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Talking 'Bout My Antitrust Generation: Competition For and In the Field of Competition Law

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Abstract

Twenty-seven years ago I took my law-school antitrust course, from a fledgling assistant professor who had just left the Federal Trade Commission. My performance was adequate, earning one of the better grades in the course, but not spectacular. Unspectacular enough that afterwards the professor said it disappointed him. In retrospect, I think I under-performed because I was a soon-to-be economist as well as a budding lawyer. Like many people back then, I approached antitrust with a presumption that the gears of industrial-organization economics and antitrust law meshed more or less synchronously. But such a presumption was unwarranted, to say the least. As the course developed, it increasingly dawned that antitrust law, supposedly devoted to enhancing competition, was more a part of the problem than the solution. A few who had thought about all this longer had figured it out already. But for a callow law student at the time, it was difficult to mesh the economics of competition with “competition” law. I went into the exam conflicted, and evidently it showed. The conflicts today are fewer, thanks to a new brand of antitrust thinking that has developed and a new breed of antitrust enforcers that have arrived over the past generation. Often the new thinkers and enforcers are one and the same. The assistant professor who taught me antitrust is now the Chairman of the Federal Trade Commission, having written prolifically on both the Commission and antitrust law generally. Likewise, seminal scholars - also among my contemporaries and teaching colleagues - such as Frank Easterbrook, Richard Posner and Diane Wood - now as judges apply the new law that they espoused as academics. This article describes aspects of the evolution by which new antitrust rules have emerged to stimulate the salutary (if incomplete) rapprochement between economics and law in antitrust. In effect, the new rules

have emerged from various types of competition, of two general sorts. To invoke Harold Demsetz's useful distinction, the competition has occurred in the field and for the field of antitrust. That is, the current generation has witnessed competition, first, as to which intellectual (including economic) paradigm animates antitrust law - competition for the field. As Section I details, competition for the field has included competition in the federal judiciary, some of that competition represented by acts of seeming judicial disobedience in antitrust. Thereafter, there has been considerable competition in the field, along lines to be described in section II, focusing on developments (some desirable, some not) in enforcement of the antitrust laws.

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TALKING 'BOUT MY ANTITRUST GENERATION:

COMPETITION FOR AND IN THE FIELD OF COMPETITION LAW

Fred S. McChesney[*]

Now I ain't looking to compete with you.
Beat or cheat or mistreat you…
All I really want to do.
Is baby be friends with you.[1]

The customer is our enemy; the competitor is our friend.[2]

Introduction

Twenty-seven years ago I took my law-school antitrust course, from a fledgling assistant professor who had just left the Federal Trade Commission. My performance was adequate, earning one of the better grades in the course, but not spectacular. Unspectacular enough that afterwards the professor said it disappointed him.

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[1] B. Dylan, All I Really Want to Do (ASCAP, Warner Bros. Music).

[2] Internal slogan among executives at Archer Daniels Midland, whose alleged price fixing in the 1990s led to criminal antitrust convictions. See K. Eichenwald, The Informant (2000); J. Lieber, Rats in the Grain: The Dirty Tricks and Trials of Archer Daniels Midland (2000).

In retrospect, I think I under-performed because I was a soon-to-be economist as well as a budding lawyer. Like many people back then, I approached antitrust with a presumption that the gears of industrial-organization economics and antitrust law meshed more or less synchronously. But such a presumption was unwarranted, to say the least. As the course developed, it increasingly dawned that antitrust law, supposedly devoted to enhancing competition, was more a part of the problem than the solution. A few who had thought about all this longer had figured it out already.[3] But for a callow law student at the time, it was difficult to mesh the economics of competition with "competition" law. I went into the exam conflicted, and evidently it showed.[4]

The conflicts today are fewer, thanks to a new brand of antitrust thinking that has developed and a new breed of antitrust enforcers that have arrived over the past generation.[5] Often the new thinkers and enforcers are one and the same. The assistant professor who taught me antitrust is now the Chairman of the Federal Trade Commission, having written prolifically on both the Commission and antitrust law generally.[6] Likewise, seminal scholars -- also among

[3] Bork, Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception, 22 U. Chi. L. Rev. 157 (1954); see also R. Bork; The Antitrust Paradox: A Policy at War with Itself (1978); Liebeler, Towards a Consumers' Antitrust Law: The Federal Trade Commission and Vertical Merges in the Cement Industry, 15 U.C.L.A. L. Rev. 1153 (1968); D. Armentano, Antitrust and Monopoly: Anatomy of a Policy Failure (1982). And some, fortunately, figured it out later. E.g., Baumol & Ordover.Use of Antitrust to Subvert Competition, 28 J. Law & Econ. 247 (1985).

[4] Ironically, as I was learning antitrust, the Supreme Court was considering cases that ultimately improved the alignment between the economics and the law of antitrust. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977); Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). These cases are discussed, *passim,* below.

[5] Ergo, today's antitrust students will never be exposed to supposed "issues" such as advertising as an impediment to competition, or the role of industrial concentration in monetary inflation, that those of us in the 1970s were. For a sense of where the Old Testament ended and the New Testament began in antitrust, see Industrial Concentration: The New Learning (H. Goldschmid et al. eds. 1974).

[6] E.g., K. Clarkson & T. Muris (eds.), The Federal Trade Commission Since 1970: Economic Regulation and Bureaucratic Behavior (1981); Muris, California Dental Ass'n v. Federal Trade Commission: The Revenge of Footnote 17, 8 Sup. Ct. Econ. Rev. 265 (2000). For a superb summary of the changes in antitrust over the past generation, see Muris, Improving the Economic Foundations of Competition Policy, __ Geo. Mason L. Rev. __ (200_) (hereinafter "Competition Policy").

my contemporaries and teaching colleagues – such as Frank Easterbrook, Richard Posner and Diane Wood -- now as judges apply the new law that they espoused as academics.

This article describes aspects of the evolution by which new antitrust rules have emerged to stimulate the salutary (if incomplete) *rapprochement* between economics and law in antitrust. In effect, the new rules have emerged from various types of competition, of two general sorts. To invoke Harold Demsetz's useful distinction, the competition has occurred in the field and for the field of antitrust.[7] That is, the current generation has witnessed competition, first, as to which intellectual (including economic) paradigm animates antitrust law – competition for the field. As Section I details, competition for the field has included competition in the federal judiciary, some of that competition represented by acts of seeming judicial disobedience in antitrust. Thereafter, there has been considerable competition in the field, along lines to be described in section II, focusing on developments (some desirable, some not) in enforcement of the antitrust laws.

I. Competition for the Antitrust Field

A. Intellectual Competition

No body of law ever commands unanimity as to what it should achieve, and different groups predictably will vie to define the field. However, the competition has been more vigorous in antitrust, because competing groups seeking to play the central roles in setting the antitrust agenda have included both lawyers and economists. Antitrust is somewhat unusual in law, in that its fundamental concepts supposedly parallel those of economics. "Parallel" is too precise a term, however. At times, economics informs antitrust. At other times, economics has

[7] Demsetz, Why Regulate Utilities? 11 J. Law & Econ. 55 (1968).

had little to say in antitrust cases, because the legal issues presented were ones whose competitive consequences economists had not thought about. And so the law has had to develop on its own, with later-developing economics left to reclaim what it could, once it tackled the problems courts had already (for better or for worse) resolved for themselves.[8]

Much of the past generation of antitrust has thus concerned intellectual competition among economists and competition-minded jurists as to what antitrust is supposed to be about. The principal provision of the Sherman Act, outlawing a "[e]very contract, combination…or conspiracy" that is "in restraint of trade," defined none of those terms.[9] Likewise, although making it illegal to "monopolize" (or attempt to "monopolize"), the Act did not define that term, either.[10] The Act thus is quasi-constitutional, in that courts were left to flesh out from very skeletal language what would be deemed anticompetitive.[11] The operative language of the other two important antitrust statutes, the Clayton and Federal Trade Commission Acts, is equally bare-bones.[12]

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[8] For more on the fitful overlaps between economics and competition law, see, e.g., McChesney, Antitrust, in The Fortune Encyclopedia of Economics (D. Henderson, ed. 1993); Kovacic and Shapiro, Antitrust Policy: A Century of Economic and Legal Thinking, 14 J. Econ. Perspectives 43 (2000).

[9] 15 U.S.C. §1.

[10] 15 U.S.C. §2.

[11] "Back in 1890 Senator Sherman and his colleagues protested the Sugar Trust and other malefactors and told the judiciary to do something about it. They weren't sure just what. Their statute does not contain a program; it is instead a blank check." Easterbrook, Workable Antitrust Policy, 48 U. Mich. L. Rev. 1696, 1702 (1986) (hereinafter Workable Antitrust Policy). See also Kovacic and Shapiro, supra note __, at 43 (referring to the Sherman Act's "open-ended commands [by which] Congress gave federal judges extraordinary power to draw lines between acceptable cooperation and illegal collusion, between vigorous competition and unlawful monopolization").

[12] The key substantive sections of the Clayton Act, sections 3 and 7 (15 U.S.C. §§14 & 18) forbid certain conduct when its effect "may be substantially to lessen competition, or to tend to create a monopoly." The operative section of the Federal Trade Commission Act declares unlawful "unfair methods of competition." 15 U.S.C. §45(a)(1).

Ineluctably, then, lawyers and economists were left to figure out just what contracts, combinations or conspiracies were in restraint of trade, and what exactly constituted monopolizing behavior. At sea for the most part, judges initially applied standards of *per se* illegality to almost any contract among horizontal competitors, to many agreements among vertical contractors, and to any price agreement among vertically-linked parties.[13] Economists, who had not been very interested in legislating competition in the first place, did not disagree.[14] The prevailing *per se* views on contracts and practices like price-fixing, information exchanges, territorial allocations, and tying shifted over time. Various sources have detailed the black-letter-law developments as concern these specific areas of antitrust, and need not be detailed here.[15]

Less fully appreciated have been the past generation's more subtle alterations, not to the law of specific contracts or practices, but in the appropriate approach to antitrust analysis overall. Traditionally in antitrust, each sort of "contract, combination or conspiracy" or allegedly "monopolizing" practice has been treated as requiring a separate mode of analysis. So, a separate body of case law specific to each contract or practice has been needed, as a review of any standard antitrust casebook or treatise reveals. Areas of substantive antitrust importance are first divided into several major categories: horizontal contracts under section 1 of the Sherman Act, vertical contracts under that same section, monopolization and attempted monopolization under Section 2 of the Sherman Act, tying and exclusive dealing under section 3 of the Clayton Act, and mergers under section 7 of the Clayton Act. Contracts governed by section 1 of the

[13] E.g., U.S. v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897) (price fixing among competitors); Eastern States Retail Lumber Dealers' Ass'n v. U.S. 234 U.S. 600 (1914) (boycotts); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) (vertical price fixing).

[14] Stigler, The Economists and the Problem of Monopoly, in The Economist as Preacher and Other Essays (1982).

[15] See generally H. Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice (2d ed. 1994).

Sherman Act are then sub-divided into price-fixing, boycotts (or concerted refusals to deal), and territorial allocation contracts – each one with different rules, depending on whether they are horizontal or vertical.[16] Antitrust law until the mid-1970s sometimes felt like tax law, with various provisions and rules applying to different transactions, rather than a system directed to more fundamental notions of competition.

Increasingly, however, disparate strands of antitrust law have coalesced to ignore this needless taxonomy, with its different cases and analyses for different contracts or practices. Rather, judges more and more are relying on a single model of competition applicable to practically all antitrust areas. Justice O'Connor fired an important shot across the bow with her concurrence in the *Jefferson Parish* case.[17] Particularized rules for each sort of contract or practice coming under the antitrust lens made no sense, she wrote. Instead, she called for a unified approach to antitrust analysis, based on a common Rule-of-Reason approach that compares a practice's economic benefits and costs.[18]

> The time has therefore come to abandon the "*per se*" label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have. The law of tie-ins will thus be brought into accord with the law applicable to all other allegedly anticompetitive economic arrangements….

Lower courts have leapt at the invitation to combine antitrust's disjointed jurisprudence into a single analytic model. For example, in its (apparently) final *Microsoft* opinion, the D.C. Circuit interpreted the standards that should be applied under section 1 and section 2 of the

[16] See, e.g., Hovenkamp, supra note __.

[17] Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984).

[18] 466 U.S. at __ (O'Connor, J., concurring).

Sherman Acts as a single test, a ruling as sensible as it would be surprising a generation ago. The court said that regardless of statutory origin, an antitrust challenge should be evaluated by competitive costs and benefits of the challenged practice, noting that other circuits had concluded equivalently in other circumstances.[19]

The simplifying reasoning espoused by Justice O'Connor in *Jefferson Parish* and in lower appellate courts must inevitably percolate down to trial courts, and in fact already has. Noteworthy in this respect was the recent *Visa/MasterCard* case brought by the Justice Department.[20] The Justice Department challenged several aspects of the Visa-MasterCard relationship, including restrictions by banks that own Visa and MasterCard as to who could sit on the boards of those two associations. Under traditional antitrust jurisprudence, the challenged practices would first have to be characterized as (1) horizontal or vertical, next as (2) price or non-price contracts, and only then evaluated by the standards (*per se* or Rule of Reason) established in the cases appropriate to those pigeon-hole designations. Instead, the district court ranged across the tests set out in many cases -- horizontal and vertical, price and non-price – in reaching its conclusions as to liability.

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[19] United States v. Microsoft, 253 F.3d 34, 47-48 (D.C. Cir. 2001):

> In cases arising under § 1 of the Sherman Act, the courts routinely apply a similar balancing approach under the rubric of the "rule of reason." The source of the rule of reason is *Standard Oil Co. v. United States, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 (1911),* in which the Supreme Court used that term to describe the proper inquiry under both sections of the Act. *See id. at 61-62* ("When the second section [of the Sherman Act] is thus harmonized with ... the first, it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason guided by the established law...."). As the Fifth Circuit more recently explained, "it is clear ... that the analysis under section 2 is similar to that under section 1 regardless whether the rule of reason label is applied...." *Mid-Texas Communications Sys., Inc. v. AT & T, 615 F.2d 1372, 1389 n.13 (5th Cir. 1980)* (citing *Byars v. Bluff City News Co., 609 F.2d 843, 860 (6th Cir. 1979)); see also Cal. Computer Prods., Inc. v. IBM Corp., 613 F.2d 727, 737 (9th Cir. 1979).*

[20] United States v. Visa U.S.A., 163 F.Supp. 2d 322 (S.D.N.Y. 2001).

Growing coalescence of antitrust jurisprudence is emerging in other ways. The Department of Justice / Federal Trade Commission Merger Guidelines were promulgated to explain how the enforcement agencies analyze proposed mergers. However, over time, they have come to figure prominently in judicial determinations concerning liability in litigated cases.[21] Indeed, the general Merger Guidelines model of analyzing competition is being adopted outside the area of mergers altogether.[22] It remains to be seen how far this unification of antitrust analysis proceeds. In some areas, it predictably will take longer. Justice O'Connor's plea for unity was written in a case involving tying, an area so confused by the Supreme Court's last opinion that no prediction as to future jurisprudence can be made with any confidence.[23]

Overall, however, the growing unification of antitrust evaluation has resolved a number of issues that had plagued antitrust for years. First, the law has finally ended any intellectual competition about what the goals of antitrust are. In particular, the debate whether antitrust is to pursue economic or social goals is over: economics has won.[24] "Anticompetitive" now is

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21 E.g., United States v. Waste Management, Inc., 743 F.2d 976 (2d Cir. 1984) (Winter, J); United States v. Syufy Enterprises, 903 F.2d 659 (9th Cir. 1990) (Kozinski, J.) FTC v. PPG Industries, Inc., 798 F.2d 1500 (2nd Cir. 1986) (Bork, J.)

22 E.g., Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421 (9th Cir. 1995) (predatory pricing); Horst v. Laidlaw Waste Systems, Inc., 917 F.Supp. 739 (D.Colo. 1996) (attempted monopolization).

23 Justice Stevens' opinion for the Court in *Jefferson Parish* is at odds not just with the Court's prior precedents but also with ordinary antitrust modes of analysis, such that lower courts have been uncertain what to make of it. This point is discussed in Town Sound and Custom Tops, Inc. v. Chrysler Motors, 959, F.2d 468 (3rd Cir. 1992), in which Judge Becker doggedly attempts to implement Justice Stevens' opinion, but notes that other lower courts have had less patience with it, as compared to the more straightforward application of the general antitrust standard set forth in Justice O'Connor's concurrence. See, e.g., Grapppone, Inc. v. Subaru of New England, Inc, 858 F.2d 792 (1st Cir. 1988) (Breyer, J.)

24 For an excellent discussion of what "competition" means generally, and particularly for purposes of antitrust law, see Easterbrook, The Limits of Antitrust, 63 Tex. L. Rev. 1 (1984) (hereinafter Limits of Antitrust); Workable Antitrust Policy, supra note __.

clearly defined as that which raises price, restricts quantity or lowers quality.[25] Social goals such as maintaining large numbers of smaller, less efficient firms in the market have largely been repudiated.[26] Courts' focus on the economics of antitrust represents a triumph for the "Chicago School" approach to antitrust.[27] The Chicago antitrust focus on price, quantity and quality is now accepted as the norm in antitrust.[28]

Of course, analysis of the price, quantity and quality effects of business contracts and practices is the very stuff of economics. But any ability to use that analysis in the antitrust domain required a second development that has characterized the past generation of antitrust: the demise of *per se* rules of illegality and concomitant rise of the Rule of Reason as the dominant mode of antitrust analysis.[29] The seemingly impregnable fortress of *per se* rules erected during

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25 E.g., U.S. v. Brown University, 5 F.3d 658, __ (3d Cir. 1993): "The plaintiff bears an initial burden under the rule of reason of showing that the alleged combination or agreement produced adverise, anticompetitive effects within the relevant product and geographic markets. The plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods or services."

26 Few if any courts today, for example, would agree with Judge Learned Hand's statement that "great industrial consolidations are inherently undesirable, regardless of their economic results," and that one purpose of antitrust law was "to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small unit…." U.S. v. Aluminum co. of America, 148 F.2d 416, __ (2d Cir. 1945). Likewise, the concern expressed in the *Trans-Missouri* case for preserving the livelihoods of "small dealers and worthy men" would be unlikely to count in a modern antitrust case.

27 For summaries of the "Chicago School" approach to antitrust, see Kovacic and Shapiro, supra note __, at 52-55; McChesney, Be True to Your School: Chicago's Contradictory Views of Antitrust and Regulation, in The Causes and Consequences of Antitrust: The Public-Choice Perspective (F. McChesney & W. Shughart II, eds., 2000).

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> Should the antitrust laws seek to enhance competition by maintaining an atomistic structure, in which numerous small businesses compete, or should it aim to maximize consumer welfare? A crude but fair summary of the development of antitrust law is that courts have shifted, though gradually, from an adherence to the former to an acceptance of the latter.

K. Hylton, Antitrust Law: Economic Theory and Common Law Evolution 40 (2003). For a lengthier discussion, see Joskow, The Role of Transactions Cost Economics in Antitrust and Public Utility Regulation, 7 J. L. Econ. & Org. __ (1991).

29 See, e.g., Easterbrook, Limits of Antitrust, supra note __, at 9-10 (referring to "the shrinking *per se* rule").

the years of Justice Douglas' pivotal antitrust role on the Court crumbled quickly after his departure.[30] True, Justice Douglas' views are still represented, at least to some extent, by Justice Stevens.[31] And not all areas of *per se* treatment have been eradicated.[32] But in the past generation, lower courts have found ways to minimize the harm done by mistaken *per se* rules. Indeed, competition from lower courts has sped the demise of bad antitrust and rise of better antitrust.

B. Judicial Competition

1. Case Law Competition

By the mid-1970s, faced with *per se* Supreme Court pronouncements that were blatantly nonsensical from the standpoint of competition, American lower-court judges fought back in various ways. Some lower courts have respected the judicial hierarchy, applying misguided Supreme Court precedents while imploring the Court to reverse them. Perhaps the most famous example is Judge Posner's opinion in *Khan v. State Oil Co*., concerning the setting of maximum resale prices.[33] Posner criticized as "unsound" existing Supreme Court law making vertical maximum-price fixing *per se* illegal, noting that the prior rulings rested economically on

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[30] E.g., compare United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (Douglas, J.) (horizontal price fixing illegal *per se)* with Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979) (White, J.) (horizontal price fixing not *per se* illegal).

[31] Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982) (holding the fixing of prices at which insurance companies would reimburse doctors *per se* illegal); see also Jefferson Parish Hospital District No. 2 v. Hyde, supra note __ ("It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable "*per se.*").

[32] The most egregious example concerns resale price maintenance. Dr. Miles Medical Co. v. John d. Park & Sons, 220 U.S. 373 (1911). See also United States v. Topco Associates, Inc., 405 U.S. 596 (1972), discussed further, infra.

[33] Khan v. State Oil Co., 93 F.3d 1358 (7th Cir. 1996).

"increasingly wobbly, moth-eaten foundations." But, he held, as an appellate judge he was bound by the Supreme Court's ruling in *Albrecht v. Herald Co.* that maximum price fixing was illegal *per se.*[34]

Yet Posner ultimately had his cake and ate it, too. The Supreme Court congratulated Judge Posner for applying *stare decisis,* despite his disagreement with the prior Court case: "it is this Court's prerogative alone to overrule one of its precedents."[35] The Court then overruled *Albrecht*.

Pointing out error and inviting superior courts to amend it is the textbook method of correcting legal error. Judge Posner's approach differs from that of other Chicagoans, however, whose techniques have less to with *The Bramble Bush* or *The Art of Legal Reasoning* than with judicial nullification of (admittedly undesirable) Supreme Court precedent. At the other end of the spectrum from Judge Posner's approach in *Khan* has been lower courts' pretending that there is no Supreme Court decision of relevance in the first place.

Judge Easterbrook's opinion in *Polk Brothers, Inc. v. Forest City Enterprises, Inc.* is a noteworthy example.[36] Technically, by standard antitrust pigeonholing, the agreement between the two parties constituted a horizontal territorial allocation, each firm agreeing to cede the "territory" for certain products to the other.[37] Territorial allocations are *per se* illegal under the

[34] Albrecht v. Herald Co., 390 U.S. 145 (1968).

[35] Kahn v. State Oil Co., 522 U.S. 3, __ (1997).

[36] 776 F.2d 185 (7th Cir. 1985).

[37] Plaintiff Forest City specialized in lumber, tools and building materials; defendant Polk Brothers in home appliances and furnishings. But both sold, as minor lines, the products in which the other specialized. As part of a larger agreement to develop a site at which each would establish a new store, the parties agreed that neither would offer products in which the other specialized.

Supreme Court's ruling in *United States v. Topco Associates, Inc.*[38] And so, when Forest City informed Polk Brothers that it would no longer honor its agreement and Polk Brothers sought an injunction to compel performance, the district court held that the agreement was illegal *per se*.

On appeal, Judge Easterbrook explained why such an agreement was presumptively a good thing. But under *Topco,* good things would be irrelevant; the contract would be *per se* illegal. Nonetheless, Judge Easterbrook did the economically honorable thing, reversing the district court without ever discussing, or even citing, *Topco*.[39] Similar acts of unabashed judicial nullification in the face of robotic *per se* rulings from the Supreme Court have been routine in other areas of antitrust.[40]

Between Posnerian deferential invitations to revisit mistaken rules and Easterbrookian refusals to recognize the rules in the first place, other lower-court cases have worked around undesirable Supreme Court holdings by artfully distinguishing the Court's rulings. Two ploys have been employed. In the first, the lower court notes that seemingly binding precedent comes from older cases – as all precedent must. The court then decides that, if the current Supreme Court were now deciding a similar case, it would adopt a different rule. The lower court then

[38] 405 U.S. 596 (1972). As far as the Supreme Court is concerned, horizontal territorial allocations are still illegal *per se.* Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990) (per curiam). Compare the holding in *Polk Brothers* with that in General Leaseways v. National Truck Leasing Assn., 744 F.2d 588 (7th Cir. 1984) (Posner, J.) (holding territorial allocation illegal *per se* under *Topco*).

[39] On the issue of judicial law-making in the pursuit of sensible economics, see Buchanan, Good Economics – Bad Law, __ Va. L. Rev. __ (1974).

[40] For example, until 1985 horizontal boycotts were judged under a *per se* rule if the case made it as far as the Supreme Court. Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914); Fashion Originators' Guild of America v. Federal Trade Commission, 312 U.S. 457 (1941); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207n (1959). Meanwhile, lower courts ignored the Court, using common sense in upholding boycotts that made economic sense. For a lengthy discussion of the cases, see R. Bork, The Antitrust Paradox, supra note __, at 330-46.

resolves the current dispute "as if" the Supreme Court had abandoned its prior rule in favor of a more economically-informed alternative.

So, for example, then-Judge Bork discussed horizontal non-price contracts (like those at issue in *Topco*) in *Rothery Storage & Van Co. v. Atlas Van Lines*.[41] Plaintiff Rothery challenged various aspects of the way Atlas organized its operations, which required cooperation among competing movers using the Atlas name. "The business arrangement in *Topco* very closely resembles Atlas' policy," Judge Bork wrote for the D.C. Circuit panel.[42] Thus, if *Topco* and other horizontal-restraint cases controlled, "the restraints imposed by Atlas would appear to be a *per se* violation of the Sherman Act." However, Judge Bork concluded, "examination of more recent Supreme Court decisions" indicated that those cases (including *Topco*) "must be regarded as effectively overruled."[43] Treating these cases "as if" they had been overruled, Judge Bork held that the horizontal contracts at issue in *Rothery* did not violate the Sherman Act.

An alternative to arguing the law is arguing the facts. And so, as an alternative to treating undesirable precedent as "effectively overruled," lower courts sometimes just distinguish the facts of their cases from the facts in the case on which the Court opined. In *Continental T.V., Inc. v. GTE Sylvania, Inc.,*[44] for example, the Supreme Court noted much lower-court hostility to its *per se* ruling ten years earlier in *Arnold, Schwinn & Co. v. United States,* a case involving non-price vertical restraints.[45] Opposition to *Schwinn* was clear from the appellate ruling in the

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[41] 792 F.2d 210 (D.C. Cir. 1986).

[42] 792 F.2d at __. The panel included then-Chief Judge Patricia Wald and then-Judge Ruth Bader Ginsburg.

[43] 792 F.2d at __.

[44] 433 U.S. 367 (1977).

[45] 388 U.S. 365 (1967).

Sylvania case. The Ninth Circuit had distinguished *Schwinn* on several grounds, all essentially factual, and thus held that the matter before it should be judged under the Rule of Reason rather than the *per se* standard dictated by *Schwinn*. In addition, as the Supreme Court noted, "the [Ninth Circuit] found support for its position in the…decisions of other federal courts involving non-price vertical restrictions."[46] The Supreme Court disagreed with the various attempts to distinguish *Schwinn*, stating that these distinctions "have no basis" in that case.[47] However, faced with large-scale judicial nullification of *Schwinn* in the lower courts, the Supreme Court noted that its prior *per se* ruling had little economic justification, and so concluded that the case "must be overruled."[48] Leading from the rear, in effect, the Court just validated what lower courts had already been doing with bad Supreme Court precedent.

2. Type I and Type II Errors

Judicial competition for the field in antitrust has been increasingly influenced by courts' recognition of the harm that misguided antitrust can inflict. The early days of *per se* dominance in antitrust reasoning in effect posited that there was little reason to worry if courts were wrong in outlawing a problem. In the classic *apologia* for *per se* rules, Justice Black opined that some agreements, "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable"[49] If a contract or practice can only be bad, there is little problem in proscribing it. *Per se* rules essentially mean there is no error cost associated with banning a certain contract or practice. The only error would be in *not* outlawing it.

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[46] 433 U.S. at __.

[47] 433 U.S. 33 at __ n.12.

[48] 433 U.S. at __.

[49] Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

More recently, however, antitrust courts have recognized that there are two types of error to be considered, only one of which enters into *per se* reasoning. Type I error refers to a "false positive," analogous in the legal context to mistakenly imposing liability on an innocent defendant. Type II error is a "false negative," or failing to punish a guilty party. Each type of error has a cost associated with it. Because judges (like everyone else) are human, their decisions will sometimes be wrong. If a decision can never be correct with certainty, there is always some possibility of error in deciding one way or another. Optimally, decisions would be made so as to minimize the costs of being wrong. That decision standard is reflected in courts' choice of burdens of proof in different kinds of cases.[50]

The trade-off between Type I and Type II error is common to all of law. But antitrust is different in one respect. Type II errors (failing to penalize anticompetitive contracts and practices) will be low, as long as entry barriers into markets plagued by suspected anticompetition are also low. As prices rise because of anticompetitive contracts or practices, new entrants emerge to alleviate or even eradicate the problem. Letting the guilty go free in antitrust is generally a self-correcting problem.[51]

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[50] As Justice Harlan wrote, "a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions." *In re Winship*, 397 U.S. 358, 370 (1970). The liability standard in civil cases, requiring merely "a preponderance of the evidence," makes a plaintiff's victory relatively easy, which will entail more Type I error but less Type II error. But criminal liability standards like "proof beyond a reasonable doubt" mean that prosecutors will win less often, which produces more Type II error (failing to punish the guilty) but more Type I error (punishing the innocent). The different standards reflect a sense that Type I error costs (jail, or even execution, for the innocent) are relatively high in criminal matters, relative to those (money damages, typically) in civil cases. For an excellent discussion recognizing (albeit without using the terms) the different error costs associated with different liability standards, see *United States v. Fatico*, 458 F. Supp. 388 (E.D.N.Y. 1978).

[51] If entry barriers are high, that is, if it is too costly for others to enter a market characterized by "high" prices, the firm with market power already in the market in effect has a natural monopoly. But antitrust is poorly suited to solve any problems associated with natural monopoly, which ordinarily are resolved through price regulation. See Blue Cross & Blue Shield of Wisconsin v. Marshfield Clinic, 65 F.3d 1406 (7th Cir. 1995) (Posner, J.) See generally Hovenkamp, supra note __, at 31-36.

Type I error, however, is not subject to much self-correction. If liability is imposed on conduct that actually is beneficial (that is, competitive innocents are punished), there is no market corrective for judicial mistake. Only judicial reversal of the case or legislative intervention to change the decision will undo the Type I error.[52]

Antitrust developments of the past twenty-five years demonstrate growing awareness of the importance of the distinction between Type I and Type II error costs, with the balance shifting toward giving greater weight to the former. Traditionally, not only were Type I error costs treated as minimal (as reflected by the dominance of *per se* rules), but legislative correction was treated -- or at last given lip service -- as one reason not to be overly concerned about Type I error,[53] even though it never occurred. All that began to change a generation ago.

First, the importance of Type II error itself began to receive attention. Not surprisingly, courts have become increasingly concerned about punishing behavior that supposedly leads to

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[52] See Easterbrook, Limits of Antitrust, *supra* note __, at 2-3:

> If the court errs by condemning a beneficial practice, the benefits may be lost for good. Any other firm that uses the condemned practice faces sanctions in the name of *stare decisis*, no matter the benefits. If the court errs by permitting a deleterious practice, though, the welfare loss decreases over time. Monopoly is self-destructive. Monopoly vices eventually attract entry.

[53] E.g., Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, __ (1984) (Brennan, J., concurring):

> As the opinion for the Court demonstrates, we have long held that tying arrangements are subject to evaluation for *per se* illegality under §1 of the Sherman Act. Whatever merit the policy arguments against this longstanding construction of the Act might have, Congress, presumably aware of our decisions, has never changed the rule by amending the Act. In such circumstances, our practice usually has been to stand by a settled statutory interpretation and leave the task of modifying the statute's reach to Congress. I see no reason to depart from that principle in this case and therefore join the opinion and judgment of the Court.

See also U.S. v. Topco Associates, Inc., 405 U.S. 596 (1972) (Blackmun, J., concurring) (although the Court's *per se* opinion has its "anomalous aspects," in that it actually will "stultify" competition, the "*per se* rule now appears to be so firmly established by the Court that, at this late date, I could not oppose it. Relief, if any is to be forthcoming, apparently must be by way of legislation.")

lower prices.[54] Courts have also reflected demonstrated increased awareness of the self-correcting nature of Type II problems, that is, the ability of markets to correct judicial failure to stop behavior that truly is anticompetitive.[55]

Sensitivity to error has increasingly gone beyond just the substance of antitrust opinions. Optimal minimization of error requires not just rules that are substantively sound, but also ones relatively easy for other courts to apply correctly. For one court to get it right, using a mode of analysis that later courts will misapply and so get it wrong, is patently undesirable. And thus, courts increasingly look for rules that are relatively foolproof in their application. In an opinion remarkably sophisticated for its treatment of the economics of successive monopoly, then-Judge Breyer preceded his analysis with an encomium for simple rules:

> We shall take account of the institutional fact that antitrust rules are court-administered rules. They must be clear enough for lawyers to explain them to clients. They must be administratively workable and therefore cannot always take account of every complex economic circumstance or qualification….They must be designed with the knowledge that firms ultimately act, not in precise conformity with the literal language of complex rules, but in reaction to what they see as the likely outcome of court proceedings.[56]

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[54] E.g., Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Brooke Group Ltd. v. Brown & Williamson Tobacco Co., 509 U.S. 209 (1993); A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396 (7th Cir. 1989) (Easterbrook, J.); Town of Concord v. Boston Edison Co., 914 F.2d 17 (1st Cir. 1990) (Breyer, J.).

[55] E.g., United States v. Waste Management, Inc., supra note __.

[56] Town of Concord v. Boston Edison Co., 915 F.2d 17, __ (1st Cir. 1990). In the same vein, the current Chairman of the Federal Trade Commission extols "administrability" as a goal for antitrust: "The suitability of an economic hypothesis for shaping antitrust doctrine should be measured by whether the hypothesis lends itself to the development of standards that courts and enforcement agencies can administer effectively." Muris, Competition Policy, supra note __, at __.

Concern about how judges will apply antitrust precedent extends as well to misgivings about antitrust remedies that constitute *de facto* regulatory regimes, which in turn reflects concern for antitrust causes of action that would require courts to take continuing jurisdiction, such as the "essential facilities" doctrine.[57]

Concerns about Type I *versus* Type II errors, plus the problems of judicial application of overly complex antitrust principles, explain a major non-development in the past generation of antitrust: the fact that "post-Chicago" economic approaches to antitrust have had no important impact in the courts. Post-Chicago economics "relies on game-theoretic concepts, which emphasize strategic behavior among economic agents."[58] The game-theoretic approaches typically rely on repeated interaction over time among competing firms, and among firms and purchasers.[59] Behavior that would make no sense economically if part of a one-time-only strategy, such as a predatory pricing,[60] can be shown more sensible as part of a repeated-strategy game.[61].

The likelihood that post-Chicago economics, using more complicated game-theoretic models to provide new bases for plaintiff recoveries, seemed especially high following the

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57 See, e.g., Blue Cross & Blue Shield of Wisconsin v. Marshfield Clinic, supra note __. See generally Easterbrook, Limits of Antitrust, supra note __, at 35 n.72; Sullivan, The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition, 64 Wash. U. L.Q. 997 (1986); Wilke & Gruley, "Acquisitions Can Mean Long-Lasting Scrutiny by Antitrust Agencies," Wall St. J., March 4, 1997, p. A1.

58 Coate & Fischer, Can Post-Chicago Economics Survive Daubert? 34 Akron L. Rev. 795 (2001). "Antitrust in the 1990s has been heavily influenced by the thinking of the Post-Chicago school of scholars." Id. at 795.

59 For further discussion and relevant citations, see Hylton, supra note __, at 76-77, 224-28.

60 The Supreme Court has repeatedly expressed skepticism that predatory pricing is rational maximizing strategy. Brooke Group Ltd. V. Brown & Williamson Tobacco, 509 U.S. 209 (1993); Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.s. 104 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

61 Klevorick, The Current State of the Law and Economics of Predatory Pricing, 83 Am. Econ. Rev. 162 (1993); Ordover and Saloner, Predation, Monopolization and Antitrust, in The Handbook of Industrial Organization (R. Schmalansee and R Willig, eds.) (1989).

Supreme Court's opinion in *Eastman Kodak v. Image Technical Services*.[62] But *Kodak* has been very narrowly interpreted by lower courts, which have again shown wariness of seeming broad Supreme Court pronouncements.[63] More generally, the complexity of game-theoretic approaches has made them unattractive to modern antitrust judges, anxious for simple rules and worried about how complexity produces Type I error. In the one area where economists' game-

[62] 504 U.S. 451 (1992). The case is recognized as '[p]erhaps the most important modern judicial use of game theory, the econmics of information, and transaction cost economics." Kovacic & Shapiro, supra note __, at 56. At one level, *Kodak* seemed a routine tying case, in which Kodak required the use of Kodak service personnel as a condition for getting Kodak replacement parts when Kodak copiers needed service. The case involved Kodak's refusal to make available to independent service organizations ("ISOs") replacement parts needed to service Kodak copiers.

> Kodak initially sold copiers and made repair parts available to the ISOs that specialized in servicing Kodak equipment. Thus, Kodak customers had three choices for service: repair and maintain the copiers themselves, hire Kodak to service the machines, or retain an ISO to keep their equipment functional. In 1985, Kodak changed its open policy and refused to sell to ISOs. Kodak also pressured original equipment manufacturers, parts distributors, and equipment owners not to make Kodak parts available to ISOs. Without access to parts, ISOs had difficulty competing and thus lost share. The ISOs charged that Kodak's behavior amounted to actual and/or attempted monopolization. In particular, conditioning the purchase of Kodak parts on the use of Kodak services was alleged to be tying. In contrast, Kodak claimed that its behavior simply amounted to competition in the copier market.

Coate and Fischer, supra note __, at 838. But the supposed source of gain to Kodak lay in its ability to fool customers over time: customers who thought they would get allegedly lower-price service on their copiers from non-Kodak personnel found – after they bought a Kodak copier – that the lower-priced service was not available.

[63] "At first, it seemed that *Kodak* might transform jurisprudence governing dominant firm conduct…Since 1992, however, lower court decisions have tended to limit *Kodak's* application to a relatively demanding set of conditions." Kovacic & Shapiro, supra note __, at__. Post-*Kodak* courts have distinguished between (a) buyer willingness to contract into a situation whose consequences were readily foreseeable, *versus* (b) buyers being "forced" later to adapt to changes in the buyer-seller relationship they arguably would not have foreseen until after they were "locked in." E.g., compare Hack v. Yale College, 237 F.3d 81 (2d Cir. 2000); with Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton College, 128 F.3d 59 (2d Cir. 1997). See also Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430 (3rd Cir. 1997) (*Kodak* inapplicable where plaintiffs were "forced" to purchase related products only because of voluntary contractual requirements); *Chawla v. Shell Oil Co.,* 75 F.Supp.2d 626 (S.D. Tex. 1999) (requirement that service station dealers use a particular system for credit card sales not illegal because the source of alleged power— "uniqueness" of tying product [seller's gasoline]—was due solely to contractual agreement).

theoretic approaches seemingly offered new possibilities for plaintiff victories, predatory pricing, the post-Chicago approach has failed to deliver.

> Where in all of the judiciary's elaboration of the law of predatory pricing are the insights of the [post-Chicago] market-organization literatures on predation? Nowhere. The equilibrium models of predatory pricing developed in the last dozen years or so have not had an impact on the developing antitrust law of predatory pricing….The lack of impact that the recent equilibrium models of predation have had on the development of antitrust law concerning predatory pricing is unfortunate. The major cases on predatory pricing have been particularly concerned with the rationality of predation by a dominant firm. They have not heeded, however, the lessons of the recent microeconomics literature that suggest a possible role for price predation in a dynamic strategic context.[64]

To say that game-theoretic approaches "have not had an impact" is an understatement. The Supreme Court has been candidly skeptical of their value.[65]

In an antitrust order increasingly recognizant of economic learning, why has post-Chicago economics had so little impact? Given the increasing concerns about Type I error and

[64] Klevorick, supra note __, at 165-66.

[65] In Brooke Group Ltd. V. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993), its last predatory pricing case, the Court dismissed plaintiff's game theory model as implausible:

> However unlikely predatory pricing by multiple firms may be when they conspire, it is even less likely when, as here, there is no express coordination. Firms that seek to recoup predatory losses through the conscious parallelism of oligopoly must rely on uncertain and ambiguous signals to achieve concerted action. The signals are subject to misinterpretation and are a blunt and imprecise means of ensuring smooth cooperation, especially in the context of changing or unprecedented market circumstances. This anticompetitive minuet is most difficult to compose and to perform, even for a disciplined oligopoly.

509 U.S. at 227-28.

concomitant desire for simplicity in liability rules, post-Chicago economics cannot be an easy sell. Consider one description of its basic approach:

> [T]he market organization literature [began] to see an infusion of contributions that used modern game-theoretical concepts and techniques to analyze well-specified models of strategic firm behavior in oligopolistic markets….A central feature of this class of models is some asymmetry of information between market actors. The dominant incumbent firm is better informed than its smaller rival in models where the predator induces exit of competitors; the incumbent is better informed than potential entrants in models where predation takes the form of entry deterrence; and firms in general are better informed about their prospects than are their sources of financing.[66]

Another summary of the post-Chicago, game-theoretic approach, explains more pointedly the problem for antitrust courts.

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[66] Klevorick, supra note __, at 162. Two other economists elaborate on the above:

> Post-Chicago Economics (PCE) stems from the proposition that mathematical modeling, in the form of game theory, would provide a useful underpinning for antitrust analysis. This school generally focuses on strategic behavior of firms. Instead of focusing on the basic competitive interactions of the market, these models show how firms can enhance or protect their market power by incorporating specific strategies, and the reactions of their rivals, into a complex equilibrium analysis. Although there are notable exceptions, the mathematical models underpinning these theories tended to be developed in the economics departments of academic institutions before they were adopted by antitrust practitioners. The models start with the Chicago school's proposition that economics controls antitrust, but then they add complexity to the microeconomic analysis that seeks to generate a collection of special case results. These results are then linked to traditional antitrust doctrine as examples of anticompetitive conduct. The insights can be considered almost normative because of the special nature of the assumptions. If you believe that the world follows a particular mathematical model, then certain antitrust policies should be followed. Many PCE adherents appear to distrust market outcomes and believe instead that government regulation is necessary to rein in the natural tendency of firms to acquire and exploit market power. n71 Proponents of PCE take a broad view of PCE theories, suggesting that they describe how the world can really function. n72 The only thing the PCE theorists must do is check the assumptions. This, of course, will turn out to be the real trick.

Coate and Fischer, supra note __, at 812-13 (citations omitted).

> Game-theoretic methods dominated industrial organization theory in the 1970s and 1980s. The flexibility of game theory allowed economic theorists to generate equilibrium predictions in settings involving a wide range of conduct….However, the same flexibility made general predictions hard to come by. Some types of conduct, such as long term contracts with key customers or preemptive capacity expansion, *could* deter entry and entrench dominance, but they also *could* generate efficiencies. The only way to tell in a given case appeared to be for the antitrust agencies and the courts to conduct a full-scale rule of reason inquiry.[67]

In short, it is hard enough for courts "to determine what is 'efficient' using a simple model" of competition.[68] But if so, Judge Easterbrook has asked, "how are courts going to decide cases based on complex, strategic models?"[69] The answer, surely, is that they will do so badly, with considerable amounts of more costly Type I error. The error costs must be all the higher when the game-theoretic economic models themselves do not generate consistent answers. Judicial error costs are avoided by more simple rules, as courts themselves apparently have realized.

II. Competition in the Field

The foregoing has summarized a number of trends in the past generation of antitrust law. At the moment at least, a new equilibrium seems to have been established, one different from that prevailing until the mid-1970s. However, even in the new equilibrium, there is ongoing

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[67] Kovacic & Shapiro, supra note __, at 55. See also Muris, Competition Policy, supra note __, at __ (citation omitted): "there have been relatively few successful efforts to translate the mathematically elaborate, game theoretic models into administrable antitrust rule or analytical techniques to support enforcement."

[68] Easterbrook, Workable Competition, supra note __, at 1700.

[69] Easterbrook, Workable Competition, supra note __, at 1700.

competition within the field of antitrust. The competition is of two sorts, dealing with matters of antitrust substance and antitrust enforcement. Substantive competition arises primarily from property-rights considerations that vie with fundamental antitrust concepts, even as those concepts have become clearer over the past generation. Enforcement competition comes from two groups that traditionally have not figured prominently in the world of antitrust, state antitrust enforcers and international enforcers.

A. Antitrust and Property

The standard antitrust paradigm, even in the current era where price (or, reciprocally, quantity) is the principal focus, takes for granted that property rights are well defined and enforced. While that assumption may be warranted in the typical case, it does not apply across the board. And when it does not, the antitrust model has proven difficult to apply, sometimes leading to perverse applications.

The tension between antitrust and property is well understood in the context of intellectual property. Legal protections afforded by patents, copyrights and trademarks recognize that creation and enforcement of intellectual property entails a separate cost – the item must not only be produced but first created – that does not apply to the standard widget. If so, prices above marginal production costs must be charged as an incentive to compensate for the fixed costs of creating the good in the first place.[70] The higher prices necessarily result in lower quantities sold, compared to a price covering just production costs as in the standard economic model of competition.

[70] E.g., R. Posner, Economic Analysis of Law 44-45 (5th ed. 1998).

In effect, antitrust law is static: the good is there in the market, and the economic goal of the law is maximization of social welfare by maximizing quantities produced (or minimizing price), with the optimal amount dictated by given demand and marginal production cost curves. Intellectual property law is more dynamic, because it starts from a chronologically anterior state of the world: first the good must be created, and only then are there demand and production-cost curves of any relevance. This distinction between the static model with well defined property rights and a more dynamic model that takes into account the need to create assets first would seem self-evident. But traditionally it has not been self-evident to antitrust enforcers. In the field of intellectual property, for example, "the history of the Department of Justice enforcement has been one of almost unbroken hostility towards patents."[71]

Although the property-antitrust dichotomy arises most frequently in the area of intellectual property such as patents, it is perhaps best illustrated in the context of more traditional property rights. Take the standard economic example, the fishery.[72] Typically, fish are found in "open access," owned by no one until they are actually caught. Because access to a lake, stream or ocean is open, over-fishing is a well recognized problem.[73] The equally well-recognized solution to this so-called "tragedy of the commons" is some form of ownership, either communal or completely private.[74] With private ownership, over-fishing ends.[75]

71 Rule, Patent-Antitrust Policy: Looking Back and Ahead, 59 Antit. L.J. 729, 733 (1991)

72 The literature is vast. For the seminal contribution, see Gordon, The Economic Theory of a Common Property Resource: The Fishery, 62 J. Pol. Econ. 124 (1954). See generally T. Anderson & F. McChesney, eds. Property Rights: Cooperation, Conflict and Law (2003).

73 E.g., Lomborg, The Skeptical Environmentalist 106-08 (2001).

74 Again, the literature is large, beginning with Hardin, The Tragedy of the Commons, 162 Science 1243 (1968).

75 For further and more precise discussion of these points, see Anderson and McChesney, supra note __, at 59-72.

But in an antitrust world where low prices and high quantities are the goal, establishment of property rights is an objectionable solution. Property rights mean the exclusion of some fishers and ending exploitation of the open-access resource. As quantities taken diminish, prices naturally rise, a result striking at the core values of modern antitrust. To antitrusters, the result is particularly objectionable when, as is often the case, the solution to over-exploitation of resources available in open access requires a collective agreement among competing fishermen to reduce their catch. Then, it is a "contract, combination or conspiracy" employed "in restraint of trade," with restricted quantities and higher prices. In the static antitrust world, Sherman Act liability would follow.

And so it has when private agreements have attempted to solve the tragedy of the commons.[76] The Gulf Coast Shrimpers & Oystermans Association (GCSOA) was a private organization that regulated shrimp harvests along the Mississippi cost of the Gulf of Mexico. Its members agreed also to sell only to certain packers, who would pay GCSOA packers a minimum price. The Justice Department ended the GSSOA's private definition of property rights in a criminal action brought under section 1 of the Sherman Act.[77]

And so, an attempt to define private property, thus avoiding the economic waste created by open access, resulted in a criminal conviction. The grand-daddy of all criminal price fixing cases likewise involved a collective attempt to solve property rights problems concerning open-access resources, with the participants likewise convicted under section 1.[78] Private treble-

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[76] See Yandle, Antitrust and the Commons, Cooperation or Collusion? 3 The Independent Rev. 37 (1998); Adler, Legal Obstacles to Private Ordering in Marine Fisheries (manuscript 2002).

[77] Gulf Coast Shrimpers & Oystermans Ass'n v. United States, 236 F.2d 658 (5th Cir. 1956). For further discussion see Adler, supra note __, at 23-25; G. Libecap, Contracting for Property Rights 88-90 (1989).

[78] United States v. Socony-Vacuum Oil Co., supra note __.

damage actions against collective attempts to create property rights naturally produce a chilling effect. Discussing cases, Jonathan Adler writes that past antitrust actions against private organizations establishing property rights have created "a powerful incentive for fishers to stay well clear of those activities which could run afoul of antitrust laws. Surveying self-governance arrangements in fisheries, Ralph Townsend encountered substantial reluctance by fishers in the U.S. and Canada to discuss such arrangements for fear of government regulation or prosecution."[79]

Just as it has been hostile to private creation of property – intellectual or marine – so has antitrust enforcement been hostile to private enforcement of property rights.[80] To cite some of the better known cases, the government has attacked manufacturers' collective attempts to safeguard their contract rights against fraud,[81] to protect their original fabric designs from being

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[79] Adler, supra note __, at 27-28, citing Townsend, Producer Organizations and Agreements in Fisheries: Integrating Regulation and Coasian Bargaining, in Evolving Property Rights in Marine Fisheries (D. Leal, ed., forthcoming).

[80] On private enforcement of property rights, see generally Anderson and McChesney, supra note __, *passim*. For classic and still influential discussion of the subject, see Umbeck, A Theory of Contract Choice and the California Gold Rush, 20 J. L.& Econ. 421 (1977); Umbeck, Might Makes Rights: A Theory of the Formation and Initial Distribution of Property Rights, 19 Econ. Inq. 38 (1981).

[81] Cement Manufacturers Protective Ass'n v. United States, 268 U.S. 588. In that case, competing cement manufacturers agreed to exchange information, including price information, to protect themselves from being defrauded by purchasers with whom they had signed requirements contracts at a set price for cement. When the spot price of cement rose, purchasers ordered more than their requirements to take advantage of the price at which they could purchase from the manufacturers relative to the spot price in the market. The case thus involved recognition that contracts, once concluded, create property rights between the contracting parties, rights that the common law protects through liability and disgorgement remedies for tortious interference with contract. See McChesney, Tortious Interference *versus* Efficient-Breach of Contract: Theory and Statistical Evidence, 28 J. Legal Stud. (1999). Protecting oneself against tortious interference with one's contracts does not insulate against antitrust liability, however. See Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911). Justice Holmes dissent in this case is particularly notable for highlighting the interplay between tortious interference with contract and antitrust.

copied by pirates,[82] or to prevent reverse engineering of machinery protected by a web of patents and unpatented trade secrets.[83]

Analyses that would reconcile property (including intellectual) law with antitrust, though voluminous, thus have not succeeded in resolving the essential puzzles.[84] Although complex reasons are often offered for the incompatibility of the two systems, simple reasons suffice. Both intellectual property and antitrust law (as considered today) supposedly seek to maximize social welfare, net of costs. But one system (antitrust) maximizes welfare in a short-run static sense. The other (property) is based on the claim that short-run losses from higher prices are necessary for the long-run existence of the good, and so benefits will ultimately exceed costs. Thus, comparison of welfare benefits net of costs under the two models must by definition be an empirical exercise, comparing streams of benefits and costs over time, appropriately discounted for the time-value of money and for the risks of attaining the supposed net benefits.

By itself, comparison of the relative benefits and costs of a contract or practice challenged under the Rule of Reason in antitrust law also requires an empirical reckoning of relative benefit and cost magnitudes, appropriately discounted for time and risk. The need for sound quantitative information is one of the "fundamental points" of a desirable antitrust

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[82] Fashion Originators Guild of American v. Federal Trade Commission, 312 U.S. 668 (1941) (*FOGA*). The Guild organized a boycott of clothing retailers who sold dresses with designs "pirated" from those created by Guild members. A sometimes overlooked feature of the Court's *FOGA* decision is its statement that self-help as employed by the dress designers was illegal, even if the style piracy constituted a business tort. "Even if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law." 312 U.S. at __.

[83] United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953).

[84] For a good, recent summary of the arguments and a detailed list of references, see Carrier, Unraveling the Patent-Antitrust Paradox, 150 U. Pa. L. Rev. 761 (2002). "The intersection of the patent and antitrust laws presents a formidable paradox…. Courts and commentators have struggled, unsuccessfully, with the patent-antitrust paradox for generations." Id. at 761, 854. See also Langenfeld, Intellectual Property and Antitrust: Steps Toward Striking a Balance, 52 Case W. Res. L. Rev. 91 (2001).

enforcement policy, as Frank Easterbrook writes.[85] Yet, Judge Easterbrook notes, determining actual economic benefit is difficult or impossible in antitrust cases.[86] The data demands are too great – even if judges and juries would know what to do with the data, were it available.

Even the few academic attempts to posit theoretically some sort of comparative welfare basis for evaluating the gains and losses of property protection *versus* antitrust liability brush over the empirical intractability of implementing any such comparison.[87] But clearly, the empirical demands for measuring net benefits in relatively static antitrust cases are less than those in more dynamic property-rights settings. In short, however soluble the theoretical difficulties of reconciling the legal regimes of intellectual property and antitrust, finding practical legal solutions in any given situation presents intractable empirical problems.

Thus, even the much improved, Chicago version of antitrust cannot reconcile dynamic property-creation issues with static antitrust notions of wealth maximization. Collective measures that create and enforce property rights are presumptively good. But they necessarily result in restricted quantities and higher prices. Antitrust attempts to keep prices down and quantities up dilute incentives to create and enforce new property rights. What is best in any particular situation requires empirical data which cannot be expected to emerge, at least not in the context of litigation.

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85 Workable Antitrust Policy, supra note __, at 1701. "No question should be answered without adequate data. The best data and answers come from a study of the practice. The nextbest answers come from extrapolations and interpolations from existing data." Id.

86 Easterbrook, Limits of Antitrust, supra note __, at 17.

87 The most-cited attempt at balancing the relative net benefits of intellectual property *versus* antitrust is perhaps the "ratio test" proposed by Louis Kaplow. Kaplow, The Patent-Antitrust Intersectoin: A Reappraisal, 97 *Harv. L. Rev.* 1813 (1984).

What of the suggestion that non-quantitative tests be employed, at least in an initial evaluation of the worthiness of any antitrust allegation? In an important article, Frank Easterbrook suggested that antitrust embrace a series of "filters" in separating competition from anticompetition, two of which would be required in any antitrust case. "First, the plaintiff should be required to offer a logical demonstration that the firm or firms employing the arrangement possess market power."[88] If market power is conventionally defined as the ability to increase profits by raising price, then private attempts to create property will always entail antitrust-type market power. Restricting quantities must raise price, and it is the increased-profit potential of privatizing common-access resources that impels private parties to attempt to do so. The essence of the government prosecution of the fishers in the GCSOA, for example, was that they raised price.[89]

"Second, the plaintiff should be required to demonstrate that the defendant's practices are capable of enriching the defendant by harming consumers."[90] Again, whether consumers are harmed depends on whether a longer-run property-rights perspective or a shorter-run antitrust perspective is adopted. In the short run, since prices must rise as a result of defining property rights, as compared to a regime where no property right exists or is respected, consumers must be harmed. No property rights in the fishery means free fish for anybody who can catch them. But what of the longer-run issue, whether property-right protection is necessary for the good to exist in the first place or persist in the longer run? Resolving that issue raises anew the intractable problem of relative empirical measurements.

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[88] Easterbrook, Limits of Antitrust, supra note __, at 17.

[89] Gulf Coast Shrimpers & Oystermans Ass'n v. United States, 236 F.2d at 662.

[90] Easterbrook, supra note __, at 18.

Other of Judge Easterbrook's suggested filters, while clearly useful in contexts where no property rights issues arise, are likewise unhelpful – or even perverse – in a setting where property and antitrust issues clash. A court should ask "whether the evidence is consistent with a reduction in output."[91] This test is indeed salutary in the setting for which the Sherman Act seemingly was designed, one in which property exists and enforced; it is a test embraced and used by others in standard antitrust litigation.[92] But of course, the very essence of removing resources from open access into a regime of property (communal or private) is to reduce production from non-maximizing, over-exploiting levels.

The foregoing is no criticism of Judge Easterbrook's filters. They have exerted an important influence in antitrust thinking since their appearance some twenty years ago, and deservedly so. The point, rather, is that they are effective in the standard antitrust paradigm in which property rights are already well defined and enforced.[93] When antitrust cases arise outside that paradigm, standard antitrust thinking risks to diminish social welfare by applying the tools of maintaining competition in situations where the standard assumptions do not apply.

B. Enforcement Competition

Antitrust is unusual in the number of potential enforcers of the law, both American and foreign. The enforcers all stand to gain in various ways, politically for some and pecuniarily for others. There is nothing necessarily objectionable about that; it is the possibility of benefit that

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91 Easterbrook, supra note 18, at __.

92 E.g., Blair and Romano, Distinguishing Participants from Nonparticipants in a Price-fixing Conspiracy: Liability and Damages, in Economic Inputs, Legal Outputs (F. McChesney, ed.) 1998.

93 Judge Easterbrook's recommendation that, for the most part, antitrust should only pursue "plain vanilla cartels and mergers to monopoly" is certainly unobjectionable in principle. Workable Antitrust Policy, supra note __, at 1701. But it leaves open the question, what is a "plain vanilla" cartel? Does it include agreements like that at issue in Gulf Coast Shrimpers & Oystermans Ass'n v. United States, supra note __? Or that in Unites States v. Socony-Vacuum Oil Co., supra note __?

impels plaintiffs to bring actions in any area of law. But developments have shown that having multiple enforcers of antitrust can produce undesirable results.

1. Competition Among American Enforcers

Enforcement of antitrust is unique by the standards of American law, and sometimes perverse by the standards of economics. It is unique because, first, there are two national-government agencies that enforce the law.[94] Unique, second, because there is also state enforcement of the law, under statutes that mimic the applicable federal statutes and under holdings that explicitly adopt federal court law as the applicable precedent.[95] And unique, third, because there is also private enforcement of federal antitrust law, with treble damages (plus costs and attorney's fees) for successful private plaintiffs.[96]

An important improvement in antitrust law during the past generation has been the reduction of private treble-damage actions in the overall scheme of antitrust enforcement, and so less competition between public and private enforcers. Private cases brought by competitors complaining of actions that are actually pro-competitive no longer succeed.[97] Also, courts are more alert to plaintiffs' understandable desire to characterize as treble-damage antitrust cases disputes that really sound in more traditional areas like contract or business torts, and thus to

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94 See text accompanying note __, infra.

95 See Hovenkamp, supra note __, at 590.

96 Section 4 of the Clayton Act of 1914, 15 U.S.C. sec. 15, provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore…and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

97 Brunswick Corp. v. Pueblo-Bowl-O-Mat, Inc, supra note __; Cargill, Inc. v. Montfort of Colorado, Inc., 479 U.S. 104 (1986); Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990).

deny recovery on antitrust grounds.[98] And, perhaps most important in terms of competition for antitrust enforcement, the Supreme Court limited private recovery for anticompetitive overcharges under federal antitrust law to plaintiffs who are direct purchasers from antitrust violators.[99] No longer, then, would subsequent – so-called "indirect" -- purchasers compete among themselves and with direct victims of illegal overcharges for a chance at the triple-damage trough.

But as private involvement in antitrust enforcement has diminished, public enforcement of antitrust has become more competitive. In particular, state attorneys-general have increasingly insisted in mounting their own antitrust enforcement efforts. Most states had antitrust legislation when the Sherman Act was passed in 1890. Subsequently, the states legislated anew, adopting the language of the national antitrust statute. Until a generation ago, however, state involvement in antitrust enforcement was negligible, as compared to that of the federal government.[100] States had only bit parts role on the antitrust stage, in part because they

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[98] E.g., Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983). Almost all private antitrust litigation has been brought by (a) competitors of the defendant, or (b) those in a vertical contractual relationship – e.g., dealer, franchisee, licensee – with the defendant. Salop & White, Economic Analysis of Private Antitrust Litigation," 74 Georgetown L.J. __ (1986); Shughart, "Assessing Private Antitrust Enforcement," Regulation, Fall, 1990. Competitor suits make no economic sense; a plaintiff can only gain from the defendant-competition cartelizing or monopolizing. Suits among vertical contracting parties ordinarily are mere contract disputes having no competitive significance at all, since horizontal competition at any given vertical level is unaffected. It is the possibility of treble damages that leads plaintiffs to try to cast the contract dispute as an antitrust violation.

[99] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[100] After 1914, the federal government itself had some competition in antitrust enforcement, between the Antitrust Division of the Department of Justice and the Federal Trade Commission. That enforcement duopoly ended when the Antitrust Division and the FTC concluded a market-division agreement by which each industry was awarded to one enforcement agency or the other. For discussion and data on the price and output effects of reducing competition in public enforcement, see Shughart & Tollison, The Positive Economics of Antitrust Policy: A Survey Article*,* 5 Int'l Rev. L. & Econ. 39 (1985).

could not bring actions *parens patriae* on behalf of their citizens.[101] That changed in 1976, when the Hart-Scott-Rodino Antitrust Improvements Act, in addition to creating the regulatory regime that now applies to mergers, gave state attorneys-general the ability to bring actions *parens patriae* for damages under the federal antitrust laws.[102]

State antitrust enforcers differ from the national government's enforcers in three important ways. First, given that most antitrust offenders will operate across state borders, any particular state is at a disadvantage in pursuing antitrust offenses by itself. Second, given that the state attorney- general has responsibility for all of her state's legal work, there will be relatively few lawyers and staff devoted to antitrust work, and they – like the attorney-general herself – will be relatively unspecialized.[103] And finally, the state AG is an elected official, often one with aspirations for higher office. The joke goes that "AG" refers to "aspiring governor." And so, the antitrust agenda of the state attorneys-general will be one driven more by political than truly economic concerns, as compared to that of the non-elected national enforcers.[104]

From these three differences derive several predictions. First, since a single state can do little by itself in ferreting out and pursuing multi-state antitrust offenses, and given that few if any offenses are *not* multi-state, a state AG will only become interested in antitrust to the extent

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[101] Hawaii v. Standard Oil Co. of California, 405 U.S. 251 (1972).

[102] 15 U.S.C. §15c-15h.

[103] Posner, supra note __, makes a stronger claim, based on his experience as a Supreme Court law clerk and now as a judge, that lawyers in state attorney-generals' offices are of below-mean quality, because the salaries they are paid are so low. Posner, supra note __, at 941.

[104] This is not to say that the national antitrust agenda is not a product of politics. See generally F. McChesney & W. Shughart II, eds., The Causes and Consequences of Antitrust: The Public Choice Perspective (1995).

that her fellow AG's are similarly willing to get involved.[105] But second, to the extent that more and more states are willing to get involved, the efforts of the state AG's merely duplicate what could be done by a national antitrust enforcer. If all fifty state attorneys-general want to pursue a Fortune 100 company operating in all 50 states, they will have to coordinate their efforts and devise *ad hoc* ways to pursue the case. The national enforcement agencies are already set up to handle national cases. State enforcement thus will entail great fixed costs in organizing to pursue cases, and great marginal costs in actually pursuing them, as compared to how the national agencies operate. And finally, as politically motivated organizations, state attorneys-general will look for high-profile but easily-won cases, ones that will resonate with voters as the attorney-general mounts the stump at the next election.

If so, further predictions follow as to the kind of cases states will pursue. Two sorts will dominate. First, states will be seek cases in which the national enforcers are already involved, or likely to be. That is, the states, as the more costly enforcers should they pursue their own cases, will be interested in "piling on" in cases where the national enforcers are already active.[106] The *Microsoft* case exemplifies this first type of case, in which the states essentially free ride on the federal government.[107] The states' theory of the case was no different from that of the federal government, Judge Jackson ruled early in the litigation. Years later, at the end of the case, state

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[105] See First, Delivering Remedies: The Role of the States in Antitrust Enforcement, 69 Geo. Wash. L. Rev. 1004, 1014 (2001), for details on how states organize their cooperation on antitrust matters, particularly through the National Association of Attorneys General (NAAG).

[106] See Posner, Antitrust in the New Economy, 68 Antit. L.J. 925, 940-41 (2001): "No sooner does the Antitrust Division bring a case, but the states … are likely to join the fray….The effect is to lengthen the original lawsuit, complicate settlement, magnify and protract the uncertainty engendered by the litigation, and increase litigation costs. For arguments counter to those of Judge Posner, see Doris, Another View on State Antitrust Enforcement – A Reply to Judge Posner, 69 Antit. L.J. 345(2001); First, supra note __. Both the Doris and First arguments are discussed below.

[107] First, supra note __, at 1028, justifies free riding because the states have "inadequate resources."

complaints about the allegedly lenient remedies the federal government had obtained against *Microsoft* were brushed aside by the federal district court.[108]

For state attorneys-general, free-riding on the efforts of the national enforcers has its down side, in that most of the glory will inure to the feds. Low costs are matched by low benefits. States will naturally be interested, therefore, in cases that the federal government declines to pursue. But what will those cases entail? By definition, conduct that the federal enforcers do not find it worth pursuing. Moreover, the cases must deliver a victory at relatively little cost, since the states will be bearing the financial burden themselves.

Consider a case like that against Salton, Inc. for resale price maintenance of its George Forman™ grills, provisionally settled in September 2002.[109] The case is one in which the federal antitrust authorities would have no interest. Resale price maintenance is now understood to be an intra-brand practice that enhances inter-brand competition. Economists almost unanimously applaud it as procompetitive, a way to enhance distributor efforts to market the product vis-à-vis competing brands that almost never has countervailing anticompetitive aspects.[110] Resale price maintenance simply has no place in the modern, economics-based enforcement agenda.

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108 Harmon, "Judge Backs Terms of U.S. Settlement in Microsoft Case," N.Y. Times, Nov. 2, 2002, p. A1 (district judge "largely dismissed the contention by nine states that broader restrictions on Microsoft were necessary"); Krim, "Judge Accepts Settlement in Microsoft Case," Wash. Post, Nov. 2, 2002, pp. A1, A14 (federal district judge "all but ridiculed the states for the legal theories they put forth to justify tougher restrictions"). See also Johnson, "Microsoft Ruling a Blow to Sates Case," Wash. Post, Nov. 2, 2002 (

109 The author's wife has purchased two of the millions of grills sold. He has no other involvement with the *Salton* case, and thanks Alan Silberman for providing useful information about it.

110 Telser, Why Should Manufacturers Want Fair Trade? 3 J. L. & Econ. 12 (1960); Ippolito, Resale Price Maintenance: Evidence from Litigation, 34, J. L. & Econ. 263 (1991); see also Goldberg, The Free Rider Problem, Imperfect Prices and the Economics of Retail Services, 79 Nw. L. Rev. 736 (1984).

However, resale price maintenance cases like that against Salton are a natural for the state attorneys-general.[111] First, anomalously, resale price maintenance remains *per se* illegal under the Sherman Act , and thus under states' little Sherman Acts. Therefore, victory is automatic – and cheap. All that need be shown is a contract to set resale prices, or something that a jury might so construe. Victory is even easier when the states sue for hundreds of millions of dollars ($240 million in the *Salton* case) and then offer a settlement for cents on the dollar ($8 million dollars in the *Salton* case). No company, particularly one with public shareholders, could refuse a settlement offer for so little. To do so would invite a shareholder suit.

Salton's George Forman™ grill is one of the great success stories in kitchen appliance sales. With unit sales in the millions, its high profile is guaranteed by George Forman's name and ability to promote it. Hanging the scalp of a brand-name retailer and a phenomenally successful product on an attorney-general's wall was not likely to discourage the two lead AG's in the Salton case, New York's Eliot Spitzer and Illinois' James Ryan.[112] The former has shown himself not averse to publicity; the latter was running for governor at the time the suit's settlement was announced.[113]

The suit certainly was valuable to the attorneys-general. What, however, was in it for consumers, the supposed beneficiaries of antitrust? Nothing, apparently. Not only is resale price

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[111] In defending the antitrust role of state attorneys-general, the Chief Deputy Attorney General in the Office of the Illinois Attorney General notes, "The states have investigated resale price maintenance activity, obtaining a $9.5 million settlement against Reebok, and, separately, against Nine West ($34 million), among others. Doris, supra note __, at 345. See also In re Panasonic Consumer Electronics Products Antitrust Litig., 1989-1 Trade Cas. ¶ 68613 (S.D. N.Y. 1989) (approving settlement).

[112] The Settlement Agreement defines Spitzer and Ryan as "Lead Counsel" in the suit. Salton's settlement checks were to be sent to them.

[113] For Ryan, the case had all the more publicity value because Salton is an Illinois corporation.

maintenance generally a beneficial practice socially,[114] but the settlement amount was laughable in terms of redressing any supposed consumer injury. The settlement amounted to just pennies per grill sold. But the attorneys-general did not even try to get the money to the actual sufferers of any higher prices. Instead – attorneys-general are politicians, and 2002 was an election year – the money was destined elsewhere:

> In view of the difficulty in identifying the millions of purchasers of the Salton grills covered by the settlement and relatively small alleged overcharge per grill purchased, the States propose to use the $8 million settlement in the following manner: Each State shall direct that its share of the $8 million be distributed to the State, its political subdivisions, municipalities, not-for-profit corporations and/or charitable organizations for health or nutrition-related causes. In this manner the purchasers covered by the lawsuits (persons who bought Salton George Foreman™ Grills) will benefit from the settlement.

The candor in this statement is commendable. Not only will supposedly-wronged consumers not get any money, but the supposed overcharge was "relatively small" to begin with. If the overcharge was "relatively small," Salton cannot have much market power to begin with. Thus, the case flunks one of the principal filter-tests that Judge Easterbrook rightly would impose to evaluate the worth of a standard antitrust case.[115]

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114 See text accompanying note __, supra.

115 The state attorneys-general attempted to finesse the market power issue by doing what antitrust plaintiffs typically do. They defined the relevant product market as "contact grills," that is, grills that "are hinged, two-surfaced electric cooking appliances, which cook food on both sides simultaneously when the two surfaces are closed, [and which] may also permit excess grease to be drained away from the food into a receptacle." Complaint, ¶2. That definition describes a product: the Salton George Foreman™ grill. But it certainly does not describe a

The foregoing describes some of the costs of having an independent state role in antitrust. But the real question is whether the costs are outweighed by any benefits from a separate state enforcement role. In justifying a separate state role, defenders of state antitrust enforcement respond in various ways. One can dismiss quickly one argument for state enforcement, that the value of having states enforce the antitrust law is shown by their successfully getting money settlements in antitrust cases.[116] If getting money from business firms were itself proof of social value, street gangs seeking "settlements" from local merchants would be put on pedestals rather than in jail. Getting more money out of the private citizenry to buy off politically motivated attacks is anything but proof that politicians are doing good (as opposed to doing well for themselves).[117]

An antitrust role for the states is also said to be justified because the state statutes permit private plaintiffs who are indirect purchasers – and states suing on their behalf -- to obtain damages, whereas the federal statutes after *Illinois Brick* do not.[118] To a considerable extent, the argument is just a variant of the one above: by bringing actions that would not be brought under federal law, states can get money from business firms. Whether states' ability to seek remedies

market: there are innumerable cooking substitutes for hinged, two-surfaced electric cooking appliances, which cook food on both sides simultaneously when the two surfaces are closed, and permit excess grease to be drained away from the food into a receptacle. Naturally, however, with a single product defined as the entire market, Salton must have market power, and so the complaint alleged: "Salton dominates the market for contact grills." Complaint, ¶3.

[116] See, e.g., Doris, supra note __, who recites various amounts received in state antitrust cases as indicating that the cases demonstrate a useful role for state antitrust aneforcement. First, supra note __, at 1005 & 1037, makes a similar argument: "the history of state enforcement and the current record of state enforcement results demonstrate that the states do play an important role in antitrust enforcement today. That role features the pursuit of remedies that benefit consumers, particularly monetary remedies….If there is one consistent thread to state antitrust enforcement in the past sixty years, it is the effort to collect money damages for violations of the antitrust laws."

[117] See generally F. McChesney, Money for Nothing: Politicians, Rent Extraction and Political Extortion (1997).

[118] Following the *Illinois Brick* decision, states passed legislation to allow indirect purchasers to recover under state antitrust laws, legislation that was upheld in California v. ARC America Corp., 490 U.S. 93 (1989). See First, supra note __, at 1008-1012.

not available to the federal government is a good thing depends on the kind of cases states pursue; recovering money tells one nothing about the validity of the suit.[119]

It is claimed that a state role is justified because anticompetitive contracts or practices may "affect the local populace but may not be sufficiently broad ranging to attract federal attention."[120] A defensible theoretical argument, but one that hardly applies to states' free-riding on pre-existing federal antitrust actions like *Microsoft.*[121] Likewise, Salton's nationally profitable grills can hardly be described as affecting mostly the "local populace." Particularly when all 50 states and the District of Columbia bring the action, as in the *Salton* case, the supposed problem is by definition national, not local.

In the end, suspicion abides that state antitrust enforcement is mostly about politics: a defender of state antitrust activity summarizes that "state attorneys general have made a significant contribution to their *constituents*," a revealing choice of words.[122] To compete politically, the states must come up with enforcement programs that go beyond that of the federal government.[123] As a latecomer to the antitrust feast, the states can only get an extra seat at the

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[119] Some arguments offered for a separate state antitrust role focus on enforcement of judgments obtained by others. States may be efficient distributors of the proceeds from successful antitrust cases brought by others. It is said, for example, that in a case brought by the FTC and joined by the states against a pharmaceutical manufacturer, the states "have taken full responsibility for the distribution of the settlement funds to the purchasers of the drugs." Doris, supra note __, at 346. But administrative functions like a check-writing clearinghouse hardly require an antitrust legal squad; states already have a vast investment sunk in their tax, welfare and other redistributive bureaucracies.

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[120] Doris, supra note __, at 345.

[121] "Although the anticompetitive impact of Microsoft's conduct on innovation is certain important from a public policy point of view, the effects on consumers are not localized in any way." First, supra note __, at 1019.

[122] Doris, supra note __, at 346 (emphasis supplied).

[123] States have legislated their own horizontal merger guidelines, which are more aggressive than those of the federal government. The states have also issued vertical restraints guidelines that are more stringent than those that, were set out in guidelines (now withdrawn) by the federal government.

table by being pushy. That lesson has apparently not been lost on others who would take their place at the table.

2. Competition With Foreign Enforcers

In the longer run, perhaps the most important aspect of competition within the antitrust enforcement field will come from the rise of non-American antitrust regimes. The Sherman Act was the first national competition legislation. For generations, the United States monopolized the field of antitrust. Although American firms abroad encountered little or no antitrust legislation there, foreign firms wishing to do business here had to submit to legal standards that did not apply in their own countries. That monopoly on antitrust law gave the United States a reach beyond its borders in imposing antitrust standards on behavior occurring in and affecting foreign nations.

However, monopolies – be they private or governmental -- endure only to the extent that there are barriers to entry. With most important companies now operating internationally, the United States has had no way to prevent other national authorities from legislating and enforcing their own antitrust laws. The fact that antitrust has traditionally allowed American political authorities to control economic resources could not have been lost on their foreign counterparts, also interested in controlling resources.

And so, the past generation has increasingly seen the rise of antitrust in foreign nations, most notably as part of the European Union (EU).[124] The operative legislation under which EU

[124] The rise of antitrust in Europe is certainly the most important extra-American event in the past generation of antitrust. See generally E. Fox, The Competition Law of the European Union (2002). But European antitrust law in only one of dozens of international antitrust legal systems that now exist. For discussions of various other non-American antitrust systems, see ABA Section of Antitrust Law, Competition Laws Outside the United States (2001); Chao et al. (eds.), International and Comparative Competition Law and Policies (2001); Evenett et al. (eds.), Antitrust Goes Global (2000). See also Fox, The Antitrust Laws of the United States and the Ley de Competencia of Mexico: A Comparative Review, 4 U.S.-Mex. L.J. 11 (1996).

competition law operates is not very different doctrinally from that of the United States.[125] The law "can be divided into three areas: collusion, dominance and mergers," a more compact and intellectually appealing taxonomy than that which currently afflicts American antitrust law.[126] Several aspects of EU competition law are noteworthy, indeed praiseworthy. To revert to Justice O'Connor's lament in the *Jefferson Parish* case, there is no separate statutory "box" in EU competition law for tying, for example, akin to section 3 of the Clayton Act.

European antitrust activism is a relatively recent phenomenon, just a generation old. The economics and politics by which ultimately it will work remain to be seen. But several lessons from the American antitrust experience are instructive.

First, it is not surprising that a large, trans-European antitrust regime has emerged in the EU. Individual European countries are at a disadvantage in antitrust enforcement similar to that of the individual American states. Most important enterprises operating in Europe do so transnationally, just as most large American firms operate across the several states, so any particular European country operates at a disadvantage in pursuing supposedly anticompetitive problems of any consequence. It makes sense to pursue antitrust offenses collectively. Hence the desirability, in principle, of European enforcement of otherwise-national antitrust law by cartelizing enforcement under an organization like the EU.

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[125] See generally ABA Section of Antitrust Law, European Union, in Competiti8on Laws Outside the United States, supra note __; V. Korah, An Introductory Guide to EC Competition Law and Practice (6th ed. 1997). "The primary sources of competition law within the EU are the EC [Eurpoean Communities] Treaties and the competition laws of the individual member countries. Because the EU is a political rather than a legal body, there is no EU competition law as such; there is the competition law of the European Communities, which together are one part of the EU. EU competition law is a common, albeit legally imprecise, way of talking about the competition law of the European Communities. " Sjostrom, Competition Law in the European Union and the United States, in The New Palgrave Dictionary of Economics and the Law, vol. 1 371 (P. Newman, ed.), 1998

[126] Sjostrom,. supra note __, at 370.

But the structure of European antitrust enforcement differs importantly from that characterizing the state-federal relationship in the United States.[127] Most important, EU enforcement is not directed by an organization made up of representatives answering to national political authorities, the way that the NAAG is just a coalition of representatives from state AG offices. Rather, the enforcement of EU competition law is entrusted to a professional bureaucracy, separate from that of national governments, with the same permanence found in other international bureaucracies like the United Nations or the OECD.[128] The NAAG represents the responsible antitrust authorities (the attorneys-general) of individual states; the EU competition bureaucracy does not represent the antitrust authorities of the European member states.

Moreoever, the law applied by the EU and individual European nations is often not the same. "The EEC has a common competition policy, and, as well, each member state has its own antitrust law. Only with respect to big mergers does the common competition policy overrides national law. Otherwise, member states may apply their own competition laws as long as it does not conflict with EEC competition law or enforcement."[129] In short, while the American attorneys-general function via a loose federation of state politicians, working with personnel that are under their control (and thus whose careers depend on the attorney-general's political

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[127] Analyses of the politics of American antitrust have left many important questions unanswered. See generally McChesney & Shughart, supra note __. But despite recognition that antitrust is just government regulation, almost no work has been done on the politics of European antitrust. .For a summary of the small literature on the politics of European antitrust, see Sjostrom, supra note __., who also notes of economists, "Of the interest group foundations of EU competition policy, their ignorance is encyclopaedic." Id. at 376.

[128] Concerning the latter, see Winslow, The OECD's Global Forum on Competition and Other Activities, 18 Antitrust 38 (2001).

[129] Fox, supra note __, at __. For summaries of the national antitrust regimes of France Germany, Italy and the United Kingdom, including their relation to EU law, see ABA Section of Antitrust Law, supra note __, vol. II.

fortune), EU antitrust enforcement includes a permanent bureaucracy largely unreachable by individual national authority, applying and enforcing its own dictates.

And so, judging from the American experience, one would expect that individual European governments would take a back seat to the EU antitrust enforcement regime. In the United States, the states must gear up *ad hoc* to tackle each case they decide to pursue, making them the higher cost enforcer as compared to the federal government, with its two permanent bureaucracies. In Europe, however, it is the EU that has the permanent antitrust bureaucracy for pursuing trans-European antitrust enforcement. Thus, while the American government pursues the major antitrust cases (with the states either free-riding on those cases or instituting relatively unimportant actions of no interest to the federal government), the reverse would be true in Europe. The European Union permanent bureaucracy, not enforcers from a particular country, would undertake the principal enforcement actions in Europe.

Given the institutional arrangements involving the EU and European national governments, how predictably would EU antitrust enforcers treat contracts and practices that affect both the United States and Europe? The independent bureaucracy operating in Europe would respond to the incentives that it faces. The Europeans are antitrust newcomers, and so will only justify their existence by imposing more restrictive rules than the American federal enforcers impose. A mere "me too" attitude hardly justifies a separate European presence in global antitrust. Modern stand-offs between the United States and Europe on mergers, such as the proposed GE-Honeywell merger, are exemplary in that respect.[130]

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[130] See, e.g., Reynolds & Ordover, Archimedean Leveraging and the GE/Honeywell Transaction, 70 Antit. L.J. 171, 171 (2001) (the proposed merger was ""unprecedented" because of its approval by American antitrust enforcers but then rejected by European enforcers, "even though both GE and Honey well were headquartered in the United States").

> In *GE/Honeywell*, a foreign antitrust authority for the first time prohibited a merger that the United States had permitted. It was also the first time the world's major antitrust agencies confronted each other across a clear line of disagreement: the rules implicit in the European decision – vigorously defended by their authors – were declared by the U.S. 'antithetical' to the purposes of competition law. The general public thereby became aware of conflicting approaches to business regulation in the world's two largest economies.[131]

The concern engendered by the EU's *GE/Honeywell* decision has beeen considerable.[132] But *GE/Honeywell* was not unprecedented; European objections to the Boeing/McDonnell Douglas merger, a largely vertical arrangement approved quickly in the United States, forced Boeing to abandon existing contracts that disfavored its European competitor, Airbus.[133] The "acrimonious disagreement over the merger…took the United States and European Union to the brink of a trade war."[134]

Other examples of the need to avoid a "me too" stance, which requires alleging offenses not pursued by Americans, are plentiful. The EU's case against Microsoft is a good example.

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[131] Lipsky, The ABA Section of Antitrust Law and International Antitrust Convergence: Sketching the Grand Design, 16 Antit. 46, 46 (2001). Tad Lipsky is another prominent member of my antitrust generation. We worked together in private practice, and took government positions at almost the same time. In January, 1982, as Deputy Assistant Attorney General for Antitrust, he obtained dismissal of the government's ill-founded monopolization complaint against IBM, a case filed in 1969, still in its discovery phase, and of no value to anyone other than the district judge who had made a career of it. See in re Int'l Business Mach. Corp., 687 F.2d 591 (2d Cir. 1982) (issuing writ of mandamus to federal court to terminate litigation). Returning to practice, he has remained active as an antitrust lawyer and scholar. E.g., Lipsky, The Global Antitrust Explosion: Safeguarding Trade and Commerce or Runaway Regulation?, 26 Fletcher Forum of World Affairs 59 (2002); Lipsky & Sidak, Essential Facilities, 51 Stan. L. Rev. 1187 (1999).

[132] See, e.g., the series of articles as part of a symposium, "Transatlantic Antitrust: Convergence or Divergence?" in *Antitrust,* vol. 16, no. 1 (2001).

[133] Cole & Wilke, "Boeing May Offer to End Exclusivity In Airline Accords to Help Acquisition," Wall St. J., June 25, 1997, p. A3. See generally Boeder, The Boeing-McDonnell Douglas Merger, in Evenett et al., supra note __.

[134] Armacost, Foreward, in Evenett et al., supra note __, at vii.

Although its American antitrust problems have now been resolved, with seemingly few important consequences,[135] Microsoft faces continuing challenges from European antitrust enforcers. Predictably, the European case has focused on areas like servers and media players that did not figure in the American case, and seeks sanctions different from those sought by American antitrust enforcers.[136] Just as predictably, Microsoft's competitors seek to take advantage of the separate European agenda to advance their own agendas.[137] Having a European antitrust regime alongside that of the United States offers all the advantages of forum-shopping without the possibility that the cases might eventually be consolidated, and so be subject to a single standard.

Perhaps most egregious is the EU's pursuit of vertical non-price restraints. These agreements have practically no potential for impeding competition. And so, while such agreements (involving things like manufacturers setting exclusive territories in their distributions chains) are almost always legal under American law,[138] they have frequently been declared illegal in Europe.[139] Indeed, the hostility with which European antitrust enforcers pursue companies thought to be using vertical non-price contracts is sometimes remarkable.[140]

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[135] See Krim, supra note __ (Microsoft's settlement with the Justice Department "represents a remarkable legal turnaround for a company that two years ago faced the prospect of being broken up").

[136] Krim, supra note __, at A14.

[137] "Microsoft Rivals Allege Antitrust in New EU Case," Wall St. J., Feb. 11, 2003, p. A1

[138] Continental T.V. v. GTE Sylvania, Inc. 433 U.S. 36 (1977). For a rare case in which a court, seemingly reluctantly, upheld a lower court decision imposing liability for non-price vertical restraints, see Graphic Products Distributors, Inc. v. Itek Corp., 717 F.2d 1560 (11th Cir. 1983).

[139] Consten and Grundig v. Commission, Cases 56, 58/64, [1966] ECR 299.

[140] European law allows unannounced raids against companies suspected of antitrust violations. Raids against automobile companies suspected of vertical non-price arrangements have been undertaken recently. See, e.g., Reinking & Jennen, "Antitrust Raids on Peugeot," Fin. Times, Apr. 7, 2003, p. 18. Some believe that Europeans' views toward vertical contracts may be changing. E.g., Wintersscheid & Ward, New Rules for Vertical Agreements

There is only one body of economics, by which antitrust supposedly is driven. But with the United States still the dominant antitrust enforcer and Europe striving to create a niche for itself, one body of antitrust law seems unlikely to emerge. In fact, there is demonstrated resistance in the EU against a single approach ("harmonization" is the term usually employed) to antitrust.[141] Harmonization would mean that, once the American antitrust authorities had passed on a merger, or a case with international significance like *Microsoft*, there would be little for the Europeans to do.

The incentives to maintain a separate EU antitrust presence vis-à-vis the United States are the same as those that, in America, drive state AG's to maintain their own antitrust regimes. Just as state attorneys-general find it useful for their own careers to bring high-profile antitrust cases, so is it widely suspected that EU antitrust actions are driven, at least in part, by what is perceived as politically and personally useful to the EU bureaucracy. That bureaucracy is headed by Mario Monti, the European Commissioner for Competition Policy. Known as "Super Mario" for his ability to bring actions against companies like General Electric and Microsoft, Monti is for "many American companies…the most powerful man in Europe."[142] Claims that EU actions are motivated by concerns about politics rather than economics are heard increasingly.[143]

Under European Union Competition Policy, Antitrust, Summer 2000, p. 52. See also Meller, "Bayer's Export Policy Upheld By a European Court Adviser," N.Y. Times, May 23, 2003 (European Union's advocate general calling "absurd" the European Commission's finding that Bayer policy to limit sales to European countries with low prices constituted a collusive practice in violation of EU law).

141 "Interview with Professor Mario Monti, European Commissioner for Competition Policy," Antitrust, Spring 2001, p. 6

142 Raghavan and Michener, "Super Mario: EU's Antitrust Czar Isn't Afraid to Say No: Just Ask Time Warner," Wall. St. J., Oct. 2, 2000, p. A1.

143 Politics was frequently alleged as the basis for the EU's disapproval of the GE/Honeywell merger. E.g., Priest & Romani, "The GE/Honeywell Precedent," Wall St. J., June 20, 2001, p. A18; Michener & Murray, "EU's Monti Stands Firm on GE Deal: Commissioner Rejects Claims That Review was Politically Tainted," Wall St. J., June 27,

Indeed, one would predict further, the European permanent bureaucracy would sometimes advance its own ends at the expense of national enforcers, in ways that staff from the state attorneys-generals' office would never do as part of the NAAG. The more independent a bureaucracy is, the more likely it will be "caught out" when political shifts in the underlying populace or national governments occur.[144] That is exactly what has happened recently in the most recent wave of EU merger cases, in which several EU rulings objecting to mergers have been overturned by reviewing courts.[145]

Conclusion

Established to protect competition, antitrust has itself been subject to much competition. The competition has occurred, first, *for* the field. What is antitrust supposed to achieve? The current antitrust generation has seen a pronounced shift in favor of the economic view of antitrust's role, to the diminution of any political or social objectives once thought to be important antitrust goals. Part and parcel of the economic approach to antitrust has been increasing judicial attention to Type I error in antitrust judgments, including the desirability of relatively simple antitrust rules.

Competition has occurred, second, *in* the antitrust field. Here, many problems remain unresolved, ones involving both liability and enforcement. As to the former, antitrust rules are

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2001. Likewise, the EU's imposition of very onerous conditions for granting approval for the Boeing-McDonnell Douglas merger struck many as driven overtly by politics, not economics. See Broeder, supra note __, at 142.

[144] E.g., Weingast & Moran, Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission, 91 J. Pol. Econ. 765 (1983).

[145] Case T-342/99, Airtours Plc v. EC Commission, [2002] 5 C.M.L.R. 7 (Ct. First Instance 2002); Case T-310/01, Schneider Electric SA v. EC Commission, [2003] 4 C.M.L.R. 17 (Ct. First Instance 2002); Case T-5/02, Tetra Laval BV v. EC Commission (I), [2002] 5 C.M.L.R. 28 (Ct. First Instance 2002); Case T-80/02, Tetra Laval BV v. EC Commission (II), [2002] 5 C.M.L.R. 29 (Ct. First Instance 2002).

sometimes at variance with wider, non-antitrust rules concerning the creation and enforcement of property rights. As to enforcement, although non-meritorious private actions have diminished during recent years, new problems of public enforcement have arisen. The desire of both state attorney-generals in the United States and of foreign enforcers to assume larger roles on the global antitrust stage are particularly noteworthy. How these issues are resolved in the next antitrust generation will be a subject of considerable interest.