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ANTITRUST'S DEMOCRACY DEFICIT

Harry First & Spencer Weber Waller***

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

—Condoleezza Rice, Speech at the Republican National Convention,
Aug. 29, 2012¹

INTRODUCTION

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

Many scholars have tried to explain what has caused the shift in antitrust’s political salience,³ but the purpose of this Article is more to describe how the shift has affected the way we now do the “antitrust enterprise” and to connect this shift to our concern for the political values

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1. Condoleezza Rice, Former Sec’y of State, Speech at the Republican National Convention (Aug. 29, 2012), *available at* <http://www.foxnews.com/politics/2012/08/29/transcript-condoleezza-rice-speech-at-rnc/>.

2. RICHARD HOFSTADTER, *What Happened to the Antitrust Movement?*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 188, 189 (1965).

3. See HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 1–10 (2005); Jonathan B. Baker, *Preserving a Political Bargain: The Political Economy of the Non-interventionist Challenge to Monopolization Enforcement*, 76 *ANTITRUST L.J.* 605 (2010).

that we believe underlie the antitrust laws. Thus, we take guidance from two points in Secretary Rice's speech: First, we connect free markets with free people, favoring open markets that provide the opportunity to compete. Second, we see the connection between free markets and democratic values and institutions.⁴ As Secretary Rice also suggests (although likely with foreign policy in mind), we, too, believe that a balance of institutional power is necessary to advance the goals that free markets embody.

The institutional aspects of today's antitrust enterprise, however, are increasingly out of balance, threatening the democratic, economic, and political goals of the antitrust laws.⁵ The shift that Hofstadter first described has led to an antitrust system captured by lawyers and economists advancing their own self-referential goals, free of political control and economic accountability. Some of this professional control is inevitable, of course, because antitrust is a system of legal ordering of economic relationships. But antitrust is also public law designed to serve public ends. Today's unbalanced system puts too much control in the hands of technical experts, moving antitrust enforcement too far away from its democratic roots.

We characterize the result of this shift toward technocracy as antitrust's democracy deficit.⁶ We draw upon the concept of a democracy deficit from the literature analyzing and critiquing the European Union (EU) and the World Trade Organization (WTO).⁷ The term has generally been used to

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

5. We take as a given that antitrust has political goals and reflects political value judgments. Other papers in this Symposium engage more fully with what those goals are, further developing a rich tradition of antitrust scholarship. For earlier contributions, see, for example, Robert Bork, Ward Bowman, Harlan Blake & Kenneth Jones, *The Goals of Antitrust: A Dialogue on Policy*, 65 COLUM. L. REV. 363 (1965); John J. Flynn, *Antitrust Policy and the Concept of a Competitive Process*, 35 N.Y.L. SCH. L. REV. 893, 897 (1990); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis*, 50 OHIO ST. L.J. 257 (1989); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Louis B. Schwartz, *Justice and Other Non-economic Goals of Antitrust*, 127 U. PA. L. REV. 1076 (1979); Louis B. Schwartz, *The Schwartz Dissent*, 1 ANTITRUST BULL. 37, 38 (1955) ("The purpose of the antitrust laws is to preserve liberty, *i.e.*, freedom of choice and action, first in the economic sphere but ultimately in the political sphere as well.").

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

7. *E.g.*, DAVID MARQUAND, PARLIAMENT FOR EUROPE 64–66 (1979); Robert Howse, *How To Begin To Think About the "Democratic Deficit" at the WTO*, in INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS 79, 79–101 (Stefan Griller ed., 2003); Anne-Marie Slaughter, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*, 39 GOV'T & OPPOSITION 159 (2004); Joseph

refer to policymaking by unaccountable and nontransparent technocratic institutions far removed from democratic (or national) control.⁸ The concern over a democracy deficit has led Europeans to develop the principle of subsidiarity, which seeks to direct lawmaking and enforcement, where possible, to the level of government closest to the people affected by the decisions.⁹ Similar concerns have led the WTO to open its dispute resolution proceedings to participation by nongovernmental organizations and other affected parties.¹⁰

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

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

H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and Its Discontents*, 17 NW. J. INT'L L. & BUS. 354 (1996).

8. See Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2466–74 (1991) (describing the aspects of the democracy deficit in European Community institutions). For discussion in the U.S. administrative law context, see, for example, Peter L. Strauss, *Legislation That Isn't—Attending to Rulemaking's "Democracy Deficit,"* 98 CALIF. L. REV. 1351 (2010) (discussing the legitimacy of having unelected regulators creating "binding legal texts" through regulation).

9. For an overview, see SUBSIDIARITY AND ECONOMIC REFORM IN EUROPE (George Gelauff et al. eds., 2008).

10. See MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS C. MAVROIDIS, *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 24–25 (2d ed. 2006).

11. See, e.g., Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 28 (2005) (“[G]lobal administrative law effectively covers all the rules and procedures that help ensure the accountability of global administration, and it focuses in particular on administrative structures, on transparency, on participatory elements in the administrative procedure, on principles of reasoned decisionmaking, and on mechanisms of review.”). For fuller discussion of the scope of the field and current research, see *Global Administrative Law Project*, INST. FOR INT'L L. & JUST., N.Y.U. SCH. OF L., <http://www.iilj.org/GAL/default.asp> (last visited Mar. 19, 2013).

12. See THE DESIGN OF COMPETITION LAW INSTITUTIONS: GLOBAL NORMS, LOCAL CHOICES (Eleanor M. Fox & Michael J. Trebilcock eds., 2013) (studying institutional norms in competition law enforcement in ten jurisdictions).

populism.¹³ Political values change over time with changes in the social sciences and the world more generally. Rather, we think that by redressing the democracy deficit we can move the needle back toward policies that reflect more general political understandings and views of antitrust policy, even if not all the way back to the nineteenth century.

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

I. THE DEMOCRACY DEFICIT

Part I first charts the democracy deficit as reflected in the conduct of the major institutions of the antitrust system—the courts, Congress, and public enforcers. It then compares the situation in the United States with the evolving competition law enforcement regime in Europe.

A. *The Courts*

Perhaps the most significant innovation Congress made when it enacted the Sherman Act was to create a system of public enforcement of competition law.¹⁴ Restraints of trade had previously been largely a private matter, raised defensively to avoid the enforcement of contracts that were against public policy.¹⁵ Under the Sherman Act, however, the government was given the power to use judicial processes to stop agreements in restraint of trade and even to prosecute criminally those parties who entered into them.¹⁶ Private parties also gained a new right, specifically the right to sue for damages caused by such restraints.¹⁷ Together, these two affirmative rights placed decisional power in antitrust cases squarely in the hands of judges and juries, the former often viewed as the least democratic branch of government and the latter often viewed as representing the populace from

13. For a general history of populism, see, for example, LAWRENCE GOODWYN, *DEMOCRATIC PROMISE: THE POPULIST MOMENT IN AMERICA* (1976); RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* (1955).

14. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2006)).

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

16. 15 U.S.C. § 1 (2006).

17. Sherman Antitrust Act § 7 (superseded by 15 U.S.C. § 15(a)).

which it was drawn.¹⁸ Framed this way, how they exercise their powers will strongly affect the balance between technocracy and democracy.

1. Judges: Antitrust As Common Law

How should judges interpret the antitrust laws? The Sherman, Clayton,¹⁹ and Federal Trade Commission²⁰ Acts are broadly worded, with Congress intentionally leaving it to the courts to fill in the exact meaning of phrases like “restraint of trade,” “monopolization,” “substantially to lessen competition,” and “unfair methods of competition,” none of which was statutorily defined.²¹ Early judicial opinions struggled with interpretation issues, particularly in Sherman Act cases where the courts were caught between the literalism of “[e]very contract, combination . . . or conspiracy, in restraint of trade . . . is declared to be illegal”²² and the common law tradition of a rule of reason.

Exemplifying the initial common law approach is Judge Taft’s circuit court opinion in *United States v. Addyston Pipe & Steel Co.*²³ This opinion is well known for its ancillary restraints analytical framework, but it is perhaps less appreciated for its institutional approach in which Taft engaged in a broad inquiry into how the defendants’ agreement might be viewed under the common law.

The “common law,” Taft knew, was hardly a seamless body, uniform in application; but Taft did not ignore decisions pointing in different directions. Instead, he examined cases on both sides of the issue, reviewing cases dating back to the medieval English Year Books up until the time of his decision. The jurisdictions involved were diverse—England, Canada, Australia, the U.S. Supreme Court, U.S. federal courts, and eighteen state courts.²⁴ Taft drew on these cases for their different approaches, and for the

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

19. Clayton Antitrust Act, 15 U.S.C. §§ 12–77; 29 U.S.C. §§ 52–53 (2006).

20. Federal Trade Commission Act, 15 U.S.C. §§ 41–58.

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

22. Sherman Antitrust Act, 15 U.S.C. § 1.

23. 85 F. 271 (6th Cir. 1898), *aff’d*, 175 U.S. 211 (1899).

24. See *id.* at 279–91. The states were Massachusetts, New York, Michigan, Minnesota, Wisconsin, Ohio, Pennsylvania, Rhode Island, Illinois, Kentucky, Iowa, California, Texas, Louisiana, Nebraska, New Jersey, West Virginia, and Georgia.

policies these courts articulated, before determining whether the cartel agreement in the case violated the Sherman Act.

Taft did not see the court as being at liberty to decide “how much restraint of competition is in the public interest, and how much is not.” He was not about to “set sail on a sea of doubt” and “assume[] [such a] power.”²⁵ For Taft, the common law constrained judicial power. His decision needed to be within the bounds that the common law set, in part because the Sherman Act had made contracts that were in restraint of trade at common law “unlawful in an affirmative or positive sense.”²⁶

This sense of judicial restraint was not on display in the Supreme Court’s 1911 decision in *Standard Oil Co. v. United States*.²⁷ There, the Supreme Court chose to interpret the Sherman Act expansively, “by the light of reason,” to determine “in every given case whether [the conduct] was within the contemplation of the statute.”²⁸ Justice Harlan, who had joined Taft in the circuit court in *Addyston Pipe*, vigorously dissented. “[S]uch a course of proceeding,” he wrote, “would be ‘judicial legislation.’”²⁹

Congress responded to critics from all sides of the political spectrum by enacting the Clayton Act in 1914, trying to limit the discretion of the courts by writing clearer prohibitions on specific types of conduct. Congress’s fear was that without greater legislative control, the legality of any particular restraint would be determined by a judge’s individual opinion as an economist or sociologist rather than by a legislatively set legal standard.³⁰

These early jousts between the courts and the legislature over the Sherman Act’s meaning have now been relegated to history. The modern Supreme Court has come to be unmoored from any sense of legislative direction of judicial decision making when it comes to interpreting the

25. *Id.* at 284.

26. *Id.* at 279.

27. 221 U.S. 1 (1911).

28. *Id.* at 64 (emphasis added).

29. *Id.* at 100 (Harlan, J., concurring in part and dissenting in part). As President, Taft subsequently took the position that *Standard Oil* “merely adopted the tests of the common law” and that no prior case would have been decided differently under its approach. See Annual Message—Part I, On the Anti-Trust Statute, 17 COMP. MESSAGES & PAPERS PRES. 7644, 7645–46 (1911). But he also argued that the Court had not committed to itself “unlimited discretion” to decide a restraint’s illegality, repeating the approach he had taken in *Addyston Pipe*:

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

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

30. See S. REP. NO. 62-1326, at 11 (1913).

antitrust laws.³¹ Although some modern cases take a default view of appropriate antitrust rules—make a decision while reminding Congress of its legislative responsibility to alter it³²—even that modest acknowledgement of legislative authority is lacking today.

Instead, the Supreme Court now refers to the “quasi-common law realm of antitrust,”³³ writing that the Sherman Act’s use of the term “‘restraint of trade’ invokes the common law itself.”³⁴ But now the Court does not mean a common law of bounded precedent, to be parsed and reconciled as Taft did in *Addyston Pipe*, but law made by judges as they see fit. This expansive view of the Court’s powers allowed the Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* to overrule *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,³⁵ a nearly 100-year-old precedent whose congressional endorsement an earlier Supreme Court opinion had actually recognized and deferred to.³⁶

Even Justice Scalia, an originalist, has come to emphasize the “dynamic potential” of the term “restraint of trade.”³⁷ “[L]ike the term at common law,” he wrote for the Court in *Business Electronics Corp. v. Sharp Electronics, Inc.*, “restraint of trade” refers to a “particular economic consequence,” one to be assessed as “new circumstances and new wisdom” evolve, not one “governed by 19th-century notions of reasonableness” that “remain[] forever fixed where it was.”³⁸ The question is no longer whether a practice in question is one that common law courts might have recognized as unlawful, as Taft thought in *Addyston Pipe*, but whether a modern judge thinks the practice is good or bad, the very approach that Taft rejected.

The willingness of the courts in antitrust cases to act as unconstrained common law courts, ignoring any boundaries the legislature may have placed on the antitrust laws, has been particularly pronounced when the courts have interpreted the Clayton Act. This is ironic because the Clayton Act is the very statute that Congress passed to stop judges from deciding cases based on their “individual opinion[s] as an economist.”³⁹

Take the prohibition on primary-line price discrimination in section 2 of the Clayton Act. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, a suit brought under section 2 of the Clayton Act, the Court

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

32. See, e.g., *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332 (1982).

33. *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 780 (1999).

34. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 888 (2007).

35. 220 U.S. 373 (1911), *overruled by Leegin*, 551 U.S. 877.

36. See *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 n.18 (1977) (referring to Congress’s enactment of the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (codified at 15 U.S.C. §§ 1, 45(a) (2006)), repealing the Miller-Tydings Fair Trade Act, ch. 690, Title VIII, 50 Stat. 693 (1937), and the McGuire Act, ch. 745, 66 Stat. 631 (1952)).

37. *Bus. Elecs. Corp. v. Sharp Elecs., Corp.*, 485 U.S. 717, 732 (1988).

38. *Id.* at 731–32.

39. See S. REP. NO. 62-1326, at 11 (1913).

collapsed primary-line price discrimination into the Sherman Act's monopolization offense, and then applied a legal standard that assumed that predatory pricing almost never occurs, without ever acknowledging that Congress thought otherwise when it passed the Clayton Act.⁴⁰ Similarly, the ban on exclusive dealing in section 3 of the Clayton Act has been subsumed by section 2 of the Sherman Act. If anything, it is harder today to prove a Clayton Act violation than a Sherman Act violation, a judicial flip of the legislative effort to tighten up the Sherman Act's standards when judging exclusive dealing arrangements.⁴¹

A similarly egregious example of ignoring the Clayton Act involves the practice of tying, where the provision of one product or service is conditioned on the acceptance of a second product or service. Tying can be challenged under four separate statutory provisions, each with its own language, legislative history, and purpose. There are tying cases under section 1 of the Sherman Act barring agreements in restraint of trade,⁴² section 2 of the Sherman Act barring monopolization or attempted monopolization,⁴³ section 3 of the later-enacted Clayton Act barring the sale of goods on the condition that the purchaser shall not use or deal in the goods of a competitor where the effect may be to substantially lessen competition or tend to create a monopoly,⁴⁴ and section 5 of the Federal Trade Commission Act barring unfair methods of competition.⁴⁵ Despite the disparate language and aims, the Supreme Court has collapsed tying

40. See *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993) (“[W]hether the claim alleges predatory pricing under § 2 of the Sherman Act or primary-line price discrimination under the Robinson-Patman Act, two prerequisites to recovery remain the same.”). The Court repeated its view, originally asserted in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 589–90 (1986), that “predatory pricing schemes are rarely tried, and even more rarely successful,” see *Brooke Grp. Ltd.*, 509 U.S. at 226, despite the fact that Congress in 1914 relied on social science views to the contrary, see William S. Stevens, *Unfair Competition*, 29 POL. SCI. Q. 282, 284–86 (1914) (describing geographic predatory pricing).

41. See *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 186 (3d Cir. 2005) (reversing a district court decision that exclusive dealing agreements did not violate section 2; although the government alleged a Clayton Act violation at trial, the government did not appeal the district court's adverse finding on this claim); *LePage's Inc. v. 3M*, 324 F.3d 141, 145 (3d Cir. 2003) (en banc) (affirming a jury verdict for the plaintiff on section 2 claim of exclusive dealing; on Clayton Act exclusive dealing claim, jury had found for the defendant); cf. *United States v. Microsoft Corp.*, 253 F.3d 34, 70–71 (D.C. Cir. 2001) (holding that exclusive dealing agreements violated section 2, where those agreements were challenged under sections 1 and 2 of the Sherman Act and the government plaintiffs did not appeal the district court's adverse finding on the section 1 claim).

42. See, e.g., *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495 (1969) (tying loans to prefabricated houses).

43. See, e.g., *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594 (1953) (tying advertising in morning newspaper to advertising in evening newspaper).

44. See, e.g., *Int'l Salt Co. v. United States*, 332 U.S. 392 (1947) (tying canning machinery to salt).

45. See, e.g., *FTC v. Sinclair Ref. Co.*, 261 U.S. 463 (1923) (tying tanks and pumps to gasoline).

analysis into a single quasi-per se analysis of its own making, regardless of which (or how many) statutes are involved.⁴⁶

The evolution of section 7 of the Clayton Act is even more dramatic. Interpretation of this provision is now so far removed from the legislative purposes that animated it that it is hard see the connection between the statute and current interpretations. The Court started out in *Brown Shoe Co. v. United States*⁴⁷ with a faithful effort to interpret the 1950 Cellar-Kefauver amendment to section 7 in light of its legislative purposes,⁴⁸ and the Court's decision in *United States v. Philadelphia National Bank*⁴⁹ the following year made an effort to tie its invented legal/economic test to section 7's concern for concentration.⁵⁰ But a decade later, in *United States v. General Dynamics*,⁵¹ the Court relegated concentration to a starting point in the analysis and invited defendants to come up with their own (more persuasive) economic theories for showing that big mergers do not hurt competition.⁵² Ever more sophisticated economic theories have now led merger analysis down the rabbit hole into a world where the government is forced to vigorously litigate mergers at very high levels of concentration. We are now lucky if we can stop a three-to-two merger—forget a merger that threatens competition in its incipiency.⁵³

No one would contend that the federal judiciary is an institution subject to much democratic control. Its members are not elected and are practically unremovable from their offices. But control over the meaning of the antitrust laws is now firmly in the grip of this unelected judiciary that feels

46. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984); see also HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* ¶ 10.3 (4th ed. 2011).

47. 370 U.S. 294, 315 (1962).

48. See *id.* (“The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy.”).

49. 374 U.S. 321, 363 (1963).

50. See *id.* (justifying a test for presuming anticompetitive effect as being warranted by the “intense congressional concern with the trend toward concentration”).

51. 415 U.S. 486, 497–98 (1974).

52. See *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 631 (1974) (noting that, after the government introduced evidence of concentration ratios, defendant could then explain why concentration ratios were “unreliable indicators of actual market behavior”); *General Dynamics Corp.*, 415 U.S. at 497–98 (holding that, despite sufficient statistical showing, “other pertinent factors” affecting the industry and the merging parties’ business properly led the district court to find a lack of substantial effect on competition).

53. See *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 92 (D.D.C. 2011) (enjoining, after trial on the merits, a merger creating duopoly in the “digital do-it-yourself tax preparation” market); cf. Amended Complaint, *United States v. AT&T Inc.*, No. 11-01560 (ESH) (D.D.C. Sept. 16, 2011), available at <http://www.justice.gov/atr/cases/f275100/275128.pdf> (action to enjoin four-to-three merger in mobile wireless telecommunications services market). AT&T subsequently abandoned the acquisition. See Press Release, Dep’t of Justice, Justice Dep’t Issues Statements Regarding AT&T Inc.’s Abandonment of Its Proposed Acquisition of T-Mobile USA Inc. (Dec. 19, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/278406.pdf; cf. *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004) (holding no violation of section 7 in an alleged three-to-two merger).

free to pay little attention to the goals that Congress was trying to advance when the laws were enacted. Although the judicial exercise of “legislative power” has always been of concern in our legal and political system and is at the heart of criticism of the power of constitutional judicial review, no one seems to notice its exercise or care when antitrust is involved.

2. The Jury

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

How well do antitrust juries do their job? Who knows. There are many jury studies, but almost none focused on antitrust.⁵⁴ Some federal judges think juries do a good job; presumably, others do not.⁵⁵ But most antitrust commentators today think that juries are anathema to antitrust.⁵⁶ As Daniel Crane points out, “Few institutions could be further from the technocratic model of expert administration than a randomly selected group of lay fact

54. See CRANE, *supra* note 6, at 111 (“To my knowledge, there have been no systematic efforts to study the actual performance of civil antitrust juries.”). Crane does, however, draw on one study, done using juror interviews after four antitrust trials in the 1990s. See *id.* (calling these juror interviews “the richest pool of information [available]”). Note, the study’s author and Crane emphasize the conclusions only from one of those trials. See Arthur Austin, *The Jury System at Risk from Complexity, the New Media, and Deviancy*, 73 DENV. U. L. REV. 51, 52–60 (1995) (discussing the trial in *Brooke Group Ltd.*). For a much more positive conclusion regarding the jury’s abilities, see Shari Seidman Diamond & Jessica M. Salerno, *Empirical Analysis of Juries in Tort Cases*, in RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS (J. Arlen ed., forthcoming 2013) (manuscript at 1), available at <http://www.thefederation.org/documents/11.Empirical%20Analysis%20of%20Jurors-Diamond.pdf> (concluding that “juries usually use reasonable strategies to evaluate the conflicting evidence they are given” and are “active problem-solvers who typically work to produce defensible verdicts”).

55. Judge Lewis Kaplan, for example, has observed that in his seventeen years as a trial judge on the federal bench, he thought that all the juries in the cases before him had understood the cases they were presented, with the exception of one patent case. See Email from Judge Lewis Kaplan, S.D.N.Y., to Harry First (Dec. 19, 2012, 4:36 PM) (on file with author) (reflecting on remarks made in a 2011 speech to the Executive Committee of the New York State Bar Association, Antitrust Law Section); see also Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 2–3 (1993) (“When I served as a district judge for about eighteen months, I was fond of telling jurors in my courtroom that I would prefer to have a case decided by twelve ordinary people than by one ordinary person. In other words, I do not believe much in expertise, and if there is such a thing, I doubt if it is any match for common sense.”).

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

finders.”⁵⁷ Juries, in Crane’s view, are “populist” institutions and “antitrust populism is long dead.”⁵⁸

In one sense, this hostility to juries in antitrust cases seems almost irrelevant. Jury use is limited in the antitrust system because a jury is required only in suits for damages and in criminal cases—government enforcement actions seeking injunctive relief are tried only to a judge. This means that there will be no jury involvement with much of what might present conflicts in terms of antitrust policy—mergers, monopolization, and collaborative activities other than price fixing. Further, trials are generally rare in federal court anyway, whether in civil or criminal cases; most cases end in a settlement or a guilty plea. This is certainly true for antitrust.⁵⁹ For example, of the more than 200 private cases filed against Microsoft in the aftermath of the government monopolization case, only two ever went to trial before a jury and only one to a conclusion; all the others were either dismissed or settled.⁶⁰ Why be so upset about an institution so rarely invoked?

Two reasons help explain this hostility. One we have already noted—the general preference that antitrust be kept in the hands of experts versed in the intricacies of antitrust law and economic theory. The other is likely more significant—hostility to the private action itself and the fear that large settlements will occur in the shadow of a populist jury that hates big business and does not understand economic terms like “average variable cost” or “elasticity of demand.”⁶¹

57. CRANE, *supra* note 6, at 113.

58. *Id.*

59. For example, of the 641 federal civil antitrust cases terminated in Fiscal Year 2011, only five terminated during or after a jury trial, which is less than 1 percent (0.78%) of the total civil antitrust cases filed. This is slightly higher than the percentage of all civil cases filed that year that went to a jury trial (0.74%). Most civil antitrust cases ended (presumably by settlement) before or during pretrial proceedings (79%), slightly lower than the number for all civil cases (82%). See ADMIN. OFFICE OF THE U.S. COURTS, 2011 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 149–50 tbl.C-4 (2012), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf>.

60. See *Novell, Inc. v. Microsoft Corp.*, No. 2:04-cv-01045-JFM, 2012 U.S. Dist. LEXIS 98710, at *5–6 nn.4 & 5 (D. Utah July 16, 2012) (granting Microsoft’s motion for judgment as a matter of law after the jury had hung, 11–1, in favor of Novell), *appeal docketed*, No. 12-4143 (10th Cir. Aug. 10, 2012); *Gordon v. Microsoft Corp.*, No. 00-5994, 2001 WL 366432 (D. Minn. Mar. 30, 2001) (granting class certification). The *Gordon* case was settled during the trial for \$182 million. For an interesting discussion of the trial, belying the skeptical account of jurors’ abilities to understand complex antitrust cases, see “*Gordon v. Microsoft*”: *Observations from the Trial Judge and Selected Jurors*, AM. BAR. ASS’N (Dec. 17, 2004), <http://apps.americanbar.org/antitrust/at-committees/at-trial/pdf/past-programs/gordon-transcript-04.pdf> [hereinafter *Observations*].

61. See CRANE, *supra* note 6, at 111 (citing Austin, *supra* note 54). Curiously, Crane cites one experimental study showing that juries would award lower damages if they were told that damages were automatically trebled to support his view that jury trials “may be tilted in a populist anti-big business direction.” See *id.* at 112–13. To the contrary, this finding indicates that jurors are not biased against corporations, because they would want to reduce the damages award if they had full information; if anything, this finding reveals a “bias” against plaintiffs who are, by law, entitled to treble-damages. One juror in the

Fear of improperly exacted large settlements has given the antijury critique important consequence for antitrust law. Beginning with *In re Japanese Electronic Products Antitrust Litigation* in the 1970s—in which the defendants argued that there should be no constitutional right to a jury trial because the case was too complex⁶²—the Supreme Court has engaged in a relentless effort to keep antitrust away from juries. In the Japanese consumer electronics case the Court took a defendant-favorable approach to summary judgment motions, ignoring its earlier, more permissive precedents, and cut off the plaintiffs' attempt to present their predatory pricing claim to the jury.⁶³ Then came cases adopting stricter standards for plaintiffs to prove causation and standing.⁶⁴ Subsequently, the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, raised the pleading standard so as to make it easier for a defendant to get a case dismissed at the complaint stage, even before filing an answer—let alone submitting to any discovery.⁶⁵ Most recently, the courts have focused on class certification, raising the requirements for showing predominance of common issues in a way that pushes much of the litigation into the class certification stage.⁶⁶ The hearing on class certification, of course, is held before a judge, not a jury.

This hostility to private antitrust litigation, which is shared by many commentators, lawyers, and courts, is another example of the democracy deficit in the antitrust system. Private litigation is a democratizing force in

Gordon case indicated that she “might have lowered the amount” of damages had she known about treble-damages. See *Observations*, *supra* note 60, at 18.

62. See *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1079, 1089 (3d Cir. 1980) (holding that a case involving Sherman Act and Antidumping Act claims might be “too complex” for a jury to decide “in a proper manner,” with the result that a jury trial “would violate due process and therefore would be beyond the guarantee of the seventh amendment,” and remanding for further proceedings).

63. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596–98 (1986).

64. See Stephen Calkins, *Summary Judgment, Motions To Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065 (1986).

65. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). One explanation for the Court's hostility has been the near-total absence of Supreme Court Justices with any substantial civil trial experience. Justice Stevens was a notable exception, having been an experienced antitrust litigator prior to his appointment to the bench. See Spencer Weber Waller, *Justice Stevens and the Rule of Reason*, 62 SMUL. REV. 693, 697–98 (2009).

66. See, e.g., *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008) (denying class certification); see also *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010) (restricting the use of class actions in arbitration). In *Behrend v. Comcast Corp.*, 655 F.3d 182 (3d Cir. 2011), the Third Circuit took a less restrictive view of class certification, but the Court has now granted certiorari to review the decision. See *Behrend*, 655 F.3d 182, *cert. granted*, 133 S. Ct. 24 (U.S. June 25, 2012) (No. 11-864). The transcript of the Supreme Court oral argument is available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-864.pdf. These cases have had a noxious effect on the ability of all types of plaintiffs to recover money damages in federal courts, as the Court has extended their principles beyond antitrust litigation. See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (extending *Twombly* to a suit for damages from unconstitutional conduct); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006) (requiring allegation of proximate cause in a RICO damages suit).

antitrust, like the jury itself, allowing injured citizens to seek redress for injuries suffered. Private litigation is not in the control of government enforcers nor antitrust experts, although private litigants must necessarily employ them. Private citizens and business firms do not care so much for antitrust theory as they care about getting damages for anticompetitive conduct that has harmed them or, in the case of businesses, stopping behavior that makes it hard for them to compete.

Viewing antitrust as a technical enterprise leads today's antitrust system away from private enforcement and toward public enforcement, firmly in the hands of expert federal enforcement agencies. How else to explain Justice Breyer's otherwise cryptic remark in *Pacific Bell Telephone Co. v. LinkLine Communications, Inc.*, (a private treble-damages suit) that a price squeeze claim finds its "natural home in a Sherman Act § 2 monopolization case where *the Government as plaintiff* seeks to show that a defendant's monopoly power rests, not upon 'skill, foresight and industry,' but upon exclusionary conduct"⁶⁷ Why mention only the Government? Why not private litigants as well? Don't private litigants understand full well when they have been excluded by monopolizing conduct? Or does Justice Breyer believe that the Sherman Act should be judicially rewritten to provide a separate substantive right enforceable only by expert government agencies?⁶⁸

B. Fear and Loathing of Congress

Congress is the natural democratic repository of lawmaking authority in our system. Congress passes the statutory framework for substantive antitrust law, exemptions and immunities, the procedures for its enforcement, the penalties for its violation, and the institutions for its enforcement. However, in recent times, Congress has seen fit only to nibble at the edges of antitrust law with increased penalties, minor amendments, and uneventful hearings over individual mergers or investigations of interest to particular congressional committees. Most

67. *Pac. Bell Tel. Co. v. LinkLine Commc'ns, Inc.*, 555 U.S. 438, 458 (2009) (Breyer, J., concurring) (emphasis added) (citation omitted); *see also* *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 281–82 (2007) (expressing concern that private antitrust suits involving the marketing of initial public offerings would be brought before "different nonexpert judges and different nonexpert juries" reaching inconsistent verdicts, resulting in "unusually serious mistakes").

68. It may be that Justice Breyer was implicitly referencing the debate over whether section 5 of the Federal Trade Commission Act can be read more broadly than section 2 in appropriate monopolization cases, in part because section 5 is enforceable only by the FTC and not by private parties. *See* William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 939, 947–50 (2010); J. Thomas Rosch, Comm'r, FTC, *Wading into Pandora's Box: Thoughts on Unanswered Questions Concerning the Scope and Application of Section 2 & Some Further Observations on Section 5*, Remarks Before the LECG Newport Summit on Antitrust Law & Economics 25 (Oct. 3, 2009), *available at* ftc.gov/speeches/rosch/091003_roschlecgspeech.pdf (discussing the lack of spillover effects on private enforcement from using section 5).

observers are content or pleased with the virtual withdrawal of Congress from the field,⁶⁹ but even at a time of nearly universal dislike for Congress, we think that both branches of Congress should be expected to do better.

Congress's task as the legislative branch is first and foremost to pass laws, but that is not its only task. Congress also appropriates money, provides advice and consent to presidential appointments, broadly oversees executive branch and independent agency activity, conducts investigations, holds hearings, and enacts resolutions. But despite a history of bipartisan congressional support for the importance of the antitrust laws and their enforcement,⁷⁰ of late Congress has done little. And when it has done something, it has focused on the micro rather than the macro changes that have occurred in the field.

A review of Congress's activities in the antitrust field makes this rather dismal picture clear. Large-scale reviews of antitrust policy and practice have been farmed out to third-party blue ribbon commissions whose reports are then generally ignored.⁷¹ This is illustrated by the fact that the last major amendments to the antitrust laws occurred in the 1970s, consisting of the elevation of antitrust crimes to felonies⁷² and the passage of the Tunney Act—requiring judicial oversight for government consent decrees⁷³—and the Hart-Scott-Rodino Act—requiring premerger notification for large mergers and acquisitions⁷⁴ and giving state attorneys general the right to sue for money damages on behalf of their natural citizens (a right the Supreme Court subsequently defanged in *Illinois Brick Co. v. Illinois*).⁷⁵

Since that time, Congress has increased statutory criminal penalties (but without changing the Sentencing Guidelines),⁷⁶ established zero or single damages instead of treble damages for certain limited categories of private litigation,⁷⁷ repealed a portion of baseball's judicially created antitrust

69. See HOVENKAMP, *supra* note 3, at 42–45.

70. See Deborah K. Owen, *Antitrust Under the Watchful Eye of a Conservative Congress*, 41 ANTITRUST BULL. 1, 1 (1996); Joe Sims, *Report of the President's Commission on Antitrust*, REGULATION, March/April 1979, at 25, 25.

71. The most recent is the 2007 report of the Antitrust Modernization Commission. See ANTITRUST MODERNIZATION COMM'N: REPORT AND RECOMMENDATIONS (2007) [hereinafter AMC REPORT], available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf. See generally Stephen Calkins, *Antitrust Modernization: Looking Backwards*, 31 J. CORP. L. 421, 430–31 (2006); Albert A. Foer, *The Antitrust Modernization Commission: A Retrospective from the Perspective of the American Antitrust Institute*, 54 ANTITRUST BULL. 305, 306 (2009).

72. Antitrust Procedures and Penalties Act, Pub. L. 93-528, 88 Stat. 1706 (codified as amended at 15 U.S.C. § 16 (2006)) (amending 15 U.S.C. §§ 1, 2).

73. 15 U.S.C. § 16(b) (2006).

74. Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. 94-435, tit. II, 90 Stat. 1383 (codified as amended at 15 U.S.C. § 18a).

75. See 431 U.S. 720 (1977).

76. See Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. 108-237, § 215 (raising criminal fines and imprisonment). The U.S. Sentencing Commission did alter the antitrust guideline after passage of the Act to make the penalties similar to those for sophisticated frauds. See 3 U.S. SENTENCING GUIDELINES MANUAL app. C, at 146 (2011).

77. See Export Trading Company Act of 1982, Pub. L. 97-290, 96 Stat. 1233, tit. III (codified as amended at 15 U.S.C. §§ 4001–4021) (providing immunity from suit); Local

immunity,⁷⁸ and granted a new immunity to teaching hospitals and medical schools that were on the verge of losing a private antitrust case challenging the match program for medical residents.⁷⁹ It has fitfully considered, but failed to enact, antitrust amendments that would have limited certain defenses related to OPEC's antitrust liability in the United States,⁸⁰ reduced certain industry exemptions,⁸¹ overruled the *Leegin* and *Illinois Brick* decisions,⁸² and jettisoned section 7 of the Clayton Act.⁸³ It has passed, but eventually discontinued, budget riders prohibiting the use of funds to overturn the per se ban on resale price maintenance.⁸⁴ It has expressed its displeasure regarding formalizing the allocation of specific matters and turf more generally between the Antitrust Division and the Federal Trade

Government Antitrust Act of 1984, Pub. L. 98-544, § 2, 98 Stat. 2750, 2750 (codified at 15 U.S.C. §§ 34–36) (no damages); National Cooperative Research Act of 1984, Pub. L. 98-462, 98 Stat. 1815 (codified at 15 U.S.C. §§ 4301–4306) (detrubling).

78. Curt Flood Act of 1998, Pub. L. 105-297, 112 Stat. 2824 (codified at 15 U.S.C. § 27a).

79. See Pension Funding Equity Act of 2004, Pub. L. 108-218, § 207, 118 Stat. 596, 611 (codified at 15 U.S.C. § 37b). Senator Kohl strongly condemned the statute on the Senate floor as “nothing more than a giveaway to one particular special interest,” to no effect. See 150 CONG. REC. 6812, 6833 (2004). For exploration of the potential competitive merits of the match process, see Kristin Madison, *The Residency Match: Competitive Restraints In An Imperfect World*, 42 HOUS. L. REV. 759 (2005).

80. See No Oil Producing and Exporting Cartels Act (NOPEC) of 2008, H.R. 6074, 110th Cong., (2008). The bill passed the House but died in the Senate on a threat of a veto by President George W. Bush. See *House Passes Bill To Expose OPEC to Antitrust Challenge*, 94 ANTITRUST & TRADE REG. REP. (BNA) 516 (May 23, 2008).

81. In the 2010 health care reform effort, there was a modest provision that would have removed the McCarran-Ferguson Act's insurance exemption for “person[s] engaged in the business of health insurance . . . or . . . the business of medical malpractice insurance.” See Affordable Health Care for America Act, H.R. 3962, 111th Cong. § 262 (2009). The provision was taken out prior to the passage of the legislation. See Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010, Pub. L. 111-192, 124 Stat. 1280. For an explanation of the bill proposing to remove the exemption, including a discussion of previous efforts to repeal or scale back the McCarran-Ferguson Act, see H.R. REP. NO. 111-322 (2009).

82. See Discount Pricing Consumer Protection Act, S. 2261, 110th Cong. (2007) (to overrule *Leegin*); Edward D. Cavanagh, *Illinois Brick: A Look Back and a Look Ahead*, 17 LOY. CONSUMER L. REV. 1, 19, 26 (2004) (discussing bills to repeal *Illinois Brick*, all of which died in committee).

83. See Merger Modernization Act of 1986, H.R. 4247, 99th Cong. (1986) (altering the language of the Clayton Act to codify aspects of the Justice Department Merger Guidelines). See generally Douglas H. Ginsburg, *The Reagan Administration's Legislative Initiative in Antitrust*, 31 ANTITRUST BULL. 851 (1986).

84. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1984, Pub. L. No. 98-166, § 510, 97 Stat. 1071, 1102 (1983) (“None of the funds appropriated in title I and title II of this Act may be used for any activity, the purpose of which is to overturn or alter the per se prohibition on resale price maintenance in effect under Federal antitrust laws: *Provided*, That nothing in this provision shall prohibit any employee of a department or agency for which funds are provided in titles I and II of this Act from presenting testimony on this matter before appropriate committees of the House and Senate.”).

Commission.⁸⁵ At its pettiest, it has sought to force the Federal Trade Commission to vacate its headquarters so that the National Gallery of Art could take over the space.⁸⁶ Different committees have conducted the required hearings for appointments of the key governmental enforcers as well the occasional hearing on a specific matter of committee interest.⁸⁷ Budgets have been increased and tightened in different eras with only limited controversy.

This raises two different questions. Why is Congress afraid of antitrust and so focused on trivia, and why is the antitrust community afraid of Congress? One possible answer to the first question is that the technocratic wall that antitrust professionals have built around antitrust has simply scared Congress away from the area. In turn, the answer to the second question may be that the antitrust professional community fears that a breach of this wall could only lead to mischief, with untutored “business interest” legislators trying to dismantle antitrust law while “populist” legislators try to impose excessive restrictions on economic activity.

Of course, it is possible that Congress has not been scared off, but is simply disinterested in antitrust or content with the status quo. The most jaded public choice advocates would contend that there is not enough payoff in the form of either electoral support or financial campaign support to justify more investment in the field versus other areas of the law. Under this theory the disinterest is perfectly rational. All we are left with, then, is an effort by the different congressional committees to protect their turf for self-aggrandizing reasons, an effort most on display in the “outrage” over the agencies’ efforts to fix the merger clearance process.

Putting such cynical explanations aside, as an institutional matter we should not assume that Congress is simply content with the status quo. The historic delegation of authority to the courts to develop a common law of antitrust never included *carte blanche* authority to make fundamental economic public policy in the guise of case decisions. Nor did it encompass the right for the agencies to increasingly make law in house through unreviewable decisions not to enforce the law, decisions to settle without effective relief, the issuance of advisory opinions, and the issuance of guidelines which effectively change the law, all without even resorting to the courts or Congress.⁸⁸

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

85. See Harry First, Eleanor M. Fox & Daniel E. Hemli, *The United States: The Competition Law System and the Country's Norms*, in *THE DESIGN OF COMPETITION LAWS*, *supra* note 12, at 375 & nn.261–63 (describing the congressional dispute).

86. See Andy Medici, *GSA Leases Held up in Real Estate Power Play*, *FED. TIMES*, June 18, 2012, at 1.

87. See Peter Lattman, *Senate Confirms Antitrust Chief for Justice Department*, *N.Y. TIMES*, Dec. 31, 2012, at B2 (discussing delays in the confirmation process).

88. See Richard Steuer, *Counseling Without Case Law*, 63 *ANTITRUST L.J.* 823 (1995); Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 *OR. L. REV.* 1383 (1998).

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

Congressional distance from core antitrust policy is further compounded by the Court's tendency to simply ignore the work of Congress even when it has expressed a view on any of these issues. For example, in the *Leegin* case, the Supreme Court gave no significance to Congress's awareness of a consistent judicial interpretation of the per se illegality of resale price maintenance at the federal level, a repeal of the statutes that allowed states to form a contrary policy under certain circumstances, and a budget rider that came in response to an expressed goal of the Justice Department to change the law in the 1980s.⁸⁹ Congressional failure to respond to the Court then just confirms the judiciary's view that it can act free from democratic control.

Congress should be able to do better. As in other areas of the law, Congress tends to focus on short-term, partisan, and publicity driven activity that often results in gridlock and focuses on the minutiae. Instead of substantive legislation that would expand or restrict the antitrust laws in accordance with the will of the majority of the legislature, we are treated to the spectacle of sideshows like multiple hearings over the antitrust status of baseball,⁹⁰ browbeating agency nominees over the perceived failures of the agencies in individual matters,⁹¹ and other oversight hearings about a particular merger (Universal-EMI) or high-profile industries (Google) that are newsworthy.⁹² In contrast, Congress remained entirely silent when (1) the 2008 Department of Justice report on unilateral conduct made important and wide sweeping changes to the interpretation and enforcement of section 2,⁹³ (2) the Federal Trade Commission (FTC) refused to sign the report and

89. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 919 (Breyer, J., dissenting) (2007); cf. *Flood v. Kuhn*, 407 U.S. 258 (1972) (deferring to congressional silence regarding the fifty-year-old decision in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), which gave professional baseball an effective exemption from federal antitrust law).

90. See Adam Berenbak, *Congressional Play-by-Play on Baseball*, PROLOGUE, Summer 2011, at 24.

91. See *Oversight of the Enforcement of the Antitrust Laws: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 111th Cong. (2010).

92. See *The Universal Music Group/EMI Merger and the Future of Online Music: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 112th Cong. (2012); *The Power of Google: Serving Consumers or Threatening Competition?: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 112th Cong. (2011).

93. See U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), available at www.justice.gov/atr/public/reports/236681.pdf.

issued policy statements in response;⁹⁴ and (3) the Department of Justice (DOJ) report was withdrawn by the subsequent Administration.⁹⁵

As a result, both agencies and courts have the best of both worlds and would oppose any change where Congress reasserts its fundamental role in setting the public policy to be enforced by the other branches of government. Agencies can proceed with fewer constraints in setting the agenda rather than executing one set by others. Most of their work can proceed behind closed doors and by negotiation with affected parties without external review.⁹⁶ When the courts become involved because of settlement break down, they can establish their own view of sound public policy largely unconstrained by their coequal branches of government.⁹⁷

A realistic and more democratic role for Congress in the formulation of competition policy, as a fundamental part of national economic policy, would involve a number of relatively small changes. The first principle should be establishing a norm of statutory interpretation that silence after a Court decision does not mean acquiescence. The fact that Congress does not specifically tee up a bill or resolution in each legislative session does not mean it has changed its mind on a particular subject or approves of a particular development in the antitrust world. Second, Congress should require the agencies periodically to report changes in enforcement or budget priorities and judicial changes in established precedent. Third, exemptions and immunities should be retrofitted to include sunset provisions so that Congress is required to take some action to preserve the status quo.⁹⁸ Fourth, if Congress outsources big-picture studies to blue ribbon commissions, such action should be accompanied by a provision that the recommendations of the commission be introduced in the following legislative session. Fifth, nomination, oversight, and budget hearings should be better focused on the major themes of what agencies do and don't do, rather than the minutiae of the moment.

The recommendation that Congress shift its focus to major issues is particularly critical to reinvigorating Congress's role in antitrust policy. It

94. Press Release, FTC, FTC Commissioners React to Department of Justice Report, "Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act" (Sept. 8, 2008), available at <http://www.ftc.gov/opa/2008/09/section2.shtm>.

95. Press Release, Dep't of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), available at <http://www.justice.gov/opa/pr/2009/May/09-at-459.html>.

96. The Government in the Sunshine Act, however, limits private discussion of commission business to no more than two commissioners at a time. See Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified at 5 U.S.C. § 552b(a)(1) (2006)). The FTC has criticized this limitation. See Stephen Calkins, Gen. Counsel, FTC, Prepared Statement of the Federal Trade Commission Before the Special Committee To Review the Government in the Sunshine Act, Administrative Conference of the United States (Sept. 12, 1995), available at <http://www.ftc.gov/speeches/other/suntest.shtm>.

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

98. See AMC REPORT, *supra* note 71, at 355-56 (recommending the adoption of a sunset provision for any antitrust exemption).

is simply more important to probe whether merger enforcement has now been virtually limited to mergers to monopoly than to hold hearings into whether a particular merger in a particular industry is a good idea. Similarly, reasonable people can differ over whether a particular antitrust provision should be enforced more vigorously, less vigorously, or simply repealed, but we doubt any Congress since the passage of the Sherman Act would simply say, "We don't care, do whatever you want." We may not like the results of what Congress says on any particular issue, but it remains the only directly democratically accountable branch of government and the one most clearly charged with setting the broad parameters of fundamental public policy. It should speak, as it does in most other areas of our complex economy, and not have its silence used as an excuse for self-interested actors to shift power in their favor when the legislature chooses to turn to other pressing issues of the day.

C. State Enforcement

There is one group of public antitrust enforcers that has been consistently criticized over the past two decades, not for over- or underenforcement of the antitrust laws, but for having the authority to enforce the antitrust laws in the first place. That group is the state attorneys general. Many antitrust commentators, some federal judges, and some in Congress have been unhappy with an enforcement structure that has given authority to state attorneys general to enforce federal antitrust law in federal court, to the point where some have proposed ending or limiting state jurisdiction over all antitrust claims, whether brought under federal or state antitrust law.⁹⁹ Indeed, the effort to strip states of jurisdiction in antitrust matters was an important part of the agenda of the Antitrust Modernization Commission appointed in the mid-2000s, although this extreme view was eventually rejected by all but one of the Commissioners.¹⁰⁰

99. See, e.g., Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, in *COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY* 252, 260–62 (Richard A. Epstein & Michael S. Greve eds., 2004) (arguing that the states should be stripped of their authority to bring antitrust suits under either state or federal law or, at least, that Congress should preempt state antitrust law insofar as it might affect interstate or foreign commerce); Memorandum from AMC Staff to All Comm'rs 9–24 (May 19, 2006), available at http://govinfo.library.unt.edu/amc/pdf/meetings/EnfInst_State_DiscMemo_pub.pdf (discussing various commentators' criticisms of state enforcement and proposals to restrict or eliminate state authority); see also Richard A. Posner, *Antitrust in the New Economy*, 68 *ANTITRUST L.J.* 925, 940 (2001) [hereinafter Posner, *Antitrust and the New Economy*] (proposing that states should have no authority to bring antitrust suits under federal or state law, except where the state was injured as a purchaser of goods or services).

100. The Commissioner was John Warden. See AMC REPORT, *supra* note 71, at 444–45 (statement of John Warden). Warden had represented Microsoft Corp. in the monopolization litigation brought against it by the federal and state governments. See Harry First, *Modernizing State Antitrust Enforcement: Making the Best of a Good Situation*, 54 *ANTITRUST BULL.* 281, 283–91 (2009) (discussing AMC effort). See generally Richard Wolfram & Spencer Weber Waller, *Contemporary Antitrust Federalism: Cluster Bombs or Rough Justice?*, in *ANTITRUST LAW IN NEW YORK STATE* 1 (Robert L. Hubbard & Pamela

From the point of view of democratic accountability, the criticism of the state attorneys general is deeply ironic because nearly all the state attorneys general are elected officials.¹⁰¹ Having antitrust enforcers directly accountable to the electorate is probably unique in the world, perhaps another example of the United States' vaunted exceptionalism. One might even think that this political accountability would be held up to other regimes around the world as an example to be followed, rather than as something we ought cripple or dismantle as soon as possible.

The fact that democratic accountability for antitrust enforcement is roundly condemned once again reveals the strong preference we have for keeping antitrust away from democratic control and firmly in the hands of antitrust professionals. This preference was less clear when the antitrust laws were first passed. At that time, state enforcement by elected officials was an important part of the antitrust enforcement landscape; indeed, state enforcement in the early period of the antitrust laws was in some ways ahead of federal antitrust enforcement.¹⁰² By 1914 some in Congress were ready to give state attorneys general the right to bring suit in the name of the United States if the U.S. Attorney General did not act—an amendment to the proposed Clayton Act that failed in the Senate.¹⁰³

Today's critique goes beyond the fear expressed in the 1914 debate that publicity-hungry state attorneys general would be incentivized to go after "larger matters" more properly of concern to federal enforcers (that would arguably be a good result). Today's critique is that elected state enforcers are too easily captured by bad political actors, such as labor interests or in-state companies hurt by competition from out-of-state firms, and are not competent professionals in any event.¹⁰⁴ The capture argument reflects the fact that some popular political interests may disagree with a purer form of antitrust than the technocracy likes. The competency argument is an

Jones Harbour eds., 2d ed. 2002) (describing state and federal interaction in several significant antitrust cases from the 1990s).

101. See *About NAAG*, NAT'L ASS'N ATT'YS GEN., http://www.naag.org/about_naag.php (last visited Mar. 19, 2013) (attorneys general are popularly elected in 43 states; the remaining states have a variety of selection mechanisms).

102. Compare *United States v. Int'l Harvester Co.*, 214 F. 987, 999–1000 (D. Minn. 1914) (federal antitrust suit filed April 30, 1912) (finding the combination of five companies, collectively holding 80 to 85 percent of the market, to form International Harvester to be an unreasonable restraint of trade in violation of sections 1 and 2 of the Sherman Act), with *State v. Int'l Harvester Co.*, 141 S.W. 672, 678 (Mo. 1911) (finding International Harvester to be "an unlawful combination to suppress competition" in violation of state antitrust law). See generally May, *supra* note 15, at 498–506.

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

104. See Posner, *Antitrust in the New Economy*, *supra* note 99, at 940–41.

unwarranted slur on the ability of relatively poorly paid state lawyers to understand the complexities of the antitrust laws (just like juries!). The empirical record, however, provides little evidence either for the capture or competence critique.¹⁰⁵

The fact that state attorneys general are popularly elected gives them incentives to pursue enforcement actions that benefit the electorate generally and of which the general electorate might approve. These incentives appear to have worked, for the record shows that the states have historically been interested in using the antitrust laws to obtain monetary damages on behalf of state government entities and state consumers injured by antitrust violations.¹⁰⁶ The U.S. Justice Department, on the other hand, has been indifferent to seeking such redress, despite its statutory right to sue for treble damages when the federal government is injured by an antitrust violator.¹⁰⁷ The states also continue to take a firmer stance against vertical resale price fixing out of a concern for the interests of consumers who they believe will benefit from price competition among sellers of the same brand of goods. By contrast, federal enforcers now simply ignore such behavior.¹⁰⁸ Thus, the institutional structure of having a popularly elected enforcement official may better align the interests of consumers and the interests of enforcers, a virtuous result from the point of view of antitrust.

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

Even if we are not likely to start electing our federal antitrust enforcers, we can still pay closer attention to other mechanisms that can make bureaucratic enforcers more accountable to the democratic will. The primary mechanism is transparency of decision making. Although the DOJ

105. See Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004, 1029–31 (2001).

106. See *id.* at 1018 tbl.5 (New York state monetary awards); First, *supra* note 100, at 300 (recent cases). The states' interest in monetary recoveries dates to the early days of the Sherman Act. See *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906) (antitrust damages suit for overcharges by iron water pipe cartel).

107. See Harry First, *Lost in Conversation: The Compensatory Function of Antitrust Law* 48–61 (N.Y.U. Law & Econ., Working Paper No. 10-14, 2010), available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1229&context=nyu_lewp (detailing the lack of enforcement).

108. Compare *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 900 (2007) (Department of Justice and FTC urge application of the rule of reason to minimum resale price maintenance agreements), with *People v. Tempur-Pedic Int'l, Inc.*, 916 N.Y.S.2d 900 (Sup. Ct. 2011) (suit brought by New York State Attorney General under state law for resale price maintenance) (dismissed), *aff'd*, 944 N.Y.S.2d 518 (App. Div. 2012).

and FTC engage in a variety of practices to foster transparency, including the issuance of enforcement guidelines and business review letters, both agencies still lag in disclosing their reasons for settling or not bringing particular cases. Both agencies have issued closing statements on a sporadic basis, but even these statements are often less than candid with regard to the agency's decisions.¹⁰⁹ This lack of transparency is another example of antitrust's democracy deficit.

D. Europe's Democracy Deficit in Competition Law

While the United States antitrust system has increased its democracy deficit, the European Union has narrowed its own in the competition law field. Over the last ten years, the EU has gone from the originator of the very term "democracy deficit" toward a new, more decentralized system of competition enforcement with a serious commitment to more transparency, accountability, private litigation, and aggregating small claims through collective and representative actions.

At its inception, the EU's democracy deficit carried over into the competition area. The EU Commission was selected as the exclusive enforcer of EU (then EEC) competition law.¹¹⁰ The Commission had the exclusive power to both bring proceedings for fines against undertakings and to grant exemptions for otherwise unlawful agreements under what is now article 101(3) of the EU Treaty.¹¹¹ It also had the power to issue block exemptions for categories of agreements that met certain listed criteria. It could further sculpt the law through the issuance of negative clearances, comfort letters, guidelines, and notices. One notable example is the so-called *de minimis* notice, which effectively exempts most conduct by firms below certain turnover and market share thresholds as not likely to amount to a matter of EU concern.¹¹²

The combined effect of these functionally exclusive positive and negative powers gave the Commission almost complete control over the enforcement of EU competition law. Although member states, through what are now called National Competition Authorities (NCAs), could enforce their own

109. The FTC tends to be more candid than the DOJ, in part because dissenting commissioners are able to articulate the arguments in favor of enforcement, thereby requiring greater explanation from the majority of Commissioners. *See, e.g.*, Press Release, FTC Closes Its Investigation of Genzyme Corp.'s 2001 Acquisition of Novazyme Pharm., Inc. (Jan. 13, 2004), available at <http://www.ftc.gov/opa/2004/01/genzyme.shtm> (with links to statements by Chairman Muris and Commissioner Harbour and dissenting statement of Commissioner Thompson); *see also* First et al., *supra* note 85, at 367–73 (discussing the variety of disclosure practices of the federal antitrust enforcement agencies).

110. Council Regulation 17/62, 1959–1962 O.J. SPEC. ED. 87.

111. Consolidated Version of the Treaty on the Functioning of the European Union art. 101(3), Mar. 30, 2010, 2010 O.J. (C 83) 47, 89 [hereinafter TFEU], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>.

112. *Commission Notice on Agreements of Minor Importance Which Do Not Appreciably Restrict Competition Under Article 81(1) of the Treaty Establishing the European Community (de minimis)*, 2001 O.J. (C 368) 13–15, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:368:0013:0015:EN:PDF>.

national competition laws, they could not grant or adjudicate claims of exemption. This proved to be a nearly insurmountable obstacle where the Commission had acted, was considering acting, or where the parties could make a colorable claim that their conduct was exemptible by the Commission, which then needed years to complete its own internal processes because of the extent of its own caseload.¹¹³

Similarly, although competition law has direct effect in the member states, and private parties have a legally protected right to seek damages and other remedies for violations of EU competition law,¹¹⁴ private litigation has not provided a meaningful remedy for most of the history of the EU. Competition claims surfaced offensively and defensively in various commercial and intellectual property disputes, but their effective resolution was hampered by the inability of national courts to definitively interpret and grant the exemptions exclusively within the purview of the EU Commission.¹¹⁵ Despite clear statements of the need and the right of victims of competition offenses to seek compensation, such claims were few and far between because of procedural limitations in the national courts, including bans or limitations on discovery and the lack of mechanisms to aggregate claims akin to U.S. class actions.¹¹⁶

All of these issues were addressed in the Modernization Initiative, which the Council of the European Union adopted in a package of legislative enactments in 2004¹¹⁷ following a rich and intense public debate within the various bodies of the EU, national political actors, the bar, academia, and civil society more generally. First, the Commission surrendered its exclusive powers over individual exemptions.¹¹⁸ Second, national competition authorities and courts would now have the power, and indeed the obligation, to apply the full provisions of EU competition law both as to liability and exemption.¹¹⁹ Third, the European Competition Network was

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

114. See, e.g., Case C-453/99, *Courage Ltd. v. Crehan*, 2001 E.C.R. I-6297, ¶ 1 (“A party to a contract liable to restrict or distort competition within [EU law] can rely on the breach of that provision to obtain relief from the other contracting party.”).

115. IVO VAN BAELE & JEAN-FRANÇOIS BELLIS, *COMPETITION LAW OF THE EUROPEAN COMMUNITY* 12–13 (5th ed. 2010).

116. As an illustration, July 2012 was the first time a UK court awarded damages to a private plaintiff for injuries resulting from a violation of competition laws. See *2 Travel Grp. PLC. (in liquidation) v. Cardiff City Transp. Servs. Ltd.*, No. 1178/5/7/11, Judgment, ¶ 599 (Competition Appeal Tribunal 2012), <http://www.catribunal.org.uk/238-6946/1178-5-7-11-2-Travel-Group-PLC-in-liquidation.html> (appeal taken from the Office of Fair Trading).

117. See Council Regulation 1/2003, 2003 O.J. (L 1) 1 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:EN:PDF>, amended by Council Regulation 411/2004, 2004 O.J. (L 68) 1 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:068:0001:0002:EN:PDF>; Council Regulation 1419/2006, 2006 O.J. (L 269) 1 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:269:0001:0003:EN:PDF>.

118. See Council Regulation 1/2003, *supra* note 117, art. 1–3, 6.

119. *Id.* art. 3, 5–6.

created to clarify the responsibilities and cooperation between the central authority in Brussels and the national competition authorities in the twenty-seven member states in investigations and proceedings.¹²⁰ Finally, the Commission initiated a program to encourage private rights of action in the member state courts.¹²¹

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

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

Unlike the war on the private right of action in the United States, the Commission has actively supported an enhanced right of compensation for private parties and does not appear to view this development as a threat to its leniency program or cartel enforcement activity. While progress has slowed, at least two U.S. law firms have established an office in the EU with an eye toward bringing private damages cases for cartel victims.¹²² A 2008 White Paper and a 2012 Commission study illustrates the extent of private rights of action in the various states and outlines methods of proof and a series of recommendations for greater use of collective and representative actions to allow aggregate litigation of small claims.¹²³ The

120. *Id.* art. 11–16.

121. For an overview, see *Actions for Damages—Overview*, EUROPEAN COMM'N, <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html> (last updated Aug. 14, 2012) and the documents cited therein.

122. See *About Hausfeld LLP: Vision Statement*, HAUSFELD LLP, <http://www.hausfeldllp.com/pages/about> (last visited Mar. 19, 2013) (referring to the London office); *Baker Botts Opens Brussels Office; Enhances Global Reach of Antitrust and Competition Law Practice*, BAKER BOTTS, <http://www.bakerbotts.com/baker-botts-opens-brussels-office-enhances-global-reach-of-antitrust-and-competition-law-practice-09-05-2012/> (last visited Mar. 19, 2013).

123. *Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2008) 165 final (April 2, 2008), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0165:FIN:EN:PDF>; *Commission Draft Guidance Paper:*

continued development of individual and collective private rights of action in the EU has been marked by a robust public debate at the highest levels of community and national governmental institutions and among stakeholders in civil society. Contrast this to the way that the private rights “debate” in the United States has been handled, where an ever-increasing set of restrictions has been judicially enacted in a technical and obfuscating manner that both preempts and limits public response.

Finally, the EU Competition law system includes procedural safeguards for public participation that are absent in the United States. While the Commission may proceed on its own initiative, when the EU receives a complaint from a private party it is generally required to formally decide, with reasons, whether to open a formal investigation or not, although it has the discretion to prioritize matters with the greatest community interests.¹²⁴ A decision not to proceed at any stage is appealable by the complainant and certain other entities affected by the decision.¹²⁵ Although the Commission is granted substantial discretion by the courts, it must nonetheless explain itself both in its decision and in court, unlike the virtually unlimited discretion of the U.S. agencies not to proceed in a matter with only occasional and entirely voluntary closing memos to explain their decisions.¹²⁶

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

II. TECHNOCRACY AND IDEOLOGY

While reasonable people can debate what set of rules, institutions, and procedures produce the “best” competition policy,¹²⁷ that is not the main thrust of the current push for a technocratic antitrust order. Instead, there is

Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty of the Functioning of the European Union (June 2011), available at http://ec.europa.eu/competition/consultations/2011_actions_damages/draft_guidance_paper_en.pdf.

124. TFEU art. 228; Charter of Fundamental Rights of the European Union art. 41(2), Dec. 18, 2000, 2000 O.J. (C 364) 1, available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf; see also VAN BAEL & BELLIS, *supra* note 115, at 989–93.

125. Case T-464/04, *Indep. Music Publishers & Labels Ass'n v. Comm'n*, 2006 E.C.R. II-2298; Case T-24/90, *Automec Srl v. Comm'n*, 1992 E.C.R. II-2223; see also TFEU art. 232 (liability for failure to act).

126. See, e.g., 15 U.S.C. § 16(b)–(h) (2006); *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995) (under the Tunney Act, a court cannot reject a proposed consent decree on the grounds that the complaint should have been broader).

127. See generally Symposium, 41 *LOY. U. CHI. L.J.* 411 (2010).

a strong laissez-faire ideological underpinning for many of the advocates of such an approach that favors the near abolition of antitrust without having to engage the political sphere that has never favored such a result.

Technocracy does not have to equate with restricting enforcement. The later New Deal era, when Thurman Arnold headed the Antitrust Division, is one illustration of a move toward technocracy in the service of increased enforcement.¹²⁸ Most of the early enforcement history of the EU is another. In fact, technocracy versus a more politically responsive antitrust and more enforcement versus less are two separate variables with a number of historical variations, as illustrated in Table 1.

Table 1: Enforcement: Technocracy and Political Antitrust

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

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

The first critique involves the longstanding debate over the use of per se rules versus a rule of reason approach for antitrust offenses. Developed originally as a rule of interpretation for section 1 of the Sherman Act, a version of the rule of reason approach has spread to govern virtually all of antitrust including monopolization and merger analysis.¹²⁹ Although per se rules were once common, the Supreme Court has told us that such rules are only applicable to those offenses that are manifestly anticompetitive and wholly lacking any plausible procompetitive justification.¹³⁰ At the same time, it is easier and easier with the help of skilled economic expertise to

128. SPENCER WEBER WALLER, THURMAN ARNOLD: A BIOGRAPHY 78–110 (2005).

129. See *United States v. Microsoft Corp.*, 253 F.3d 34, 58–59 (D.C. Cir. 2001); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1 (Aug. 19, 2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

130. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 900 (2007).

assert a procompetitive justification that the courts will find plausible, thereby taking the case out of the realm of per se analysis.

The courts have often fumbled the application of this core principle largely as a result of Justice Brandeis's ill-advised kitchen sink approach to the rule of reason in *Chicago Board of Trade v. United States*,¹³¹ where everything is relevant and nothing is determinative. *Chicago Board of Trade* produced two different reactions. The first was a series of per se rules for various practices where the plaintiff always (or nearly always) won, and where the defendant always (or nearly always) won everything else when labeled rule of reason. Whether justified or not, this system fell into disrepair as most practices, except hardcore cartel behavior, became subject to some form of the rule of reason.

This in turn led to the criticism by some that the rule of reason cannot be effectively applied by generalist courts and lay juries, and the criticism by others that the rule of reason violates the rule of law.¹³² These criticisms, of course, were a major part of the reasoning in adopting per se rules in the first place, that is, to better calibrate the substantive rules to the procedures and institutions of the generalist judiciary.¹³³ The problem is that if the rule of reason is the default standard, and if you then conclude that courts cannot administer these types of cases, there is nothing left to antitrust except governmental challenges to the most naked price fixing arrangements. This requires a conscious political decision never contemplated, let alone endorsed, by Congress. Few argue in such stark terms,¹³⁴ but technocratic antitrust short-circuits the political process and can lead down a path to laissez-faire.

The other response was to develop an intermediate or sliding scale standard for behavior in between conduct that was unlikely to harm competition and conduct that was inevitably likely to do so. The Supreme Court developed the so-called quick-look standard in a series of cases in which Justice Stevens often spoke for the Court.¹³⁵ At the same time, the FTC developed the similar inherently suspect test in administrative proceedings and litigation in the lower courts.¹³⁶ The gist of both approaches is that in situations where a rudimentary knowledge of economics would show that an agreement is likely to raise price, reduce

131. *Chi. Bd. of Trade v. United States*, 246 U.S. 231 (1918).

132. See Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity & Judicial Training on Appeals*, 54 J.L. & ECON. 1 (2011); Douglas H. Ginsburg & Joshua D. Wright, *Dynamic Analysis and the Limits of Antitrust Institutions*, 78 ANTITRUST L.J. 1, 18–20 (2012); Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375 (2009).

133. *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362–63 (1963).

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

135. Waller, *supra* note 65.

136. *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 360–61 (5th Cir. 2008); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35 (D.C. Cir. 2005); *see also* *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 595 (7th Cir. 1984).

output, or otherwise injure an important element of market competition, harm may be presumed and the initial burden of proof should be shifted to the defendant to justify the restraint.¹³⁷ Unfortunately, this promising approach was cut short by the Supreme Court's opaque decision in *California Dental Ass'n v. FTC*,¹³⁸ which held that the quick look was appropriate in some cases, just not in this particular case, but then said nothing more as to when, where, and how the quick look might apply in future cases.¹³⁹

The second, and more troubling, critique of antitrust enforcement has been the widespread adoption of a truncated version of decision theory, which was originally developed in the computer science, statistical, and business literatures. What has come to be known as error cost analysis derives from the decision theory and related game theory approaches developed by John von Neuman and Oskar Morgenstern dating back to the 1940s.¹⁴⁰

Table 2: Decision Theory Versus Error Cost Analysis

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

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

137. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460–64 (1986); *NCAA v. Bd. of Regents*, 468 U.S. 85, 109 (1984).

138. 526 U.S. 756 (1999).

139. *Id.* For the story on how the Court was made aware of the “information asymmetries” and “markets for lemons” arguments it highlighted in *California Dental*, see Stephen Calkins, *California Dental Association: Not a Quick Look but Not The Full Monty*, 67 ANTITRUST L.J. 495 (2000).

140. JOHN VON NEUMANN & OSKAR MORGENSTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* (1944).

what set of rules, procedures, and institutions minimize the total costs of getting it wrong or maximize the benefits of getting it right.

Scholars in many areas of the law have applied decision theory in formulating and evaluating rules, procedures, and institutions. These include criminal, constitutional, contract, and most forms of regulatory law.¹⁴¹ Professor Brett Frischmann has called the assessment of the predicted benefits of getting it right “accuracy benefits.”¹⁴² Numerous scholars have referred to the assessment of the predicted costs of getting it wrong as “error costs.”¹⁴³ Most of the time the analysis includes both the predicted benefits of getting it right measured against the predicted costs of getting it wrong.

In contrast, antitrust law has relied almost entirely on analyzing error costs alone. The introduction of error cost analysis into antitrust scholarship came in then-Professor Frank Easterbrook’s 1984 article, *The Limits of Antitrust*.¹⁴⁴ This article has been widely cited and incorporated into many bodies of scholarship and a growing number of judicial opinions.¹⁴⁵

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

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

141. See David Crump, *Game Theory, Legislation, and the Multiple Meanings of Equality*, 38 HARV. J. ON LEGIS. 331 (2001); Jeremy D. Fraiberg & Michael J. Trebilcock, *Risk Regulation: Technocratic and Democratic Tools for Regulatory Reform*, 43 MCGILL L.J. 835 (1998); Tom Ginsburg, *Economic Analysis and the Design of Constitutional Courts*, 3 THEORETICAL INQUIRIES L. 49, 53 (2002); Andrew S. Gold, *A Decision Theory Approach to the Business Judgment Rule: Reflections on Disney, Good Faith, and Judicial Uncertainty*, 66 MD. L. REV. 398 (2007); Michael J. Saks, *Blaming the Jury*, 75 GEO. L.J. 693, 696 n.14 (1986); Michael Sinclair, *The Proper Treatment of “Interpretive Choice” in Statutory Decision-Making*, 45 N.Y.L. SCH. L. REV. 389 (2002); Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003 (2003).

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

143. See, e.g., Symposium, *Neo-Chicago Antitrust*, 78 ANTITRUST L.J. 37 (2012). Error cost analysis in antitrust normally is traced back to Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 14–17 (1984).

144. *Id.*

145. See McChesney, *supra* note 134, at 13 (discussing citations to *The Limits of Antitrust* by category from 1984 to 2009).

will be quickly and effectively neutralized by the market.¹⁴⁶ These assumptions are unlikely to be true in all cases, but most error cost analysis in antitrust does not even attempt to make the fine-grained adjustments to determine when such assumptions may be justified in the real world.

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

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

Such arguments are, in the absence of empirical support on a case-by-case basis, primarily a preference for a laissez-faire marketplace. Laissez-faire politics or economics is a legitimate normative preference even if it is not our cup of tea. But that is a debate that must be settled in any particular era, and revisited as needed, by the broader democratic body politic. The role of a technocrat in a society such as ours should be to execute, not make, these fundamental value choices.

III. WHY MORE DEMOCRACY IS GOOD FOR ANTITRUST

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

146. Alan Devlin & Michael S. Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. 75 (2010).

behavior would not be dismissed because judges could think up a plausible explanation for why the defendants might not have colluded. Congress would not leave antitrust law to the professional mercies of the federal enforcement agencies, antitrust lawyers, and economists. Serious legislative revision would be debated and undertaken.

Perhaps as importantly, an institutional rebalance will have a procedural side. Consider the following thought experiment: Why don't antitrust enforcement agencies resemble the Federal Reserve Board? The Federal Reserve was created in 1913 to furnish an elastic currency, to discount commercial paper, and to establish a more effective system of supervising the U.S. banking system.¹⁴⁷ It is profoundly and deliberately antidemocratic in nature. Its proceedings are closed, it hears no evidence, and affected parties have no participatory rights. While its Board of Governors is appointed by the President and confirmed by the Senate, it is largely self-regulating and self-funded. Its chairmen typically are reappointed regardless of the party in control of the White House, and its actions are supposed to be free from political control. Congressional oversight is largely limited to hectoring the chairman. In the recent financial crisis, the Fed exercised extraordinary powers at or beyond its stated powers in an effort to prevent a worldwide economic collapse.¹⁴⁸ Outside the United States, most of the national central states enjoy similar powers and similar degrees of independence within their own economies.¹⁴⁹

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

Of course, few would want a system of antitrust enforcement that operates in a totally partisan fashion. One can imagine (but not desire) a world where competition policy wildly gyrates depending on election

147. Federal Reserve Act of 1913, Pub. L. No. 63-43, 38 Stat. 251–75 (codified as amended in scattered sections of 12 U.S.C.).

148. See ANDREW ROSS SORKIN, *TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM—AND THEMSELVES* (2009).

149. PUBL'N COMM., BD. OF GOVERNORS OF THE FED. RESERVE SYS., *THE FEDERAL RESERVE SYSTEM: PURPOSES AND FUNCTIONS 1* (9th ed. 2005), available at http://www.federalreserve.gov/pf/pdf/pf_complete.pdf.

results, appointments are dictated by party loyalty without regard to expertise,¹⁵⁰ certainty is an illusion, and each enforcement decision is second guessed by Congress as is the case with too many executive branch and theoretically independent agency decisions.

Redressing antitrust's democracy deficit on the procedural side can be done with the tools of administrative law. Administrative law is the body of law that controls the procedures of governmental decision making.¹⁵¹ It allows interested persons to participate in decisions that affect their interests. Normally, it requires appropriate notice, the right to be heard, fair procedures, protection of fundamental rights, and judicial review of the resulting decision. These basic features are present in the administrative laws of most foreign legal systems and are part of a growing international consensus.¹⁵² The tradeoff is that the decisions of administrative agencies that properly follow these strictures normally are granted a degree of deference as to the interpretation of the laws they enforce.¹⁵³ Frequently, but not inevitably, private parties also have the right to proceed with actions for damages against private parties who violate their regulatory obligations and even against the government itself when it acts unlawfully, either substantively or procedurally. These tools of administrative law are available to make antitrust enforcement decisions more transparent and more responsive to the interests that the antitrust laws were meant to serve, thereby promoting both better decision making and greater democratic legitimacy.

CONCLUSION

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

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

151. *See, e.g.*, 1 JACOB A. STEIN, GLENN A. MITCHELL & BASIL J. MEZINES, ADMINISTRATIVE LAW § 1.01 (2012) (defining administrative law as the law "relat[ing] to the powers, functions and procedures of the various administrative agencies and the methods provided for judicial review of their decisions").

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

153. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).