due process and institutional norms.<sup>12</sup>

Our concern over antitrust's move away from more democratically controlled institutions toward greater reliance on technical experts is not just animated by a theoretical preference for democracy. As lawyers know, institutional arrangements affect outcomes. A preference for democratic institutions implicitly assumes that more democratically arranged institutions will, in general, produce preferable antitrust policies and outcomes. We think this is particularly true today, when the imbalance between democratic control and technocratic control has put antitrust on a thin diet of efficiency, one that has weakened antitrust's ability to control corporate power. Nevertheless, our concern about a democracy deficit does not lead us to a full-throated embrace of William Jennings Bryant-style populism. Political values change over time, affected by how the

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<sup>10</sup> Mitsuo Matsushita, Thomas J. Schoenbaum & Petros C. Mavroides, *The World Trade Organization: Law Practice & Policy* 12-25 (2d ed. 2012).

<sup>11</sup> See, e.g. Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *LAW & CONTEMP. PROB.* 15, 28 (2005) (“global administrative law effectively covers all the rules and procedures that help ensure the accountability of global administration, and it focuses in particular on administrative structures, on transparency, on participatory elements in the administrative procedure, on principles of reasoned decisionmaking, and on mechanisms of review”). For fuller discussion of the scope of the field and current research, see “Global Administrative Law Project,” <http://www.iilj.org/GAL/default.asp>.

<sup>12</sup> See *THE DESIGN OF COMPETITION LAW INSTITUTIONS: GLOBAL NORMS, LOCAL CHOICES* (Eleanor M. Fox and Michael J. Trebilcock eds. 2013) (studies of institutional norms in competition law enforcement in ten jurisdictions).

world has changed and the lessons we can take from the social sciences. Rather, we think that by redressing the democracy deficit we can move the needle back toward policies that reflect more general political understandings and views of antitrust policy, even if not all the way back to the Nineteenth Century.

We begin our article by charting the democracy deficit as reflected in the conduct of the major institutions of the antitrust system—the courts, the Congress, and public enforcers—and compare the situation in the United States with that of the evolving competition law enforcement regime in Europe. In the second part of the article we explore the link between technocracy and ideology, discussing how a technocratic approach has today come to support an extreme laissez faire ideology for antitrust enforcement. Finally, our article concludes with some thoughts on why more democracy would be good for antitrust.

## I. The Democracy Deficit

### A. The Courts

Perhaps the most significant innovation that Congress made when it enacted the Sherman Act was to create a system of public enforcement of competition law. Restraints of trade had previously been largely a private matter, raised defensively to avoid the enforcement of contracts that were against public policy.<sup>13</sup> Under the Sherman Act, however, the government was given the power to use judicial processes to stop agreements in restraint of trade, and even to prosecute criminally those parties who entered into them. Private parties also gained a new right, specifically the right to sue for

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<sup>13</sup> Note that some state government antitrust enforcement did precede passage of the Sherman Act. See James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495, 499 (1987) (discussing state enforcement of antitrust law prior to passage of Sherman Act).

damages caused by such restraints. Together, these two affirmative rights placed decisional power in antitrust cases squarely in the hands of judges and juries, the former often viewed as the least democratic branch of government and the latter often viewed as representing the populace from which it was drawn.<sup>14</sup> Framed this way, how they exercise their powers will strongly affect the balance between technocracy and democracy.

### 1. Judges: Antitrust as Common Law

How should judges interpret the antitrust laws? The Sherman, Clayton, and Federal Trade Commission Acts are broadly-worded, with Congress intentionally leaving it to the courts to fill in the exact meaning of phrases like “restraint of trade,” “monopolization,” “substantially to lessen competition,” and “unfair methods of competition,” none of which was statutorily defined.<sup>15</sup> Early judicial opinions struggled with interpretation issues, particularly in Sherman Act cases where the courts were caught between the literalism of “every” and the common law tradition of a rule of reason.

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<sup>14</sup> For the classic text discussing the counter-majoritarian problem of having judges review the constitutionality of legislation, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 18 (2d ed. 1986) (“judicial review is a deviant institution in the American democracy”). For discussion of the popular role of the jury, see LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 28-29 (2004) (quoting John Adams for the proposition that the jury “introduced a ‘mixture of popular power’ into the execution of the law and was thus an important protection of liberty. This was particularly true when it came to fundamental law, for the jury was ‘the Voice of the People.’”)

<sup>15</sup> See 51 CONG. REC. 4089 (1890) (“Now, just what contracts, what combinations in the form of trusts, or what conspiracies will be in restraint of the trade or commerce mentioned in the bill will not be known until the courts have construed and interpreted this provision.”) (remarks of Representative Culberson, reporting the bill on behalf of the House Judiciary Committee).



Exemplifying the initial common law approach is then-Judge Taft’s opinion in *Addyston Pipe*.<sup>16</sup> This opinion is well-known for its ancillary restraints analytical framework, but it is perhaps less well-appreciated for its institutional approach in which Taft engaged in a broad inquiry into how the defendants’ agreement might be viewed under the common law.

The “common law,” Taft knew, was hardly a seamless body, uniform in application, but Taft did not ignore decisions pointing in different directions. Instead, he examined cases on both sides of the issue, reviewing cases dating back to the Year Books up until the time of his decision. The jurisdictions involved were diverse—England, Canada, and Australia; the U.S. Supreme Court and the federal courts; and eighteen state courts.<sup>17</sup> Taft drew on these cases for their different approaches, and for the policies these courts articulated, before determining whether the cartel agreement in the case violated the Sherman Act.

Taft did not see the court’s role as being at liberty to decide “how much restraint of competition is in the public interest, and how much is not.” He was not about to “set sail on a sea of doubt” and “assume such a power.”<sup>18</sup> For Taft, the common law constrained judicial power. His decision needed to be within the bounds that the

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<sup>16</sup> See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff’d*, 175 U.S. 211 (1899).

<sup>17</sup> The states were: Massachusetts, New York, Michigan, Minnesota, Wisconsin, Ohio, Pennsylvania, Rhode Island, Illinois, Kentucky, Iowa, California, Texas, Louisiana, Nebraska, New Jersey, West Virginia, and Georgia.

<sup>18</sup> *Addyston Pipe*, 85 F. at 284.

common law set, in part because the Sherman Act had made contracts that were in restraint of trade at common law “unlawful in an affirmative or positive sense.”<sup>19</sup>

This sense of judicial restraint was not on display in the Supreme Court’s 1911 decision in *Standard Oil*.<sup>20</sup> There the Supreme Court chose to interpret the Sherman Act expansively, “by the light of reason,” to determine “in every given case” whether the conduct was “within the contemplation of the statute.”<sup>21</sup> Justice Harlan, who had joined Taft in the circuit court in *Addyston Pipe*, vigorously dissented. “[S]uch a course of proceeding,” he wrote, “would be ‘judicial legislation.’”<sup>22</sup>

Congress responded to critics from all sides of the political spectrum by enacting the Clayton Act in 1914, trying to limit the discretion of the courts by writing clearer prohibitions on specific types of conduct. Congress’s fear was that without greater legislative control, the legality of any particular restraint would be determined by a

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<sup>19</sup> *Id.* at 279.

<sup>20</sup> *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

<sup>21</sup> *Id.* at 63.

<sup>22</sup> *Id.* at 100. President Taft subsequently took the position that *Standard Oil* “merely adopted the tests of the common law” and that no prior case would have been decided differently under its approach. See Annual Message—Part I, On the Anti-trust Statute, to the Senate and House of Representatives, Dec. 5, 1911, 17 COMP. MESSAGES & PAPERS PRES. 7644, 7645–46. But he also argued that the Court had not committed to itself “unlimited discretion” to decide a restraint’s illegality, repeating the approach he had taken in *Addyston Pipe*:

A reasonable restraint of trade at common law is well understood and is clearly defined. It does not rest in the discretion of the court. It must be limited to accomplish the purpose of a lawful main contract to which, in order that it shall be enforceable at all, it must be incidental. If it exceed the needs of that contract, it is void.”

*Id.* at 7646. See also Alan J. Meese, *Standard Oil As Lochner's Trojan Horse*, 85 S. CAL. L. REV. 783, 797 (2012) (discussing Taft’s view of *Standard Oil*).

judge's "individual opinion as an economist or sociologist" rather than by a legislatively set legal standard.<sup>23</sup>

These early jousts between the courts and the legislature over the Sherman Act's meaning have now been relegated to history. The modern Supreme Court has come to be unmoored from any sense of legislative direction of judicial decision-making when it comes to interpreting the antitrust laws.<sup>24</sup> Although some modern cases take a default-view of appropriate antitrust rules—make a decision while reminding Congress of its legislative responsibility to alter it<sup>25</sup>—even that modest acknowledgement of legislative authority is lacking today.

Instead, the Supreme Court now refers to the "quasi-common law realm of antitrust,"<sup>26</sup> writing that the Sherman Act's use of the term "restraint of trade" "invokes the common law itself."<sup>27</sup> But now the Court does not mean a common law of bounded precedent, to be parsed and reconciled as Taft did in *Addyston Pipe*, but law made by judges as they see fit. This expansive view of the Court's powers allowed the Supreme Court in *Leegin* to overrule the *Dr. Miles* case, a nearly 100 year old precedent whose Congressional endorsement an earlier Supreme Court had actually recognized and deferred to.<sup>28</sup>

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<sup>23</sup> See S. Rep. No. 62-1326, at 11 (1913).

<sup>24</sup> Cf. Margaret L. Moses, *Beyond Judicial Activism: When the Supreme Court Is No Longer a Court*, 14 U. PA. J. CONST. L. 161 (2011) (discussing unconstrained Supreme Court decision-making in other areas of the law).

<sup>25</sup> See, e.g., *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982).

<sup>26</sup> *California Dent. Ass'n v. FTC*, 526 U.S. 756, 780 (1999).

<sup>27</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 888 (2007).

<sup>28</sup> See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 n.18 (1977).

Even Justice Scalia, the champion of originalism in interpreting text, has come to emphasize the “dynamic potential” of the term “restraint of trade.” “Like the term at common law,” he wrote for the Court in *Sharp*, “restraint of trade” refers to a “particular economic consequence,” one to be assessed as “new circumstances and new wisdom” evolve, not one “governed by 19th-century notions of reasonableness” that “remains forever fixed where it was.”<sup>29</sup> The question is no longer whether a practice in question is one that common law courts might have recognized as unlawful, as Taft thought in *Addyston Pipe*, but whether a modern judge thinks the practice is good or bad, the very approach that Taft rejected.

The willingness of the courts in antitrust cases to act as unconstrained common law courts, ignoring any boundaries the legislature may have placed on the antitrust laws, has been particularly pronounced when the courts have interpreted the Clayton Act. This is ironic because the Clayton Act is the very statute that Congress passed to stop judges from deciding cases based on their “individual opinion[s] as an economist.”<sup>30</sup>

Take the prohibition on primary-line price discrimination in Section 2 of the Clayton Act. In *Brooke Group*, a suit brought under Section 2 of the Clayton Act, the Court collapsed primary-line price discrimination into the Sherman Act’s monopolization offense, and then applied a legal standard to the defendant’s discriminatory and allegedly predatory pricing strategies that assumed that this type of behavior never occurs anyway, without ever acknowledging that Congress thought otherwise when it passed Section 2.<sup>31</sup>

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<sup>29</sup> *Business Electronics Corp. v. Sharp Electronics, Inc.*, 485 U.S. 717, 732 (1988).

<sup>30</sup> *See supra* note 23.

<sup>31</sup> *Brooke Group Ltd. V. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993) (“whether the claim alleges predatory pricing under § 2 of the Sherman Act or primary-line price discrimination under the Robinson-Patman Act, two prerequisites to recovery remain the same”). The

Section 3's ban on exclusive dealing has likewise been subsumed by Section 2 of the Sherman Act; if anything, it is harder today to prove the Clayton Act violation than the Sherman Act violation, a judicial flip of the legislative effort to tighten up the Sherman Act's standards when judging exclusive dealing arrangements.<sup>32</sup>

A similarly egregious example of ignoring the Clayton Act involves the practice of tying, where the provision of one product or service is conditioned on the acceptance of a second product or service. Tying can be challenged under four separate statutory provisions, each with its own language, legislative history, and purpose. There are tying cases under Section 1 of the Sherman Act barring agreements in restraint of trade; Section 2 of the Sherman Act barring monopolization or attempted monopolization; Section 3 of the later enacted Clayton Act barring the sale of goods on the condition that the purchaser shall not use or deal in the goods of a competitor where the effect may be to substantially lessen competition or tend to create a monopoly; and Section 5 of the Federal Trade Commission Act which bars unfair methods of competition. Despite the disparate language and aims, the Supreme Court has collapsed tying analysis into a single

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Court repeated its view, originally asserted in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 589-90 (1986), that “predatory pricing schemes are rarely tried, and even more rarely successful.” *see* 509 U.S. at 226, despite the fact that Congress in 1914 relied on social science views to the contrary, *see* William S. Stevens, *Unfair Competition*, 29 POL. SCI. Q. 282, 284-86 (1914) (describing geographic predatory pricing).

<sup>32</sup> *See* *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 186 (3d Cir. 2005) (reversing district court decision that exclusive dealing agreements did not violate Section 2; although Government alleged a Clayton Act violation at trial, Government did not appeal the district court's adverse finding on this claim); *LePage's Inc. v. 3M*, 324 F.3d 141, 145 (3d Cir. 2003)(en banc) (affirming jury verdict for plaintiff on Section 2 claim of exclusive dealing; on Clayton Act exclusive dealing claim, jury had found for defendant); *cf.* *United States v. Microsoft Corp.*, 253 F.3d 34, 70-71 (D.C. Cir. 2001) (exclusive dealing agreements challenged under Sections 1 and 2 of the Sherman Act; Government did not appeal district court's adverse finding on its Sherman Act claim; held: exclusive dealing agreements violated Section 2).

quasi-per se analysis of its own making regardless of which (or how many) statute(s) are involved.<sup>33</sup>

The evolution of Section 7 of the Clayton Act is even more dramatic. Interpretation of this provision is now so far removed from the legislative purposes that animated it that it is hard see the connection between the statute and current interpretations. The Court started out in *Brown Shoe* with a faithful effort to interpret the 1950 Cellar-Kefauver amendment to Section 7 in light of its legislative purposes, and the Court's decision in *Philadelphia National Bank* the following year made an effort to tie its invented legal/economic test to Section 7's concern for concentration.<sup>34</sup> But a decade later, in *General Dynamics*, the Court relegated concentration to a starting point in the analysis and invited defendants to come up with their own (more persuasive) economic theories for showing that big mergers don't matter.<sup>35</sup> Ever more sophisticated economic theories have now led merger analysis down the rabbit-hole into a world where we can barely stop a 3-to-2 merger, let alone a merger that threatens competition "in its incipency."<sup>36</sup>

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<sup>33</sup> See e.g., *Jefferson Parrish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). See generally HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* ¶ 10.3 and cases cited therein.

<sup>34</sup> See *Brown Shoe Co. v. United States*, 370 U.S. 294, 315 (1962) ("The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy."); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963) (justifying test for presuming anticompetitive effect as being warranted by the "intense congressional concern with the trend toward concentration").

<sup>35</sup> See *United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974) (despite sufficient statistical showing, "other pertinent factors" affecting the industry and the merging parties' business properly led the district court to find a lack of substantial effect on competition); *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 631 (1974) (after Government introduced evidence of concentration ratios, defendant could then explain why concentration ratios were "unreliable indicators of actual market behavior").

<sup>36</sup> See *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011) (enjoining, after trial on the merits, merger creating duopoly in the "digital do-it-yourself tax preparation" market); *cf.* *United*

No one would contend that the federal judiciary is an institution subject to much democratic control. Its members are not elected and are basically unremovable from their offices. But judicial control over the meaning of the antitrust laws is now firmly in the grip of this unelected judiciary that feels free to pay little attention to the goals that Congress was trying to advance when the laws were enacted. Although the judicial exercise of “legislative power” has always been of concern in our legal and political system, and is at the heart of criticism of the power of constitutional judicial review, no one seems to notice its exercise, or care, when antitrust is involved.

## 2. The Jury

Juries help democratize antitrust. Juries are composed of lay people, citizens who are not expert in antitrust. Their function is not to articulate the law. Juries are asked to understand the evidence presented to them and to decide whether the plaintiff has proven the facts that are required for liability, based on the legal principles that the judge describes. The jury’s important role thus forces lawyers to present their cases in ways that will make sense to lay people. This means that antitrust claims and antitrust defenses must be comprehensible, not cloaked in professional jargon.

How well do antitrust juries do their job? Who knows? There are many jury studies, but almost none focused on antitrust.<sup>37</sup> Some federal judges think juries do a

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States v. AT&T Inc., Civ. No. 11-01560 (ESH) (D.D.C. filed Sept. 16, 2011) (amended complaint) (four to three merger in mobile wireless telecommunications services market), acquisition abandoned, see Press Release, Dep’t of Justice, Dec. 19, 2011, [http://www.justice.gov/atr/public/press\\_releases/2011/278406.htm](http://www.justice.gov/atr/public/press_releases/2011/278406.htm).

<sup>37</sup> Daniel Crane notes that “[t]o my knowledge, there have been no systematic efforts to study the actual performance of civil antitrust juries.” CRANE, INSTITUTIONAL STRUCTURE, *supra* note 6, at 111. Crane does, however, draw on one study, done using juror interviews after four antitrust trials in the 1990s (“the richest pool of information available,” *id.*), although the study’s author and Crane emphasize the conclusions only from one of those trials. See Arthur Austin, *The Jury System at Risk from Complexity, the New Media, and Deviancy*, 73 DENV. U.L. REV. 51 (1995) (discussing the trial in Brooke Group Ltd. v.

good job; presumably, others do not.<sup>38</sup> But most antitrust commentators today think that juries are anathema to antitrust.<sup>39</sup> As Daniel Crane points out, “[f]ew institutions could be further from the technocratic model of expert administration than a randomly selected group of lay fact finders.” Juries, in Crane’s view, are “populist” institutions and “antitrust populism is long dead.”<sup>40</sup>

In one sense this antitrust hostility to juries seems almost irrelevant. Jury use is limited in the antitrust system because a jury is required only in suits for damages and in criminal cases. Government enforcement actions seeking injunctive relief are tried only to a judge. This means that there will be no jury involvement with much of what might present conflicts in terms of antitrust policy—mergers, monopolization, and collaborative activities other than price fixing. Further, trials are generally rare in federal court anyway, whether in civil or criminal cases; most cases end in a settlement or a guilty

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Brown & Williamson Tobacco Corp.). For a good review of the empirical literature of jury studies in general torts cases, reaching a much more positive conclusion regarding the jury’s abilities, see Shari Seidman Diamond and Jessica M. Salerno, *Empirical Analysis of Juries in Tort Cases*, in RESEARCH HANDBOOK ON THE ECONOMIC ANALYSIS OF TORTS \_ (Jennifer Arlen ed. 2013) (concluding that “juries usually use reasonable strategies to evaluate the conflicting evidence they are given” and are “active problem-solvers who typically work to produce defensible verdicts”).

<sup>38</sup> Judge Lewis Kaplan, for example, has observed that in his seventeen years as a trial judge on the federal bench, he thought that all the juries in the cases before him had understood the cases they were presented, with the exception of one patent case. Lewis Kaplan, *Federal Antitrust Litigation in the Information Age - A View From the Bench*,” Remarks to the Exec. Comm. of the New York State Bar Ass’n Antitrust Law Section, May 18, 2011 (unpublished). See also Richard S. Arnold, *Trial By Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 2-3 (1993) (“When I served as a district judge for about eighteen months, I was fond of telling jurors in my courtroom that I would prefer to have a case decided by twelve ordinary people than by one ordinary person. In other words, I do not believe much in expertise, and if there is such a thing, I doubt if it is any match for common sense.”).

<sup>39</sup> For a listing, see CRANE, INSTITUTIONAL STRUCTURE, *supra* note 6, at 109. See also Rebecca Haw, *Adversarial Economics in Antitrust Litigation: Losing Academic Consensus in the Battle of the Experts*, 106 NW. U.L. REV. 1261, 1293 (2012) (noting that the problems with jury decision-making in antitrust “have been well documented,” with issues of economic debate that are “beyond the ken of lay people” being resolved by a lay decision-maker).

<sup>40</sup> CRANE, INSTITUTIONAL STRUCTURE, *supra* note 6, at 113.



plea. This is certainly true for antitrust.<sup>41</sup> For example, of the more than 200 private cases filed against Microsoft in the aftermath of the governments' monopolization case, only two ever went to trial before a jury and only one to a conclusion; all the others were either dismissed or settled.<sup>42</sup> Why be so upset about an institution so rarely invoked?

Two reasons help explain this hostility. One we have already noted—the general preference that antitrust be kept in the hands of experts, versed in the intricacies of antitrust law and economic theory. The other is likely more significant—hostility to the private action itself and the fear that large settlements will occur in the shadow of a populist jury that hates big business and does not understand economic terms like “average variable cost” or “elasticity of demand.”<sup>43</sup>

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<sup>41</sup> For example, of the 641 federal civil antitrust cases terminated in Fiscal Year 2011, only five terminated during or after a jury trial, which is less than one percent (.78 percent) of the total civil antitrust cases filed. This is slightly higher than the percentage of all civil cases filed that year that went to a jury trial (.74 percent). Most civil antitrust cases ended (presumably by settlement) before or during pretrial proceedings (79 percent), slightly lower than the number for all civil cases (82 percent). *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS. 2011 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 149-50 (2012) (Table C-4. U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending September 30, 2011), *available at* <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf>.

<sup>42</sup> *See* *Novell, Inc. v. Microsoft Corp.*, 2012 U.S. Dist. LEXIS 98710 \*5-\*6 nn. 4, 5, 2012-2 Trade Cas. (CCH) ¶77,979 (2012) (granting Microsoft's motion for judgment as a matter of law after the jury had hung, 11-1, in favor of Novell), notice of appeal filed, Aug. 10, 2012; *Gordon v. Microsoft Corp.*, No. 00-5994, 2001 WL 366432 (Minn. Dist. Ct. Mar. 30, 2001) (granting class certification). The *Gordon* case was settled during the trial for \$182 million. For an interesting discussion of the trial, belying the skeptical account of jurors' abilities to understand complex antitrust cases, see “Gordon v. Microsoft” Observations from the Trial Judge and Selected Jurors (Dec. 17, 2004), <http://apps.americanbar.org/antitrust/at-committees/at-trial/pdf/past-programs/gordon-transcript-04.pdf>.

<sup>43</sup> Daniel Crane draws on Austin's study, *supra* note 37, for this example. *See* CRANE, INSTITUTIONAL STRUCTURE, *supra* note 6, at 111. Curiously Crane cites one experimental study showing that juries would award lower damages if they were told that damages were automatically trebled to support his view that jury trials “may be tilted in a populist anti-big business direction.” *See id.* at 112-13. If anything, this finding shows that jurors are not biased against corporations, since they would want to reduce the damages award; if anything, this would show “bias” against plaintiffs who are, by law, entitled to treble-damages. One juror in the *Gordon* case indicated that she “might have lowered the amount” of damages had she known about treble-damages, see Observations, *supra* note 42, at 18.

Fear of improperly exacted large settlements has given the anti-jury critique important consequence for antitrust law. Beginning with the Japanese consumer electronics products litigation in the 1970s—in which the defendants argued that there should be no constitutional right to a jury trial because the case was too complex<sup>44</sup>—the Supreme Court has engaged in a relentless effort to keep antitrust away from juries. In the Japanese consumer electronics case the Court took a defendant-favorable approach to summary judgment motions, ignoring its earlier more permissive precedents, and cut off the plaintiffs’ attempt to present their predatory pricing claim to the jury.<sup>45</sup> Then came cases adopting stricter standards for plaintiffs to prove causation and standing.<sup>46</sup> More recently was the Supreme Court’s decision in *Twombly*, raising the pleading standard so as to make it easier for a defendant to get a case dismissed at the complaint stage, even before filing an answer let alone submitting to any discovery.<sup>47</sup> Most recently, the courts have focused on class certification, raising the requirements for showing predominance of common issues in a way that pushes much of the litigation into the class certification stage.<sup>48</sup> The hearing on class certification, of course, is held before a judge not a jury.

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<sup>44</sup> See *In re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069, 1079, 1089 (3d Cir. 1980) (case involving Sherman Act and Antidumping Act claims might be “too complex” for a jury to decide “in a proper manner,” with the result that a jury trial “would be a violation of due process and therefore would be beyond the guarantee of the seventh amendment”) (remanding for further proceedings).

<sup>45</sup> *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

<sup>46</sup> See Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 *GEO. L.J.* 1065 (1986).

<sup>47</sup> One explanation for the Court’s hostility has been the near-total absence of Supreme Court Justices with any substantial civil trial experience. Justice Stevens was a notable exception, having been an experienced antitrust litigator prior to his appointment to the bench. Spencer Weber Waller, *Justice Stevens and the Rule of Reason*, 62 *SMU L. REV.* 693, 697-98 (2009).

<sup>48</sup> See, e.g., *In Re: Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008) (denying class certification); see also *Stolt-Nielsen S.A. v. Animal-Feeds Int’l Corp.*, 559 U.S. \_\_\_, 130 S.Ct. 1758 (2010) (restricting class action in arbitration). In *Behrend v. Comcast Corp.*, 655 F.3d 182 (3d Cir. 2011),

This hostility to private antitrust litigation, which is shared by many commentators, lawyers, and courts, is another example of the democracy deficit in the antitrust system. Private litigation is a democratizing force in antitrust, like the jury itself, allowing injured citizens to seek redress for injuries suffered. Private litigation is not in the control of government enforcers and not in the control of antitrust experts, although private litigants must necessarily employ them. Private citizens (and here we can add private businesses, which bring more antitrust suits than do individual consumers) do not care so much for antitrust theory as they care about getting damages for anticompetitive conduct that has harmed them or, in the case of business, stopping behavior that makes it hard for them to compete.

Viewing antitrust as a technical enterprise leads today's antitrust system away from private enforcement and towards public enforcement, firmly in the hands of expert federal enforcement agencies. How else to explain Justice Breyer's otherwise cryptic remark in *linkLine* (a private treble-damages suit) that a price squeeze claim finds its "natural home in a Sherman Act § 2 monopolization case where *the Government as plaintiff* seeks to show that a defendant's monopoly power rests, not upon 'skill, foresight and industry,' but upon exclusionary conduct"?<sup>49</sup> Why mention only the Government?

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the Third Circuit took a less restrictive view of class certification; the Court has now granted certiorari to review the decision. *See Comcast Corp. v. Behrend*, 133 S.Ct. 24 (2012). These cases have had a noxious effect on the ability of all types of plaintiffs to recover money damages in federal courts, as the Court has extended their principles beyond antitrust litigation. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (extending *Twombly* to suit for damages from unconstitutional conduct); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006) (requiring allegation of proximate cause in RICO damages suit).

<sup>49</sup> *Pac. Bell Tel. Co. v. linkLine Communics, Inc.*, 555 U.S. 438, 458 (2009) (concurring opinion) (italics added and internal citation omitted). *See also Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, 281-82 (2007) (expressing concern that private antitrust suits involving the marketing of initial public offerings would be brought before "different nonexpert judges and different nonexpert juries" reaching inconsistent verdicts, resulting in "unusually serious mistakes") (held: securities laws preempt private antitrust suits).

Why not private litigants as well? Don't private litigants understand full well when they have been excluded by monopolizing conduct? Or does Justice Breyer believe that the Sherman Act should be judicially rewritten to provide a separate substantive law right enforceable only by expert government agencies?<sup>50</sup>

### B. Fear and Loathing of Congress

Congress is the natural democratic repository of law making authority in our system. Congress passes the statutory framework for substantive antitrust law, exemptions and immunities, the procedures for its enforcement, the penalties for its violation, and the institutions for its enforcement. However, in recent times, Congress has seen fit only to nibble at the edges of antitrust law with increased penalties, minor amendments, and uneventful hearings over individual mergers or investigations of interest to particular Congressional committees. Most observers are content or pleased with the virtual withdrawal of Congress from the field.<sup>51</sup> Even at a time of nearly universal dislike for Congress, both branches of Congress should be expected to do better.

Congress's task as the legislative branch is first and foremost to pass laws, but that is not its only task. Congress also appropriates money, provides advice and consent to Presidential appointments, broadly oversees Executive branch and independent agency

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<sup>50</sup> It may be that Justice Breyer was implicitly referencing the debate over whether Section 5 of the Federal Trade Commission Act can be read more broadly than Section 2 in appropriate monopolization cases, in part because Section 5 is enforceable only by the FTC and not by private parties. See William E. Kovacic and Marc Winerman, *Competition Policy And The Application Of Section 5 Of The Federal Trade Commission Act*, 76 ANTITRUST L.J. 929 (2010); J. Thomas Rosch, *Wading Into Pandora's Box: Thoughts On Unanswered Questions Concerning the Scope and Application of Section 2 & Some Further Observations on Section 5* at 25 (Oct. 3, 2009) (discussing lack of spillover effects on private enforcement from using Section 5) , [ftc.gov/speeches/rosch/091003roschlecgspeech.pdf](http://ftc.gov/speeches/rosch/091003roschlecgspeech.pdf).

<sup>51</sup> Hovenkamp, ANTITRUST ENTERPRISE, *supra* note 3, at 42-45.

activity, conducts investigations, holds hearings, and enacts resolutions. Despite many bi-partisan Congressional odes to the importance of the antitrust laws and their enforcement, of late Congress has done little and focused on the micro, rather than the macro, changes that have occurred in the field.

A review of Congress's activities in the antitrust field makes this rather dismal picture clear. Large scale reviews of antitrust policy and practice have been farmed out to third party blue ribbon commissions whose reports are then generally ignored.<sup>52</sup> The last major amendments to the antitrust laws occurred in the 1970s, consisting of the elevation of antitrust crimes to felonies,<sup>53</sup> the passage of the Tunney Act requiring judicial oversight for government consent decrees,<sup>54</sup> and the Hart-Scott-Rodino Act requiring pre-merger notification for large mergers and acquisitions<sup>55</sup> and giving State Attorneys General the right to sue for money damages on behalf of their natural citizens (a right the Supreme Court subsequently de-fanged in *Illinois Brick*).<sup>56</sup> Since that time, Congress further increased statutory criminal penalties (but without changing the

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<sup>52</sup> The most recent is the 2007 report of the Antitrust Modernization Commission. See ANTITRUST MODERNIZATION COMMISSION: REPORT AND RECOMMENDATIONS (April 2007), available at [http://govinfo.library.unt.edu/amc/report\\_recommendation/toc.htm](http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm) (hereinafter AMC REPORT). See generally Stephen Calkins, *Antitrust Modernization: Looking Backwards*, 31 J. CORP. L. 421 (2006); Albert A. Foer, *The Antitrust Modernization Commission: A Retrospective from the Perspective of the American Antitrust Institute*, 54 ANTITRUST BULL. 309 (2009).

<sup>53</sup> Antitrust Procedures and Penalties Act, Pub. L. 93-528, 88 Stat. 1706, amending 15 U.S.C. §§ 1, 2.

<sup>54</sup> *Id.*, codified at 15 U.S.C. § 16(b) – (h).

<sup>55</sup> Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. 94-435, Tit. II, 90 Stat. 1390, codified at 15 U.S.C. § 18a.

<sup>56</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

Sentencing Guidelines),<sup>57</sup> established zero or single damages instead of treble damages for certain limited categories of private litigation,<sup>58</sup> repealed a portion of baseball’s judicially created antitrust immunity,<sup>59</sup> and granted a new immunity to teaching hospitals and medical schools that were on the verge of losing a private antitrust case challenging the match program for medical residents.<sup>60</sup> It has fitfully considered, but failed to enact, antitrust amendments that would have limited certain defenses related to OPEC’s antitrust liability in the US,<sup>61</sup> reduced certain industry exemptions,<sup>62</sup> overruled the *Leegin* and *Illinois Brick* decisions,<sup>63</sup> and jettisoned Section 7 of the Clayton Act.<sup>64</sup> It has

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<sup>57</sup> See Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. 108-237, §215 (raising criminal fines and imprisonment). The U.S. Sentencing Commission did alter the antitrust guideline after passage of the Act to make the penalties similar to those for sophisticated frauds. See U.S. SENTENCING GUIDELINES MANUAL, APP. C, VOL. III at 146.

<sup>58</sup> See Export Trading Company Act, Pub. L. 97-290, 96 Stat. 1233, tit. III, 15 U.S.C. §§ 4001-4021 (providing immunity from suit); Local Government Act, Pub. L. 98-544, §2, 98 Stat. 2750, codified at 15 U.S.C. §§ 34-36 (no damages); National Cooperative Research and Production Act, Pub. L. 98-462, 98 Stat. 1815, codified at 15 U.S.C. §§ 4301-4306. (detrabling).

<sup>59</sup> Curt Flood Act of 1998, Pub. L. 105-297, 112 Stat. 2824, codified at 15 U.S.C. § 26b.

<sup>60</sup> See Pension Funding Equity Act of 2004 § 207, Pub. L. 108-218, 15 U.S.C § 37b. Senator Kohl strongly condemned the statute on the Senate floor as “nothing more than a giveaway to one particular special interest,” to no effect. See 150 CONG. REC. S3979 (daily ed. Apr. 8, 2004). For exploration of the potential competitive merits of the match process, see Kristin Madison, *The Residency Match: Competitive Restraints In An Imperfect World*, 42 HOUS. L. REV. 759 (2005).

<sup>61</sup> See H.R. 6074, 110<sup>th</sup> Cong, 2d Sess. (2008) (No Oil Producing and Exporting Cartels Act of 2008' or 'NOPEC'). The bill passed the House but died in the Senate on a threat of a veto by President George W. Bush. See House Passes Bill to Expose OPEC to Antitrust Challenge, 94 Antitrust & Trade Reg. Rep. (BNA) 516 (May 23, 2008).

<sup>62</sup> In the 2010 health care reform effort there was a modest provision which would have removed the McCarran Ferguson Act’s insurance exemption for “persons engaged in the business of health insurance or the business of medical malpractice insurance,” see H.R. 3962, 111<sup>th</sup> Cong., 1<sup>st</sup> Sess., Sec. 262 (2009). The provision was taken out prior to the passage of the legislation. See Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010, Pub. L. 111-192, 124 Stat. 1280. For an explanation of the bill proposing to remove the exemption, including a discussion of previous efforts to repeal or scale back the McCarran Ferguson Act, see H.R. Rep. No. 111-322, 111<sup>th</sup> Cong., 1<sup>st</sup> Sess. (Nov. 2, 2009).

<sup>63</sup> See Discount Pricing Consumer Protection Act. S. 2261, 110<sup>th</sup> Cong., 2d Sess. (2007) (to overrule *Leegin*); Edward D. Cavanagh, *Illinois Brick: A Look Back and a Look Ahead*, 17 LOY.

passed, but eventually discontinued, budget riders prohibiting the use of funds to overturn the per se ban on resale price maintenance.<sup>65</sup> It expressed its displeasure regarding formalizing the allocation of specific matters and turf more generally between the Antitrust Division and the Federal Trade Commission.<sup>66</sup> At its pettiest, it sought to force the Federal Trade Commission to vacate its headquarters building so the National Gallery of Art could take over the space.<sup>67</sup> Different committees have conducted the required hearings for appointments of the key governmental enforcers as well the occasional hearing on a specific matter of committee interest.<sup>68</sup> Budgets have been increased and tightened in different eras with only limited controversy.

This raises two different questions. Why is Congress afraid of antitrust and so focused on trivia, and why is the antitrust community afraid of Congress? One possible answer to the first question is that the technocratic wall that antitrust professionals have built around antitrust has simply scared Congress away from the area. In turn, the answer to the second question may be that the antitrust professional community fears that a

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CONSUMER L. REV. 1, 19, 26 (2004) (discussing bills to repeal *Illinois Brick*, all of which died in committee).

<sup>64</sup> See Merger Modernization Act, H.R. 4247, 99th Cong. 2d Sess. (1986) (effort to alter Clayton Act language to codify aspects of Justice Department Merger Guidelines).

<sup>65</sup> See Pub. L. No. 98-166, § 510 (“None of the funds appropriated in title I and title II of this Act may be used for any activity, the purpose of which is to overturn or alter the per se prohibition on resale price maintenance in effect under Federal antitrust laws: Provided, That nothing in this provision shall prohibit any employee of a department or agency for which funds are provided in titles I and II of this Act from presenting testimony on this matter before appropriate committees of the House and Senate.”)

<sup>66</sup> See Harry First, Eleanor M. Fox, and Daniel E. Hemli, *The United States: The Competition Law System and the Country’s Norms*, in THE DESIGN OF COMPETITION LAWS, *supra* note 12, at 375 nn. 261-63 and accompanying text (describing the Congressional dispute).

<sup>67</sup> GSA Leases Held up in Real Estate Power Play, Federal Times, Jun. 17, 2012.

<sup>68</sup> Peter Lattiman, *William Baer Confirmed as Justice Department Antitrust Chief*, NY TIMES, Dec. 20, 2012 (discussing delays in confirmation process).

breach of this wall could only lead to mischief, with untutored “business interest” legislators trying to dismantle antitrust law while “populist” legislators try to impose excessive restrictions on economic activity.

Of course, it is possible that Congress has not been scared off, but is simply disinterested in antitrust or content with the status quo. The most jaded public choice advocates would contend that there is neither enough payoff in the form of electoral support or financial campaign support to justify more investment in the field versus other areas of the law, so the disinterest is perfectly rational. All we are left with, then, is an effort by the different Congressional committees to protect their turf for self-aggrandizing reasons, an effort most on display in the “outrage” over the agencies’ efforts to fix the merger clearance process.

Putting such cynical explanations aside, as an institutional matter we should not assume that Congress is simply content with the status quo. The historic delegation of authority to the courts to develop a common law of antitrust never included carte blanche authority to make fundamental economic public policy in the guise of case decisions. Nor did it encompass the right for the agencies to increasingly make law in-house through unreviewable decisions not to enforce the law, decisions to settle without effective relief, the issuance of advisory opinions, and the issuance of guidelines which effectively change the law, all without even resorting to the courts or Congress.<sup>69</sup>

The sad fact is, however, that Congress has acquiesced in its own marginalization. There is certainly a limit to the amount of attention that Congress can pay to any area of

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<sup>69</sup> Richard Steuer, *Counseling without Case Law*, 63 ANTITRUST L.J. 823 (1994-95); Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383 (1998).



the law and we do not claim that antitrust should be a top national priority. This trend is compounded by the judiciary which has made antitrust overly technical and primarily dependent on economics in such a way that it is hard to discern whether or not an area of the law or an individual decision is consistent with the statutory scheme and current Congressional desire.

Congressional distance from core antitrust policy is further compounded by the Court's tendency to simply ignore the work of Congress even when it has expressed a view on any of these issues. For example, in the *Leegin* case, the Supreme Court gave no significance to Congress's awareness of a consistent court interpretation of the per se illegality of resale price maintenance at the federal level, a repeal of the statutes that allowed states to form a contrary policy under certain circumstances, and a budget rider that came in response to an expressed goal of the Justice Department to change the law in the 1980s.<sup>70</sup> Congressional failure to respond to the Court then just confirms the judiciary's view that it can act free from democratic control.

Congress should be able to do better. As in other areas of the law, Congress tends to focus on short-term, partisan, and publicity driven activity that often results in gridlock and a focus on the minutia. Instead of substantive legislation that would expand or restrict the antitrust laws in accordance with the will of the majority of the legislature, we are treated to the spectacle of sideshows like multiple hearings over the antitrust status of baseball, browbeating agency nominees over perceived failures of the agencies in individual matters, and other oversight hearings about a particular merger (Universal-

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<sup>70</sup> See *supra* note 28 and accompanying text. Compare *Flood v. Kuhn*, 407 U.S. 258 (1972) (deferring to Congressional silence regarding the fifty year-old decision in *Federal Baseball Club v. National League*, 259 U.S. 200 (1922), giving professional baseball an effective exemption from federal antitrust law).

EMI) or high profile industries (Google) that are newsworthy. In contrast, Congress remained entirely silent when 1) the 2008 Department of Justice report on unilateral conduct made important and wide sweeping changes to the interpretation and enforcement of Section 2; 2) the FTC refused to sign the report and issued policy statements in response; and 3) the DOJ report was withdrawn by the subsequent Administration.

As a result, both agencies and courts have the best of both worlds and would oppose any change where Congress reasserts its fundamental role in setting the public policy to be enforced by the other branches of government. Agencies can proceed with fewer constraints in setting the agenda rather than executing one set by others. Most of their work can proceed behind closed doors and by negotiation with affected parties without external review.<sup>71</sup> When the courts become involved because of settlement break down, they can establish their own view of sound public policy largely unconstrained by their co-equal branches of government.<sup>72</sup>

A realistic and more democratic role for Congress in the formulation of competition policy, as a fundamental part of national economic policy, would involve a number of relatively small changes. The first principle should be establishing a norm of statutory interpretation that silence after a Court decision does not mean acquiescence.

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<sup>71</sup> The Sunshine in Government Act, however, limits private discussion of Commission business to no more than two Commissioners at a time. *See* 5 U.S.C. § 552b(a)(2). The FTC has criticized this limitation. *See* Prepared Statement of the Federal Trade Commission Presented by Stephen Calkins, Gen. Counsel, Fed. Trade Comm'n, Before the Special Committee to Review the Government in the Sunshine Act, Administrative Conference of the United States (Sept. 12, 1995), *available at* <http://www.ftc.gov/speeches/other/suntest.shtm>.

<sup>72</sup> One would hope that public choice advocates focused on the self-interested expansion of governmental actors without regard to the public interest would be as concerned with this situation as with their usual topics of interest.

The fact that Congress does not specifically tee up a bill or resolution in each legislative session does not mean it has changed its mind on a particular subject or approves of a particular development in the antitrust world. Second, Congress should require the Agencies periodically to report changes in enforcement or budget priorities and judicial changes in established precedent. Third, exemptions and immunities should be retrofitted to include sunset provisions so that Congress is required to take some action to preserve the status quo.<sup>73</sup> Fourth, if Congress out-sources big picture studies to blue ribbon commissions, such action should be accompanied by a provision that the recommendations of the commission be introduced in the following legislative session. Fifth, nomination, oversight, and budget hearings should be better focused on the major themes of what agencies do and don't do, rather than the minutiae of the moment.

The recommendation that Congress shift its focus to major issues is particularly critical to reinvigorating Congress' role in antitrust policy. It is simply more important to probe whether merger enforcement has now been virtually limited to mergers to monopoly than to hold hearings into whether a particular merger in a particular industry is a good idea. Similarly, reasonable people can differ over whether a particular antitrust provision should be enforced more vigorously, less vigorously, or simply repealed, but we doubt any Congress since the passage of the Sherman Act would simply say, "We don't care, do whatever you want." We may not like the results of what Congress says on any particular issue, but it remains the only directly democratically accountable branch of government and the one most clearly charged with setting the broad parameters of fundamental public policy. It should speak, as it does in most other areas of our

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<sup>73</sup> See AMC REPORT, *supra* note 52, at 355-56 (recommending adoption of sunset provision for any antitrust exemption).

complex economy, and not have its silence used as an excuse for self-interested actors to shift power in their favor when the legislature chooses to turn to other pressing issues of the day.

### C. State Enforcement

There is one group of public antitrust enforcers that has been consistently criticized over the past two decades, not for over- or under-enforcement of the antitrust laws, but for having the authority to enforce the antitrust laws in the first place. That group is the state attorneys general. Many antitrust commentators, some federal judges, and some in Congress have been unhappy with an enforcement structure that has given authority to state attorneys general to enforce federal antitrust law in federal court, to the point where some have proposed ending state jurisdiction over all antitrust claims, whether brought under federal or state antitrust law.<sup>74</sup> Indeed, the effort to strip states of jurisdiction in antitrust matters was an important part of the agenda of the Antitrust Modernization Commission appointed in the mid-2000s, although this extreme view was eventually rejected by all but one of the Commissioners.<sup>75</sup>

From the point of view of democratic accountability, the criticism of the state attorneys general is deeply ironic because nearly all the state attorneys general are elected

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<sup>74</sup> See Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, in *COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY* 260–62 (Richard A. Epstein & Michael S. Greve eds., 2004); see also Richard A. Posner, *Antitrust in the New Economy*, 68 *ANTITRUST L.J.* 925, 940 (2001) (states should have no authority to bring antitrust suits under federal or state law, except where the state was injured as a purchaser of goods or services).

<sup>75</sup> The Commissioner was John Warden. See *AMC REPORT*, *supra* note 52, at 444–45 (statement of John Warden). Warden had represented Microsoft Corp. in the monopolization litigation brought against it by the federal and state governments. See also Harry First, *Modernizing State Antitrust Enforcement: Making the Best of a Good Situation*, 54 *Antitrust Bull.* 281, 282–91 (2009) (discussing AMC effort). See generally, Spencer Weber Waller & Richard Wolfram, *Contemporary Antitrust Federalism: Cluster Bombs or Rough Justice?*, in *ANTITRUST LAW IN NEW YORK STATE* 1 (2d ed. 2002).

officials.<sup>76</sup> Having antitrust enforcers directly accountable to the electorate is probably unique in all the world, perhaps another example of the United States' vaunted exceptionalism. One might even think that this political accountability would be held up to other regimes around the world as an example to be followed, rather than as something we ought cripple or dismantle as soon as possible.

The fact that democratic accountability for antitrust enforcement is roundly condemned once again reveals the strong preference we have for keeping antitrust away from democratic control and firmly in the hands of antitrust professionals. This preference was less clear when the antitrust laws were first passed. At that time, state enforcement by elected officials was an important part of the antitrust enforcement landscape; indeed, state enforcement in the early period of the antitrust laws was in some ways ahead of federal antitrust enforcement.<sup>77</sup> By 1914 some in Congress were ready to give state attorneys general the right to bring suit in the name of the United States if the U.S. Attorney General did not act, an amendment to the proposed Clayton Act that failed in the Senate.<sup>78</sup>

Today's critique goes beyond the fear expressed in the 1914 debate that publicity-hungry state attorneys general would be incentivized to go after "larger matters" more

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<sup>76</sup> See [http://www.naag.org/about\\_naag.php](http://www.naag.org/about_naag.php) (attorneys general are popularly elected in 43 states; remaining states have a variety of selection mechanisms).

<sup>77</sup> See *United States v. Int'l Harvester Co.*, 214 F. 987 (D. Minn. 1914) (federal suit filed after suits brought by Kentucky and Missouri), *appeal dismissed*, 248 U.S. 587 (1918). See generally May, *supra* note 13, at 498-506.

<sup>78</sup> The amendment failed by a vote of 21-39. For discussion of the amendment, see 51 CONG. REC. 14,513-26 (1914). Proponents of the amendment argued that federal enforcement had been lax, that the amendment would put "46 watchdogs on guard," and that the "best enforcement" had actually come from state attorneys general acting under more limited state law. Critics were concerned about "divided responsibility" in the enforcement of federal law and the "temptation" for state attorneys general to "get more publicity" by taking up the "larger matters" of federal enforcement. See, e.g., *id.* at 14,515, 14,519.

properly of concern to federal enforcers (that would arguably be a good result). Today's critique is that elected state enforcers are too easily captured by bad political actors, such as labor interests or in-state companies hurt by competition from out-of-state firms, and are not competent professionals in any event.<sup>79</sup> The capture argument reflects the fact that some popular political interests may disagree with a purer form of antitrust than the technocracy likes. The competency argument is an unwarranted slur on the ability of relatively poorly-paid state lawyers to understand the complexities of the antitrust laws (just like juries!). The empirical record, however, provides little evidence either for the capture or competence critique.<sup>80</sup>

The fact that state attorneys general are popularly elected gives those officials incentives to pursue enforcement actions that benefit the electorate generally and of which the general electorate might approve. These incentives appear to have worked, for the record shows that the states have historically been interested in using the antitrust laws to obtain monetary damages relief on behalf of state government entities and state consumers injured by antitrust violations.<sup>81</sup> The U.S. Justice Department, on the other hand, has been indifferent to seeking such redress, despite its statutory right to sue for treble-damages when the federal government is injured by an antitrust violator.<sup>82</sup> The

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<sup>79</sup> See Posner, *Antitrust in the New Economy*, *supra* note 74 at 940-41.

<sup>80</sup> See Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 G.W. L. REV. 1701, 1726-28 (2001).

<sup>81</sup> See *id.* at 1715 (New York state monetary awards) (Table 5); First, *Modernizing State Antitrust Enforcement*, *supra* note 75, at 300 (recent cases). The states interest in monetary recoveries dates to the early days of the Sherman Act, see *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906) (antitrust damages suit for overcharges by iron water pipe cartel).

<sup>82</sup> See Harry First, *Lost in Conversation: The Compensatory Function of Antitrust Law*, NYU Law and Economics Research Paper No. 10-14, 48-61 (2010) (detailing lack of enforcement), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1579343](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1579343).

states also continue to take a firmer stance against vertical resale price fixing out of a concern for the interests of consumers who they believe will benefit from price competition among sellers of the same brand of goods. By contrast, federal enforcers now simply ignore such behavior.<sup>83</sup> Thus, the institutional structure of having a popularly elected enforcement official may better align the interests of consumers and the interests of enforcers, a virtuous result from the point of view of antitrust.

It is true that state attorneys general who enforce the antitrust laws need to be on guard that their enforcement does not end up protecting competitors from competition. They, too, need to maintain “free markets for free people.” But so, too, do unelected federal enforcers who are also subject to political pressures from affected groups (whether in favor of enforcement or against it). But at least state enforcers have other direct political interests that can counter-balance protectionist forces. Federal enforcers may lack that political counter-weight, unless they are smart enough to cultivate such support.

Even if we are not likely to start electing our federal antitrust enforcers, we can still pay closer attention to other mechanisms that can make bureaucratic enforcers more accountable to the democratic will. The primary mechanism is transparency of decision-making. Although both federal agencies engage in a variety of practices to foster transparency, including the issuance of enforcement guidelines and business review letters, both agencies still lag in disclosing their reasons for settling or not bringing particular cases. Both agencies have issued closing statements on a sporadic basis, but

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<sup>83</sup> Compare *People v. Tempur-Pedic Int'l, Inc.*, 916 N.Y.S.2d 900 (N.Y. Sup. Ct. 2011) (suit brought by New York State Attorney General under state law for resale price maintenance) (dismissed), *aff'd*, 944 N.Y.S.2d 518 (App. Div. 2012) with *Leegin*, 551 U.S. at 900 (Department of Justice and FTC urge application of rule of reason to minimum resale price maintenance agreements).

even these statements are often less than candid with regard to the agency's decisions.<sup>84</sup> This lack of transparency is another example of antitrust's democracy deficit.

#### D. Europe's Democracy Deficit in Competition Law

At the same time that the United States antitrust system has increased its democracy deficit, the European Union has narrowed its own in the competition law field. Over the last ten years, the EU has gone from the originator of the very term "democracy deficit" towards a new more decentralized system of competition enforcement with a serious commitment to more transparency, accountability, encouragement of private litigation, and slow steps toward the development of collective actions and representative actions in order to aggregate small claims.

At its inception, the EU's democracy deficit carried over into the competition area. The EU Commission was created intentionally as the exclusive enforcer of EU (then EEC) competition law. The Commission had the exclusive power to both bring proceedings for fines against undertakings and to grant exemptions for otherwise unlawful agreements under what is now Article 101(3) of the EU Treaty.<sup>85</sup> It also had the power to issue block exemptions for categories of agreements that met certain listed criteria. It could further sculpt the law through the issuance of negative clearances, comfort letters, guidelines, and notices. One notable example is the so-called *de minimis*

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<sup>84</sup> The FTC tends to be more candid than the DOJ, in part because dissenting commissioners are able to articulate the arguments in favor of enforcement, thereby requiring greater explanation from the majority of Commissioners. *See, e.g.*, Press Release, FTC Closes its Investigation of Genzyme Corporation's 2001 Acquisition of Novazyme Pharmaceuticals, Inc. (January 13, 2004), <http://www.ftc.gov/opa/2004/01/genzyme.shtm> (with links to statements by Chairman Muris and Commissioner Harbour, and dissenting statement of Commissioner Thompson). *See also* First, Fox, and Hemli, *supra* note 66, at 367-73 (discussing the variety of disclosure practices of the federal antitrust enforcement agencies).

<sup>85</sup> Consolidated Version of the Treaty on the Functioning of the European Union, art. 101(3), Mar. 30, 2010, 2010 O.J. (C 83) 47, 89.



notice which effectively exempts most conduct by firms below certain turnover and market share thresholds as not likely to amount to a matter of EU concern.<sup>86</sup>

The combined effect of these functionally exclusive positive and negative powers gave the Commission almost complete control over the enforcement of EU competition law. Although member states, through what are now called National Competition Authorities (NCAs), could enforce their own national competition laws, they could not grant or adjudicate claims of exemption. This proved to be a nearly insurmountable obstacle where the Commission had acted, was considering acting, or the where the parties could make a colorable claim that their conduct was exemptible by the Commission, which then needed years to complete its own internal processes because of the extent of its own caseload.<sup>87</sup>

Similarly, although competition law has direct effect in the member states and private parties have a legally protected right to seek damages and other remedies for violations of EU competition law,<sup>88</sup> private litigation has not provided a meaningful remedy for most of the history of the EU. Competition claims surfaced offensively and defensively in various commercial and intellectual property disputes, but their effective resolution was hampered by the inability of national courts to definitively interpret and

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<sup>86</sup> Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) (Text with EEA relevance), OJ C 368, 22.12.2001, p. 13–15, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52001XC1222%2803%29:EN:NOT>.

<sup>87</sup> See generally David J. Gerber, *Two Forms of Modernization in European Competition Law*, 31 *FORDHAM INT'L L.J.* 1235 (2008); Ben Depoorter, *The Modernization of European Antitrust Enforcement: The Economics of Regulatory Competition*, 13 *GEO. MASON L. REV.* 309 (2005).

<sup>88</sup> *Courage Ltd v. Bernard Crehan*, Case C-453/99, [2001] ECR I-6297, 5 CMLR 28 (ECJ).

grant the exemptions exclusively within the purview of the EU Commission.<sup>89</sup> Despite clear statements of the need and the right of victims of competition offenses to seek compensation, such claims were few and far between because of procedural limitations in the national courts including bans or limitations on discovery and the lack of mechanisms to aggregate claims akin to U.S. class actions.<sup>90</sup>

All of these issues were addressed in the Modernization Initiative which the Council of the European Union adopted in a package of legislative enactments in 2004 following a rich and intense public debate within the various bodies of the EU, national political actors, the bar, academia, and civil society more generally.<sup>91</sup> First, the Commission surrendered its exclusive powers over individual exemptions. Second, national competition authorities and courts would now have the power, and indeed the obligation, to apply the full provisions of EU competition law both as to liability and exemption. Third, a European Competition Network was created, spelling out more clearly when and how cases and investigations would be allocated between the central authority in Brussels and the national competition authorities in the 27 member states and how the different authorities would cooperate with each other at various stages of the proceeding. Finally, the Commission initiated a program to encourage private rights of action in the member state courts.

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<sup>89</sup> VAN BAEL & BELLIS, *COMPETITION LAW OF THE EUROPEAN COMMUNITY* 12-13 (5<sup>th</sup> ed. 2010).

<sup>90</sup> *See* 2 Travel Group plc (in liquidation) v Cardiff City Transport Services Limited, judgment of 5 July 2012 ([2012] CAT 19) (first judicial award of damages in a private action in the UK), available at <http://www.catribunal.org.uk/238-7662/Judgment.html>.

<sup>91</sup> Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1/1, 4.1.2003) amended by Council Regulation (EC) No 411/2004 of 26 February 2004 (OJ L 68/1, 6.3.2004) and Council Regulation (EC) No 1419/2006 of 25 September 2006 (OJ L 269/128.9.2006) – Consolidated version of 18 October 2006. Compare to AMC.

The undoing of the former system both increased and decreased the powers of the Competition Directorate of the European Commission. This change eliminated the need for spending vast amount of time and resources on the processing of numerous requests for negative clearances, individual exemptions, and more informal comfort letters and allowed the Commission to focus on bigger ticket cartel, abuse of dominance, and merger cases while still setting overall policy for the Community through the continued enactment of block exemptions and providing other forms of guidance to the NCAs, national courts, and private parties.

This change pushed the power and the obligation to enforce both the prohibitions and exemptions of EU competition law down to the NCAs and national courts. While the NCAs are themselves technocracies, they are one level closer to the people of the EU and the more democratic institutions of the member states than is the Commission in Brussels. The allocation of jurisdiction among the member states and between the member states and the Commission is spelled out more clearly in a legislative instrument that the member states directly participated in creating. While the Commission retains the power to trump member states action under certain circumstances, it has wisely refrained from exercising these powers so far.

Unlike the war on the private right of action in the United States, the Commission has actively supported an enhanced right of compensation for private parties and does not appear to view this development as a threat to its leniency program or cartel enforcement activity. While progress has slowed, at least one U.S. law firm has established offices in the EU for the express purpose of bringing private damage cases for cartel victims.<sup>92</sup> A

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<sup>92</sup> Hausfeld LLP, available at <http://www.hausfeldllp.com/pages/about>.

2008 White Paper and a 2012 Commission study illustrates the extent of private rights of action in the various states and outlines methods of proof and a series of recommendations for greater use of collective and representative actions to allow aggregate litigation of small claims.<sup>93</sup> The continued development of individual and collective private rights of action in the EU has been marked by a robust public debate at the highest levels of Community and national governmental institutions and among stakeholders in civil society. Contrast this to the way the private rights “debate” in the United States has been handled, where an ever-increasing set of restrictions has been judicially enacted in a technical and obfuscating manner that both preempts and limits public response.

Finally the EU Competition law system includes procedural safeguards for public participation that are absent in the U.S. While the Commission may proceed on its own initiative, when the EU receives a complaint from a private party it is generally required to take a formal decision stating reasons whether to open a formal investigation or not, although it has the discretion to prioritize matters with the greatest community interests.<sup>94</sup> A decision not to proceed at any stage is appealable by the complainant and certain other undertaking affected by the decision.<sup>95</sup> Although the Commission is granted substantial

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<sup>93</sup> WHITE PAPER on Damages actions for breach of the EC antitrust rules {SEC(2008) 404} {SEC(2008) 405} {SEC(2008) 406}, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0165:FIN:EN:PDF>; Draft Guidance Paper – Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty, available at [http://ec.europa.eu/competition/consultations/2011\\_actions\\_damages/index\\_en.html](http://ec.europa.eu/competition/consultations/2011_actions_damages/index_en.html).

<sup>94</sup> TFEU, *supra* note 84, at art. 253; Article 41(2), Charter of Fundamental Rights of the European Union, (2000/C 364/01), available at [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf). See generally, VAN BAELE & BELLIS, COMPETITION LAW OF THE EUROPEAN COMMUNITY 989-993 (5<sup>th</sup> ed. 2010).

<sup>95</sup> IMPALA v. Commission, Case T-464/04, [2006] ECR-II-2289, [2006] 5 CMLR 19 (CFI); Automec Srl v. Commission, Case T-24/90, [1992] ECR II-2223, [1992] 5 CMLR 431 (CFI). See also TFEU, *supra* note 84, at a 232. (liability for failure to act).

discretion by the courts, it must nonetheless explain itself both in its decision and in court, unlike the virtually unlimited discretion of the US agencies not to proceed in a matter with only the occasional and entirely voluntary closing memos to explain their decisions.<sup>96</sup>

No administrative system, whether deemed law enforcement or regulation, is ever entirely democratic in a modern complex economy. However, EU competition law shows the value of a system which takes subsidiarity seriously, makes an effort to encourage both public and private enforcement at the expense of unaccountable centralization, and subjects all stages of the investigative process at the EU level to binding rules of administrative law and judicial review. It is all the more remarkable since the EU Commission had the full powers of a technocratic enforcer and chose to move in the opposite direction.

## II. Technocracy and Ideology

While reasonable people can debate what set of rules, institutions, and procedures produce the “best” competition policy,<sup>97</sup> that is not the main thrust of the current push for a technocratic antitrust order. Instead, there is a strong *laissez faire* ideological underpinning for many of the advocates of such an approach that favors the near abolition of antitrust without having to engage the political sphere that has never favored such a result.

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<sup>96</sup> See e.g., 15 U.S.C. 16(b-h). *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995) (court under Tunney Act cannot reject proposed consent decree on grounds that complaint should have been broader).

<sup>97</sup> *Symposium: A Comparative Analysis of Antitrust Law Regimes: Designing Better Institutions for Deciding Antitrust Issues*, 41 LOY. U. CHI. L.J. 411-586 (2010).

Technocracy does not have to equate with restricting enforcement. The later New Deal era when Thurman Arnold headed the Antitrust Division is one illustration of a move toward technocracy in the service of increased enforcement.<sup>98</sup> Most of the early enforcement history of the EU is another. In fact, technocracy versus a more politically responsive antitrust and more enforcement versus less are two separate variables with a number of historical variations as illustrated in Table 1.

Table 1. Enforcement: Technocracy and Political Antitrust

	Technocratic Antitrust	Politically Accountable Antitrust
More Enforcement	Later New Deal, e.g., Socony-Vacuum; Alcoa; early EU competition enforcement	Post WWII, Warren Court; e.g., Brown Shoe, Morton Salt
Laissez faire Enforcement	Roberts Court; e.g., Twombly, Trinko	Early New Deal statutes; Appalachian Coals

The ideological thrust of the current move to both technocracy and laissez faire can best be illustrated in two related critiques of antitrust substance, procedures, and institutions. These critiques, if accepted, inexorably lead to, at best, a shrunken antitrust world with almost exclusive federal enforcement of the narrowest set possible of antitrust principles before increasingly hostile courts, along with the effective abolition of private and state antitrust enforcement as a meaningful constraint on the commercial marketplace, all without a meaningful public debate for this extraordinary step.

The first critique involves the long standing debate over the use of per se rules versus a rule of reason approach for antitrust offenses. Developed originally as a rule of

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<sup>98</sup> SPENCER WEBER WALLER, THURMAN ARNOLD: A BIOGRAPHY 78-110 (2005).

interpretation for Section 1 of the Sherman Act, a version of the rule of reason approach has spread to govern virtually all of antitrust including monopolization and merger analysis.<sup>99</sup> Although per se rules were once common, the Supreme Court has told us that such rules are only applicable to those offenses that are manifestly anticompetitive and wholly lacking any plausible pro-competitive justification.<sup>100</sup> At the same time, it is easier and easier with the help of skilled economic expertise to assert a procompetitive justification that the courts will find plausible, thereby taking the case out of the realm of per se analysis.

The courts have often fumbled the application of this core principle largely as a result of Justice Brandeis's ill-advised kitchen sink approach to the rule of reason in *Chicago Board of Trade*,<sup>101</sup> where everything is relevant and nothing is determinative. *Chicago Board of Trade* produced two different reactions. The first was a series of per se rules for various practices where the plaintiff always (or nearly always) won, and where the defendant always (or nearly always) won everything else when labeled rule of reason. Whether justified or not, this system fell into disrepair as most practices except hard core cartel behavior became subject to some form of the rule of reason.

This in turn led to the criticism by some that the rule of reason cannot be effectively applied by generalist courts and lay juries and the criticism by others that the

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<sup>99</sup> U.S. Dep't of Justice & Federal Trade Commission, Horizontal Merger Guidelines § 1 (Aug. 19, 2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html> ; Microsoft Corp. v. United States, 253 F. 3d 34, 58-59 (D.C. Cir. 2001).

<sup>100</sup> *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

<sup>101</sup> *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918).

rule of reason violates the rule of law.<sup>102</sup> These criticisms, of course, were a major part of the reasoning in adopting per se rules in the first place, that is, to better calibrate the substantive rules to the procedures and institutions of the generalist judiciary.<sup>103</sup> The problem is that if the rule of reason is the default standard, and if you then conclude that courts cannot administer these type of cases, there is nothing left to antitrust except governmental challenges to the most naked price fixing arrangements. This requires a conscious political decision never contemplated, let alone endorsed, by Congress. Few argue in such stark terms,<sup>104</sup> but technocratic antitrust short-circuits the political process and can lead down a path to laissez faire.

The other response was to develop an intermediate or sliding scale standard for behavior in between conduct that was unlikely to harm competition and conduct that was inevitably likely to do so. The Supreme Court developed the so-called quick look standard in a series of cases in which Justice Stevens often spoke for the Court.<sup>105</sup> At the same time, the FTC developed the similar inherently suspect test in administrative proceedings and litigation in the lower courts.<sup>106</sup> The gist of both approaches is that in

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<sup>102</sup> Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity & Judicial Training on Appeals*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1319888](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1319888); Douglas H. Ginsburg & Joshua D. Wright, *Dynamic Analysis and the Limits of Antitrust Institutions*, 78 ANTITRUST L.J. 1 (2012); Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375 (2009).

<sup>103</sup> *United States v. Philadelphia National Bank*, 374 U.S. 321, 362 (1963).

<sup>104</sup> But *cf.*, Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMP. L. & ECON. 153, 162, 195 (2010); Fred S. McChesney, *Easterbrook on Errors*, 6 J. COMP. L. & ECON. 11, 25-27 (2010)(hinting at this outcome).

<sup>105</sup> Spencer Weber Waller, *Justice Stevens and the Rule of Reason*, 62 S.M.U. L. REV. 693,704-10 (2009).

<sup>106</sup> *Gen. Leaseways, Inc. v. Nat'l Truck leasing Ass'n*, 744 F. 2d 588, 595 (7<sup>th</sup> Cir. 1984); *Polygram Holding, Inc. v. FTC*, 416 F. 3d 29 (D.C. Cir. 2005); *North Texas Speciality Physicians v. FTC*, 528 F. 3d 346 (5<sup>th</sup> Cir. 2008).



situations where a rudimentary knowledge of economics would show that an agreement is likely to raise price, reduce output, or otherwise injure an important element of market competition, harm may be presumed and the initial burden of proof should be shifted to the defendant to justify the restraint.<sup>107</sup> Unfortunately, this promising approach was cut short by the Supreme Court’s opaque decision in *California Dental* which held that the quick look was appropriate in some cases, just not in this particular case, but then said nothing more as to when where and how the quick look might apply in future cases.<sup>108</sup>

The second, and more troubling, critique of antitrust enforcement has been the widespread adoption of a truncated version of decision theory, which was originally developed in the computer science, statistical, and business literatures. What has come to be known as error cost analysis derives from the decision theory and related game theory approaches developed by John Von Neuman and Oskar Morgenstern dating back to the 1940s.<sup>109</sup>

Table 2. Decision Theory versus Error Cost Analysis

	Take Action	Do Nothing
Assess Correctly	Benefit A (True Positive)	Benefit B (True Negative)
Assess Incorrectly	Cost C (False Positive)	Cost D (False Negative)

<sup>107</sup> Bd. Of Regents v. NCAA, 468 U.S. 85, 109 (1984); FTC v. Indiana Federation of Dentists, 476 U.S. 447, 460-64 (1986).

<sup>108</sup> *California Dental Association v. Federal Trade Commission*, 526 U.S. 756 (1999). For the story on how the Court was made aware of the “information asymmetries” and “markets for lemons” arguments it highlighted in *California Dental*, see Stephen Calkins, *California Dental Association: Not a Quick Look But Not The Full Monty*, 67 ANTITRUST L.J. 495 (2000)..

<sup>109</sup> John Von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behavior* (1944).

Most versions of decision theory involve the construction of a two by two matrix in the form shown in Table 2. The matrix shows the anticipated benefits and costs if the decision maker selects a particular rule for the system (for example, choosing between the per se rule and the rule of reason to judge a particular business practice). The top row shows the anticipated benefits for the choices made by the decision maker. These are usually referred to as true positives and true negatives. Prohibiting conduct that should be lawful (Type I error) or incorrectly permitting harmful conduct (Type II error) is usually referred to as false positives and false negatives. In some models, the costs of operating the system itself are also included in analyzing whether optimal results occur. In most models the combined accuracy benefits obtained when the parties act correctly are weighed against the combined error costs (and system costs) to evaluate the value of the rule or decision in question. The ultimate question remains what set of rules, procedures, and institutions, minimize the total costs of getting it wrong, or maximize the benefits of getting it right.

Scholars in many areas of the law have applied decision theory in formulating and evaluating rules, procedures, and institutions. These include criminal, constitutional, contract, and most forms of regulatory law.<sup>110</sup> Professor Brett Frischmann has called the assessment of the predicted benefits of getting it right “accuracy benefits.”<sup>111</sup> Numerous

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<sup>110</sup> Cass Sunstein, *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003 (2003); Andrew S. Gold, *A Decision Theory Approach to the Business Judgment Rule*, 66 MD. L. REV. 398 (2007); Jeremy D. Fraiberg, Michael J. Trebilcock, *Risk Regulation: Technocratic and Democratic Tools for Regulatory Reform*, 43 MCGILL L.J. 835 (1998); David Crump, *Game Theory, Legislation, and the Multiple Meanings of Equality*, 38 HARV. J. ON LEGIS. 331 (2001); Michael J. Saks, *Blaming the Jury*, 75 GEO. L.J. 693, 697 Fn. 14 (1986); Tom Ginsburg, *Economic Analysis and the Design of Constitutional Court*, 3 THEORETICAL INQUIRIES L. 49, 53 (2002); Michael Sinclair, *The Proper Treatment of "Interpretive Choice" in Statutory Decision-Making*, 45 N.Y.L. SCH. L. REV. 389 (2002).

<sup>111</sup> Brett Frischmann, *Error Costs vs. Accuracy Benefits*, madisonian.net (Jan. 16, 2008), available at <http://madisonian.net/2008/01/16/error-costs-vs-accuracy-benefits/>.

scholars have referred to the assessment of the predicted costs of getting it wrong as “error costs.”<sup>112</sup> Most of the time the analysis includes both the predicted benefits of getting it right measured against the predicted costs of getting it wrong.<sup>113</sup>

In contrast, antitrust law has relied almost entirely on analyzing error costs alone. The introduction of error cost analysis into antitrust scholarship came in then-Professor Frank Easterbrook’s 1984 article, *The Limits of Antitrust*.<sup>114</sup> This article has been widely cited and incorporated into many bodies of scholarship and a growing number of judicial opinions.<sup>115</sup>

The danger of this particular form of error cost analysis is that it systematically undervalues all forms of enforcement and can appear to provide seemingly neutral technocratic justifications for what is merely a normative preference for laissez faire outcomes. First, the Easterbrook form of error costs ignores the accuracy benefits of any given rule, procedure, or enforcement action. If one seeks to minimize error costs (by itself a legitimate exercise) without considering the accuracy benefits, one inevitably gets less enforcement activity than should otherwise be the case. It is only in the happy coincidence when the magnitude and probabilities of accuracy benefits and error costs are reciprocal that this does not result.

As brilliantly analyzed by Michael Jacobs and Alan Devlin, this form of error cost analysis also assumes that all false positives are long lasting, businesses lack effective

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<sup>112</sup> Error cost analysis in antitrust normally is traced back to Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 14-17 (1984), although he did not use this precise term.

<sup>113</sup> Supra note 110.

<sup>114</sup> Easterbrook, Supra note 118.

<sup>115</sup> See Fred S. McChesney, *Easterbrook on Errors*, 6 J. COMP. L. & ECON. 11, 13 (March 2010)(citations to *Limits of Antitrust* by category from 1984-2009).

alternative lawful strategies, and that all false negatives will be quickly and effectively neutralized by the market.<sup>116</sup> These assumptions are unlikely to be true in all cases, but most error cost analysis in antitrust does not even attempt to make the fine grained adjustments to determine when such assumptions may be justified in the real world.

Moreover, error cost analysts frequently fail to undertake the basic task of calculating the error cost of a particular rule or system under their own limiting assumptions. There is little attempt to assess the available empirical data as to the costs of Type I and Type II errors beyond the assumptions that Type I errors are harmful and Type II errors benign. This type of analysis is more properly a restatement of the critic's prior assumptions and beliefs, rather than the application of error cost analysis to solve problems in the real world.

Combining today's error cost approach with today's rule of reason approach ends up reducing antitrust enforcement to a near null set. There may be situations where the rule of reason is beyond the capabilities of general courts. There may be situations where error costs counsel against a finding of liability or the adoption of a particular legal test. But these are not inevitable nor merely the product of a preference for technocratic administration. Nor are those results in any particular case an argument for less (or more) antitrust in all cases.

Such arguments are, in the absence of empirical support on a case-by-case basis, primarily a preference for a laissez faire marketplace. Laissez faire politics or economics is a legitimate normative preference even if it is not our cup of tea. But that is a debate that must be settled in any particular era, and revisited as needed, by the broader

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<sup>116</sup> Michael S. Jacobs & Alan Devlin, *Antitrust Error*, 52 WILLIAM & MARY L. REV. 75 (2010).

democratic body politic. The role of a technocrat in a society such as ours should be to execute, not to make, these fundamental value choices.

### III. Why More Democracy Is Good For Antitrust

In this article we have argued for a rebalancing of antitrust's institutional approach, away from technocracy and toward democracy. Such a rebalancing could result in important substantive changes in antitrust doctrines and litigation results. Courts in Sherman Act cases would need to pay more attention to the Act's statutory purposes, particularly with regard to protecting businesses from exclusionary conduct, and would be less willing to view themselves as unconstrained law makers, free to follow the economic theory du jour. Merger law would pay attention to concentration, not just as a screen for case consideration, but as an independent concern that Congress had when passing the Clayton Act. Juries would be returned to their role of evaluating business behavior in its factual context. Predatory campaigns that exclude rivals would not be excused on the ground that such behavior made no economic sense to judges who could not figure out why such campaigns would be profitable. Claims of collusive behavior would not be dismissed because judges could think up a plausible explanation for why the defendants might not have colluded. Congress would not leave antitrust law to the professional mercies of the federal enforcement agencies, antitrust lawyers, and economists. Serious legislative revision would be debated and undertaken.

Perhaps as importantly, an institutional rebalance will have a procedural side. Consider the following thought experiment: Why don't antitrust enforcement agencies resemble the Federal Reserve Board? The Federal Reserve was created in 1913 to furnish an elastic currency, discount commercial paper, and establish a more effective system of

supervising the U.S. banking system.<sup>117</sup> It is profoundly antidemocratic in nature, deliberately by design. Its proceedings are closed, it hears no evidence, and affected parties have no participatory rights. While its Board of Governors is appointed by the President and confirmed by the Senate, it is largely self-regulating and self-funded. Its chairmen typically are reappointed regardless of the party in control of the White House, and its actions are supposed to be free from political control. Congressional oversight is largely limited to hectoring the chairman. In the recent financial crisis the Fed exercised extraordinary powers at, or beyond, its stated powers in an effort to prevent a world-wide economic collapse.<sup>118</sup> Outside the U.S., most of the national central states enjoy similar powers and similar degrees of independence within their own economies.<sup>119</sup>

But antitrust agencies are not like the Fed. Most importantly, the democratic choices made when the antitrust agencies were created were fundamentally different from the choices made when the Fed was created. Public and private antitrust enforcement were set up to enforce the law in a way that would advance democratic goals—to deal with concentrations of economic power and to police business behavior that exploited consumers and excluded competitors. When the Department of Justice did not carry out that mandate adequately, Congress established a second agency “to stop monopoly in the embryo” and to check the lassitude of the Department. The political choice for the Fed was fundamentally different, a democratic pre-commitment to insulate the Fed from any popular political pressure to manipulate the money supply. Stability in monetary policy

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<sup>117</sup> 38 Stat. 251, enacted December 23, 1913, 12 U.S.C. ch.3.

<sup>118</sup> See generally ANDREW ROSS, *TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM---AND THEMSELVES* (2009).

<sup>119</sup> THE FEDERAL RESERVE SYSTEM: PURPOSES AND FUNCTIONS 1 (no date), available at <http://www.federalreserve.gov/pf/pf.htm>

was so preferred to volatility that the constraints of democratic control were substantially weakened.

Of course, few would want a system of antitrust enforcement that operates in a totally partisan fashion. One can imagine (but not desire) a world where competition policy wildly gyrates depending on election results, appointments are dictated by party loyalty without regard to expertise,<sup>120</sup> certainty is an illusion, and each enforcement decision is second guessed by Congress as is the case with too many executive branch and theoretically independent agency decisions.

Redressing antitrust's democracy deficit on the procedural side can be done with the tools of administrative law. Administrative law is the body of law that controls the procedures of governmental decision making.<sup>121</sup> It allows interested persons to participate in decisions that affect their interests. Normally, it requires appropriate notice, the right to be heard, fair procedures, protection of fundamental rights, and judicial review of the resulting decision. These basic features are present in the administrative laws of most foreign legal systems and are part of a growing international consensus.<sup>122</sup> The tradeoff is that the decisions of administrative agencies that properly follow these strictures normally are granted a degree of deference as to the interpretation

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<sup>120</sup> *But see* William Kovacic, *The Quality of Appointments and the Capability of the Federal Trade Commission*, 49 ADMIN. L. REV. 915 (1997) (evaluating experience and quality of past FTC Commissioners).

<sup>121</sup> KENNETH CULP DAVIS, ADMINISTRATIVE LAW § 1.1 (2d ed. 1978) (describing administrative law as “the law that governs those who administer any part of governmental activities”); JACOB A. STEIN, GLENN A. MITCHELL & BASIL J. MEZINES, 1 ADMINISTRATIVE LAW § 1.01 (1993) (defining administrative law as “the powers, functions and procedures of the various administrative agencies and the methods provided for judicial review of their decisions”).

<sup>122</sup> *See* THE DESIGN OF COMPETITION LAW INSTITUTIONS, *supra* note 12 (discussing application of these norms with regard to competition law enforcement in eight countries, the European Union, and in international institutions).

of the laws they enforce.<sup>123</sup> Frequently, but not inevitably, private parties also have the right to proceed with actions for damages against private parties who violate their regulatory obligations and even against the government itself when it acts unlawfully, either substantively or procedurally. These tools of administrative law are available to make antitrust enforcement decisions more transparent and more responsive to the interests that the antitrust laws were meant to serve, thereby promoting both better decision-making and greater democratic legitimacy.

#### IV. Conclusion

Free markets and free people cannot be assured by the efforts of technocrats. Ultimately, both come about through the workings of democratic institutions, respectful of the legislature's goals and constrained from engaging in arbitrary action. Antitrust has moved too far from democratic institutions and towards technocratic control, in service to a laissez faire approach to antitrust enforcement. We need to move the needle back. Doing so will strengthen the institutions of antitrust, the market economy, and the democratic branches of government themselves.

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<sup>123</sup> *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).