SAVING ANTITRUST

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INTRODUCTION

Trashing antitrust is common among distinguished intellectuals of every stripe. Some would like to see the law sharply curtailed. Robert Bork argues that antitrust exhibits "the

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paradox of great popularity and vigorous enforcement coupled with *internal contradiction and intellectual decadence*."[1] Frank Easterbrook laments that "the history of antitrust is filled with decisions that now seem blunders."[2] Two public choice scholars even state bluntly that "it is commonly recognized that antitrust has failed."[3]

Even commentators who believe in the need for antitrust are critical of its evolution. Herbert Hovenkamp, who has co-authored the leading treatise on antitrust law, notes that part of the treatise's mandate has been "to bring order out of a set of cases that are in fact *hopelessly chaotic*."[4] Referring to the confusing and amorphous standards that currently guide antitrust enforcement, Glen Robinson says simply that "[t]oday, antitrust is buried deep in the *mud cycle*."[5] Another commentator, noting the overuse of economic models in antitrust, laments how "[i]ts fervor fading, its doctrines fraying, antitrust is becoming a religion without a cause."[6]

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1. ROBERT H. BORK, THE ANTITRUST PARADOX 408 (1978) (emphasis added) [hereinafter BORK, PARADOX]; *see also id.* at 418 ("[M]odern antitrust has so decayed that the policy is no longer intellectually respectable."). Note that over a decade before Bork, another scholar associated with the Chicago School, George Stigler, pointed to the ambiguous results of antitrust. *See* George J. Stigler, *The Economic Effects of the Antitrust Laws*, 9 J.L. & ECON. 225, 236 (1966) [hereinafter Stigler, *Economic Effects*] (noting that the Sherman Act "appears to have had only a very modest effect in reducing concentration" yet "has reduced the availability of the most efficient methods of collusion and thereby reduced the amount and effects of collusion").

2. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 3 (1984) [hereinafter Easterbrook, *Limits*]. Similarly, Lino Graglia believes that the history of antitrust is one of "paradoxical results." Lino A. Graglia, *Is Antitrust Obsolete?*, 23 HARV. J.L. & PUB. POL'Y 11, 17 (1999).

3. Fred S. McChesney & William F. Shughart II, *The Unjoined Debate*, *in* THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE 341 (Fred S. McChesney & William F. Shughart II eds., 1995) [hereinafter McChesney & Shughart, *Unjoined Debate*]; *see also* Fred S. McChesney, *Be True to Your School: Chicago's Contradictory Views of Antitrust and Regulation*, *in* THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE 324 (Fred S. McChesney & William F. Shughart II eds., 1995) [hereinafter, McChesney, *Be True*] ("After a century of experience with antitrust, almost no one would disagree that it has developed in thoroughly undesirable ways.").

4. Herbert Hovenkamp, *The Areeda-Turner Treatise in Antitrust Analysis*, 41 ANTITRUST BULL. 815, 829 (1996) (emphasis added) [hereinafter Hovenkamp, *Areeda-Turner Treatise*].

5. Glen O. Robinson, *On Refusing to Deal with Rivals*, 87 CORNELL L. REV. 1177, 1232 (2002) (emphasis added).

6. Frederick M. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511, 1512–13 (1984); *see*

Outside the academic world, antitrust has not fared any better. On the one hand, mergers and acquisitions have taken place across a variety of industries—from banks to airlines to media interests.[7] Consumer advocates correctly point out the pernicious effects of consolidation,[8] which competition law seems either incapable or unwilling to stop. On the other hand, the business press revels in describing overzealous antitrust enforcement that is trying to save the world from monopolies in such markets as that for "'superpremium' ice cream."[9] In an environment bereft of clear rules or standards, legal advice becomes necessarily muddled.[10]

How has antitrust law—once heralded by the United States Supreme Court as "the Magna Carta of free enterprise . . . [and] as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms"[11]—

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also id. at 1567 ("Inevitably, antitrust is drifting backward, heading toward irrelevancy—reminiscent of the demise of the British common law bans on restraints of competition at the hands of judges sensing the libertarian 'spirit of the age.'"). For a more optimistic view of the current state of antitrust, see RICHARD A. POSNER, ANTITRUST LAW 266 (2d ed. 2001) [hereinafter POSNER ANTITRUST] ("[A]ntitrust doctrine is in pretty good shape.").

7. *See* Reza Dibadj, *Deregulation: A Tragedy in Three Acts*, WASH. POST, Sept. 13, 2003, at A21; William Safire, *On Media Giantism*, N.Y. TIMES, Jan. 20, 2003, at A19.

8. *See, e.g.*, *Deregulated*, CONSUMER REP., July 2002, at 30. *Cf.* Steven Pearlstein, *Regulation Vs. Competition: No Winner Yet*, WASH. POST, Nov. 2, 2002, at A14 (discussing failure of antitrust in bringing competition to newly deregulated industries such as electricity and telecommunications).

9. Holman W. Jenkins, *FTC Screams for Antitrust*, WALL ST. J., Mar. 12, 2003, at A19.

10. Antitrust authorities themselves seem to have recognized this dilemma. *See, e.g.*, Carl Shapiro, Antitrust in Network Industries, Address Before the American Law Institute and American Bar Association (Jan. 25, 1996), *available at* http://www.usdoj.gov/atr/public/speeches/shapiro.htm [hereinafter Shapiro Speech] ("I cannot stand before you today and give you simple, clear guidance that you can use to counsel your clients, uncluttered by the necessarily complex facts specific to your industry or your company."); Daniel L. Rubinfeld, Competition, Innovation, and Antitrust Enforcement in Dynamic Network Industries, Address Before the Software Publishers Ass'n (Mar. 24, 1998), *available at* http://www.apeccp.org.tw/doc/USA/Policy/speech/1611.htm ("The challenge for antitrust law is to distinguish legitimate pro-competitive innovation strategies that harm competitors simply because they are successful from those that are motivated for predatory reasons.").

11. United States v. Topco Assocs., 405 U.S. 596, 610 (1972); *see also* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 104 n.27 (1984) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.").

descended into this mess? To date, much of the leading legal and economic analysis has been piecemeal and internal to conventional antitrust scholarship: arguing for or against the wisdom of a particular case or doctrine, or for or against one economic theory or another. In distinction to existing commentary, this article attempts a systemic deconstruction of antitrust, followed by a reconstruction of the economic and institutional foundations of a new competition law. Paradoxically, saving antitrust will require looking beyond its traditions to incorporate learnings from economic regulation.

Part I attempts to link antitrust's modern woes to two root causes: predominantly *laissez-faire* economics and limited institutions. In their zeal to adopt economic models of "efficiency," many modern interpreters—most notably those associated with the Chicago School—have tantalizingly set "consumer welfare" as the goal of antitrust, but erroneously defined this standard under the false auspices of neoclassical price theory. In doing so, these scholars have failed to pay attention to the legislative history of the antitrust statutes. In parallel, modern advances in economics generated by game theory and dynamic market analysis have typically struggled to enter the mainstream. Some of these new insights—for example, noncontestable markets that create barriers to entry, or predatory pricing and vertical integration that raise rivals' costs—argue for a more active role for competition law. Ironically, other advances—such as core theory[12]—point to a more limited role in other areas. In new economy industries, intellectual property, network effects, and path dependence further complicate the analysis. Finally, when it comes to institutions, ex post private common law adjudication is simply not up to the task of setting economic policy.

Part II lays the groundwork for the new competition law. First, it takes issue with the contractarian arguments espoused by public choice scholars to argue that despite antitrust's current failings, government intervention is essential to protecting the integrity of markets. Second, it posits that as economic regulation has evolved it no longer makes sense to treat antitrust and regulation as separate bodies of doctrine—unified, they should form the building blocks of a new competition law.

12. Core theory posits that competitive equilibrium may not be attainable in markets characterized by high fixed costs. *See infra* Part I.A.3.

Part III outlines a new competition law which attempts to blend insights from economic regulation to remedy antitrust's current economic and institutional problems. Competition law economics must incorporate insights from Post-Chicago analysis and core theory. Its economics must rest on empirical and behavioral reality. The goal should be to emulate a monopsonist consumer. Analytical methods must emphasize three elements: structural industry analysis, pragmatic market definitions, and isolation of bottlenecks to competition.

Finally, the article argues that such a vision can only occur through a revamping of institutions. Specifically, it argues for substantial changes to the nature of private antitrust litigation and the creation of a cross-industry Competition Office of limited powers to implement competition policy. Public policy should be set ex ante through public law. The ultimate goal is to look across legal and economic disciplines to protect the integrity of markets. A happy by-product is the reconciliation of antitrust and regulation.

I. DECONSTRUCTING ANTITRUST

A. *Economic Battles*

A useful lens through which to begin analyzing antitrust is that of economics. More specifically, what have the key interpretative battles been?

1. Chicago's Ascendancy

Up until very recently, the so-called "Chicago School" has successfully supplied an overarching economic methodology with which to analyze antitrust. Unfortunately, the paradigm suffers from numerous methodological shortcomings.

a. *Inventing Consumer Welfare*

The minimalist nature of the antitrust statutes present interpretative challenges.[13] Among the interpretative method-

13. The most important antitrust statute is the Sherman Act of 1890 which consists of two short sections. Section 1 outlaws collusion: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or

ologies, economics has risen to the forefront. This approach owes a large part of its success to the achievements of the "Chicago School," so named since many of its leaders trained under the tutelage of Aaron Director and Edward Levi at the University of Chicago.[14] Much of Chicago's influence can be traced to

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commerce among the several States, or with foreign nations, is declared to be illegal." Sherman Act of 1890, 15 U.S.C. § 1 (2003). Section 2 makes monopolization a crime: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2. Similarly, the most important provision in the Clayton Act of 1914, section 7, prohibits mergers that have an anticompetitive effect:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce . . . where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Clayton Act of 1914, 15 U.S.C. § 18 (2003). The Federal Trade Commission (FTC) Act of 1914 is similarly vague in its most important provision, since it simply states that "[u]nfair methods of competition in or affecting commerce, and unfair acts or deceptive practices in or affecting commerce, are hereby declared unlawful." Federal Trade Commission Act of 1914, 15 U.S.C. § 45(a)(1) (2003). As Robert Lande points out, "[t]he antitrust laws are among the least precise statutes enacted by Congress. The central terms, including 'competition,' 'unfair methods of competition,' 'conspiracy in restraint of trade,' and 'monopolize,' are inherently vague and not self-defining." Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 81 (1982); *see also* Mark A. Lemley and David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 573 (1998) (observing how these statutes consist of "majestically general language overlaying a byzantine mixture of economic relationships"). The legislative history, however, is somewhat illuminating. *See infra* Part I.A.1.b.

14. Of course what is called the "Chicago School" does not represent the views of the University of Chicago. As Robert Bork stated:

> My intellectual indebtedness is particularly heavy. Much of what is said here derives from the work of Aaron Director, who has long seemed to me . . . the seminal thinker in antitrust economics and industrial organization. His reputation is immense among those who know him; that it is not more widespread is entirely due to his choice to publish little and rest content with the establishment of a strong oral tradition at the law school of the University of Chicago . . . . Closely associated with Director in those days was Edward H. Levi, without question the most brilliant classroom teacher I have ever seen. He heavily influenced all my views of antitrust and of law generally. . . . There is much more to be said of Levi and his intellectual influence in the law school at that time.

BORK, PARADOX, *supra* note 1, at ix–x. For a rare example of Director and Levi's writing, see Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV 281 (1956). Issue one of Volume seventeen of the *Mis-*

the appointment of several of its intellectual leaders to the federal judiciary—notably Richard Posner, Robert Bork, and Frank Easterbrook.[15] Posner, in particular, has successfully served as Chicago's ambassador given his exceptional scholarly productivity.[16]

Chicago's principal allure is its simplicity. Based on neoclassical price theory, it envisions a world of simple downward sloping demand schedules neatly intersecting supply curves at equilibrium.[17] The goal is efficiency; more specifically, maximizing "allocative efficiency" which seeks to increase the aggregate welfare of society by rearranging resources so that they occupy their most valued use.[18] There are a number of prob-

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sissippi College Law Review was dedicated to Director and Levi's article and included a reprint. 17 MISS. C. L. REV. 1, 7 (1996). Also appearing in the issue was an article by Thomas C. Arthur entitled *The Influence of Levi's Legal Process on Bork's The Antitrust Paradox: June 5*, 17 MISS. C. L. REV. 124 (1996).

15. Chicagoans, of course, did not originate the economic analysis of antitrust. *See* Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 223 (1985) [hereinafter Hovenkamp, *After Chicago*] ("[E]arlier courts and enforcers may have recognized economic goals for antitrust policy, but they mixed these goals in some way with distributive goals."). Among the earliest economic applications was the analysis of § 1 conspiracy doctrine. *See, e.g.*, James A. Rahl, *Conspiracy and the Anti-Trust Laws*, 44 NW. U. L. REV. 743, 768 (1950) (observing that "the courts are really attempting to turn the Sherman Act into something of the economic document that it needs to be"); Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 661 (1962) (analyzing the agreement problem from the perspective of an economist). For a more recent discussion of the economics of the conspiracy doctrine, see KEITH N. HYLTON, ANTITRUST LAW 75–77 (2003) [hereinafter HYLTON, ANTITRUST]. Some early economic contributions went beyond conspiracy analysis. For instance, Derek Bok advocated the economic analysis of market shares in Clayton Act merger analysis. *See* Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226 (1960).

16. *See, e.g.*, Larissa MacFarquhar, *The Bench Burner*, THE NEW YORKER, Dec. 10, 2001, at 78 ("As much as for his contentious opinions, Posner is famous for his freakish productivity. He publishes a book every half hour. Now sixty-two, he has written thirty-one books, more than three hundred articles, and nearly nineteen hundred judicial opinions.").

17. Lawrence Sullivan notes the "elegant certainties of Chicago school economics." Lawrence A. Sullivan, *An Inquiry Into Antitrust, Intellectual Property, and Broadband Regulation as Applied to the "New Economy,"* 52 CASE W. RES. L. REV. 41, 57 (2001). For an overview of Chicago School economics, see William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221 (1989).

18. There is also the notion of "productive efficiency" which is increased as a firm manages to reduce its costs. For a good discussion of efficiency definitions, see Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 18 (2001) ("Allocative efficiency is present when goods and services are allocated to the uses in which they have the highest value. Productive efficiency is present when producers use goods and services in such a

lems with the efficiency criterion, however. First, the allocative efficiency mantra, theoretically based on Pareto optimality,[19] artificially ignores distributional concerns.[20] Second, by ignoring transaction costs[21] and behavioral biases,[22] it implicitly assumes that the initial allocation of resources does not matter.[23] As Herbert Hovenkamp points out, "[t]o date, no

manner as to minimize costs, subject to technological constraints."); Lande, *supra* note 13, at 78 ("Whereas allocative efficiency concerns overall placement of resources in the economy, productive, or technical, efficiency refers to individual firms' use of their resources in the most effective manner."); Walter Adams & James W. Brock, *Antitrust, Ideology, and the Arabesques of Economic Theory*, 66 U. COLO. L. REV. 257, 284 (1995).

19. As Richard Posner describes, a "Pareto-superior transaction . . . is one that makes at least one person better off and no one worse off." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 14 (5th ed. 1998). Given that third-parties are often made worse off, economists typically use a less stringent form of optimality, called Kaldor-Hicks efficiency. Under Kaldor-Hicks, a transaction is said to be efficient if those that are made better off "could compensate the losers, whether or not they actually do." *Id.* Thus, under Kaldor-Hicks, efficiency can be increased even though some members of society are left worse off.

20. *See* Hovenkamp, *After Chicago*, *supra* note 15, at 245–46 ("In the real world, efficiency and distributional *effects* generally cannot be separated from one another. It would probably be impossible to implement a policy that increased social wealth without affecting the way wealth is distributed."); Adams & Brock, *supra* note 18, at 324; Lande, *supra* note 13, at 75; Page, *supra* note 17, at 1226. For an argument that Pareto optimality is inconsistent with individual autonomy when individuals face more than two alternatives, see Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152 (1970).

21. These include "search and information costs, bargaining and decision costs, policing and enforcement costs." Carl J. Dahlman, *The Problem of Externality*, 22 J.L. & ECON. 141, 148 (1979); *see also* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 12 (2d ed. 1989) ("In general, transaction costs include the costs of identifying the parties with whom one has to bargain, the costs of getting together with them, the costs of the bargaining process itself, and the costs of enforcing any bargain reached."); Robert C. Ellickson, *The Case for Coase and Against "Coaseanism,"* 99 YALE L.J. 611, 615 (1989) (identifying transaction costs as "(1) get-together costs, (2) decision and execution costs, and (3) information costs").

22. Behavioral economists have identified an "endowment effect" where individuals demand more to give up an asset than to acquire it. This suggests that even in a world with negligible transaction costs, the initial allocations matter. *See, e.g.*, Jennifer Arlen, Comment: *The Future Behavioral Economic Analysis of Law*, 51 VAND. L. REV. 1765, 1771 (1998) ("The endowment effect challenges the fundamental assumption of economics that, absent wealth effects, an individual's maximum willingness to pay for a good should equal his minimum sale price. *This assumption is at the heart of the conclusion that in markets with de minimis transaction costs, commodities will flow to the people who value them most.*") (emphasis added); *see also* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1483 (1998) ("[E]ven when transaction costs and wealth effects are known to be zero, initial entitlements alter the final allocation of resources.").

23. This tradition claims its intellectual roots in a landmark article by Ronald

compelling argument has been made for a policy of maximizing satisfaction from a given starting point that says nothing about the location of the starting point. Until such an argument is made, the notion of 'allocative efficiency' is, at best, a trivial guide to policymaking."[24]

Highlighting this conservative ideological bent, other critics have variously labeled neoclassical law and economics as "avowedly anti-populist"[25] or as having an "oligarchic underside."[26] Intellectually, efficiency becomes a self-fulfilling nonfalsifiable prophecy. As Frederick Rowe argues, somewhat humorously:

> Per the truisms and axioms of circular logic, the market ensures efficiency and cures inefficiency if meddling governments keep out. Offering easy answers to antitrust law's hardest questions, the Efficiency Model tells what is efficient—but never when. *Over time's rainbow, in the radiance of revelation, what is efficient is what is.*[27]

At this point, one might reasonably ask why any of this discussion is relevant to antitrust. After all, as the Supreme

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Coase. *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Coase posits that private parties can theoretically achieve an optimal distribution of resources regardless of how initial entitlements are distributed. *Id.* at 15 ("It is always possible to modify by transactions on the market the initial legal delimitation of rights. And, of course, if such market transactions are costless, such a rearrangement of rights will always take place if it would lead to an increase in the value of production."). However, his Chicago School interpreters conveniently limit their analysis to the first part of the article where Coase highlights an imaginary world of perfect competition and zero transaction costs. *See id.* at 3–8.

24. Hovenkamp, *After Chicago*, *supra* note 15, at 248.

> However, any argument in favor of a more general policy of maximizing efficiency while ignoring distributive concerns must meet one objection that no one has answered. The 'efficient' allocation of resources in any particular society is substantially a function of the way that society's wealth is distributed initially. . . . The principle that the efficient outcome is a function of the initial distribution of wealth deprives the efficiency goal of a great deal of its intellectual appeal.

Id. at 247.

25. Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 CORNELL J.L. & PUB. POL'Y 239, 248 (1999).

26. RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA, 1888–1992, at 7 (1996).

27. Rowe, *supra* note 6, at 1549 (emphasis added). For a legal critique of neoclassical economics, see Reza Dibadj, *Beyond Facile Assumptions and Radical Assertions: A Case for Critical Legal Economics?*, 2003 UTAH L. REV. (forthcoming 2003) [hereinafter Dibadj, *CLE*].

Court has pointed out, antitrust's goal is to maximize "consumer welfare,"[28] so why critique total welfare (or allocative efficiency)? Remarkably, through a curious and often overlooked sleight of hand, the Chicago School has managed to redefine consumer welfare as allocative efficiency.[29] Bork, for instance, believes that the "closer the members of the industry come to maximizing their profits, the closer they come to maximizing the welfare of consumers"[30] since it is an "obvious fact that more efficient methods of doing business are as valuable to the public as they are to businessmen."[31] Indeed, for him, the "whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare."[32]

Similarly, Frank Easterbrook cleverly equates efficiency with consumer welfare,[33] and Richard Posner extols the virtues

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28. *See, e.g.,* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 107 (1984). In the words of Areeda and Hovenkamp:

> Thus we say that the principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively, while yet permitting them to take advantage of every available economy that comes from internal or jointly created production efficiencies, or from innovation producing new processes or new or improved products.

PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 100a (2d ed. 2000); *see also* HYLTON, ANTITRUST, *supra* note 15, at 321 ("The ultimate aim of antitrust law is to benefit consumers.").

29. *Cf.* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 76 (2d ed. 1999) [hereinafter HOVENKAMP, ANTITRUST POLICY] ("Many people who probably believe that maximizing allocative efficiency should be the exclusive goal of antitrust, *state* that the goal of antitrust should be to maximize the welfare of consumers. Spoken in such terms, the goal sounds very attractive and certainly less technical than 'potential Pareto efficiency.'").

30. BORK, PARADOX, *supra* note 1, at 97.

31. *Id.* at 4.

32. *Id.* at 91; *see also id.* at 109 ("[A]ntitrust should concern itself solely with allocative and productive efficiency."). As Robert Lande observes, "Judge Bork asserts that the sole purpose of the Sherman Act was enhancement of 'consumer welfare,' a term of art . . . . This view of 'consumer welfare' includes maximum economic efficiency but excludes anything giving preference to consumers over monopolists or any concern with 'unfair' transfers of wealth from consumers to monopolists." Lande, *supra* note 13, at 84; *see also* Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intra-Market Second-Best Tradeoffs*, 98 MICH. L. REV. 849, 858 n.21, 905 n.150 (2000).

33. Frank H. Easterbrook, *Does Antitrust Have a Comparative Advantage?*, 23 HARV. J.L. & PUB. POL'Y 5, 6 (1999) [hereinafter Easterbook, *Comparative Advantage*] ("Modern antitrust law thus is a search for economic explanations of problematic conduct. If the explanations show the conduct *efficient—and therefore ul-*

of efficiency, even suggesting that the "small businessman usually is helped rather than hurt by monopoly."[34] Perhaps most stunning is the lack of any empirical evidence to support these sweeping claims—in a frank sentence, Bork even admits that his vision of antitrust "must avoid any standards that require direct measurement and quantification of either restriction of output or efficiency."[35] Beyond its methodological weaknesses, the redefinition is rhetorically masterful. As Robert Skitol notes, "[w]hile Chicago School adherents trumpeted their support of 'consumer welfare,' they used that term in a counterintuitive manner to mean overall economy-wide efficiency rather than the protection of consumers as a class distinct from producers or a producer's shareholding owners."[36] The point, of course, is not that efficiency is unimportant. Rather, it is that consumer welfare means more than just efficiency.[37]

b. *Downplaying Legislative History*

To buttress his argument, Judge Bork claims that the legislative history of the antitrust statutes does "not support any claim that Congress intended the courts to sacrifice [his 'efficiency' version of] consumer welfare to any other goal."[38] Yet in *Brown Shoe*,[39] the Supreme Court observed something very different; namely, that in enacting the antitrust laws, "Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon local control of industry and upon small business."[40] This is a far cry from allocative efficiency.

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timately to consumers' benefit—then the court stays its hand; if not, the court condemns the conduct.") (emphasis added).

34. POSNER ANTITRUST, *supra* note 6, at 2.

35. BORK, PARADOX, *supra* note 1, at 117. Bork continues:

> As a source of antitrust norms, then, the Efficiency Model is an illusion. Since allocative efficiency is indeterminate and productive efficiency is circular, no legal criteria emerge for assessing competitive prospects in any given case. . . . Both lack empirical content testable by proof or refutation, against which any particular transaction can be matched.

Id. Cf. Rowe, *supra* note 6, at 1550.

36. Skitol, *supra* note 25, at 249.

37. *See infra* Part III.A.

38. BORK, PARADOX, *supra* note 1, at 66.

39. Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

40. *Id.* at 333.

Virtually all detailed studies of the legislative history agree with *Brown Shoe* and disagree with Bork. Robert Lande, for instance, demonstrates that "the legislative history of the Sherman Act reveals a total lack of concern for allocative inefficiency,"[41] adding that "[n]o member of Congress, however, when subjectively designing or voting for any antitrust law, was, or is, under any compunction to be held to the Pareto principle."[42] Rather,

> Congressional distaste for the pricing and output consequences of monopoly pricing must therefore be rooted in other concerns. These concerns include the distribution of wealth between consumers and producers and, secondarily, the maintenance of productive efficiency, preservation of economic opportunities for small enterprises, and the concentration of economic, social and political power in a few hands.[43]

After analyzing the Clayton and Federal Trade Commission (FTC) Acts,[44] Lande concludes that the "antimerger statutes were passed primarily to benefit consumers directly. The overriding economic purpose was the prevention of consumer exploitation through supracompetitive pricing, a likely consequence of merger-created market power."[45] Other leading

41. Lande, *supra* note 13, at 83; *see also* Rowe, *supra* note 6, at 1516 ("[T]hat the Congress of 1890 did *not* enact that day's pieties about the fittest survivors or codify a timeless economic calculus seems plain."); Skitol, *supra* note 25, at 249 ("The idea that antitrust is about 'allocative efficiency' and has nothing to do with political, social or wealth redistribution concerns does not square with what we know to have been the historical roots of antitrust policy."); Areeda & Hovenkamp, *supra* note 28, ¶ 101.

42. Lande, *supra* note 13, at 77. Lande states:

> It is extremely unlikely that the legislators' distaste for monopoly pricing could have been based upon its impact on allocative efficiency: the concept of allocative efficiency was, at best, on the verge of discovery by leading economic theorists when the Sherman Act was passed.
>
> More importantly, leading economists of the day had very little influence on the passage of the Act.

Id. at 88–89.

43. *Id.* at 89.

44. *See id.* at 106–141. "The primary goals of the Clayton Act were virtually identical to those of the Sherman and FTC Acts." *Id.* at 140–41. Note, for example, the FTC Act's moral undertone in prohibiting "unfair methods of competition." *See supra* note 13.

45. Lande, *supra* note 13, at 141; *see also id.* at 150 ("Each antitrust law grew in part out of a desire to define and protect consumers' property rights, an antipathy toward corporate aggregations of economic, social, and political power, and a

scholars arrive at similar conclusions. Herbert Hovenkamp shows how a desire to protect competitors runs through the legislative history.[46] For example, the Robinson-Patman Act[47] was designed to protect small retail grocers from large grocery chains.[48] Derek Bok shows how the legislative history of the 1950 Celler-Kefauver amendments[49] to § 7 of the Clayton Act "centered on the virtues of the small entrepreneur to an extent seldom duplicated in economic literature."[50] Even Richard Posner admits that "[n]o doubt most of the legislators whose votes were essential to the enactment of these statutes cared more about the distribution of income and wealth and the welfare of small business and particular consumer groups than they did about allocative efficiency."[51]

Those commentators who believe efficiency played a role in the legislative history nonetheless see efficiency in constant tension with distributional goals. Lawrence Sullivan, for instance, argues for antitrust's own "homiletic tradition, which celebrates and reinforces values clustered around fairness and efficiency."[52] Similarly, Rudolph Peritz conceives of conflicting rhetoric in antitrust:

> One rhetoric has reflected a primary commitment to individual liberty, to competition free of government power, in appeals to freedom of contract, wealth maximization, private property rights, or freedom of speech. The other rheto-

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concern for small entrepreneurs.").

46. *See* Hovenkamp, *After Chicago*, *supra* note 15, at 249–55.

47. Robinson-Patman Act, 15 U.S.C. §§ 13–13a (2003).

48. *See* Hovenkamp, *After Chicago*, *supra* note 15, at 253.

49. § 7 originally prohibited uncompetitive horizontal mergers obtained via purchase of stock. These amendments also restricted the purchase of assets. See *supra* note 13 for the amended statute.

50. Bok, *supra* note 15, at 236–37; *see also* Hovenkamp, *Areeda-Turner Treatise*, *supra* note 4, at 824–25. The Supreme Court's view seems in line with Bok and Hovenkamp's. *See* United States v. Von's Grocery Co., 384 U.S. 270, 275 (1966) ("Like the Sherman Act in 1890 and the Clayton Act in 1914, the basic purpose of the 1950 Celler-Kefauver Act was to prevent economic concentration in the American economy by keeping a large number of small competitors in business."); Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962) ("The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy.").

51. POSNER ANTITRUST, *supra* note 6, at 35. Public choice theorists seem to agree. *See* McChesney, *Be True*, *supra* note 3, at 331 ("[A]lmost all other inquiries into the passage of the antitrust statutes have disagreed with Bork's reading of the legislative history . . . .").

52. Sullivan, *supra* note 17, at 45.

> ric has reflected a primary commitment to rough equality, to competition free of excessive economic power, in appeals to fair competition, consumerism, majoritarianism, or Jeffersonian entrepreneurialism.[53]

Indeed, Peritz views the blending of common law language of "restraint of trade" and "monopolization" with statutory remedies as a compromise reflecting this duality.[54]

At best, then, efficiency might animate antitrust's history, but it is by no means the only, or the most important, consideration. One option is simply to ignore or downplay this reality—to argue, as Richard Posner has done, that "the motive and meaning of legislation are different things"[55] and cling to a calculus that equates consumer welfare to allocative efficiency. As Herbert Hovenkamp insightfully points out, "[a]t the extreme . . . Chicago School policy . . . permits the antitrust policymaker to ignore the legislative history of the antitrust laws."[56] In suggesting a new competition law in Part III, how-

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53. Peritz, *supra* note 26, at 301.

> The Sherman Act passed through a Congress struggling with tensions between belief and experience; tensions between, on the one side, the economic mythology of artisans and local markets together with the political ideology of a yeoman citizenry and, on the other side, the actuality of a new economic order of large-scale enterprise and national markets. Liberty—both industrial and political—seemed to need government intervention to reestablish competitive markets overrun by powerful trusts and cartels.

Id. at 24.

54. *See id.* at 26:

> In the social and political turmoil of the new economic order, the common-law Sherman Act, with its supplement of uncommon-law remedies, seemed to be reaching for a middle ground between the rhetorics of industrial liberty and fair price, between their logics of competition policy and private property rights, and between their statist and libertarian approaches.

See also Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI.-KENT L. REV. 207, 236 (2003) ("Antitrust long ago diverged from its common law torts roots. It substituted a statutory treble damage remedy and a statutory exception from the American rule for attorneys' fees for the normal rules otherwise applicable in civil litigation.").

55. POSNER ANTITRUST, *supra* note 6, at 35; *Cf.* Areeda & Hovenkamp, *supra* note 28, ¶ 101 ("While these historical concerns must be taken seriously, none is necessarily decisive over modern antitrust policy.").

56. Hovenkamp, *After Chicago*, *supra* note 15, at 232; *see also* Skitol, *supra* note 25, at 248:

> The core of this [Chicago] philosophy is that the sole legitimate objective of antitrust law should be maximization of 'consumer welfare.' Under this view, antitrust policy lost its way under the influence of populist

ever, this article favors a different approach that takes into consideration the political and social reality behind the passage of the antitrust laws.

c. *Assuming Contestability*

Initially separate from the Chicago School's efforts, William Baumol, Robert Willig, and Elizabeth Bailey developed the theory of contestability. Rather than focus on traditional notions of actual competition creating competitive equilibrium, they argued that the threat of competition is enough to discipline a market if firms are free to exit and enter:

> The key element of contestability is that a market is vulnerable to competitive forces even when it is currently occupied by an oligopoly or a monopoly. That is, if any incumbent is inefficient or charges excessive prices or exploits consumers in any other way, successful entry must be possible and profitable. Thus, in contestable markets, entry and exit must be free and easy.[57]

The core of their argument is that in a market with no sunk costs,[58] even a monopolist is vulnerable to the threat of a potential entrant; in other words, the "equilibrium of a contestable market is often a better standard for public policy than the competitive model, particularly in the presence of economies of scale and scope."[59] Baumol and Willig have been very careful

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> concerns with 'small business' welfare and negative attitudes toward both single-firm bigness and industrywide concentration generally. Chicago School advocates denied the legitimacy of any political or social purposes behind antitrust law . . . .

57. Elizabeth E. Bailey, *Contestability and the Design of Regulatory and Antitrust Policy*, 71 AM. ECON. REV. 178, 178 (1981). In Bailey and Baumol's words:

> Formally, a market is defined to be perfectly contestable if no price in that market can be in equilibrium when its magnitude is such as to enable an entrant to undercut it and nevertheless earn a profit. . . . A market is perfectly contestable if firms can enter it and then, if they choose, exit without losing any of their investment.

Elizabeth E. Bailey & William J. Baumol, *Deregulation and the Theory of Contestable Markets*, 1 YALE J. ON REG. 111, 113 (1984) [hereinafter, Bailey & Baumol, *Contestable Markets*].

58. A sunk cost is "an outlay that cannot be recouped without substantial delay." Bailey & Baumol, *Contestable Markets*, *supra* note 57, at 114.

59. *Id.* at 123; *see also id.* at 112 ("It is the presence of sunk costs rather than economies of scale that is of vital significance for both theory and practice."); William J. Baumol et al., *Weak Invisible Hand Theorems on the Sustainability of*

to point out, however, that "contestability theory provides no mechanistic prescriptions or inviolable rules"[60] and that since "there may well be sunk costs and entry barriers at an industry level, a market-by-market analysis within the industry may have to be undertaken."[61] Some Chicago scholars, however, broadly assumed that markets are contestable, and used this to argue against government involvement.[62]

d. Limiting Antitrust

Having equated consumer welfare with allocative efficiency, cast aside the distributional concerns behind the statutes' history, and assumed costless entry and exit, what are the Chicago School's specific policy prescriptions? These scholars envision a limited role for antitrust. Perhaps the best example is Robert Bork's influential book, *The Antitrust Paradox*,[63] where he lucidly lays out his vision of an antitrust that protects only against explicit collusion, large horizontal mergers,[64] and extreme forms of predation:

> The law should be reformed so that it strikes at three classes of behavior:

Multiproduct Natural Monopoly, 67 AM. ECON. REV. 350, 360 (1977) ("We have shown that even under monopoly, the threat of entry can impart some power to the invisible hand."); William J. Baumol, *Contestable Markets: An Uprising in the Theory of Industry Structure*, 72 AM. ECON. REV. 1, 14 (1982) [hereinafter Baumol, *Uprising*] ("[T]he heroes are the (unidentified) potential entrants who exercise discipline over the incumbent, and who do so most effectively when entry is free."); John C. Panzar & Robert D. Willig, *Free Entry and the Sustainability of Natural Monopoly*, 8 BELL J. ECON. 1 (1977); Elizabeth E. Bailey & John C. Panzar, *The Contestability of Airline Markets During the Transition to Deregulation*, 44 LAW & CONTEMP. PROBS. 125 (1981); Don Coursey et al., *Natural Monopoly and Contested Markets: Some Experimental Results*, 27 J.L. & ECON. 91, 111 (1984) ("[T]he behavioral predictions of the contestable market hypothesis are fundamentally correct.").

60. Bailey & Baumol, *Contestable Markets*, *supra* note 57, at 125.

61. *Id.* at 137.

62. *See, e.g.*, Harold Demsetz, *Barriers to Entry*, 72 AM. ECON. REV. 47 (1982).

63. *See* BORK, PARADOX, *supra* note 1.

64. "An economic arrangement between companies performing similar functions in the production or sale of comparable goods or services is characterized as 'horizontal.'" Brown Shoe Co. v. United States, 370 U.S. 294, 334 (1962). By contrast, "[e]conomic arrangements between companies standing in a supplier-customer relationship are characterized as 'vertical.'" *Id.* at 323.

(a) The suppression of competition by horizontal agreement, such as the nonancillary agreements of rivals or potential rivals to fix prices or divide markets.

(b) Horizontal mergers creating very large market shares (those that leave fewer than three significant rivals in any market).

(c) Deliberate predation engaged in to drive rivals from a market, prevent or delay the entry of rivals, or discipline existing rivals. The kinds of predation that are likely to occur have been discussed, and care must be taken not to confuse hard competition with predation.[65]

Bork does not want antitrust to interfere with other arrangements:

> The law should permit agreements on prices, territories, refusals to deal, and other suppressions of rivalry that are ancillary, in the sense discussed, to an integration of productive economic activity. It should abandon its concern with such beneficial practices as small horizontal mergers, all vertical and conglomerate mergers, vertical price maintenance and market division, tying arrangements, exclusive dealing and requirements contracts, "predatory" price cutting, price "discrimination," and the like.[66]

Such a *laissez-faire* perspective is a new layer of reassuring abstraction built upon the belief in allocative efficiency as the supervening objective. After all, if what's good for industry is what's good for consumers,[67] then how can industry concentration be bad? In a world of no sunk costs and costless entry and exit,[68] why wouldn't markets be self-disciplining?[69]

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65. BORK, PARADOX, *supra* note 1, at 405–06.

66. *Id.* at 406; *Cf.* Easterbrook, *Comparative Advantage*, *supra* note 33, at 6 (advocating "being skeptical of antitrust itself, beyond some simple rules such as do not collude").

67. *See supra* notes 30–31 and accompanying text.

68. *See supra* Part I.A.1.c.

69. As Herbert Hovenkamp outlines:

> [T]he economics that the Chicago school applies is rigorously neoclassical, with a narrow conception of entry barriers and a strong belief that the market will discipline most anticompetitive practices more quickly

Despite these facile assumptions, the Chicago's School has even influenced the Supreme Court's thinking, especially during the 1970s and 1980s. Classic cases in this tradition include *United States v. General Dynamics Corp.*,[70] *Continental T.V. v. GTE Sylvania*,[71] and *Matsushita Electric Industrial Co. v. Zenith Radio*.[72] No sooner was Chicago's victory within reach, however, when a new generation of economists began to move away from neoclassical price theory to examine how firms actually behave.[73]

2. Encouraging Competition: Post-Chicago Fights Back

Chicago School analysis, based on the simplistic assumptions of neoclassical price theory ignores at least three realities. First and most simply, it ignores competitor size—more precisely, the idea that scale economies can present barriers to entry and exit, and permit a larger incumbent to squelch competition.[74] Second, the Chicago School downplays transaction costs

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> and accurately than an antitrust tribunal will be able to do. Finally, the Chicago approach deemphasizes structure . . . and thus believes that workable competition can be achieved in all but the most concentrated markets.

Hovenkamp, *Areeda-Turner Treatise*, *supra* note 4, at 822–23; *see also* Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 267 (2001) [hereinafter Hovenkamp, *Post-Chicago*] (noting that for Chicagoans, "the best antitrust policy is one of doing as little as possible, confined to blatant practices such as naked price fixing or market division").

70. 415 U.S. 486 (1974) (rejecting the argument that statistical evidence of increased concentration in the coal industry implies an anticompetitive effect).

71. 433 U.S. 36 (1977) (deciding to relax the level of scrutiny for vertical restrictions from per se prohibition to rule of reason analysis). For a discussion of the significance of these two standards, see *infra* notes 171–177 and accompanying text.

72. 475 U.S. 574 (1986) (viewing claims of predatory pricing with a high level of skepticism).

73. *See also* Ashutosh Bhagwat, *Unnatural Competition?: Applying the New Antitrust Learning to Foster Competition in the Local Exchange*, 50 HASTINGS L.J. 1479, 1486 (1999):

> [N]eoclassical models tend to base their analysis on a static view of competition, which emphasizes the expected results of competition, but does not give serious attention to how the behavior of individual firms leads the market to those predicted equilibria. . . . The ultimate result is a model that is skeptical about the possibility of successful anticompetitive behavior or results, and so tends to strongly oppose governmental intervention in markets as a means to 'protect' or 'foster' competition.

74. *See* Hovenkamp, *After Chicago*, *supra* note 15, at 278 ("[S]cale economies

by assuming a world of perfect information and costless contracting.[75] Third, and perhaps most importantly, its analytical framework is necessarily static.[76] Dynamic analysis, such as game theory, attempts to understand how firms actually behave with their competitors over time.[77]

A new crop of economists, loosely called the "Post-Chicago School,"[78] has used scale and concepts from industrial organization economics—more specifically game and information theory—to show that markets are not perfectly competitive.[79]

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can be used strategically for inefficient purposes.").

75. *See supra* notes 21–23 and accompanying text.

76. In the words of Hovenkamp:

> When we say that a monopolist 'reduces output' we ordinarily do not examine a real world market before and after monopolization occurred and conclude that output was greater before than after. Rather, we compare the output that occurs under the existing monopoly with the *hypothetical* output that would occur in a market that was identical in all respects but for the existence of the monopoly. Importantly, that alternative market does not exist, never did exist, and never will exist.

Hovenkamp, *After Chicago*, *supra* note 15, at 257; *see* Bhagwat, *supra* note 73, at 1487 ("The primary commonality among many of the new approaches, which distinguishes them from the Chicago School, is that they tend to focus more on the details of the competitive process than does price theory.").

77. Game theory essentially "posits that firms' optimal actions incorporate the anticipated reactions of their competitors, and vice versa." Michael A. Carrier, *Antitrust After the Interception: Of a Heroic Returner and Myriad Paths*, 55 STAN. L. REV. 287, 291 (2002) (book review). For an overview of game theoretic approaches, see JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 423–459 (1988) [hereinafter TIROLE IO].

78. For an overview of the Post-Chicago school, see Jonathan B. Baker, *Recent Developments in Economics that Challenge the Chicago School Views*, 58 ANTITRUST L.J. 645 (1989). Post-Chicago analysis can of course be used in realms beyond antitrust and regulation. *See, e.g.*, Lee Fennell, *Common Interest Tragedies*, 98 NW. U. L. REV. (forthcoming 2004) (applying game theory to property law).

79. *See, e.g.*, TIROLE IO, *supra* note 77, at 3 ("[A]nalyses that rely on models of perfect competition may be quite unsatisfactory from a positive and from a normative perspective."); Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 536 (1985) ("Markets do not always function in accordance with the textbook model of perfect competition, and the economic analysis of any situation must be adjusted accordingly."). Empirical economists also take into account market imperfections. *See, e.g.*, W. KIP VISCUSI ET AL., ECONOMICS OF REGULATION AND ANTITRUST 2 (3d ed. 2000) ("Unfortunately, economic reality seldom adheres very closely to the textbook model of perfect competition."). Strictly speaking, transaction cost economics (TCE) is not within the Post-Chicago tradition, notably because of TCE's focus on the ex ante bargaining situation prior to relationship-specific investments. *See* Paul L. Joskow, *Transaction Cost Economics, Antitrust Rules and Remedies*, 18 J.L. ECON. & ORG. 95 (2002) [hereinafter Joskow, TCE]. However, the two approaches can be complementary. *See infra* note 395.

Strategic interactions can be harmful to competition[80] by allowing incumbents to exploit new entrants.[81] This new perspective thus questions Chicago's belief in a limited role for antitrust.[82]

A central insight of the Post-Chicago School is the recognition that new firms can't costlessly enter or exit a market or remain competitive against larger rivals: not only are there barriers to entry to potential competitors, but once a new competitor has entered, an incumbent can use a host of tactics to raise its rivals' costs.[83] More broadly, there is the risk of path dependence: incumbents are able to entrench themselves not because they are more efficient, but because they were there first.[84]

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80. *See, e.g.*, Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219, 225 (1995) ("While Chicagoans assume that the desire to maximize profits drives firms to compete away market imperfections and destabilizes collusive activity, Post-Chicagoans believe that strategizing firms can create or perpetuate market imperfections that can seriously hamper competitive balance.").

81. *See, e.g.*, Avinash Dixit, *The Role of Investment in Entry Deterrence*, 90 ECON. J., 95, 95 (1980) ("Even in the simplest case of one established firm facing one prospective entrant, there are some subtle strategic interactions. The established firm's pre-entry decisions can influence the prospective entrant's view of what will happen if he enters, and the established firm will try to exploit this possibility to its own advantage.").

82. *See, e.g.*, Ian Ayres, *Playing Games with the Law*, 42 STAN. L. REV. 1291, 1315 (1990) (book review) ("The 'new' game theory thus runs against the laissez-faire policy prescriptions of the Chicago school of law and economics.").

83. *See, e.g.*, Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209, 214 (1986) ("Our central argument is that claims of anticompetitive exclusion should be judged according to whether the challenged practice places rival competitors at a cost disadvantage sufficient to allow the defendant firm to exercise monopoly power by raising its price."); Paul L. Joskow & Roger G. Noll, *The Bell Doctrine: Applications in Telecommunications, Electricity, and Other Network Industries*, 51 STAN. L. REV. 1249, 1257 (1999). Raising rivals' costs is similar to the concept of foreclosure developed early in the twentieth century. *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 323–24 (1962) ("[B]y foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a 'clog on competition.'"). However, the new research has provided a far stronger grounding for foreclosure. *See, e.g.*, Hovenkamp, *Post-Chicago*, *supra* note 69, at 319 ("RRC [raising rivals' costs] operates as a kind of substitute for the older antitrust theories of 'foreclosure,' except that the RRC theories are economically speaking far more plausible."). Nonetheless, modern scholars working in the Post-Chicago tradition acknowledge their debt to earlier theories. *See, e.g.*, Joseph F. Brodley & Ching-to Albert Ma, *Contract Penalties, Monopolizing Strategies, and Antitrust Policy*, 45 STAN. L. REV. 1161, 1213 (1993).

84. Mark Roe tees up a number of excellent questions in his discussion of path dependence. *See* Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 663 (1996) ("Classical evolution and path dependence are accretive, slow, and continuous. They look at change through time, with classical

Specifically, a number of distinguished commentators have argued that sunk costs can serve as a potent barrier to entry.[85] In particular, many large-scale infrastructure industries, such as transportation and energy, are noncontestable.[86] Jerry Hausman has shown the importance of sunk costs to the regulation of telecommunications[87] and railroads.[88] Stranded costs in energy are analogous.[89] Perhaps the best example of how simplistic economic analysis can permit anticompetitive behavior is the airline industry. Much of the impetus behind deregulation was the idea that the airline business is contestable—that airplanes "can readily be moved from market to market."[90] As the airline industry approaches oligopoly after years of lax antitrust enforcement, the realization has dawned that incumbent carriers are able strategically to create barriers to entry. Robert Willig, a leading intellectual behind contestability theory,[91] admits as much:

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evolution used to posit a drift toward efficiency, and with path dependence supposing that today's structures need not be ideal, because they must be based on past structures.").

85. *See generally* Hovenkamp, *After Chicago*, *supra* note 15, at 265.

86. For a discussion on separating the contestable from noncontestable portions, see *infra* Part III.A.2.c.

87. *See* Jerry A. Hausman, The Effect of Sunk Costs in Telecommunications Regulation 3 (Oct. 1999) (unpublished manuscript), *at* http://econ-www.mit.edu/faculty/jhausman/files/Colum98_rev3.pdf ("[T]he use of a perfectly contestable market standard fails to recognize the important feature of sunk and irreversible investments—they eliminate costless exit."); *see also* Robert W. Crandall & Jerry A. Hausman, *Competition in U.S. Telecommunications Services: Effects of the 1996 Legislation*, *in* DEREGULATION OF NETWORK INDUSTRIES 87–88 (Sam Peltzman & Clifford Winston eds., 2000) [hereinafter Crandall & Hausman, *U.S. Telecommunications Services*].

88. *See* Jerry Hausman & Stewart Myers, *Regulating the United States Railroads: The Effects of Sunk Costs and Asymmetric Risk*, 22 J. REG. ECON. 287, 308 (2002) ("The STB's [Surface Transportation Board] simulated competitive rate benchmark is too low because it fails to account for the sunk and irreversible nature of much investment in railroads.").

89. *See, e.g.*, Paul L. Joskow, *Deregulation and Regulatory Reform in the U.S. Electric Power Sector*, *in* DEREGULATION OF NETWORK INDUSTRIES 131 (Sam Peltzman & Clifford Winston eds., 2000) [hereinafter Joskow, *Electric Power Sector*].

90. Bailey & Baumol, *Contestable Markets*, *supra* note 57, at 128; *see also* Robert D. Willig, *Antitrust Lessons from The Airline Industry: The DOJ Experience*, 60 ANTITRUST L.J. 695, 699 (1992) ("During the late 1970s and early 1980s, many observers, including this author, thought that air travel provided real examples that approximated the conditions of perfectly contestable markets . . . .").

91. *See supra* Part I.A.1.c.

> Today, it is common knowledge that airport space at key network nodes is scarce, and that critical airport assets may be controlled in a concentrated fashion by particular carriers, which may possess market power over travelers as a result. The possibilities for entry or production substitution into particular routes cannot be determined without reference to the place of the routes in carriers' networks, and to the impediments carriers may face in extending their networks to those routes.[92]

Even Alfred Kahn, the father of airline deregulation, now warns that "the contestability of airline markets does not afford travelers sufficient protection."[93]

Michael Spence has shown how the investment decisions of incumbents—in particular, the decision to carry excess capacity—can serve as a barrier to entry[94] with the implication that "threat of entry does not necessarily improve resource allocation."[95] Similarly, Steven Salop discusses how "[b]y making binding commitments and communicating them during the reentry period, a strategically minded established firm is able to exploit its leadership role."[96] Once a rival has entered, of course, a larger firm can take advantage of its scale to raise its rivals' costs; for example, by engaging in a massive public relations campaign, filing litigation, or even petitioning the government.[97]

Recognition of scale, information deficiencies, and the dynamics of firm behavior are also beginning to change analysis of predatory pricing.[98] For many years, the Areeda-Turner test was the accepted logic: a price is predatory only if it is below

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92. Willig, *supra* note 90, at 699.

93. Alfred E. Kahn, *Deregulatory Schizophrenia*, 75 CALIF. L. REV. 1059, 1062 (1987); *see also* Richard D. Cudahy, *The Coming Demise of Deregulation*, 10 YALE J. ON REG. 1, 5 (1993).

94. *See* A. Michael Spence, *Entry, Capacity, Investment and Oligopolistic Pricing*, 8 BELL J. ECON. 534, 534 (1977).

95. *Id.* at 544.

96. Steven C. Salop, *Strategic Entry Deterrence*, 69 AM. ECON. REV. 335, 335 (1979).

97. *See supra* note 83 and accompanying text; *see also* Hovenkamp, *After Chicago*, *supra* note 15, at 277–78.

98. *See* Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213, 217 (1979) ("In designing a policy toward predatory pricing, one is confronted with the difficult task of inferring long-run market outcomes from observable short-run behavior and short-run market conditions.").

the producer's marginal cost.[99] This analysis, however, is necessarily static: in a case of alleged predatory pricing, what is happening to the firm's output and pricing level over time? Oliver Williamson, for instance, suggests supplementing the Areeda-Turner test to see if a firm is expanding its output in the face of new entry in the hopes of squelching competition.[100] William Baumol suggests that an incumbent lowering its price should not be "permitted to *reraise* those prices *if the entrant leaves the market* or if the firm wants to subsidize price cuts of other products that are then threatened by competition."[101] Building on Williamson and Baumol's work, Paul Joskow and Alvin Klevorick have developed a sophisticated two-tiered rule to test for predatory behavior.[102] Bolton and others analyze various flavors of predation[103] to show how,

> in a dynamic world of imperfect and asymmetric information . . . the predator seeks to influence the expectations of an existing rival, a potential rival, or perhaps most striking of all, the prey's creditors, to convince the rival that continued competition or future entry into the market will be unprofitable.[104]

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99. *See* Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). For a discussion of the Areeda-Turner test, see Thomas A. Piraino, *A Proposed Antitrust Approach to High Technology Competition*, 44 WM. & MARY L. REV. 65, 126 (2002) [hereinafter Piraino, *High Technology*].

100. *See* Oliver E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284, 334 (1977). Williamson also looks to see if pricing allows recovery of full (not just marginal) cost. *See id.*

101. William J. Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 YALE L.J. 1, 4 (1979). Baumol calls his idea a "quasi-permanent" price reduction. *See id.*

102. *See* Joskow & Klevorick, *supra* note 98, at 218. The first step is a structural analysis of the market and the alleged predator's market power. *See id.* at 244. If the presence of monopoly power is established, a rule of reason analysis is conducted. *See id.* at 258.

103. *See* Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239 (2000). Examples include reputation effect predation ("predator reduces price in one market to induce the prey to believe that the predator will cut price in its other markets or in the predatory market itself at a later time, thereby enabling multimarket recoupment of predatory losses"), test market predation ("predator frustrates the prey's market probe by openly cutting price in the test market to keep the prey ignorant about normal market conditions."), and cost signaling ("predator drastically reduces price to induce the prey to believe that the predator has lower costs, when in fact the predator has no cost advantage"). *Id.* at 2248–49.

104. *Id.* at 2247.

New work in experimental economics similarly shows that predatory pricing is more common than once believed.[105]

Scholars are also casting doubt on Chicago's benign view of tying.[106] The traditional Chicago view is that "antitrust law should be indifferent to the exploitation of monopoly power because extant power is a fixed sum and thus will result in the same damage regardless of how it is deployed."[107] Though a

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105. *See* Yun Joo Jung et al., *On the Existence of Predatory Pricing: An Experimental Study of Reputation and Entry Deterrence in the Chain-Store Game*, 25 RAND J. ECON. 72, 91–92 (1994) ("Our results demonstrate that one can find predatory pricing and that it pays under some economic structures, so that allegations of such activity outside the laboratory cannot be simply dismissed as sour grapes on the part of the prey, or economically 'irrational' actions on the part of the predators."). Earlier experiments had shown that predatory behavior is less likely. *See* R. Mark Isaac & Vernon L. Smith, *In Search of Predatory Pricing*, 93 J. POL. ECON. 320, 342 (1985) ("Based on the results of 11 predatory pricing experiments, our principal conclusion is that, so far, the phenomenon has eluded our search."). It is important to note, however, the differences in experimental design: Isaac and Smith had one monopolist facing one entrant; Jung et al. have a single monopolist facing different entrants in each period. The latter is arguably a better model for a real market.

106. Tying is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5–6 (1958); *see also* Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837, 837 (1990) ("A firm engages in tying when it makes the sale (or price) of one of its products conditional upon the purchaser also buying some other product from it."). For an early discussion of the economics behind tying, see M.L. Burstein, *A Theory of Full-Line Forcing*, 55 NW. U. L. REV. 62 (1960).

107. Kaplow, *supra* note 79, at 515–16 (critiquing the Chicago School approach). *Cf.* HYLTON, ANTITRUST, *supra* note 15, at 308 ("The core of the Chicago School critique is that tying cannot be used to enhance monopoly profits when the market for the tied good is competitive."). In the *Kodak* case, Kodak made precisely this argument. *See* Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 465–66 (1992):

> Kodak argues that it could not have the ability to raise prices of service and parts above the level that would be charged in a competitive market because any increase in profits from a higher price in the aftermarkets at least would be offset by a corresponding loss in profits from lower equipment sales as consumers began purchasing equipment with more attractive service costs.

For a similar argument in the context of telecommunications law, see PETER HUBER, LAW AND DISORDER IN CYBERSPACE 97 (1997) [hereinafter HUBER, CYBERSPACE] ("A telephone monopolist ordinarily has little incentive to mess around in adjacent, competitive markets, unless it has some truly competitive product to offer. . . . Usually there is no extra profit to be gained by suppressing competition in competitive markets nearby."). For an early example of a Chicago-style argument, see Ward S. Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19, 20 (1957) ("Analysis of the situations in which sellers find tie-ins useful casts doubt upon the validity of the statement that the only few scholars cast doubt on this claim in the 1960s and 70s,[108] the critique of tying (or leverage) began in earnest with Richard Craswell and Louis Kaplow in the 1980s. Craswell points out that "even in otherwise competitively structured markets, certain patterns of imperfect information may permit the imposition of tie-ins that do not benefit consumers."[109] Kaplow's critique is predicated on a dynamic analysis of strategic market interactions. He insightfully argues that monopoly leveraging must be examined within a class of "practices designed to affect market share and elasticity of market demand . . . . These practices do not increase short-run profits, and might even decrease them. The firm's motivation is to change the structural conditions it faces in the future in order that it may receive greater profits in the future."[110] More recently, economists have devised analytical models that build on these insights. For instance, Michael Whinston concludes:

> Once one allows for scale economies and strategic interaction, tying can make continued operation by a monopolist's tied market rival unprofitable by leading to the foreclosure of tied good sales. As the models above have indicated, such a strategy can be a profitable one for a monopolist, often

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purpose of tie-ins is monopolistic exploitation.").

108. *See, e.g.*, James M. Ferguson, *Tying Arrangements and Reciprocity: An Economic Analysis*, 30 LAW & CONTEMP. PROBS. 552 (1965) (noting how the anticompetitive nature of tying arrangements depends on the market power of the tying firm); William James Adams & Janet L. Yellen, *Commodity Bundling and the Burden of Monopoly*, 90 Q. J. ECON. 475, 495 (1976) ("We have also demonstrated that bundling is inefficient by Pareto standards: it can lead to oversupply or undersupply of particular goods, and it can lead to the wrong people consuming each good.").

109. Richard Craswell, *Tying Requirements in Competitive Markets: The Consumer Protection Issues*, 62 B.U. L. REV. 661, 663 (1982). For instance, Craswell discusses buyer search costs and the effect of repeat purchases. *See id.*

110. Kaplow, *supra* note 79, at 524. Kaplow discusses a variety of reasons why such tactics are deployed. For instance, "to the extent the restrictive practices cost the firm using them very little, they are much more likely to be used." *Id.* at 526. Monopolists can also exploit the free rider problem among customers: "each buyer will be unwilling to incur a significant expense in preventing the concentration because it bears the total cost of any of its efforts but only receives a benefit in proportion to its share of the market." *Id.* at 532. In addition, managers might possess a number of behavioral biases, including misperceiving their self-interest, and seeking to maximize sales and growth rather than profits. *See id.* at 548.

precisely because of this exclusionary effect on market structure.[111]

The bottom line is that contrary to the view of Chicago School scholars, antitrust deserves a greater role to prevent tying.

The existence of exclusionary conduct only makes things worse. The classic example of exclusionary conduct is a vertical agreement or merger[112] where "a firm may gain the ability to raise price by contracting [or merging] with input suppliers for the suppliers' agreements not to deal with the purchasing firm's competitors on equal terms."[113] But the phenomenon is broader than input foreclosure, and can include customer foreclosure,[114] and even predatory threats.[115] Again contrary to traditional neoclassical economic views,[116] new research is

111. Whinston, *supra* note 106, at 855; *see also* Jay Pil Choi & Christodoulos Stefandis, *Tying, Investment, and the Dynamic Leverage Theory*, 32 RAND J. ECON. 52, 70 (2001) (finding that, in markets where there are large upfront R&D investments, "tying may make the prospects of entry less certain, discouraging the incumbent's rivals from investing and innovating. In these circumstances, tying may lead to lower consumer and total economic welfare.").

112. *See supra* note 64. Of course trying to bucket anticompetitive behavior into strict categories is problematic. For example, tying can be vertical if the product or service tied occurs at a different level in the value chain, but not if the tied product is for a product that the tying company (or one of its competitors) would be producing. Despite these differences, some scholars have taken a functional view to argue that "vertical integration and tying deserve symmetric treatment under the antitrust laws." Roger D. Blair & David L. Kaserman, *Vertical Integration, Tying and Antitrust Policy*, 68 AM. ECON. REV. 397, 401 (1978).

113. Krattenmaker & Salop, *supra* note 83, at 223–24; *see also* Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983); Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 GEO. MASON L. REV. 617, 626 (1999) ("Input foreclosure refers to excluding rivals from high quality access to important inputs or raising rivals' costs of inputs supplied by the monopolist or others.").

114. As Steven Salop and Craig Romaine point out: "Customer foreclosure refers to using exclusive contracts and other strategies that exclude rivals from access to a sufficient customer base." Salop & Romaine, *supra* note 113, at 627; *see also id.* at 636 ("In the simplest analysis of exclusives as customer foreclosure, the monopolist might sign a sufficient number of customers to low-priced, long-term exclusive contracts so that the rival is driven below minimum viable scale.").

115. *See id.* at 640 ("Monopolists may also attempt to reduce competitive inroads by making predatory threats directly against competitors. These strategies would involve threats to financially harm a rival in some way if it competes with the monopolist.").

116. *See, e.g.*, Joseph J. Spengler, *Vertical Integration and Antitrust Policy*, 58 J. POL. ECON. 347, 347 (1950) ("Vertical integration, on the contrary, does not, as such, serve to reduce competition and may, if the economy is already ridden by deviations from competition, operate to intensify competition."). The Chicago

showing the dangers of exclusionary conduct. During the 1980s, Philippe Aghion and Patrick Bolton demonstrated that incumbents will sign long-term contracts to prevent the entry of lower-cost producers.[117] Building on Aghion and Bolton's insights, other commentators have shown that "monopolists may be able to exploit customer disorganization so as to exclude potential rivals,"[118] and how "exclusionary penalty contracts . . . severely constrain the dynamic process by which social wealth is created."[119] More recently, Bernheim and Whinston "provide formal theoretical foundations for the view that exclusive dealing may be adopted for anticompetitive reasons (to enhance market power in noncoincident markets)."[120]

Whether it be an analysis of sunk costs, predatory pricing, tying, or exclusionary agreements, the structure of the Post-Chicago critique is similar: once the realities of scale, imperfect

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School remains generally wedded to this neoclassical view. For a discussion of the infirmities of the Chicago School approach in the context of exclusionary agreements, see Eric B. Rasmusen et al., *Naked Exclusion*, 81 AM. ECON. REV. 1137, 1144 (1991). *But see* POSNER ANTITRUST, *supra* note 6, at 193–244 (recognizing some danger in exclusionary practices).

117. *See* Philippe Aghion & Patrick Bolton, *Contracts as Barrier to Entry*, 77 AM. ECON. REV. 388 (1987).

118. Rasmusen et al., *supra* note 116, at 1137. The core of their argument is a free rider scenario: each individual customer, anticipating that no entry will occur, is willing to agree to sign a exclusivity contract with the incumbent firm in exchange for a small discount. *See id.* at 1144 ("Whenever a monopolist can convince its customers that most other customers will sign an exclusionary agreement, it can obtain the agreements cheaply."). For a similar argument based on free riding that compares exclusionary contracts to yellow dog contracts and vote trading, see Zvika Neeman, *The Freedom to Contract and the Free-Rider Problem*, 15 J.L. ECON. & ORG. 685, 686 (1999):

> We identify a class of situations where single individuals or parties may use the freedom to contract to subtly manipulate large groups of individuals by offering them contracts that promote free-riding behavior. . . . For each single individual, accepting the contract is beneficial, but for the group as a whole, the situation where many of its members have entered the contract might be significantly less advantageous.

119. Brodley & Ma, *supra* note 83, at 1211.

> The penalty clause binds the monopolist and its customers in a coalition that wields monopoly power against potential entrants. The penalty clause forces an entrant to pay a penalty, through lower prices, in order to solicit customers from the monopolist. This deprives the entrant of its expected economic return, and in some cases, deters entry altogether. The economic consequences are reduced output, diminished return to innovation and new entry, and enhanced profit for the monopolist.

Id. at 1163.

120. B. Douglas Bernheim & Michael D. Whinston, *Exclusive Dealing*, 106 J. POL. ECON. 64, 90 (1998).

information, and strategic interactions are introduced, the assumptions behind a *laissez-faire* conception of antitrust become problematic. To a limited extent, the Supreme Court has acknowledged these realities by incorporating Post-Chicago ideas in its *Aspen Skiing*[121] and *Kodak*[122] decisions.

3. Discouraging Competition: Core Theory

Up until this point, the discussion has proceeded based on the premise that competition is desirable, which of course is generally an excellent assumption.[123] Core theory, however, predicts that there are a limited number of situations where in fact unregulated competition may be harmful. Core theory is a subset of cooperative game theory in that it looks at dynamic strategic interactions among market participants.[124] A game or market is said to have a "core" if goods can be traded among participants such that the "final allocations are in the hands of those who value most what they get."[125] While this might be valid where it is possible to disaggregate supply to meet changing demand, it becomes questionable in industries characterized by high fixed costs. As Stephen Pirrong points out, "when costs are characterized by indivisibilities (for example, avoid-

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121. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985). The Court found in favor of a small ski operator when a larger operator discontinued a joint marketing agreement. *Id.* at 610–11:

> [T]he record in this case comfortably supports an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival. . . . Thus the evidence supports an inference that Ski Co. [the monopolist] was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival.

Id.

122. Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451 (1992). The Court found Kodak to be acting anticompetitively in restricting the access of its repair parts to independent service organizations, given "the existence of significant information and switching costs." *Id.* at 473.

123. *See infra* note 223.

124. And in the process challenges neoclassical price theory. *See, e.g.,* George Bittlingmayer, *The Economic Problem of Fixed Costs and What Legal Research Can Contribute*, 14 LAW & SOC. INQUIRY 739, 741 (1989) [hereinafter Bittlingmayer, *Fixed Costs*] (speaking amusingly of the "smoothly functioning competitive equilibrium of textbook fame").

125. Lester G. Telser, *Cooperation, Competition, and Efficiency*, 28 J.L. & ECON. 271, 274 (1985); *see also* John Shepard Wiley, *Antitrust and Core Theory*, 54 U. CHI. L. REV. 556, 558 (1987) ("The *core* of a game is the set of solutions that leaves no coalition in a position to improve the payoffs to all of that coalition's members."). For illustrative examples of core theory, see *id.* at 558–561.

able costs) and demand is finely divisible, the core may be 'empty.' In other words, a competitive equilibrium frequently fails to exist, and, as a consequence, competitive interactions between firms cannot generate an efficient allocation of resources."[126]

Core theory correctly predicts why cutthroat competition can afflict industries characterized by high fixed costs:[127] stuck with fixed capacity, firms will try to recover whatever they can by "pricing at (or below) the incremental cost of production."[128] More importantly, it cleverly points to an unintended consequence of the antitrust laws in actually encouraging mergers. This counterintuitive argument posits that faced with an empty core, "competition may require some cooperation in order to obtain efficiency"[129]—for instance, to better control capacity. But faced with antitrust's prohibition against cooperation, firms will do the next best thing: merge. Indeed, this is precisely what George Bittlingmayer has shown in his analysis of the wave of industrial mergers at the turn of the twentieth century.[130] Despite the enactment of § 7 of the Clayton Act,

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126. Stephen Craig Pirrong, *An Application of Core Theory to the Analysis of Ocean Shipping Markets*, 35 J.L. & ECON. 89, 89 (1992); *see also* George Bittlingmayer, *Decreasing Average Cost and Competition: A New Look at the Addyston Pipe Case*, 25 J.L. & ECON. 201, 202 (1982) [hereinafter Bittlingmayer, *Average Cost*] ("[I]t becomes unrealistic to expect competitive behavior in certain markets because firms could not behave competitively even if they wanted to."). As Lester Telser points out:

> The bulk of these complications arise from the fact that costs are lower if producers make commitments in advance of the revenue they expect to receive. This is to say that they choose inputs of capital equipment, finance these inputs, hire labor, arrange the marketing of the output, decide what and how much to produce, and more before the outputs are ready for actual sale. Having done all these things, the producers have incurred fixed costs and other kinds of costs that do not necessarily rise smoothly and continuously with the actual rates of output.

Telser, *supra* note 125, at 276.

127. *See, e.g.*, Eli Noam, *quoted in* Louis Uchitelle, *Looking for Ways to Make Deregulation Keep Its Promises*, N.Y. TIMES, July 28, 2002, at C12 ("The telecommunications industry is characterized by huge investments followed by tiny costs of serving additional customers. In competition, this drives down prices to unprofitable levels."); Cudahy, *supra* note 93, at 10 ("[T]here seems to be no limit to the proclivity of financially distressed airlines to cut fares in an effort to continue operating. This is the essence of destructive competition.").

128. Bittlingmayer, *Fixed Costs*, *supra* note 124, at 755.

129. Telser, *supra* note 125, at 272.

130. *See* George Bittlingmayer, *Did Antitrust Policy Cause the Great Merger Wave?*, 28 J.L. & ECON. 77, 84 (1985) [hereinafter Bittlingmayer, *Merger Wave*] (showing how agreements and mergers can accomplish the same goals). *Cf.* Stig-

many industries continue to consolidate, further lending credence to core theory's hypothesis.[131]

Given that core theory predicts that under certain circumstances, cartels, or other collusive devices, might be "efficient,"[132] it might be natural to discount the theory as yet another attack on antitrust. But a more refined interpretation is perhaps in order. In the same way that the very existence of a firm is predicated on transaction costs that render market ordering inefficient,[133] core theory suggests that "the difficulty associated with fixed costs can be thought of as one variety of market failure that requires a partial suppression of independence and the competitive mechanism."[134] Viewed in this light, the goal would be to allow specific exemptions to the general rule against agreements among competitors where market mechanisms are inefficient. This approach is remarkably consistent with the intuition of prominent scholars who have made similar suggestions, but have approached the problem without the benefit of core theory.[135] Core theory could unify and buttress their conclusions.

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ler, *Economic Effects*, *supra* note 1, at 235–36 (showing how antitrust has made "efficient" forms of collusion illegal, prompting firms to try less obvious and efficient methods); Michael F. Sproul, *Antitrust and Prices*, 101 J. POL. ECON. 741, 753 (1993):

> There is little doubt that in the great majority of cases antitrust prosecution does not lead to lower prices. . . . If the reason is that the government mainly prosecutes cost-reducing cartels, then the implication is that the Department of Justice should either abandon antitrust activity entirely or at least limit prosecution to the most flagrant offenders. However, the trouble might be that penalties are not severe enough, and more vigorous prosecution is needed. The evidence does not give a clear answer to this question.

131. *See supra* notes 7–8. As core theory would predict, the pace of merger activity has been most frenetic in infrastructure industries with high fixed costs and overcapacity. *See, e.g.*, Joskow, *Electric Power Sector*, *supra* note 89, at 148 ("Regulatory reform and the expansion of competitive opportunities in other previously regulated industries, such as telecommunications, railroads, airlines, and trucking has been accompanied by a significant amount of merger activity. The electric power industry appears to be following this trend.").

132. *See, e.g.*, Pirrong, *supra* note 126, at 129 ("'[N]oncompetitive' institutions such as cartels may actually enhance economic efficiency, instead of retarding it."); Bittlingmayer, *Fixed Costs*, *supra* note 124, at 752.

133. *See* R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 389 (1937) ("It can, I think, be assumed that the distinguishing mark for the firm is the supersession of the price mechanism.").

134. Bittlingmayer, *Merger Wave*, *supra* note 130, at 84.

135. For example, in the context of intellectual property (IP) standard setting organizations, Mark Lemley argues that "antitrust law should show great defer-

More significantly, why does an empty core necessarily imply a private solution? Why not envision a public approach whereby a new competition law—a synthesis of regulation and antitrust—looks to manage those specific portions of industrial organization prone to an empty core, letting competition flourish elsewhere? As Bittlingmayer himself points out, the observations of core theory,

> suggest that explicit cartelization, tacit collusion, and horizontal merger can be viewed, in many instances, as the non-competitive arrangements that the firms in an industry must necessarily adopt. *Whether the resulting arrangements are in any sense optimal is another matter, and in some cases it may turn out to be correct to substitute government regulation or ownership for self-regulation.*[136]

Indeed, blending the insights of core theory with those of Post-Chicago economics must inform the economics of a new competition law.[137]

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ence to legitimate efforts to set collective rules for dealing with IP, even if those rules require competitors to discuss both the technical merits of their products and the price of an IP license." Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CALIF. L. REV. 1889, 1937 (2002). Similarly, Cass Sunstein proposes a code of broadcasting self-regulation, but realizes that this might pose a cartelization problem under the antitrust laws. *See* Cass R. Sunstein, *Television and the Public Interest*, 88 CALIF. L. REV. 499, 549–59 (1999). He concludes that "the antitrust law can go wrong when it prevents cooperative action that overcomes palpably adverse effects of market pressures." *Id.* at 552; *see also* Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424, 439 (1985) [hereinafter, Katz & Shapiro, *Network Externalities*] ("Antitrust exemptions that allow industry groups to get together may lower the costs of achieving compatibility and thus make it more likely.").

136. Bittlingmayer, *Average Cost*, *supra* note 126, at 203–04 (emphasis added). Some commentators disagree. John Wiley even has a section in an article entitled: "The Core: A Good Idea for Policymakers To Ignore." Wiley, *supra* note 125, at 569. Wiley's observations seem premised on two assumptions, however. The first is that we don't know "just how costly empty cores are likely to be." *Id.* at 579. But the combination of mergers and bankrupt industries lead one to suspect the cost is quite high. Second, Wiley seems uncomfortable with core theory because it would "use antitrust law to regulate industry as if it were a public utility." *Id.* at 570. But Wiley seems to assume that government intervention would consist of rate regulation. *See id.* at 577–78. As Parts II and III will explore, however, a new competition law does not imply setting rates.

137. *See infra* Part III.A.

4. New Economy Complications

New economy industries typically involve initial large investments in intellectual property that are then commercialized on a large scale, often over networks.[138] Of course, analysis of these industries presents the same pitfalls as analysis of more traditional industries. Especially since product cycles tend to be short, dynamic analysis is a must.[139] The creation of intellectual property has high development (fixed) costs, and low distribution (variable) costs.[140] Not only does this create a scale effect that presents a barrier to entry,[141] but it creates a high risk of predatory pricing.[142] Additionally, new economy industries present special challenges for antitrust; in particular, the role of intellectual property and the presence of network effects are particularly important to a systemic investigation of antitrust.

Many new economy companies win by being innovative, so the central question becomes how competition policy can protect consumers by creating an environment that fosters innovation.[143] On the one hand, there are the well-touted Schumpete-

138. High technology industries such as computer software and Internet-based products and services are the prototypical examples.

139. *See, e.g.*, Janusz A. Ordover & Robert D. Willig, *Antitrust for High-Technology Industries: Assessing Research Joint Ventures and Mergers*, 28 J.L. & ECON. 311, 311 (1985) ("It may be illogical and socially harmful to apply the static equilibrium framework to industries where technological progress is rapid and competition is driven by product and process innovation."); Shapiro Speech, *supra* note 10, at 8 ("I am well aware of the pitfalls of employing static analysis in dynamic industries, and the information industries are nothing if not dynamic.").

140. *See, e.g.*, Robert Pitofsky, *Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy*, 16 BERKELEY TECH. L.J. 535, 537 (2001) [hereinafter Pitofsky, *New Economy*].

141. *See, e.g.*, Lemley & McGowan, *supra* note 13, at 502 ("[T]he high fixed and low marginal costs of producing operating system software imply significant economies of scale . . . .").

142. *See* Piraino, *High Technology*, *supra* note 99, at 126 ("[A] cost-based [antitrust] rule allows high technology firms to evade predatory pricing liability entirely, because the marginal cost of producing most intellectual property is zero."); Joseph Farrell & Garth Saloner, *Installed Base and Compatibility: Innovation, Product Preannouncements, and Predation*, 76 AM. ECON. REV. 940, 954 (1986).

143. *See, e.g.*, Skitol, *supra* note 25, at 257 ("Whereas, in the past, the main focus of antitrust attention was 'price' competition and preventing either conduct or mergers that could result in higher prices, the far more important focus today is innovation competition and preventing either conduct or mergers that could result in less innovation."); Rubinfeld, *supra* note 10, at 27 ("In high technology network industries competition can be particularly significant because it affects not only the prices consumers are charged for existing products, but more impor-

rian gales of "creative destruction"[144] that can uproot the basis of competition in high technology markets. On the other, is the real possibility that an incumbent can use its intellectual property rights to maintain a proprietary stranglehold that slows technological innovation[145]—as Robert Pitofsky puts it, "there remains the concern that consumers will be exploited while we wait for the future to arrive."[146]

Network effects[147] only make things more complicated by serving as an additional barrier to entry. Such effects apply

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tantly because it encourages innovations that improve the quality of future generations of products."). Salop and Romaine note:

> To an economist, monopoly power is the power to raise or maintain prices above, and restrict output below, the competitive level. In the case of software, output would also include innovation; thus, monopoly power is the power to restrict innovation below the level that would exist in a more competitive market.

Salop & Romaine, *supra* note 113, at 619.

144. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 83 (3d ed. 1950) (positing that entrepreneurial capitalism necessarily leads markets to innovation and renewal).

145. *See* Pitofsky, *New Economy*, *supra* note 140, at 542–543 ("A legal system that overprotects intellectual property and underenforces antitrust law thus poses dangers to competition and ultimately to innovation, just as one that underprotects intellectual property and overenforces antitrust principles can harm incentives to innovate."); Carl Shapiro, *Exclusivity in Network Industries*, 7 GEO. MASON L. REV. 673, 674 (1999) [hereinafter Shapiro, *Exclusivity*] (noting the danger of monopoly power "when individual firms manage to maintain proprietary control over key product attributes or interfaces, usually based on copyright and patent protection"). There is a substantial literature on the interface of intellectual property and antitrust. *See, e.g.*, David McGowan, *Networks and Intention in Antitrust and Intellectual Property*, 24 IOWA J. CORP. L. 485 (1999); Lemley, *supra* note 135; Dana R. Wagner, *The Keepers of the Gates: Intellectual Property, Antitrust, and the Regulatory Implications of Systems Technology*, 51 HASTINGS L.J. 1073 (2000); U.S. DEP'T OF JUSTICE AND THE FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995), *available at* http://www.usdoj.gov/atr/public/guidelines/ipguide.htm.

146. Robert Pitofsky, Competition Policy in Communications Industries: New Antitrust Approaches, Glasser Legal Works Seminar on Competitive Policy in Communications Industries (Mar. 10, 1997), *available at* http://www.ftc.gov/speeches/pitofsky/newcomm.htm [hereinafter Pitofsky, New Approaches]; *see also* Piraino, *High Technology*, *supra* note 99, at 86 ("Commentators emphasizing the phenomenon of creative destruction have, however, overlooked the extent to which monopolies can become entrenched in high technology markets.").

147. Network effects are exhibited with "products for which the utility that a user derives from the consumption of the good increases with the number of other agents consuming the good." Katz & Shapiro, *Network Externalities*, *supra* note 135, at 424. By contrast, natural monopoly is a problem of "scale economies of supply: the marginal and average costs of production decline throughout the demand curve for a particular market. . . . [N]etwork effects are demand-side rather than supply-side effects: the shape of the demand curve is affected by existing

both to real networks, such as telecommunications systems,[148] as well as to virtual networks, such as the "network of Apple Macintosh users, the network of users of Microsoft Excel, or the network of users in DVD machines."[149] Consumers will be reluctant to switch to a technologically superior product offered by a new entrant: in addition to the usual switching costs, the new product might be incompatible with the installed base the existing technology enjoys.[150] This barrier is analogous to the role scale and sunk costs play on the supply side.[151] Network

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demand." Lemley & McGowan, *supra* note 13, at 484. Shelanski & Sidak, *supra* note 18, at 5 ("A network externality or 'network effect,' exists when the value of a product or service increases with the breadth of demand for that product or service."); A. Douglas Melamed, *Network Industries and Antitrust*, 23 HARV. J.L. & PUB. POL'Y 147, 148 (1999) ("The most important characteristic—indeed, the defining characteristic—of network industries is that they involve products that are more valuable to purchasers or consumers to the extent that those products are widely used. This phenomenon is known as a 'network effect' or 'demand-side economy of scale.'"); Rubinfeld, *supra* note 99, at 3 ("Network industries are created by network effects, whereby each individual's demand for a product is positively related to the usage of other individuals."). *See generally* Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSP. 93 (1994) [hereinafter Katz & Shapiro, *Systems Competition*].

148. Indeed, the classic exposition of the demand side phenomenon discusses the telephone network. *See* Jeffrey Rohlfs, *A Theory of Interdependent Demand for a Communications Service*, 5 BELL J. ECON. & MGMT. SCI. 16, 16 (1974) ("The utility that a subscriber derives from a communications service increases as others join the system.").

149. Shapiro, *Exclusivity*, *supra* note 145, at 673. There is a burgeoning literature highlighting the importance of network effects to antitrust. *See, e.g.*, David A. Balto, *Networks and Exclusivity: Antitrust Analysis to Promote Network Competition*, 7 GEO. MASON L. REV. 523 (1999); Dennis W. Carlton & J. Mark Klamer, *The Need for Coordination Among Firms, with Special Reference to Network Industries*, 50 U. CHI. L. REV. 446 (1983); Joseph P. Tomain, *networkindustries.gov.reg*, 48 KAN. L. REV. 829 (2000); Salil Kumar Mehra, *Information in an Antitrust Age*, 2000 U. CHI. LEGAL F. 219 (2000). One commentator has even identified the danger of network effects to the regulation of securities markets. *See* Robert B. Ahdieh, *Making Markets: Network Effects and the Role of Law in the Creation of Strong Securities Markets*, 76 S. CAL. L. REV. 277 (2003). *But see* William J. Kolasky, *Network Effects: A Contrarian View*, 7 GEO. MASON L. REV. 577 (1999) (discounting the importance of network effects); S.J. Liebowitz & Stephen E. Margolis, *Network Externality: An Uncommon Tragedy*, 8 J. ECON. PERSP. 133, 134 (1994) (seeking to "limit the implied scope of network externality").

150. *See, e.g.*, Farrell & Saloner, *supra* note 142, at 940 (noting how an installed base "creates the possibility of 'excess inertia': a socially excessive reluctance to switch to a superior new standard when important network externalities are present in the current one."); Shapiro, *Exclusivity*, *supra* note 145, at 675 ("Consumers in the market today must consider not only their individual switching or adoption costs, but also the possible loss of network benefits from picking an incompatible technology that is not yet popular.").

151. *See, e.g.*, Piraino, *High Technology*, *supra* note 99, at 88.

effects are also eerily reminiscent of free rider problems engendered by exclusionary agreements:[152] "if consumers expect a seller to be dominant, then consumers will be willing to pay more for the firm's product, and it will, in fact, be dominant."[153] To further enhance the importance of their network, incumbent firms could oppose open standards that ensure compatibility.[154]

What are the implications for antitrust? Given antitrust's historic focus on price and output in old economy industries, it should perhaps be no surprise that law and economics scholars are struggling with this question. The voluminous literature on the subject attests to the diversity of opinion.[155] But if one is willing to look beyond the strictures of neoclassical price theory, one danger should stand out: network effects can often combine with overexpansive intellectual property rights to lock in customers, thereby exacerbating path dependencies.[156] The

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152. *See supra* note 118 and accompanying text.

153. Katz & Shapiro, *Network Externalities*, *supra* note 135, at 425.

154. *See id.* ("We find that firms with good reputations or large existing networks will tend to be against compatibility, even when welfare is increased by the move to compatibility."). Often these tactics can backfire against the incumbents. *See* Reza Dibadj, *Toward Meaningful Cable Competition: Getting Beyond the Monopoly Morass*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 245, 282 (2003) [hereinafter Dibadj, *Cable Competition*].

155. Much of this literature debates the merits of the Microsoft monopolization litigation and the FTC case against Intel for allegedly threatening to withhold intellectual property rights in its products. *See, e.g.*, J. Gregory Sidak, *An Antitrust Rule for Software Integration*, 18 YALE J. ON REG. 1 (2001); John E. Lopatka & William H. Page, *Antitrust on Internet Time: Microsoft and the Law and Economics of Exclusion*, 7 SUP. CT. ECON. REV. 157 (1999); John T. Soma & Kevin B. Davis, *Network Effects in Technology Markets: Applying the Lessons of Intel and Microsoft to Future Clashes Between Antitrust and Intellectual Property*, 8 J. INTELL. PROP. L. 1 (2000); Timothy J. Brennan, *Do Easy Cases Make Bad Law? Antitrust Innovations or Missed Opportunities for* United States v. Microsoft, 69 GEO. WASH. L. REV. 1042 (2001); Michael P. Kenny & William H. Jordan, United States v. Microsoft: *Into the Antitrust Regulatory Vacuum Missteps the Department of Justice*, 47 EMORY L.J. 1351 (1998); Symposium, *Cyber Rights, Protection, and Markets*, 32 U. WEST L.A. L. REV. 3 (2001).

155. *See supra* note 84. *But see* S.J. Liebowitz & Stephen E. Margolis, *Should Technology Choice Be a Concern of Antitrust Policy?*, 9 HARV. J.L. & TECH. 283 (1996) (arguing against the notions of path dependence). For a discussion of the interaction between network effects and path dependence, see Shelanski & Sidak, *supra* note 18, at 8.

156. *See supra* note 84. *But see* S.J. Liebowitz & Stephen E. Margolis, *Should Technology Choice Be a Concern of Antitrust Policy?*, 9 HARV. J.L. & TECH. 283 (1996) (arguing against the notions of path dependence). For a discussion of the interaction between network effects and path dependence, see Shelanski & Sidak, *supra* note 18, at 8.

fact that markets can "tip" in the incumbent's favor[157] highlights the need for proactive antitrust enforcement:

> [W]hen a technology company achieves a thirty to forty percent level of market share, network effects will cause that company to rise, virtually automatically, to the eighty to ninety percent market share level. Therefore, antitrust remedies need to be applied earlier, while the negative economic effects of monopolies can be most efficiently dealt with by the appropriate enforcement authorities.[158]

A new approach would be to reconceptualize the network effects problem as the inverse of the durable goods problem that antitrust has faced for decades.[159] Doing so might show the danger of a monopoly that enjoys network effects.[160]

In the end, intellectual property and network effects can be even more important than economies of scale to incumbents.[161] As Robert Pitofsky summarizes:

> Because of the nature of competition in markets characterized by intellectual property, there is a tendency to drift to-

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157. For a discussion of "tipping," see Piraino, *High Technology*, *supra* note 99, at 78 ("Once a particular standard gains enough acceptance to be perceived by most consumers as the ultimate technological winner, the market 'tips' and consumers migrate to that standard en masse.").

158. Soma & Davis, *supra* note 155, at 3–4.

159. A durable goods monopolist faces the issue that every unit of production that enters the stream of commerce serves as a potential substitute to already existing units, thereby reducing the monopolist's power. *See, e.g.*, Patrick Rey & Jean Tirole, A Primer on Foreclosure 8 (Feb. 1997), *at* http://www.idei.asso.fr/Commun/Articles/Rey/PRIMER.pdf ("[A] durable-good monopolist in general does not make the monopoly profit because it 'creates its own competition': By selling more of the durable good at some date, it depreciates the value of units sold at earlier dates; the prospect of further sales in turn makes early buyers wary of expropriation and makes them reluctant to purchase."); John Shepard Wiley et al., *The Leasing Monopolist*, 37 UCLA L. REV. 693, 694 (1990) ("But a monopolist that makes long-lived goods—like diamonds, paintings, or aluminum ingots—faces an unusual situation . . . . [E]ach future unit of output potentially is a substitute for every present unit."); Jeremy I. Bulow, *Durable-Goods Monopolists*, 90 J. POL. ECON. 314 (1982) (noting how durable goods manufacturers unwittingly create a secondary market for their goods whose pricing they do not control).

160. In other words, with a good exhibiting a network effect, an extra unit of production actually enhances the value of units already in existence, thereby further increasing a monopolist's power.

161. *See, e.g.*, Shapiro, *Exclusivity*, *supra* note 145, at 673 ("Sure, there are scale economies of writing an operating system, but these are minor in comparison with the network effects that currently work in favor of Microsoft.").

> ward single-firm dominance and even monopoly for two reasons. First, in order to encourage initial investments, the law provides intellectual property protection (primarily via patent and copyright law) and, in effect, precludes competition within the scope of the intellectual property for a period of time. Second, products and services based on intellectual property frequently exhibit 'network effects' . . . .[162]

5. Beyond the Battles

The Chicago School's approach is rife with problems: its single-minded obsession with static analysis to derive allocative efficiency, its downplaying of legislative history, its naïve adoption of contestability.[163] Post-Chicago methods, with their focus on dynamic analysis and recognition of scale economies and information asymmetries, have shown that anticompetitive behavior is more prevalent than neoclassical economics would suggest. The battle rages on as some continue to defend the Chicago School's assumptions in the face of Post-Chicago's successes.[164] Antitrust thus remains shaped by the tension be-

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162. Pitofsky, *New Economy*, *supra* note 140, at 538–39; *see also* Piraino, *High Technology*, *supra* note 99, at 77 ("[T]he natural evolution of most high technology markets is from competition to monopoly. This trend to monopoly occurs as a result of the 'network effects' present in most high technology markets."); Shapiro, *Exclusivity*, *supra* note145, at 674 ("The graver problem is that the pace of innovation may be slowed, denying consumers the full benefits of technological progress that a dynamically competitive market would offer.").

163. Orthodox Chicago School antitrust policy is predicated on two assumptions about the goals of the federal antitrust laws: (1) the best policy tool currently available for maximizing economic efficiency in the real world is the neoclassical price theory model; and (2) the pursuit of economic efficiency should be the exclusive goal of antitrust enforcement policy. Herbert Hovenkamp sums up the problems with Chicago analysis:

> Both of these statements are controversial. The first one raises several economic questions about the internal integrity of the neoclassical price theory model, as well as questions about the ability of *any* economic model to identify efficient policies in the real world. The second statement is probably contrary to the intent of the Congresses that drafted the various antitrust laws.

Hovenkamp, *After Chicago*, *supra* note 15, at 226.

164. These new critiques have different flavors. Some critics apparently view Post-Chicago theories as somehow less rigorous than supply and demand schedules. *See, e.g.*, Graglia, *supra* note 2, at 21 ("Proponents of an expanded antitrust liability are reduced to concocting ever more exotic and implausible theories of how apparently innocent or useful practices can have net anticompetitive effects."); Malcolm B. Coate & Jeffrey H. Fischer, *Can Post-Chicago Economics Survive Daubert?*, 34 AKRON L. REV. 795, 795 (2001) (arguing that somehow Post-

tween economic arguments for greater enforcement and those advocating a more *laissez-faire* approach. Part III of the article takes a different tack by attempting to go beyond the caricature of more versus less antitrust. Any solution, however, will require well-designed legal institutions. Unfortunately, these are nowhere to be found.

B. Limited Institutions: Stretching the Common Law

Given its sparse statutory language,[165] antitrust law is interpreted and implemented principally by federal courts. As Phillip Areeda points out, "[t]he statutes on which it rests are so general that antitrust law shares a great deal with the common law and is no more to be judged in gross than the law of contracts."[166] Lawrence Sullivan speaks of "'big case' literature"[167] shaping antitrust, and Robert Bork even notes that the "central institution in making antitrust law has been the Supreme Court. . . . [T]he Court plays in antitrust almost as unconstrained a role as it does in constitutional law."[168] As I have

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Chicago scholars "stress[] market outcomes that could *possibly* occur, rather than outcomes that are *likely* to occur"). Other work is more analytical and based primarily on the decision-theoretic concept of the risk of "false positives" that could accompany more aggressive antitrust enforcement. *See, e.g.*, Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 ANTITRUST L.J. 469 (2001). *Cf.* Easterbrook, *Comparative Advantage*, *supra* note 33, at 8 ("But when we know but little the risk of error goes up, and the risk of false positives may be substantial."). Interestingly, some critics believe that the original Chicago School intellectuals might be resting on their laurels. For instance, in his review of the second edition of Judge Posner's book, ANTITRUST LAW, Michael Carrier notes:

> Judge Posner's focus too often is on the distant past, with most of his argument and the cases he discusses taken directly from the first edition. Relatedly, Judge Posner fails to comprehensively challenge the various theories that the Post-Chicago School has offered in the past twenty years. Second, the numerous tests he introduces to improve antitrust law often are insufficiently developed and not calibrated to the need for revision.

Carrier, *supra* note 77, at 288.

165. *See supra* note 13.

166. Phillip Areeda, *Monopolization, Mergers, and Markets: A Century Past and the Future*, 75 CALIF. L. REV. 959, 959 (1987).

167. Sullivan, *supra* note 17, at 49.

168. BORK, PARADOX, *supra* note 1, at 409; *see also* Wiley, *supra* note 125, at 557 ("Federal judges are the primary architects of American competition policy, a role forced upon them by Congress's traditional reluctance to elaborate on the broad sweep of the antitrust laws."). The Federal Trade Commission (FTC) is of course an administrative agency with antitrust responsibilities. *See* 15 U.S.C. §

argued elsewhere, generalist judges have excellent intuition and have an essential role to play as a check against ill-conceived agency regulations,[169] but it is unrealistic to expect a generalist judiciary to occupy the front lines in setting competition policy.[170]

Perhaps the best example of the courts' struggles is the confusion over what standard of review to use in antitrust cases. The traditional contrast has been between the simpler per se rule—"invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct"[171]—and the more involved rule of reason which "includes consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption."[172]

But the distinction between per se and rule of reason analysis has become muddled. As the Supreme Court admits, "there is often no bright line separating per se from Rule of Reason analysis. Per se rules may require considerable inquiry

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41 (2003); HOVENKAMP, ANTITRUST POLICY, *supra* note 29, at 587. However, the FTC shares antitrust responsibility with the Department of Justice. *See infra* note 519. In addition, the vast majority of antitrust litigation is done via private litigation. *See infra* note 191.

169. *See* Reza Dibadj, *Competitive Debacle in Local Telephony: Is the 1996 Telecommunications Act to Blame?*, 81 WASH. U. L.Q. 1, 60 (2003) [hereinafter Dibadj, *Local Telephony*]. *Cf.* Peter J. Hammer & William M. Sage, *Antitrust, Health Care Quality, and the Courts*, 102 COLUM. L. REV. 545, 639 (2002) ("courts deciding medical antitrust issues managed to get the big picture right").

170. Here, I agree with Judge Bork's analysis that

> [w]e seem intent on making difficult matters worse by pressing upon our federal courts tasks of a number and complexity unequaled by those assigned the judiciary of any other nation. . . . To make public policy well under such conditions is probably beyond the capacities of any tribunal, however competent its members.

BORK, PARADOX, *supra* note 1, at 411–12. Bork's solution, of course, is to curtail antitrust. *See supra* notes 66–67 and accompanying text. My hope is to reconstruct competition law. *See infra* Part III.

171. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 103–04 (1984). Beginning with the earliest antitrust cases, the paradigmatic use of the per se rule has been to combat price fixing. *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

172. United States v. Topco Assocs., Inc., 405 U.S. 596, 607 (1972). For classic applications of the rule of reason, see Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911); United States v. Am. Tobacco Co., 221 U.S. 106 (1911); United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

into market conditions before the evidence justifies a presumption of anticompetitive conduct."[173] Indeed, a panoply of confusing standards has emerged. First there is the "quick look" doctrine which is somewhere between a per se prohibition and a rule of reason analysis, but its boundaries are again fuzzy.[174] Somewhat amusingly, a "less quick look" doctrine has even emerged to muddy the waters further. Take the following complex passage from the Supreme Court's *California Dental* opinion:

> What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. . . . For now, at least, a less quick look was required for the initial assessment of the tendency of these professional advertising restrictions.[175]

The point here is that even the most brilliant jurists are struggling with how to review antitrust cases.

The confusion behind the standard of review is central to a deconstruction of antitrust's problems since it is symptomatic of a mismatch between the requirements of competition policy and the institutional role and capabilities of the judiciary. The per se rule places minimal institutional burden on courts since it avoids getting into the economic details. Rule of reason analysis, on the other hand, is more satisfying in that it grapples with the economics, but places a larger burden on the judiciary.[176] Keith Hylton goes so far as to argue that the diverging

173. *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 104 n.26.

174. *See, e.g.,* Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 779 (1999) ("The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like 'per se,' 'quick look,' and 'rule of reason' tend to make them appear.").

175. *Id.* at 781.

176. As the Supreme Court tells us, "the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691 (1978). This is, of course, a rather tall order, and one is left wondering how even the most able generalists will be able to discern the difference; *see also* Bok, *supra* note 15, at 252 ("To be decided is the question how detailed an investigation can be made by a judge without involving the court in inquiries too burdensome and complicated to be endured.").

standards of review frame all of antitrust since the "tension between economic reasonableness and administrative concerns seems to be the principal, or least one of the principal, driving forces in the evolution of antitrust law as a field of federal common law."[177]

A number of other problems follow from having the judiciary create and enforce competition law. At a tactical level, it further burdens an already heavy caseload and stretches the fact-finding capacities of juries.[178] The adversarial process limits the available evidence,[179] and may be prone to hyperbole rather than sober analysis.[180] Litigation is also notoriously slow and ill suited to fast-paced business competition: by the time the case winnows its way through the system, the original cause of action may be irrelevant. As Frederick Rowe points out, somewhat colorfully:

> Amid shifting technology and global contests, markets move faster than antitrust suits for their reorganization. At the hands of shrewd antitrust litigators battling antitrust

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177. HYLTON, ANTITRUST, *supra* note 15, at xiv; *see also* Piraino, *High Technology*, *supra* note 99, at 132 ("[M]ost judges and juries are simply not capable of making the economic decisions required by a full rule of reason market power analysis.").

178. *See, e.g.*, Hovenkamp, *Areeda-Turner Treatise*, *supra* note 4, at 820 ("Antitrust Law contemplates a litigation process that both includes juries much of the time and that requires simplifying assumptions if fact finding is to be coherent." (emphasis omitted)); Hovenkamp, *Post-Chicago*, *supra* note 69, at 273.

179. *See* Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CALIF. L. REV. 1005, 1043 (1987) [hereinafter Breyer, *Newly Liberated*]. Breyer comments that:

> Courts also have difficulty investigating underlying circumstances—particularly changes in circumstances—because they depend upon a record, produced through an adversarial process, for their information. In addition, courts find it difficult to balance factors tending in opposite directions, for they are uncomfortable in the absence of standards for weighing each factor in the balance.

Id; see also Page, *supra* note 17, at 1304–07.

180. *See, e.g.*, Lemley & McGowan, *supra* note 13, at 486. Lemley and McGowan explain:

> Because case law is the product of an adversarial process, counsel tend to push new theories as far as possible, perhaps beyond the premises of the theory, and sometimes without regard to whether the theory properly applies to the case in the first place. Although opposing counsel will have incentive to counter such arguments, it is unrealistic to expect judges, by definition busy generalists, to discern the wheat from the chaff.

Id.

> breakups that jeopardize a firm's survival, bickers about the relevant market ensure legal ordeals lasting many years. Antitrust's Big Case is doomed to a tragic cycle: by the time the barbecue is fit for carving, the pig is gone.[181]

The need to appear consistent with precedent despite fast-changing competitive dynamics further constrains courts' effectiveness.[182]

The subtleties of Post-Chicago economics add an extra layer of complexity. As Herbert Hovenkamp points out, "in too many instances antitrust tribunals are simply not up to handling Post-Chicago theory. Judges do not know enough economics; the economics itself is insufficiently capable of sorting out anticompetitive from competitive or harmless explanations; the American jury system turns complex fact findings into chaos."[183] To boot, courts are particularly ill-equipped to deal with new economy industries, which require specialized understanding of the role of network effects and the interplay between innovation, intellectual property, and path dependence.[184]

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181. Rowe, *supra* note 6, at 1537.

182. Stephen Breyer illustrates a variant on this point when he discusses the limitations of modifying private common law liability standards as a proxy for new regulation. *See* STEPHEN BREYER, REGULATION AND ITS REFORM 177 (1982) [hereinafter BREYER, REGULATION]. Breyer notes that:

> the process of changing a liability rule may have other, broad social consequences that affect its desirability. For example, if appellate courts change the rule, will they do so prospectively or retroactively? What is the precedential effect of their decision on the general power of the courts to change prior case law? How does this precedent affect the relation between courts and legislatures? If new rights are suddenly created, but the courts lack the resources to enforce them or to satisfy them, what are the consequences? Will the public lose faith in the courts?

Id.

183. Hovenkamp, *Post-Chicago*, *supra* note 69, at 275; *see also id.* at 278–79 ("The hallmark of post-Chicago economics is increased complexity, and the worst way to deal with complexity is to throw the issue to the jury."); Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551, 554 (1991). Synder and Kauper comment:

> We argue that the application of the recent theories, especially those asserting that vertical integration by merger or contract may foreclose competitors, will be particularly difficult . . . . The burden on the courts to assess whether the claims meet the *sufficient* conditions for the practices to harm competition and cause antitrust injury is truly daunting . . . .

Id.

184. *See supra* Part I.A.4. As Thomas Piraino has pointed out, "the courts

At a higher level, antitrust doctrine becomes shaped by a series of decisions "driven by a short time horizon . . . typically cabined by a short-run perspective that permits little if any consideration of the general character of the industry, [or] the longer-term movement of competitive forces within the particular market . . . ."[185] Over the long run, a series of ad hoc, short-term focused decisions can even appear arbitrary.[186] Even more significantly, antitrust enforcement via common law is inherently an ex post method of adjudication:[187] decisions are made after the alleged harm has already occurred.[188] This offers little prospective guidance to market participants. As one commentator has pointed out, "[u]ncertainty about what constitutes an antitrust violation continues to undermine the rule of law and expose commerce to undue legal risks."[189]

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have established confusing and inconsistent standards for the regulation of high technology competition." Piraino, *High Technology, supra* note 99, at 72.

185. Robinson, *supra* note 5, at 1181.

186. Waller notes that:

> [i]t is not that antitrust damages are necessarily too high or too low, it is that they vary dramatically and that there is no a priori way to predict where punishment in a particular case or for a particular defendant will come out. This is the real but overlooked incoherence of antitrust punishment.

Waller, *supra* note 54, at 208; *see also* Page, *supra* note 17.

187. For a philosophical critique of laws that retrospectively affect conduct, see A.D. Woozley, *What Is Wrong With Retrospective Law?*, 18 PHIL. Q. 40, 43 (1968) ("The case here against retroactive law is simply that it frustrates planning."). For an early discussion of the differences between ex ante regulation and ex post liability, see Donald Wittman, *Prior Regulation Versus Post Liability: The Choice Between Input and Output Monitoring*, 6 J. LEGAL STUD. 193 (1977); *see also* Charles D. Kolstad et al., *Ex Post Liability for Harm v. Ex Ante Safety Regulation: Substitutes or Complements?*, 80 AM. ECON. REV. 888, 889 (1990) (identifying "a set of inefficiencies associated with *ex post* liability. These inefficiencies are due to a potential injurer's being uncertain about whether a court will hold him liable in the event of an accident and suit.").

188. The one exception is the Hart-Scott-Rodino Antitrust Improvement Act of 1976 which mandates a premerger notification and waiting period. *See* 15 U.S.C. § 18a (2003).

189. Tom W. Bell, *Public Choice and Public Law: The Common Law In Cyberspace*, 97 MICH. L. REV. 1746, 1754 (1999) (book review); *see also* William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247, 264–65 (1985) (proposing the "adoption of clearer criteria of unacceptable behavior"); Cudahy, *supra* note 93, at 7. This risk is particularly great in new economy industries. *See, e.g.*, Piraino, *High Technology*, *supra* note 99, at 130 ("There is no greater deterrence to capital investment in high technology markets than uncertainty."). Even Chicago School scholars, generally very bullish on common law, seem to admit this point. *See, e.g.*, POSNER ANTITRUST, *supra* note 6, at 1 ("The result of the 'common-law' (that is, judge-made) character of antitrust law, despite its statutory foundations, and of the practical complications of

The ability to adapt antitrust is further weakened by the fact that the law is predominantly enforced by private parties, not antitrust officials.[190] The statistics are illuminating: over 90% of filed antitrust cases are private suits.[191] In addition, most scholars, despite their diverging views on the role of antitrust, agree that awarding treble damages to plaintiffs is of limited social utility.[192]

Why has common law functioned better in torts, contracts and even constitutional law?[193] The difference is that these legal areas require a broad assessment and balancing of societal impact. Antitrust, on the other hand is more narrowly focused

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its enforcement, is a considerable fluidity in the meaning and application of the law, and uncertainty about its effects."); HUBER, CYBERSPACE, *supra* note 107, at 101 (antitrust "creates more uncertainty than rules codified by a commission").

190. This phenomenon can be traced to § 4 of the Clayton Act which temptingly rewards successful plaintiffs with treble damages and attorney's fees: "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (2003).

191. According to the Sourcebook of Criminal Justice Statistics, in 2001 94% of antitrust cases filed in United States District Courts were private, whereas only 6% were filed by the federal government. The percentage of private suits since 1975 has varied from a low of 84% in 1990 to a high of 96% in 1976. *See* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, tbl. 5.39 (Maguire et al., eds., 2001), *available at* http://www.albany.edu/sourcebook/1995. These percentages are consistent with a more focused analysis of health care antitrust suits conducted by Hammer and Sage. *See* Hammer & Sage, *supra* note 169, at 565–66 ("[L]itigation by public enforcement agencies generated only 22 of the 394 health care antitrust disputes we identified (6%). By contrast, private plaintiffs were involved in 372 disputes (94%)."); *see also* Viscusi et al., *supra* note 79, at 68 (showing that private cases have accounted for 90% of antitrust cases filed in U.S. District Courts from 1975 to 1997). *Cf.* HYLTON, ANTITRUST, *supra* note 15, at 57 ("Private actions are by far the greatest part of antitrust litigation.").

192. *See, e.g.*, POSNER ANTITRUST, *supra* note 6, at 271–72 ("The damages awarded in private antitrust suits are automatically trebled, but that is not the correct way to handle the problem of concealment."); HYLTON, ANTITRUST, *supra* note 15, at 60 ("The upshot of all this is that while the treble damages rule probably overcompensates victims, it is unclear whether it underdeters potential antitrust violators."); Baumol & Ordover, *supra* note 189, at 263 ("The most obvious remedial change is a restriction of the sort of circumstances to which treble damages apply."); Jonathan B. Baker, *Private Enforcement and the Deterrent Effect of Antitrust Damage Remedies*, 4 J.L. ECON. & ORG. 385, 407 (1988) [hereinafter Baker, *Damage Remedies*] ("In this article I have shown that under one extreme assumption—the absence of private information concerning the likelihood of a successful antitrust recovery—neither treble damages nor any private damage remedy can accomplish either goal."). For solutions to the treble damages problem, see *infra* notes 455–58 and accompanying text.

193. Notwithstanding the fact that statutes now supplement many areas of private common law.

on setting appropriate competition policy. Courts are better suited to the former, less so to the latter.[194] A peculiarly private enforcement mechanism is attempting to make public policy. The institutional mismatch is apparent.[195]

C. Dashed Expectations

By now, the disappointment with conventional antitrust[196] should be unsurprising. One can hardly expect strong public policy from competing economic visions superimposed upon a common law regime and enforced primarily by private litigation.

One question remains: to what extent are the economic battles and limited institutions interrelated? On the one hand, it is reasonable to argue that the common law's institutional limitations have held back the implementation of more sophisticated economic research. More specifically, one might argue that the common law has contributed to the Chicago School's ascendancy. After all, to the extent judges should even be expected to function as economists, it is understandably much easier for a generalist judge to interpret supply and demand curves than to delve into the game theoretic models of Post-Chicago law and economics or core theory.[197] Interestingly, the Chicago School typically embraces the common law as more "ef-

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194. Keith Hylton makes an analogous point when he notes that the "common law rule of reason involved a balancing of broadly defined social costs and benefits. The modern rule of reason in antitrust is a narrower test, in the sense that it examines a narrower set of issues." HYLTON, ANTITRUST, *supra* note 15, at 116.

195. *See also* Daniel J. Gifford, *The Jurisprudence of Antitrust*, 48 SMU L. REV. 1677, 1679 (1995) ("This multiple—and largely private—enforcement of the federal antitrust laws, combined with the institutional limitations of the judiciary to formulate antitrust policy, has created a crisis of sorts in antitrust law.").

196. *See supra* notes 1–10.

197. Bolton et al. have specifically made this claim in the context of predatory pricing:

> [M]odern economic analysis has developed coherent theories of predation that contravene earlier economic writing claming that predatory pricing conduct is irrational . . . . The courts, however, have failed to incorporate the modern writing into judicial decisions, relying instead on earlier theory that is no longer generally accepted . . . .
>
> Growing market concentration, fueled by the current merger wave, has further increased the tension between judicial policy and modern economic theory.

Bolton et al., *supra* note 103, at 2241; *see also* HYLTON, ANTITRUST, *supra* note 15, at 214 ("[C]ourts are not well equipped to competently analyze all of the predatory strategies identified in the economics literature.").

ficient" than statutory or regulatory law[198]—a belief that occasionally borders on mystical affection.[199] A desire to limit administrative regulation drives most of this perspective,[200] but

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198. *See, e.g.*, Richard A. Posner, *quoted in* Douglas G. Baird, *The Future of Law and Economics: Looking Forward: Introduction*, 64 U. CHI. L. REV. 1129, 1153 (1997) ("There's certainly a lot of inefficient legislation. I think that common law rulemaking tends to be more efficient."). Other scholars have, of course, pointed to the contradictions in this position. George Priest has observed the inconsistency of adulation for judicial opinions, which are themselves a far cry from a contestable market. *See* George L. Priest, *The New Scientism in Legal Scholarship: A Comment on Clark and Posner*, 90 YALE L.J. 1284, 1290–91 (1981) ("[T]here is no individual maximizing behavior, there is no mechanism for the equilibration of individual decisions (no market), there is no conception of the margin or of marginal changes in behavior in response to marginal changes in costs."). Herbert Hovenkamp notes the irony where:

> [n]early all the world's other markets, including the common law, work quite well within the Chicago School paradigm .... However, for some reason one market that seems not to work is the political market. The Chicago School literature on legislation is full of detailed explanations of why the legislative process consistently fails to produce "efficient" statutes.

Hovenkamp, *After Chicago*, *supra* note 15, at 254–55.

199. Peter Huber offers perhaps the best example of an almost blind faith in the common law. In the telecommunications context, Huber argues that common law "is the closest we will ever come to utopia." HUBER, CYBERSPACE, *supra* note 107, at xv. Tom Bell and John Duffy have offered perceptive critiques of Huber's work. Bell notes how Huber errs "in overstressing the process of common law to the detriment of its substantive rules." Bell, *supra* note 189, at 1752. Duffy writes that "[f]or Huber, the heroic institution is the common law system .... [H]e is convinced—intensely so, it seems—that courts acting in a common-law fashion can regulate best." John F. Duffy, *The FCC and the Patent System: Progressive Ideals, Jacksonian Realism, and the Technology of Regulation*, 71 U. COLO. L. REV. 1071, 1076 (2000). Duffy also notes the inconsistency with Huber's "scathing indictments of two areas—the tort law and the rules governing admission of scientific evidence in court—that are controlled almost exclusively by common law, with only some general legislative directions for the latter." *Id.* at 1077. Maybe Huber's opinions seem to change. In the telecommunications context, he once called antitrust the "people's constitution . . . developed in the courts under the short, broad mandate of the Sherman Act." HUBER, CYBERSPACE, *supra* note 107, at 202. A few years later, he is disappointed that "antitrust courts . . . don't understand a thing about the subtle, complex economic forces that govern these capital intensive network industries." Peter Huber, *Antitrust's Real Legacy*, WALL ST. J., Dec. 26, 2002, at A14 [hereinafter Huber, *Antitrust Legacy*].

200. *See, e.g.*, Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 549 (1969) [hereinafter Posner, *Natural Monopoly*] ("even in markets where efficiency dictates monopoly we might do better to allow natural economic forces to determine business conduct and performance subject only to the constraints of antitrust policy"); HUBER, CYBERSPACE, *supra* note 107, at 206 ("From markets and the common law, by contrast, there emerges spontaneous order that is rational, efficient, and intelligent. . . . Small-scale and privately-centered common law is the only kind of law that sits comfortably with our traditions of individual freedom and private liberty.").

one cannot help wonder to what extent the Chicago School also hopes courts offer a safe forum wherein the economics can stay simple.

At the same time, and perhaps inconsistently with their general affection for the common law, Chicago School scholars have been among the most articulate critics of courts as antitrust enforcers. Richard Posner has pointed to the "troublesome . . . institutional structure of antitrust enforcement,"[201] even lamenting that what jurors see is "theater, not business reality."[202] Similarly, Frank Easterbrook argues:

> Unless the court knows the "right" balance between competition and cooperation in each market, it does not know in which direction to move. Are 10-year exclusive dealing contracts between oil companies and service stations too long? Too short? Just right? Does it matter whether there are two oil companies or twenty? 200 stations or 20,000? Is a Herfindahl-Hirschmann [sic] Index of concentration in titanium dioxide of 3000 too high? Too low? Just right? If the court tries to move the economy in the direction of the textbook model of atomistic auctions, it is sure to be wrong a great deal of the time. If the court tries to do anything else, it is at sea.[203]

Both Easterbrook and Posner have also insightfully critiqued the false dichotomy between the per se and rule of reason standards.[204] While perceptive, perhaps these criticisms

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201. Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 936 (2000), *available at* http://www.ali-aba.org/aliaba/Posner_101100.htm. Posner seems particularly concerned about antitrust's institutional ability to address issues brought about by the new economy. *See id.* at 943 (noting the "very serious mismatch between the conditions of the new economy and the institutional structure of antitrust enforcement"); POSNER ANTITRUST, *supra* note 6, at 276–77. In ANTITRUST, Posner states:

> Antitrust cases in new-economy industries present unusually difficult questions of fact because of the technical complexity of new-economy products and services . . . . A further complication is that it is difficult to find competent neutral experts to advise the lawyers, judges, and enforcement agencies on technical questions in the new economy.

Id.

202. POSNER ANTITRUST, *supra* note 6, at 285.

203. Easterbrook, *Limits*, *supra* note 2, at 2; *see also id.* at 11 ("A court could try to conduct a full inquiry into the economic costs and benefits of a particular business practice in the setting in which it has been used. But it is fantastic to suppose that judges and juries could make such an evaluation.").

204. *See, e.g.*, *id.* at 9 (article section entitled "The Shrinking Per Se Rule and the Empty Rule of Reason"); POSNER ANTITRUST, *supra* note 6, at 39 (noting how

are ultimately driven by the fact that Chicago School scholars would generally like to see less antitrust enforcement. After all, while the Chicago School has had considerable success in the courts,[205] it cannot declare victory.[206] Being attuned to the legislative history and broad social and political goals, courts have been reluctant to embrace fully the tenets of neoclassical economics.[207] What Judge Bork perceives as "increasingly bizarre results . . . because the Supreme Court has introduced conflicting goals"[208] is actually the product of courts trying to reconcile the neoclassical preaching of the Chicago School with broader economic and political reality.[209] Indeed, William Page

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the different labels attached to standards of review "are not illuminating terms").

205. *See, e.g.*, Hylton & Salinger, *supra* note 164, at 470 ("The post-Chicago literature has not had the same influence on the courts to this point as did the Chicago School writings . . . ."); HYLTON, ANTITRUST, *supra* note 15, at 40. Hylton comments:

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

Id.

206. Even though Judge Posner asserts that:

> [a]lmost everyone professionally involved in antitrust today . . . not only agrees that the only goal of the antitrust laws should be to promote economic welfare, but also agrees on the essential tenets of economic theory that should be used to determine the consistency of specific business practices with that goal.

POSNER ANTITRUST, *supra* note 6, at ix.

207. Compare *General Dynamics*, *GTE Sylvania* and *Matsushita*, *supra* notes 70–72, with *Aspen Skiing* and *Kodak*, *supra* notes 121–22.

208. BORK, PARADOX, *supra* note 1, at 7. For a similar perspective, see McChesney, *Be True*, *supra* note 3, at 332 ("Since Congress can always change the law if it wants, it must 'intend' (accepting *arguendo* Bork's notion of institutional intent) the results that antitrust has produced for a century: bad jurisprudence and anticompetitive suits.").

209. *See* Ferguson, *supra* note 108, at 552 ("Presumably the antitrust laws concern economic problems relating to competition. But the solutions of these problems by the courts are not arrived at on economic grounds but rather are approached in terms of broad social policy, perhaps influenced by a prejudice in favor of preserving small enterprise."); Page, *supra* note 17, at 1254 ("The various references the Court has made to 'economic efficiency' and 'consumer welfare' as goals are too ambiguous in their lexical meaning and in their context to justify the conclusion that the Court has adopted the Chicago conception of efficiency as its sole standard in antitrust cases."); *Cf.* Areeda, *supra* note 166, at 960 ("[C]ourts have never equated the economist's definition of market power with the antitrust notion of monopoly power that would implicate section 2."). Adams and Brock note that:

> For the past two decades, the antitrust field has been torn between two

points to "the Court's ambivalence toward the Chicago School of antitrust analysis."[210] Regardless of the common law's effect in helping or hurting Chicago's cause, at least a good case can be made—regardless of one's view on the substantive law—that ill-fitting legal institutions have provided an inappropriate forum to resolve the economic battles.[211]

II. TOWARD A NEW SYNTHESIS

A. *The Public Choice Fallacy*

Faced with these seemingly insurmountable problems of antitrust economics and institutions, it is tempting to argue that there should be no role for antitrust: get government out of the way and just let the private market decide. This is precisely what public choice scholars argue.[212] Unfortunately, while their theories are superficially seductive, under more careful scrutiny they leave much to be desired.

> major belief systems. The 'traditionalist' vision centers around the necessity of some government intervention to promote and maintain free markets as a regulatory mechanism in a free society. The 'revisionist' vision views most government intervention as counterproductive, and places its faith in the operation of natural economic laws to protect the consuming public.

Adams & Brock, *supra* note 18, at 258.

210. William H. Page, *Legal Realism and the Shaping of Modern Antitrust*, 44 EMORY L.J. 1, 3 (1995). Page believes that this is in large part due to the influence of realism. *See id.* at 5 ("Although Chicago has continued to influence the Court's perception of market relationships, the contextualist strand in realism has deterred the Court from accepting Chicago's more sweeping doctrinal prescriptions, such as rules of per se legality.").

211. *Cf.* Susan Rose-Ackerman, *Progressive Law and Economics—And the New Administrative Law*, 98 YALE L.J. 341 (1988) (arguing that conservative law and economics' focus on the common law has hindered reform of public law).

212. This belief in the superiority of private ordering is sometimes implicit even in the work of economists outside the public choice vein. *See, e.g.*, Steven A. Morrison & Clifford Winston, *The Remaining Role for Government Policy in the Deregulated Airline Industry*, *in* DEREGULATION OF NETWORK INDUSTRIES (Sam Peltzman & Clifford Winston eds., 2000) (suggesting that gates could be made available to new airline carriers, despite the strong objection of incumbents, simply by having airports compete among themselves for traffic); Curtis Grimm & Clifford Winston, *Competition in the Deregulated Railroad Industry: Sources, Effects, and Policy Issues* 67–69, *in* DEREGULATION OF NETWORK INDUSTRIES (Sam Peltzman & Clifford Winston eds., 2000) (suggesting that private negotiations could address the problem of shippers captive to one railroad).

It is important to differentiate the Chicago School from the public choice school of law and economics. The former at least countenances some role for antitrust,[213] which Posner himself defends:

> Efforts have been made to explain federal antitrust enforcement as just another example of interest-group politics, an approach that has worked for a number of government agencies and programs. But the efforts have not been successful and the reasons may be that the agencies are dominated by lawyers most of whom go on to jobs in the private sector and that antitrust law itself is dominated by federal judges exercising a broad discretion because of the open-endedness of the major federal antitrust statutes.[214]

By contrast, public choice, sometimes labeled the "Virginia School" is at heart a contractarian movement that has its roots in the pioneering work of James Buchanan. Buchanan argues that "economics comes closer to being a 'science of contract' than a 'science of choice',"[215] where the "unifying principle becomes gains-from-trade, not [social] maximization."[216]

Drawing from a belief that views government "merely [as] a mechanism for combining private preferences into a social decision,"[217] public choice commentators[218] believe that "anti-

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213. *See supra* Part I.A; *see also* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 132 (1962) ("The first and most urgent necessity in the area of government policy is the elimination of those measures which directly support monopoly . . . .").

214. POSNER ANTITRUST, *supra* note 6, at 285.

215. James M. Buchanan, *A Contractarian Paradigm for Applying Economic Theory*, 65 AM. ECON. REV. 225, 229 (1975).

216. *Id.* (emphasis omitted); *see also* James M. Buchanan, *Contractarian Political Economy and Constitutional Interpretation*, 78 AM. ECON. REV. 135 (1988).

217. DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 44 (1991); *see also* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 34–56 (1998). For a discussion of public choice as a possible explanation for regulatory largesse toward certain groups, see Reza Dibadj, *Regulatory Givings and the Anticommons*, 64 OHIO ST. L.J. 1041 (2003) [hereinafter Dibadj, *Regulatory Givings*].

218. Some of Buchanan's followers may have taken his insights to an extreme. For instance, it is one thing to say that gains-from-trade should be included in public policy. It is quite another to say that all other considerations should be disregarded. *Cf.* Howard Banks, *A Talk with the Nobel Laureate*, FORBES, Nov. 17, 1986, at 108 (noting how Buchanan is worried that some of his colleagues "have gone too far in supporting market theories in turning a blind eye to mergers among big companies").

trust enforcement agencies are shaped by politics"[219] and that antitrust should essentially be abolished since "there is widespread acknowledgement that antitrust has repeatedly failed to protect the interests of consumers. Individual case studies and more systematic evidence demonstrate that the laws have actually been used not to enhance competition but to reduce it."[220] The upshot is a peculiarly private solution to competition law: simply allow private parties to contract among themselves.[221]

Legal and economic reality, however, casts doubt on the idea that the best competition law is no competition law. One reason is quite simple: while economists generally[222] consider competition to be beneficial since it forces resources to be allocated to their most efficient use,[223] for a self-interested business, competition means lower profits.[224] As Federal Communications Commission (FCC) Chairman Michael Powell warns, "[c]ompanies don't like competition. It's the biggest red herring

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219. McChesney & Shughart, *Unjoined Debate*, *supra* note 3, at 349; *see also* William F. Shughart, II, *Retrospect and Prospect*, *in* THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE 321 (Fred S. McChesney & William F. Shughart, II eds., 1995) (espousing the cynical view that the FTC will only tackle the easy cases that can be resolved quickly to facilitate the staff's later transition to private firms).

220. Fred S. McChesney & William F. Shughart, II, *Preface* to THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC CHOICE PERSPECTIVE, x (Fred S. McChesney & William F. Shughart, II eds.); *see also* McChesney & Shughart, *Unjoined Debate*, *supra* note 3, at 341 ("No systematic empirical evidence exists to support claims that antitrust has upheld either of the two prime directives most often attributed to it—protecting the interests of consumers or championing a Jeffersonian nation of yeomen farmers and shopkeepers sheltered from the harsh gales of competition."); Fred L. Smith, *The Case for Reforming the Antitrust Regulations (If Repeal Is Not an Option)*, 23 HARV. J.L. & PUB. POL'Y 23 (1999).

221. This argument is tinged with irony given that the bulk of antitrust cases are private. *See supra* note 191.

222. The relevant exception is core theory, where competition may not be efficient if the interaction among market participants has an empty core. *See supra* Part I.A.3.

223. *See, e.g.*, Breyer, *Newly Liberated*, *supra* note 179, at 1006 ("One might describe these goals as the 'benefits' that can flow from workable competition, namely (1) prices close to incremental costs, leading to buying and production decisions that minimize economic waste, (2) efficient production processes, and (3) innovation as to both product and production processes."); *see also* Piraino, *High Technology*, *supra* note 99, at 81; Dibadj, *Cable Competition*, *supra* note 154, at 263–65; *infra* note 259.

224. Indeed, in the theoretical case of "long run competitive equilibrium, firms earn zero economic profits." HYLTON, ANTITRUST, *supra* note 15, at 9 (emphasis omitted); *see also* Bailey & Baumol, *Contestable Markets*, *supra* note 58, at 116.

and garbage I've heard in my life."[225] Or in the candid words of one article in the business press, "[b]usinessmen, by and large, don't like free and open markets. From John D. Rockefeller on, they have found markets to be messy, chaotic, and insufficiently profitable."[226] As Professor Ashutosh Bhagwat has written in the academic literature:

> Today, the instinctive distrust of any governmental action, and the almost religious faith in free markets, which characterized the deregulatory movement, seem somewhat naive. There is a growing recognition instead that unregulated markets do not necessarily operate perfectly, that successful, anticompetitive behavior by firms is in fact more plausible and common than we perhaps thought, and the social costs of these phenomena are substantial.[227]

At a deeper level, the public choice argument hinges on the notion that antitrust is simply a form of regulation, and thus subject to the same deficiencies.[228] While contractarians are insightful in seeing the similarities between the two,[229] their attacks against regulation suffer from theoretical and empirical flaws. Stephen Breyer, for example, points out that such theories

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225. Federal Communications Commission, Transcript: Spectrum Rights and Responsibilities Protection Public Workshop, Spectrum Policy Task Force, at 10 (statement of Michael Powell, FCC Chairman) (transcript *available at* http://www.fcc.gov/sptf/workshops.html); *see also* Joel I. Klein, The Importance of Antitrust Enforcement in the New Economy, Address Before the New York State Bar Association Antitrust Law Section Program 11 (Jan. 29, 1998) ("[C]ontrary to the view in some quarters, the natural state of markets is not to move towards increasing competition. Market power, rather than a competitive market, is something that every business understandably wants—because it allows a business to increase its profitability at the expense of the consuming public."), *available at* http://www.apeccp.org.tw/doc/USA/Policy/speech/1338.htm [hereinafter Klein, Enforcement].

226. Alan Murray, *Exile on G Street*, WALL ST. J., May 13, 2003, at A4.

227. Bhagwat, *supra* note 73, at 1501.

228. Public choice scholars correctly point out that the Chicago School has ignored this reality. *See* McChesney, *Be True*, *supra* note 3, at 324 ("Chicago's positive approach to antitrust, viewing it as public-interest government intervention intended to correct market failure, squarely contradicts the now-dominant economic theory of regulation that Chicago itself popularized. The Chicago school of antitrust regulation, that is, runs counter to the Chicago school of regulation more generally."); *id.* at 339 ("The current intellectual situation thus is not a stable equilibrium. Either the Chicago view of antitrust or the Chicago approach to regulation is wrong; both cannot be right.").

229. *See infra* Part II.B.

> tend to overlook the extent to which nonpolitical factors affect the content of regulation. While some regulators are politicians, many are not; they are not elected; and they do not seek to maximize votes . . . . Similarly, one cannot in fairness view legislators as interested only in the political support of those who favor or oppose particular measures. The merits of those issues play an important role in political argument.[230]

Indeed, despite empirical studies showing ideology to be a better predictor of legislative votes than economics,[231] public choice ignores the ideology of politicians and bureaucrats.[232] Steven Croley has compared public choice against the "messy participatory[] details of agency behavior"[233]—namely, rulemaking[234] and agency adjudication[235]—and concludes that "strong claims about the undesirability of regulatory government (commonly associated with public choice theory) seem

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230. BREYER, REGULATION, *supra* note 182, at 388 n.38; *see also* Croley, *supra* note 217, at 42 ("Simply knowing that a legislator seeks security of office does not, without more, imply anything specific about how that legislator will behave or, more particularly, how that legislator will satisfy the regulatory preferences of competing interest groups."). In fact, public choice must necessarily imply a poor opinion of public servants. To the extent that it discourages qualified people from entering government service or accepting public interest work, this perspective is doubly unfortunate.

231. *See* FARBER & FRICKEY, *supra* note 217, at 29.

232. *See id.* at 24 ("[P]ublic choice ignores some other common sense observations about politics. Some crucial features of the political world do not fit the economic model. It does not account for ideological politicians like Reagan and Thatcher. Most notably, it does not account for popular voting.").

233. Croley, *supra* note 217, at 7.

234. *See id.* at 142–43. Croley comments:

> On the whole, the regulatory regime's legal process rules do not seem very well designed to facilitate regulatory rent-seeking by special interest groups. Rulemaking in particular seems rather at odds with the public choice theory's expectations, considering that rulemaking is open to any interested party who wishes to participate, and that potential participants need not overcome onerous burdens to do so.

Id.

235. *See id.* at 162. Croley continues:

> The problem for public choice theory . . . is that it overlooks several important aspects of the adjudication process, including ALJ [administrative law judge] independence, the compilation of a public record, the APA's [Administrative Procedures Act] prohibition on ex parte communications, the APA's requirements that agency decisions be supportable by evidence in that record, and the possibility that federal courts will invalidate orders not supported by the record.

Id.

overstated."[236] Indeed, as Croley correctly points out, if "the relationship between legislators and regulation-seeking interest groups constitutes the real lynchpin of the public choice theory—then reforms in the area of campaign finance, for one example, might go far to alleviate the problems that lead public choice theorists to call for deregulation."[237]

Public choice's predictive power also leaves much to be desired. It does not predict regulations that have protected consumers or workers. Stephen Breyer, for instance, observes:

> Interest group theories, as causal explanations of either the historical origins of regulation or the actions of regulators, suffer several drawbacks. Where they are limited to producers, they are often inaccurate. They cannot fully explain environmental, health, safety regulation, or even traditional utility and transportation regulation . . . .
>
> If the theory is expanded beyond producers, it risks becoming nonpredictive and nonexplanatory. All regulatory rules and programs benefit some group or other.[238]

Neither does the theory predict the deregulation of industries that has often hurt industry incumbents. As Joseph Kearney and Thomas Merrill summarize:

> The public choice perspective is also vulnerable insofar as its central premise—that positive regulation is always inferior to market ordering—is usually advanced as an article of faith rather than by empirical demonstration. The history of the great transformation we have recounted—in which regulatory agencies often led the charge for regulatory reform—should by itself be enough to give pause before one asserts any invariant hypothesis about the behavior of regulators. Contrary to the theory popular in the late 1960s and early 1970s, agencies do not always behave as the hopeless captives of their client industries.[239]

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236. *Id.* at 12. Croley compares public choice to other competing theories of regulation: "neopluralist theory," "public interest theory," and "civic republican theory." *Id.* at 5.

237. *Id.* at 50–51.

238. BREYER, REGULATION, *supra* note 182, at 388 n.38

239. Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1406 (1998); *see also* Sam Peltzman & Clifford Winston, *Conclusion* to DEREGULATION OF NETWORK

If we assume away these weaknesses, we are left with public choice's central message: advocacy for a "deregulated" world of private contracts uninhibited by the strictures of government versus a "regulated" world of government intervention. To begin with, this choice is imaginary. As Cass Sunstein points out:

> What "deregulation" really means is a shift from the status quo to a system of different but emphatically legal regulation, more specifically one of property, tort, and contract rights, in which government does not impose specific public interest obligations but instead sets up initial entitlements and then permits trades among owners and producers. *This is a regulatory system as much as any other . . . . The issue is thus not whether to "deregulate," but whether one or another regulatory system is better than imaginable alternatives.*[240]

Lawrence Sullivan notes, for instance, that "intellectual property is a comprehensive regulatory intervention"[241]—how to reconcile, then, the positions of those who vehemently argue against economic regulation, yet passionately support intellectual property rights? Even what appears at first glance to be a change in private law—such as a change in tort liability to strict liability—is in effect a type of regulation.[242] In addition, the privatization solution assumes efficient rearrangement of private property rights despite transaction costs and behavioral biases.[243] What evidence is there that this is better than public deliberation?

There is much to suggest that private contract, while generally a powerful tool to allocate resources, is far from complete as a mechanism to ensure competition. Indeed, many anticom-

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INDUSTRIES 189, 189 (Sam Peltzman & Clifford Winston eds., 2000) [hereinafter Peltzman & Winston, *Conclusion*] ("There was a time when many economists were skeptical that U.S. industries would ever be deregulated because various interest groups, including the regulated industries, benefited greatly from the status quo and exercised great influence on the regulatory process."); VISCUSI ET AL., *supra* note 79, at 331.

240. Sunstein, *supra* note 135, at 512–13 (emphasis added); *see also* HOVENKAMP, ANTITRUST POLICY, *supra* note 29, at 680 ("So called *laissez faire*, or letting things alone, is never really an option. The sovereign must always make a choice, even if the choice is to develop institutions that will let private decision making determine price, output and quality.").

241. Sullivan, *supra* note 17, at 89.

242. *See, e.g.*, BREYER, REGULATION, *supra* note 182, at 174–77.

243. *See* Dibadj, *Regulatory Givings*, *supra* note 217. *Cf.* BREYER, REGULATION, *supra* note 182, at 24.

petitive practices, such as tying and exclusive dealing, are contractual in nature.[244] As Mark Lemley points out in his study of private standard setting organizations, "[l]egal theorists too often tend to exalt private ordering as perfect and denigrate public rules as incompetent, corrupt, or both. My empirical exploration does not reveal a perfectly functioning contractual system, a fact that advocates of private ordering will have to come to terms with."[245] In his study of path dependence,[246] Mark Roe provocatively notes that "[t]hinking about path dependence tempts us toward greater government direction . . . . [I]t would be most satisfying to believe in evolution-toward-efficiency if we could believe that no important path could be inefficient, a belief the modern biological analogy does not support."[247]

Indeed, as Rudolph Peritz eloquently argues in his history of competition policy, the real danger behind public choice's lionization of private contract is that antitrust will be isolated from the political processes of a democracy:

> In the last two decades, the political sphere has come to be identified as an economic domain—most zealously so under the influence of Chicago School economist George Stigler's market metaphor for government regulation and the Public Choice school that has reified Stigler's metaphor. Thus, the logic of unification produces one domain—whether political or economic—rather than the first logic's bipolar opposition. But the purity produced by the logic of unification comes at a high price: Lost in the collapse is one sphere's ethical principles and social goals. For example, equality may give way to liberty, as happened in the *Lochner* era, or equitable concerns may yield to wealth maximization . . . . In both theoretical and practical terms, *competition policy comes to reflect only one rhetoric, one vision of society, untempered by its historical counterweight*, because the unifying logic of col-

244. *See supra* Part I.A.2.

245. Lemley, *supra* note 135, at 1971–72. *Cf.* Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 934 (2001) ("It is fashionable today to argue that innovation is ensured if government simply stays out of the way . . . . We believe this view is misguided.").

246. *See* Roe, *supra* note 84.

247. *Id.* at 666. After teeing up the issue, Roe states that government intervention is unwise, but that "this belief, based on my observation on the limits of American government, is expressed here off-the-cuff; it is neither derived from a sense that evolution inevitably yields the most efficient results nor deduced from thinking about path dependence." *Id.*

> lapsing domains either ignores ethical and teleological differences between economic and political realms or understands them as closed to negotiation.[248]

Not only is competition policy necessary, but it should reflect, and be formulated within, the broader social discourse of a public political system.[249] Democracy shouldn't be privatized and reduced to monetary exchanges.[250] Perhaps former Federal Reserve Chairman Paul Volcker puts it best: "Markets are absolutely indispensable . . . . But I don't think they are God."[251]

The bottom line is that while public choice theory is useful in pointing out government's problems, its faith in privatization is not even close to offering a complete solution.[252] The challenge is thus not to abandon government, but to find ways to make it better, to go beyond and "create a regulatory super-

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248. PERITZ, *supra* note 26, at 302 (emphasis added); *see also id.* at 303 ("It is in that sense of interdependence between liberty and equality, between individual and collectivity, and, finally, between 'the market' and 'the state,' that we find the continuing possibility of democratic politics and economic opportunity."); *see also* Hovenkamp, *After Chicago*, *supra* note 15, at 232.

249. Cass Sunstein makes a similar point in his discussion of the need for broadcast regulation. *See* Sunstein, *supra* note 135, at 520 ("The most important point is that a market system may fail to provide a system of communication that is well-adapted to a democratic social order."); *see also* Cudahy, *supra* note 93, at 14 ("But I think the time may be coming when market forces alone will not be trusted to carry the whole burden of the public interest in basic infrastructure industries.").

250. For better or worse, privatization seems to have captured the popular imagination. Even during the boom years of the late 1990s, there was a reluctance to invest in public goods such as infrastructure. *See, e.g.*, Peter G. Gosselin, *The '90s: Private Boom Stingy on Public Good*, L.A. TIMES, Aug. 5, 2001, at A1. Gosselin quotes a number of prominent economists. For instance, John Kenneth Galbraith remarks: "It never ceases to amaze me how people complain about the undue burden of the public sector until forced to face reality by physical discomfort, inadequate income, bad health care or, if in California, stalled elevators . . . ." *Id.* Alfred Kahn, the patriarch of airline deregulation tellingly says that without a doubt, "we have knocked the safety padding out of a lot of the social goods we depend on." *Id.*

251. Paul Volcker, *quoted in* Jacob M. Schlesinger, *Did Washington Help Set the Stage for Economic Woe?*, WALL ST. J., Oct. 17, 2002, at A1.

252. *See also* David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 121–22 (2000) ("No family of public choice models seems more irrelevant yet is more widely cited than capture models."). Spence and Cross also aptly note that "capture theory is directly contradictory to the agency policy bias criticism, which suggests that agencies will over-regulate." *Id.* at 122; *see also* Kearney & Merrill, *supra* note 239, at 1405–06 (noting that public choice theory "has not yet displaced the mainstream perspective of those who study industrial organization, which remains deeply uncomfortable with the idea of monopoly").

structure that encourages the betterment of regulatory technology itself.... [F]or it is nothing less than the aspiration that government, like all things human, can improve."[253] Or, as Paul Joskow succinctly observes, "[b]ad antitrust policy need not be replaced with no antitrust enforcement."[254]

B. Merging Paradigms

Ironically, perhaps the most important contribution of the public choice school has been to show that antitrust is a form of regulation.[255] I propose to build on this insight, but end up in a different place: rather than abandon both and resort to private contracting, why not aspire to a public solution? One where antitrust and economic regulation can help each other.[256] Before embarking on this journey, it first might be useful to understand why the two areas have traditionally been considered to be very different and how that perspective is changing.

Antitrust's goal has been to ensure competitive markets and thus indirectly protect consumers.[257] Regulation, on the other hand, has historically been used to control exit and entry, set rates, and even dictate what products and services a company could offer.[258] Typically, regulation has been deployed via

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253. Duffy, *supra* note 199, at 1080.

254. Paul L. Joskow, *Mixing Regulatory and Antitrust Policies in the Electric Power Industry: The Price Squeeze and Retail Market Competition*, *in* ANTITRUST AND REGULATION 227 (Franklin M. Fisher ed., 1985) [hereinafter Joskow, *Mixing*].

255. *See, e.g.*, McChesney, *Be True*, *supra* note 3, at 328 ("Antitrust is economic regulation .... Antitrust thus regulates the same things that other forms of regulation have traditionally covered.").

256. Why not face common problems together? As Jean-Jacques Laffont & Jean Tirole point out, "antitrust and regulation strike at the same rocks: lack of information about costs, demands, and competitive pressure; capture by interest groups; limited commitment ability." JEAN-JACQUES LAFFONT & JEAN TIROLE, COMPETITION IN TELECOMMUNICATIONS 277 (2000).

257. *See, e.g.*, U.S. DEP'T OF JUSTICE, OVERVIEW: ANTITRUST DIVISION (2004) ("The historic goal of the antitrust laws is to protect economic freedom and opportunity by promoting competition in the marketplace. Competition in a free market benefits American consumers through lower prices, better quality and greater choice."), *at* http://www.usdoj.gov/atr/ overview.htm (last visited February 24, 2004); Klein, Enforcement, *supra* note 225, at 8–9 ("Competitive markets work best for consumers and antitrust enforcement is essential for sustaining competitive markets.").

258. *See, e.g.*, VISCUSI ET AL., *supra* note 79, at 298–300 (discussing the traditional regulatory roles of controlling price, quantity, and entry and exit); *see also* BREYER, REGULATION, *supra* note 182, at 15–35 (outlining the typical justifications for regulation: controlling monopoly power and "excess profits," correcting

regulatory commissions,[259] in markets characterized as "natural monopolies," where long-run average cost decreases with output[260] and it is most efficient for a single firm to provide service.[261] Utilities such as telecommunications and electricity are prototypical examples.[262] Thus, even though both antitrust and regulation are designed to protect consumers,[263] their mechanisms have been quite different. Leading scholars highlight this dichotomy. Stephen Breyer, for example, draws a contrast between "private anticompetitive behavior,"[264] the domain of antitrust, and "market failures"[265] which call for regulation:

> The antitrust laws seek to create or maintain the *conditions* of a competitive marketplace rather than replicate the *results* of competition or correct for the defects of competitive markets. In doing so, they act negatively, through a few highly general provisions *prohibiting* certain forms of private conduct. They do not affirmatively order firms to behave in specified ways; for the most part, they tell private firms what not to do.[266]

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for externalities and inadequate information, and addressing the fear of excessive competition); Joseph D. Kearney, *Will the FCC Go the Way of the ICC?*, 71 U. COLO. L. REV. 1153, 1156–84 (2000).

259. *See, e.g.*, Kearney & Merrill, *supra* note 239, at 1329 ("Beginning in the late nineteenth century, the dominant model of regulation viewed these various industries, or their individual constituent parts, as best served by a limited number of service providers that would be overseen by a regulatory commission concerned with maintaining standardized packages of services and prices.").

260. *See, e.g.*, VISCUSI ET AL., *supra* note 79, at 337. These are typically industries where the ratio of fixed to variable costs is high.

261. *See, e.g.*, Posner, *Natural Monopoly*, *supra* note 200, at 548 ("If the entire demand within a relevant market can be satisfied at lowest cost by one firm rather than by two or more, the market is a natural monopoly, whatever the actual number of firms in it.").

262. *See, e.g.*, Joskow, *Electric Power Sector*, *supra* note 89, at 113–188.

263. Regulation often has additional redistributive goals. *See infra* notes 329–336; *see also* BREYER, REGULATION, *supra* note 182, at 20 ("The case for regulation rests partly on economic grounds, partly on political and social grounds, and upon a host of unproved (and possibly unprovable) assumptions."); Harvey Averch & Leland L. Johnson, *Behavior of the Firm Under Regulatory Constraint*, 52 AM. ECON. REV. 1052, 1068 (1962) ("At the same time, regulatory practices that provide an incentive for the firm to operate in some markets even at a loss may constitute a convenient mechanism through which certain activities of the firm judged to be in the 'public interest' can be subsidized.").

264. BREYER, REGULATION, *supra* note 182, at 160.

265. *Id.*

266. *Id.* at 156–57; *see also* Breyer, *Newly Liberated*, *supra* note 179, at 1006 ("Economic regulation bypasses the competitive process and seeks to obtain these benefits [that flow from workable competition] *directly* . . . . Antitrust, on the

Paul Joskow warns how "[e]fforts to mix antitrust policies designed to promote competition with regulatory policies that restrict it can cause numerous difficulties."[267] Robert Pitofsky has emphasized the institutional differences: "[a]ntitrust relies heavily on legal precedent based on a clearly-defined principle of protecting the competitive process and consumer welfare, and cases may be pursued in any of a large number of forums, in both private and federal agency actions[,]"[268] whereas with regulation, "decisions are made by a prescribed agency, and they often try to balance the interests of a wide range of considerations and constituencies."[269]

But new ideas and new technology have changed regulation. In an influential 1962 article, Harvey Averch and Leland Johnson hypothesized that rate-of return regulation has led to a misallocation of resources, leading telephone carriers to overinvest in their plant and equipment.[270] At the same time, the Chicago School began questioning the value of regulation.[271] In

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other hand, tries to achieve these benefits *indirectly*.").

267. Joskow, *Mixing*, *supra* note 254, at 173; *see also* Joskow, TCE, *supra* note 79, at 98 ("U.S. antitrust policy is primarily a *deterrence* system not a regulatory system."); HYLTON , ANTITRUST, *supra* note 15, at 191 (observing that antitrust judges should not try "to emulate public utility regulators").

268. Pitofsky, New Approaches, *supra* note 146, at 7.

269. *Id.*; *see also* Hovenkamp, *Post-Chicago*, *supra* note 69, at 293 ("Judicially administered public utility style regulation of aftermarket prices is not merely administratively impossible, it is also not an 'antitrust solution' to the problem at hand, which is to make markets competitive.").

270. *See* Averch & Johnson, *supra* note 263, at 1062–68. For a later exposition of problems with rate-setting regulation, see Joskow & Noll, *supra* note 83, at 1269, who comment:

> The twin problems of avoiding bankruptcy and preventing monopoly profits are much more than a theoretical possibility; one or the other is virtually certain to occur eventually under any permanent price cap formula. Because getting uncertain costs even approximately right is essentially impossible, the price cap formula must be adjusted periodically over time.

Id.

271. For classic Chicago School writings on regulation, see Harold Demsetz, *Why Regulate Utilities?*, 11 J.L. & ECON. 55, 56 (1968) ("The theory of natural monopoly is deficient for it fails to reveal the logical steps that carry it from scale economies in production to monopoly price in the market place."); Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807, 821 (1975) ("[T]he costs of monopoly are quite probably much greater in the regulated than in the unregulated sector of the economy, despite the greater size of the latter sector."); Posner, *Natural Monopoly*, *supra* note 200, at 639. Posner advocates

> (1) the deregulation of those industries that are not natural monopolies, such as natural-gas production, aviation, and trucking, and, (2) in the other regulated industries, (a) removal of restrictions on entry and of

a seminal paper, George Stigler developed the "capture theory" of regulation, hypothesizing that "regulation is acquired by the industry and is designed and operated primarily for its benefit."[272] Stigler's pro-producer theory of regulation was later extended to become an "economic theory" which posits that regulation is a response to various interests groups.[273] Terms like "government failure" entered the lexicon to describe regulation.[274]

Other changes were afoot. Contestability theory[275] shook the foundations of regulation: if free entry and exit are the key to a robust market, then barriers to entry and exit should be removed since "[i]mpediments to entry and exit, not concentration or scale of operations, may be the primary source of interference with the workings of the invisible hand."[276] Given that regulation had traditionally imposed such barriers, the result of contestability theory has been to cut against regulation, with theorists arguing that "[t]he new analysis merely reinforces the view that any proposed regulatory barrier to entry must start off with a heavy presumption against its adoption."[277] Stephen Breyer's pathbreaking book, *Regulation and Its Reform*, further shook up traditional regulatory paradigms in the 1980s. Using the metaphor of "less restrictive alternative[s],"[278] Breyer laid

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> controls over specific rates and (b) substitution of an excess-profits tax for regulatory limitations of overall profits.

Id.

272. George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971). Stigler performed an empirical analysis of the impact of various regulations to conclude that the more powerful the interests being regulated, the more advantageous the regulations turned out being toward them. *See, e.g., id.* at 9 ("The regulations on [truck] weight were less onerous; the larger the truck population in farming, the less competitive the trucks were to railroads (i.e., the longer the rail hauls), and the better the highway system."). He also came to similar conclusions in the context of occupational licensing. *See id.* at 13–17.

273. *See* VISCUSI ET AL., *supra* note 79, at 314–21. "Economic theory" stands in contrast to the more benign theory of regulation as a curb against natural monopoly and externalities, or what is sometimes called "normative analysis as a positive theory." *See id.* at 314.

274. For a good description of this phenomenon, see *id.* at 10; *see also* Thomas W. Hazlett, *Explaining the Telecommunications Act of 1996: Comment on Thomas G. Krattenmaker*, 29 CONN. L. REV. 217, 239 (1996) (observing that in "a world where regulators have consistently proven themselves to favor monopoly over competition, producers over consumers, and government over the market, the institution of law offers an eminently reasonable remedy").

275. *See supra* Part I.A.1.c.

276. Bailey & Baumol, *Contestable Markets*, *supra* note 57, at 111.

277. Baumol, *Uprising*, *supra* note 59, at 14.

278. BREYER, REGULATION, *supra* note 182, at 341. Breyer explains that an

out "a framework that sees classical regulation as a weapon of last resort and looks for less restrictive ways to deal with problems thought to call for regulation."[279] Breyer's insights were quite prescient: as the 1980s and 1990s unfolded, technological advances brought into question at least some aspects of the natural monopoly model, allowing an unbundling of monopolists' networks. For example, long distance networks and electricity generation could be separated from local telephone and electricity wires—with competition possible on the former, regulation could be limited to the latter.[280] The point is to isolate those elements of a network that are prone to natural monopoly.[281]

Further hastening the demise of traditional regulation has been the realization that an omniscient regulatory commission able to micromanage a vast array of command-and-control regulatory edicts is a fallacy.[282] Instead, new regulatory mechanisms are emerging that try to supplement, rather than supplant, the market. These include marketable property rights that can be traded,[283] mandatory disclosure,[284] or even self-regulation.[285]

"agency or program is identified as a likely candidate for reform insofar as the framework identifies a *less restrictive method* of attacking the problem thought to call for regulation." *Id.* (emphasis added).

279. *Id.* at 368.

280. *See, e.g.*, Kearney & Merrill, *supra* note 239, at 1384 ("The original paradigm was created because of widespread perceptions of market failure in regulated industries, most prominently the presence of natural monopolies. In recent decades, however, advances in technology have eliminated many of the natural monopoly features of these industries, or at least have significantly reduced their scope.").

281. *See, e.g.*, Joskow & Noll, *supra* note 83, at 1251.

282. *See, e.g.*, Hazlett, *supra* note 274, at 225–36. Richard Cudahy makes the interesting point that deregulation is emphasized in strong, not weak, economic times.

> When essential infrastructure industries evince structural flaws—on the one hand, monopoly pricing, price discrimination and inadequate service, or, on the other, financial collapse, service abandonments and destructive competition—economic regulation has been the usual prescription. Later, in the name of economic efficiency, deregulation and competition become the universal remedy.

Cudahy, *supra* note 93, at 2.

283. These tradable rights have been used predominantly in the context of environmental regulation. *See, e.g.*, Bernard S. Black & Richard J. Pierce, Jr., *The Choice Between Markets and Central Planning in Regulating the U.S. Electricity Industry*, 93 COLUM. L. REV. 1339, 1389–98 (1993) (discussing the federal environmental regulation of power plants using market-based environmental incentives); BREYER, REGULATION, *supra* note 182, at 171–74 (also giving examples

This convergence of ideas and technology has fueled the deregulatory trends of the past two decades in trucking, railways, airlines, telecommunications, and even electricity.[286] Instead of relying on retail rate regulation, regulators are increasingly trying to create an environment where competition can flourish.[287] In the telecommunications sector, Congress has even required incumbents to unbundle their local networks to allow access to new entrants.[288] The Federal Energy Regulatory Commission (FERC) has similarly ordered electric utilities to open their transmission lines to competition.[289] Antitrust ideas are even beginning to gain broader influence with FERC[290] and other regulatory agencies such as the FCC.[291] In

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beyond the environmental domain).

284. *See, e.g.*, Sunstein, *supra* note 135, at 504 (in the context of broadcast regulation, advocating "mandatory public disclosure of information about public interest broadcasting, unaccompanied by content regulation").

285. *See id.* (arguing for "voluntary self-registration, as through a 'code' of appropriate conduct, to be created and operated by the [broadcasting] industry itself").

286. In certain industries such as trucking, where there are few barriers to entry and exit, this approach makes eminent sense. *See, e.g.*, Kearney & Merrill, *supra* note 239, at 1399 ("There has been a broad consensus among economists since the early 1970s, if not before, that the original paradigm of active government regulation makes no sense as applied to industries without any natural monopoly features . . . ."); BREYER, REGULATION, *supra* note 182, at 234–36 ("[T]he rationales for trucking regulation appear weak . . . [trucking] does not have high fixed costs and low variable costs."). Trucking regulation, while imprudent in hindsight, was imposed to achieve regulatory parity with the railway sector, whose infrastructure makes it less contestable. *Cf.* Pitofsky, New Approaches, *supra* note 146. In other industries, such as airlines, telecommunications, and electricity, competition law must take into account sunk costs and the presence of bottlenecks that incumbents control. *See infra* Part III.A.2.c.

287. *See generally* Crandall & Hausman, *U.S. Telecommunications Services*, *supra* note 87, at 110 ("[W]e would prefer an attempt by regulators to undo the regulatory-created barriers to entry built into the *retail* rate structure.").

288. *See* 47 U.S.C. § 251(c)(3) (2002) (imposing a "duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point"). For a critique of the FCC's implementation of this congressional mandate, see Dibadj, *Local Telephony*, *supra* note 169.

289. *See* FERC Order No. 888, 61 Fed. Reg. 21,540 (1996) (codified at 18 C.F.R. pts. 35, 385).

290. *See, e.g.*, Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement, Order 592, Issued Dec. 18, 1996, 77 FERC ¶¶ 61, 263 (bringing FERC's merger guidelines more in line with those of the Department of Justice); *see also* Milton A. Marquis, *DOJ, FTC and FERC Electric Power Merger Enforcement: Are There Too Many Cooks in the Merger Review Kitchen?*, 33 LOY. U. CHI. L.J. 783, 786 (2002) (proposing FERC further change its information-gathering process "to more closely match the information requirements of the Horizontal Merger Guidelines"); Joskow, *Electric Power Sector*, *supra*

some markets, such as broadband, regulation plays an even more important role than antitrust in fostering competition.[292] As Joseph Kearney and Thomas Merrill summarize in their study of the transformation of regulated industries, "[u]nder the new paradigm, the regulator plays a far more limited role. Instead of comprehensively overseeing an industry in order to protect the end-user, *its principal function is to maximize competition among rival providers, in the expectation that competition will provide all the protection necessary for end-users*."[293]

Assuming one believes that government has a role to play,[294] there are two possible reactions to this shift. One view, advocated by a number of distinguished commentators, is simply to say that as these markets "pass out of the realm of strict agency control and into the realm of private, market-based decision making, *antitrust picks up where the regulatory regime leaves off*."[295] But far from a panacea, traditional antitrust is replete with problems of its own.[296]

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note 89, at 149.

291. *See, e.g.*, News Release, Federal Communications Commission, FCC Sets Limits on Media Concentration 9 (June 2, 2003), http://hraunfoss.fcc.gov/edocs_public/attachmatch/ DOC-235047A1.pdf [hereinafter FCC MC News Release] (creating a media diversity index "modeled on the Herfindahl-Hirschmann [sic] Index (HHI), which is used in antitrust analysis to measure the degree concentration [sic] in an economic market."); 9 FCC ANN. ASSESSMENT OF THE STATUS OF COMPETITION IN THE MARKET FOR THE DELIVERY OF VIDEO PROGRAMMING ¶ 113 (2002), http://hraunfoss.fcc.gov /edocs_public/attachmatch/FCC-02-338A1.pdf (noting significant barriers to entry in the cable marketing, notably "(a) predatory conduct including 'predatory pricing'; (b) strategic behavior by an incumbent to raise its rival's costs by limiting the availability of certain popular programming as well as equipment . . .").

292. *See* Sullivan, *supra* note 17, at 75 ("[R]egulatory interventions at the federal, state, and even municipal levels have as much or more of an effect on competition in broadband markets than does antitrust.").

293. Kearney & Merrill, *supra* note 239, at 1361 (emphasis added). *See also* Klein, Enforcement, *supra* note 225, at 6 ("Two industries [telecommunications and electricity], long thought to be natural monopolies, are now undergoing significant structural change, which will lead to real competition over time."); LAFFONT & TIROLE, *supra* note 256, at 279 ("[W]e feel that competition policy should be given a more prominent role in the overall process.").

294. *See supra* Part II.A.

295. Hovenkamp, *Areeda-Turner Treatise*, *supra* note 44, at 832 (emphasis added). In Hovenkamp's words:

> To state a general principle, the less the regulatory regime interferes with the workings of the market, the more room for antitrust . . . .
> This general principle suggests that the 'deregulation' movement which began in the 1970s should lead to an increased role for antitrust in the regulated industries . . . . As industries (such as interstate air travel, trucking or telecommunications) move from price regulation to price

Another view is to recognize that "[a]ntitrust is nothing if not economic regulation"[297] and that the "attempt to draw a sharp demarcation between antitrust and regulatory objectives is a mistake."[298] As Thomas Moore points out, "[t]he Sherman Act [is] the most encompassing regulatory statute and the second oldest federal regulatory law .... Only recently have economists begun to recognize that antitrust laws are regulatory statutes."[299] Similarly, after an extensive discussion of antitrust issues in the healthcare sector, Peter Hammer and William Sage conclude that the "most important lesson is that competition can and should meet regulation at an interface, not a boundary."[300] Baumol and Sidak make a similar point when they note the benefits of harmonizing antitrust and regulation:

> This harmony between regulation and antitrust has three important implications. First, the same basic tools of microeconomic analysis can be employed in one as in the other .... Second, changes in technology or other circumstances that permit natural monopoly to give way to competition impart continuity to the relationship between economic regulation and antitrust. Third, many of the thorniest problems in antitrust law . . . are fundamentally regulatory in nature, involving issues such as entry or the pricing of intermediate goods sold to competitors. Thus, the economic scholarship on regulation can in many instances enrich antitrust jurisprudence.[301]

> competition, the law of collusion, boycott and predatory pricing picks up where agency price regulation left off.

Cf. Kahn, *supra* note 4, at 1059 ("While prepared to defend enthusiastically the deregulations with which I have been involved, I feel equally strongly that they have greatly accentuated the importance of antitrust enforcement."); Pitofsky, New Approaches, *supra* note 146, at 1 ("Of course, deregulation should be accompanied by a greater role for fundamental antitrust analysis and enforcement, lest the old shackles be replaced by new ones of private manufacture."); HOVENKAMP, ANTITRUST POLICY, *supra* note 29, at 699.

296. *See supra* Part I.

297. Bittlingmayer, *Fixed Costs*, *supra* note 124, at 744.

298. Robinson, *supra* note 5, at 1184.

299. Thomas Gale Moore, *Introduction* to *Antitrust and Economic Efficiency: A Conference Sponsored by the Hoover Institution*, 28 J.L. & ECON. 245, 245 (1985). *Cf.* LAFFONT & TIROLE, *supra* note 256, at 276–77; Jerry A. Hausman & J. Gregory Sidak, *A Consumer-Welfare Approach to the Mandatory Unbundling of Telecommunications Networks*, 109 YALE L.J. 417, 423 (1999).

300. Hammer & Sage, *supra* note 169, at 637.

301. WILLIAM J. BAUMOL & J. GREGORY SIDAK, TOWARD COMPETITION IN LOCAL TELEPHONY 27 (1994); *see also* Sullivan, *supra* note 17, at 90.

Blending learnings from both antitrust and regulation can lead to a unified competition law that seeks to address antitrust's current woes.

III. RECONSTRUCTING COMPETITION LAW

After deconstructing antitrust's problems and exploring the emerging similarities between antitrust and regulation, reconstruction can begin. The choice of the term "competition law" is not merely a semantic nicety: it is meant to symbolize that the utopian vision of traditional antitrust as a stand-alone common law entity is left wanting.[302] Economic regulation must inform the discourse. I attempt to develop proposals along the same lines as the learnings from deconstruction; by presenting economic foundations, followed by a discussion of revamped institutions.

A. *Developing Law and Economics*

Given the pitched economic battles discussed above,[303] some understandably frustrated commentators find "a stalemate in economic theory"[304] and discount using economics to

302. This is particularly true for industries undergoing dramatic change. Hammer and Sage's description of conventional antitrust's severe limitations in healthcare thus resonates broadly:

> Our study confirms that antitrust law cannot be expected to serve as the sole oversight mechanism for industries as complex and quality dependent as health care. Part of the problem, at least from the standpoint of private litigation, is structural. The existing constellation of factors (damage provisions, fee shifting rules, and standing and injury requirements) that determine which private cases will be pursued, which issues will be litigated, and how those issues will be framed for resolution are not fully meeting social needs. Another part of the problem is intellectual. Courts possess a limited grasp of what constitutes health care quality and how competition can be designed to further it .... Unless theoretical and empirical advances can be translated into fairly simple decisionmaking heuristics, they will be of little practical use to the courts. A final part of the problem is ideological. Thinking about health care quality as a component of competition rather than a professional or regulatory matter requires a conceptual shift.

Hammer & Sage, *supra* note 169, at 637.

303. *See supra* Part I.A.

304. Jacobs, *supra* note 80, at 225; *see also* id. at 265 ("Choosing between economic theories is as much an act of politics as of science. Antitrust and constitutional law may not be so different after all.").

shape antitrust. As Frederick Rowe summarizes, somewhat dramatically:

> Across the philosophical spectrum, thoughtful scholars lament a "Crisis in Economic Theory" that no longer explains, predicts, or fits. The malaise spreads from stale microeconomic models that misperceive how modern enterprise ticks. Essentially, and in conception, they ignore the interplay of governments and business organizations, neglect the spontaneous spark of innovation, and forget the "ultimate resource" of enterprise: the genius of the human mind which defies axioms, calculus, or quantification. Riddled by "externalities," "exogenous variables," and "market failures," *economic analysis tells more and more about less and less.*[305]

While acknowledging the importance of non-economic factors in shaping law, I argue that the economic paradigm should not simply be cast aside.[306] The key is for antitrust economics to look beyond the "stale microeconomic models" that Rowe laments and toward "how modern enterprise ticks." A shift is needed, away from nonfalsifiable assumptions toward a law and economics that is empirical and behavioral.[307] The most beautiful mathematical model is practically useless if its hypotheses cannot be tested against real world behavior.[308] In

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305. Rowe, *supra* note 6, at 1562 (emphasis added). Rowe further states:

> Miraculously, on the same facts under the same law, directly opposite consequences will appear. For the chosen model treats the selfsame concentration as malign or benign, by 'seeing' the same reality right side up or upside down. The upshot is vendomat jurisprudence: a model is plunked in, a legal result pops out. Wittingly or not, antitrust law comes to serve the proclivities, or gullibilities, of proponents of one or the other economic model and its hidden ideology within.

Id. at 1569.

306. More theoretical and empirical economic work of course needs to be done, something Post-Chicago scholars readily admit. *See, e.g.*, Katz & Shapiro, *Network Externalities*, *supra* note 135, at 439 ("The model here is only a beginning. Explicitly dynamic, multiperiod models are needed to shed additional light on the behavior of markets in which network externalities are important."); Whinston, *supra* note 106, at 856; Choi & Stefandis, *supra* note 111, at 70.

307. As Arthur Leff points out, "if you were interested in a society, and with law as an operative variable within that society, you would have to find out something about that subject matter and those operations. You would, it seems, have to become an empiricist." Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 454 (1974).

308. As Ronald Coase notes in the introduction to a retrospective on his work, "[n]one of the essays in this book deals with the character of human preferences, nor, as I have said, do I believe that economists will be able to make much headway until a great deal more work has been done by sociobiologists and other none-

fact, part of the confusion in antitrust exists because there are in fact two parallel universes: one where the fancy modeling is done, and the other where enforcement actually takes place. As Paul Joskow has observed:

> Somehow one gets the distinct feeling that the important messages are being carried by the informal theories, stories, and behavioral observations, and that the formal models are trotted out *ex post* to demonstrate that some kind of formal apparatus can explain or incorporate some of what is actually being observed. The formal models often have great mathematical elegance and are fun to play with and teach, but at least from this author's vantage point their existence has had a negligible effect on applied research and policy analysis in the industrial organization area.[309]

An empirical approach can help begin to bridge these two worlds. While it may be criticized for its lack of elegance or grand predictive power,[310] such an approach is also at the core of economics' true insight: a focus on how incentives shape behavior.[311] In contrast to Judge Bork's assertion that antitrust "must avoid any standards that require direct measurement and quantification of either restriction of output or efficiency,"[312] antitrust economics must base its prescriptions on actual data. As Louis Kaplow has pointed out, a "more sophisticated analysis of what motivates firm behavior . . . is of great importance to understanding much of antitrust."[313]

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conomists." R.H. COASE, THE FIRM THE MARKET AND THE LAW 5 (1988).

309. Paul L. Joskow, *Firm Decision-making Processes and Oligopoly Theory*, 65 AM. ECON. REV. 270, 273 (1975) [hereinafter Joskow, *Firm Decision-making*]; *see also id.* at 270 ("The formal models are not really utilized by serious students of actual markets and public policies. Rather, the important characteristic of much of this applied work is the use of informal models, 'stories,' the consideration of particular decision-making processes, situation-specific considerations of uncertainty, information costs, other transaction[] costs, and various institutional constraints.").

310. *See, e.g.*, Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1559 (1998) (arguing that with behavioral theories, "descriptive accuracy is purchased at a price, the price being loss of predictive power").

311. As Russell Korobkin and Thomas Ulen succinctly note, "[t]he seminal insight that economics provides to the analysis of law is that people respond to incentives—a generalized statement of price theory." Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1054 (2000).

312. *See supra* note 35.

313. Kaplow, *supra* note 79, at 552; *see also* Joskow, *Firm Decision-making*,

In doing so, competition law must look beyond the battles—beyond Chicago versus Post-Chicago, or more versus less antitrust enforcement. If nothing else, a pragmatic approach suggests that blanket policy prescriptions are dangerous. The economics of competition law must be flexible enough to adapt to the realities of individual companies and markets.[314] For instance, portions of the railway or electricity industries, with high fixed assets and an empty core, are very different from the advertising business. The market for communications software—where expansive intellectual property can combine with network externalities to cut against innovation—is very different than a commodities market which competes on volume and cost. In some cases antitrust needs to be more aggressive; in others less so, to prevent the unintended consequences core theory might predict. To be sure, the modeling can get sophisticated—for instance, to understand the role of maverick firms or to deploy real options theory[315]—but if economics loses sight of behavioral basics, it will remain stuck in a rut.

With this framework in mind,[316] I specifically seek to address the goals of competition law and economics, as well as outline three points of methodological emphasis—rehabilitating structure, defining markets, and overcoming bottlenecks. Prescriptively, the law and economics that I propose eschews the public choice proposition to collapse public and private—rather, in Pigouvian terms, it seeks to harmonize the difference between "*the value of marginal private* and *the value of the marginal social net product*."[317] In doing so, much like

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supra note 309, at 270 ("More careful analysis of actual firm decision-making processes and the phenomena which determine them is called for.").

314. Some commentators believe that this flexibility will be the enduring value of Post-Chicago approaches. *See* Hovenkamp, *Post-Chicago*, *supra* note 69, at 268 ("The real value of post-Chicago economics is its renewed recognition of the fact that markets are much more varied and complex than Chicago theorists were willing to admit."); Sullivan, *supra* note 17, at 59 ("It is precisely in applying the well established general rules of antitrust that post-Chicago thinking shows a potency that strict, ideological Chicago thinking may lack."). *Cf.* Brennan, *supra* note 155, at 1044–45.

315. *See infra* notes 364, 433.

316. For a more detailed discussion of my aspirations for law and economics, see Dibadj, *CLE*, *supra* note 27.

317. A.C. PIGOU, THE ECONOMICS OF WELFARE 131 (4th ed. 1962). Pigou defines the marginal social net product as "the total net product of physical things or objective services due to the marginal increment of resources in any given use or place, no matter to whom any part of this product may accrue." *Id.* at 134. On the other hand, the marginal private net product is "that part of the total net

welfare economics, it recognizes the importance of distributional concerns.[318]

1. Setting the Right Goal

Antitrust's goal is seemingly simple: to ensure competition. The Supreme Court reminds us that the Sherman Act:

> rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, *the policy unequivocally laid down by the Act is competition*.[319]

Similarly, two distinguished scholars note that "at its core antitrust law is a simple matter: It seeks, by prohibiting undue collusion among competitors and unjustifiable exclusion of competing firms, to prevent companies from obtaining and exercising the power to price above competitive levels."[320]

Yet if things are so simple, why is antitrust in such trouble?[321] Fundamentally, because we duck the issue of defining "competition": is it having a maximum number of industry participants, or does it follow from maximizing efficiency as the

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product of physical things or objective services due to the marginal increment of resources in any given use or place which accrues in the first instance . . . to the person responsible for investing resources there." *Id.* at 134–35.

318. In many ways, this broader perspective is inherent in newer economic models not wedded to neoclassical efficiency. *See* Hovenkamp, *After Chicago*, *supra* note 15, at 225–26. Hovenkamp notes:

> This new complexity makes it much more difficult for enforcement agencies and particularly for courts to make judgments about whether a particular practice, such as the creation of a very large plant in a market subject to substantial economies of scale, is competitive or anticompetitive. The likely effect of such complexity will be to make more room once again for distributive concerns.

Hovenkamp, *After Chicago*, *supra* note 15, at 225–26.

319. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) (emphasis added); *see also* United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 116 (1975) ("The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion—that is, by competing successfully rather than by arranging treaties with its competitors.").

320. Krattenmaker & Salop, *supra* note 83, at 211.

321. *See supra* notes 1–10.

Chicago School would have us believe?[322] In many ways, antitrust's essential tension is whether it should protect competitors or competition.[323] Even though it seems competition should be favored—something leading commentators remind us of[324]—antitrust doctrine continues to waffle, drawing ire.[325] When viewed in light of the deconstruction proposed in Part I, however, the incessant saga of "competition vs. competitors"—the seeming inability to define "competition"—is merely a manifestation of the struggle between efficiency and distributional goals.[326] A good illustration of this ambivalence is a passage from the Supreme Court's opinion in *Brown Shoe*:

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322. *See, e.g.*, Hovenkamp, *After Chicago*, *supra* note 15, at 234 ("One of the great achievements of Chicago School antitrust policy based on the market efficiency model is a claim to consistency that cannot be made by any alternative approach that requires the 'balancing' of competing interests, such as consumer welfare and small business welfare.").

323. *See also* George J. Alexander, *Antitrust and the Telephone Industry After the Telecommunications Act of 1996*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 227, 238 (1996). Alexander offers a discussion of the meaning of competition:

> In antitrust, there is a longstanding debate on the meaning of the statutes' ubiquitous goal of 'competition.' On the one hand, it has been interpreted to mean protection of the process that maximizes consumer welfare irrespective of its costs to those who are in business. On the other, it has been interpreted to mean preserving small business, thus allowing the maximum numbers to be in 'competition' with each other.

Id.; *see also* Steve Lohr, *Ideas & Trends: Discount Nation; Is Wal-Mart Good for America?*, N.Y. TIMES, Dec. 7, 2003, at §§ 4, 1.

324. *See, e.g.*, Breyer, *Newly Liberated*, *supra* note 179, at 1018. Breyer argues:

> A second special policy risk of deregulation is that government policymakers will protect competitors instead of protecting competition . . . . It arises when regulators or antitrust enforcers confuse means with ends by thinking that the object of the law is to protect individual firms from business risks rather than to bring consumers the price and production benefits that typically arise from the competitive process.

Id.; *see also* Klein, Enforcement, *supra* note 225, at 12–13 ("I believe a great mistake is made when the antitrust laws are used to protect competitors rather than competition, as has occurred too often in our history."). *Cf.* Hausman & Sidak, *supra* note 299, at 423 ("The first principle is that unbundling rules should emphasize consumer welfare and competition rather than competitor welfare.").

325. *See, e.g.*, Jenkins, *supra* note 9, at A19 ("Antitrust was invented in the 1890s to protect inefficient competitors from efficient ones, a goal that we long ago disavowed without actually disavowing the laws that embody it. Trustbusters have been searching for a mission ever since.").

326. For instance, in their analysis of antitrust in the healthcare sector, Peter Hammer and William Sage conclude that:

> certain market failures may be incompatible with competitive analysis, and therefore may require separate treatment under substantive law. The clearest examples in our case sample involve distributional consid-

> It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.[327]

To ignore this tension is to disregard the legislative history and remain trapped in a false dichotomy that leads nowhere.[328]

Fortunately for antitrust, it can learn from regulation. Like it or not, distributional goals are front and center in economic regulation—"universal service" in telecommunications,[329] "duty to serve" in electricity,[330] and "diversity" and "localism" in

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> erations such as access and availability (perhaps also including adverse selection in insurance relationships, and likely including public goods) and situations involving personal integrity and motivation.

Hammer & Sage, *supra* note 169, at 639.

327. Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).

328. Hovenkamp, *After Chicago*, *supra* note 15, at 242. The reasoning that people do not value noneconomic goals

> is irrational because the fact that people are willing to assert such goals, and that political dialogue in the United States is heavily loaded with references to them, indicates that people do indeed value such things as the diffusion of privately held economic or political power or the preservation of small business opportunity. That these goals are so prominent in the legislative history of the antitrust laws as well as in the more general American democratic and egalitarian ideology illustrates clearly enough that some people value them greatly.

Id. This political reality perhaps explains public choice's distaste for antitrust. *See, e.g.*, McChesney & Shughart, *Unjoined Debate*, *supra* note 3, at 349 ("The politics of antitrust are often subtle, sometimes benefiting large firms, sometimes small; sometimes benefiting established enterprises, sometimes new entrants; and sometimes benefiting the law enforcers themselves. Importantly, though, neither 'consumers' nor 'the public' ever seem to appear on the list of demonstrated beneficiaries.").

329. Universal service is a fund to provide telephone services to low-income consumers, high-cost service areas, rural healthcare providers, and schools and libraries. *See* Universal Service Fund, *at* http://www.fcc.gov/oig/oigaudpm-usf.html. Providing universal service often sounds like protecting small, inefficient competitors: "Large companies subsidize the required rural service by charging their other customers. Smaller ones draw from a federal fund collected from larger carriers for that purpose. This system puts a premium on smallness and inefficiency." Alexander, *supra* note 323, at 236–37. For a description of policy issues surrounding universal service, see Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 29 CONN. L. REV. 123, 142–45 (1996); Crandall & Hausman, *U.S. Telecommunications Services*, *supra* note 87, at 81.

330. *See, e.g.*, Jim Rossi, *The Common Law "Duty to Serve" and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 VAND.

media[331] are merely a few examples.[332] The ubiquitous "public interest" standard[333] in regulation has sought to encapsulate these distributional aspirations, but its vagueness has created a number of interpretative quandaries. As Thomas Hazlett puts it, "not even the government's own experts can define what it means, or what action it rules out."[334] Worse yet, as I have argued elsewhere, the public interest standard has often been manipulated to entrench private interests.[335] But the standard at least putatively attempts to protect the public in ways that go beyond measuring allocative efficiency. This is something the efficiency definition of "consumer welfare" ignores.[336]

L. REV. 1233, 1321 (1998) ("Enhanced retail competition in historically regulated markets need not mean the end of traditional doctrines of public utility law, such as the duty to serve.").

331. *See, e.g.*, FCC MC News Release, *supra* note 291, at 1; Sunstein, *supra* note 135.

332. *See* J. Gregory Sidak & Daniel F. Spulber, *Deregulation and Managed Competition in Network Industries*, 15 YALE J. ON REG. 117, 118 (1998) ("Economists may posture as purists and assert that regulators are misguided to pursue any goal other than economic efficiency. However correct that position may be as a matter of theory, it does not take the institutional setting of regulation as it really is."). Indeed, the conflict between allocative and productive efficiency is at the core of natural monopoly regulation. *See* VISCUSI ET AL., *supra* note 79, at 314.

333. An overarching mandate from Congress to virtually every regulatory agency is to protect the "public interest." For instance, under the Communications Act of 1934, the FCC must rule as "public convenience, interest, or necessity requires." 47 U.S.C. § 303 (2002). FCC Commissioner Copps has observed that "the term 'public interest' appears over 110 times in the Communications Act." *See Before the Senate Committee on Commerce, Science, and Transportation*, United States Senate at 2 (Jan. 14, 2003) (statement of Michael J. Copps, Commissioner, Federal Communications Commission), *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-230241A4.pdf.

334. Thomas W. Hazlett, *The Wireless Craze, the Unlimited Bandwidth Myth, the Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's "Big Joke": An Essay on Airwave Allocation Policy*, 14 HARV. J. LAW & TECH. 335, 401 (2001); *see also* Alexander, *supra* note 323, at 237.

335. *See* Dibadj, *Regulatory Givings*, *supra* note 217.

336. Interestingly, one of the earliest antitrust cases to reach the Supreme Court makes repeated reference to the public interest:

> We recognize the argument upon the part of the defendants that restraint upon the business of railroads will not be prejudicial to the *public interest* so long as such restraint provides for reasonable rates for transportation and prevents the deadly competition so liable to result in the ruin of the roads and to thereby impair their usefulness to the public, and in that way to prejudice the *public interest*. But it must be remembered that these results are by no means admitted with unanimity; on the contrary, they are earnestly and warmly denied on the part of the

From this starting point, new research in regulatory theory can help redefine "consumer welfare" to something that actually benefits consumers. In particular, Ian Ayres and John Braithwaite have proposed a new consumer welfare standard in the context of partial industry regulation.[337] They propose that governments "emulate what a monopsonist consumer would do,"[338] by "studying and at times emulating the practices of these quintessentially empowered consumers."[339] While Ayres and Braithwaite's discussion is within the regulatory paradigm, their insights can be transferred to competition law.[340] Indeed, to the extent that antitrust affects only certain companies within an industry, one can recast it as the paradigmatic example of partial industry regulation.[341]

The monopsony standard perhaps for the first time gives teeth to the consumer welfare standard. It also can recast the "competitors vs. competition" tension by asking how a downstream monopsonist would behave. For example, in a proposed merger, the question becomes whether the "additional competitors are likely to reduce an industry's prices"[342] or even "whether a downstream monopsonist would be willing to subsidize upstream entry."[343] If so, the merger should not proceed.

> public and by those who assume to defend its interests both in and out of Congress. Competition, they urge, is a necessity for the purpose of securing in the end just and proper rates.

United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 333 (1897) (emphasis added)

337. *See* Ian Ayres & John Braithwaite, *Partial-Industry Regulation: A Monopsony Standard for Consumer Protection*, 80 CALIF. L. REV. 13 (1992). In particular, Ayres and Braithwaite discuss different types of regulation for dominant firms, fringe firms, and oligopoly firms. *See id.* at 18.

338. *Id.* at 30. A monopsony is a market where there is a single buyer.

339. *Id.* at 52.

340. Ironically in antitrust law, the monopsonist is traditionally a private party seeking to act anticompetitively. *See, e.g.*, Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297 (1991).

341. *Cf.* Kahn, *supra* note 93, at 1060 ("My conception of antitrust is one that necessarily involves competitive handicapping: There are some practices in which some businesses may safely be permitted to engage but others may not, because in the latter case, but not the former, they would probably have anticompetitive consequences.").

342. Ayres & Braithwaite, *supra* note 337, at 34.

343. *Id.* at 31. *Cf.* Spencer Weber Waller, *Antitrust As Consumer Choice: Comments on the New Paradigm*, 62 U. PITT. L. REV. 535 (2001) (advocating a consumer choice standard as the fundamental rule of antitrust); Jennifer R. Conners, Comment, *A Critical Misdiagnosis: How Courts Underestimate the Anticompetitive Implications of Hospital Mergers*, 91 CALIF. L. REV. 543, 576 (2003) ("The problem is that the purpose of antitrust law is not to protect the merging entities;

Such questions refocus the debate on the harms and benefits to consumers.[344] The real reason to protect competitors would be to assure additional sources of supply for the monopsonist.

2. Methodological Emphasis

Three points of methodological emphasis will be essential to competition law's achievement of its revamped goals. First, there must be an emphasis on structural concepts from the industrial organization tradition. Second, competition law must rethink how it defines markets. Third, enforcement authorities must give special attention to ensuring access to portions of incumbents' networks that serve as bottlenecks to competition.

a. Rehabilitating Structure

Another corollary to a pragmatic approach to competition law would be to emphasize the structural analysis of industries. For too long, antitrust has remained wedded to the notion that analysis must be constrained to a company's conduct.[345] In *Alcoa*, Judge Hand observed that:

> A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although[] the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to

the purpose of antitrust law is to protect consumers from the anticompetitive effects of mergers.").

344. *See also* Ayres & Braithwaite, *supra* note 337, at 52 ("Our message is that if those consumers with market power protect themselves through strategies such as second-sourcing, we should consider government second-sourcing on behalf of less powerful consumers.").

345. *See, e.g.*, Joel I. Klein, Making the Transition from Regulation to Competition: Thinking About Merger Policy During the Process of Electrical Power Restructuring, Federal Energy Regulatory Commission Distinguished Speaker Series 4–5 (Jan. 21, 1998), *at* http://www.usdoj.gov/atr/public/speeches/1332.pdf [hereinafter Klein, Transition] ("The antitrust laws provide ample authority for the Justice Department to challenge anticompetitive conduct of various sorts, but we cannot challenge market structure itself."); Shapiro Speech, *supra* note 10, at 10 ("I should stress that my focus, as an antitrust enforcement official, is on the conduct of firms that have or might obtain monopoly power.").

> foster. . . . The successful competitor, having been urged to compete, must not be turned upon when he wins.[346]

Despite Hand's elegant words, how is an antitrust tribunal meant to divine whether the intent of a company is competitive or not? As Herbert Hovenkamp warns, "'[i]ntent' is usually a meaningless and almost always an unadministrable concept in antitrust litigation because there is no reliable way of distinguishing the 'competitive' intent to harm one's rivals, which antitrust should encourage, from the 'anticompetitive' intent that it should condemn."[347] Logically, since businesses do not like competition,[348] one can even argue that business conduct is by definition anticompetitive. Given this rather obvious limitation, it is somewhat puzzling that commentators continue to push for an intent-based approach to antitrust in an effort to avoid grappling with the essential task of actually having to analyze the market.[349]

A structural approach would be better and more consistent with common sense. In *A Theory of Oligopoly*, George Stigler shows that the success of collusion cannot be assumed because it requires firms not only to agree on prices and market shares, but also to deter cheating on this agreement.[350] Importantly,

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346. United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945). Similar perspectives are found in contemporary antitrust criticism. *See, e.g.*, Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395, 401 (1986) ("The source of the monopoly power varies, from a natural monopoly due to economies of scale, or acquired by skill and foresight, to one granted by government franchise or patent, to one illegally acquired."); Thomas A. Piraino, *Identifying Monopolists' Illegal Conduct Under the Sherman Act*, 75 N.Y.U. L. REV. 809, 892 (2000) [hereinafter Piraino, *Illegal Conduct*] ("On one hand, monopolists can harm consumers by raising prices and decreasing output. On the other hand, many firms have achieved monopoly power because they have delivered products to consumers more efficiently than their competitors.").

347. Hovenkamp, *Areeda-Turner Treatise*, *supra* note 4, at 817–18; *see also* Hovenkamp, *Post-Chicago*, *supra* note 69, at 327 ("[T]his turns the focus of the inquiry to the defendant's intent, which in the antitrust context is almost always asking for trouble."). For a broader discussion of intent in antitrust, see Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S. CAL. L. REV. 657 (2001).

348. *See supra* notes 222–226 and accompanying text.

349. *See, e.g.*, Piraino, *High Technology*, *supra* note 99, at 152–53 ("A court would not have to engage in any inquiry into the market power of the parties or other economic characteristics of the relevant market. It should simply consider whether such restraints are limited to the scope necessary to promote the venture's procompetitive purposes."); Piraino, *Illegal Conduct*, *supra* note 346, at 892.

350. *See* George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964). Stigler is associated with the Chicago School, and many have used portions of Stigler's work to argue that the existence and danger of oligopoly is overstated.

Stigler argues that the smaller number of firms in an industry, the easier it is to establish and police an oligopoly. In other words, greater concentration means greater risk to consumers. This perspective is both intuitive and consistent with the underlying "structure-conduct-performance" paradigm of industrial organization where market structure influences conduct, which in turn affects firm performance.[351] Scholars have also noted how structural approaches to antitrust can benefit consumers.[352] This accords with the common sense notion that to protect consumers, antitrust should attack monopoly rather than try to play the game of distinguishing "anticompetitive" from "competitive" conduct. It also flows naturally from the buyer monopsony goal's examination of the desirability of multiple upstream sourcing.[353] In Ayres and Braithwaite's words, "[b]oth theory and practice strongly support the proposition that in many contexts increasing the number of competitors will engender more competitive behavior. . . . [A]s the number of firms increases, the market price falls toward the competitive level."[354]

One well-studied illustration of the danger of concentrated industry structure is the airline industry. Study after study has confirmed that, post-deregulation, mergers "led to higher fares, creating wealth transfers from consumers."[355] Robert

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351. *See, e.g.*, TIROLE IO, *supra* note 77, at 1–2; Viscusi et al., *supra* note 79, at 61–65.

352. *See, e.g.*, Adams & Yellen, *supra* note 108, at 477 ("Finally, prohibition of bundling in monopolistic markets, without elimination of monopoly, can either increase or decrease the deadweight loss arising in the relevant markets. This reinforces the desirability of a structural, as opposed to conduct, attack on market power."); Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U. L. REV. 135, 160 (2002) [hereinafter Baker, *Mavericks*] (empirical evidence suggests price fixing, high price-cost margins in concentrated industries, and the idea that repeated interactions among oligopolists discourage cheating). *Cf.* BREYER, REGULATION, *supra* note 182, at 15 ("The *justification* for intervention arises out of an alleged inability of the marketplace to deal with particular structural problems.").

353. *See supra* notes 342–344 and accompanying text.

354. Ayres & Braithwaite, *supra* note 337, at 24.

355. E. Han Kim & Vijay Singal, *Mergers and Market Power: Evidence from the Airline Industry*, 83 AM. ECON. REV. 549, 550 (1993). Kim and Singal conclude that "wealth gains to the stockholders of merging firms do not arise through value creation alone, and relaxation of antitrust policy may result in nontrivial wealth transfers from consumers." *Id.*; *see also* David R. Graham et al., *Efficiency and Competition in the Airline Industry*, 14 BELL J. ECON. 118, 137 (1983) ("fares seem to be positively correlated to concentration, thereby indicating that potential competition is not strong enough at present to eliminate all attempts to raise price in concentrated markets.").

Willig finds, for instance, that "moving from three to two equally-sized market participants raised price on average about ten percent. A further decrease from two to one market participants further raised price another twenty percent on average."[356] Alfred Kahn, arguably the most important force behind airline deregulation, now supports "a virtual per se opposition to any major mergers that would substantially increase concentration in the aggregate."[357] Telecommunications provides another example. AT&T was not a paragon of innovation and consumer value as a monopolist of local and long distance telephone service.[358] Evidence also suggests that mergers have hurt consumers in the cable and wireless markets.[359] Similar effects have been found in hospital mergers.[360]

In fact, one is hard-pressed to find cases where industry concentration has actually helped consumers: it is no coincidence that consumer advocates tend to oppose mergers.[361] Despite eloquent reassurances from companies that a merger will unlock synergies or reduce costs and thus provide greater value to consumers, these deals are too often consummated because of what managers believe will benefit them—even sharehold-

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356. Willig, *supra* note 90, at 701.

357. Kahn, *supra* note 93, at 1064. In addition, Kahn states:

> I am aware of six studies of airline pricing since deregulation. Every one of them has reached the same two conclusions. The first is that market concentration ratios make a significant difference in fares—which is another way of saying that a competitor in the market is worth six potential contestors in the bush. The second is that actual entry, and especially entry by new firms, has been by far the most powerful competitive force.

Kahn, *supra* note 93, at 1062.

358. Indeed, the Modified Final Judgment (MFJ) which divided AT&T into Regional Bell Operating Companies (RBOCs) is a classic example of a structural remedy. *See* United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131 (D.C. Cir. 1982); *see also* Joseph D. Kearney, *From the Fall of the Bell System to the Telecommunications Act: Regulation of Telecommunications Under Judge Greene*, 50 HASTINGS L.J. 1395, 1403 (1999) ("The MFJ's lasting lesson for public policy is that, at least in the antitrust context, reliance on a structural consent decree that is premised on an articulable economic theory and is administered by a court committed to that theory can be a defensible judicial enterprise.").

359. *See, e.g.*, Dibadj, *Cable Competition*, *supra* note 154; John W. Berresford, *Mergers in Mobile Telecommunications Services: A Primer on the Analysis of Their Competitive Effects*, 48 FED. COMM. L.J. 247 (1996).

360. *See* Conners, *supra* note 343, at 545–46 ("In many communities, the merged entities [hospitals] have accrued considerable market power with deleterious ramifications for both price and nonprice competition.").

361. *See supra* note 8.

ers' interests are frequently secondary.[362] Over time, dynamic analysis can develop to better understand strategic interactions. Jonathan Baker, for instance, suggests that understanding of industry structure can be enhanced by identifying the maverick—the firm that keeps industry prices to consumers lower than they would have been otherwise.[363] In the merger context, for example, competition law would seek to understand "the effect of the merger on the maverick's incentives to constrain coordination."[364]

In sum, competition law will need to supplement antitrust's existing tools that analyze industry structure[365] with a new conception of consumer welfare and a heightened realization of the dangers of industry concentration. Only then will it be poised to protect consumers.

b. Defining Markets

Structural analysis must be predicated on a pragmatic approach to defining markets. The importance of market defini-

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362. *See, e.g.*, Robert G. Eccles et al., *Are You Paying Too Much for that Acquisition?*, HARV. BUS. REV., July–Aug. 1999, at 136 ("Despite 30 years of evidence demonstrating that most acquisitions don't create value for the acquiring company's shareholders, executives continue to make more deals, and bigger deals, every year."); Federal Communications Commission, 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, at 11 (June 2, 2003) (Statement of Commissioner Michael J. Copps, Dissenting), *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-127A5.doc. Copp notes that:

> [t]his country has witnessed the unraveling of huge mega mergers and acquisitions across economic sectors during the past couple of years, while other such ventures are struggling to make it. We should have learned by now that size is no guarantor of success, even though the urge to grow larger continues to motivate so many industries.

Id.

363. Baker uses the example of Northwest Airlines in the airline industry. *See* Baker, *Mavericks, supra* note 352, at 136.

364. *Id.* at 200. Moreover, Baker observes that:

> even as antitrust comes to focus on the role of the maverick in analyzing coordinated competitive effects, the structural presumption should continue to play an important role, because it will not always be possible to identify the maverick with precision or to determine with confidence how the loss of a firm affects the maverick's incentives.

Id. at 198.

365. In particular, antitrust law currently uses the Herfindahl-Hirschman Index (HHI) as a proxy for industry concentration. *See* U.S. DEP'T OF JUSTICE, HERFINDAHL-HIRSCHMAN INDEX, *at* www.usdoj.gov/atr/hhi.htm.

tion in antitrust cannot be over-emphasized—it is the issue upon which a case will frequently turn.[366] Though measuring market power is not simple,[367] antitrust law has developed its own framework to define markets primarily based on elasticities of demand. To oversimplify, a market boundary occurs where there is low demand elasticity between the products in the market and the products outside it. The Supreme Court has articulated this idea conceptually by noting that the "outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."[368] More tactically, under the Department of Justice and FTC Horizontal Merger Guidelines:

> A market is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm . . . likely would impose at least a "small but significant and nontransitory" increase in price, assuming the terms of sale of all other products are held constant. A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test. . . .
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> . . . A price increase could be made unprofitable by consumers either switching to other products or switching to the same product produced by firms at other locations. The nature and magnitude of these two types of demand responses

366. *See, e.g.*, Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 COLUM. L. REV. 1805, 1807 (1990) [hereinafter Pitofsky, *New Definitions*] ("Knowledgeable antitrust practitioners have long known that the most important single issue in most enforcement actions—because so much depends on it—is market definition."); Rowe, *supra* note 6, at 1563 ("In conventional antitrust analysis, definition of the 'relevant' market predetermines the outcome of many cases."). A recent prominent example is the Univision-Hispanic Broadcasting merger whose approval was predicated on the assessment that Spanish language media does not constitute a separate market. *See* News Release, Federal Communications Commission, FCC Grants Conditioned Approval of Univision/HBC Merger (Sept. 22, 2003), *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-239081A1.pdf.

367. For a discussion of the difficulties in defining and measuring market power, see Areeda, *supra* note 166.

368. Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962). For an early discussion of market definition, see William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 983 (1981) ("The Article emphasizes the dependence of market power on the elasticities of demand and of supply in the market in question, as well as on the defendant's market share.").

respectively determine the scope of the product market and the geographic market.[369]

Typically, enforcement agencies test for a five percent possible price increase over two years.[370] Market shares are then calculated to derive the Herfindahl-Hirschman market concentration index, where higher levels of concentration trigger a higher level of antitrust scrutiny.[371] For example, liquid crystal display (LCD) computer screens may not constitute a "market" in the antitrust sense, whereas the overall market for computer displays might. Similarly, cable modem internet access may not be a "market," but broadband internet access might. In each case, where the market is defined too narrowly, consumers could switch to a substitute product if a monopolist seeks to increase price.[372]

Even though this framework can be further refined,[373] it is very useful in offering a starting point. In fact, to the extent that traditional regulatory agencies are involved in competition policy,[374] it would behoove them to adopt market definition concepts from antitrust rather than simply making assumptions.[375]

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369. U.S. Dep't of Justice & Fed. Trade Comm'n, 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41552 (1992), revised, 4 Trade Reg. Rep. (CCH) ¶ 13104 (Apr. 8, 1997), *at* http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html [hereinafter Horizontal Merger Guidelines].

370. *See* Hausman & Sidak, *supra* note 299, at 477.

371. *See supra* note 365. The HHI is calculated by squaring the market share of each firm, then adding the resulting numbers. An HHI below 1000 is considered unconcentrated, between 1000 and 1800 is moderately concentrated, and above 1800 is highly concentrated. *See* Horizontal Merger Guidelines, *supra* note 369, at § 1.5.

372. For example, by buying a cathode ray tube (CRT) screen or signing up for a telephone digital subscriber line (DSL).

373. For suggestions on how to improve the merger guidelines, see Pitofsky, *New Definitions*, *supra* note 366. Pitofsky's primary concern is the ability of those who do not believe in antitrust enforcement to make market power appear lower than it actually is. *See id.* at 1808–09.

374. At least during a transitory phase. *See infra* Part III.B.

375. For example, in 2001 the D.C. Circuit struck down the FCC's limits on media concentration primarily because the FCC offered virtually no market analysis. *See* Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1132 (D.C. Cir. 2001) ("The Commission's own findings amount to precious little."); *id.* at 1133 ("[T]he FCC has put forth no evidence at all that indicates the prospects for collusion."); *id.* at 1137 ("Far from satisfying this [intermediate scrutiny] test, the FCC seems to have plucked the 40% limit out of thin air."). When the FCC addressed the problem in 2003, it did use antitrust concepts. *See supra* note 291. Jim Chen even argues that the "multiple failings of mass communications law can be traced to an appalling neglect of antitrust principles." Jim Chen, *The Last Picture Show (On the Twilight of Federal Mass Communications Regulation)*, 80 MINN. L. REV.

If we aspire to a new competition law, however, it is imperative that the price elasticity model be supplemented with factors that neoclassical economics simply cannot capture.[376] The most important point is not to get lost in the details of a narrowly defined market while ignoring the big picture. One of the most articulate critics of this tunnel vision has been Frederick Rowe, who laments that:

> More and more, fixation on market shares and concentration levels degenerated into "numbers games." The Justice Department hit mergers threatening to raise concentration in markets for "frozen dessert pies," for "artificial Christmas trees," for "vandal-resistant plumbing fixtures" used in prisons, for local towel rental services, for "custom-compounded reinforced thermoplastics," for drapery hardware, or for commercial trash hauling in Dallas. The Federal Trade Commission moved against mergers threatening to raise concentration in markets for frozen pizza, for carburetor

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1415, 1483 (1996). For example, in the context of wireless spectrum, Chen argues that:

> [w]e can overcome our obsession with scarcity by consulting an indispensable element of antitrust analysis: defining the relevant product market. This issue, so central to the battery of antitrust doctrines hinging upon proof of market or monopoly power, is persistently ignored by communications lawyers who assume that a client's current technology represents the sole product in question.

Id. at 1495–96. Additionally, Krattenmaker notes that:

> [a]n extensive, thoughtful literature on the economics of industrial organization and behavior underlies current antitrust law. This literature teaches us that, in order to analyze the effects on competition of the behavior at issue, we should first define the market(s) in which the firm(s) operate, then determine who controls what firms in that market, and then calculate the extent of concentration of control in that market. These might seem obvious and elementary principles. To any student of antitrust they are quite simple and basic. Yet one who had read only the Telecommunications Act of 1996 would think that Congress was completely unaware of this antitrust learning.

Krattenmaker, *supra* note 329, at 167; *see also* Sullivan, *supra* note 17, at 81.

376. *See, e.g.,* Adams & Brock, *supra* note 18, at 296. Adams and Brock note the problems with neoclassic economics in this context:

> Economic theory alone cannot provide operationally definitive categories or boundary points: Some might consider the capacity to raise price by as little as five percent to constitute the necessary control over price; others may insist on more substantial magnitudes, such as ten, twenty, or thirty percent. In a related vein, over what length of time must the firm demonstrate an ability to control price?

Adams & Brock, *supra* note 18, at 296.

> kits, for urological catheters, and for "knockdown casket parts" . . . .[377]

Careful examination of the elasticity test, however, would show that such an outcome is not surprising: the analysis begins with as narrow a market as possible, then iterates progressively outward toward increasingly broader markets until a market triggers the test.[378] This perspective is certainly valuable in preventing companies from defining markets so broadly that their market shares become insignificant, but it could miss broader anticompetitive threats. In understanding what a market is, competition law must ask broader questions around both the products and the companies under scrutiny. Product questions should center around structural characteristics; in particular, the severity of barriers to entry and the potential presence of an empty core.[379] Company questions should center around the size and importance of both acquiror and acquiree: does the acquiror have substantial power in related markets? Is the acquiree a particularly innovative company, maybe even a maverick?[380] The argument is not a priori that a narrow micromarket cannot pose a severe anticompetitive threat: sunk costs may be high, and the acquiror may be a large company with a significant presence across a variety of markets. The point is to let the questions refine and "sanity check" market definition. Placing too much faith in cross-price elasticities risks obfuscating the real competitive dynamics.

This is doubly true in industries where innovation is often of greater significance than price.[381] Here, long-term impact on

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377. Rowe, *supra* note 6, at 1528. "Court decisions based illegality on high shares in markets of championship as distinct from other boxing matches, of gospel as distinct from pop music, of collection as distinct from burial of nuclear wastes, and of bubblegum baseball cards as distinct from football cards or other candy premiums." *Id.*, at 1536

378. *See* Horizontal Merger Guidelines, *supra* note 369, at § 1.11.

379. The former would invite strict antitrust scrutiny; the latter might perhaps permit an interfirm agreement rather than a merger.

380. Interestingly, the Guidelines mention the maverick question. *See* Horizontal Merger Guidelines, *supra* note 369, at § 2.12. Yet, such analysis seems rare in practice.

381. While innovative new economy industries are the paradigmatic examples, one could argue that except for commodities, the non-price component of competition exists virtually everywhere. One particularly important example is healthcare. *See, e.g.*, Hammer & Sage, *supra* note 169, at 636; Conners, *supra* note 343, at 570 ("Hospitals do not compete simply on the basis of price alone, whether for insurance contracts or for patients.").

industry evolution is a more important factor than price elasticities over a two-year timeframe.[382] The real issue may not be whether the merged entity will have the power to impose a profitable five or ten percent price increase, but rather whether new product development risks dramatically being reduced.[383] Sensitivity is also required geographically. Sometimes consumers are captive and benefit from a narrow geographic definition—say retail food or cable television distribution. At other times, however, consumers might benefit from treating the geographic market broadly—perhaps two small domestic clothing manufacturers should be able to collaborate to compete more effectively against foreign competition.[384]

To be sure, the Guidelines do aspire to look beyond the numbers.[385] Yet they do so in a way that often curiously seems to cut against broader antitrust enforcement. In particular, emphasizing efficiency[386] and downplaying sunk costs and barriers to entry[387] are reminiscent of the Chicago School's *laissez-faire* approach. A narrow definition of competition, combined

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382. *See also* Gary S. Becker, *Let the Marketplace Judge Microsoft*, BUS. WK., Apr. 6, 1998, at 26 ("Rapid turnover of monopolies in dynamic industries such as computing suggests that antitrust policy should focus not on whether companies have large market shares but on how soon they are likely to be replaced by others with superior technologies.").

383. In regard to new product development policy, Pitofsky argues:

> Because market participants' incentives and opportunities to innovate are increasingly important in the intellectual property-intensive new economy, a rational competition policy will pay more heed to the effects of market structure, competitive conduct, and enforcement on innovation than it paid in industries where cost minimization was the most significant dimension of efficient competition.

Pitofsky, *New Economy*, *supra* note 140, at 540.

384. However, we must be careful not to give companies a free pass simply because they are spreading their anticompetitive tentacles across geographies. *See* Rowe, *supra* note 6, at 1525.

385. *See, e.g.,* Horizontal Merger Guidelines, *supra* note 369, at § 2.0 ("[M]arket share and concentration data provide only the starting point for analyzing the competitive impact of a merger.").

386. *See id.* at § 4 ("[T]he Agency considers whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm consumers in the relevant market.").

387. The Guidelines allow a case to be made for the presence of new entrants who might enter in response to a hypothetical price increase—both those with and without sunk costs. Uncommitted entrants can create "supply responses . . . within one year and without the expenditure of significant sunk costs of entry and exit . . . ." *Id.* at § 1.32. Committed entry, on the other hand, "requires expenditure of significant sunk costs of entry and exit." *Id.* at § 3.0. While this distinction is rarely used in practice, the overall emphasis reflects a belief in contestability.

with the opportunity to introduce Chicago-style defenses, can have perverse consequences. In particular, it would tend to target smaller companies in narrow markets who wish to merge or collaborate, while at the same time ignoring the anti-competitive potential of larger companies who operate in broader markets not amenable to an analysis of elasticities. Further, larger more sophisticated companies are better able to make arguments around how market definitions should be permeable, since they can use a battery of "experts" to show that new entrants will mysteriously appear and efficiencies will magically materialize. Naturally, such claims rarely come to pass.[388] Indeed, this is precisely what has happened: large markets—banking, airlines, cable, computer software, to name a few—have become increasingly concentrated while antitrust authorities pursue such threats as the 'superpremium' ice cream oligopoly.[389] This inconsistency is a looming factor behind the low regard many critics have for antitrust.[390]

Another inconsistency is antitrust's traditionally rigid bifurcation between market calculations in horizontal mergers versus vertical or conglomerate mergers. The latter two are typically considered less dangerous than the former[391]—the unintended consequence has been to allow massive, often vertically integrated, conglomerates to form. As Frederick Rowe observes:

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388. *See supra* note 362 and accompanying text.

389. *See supra* note 362.

390. *See also* Rowe, supra note 6, at 1563 ("[E]nforcement routines hound petty mergers that look large in trivial markets . . . while neglecting huge transactions that do not fit within some product market, yet pose troubling policy choices.").

391. *See, e.g.,* U.S. Dep't of Justice, Non-Horizontal Merger Guidelines, 49 Fed. Reg. 26823 § 4.0 (1984), *available at* http://www.usdoj.gov/atr/public/guidelines/2614.htm ("[N]on-horizontal mergers are less likely than horizontal mergers to create competitive problems."); *id.* at § 4.24 ("[T]he Department will give relatively more weight to expected efficiencies in determining whether to challenge a vertical merger than in determining whether to challenge a horizontal merger."). The non-horizontal guidelines are much shorter than those for horizontal mergers, perhaps indirectly expressing the view that vertical and conglomerate mergers are of lesser importance. The guidelines, however, are similar to those for horizontal mergers in laying out somewhat mechanistic formulas. *See, e.g., id.* at § 4.131 ("The Department is unlikely to challenge a potential competition merger, unless overall concentration of the acquired firm's market is above 1800 HHI. . . ."); *id.* at § 4.133 ("The Department is unlikely to challenge a potential competition merger if the entry advantage ascribed to the acquiring firm . . . is also possessed by three or more other firms."); *id.* at § 4.134.

> [A] horizontal merger of a town's top towel service or refuse-hauling firm zooms the market concentration that sets off the antitrust "alarm." But nonhorizontal mergers that are not within the same product market . . . will stir no fuss or index flutter, since neither market shares nor concentration counts would rise. In practice, the merger meter has the egalitarian elegance of metaphysics: seeing elephants as ants, making mountains of pimples.[392]

Moreover, given the insights of Post-Chicago law and economics, which has highlighted the dangers of vertical integration such as tying and exclusionary agreements,[393] market assessments need to take into account the degree of vertical anticompetitive threat.

In the case of vertical mergers, the elasticity test and market concentration indices are useful tools to derive a starting point. Vertical agreements, however, present special definitional problems since they require the market to be defined not in the aggregate, but based on the perspective of parties already parties to the contract. One particularly intriguing idea proposed by Paul Joskow is to adapt ideas from transaction cost economics[394] when analyzing such claims of vertically-oriented anticompetitive behavior. Rather than looking ex post after the agreement has been signed, one could look to see whether the ex ante bargaining situation was competitive. Joskow argues that:

> [the current] focus on the ex post bargaining situation is especially troublesome when it involves suppliers of specific brands of products that have many competitors ex ante who enter into sales or franchise agreements with individual downstream firms which place obligations and restrictions on the downstream contracting parties ex post. Rather than focusing on (ex ante) "interbrand competition," this ap-

392. Rowe, *supra* note 6, at 1533 (footnote omitted); *see also id.* at 1524 ("[A]nti-merger policy became a Procrustean regimen that fostered large conglomerations while hounding trivial acquisitions in 'numbers games.'"); *id.* at 1527 ("Strict bans on horizontal acquisitions, stressing high market shares and concentration levels, turned business incentives toward conglomeration beyond the market. In the 'go-go years' of the 1960s, conglomateurs (Gulf & Western, IT&T, LTV, Textron) gobbled hodge-podge assets."). History repeated itself in the 1990s.

393. *See supra* Part I.A.2.

394. Transaction cost economics "is concerned with understanding how variations in certain basic characteristics of transactions lead to the diverse organizational arrangements that govern trade in a market economy." Joskow, TCE, *supra* note 79, at 95. For a definition of transaction costs, see *supra* note 21.

> proach led antitrust policy to focus on (ex post) "intra-brand" competition. This in turn led to single brand market definitions, in which the supplier of the brand necessarily had a very high market share, and a resulting inference that the supplier of the brand had "market power" *of concern to the antitrust laws* in its relationships with firms that it had contracted with downstream ex ante.[395]

Joskow is effectively arguing that in the analysis of vertical exclusionary agreements, we need to ask whether parties had voluntarily entered into these agreements, and hence made relationship-specific investments, to reduce their transaction costs. The key question is whether the market, as defined ex ante, was competitive.

It should hopefully be obvious by now that a more practical approach to market definition does not necessarily equate to more antitrust enforcement. It calls for a more pragmatic and holistic assessment—something within the overarching spirit of the guidelines whose "unifying theme . . . is that mergers should not be permitted to create or enhance market power or to facilitate its exercise."[396] Common sense must supplement mathematics.[397]

c. *Overcoming Bottlenecks*

Pragmatic market analysis using common sense market definitions may occasionally reveal that meaningful competition would be possible in an industry but for the fact that the larger or more established firms control an essential input to the end-product that forecloses new competition. This could be

395. Joskow, TCE, *supra* note 79, at 103. Joskow believes the insights of transaction costs economics can be fruitfully blended with those of the Post-Chicago School. *See id.* at 15.

396. Horizontal Merger Guidelines, *supra* note 369, at § 0.1. *Cf. id.* at § 0 ("[I]t is not possible to remove the exercise of judgment from the evaluation of mergers under the antitrust laws. . . . [M]echanical application of those standards may provide misleading answers to the economic questions raised under the antitrust laws.").

397. *See also* Rowe, *supra* note 6, at 1565 ("[W]hen reified 'from metaphor to algorithm,' the market feeds the naive delusion that one omnibus principle can define competition and reveal sound policies for steel, finance, health care, or beer."). *Cf.* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 466–67 (1992) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law."); Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 319 (1962).

due to the natural monopoly characteristics of the industry, or more generally, where supply-side economies of scale or demand-side network effects give incumbents the upper hand. The bottleneck, for instance, could be telephone, cable or electricity wires running into subscribers' homes, a dominant computer operating system, or an airport landing slot.

Confronted with this difficult situation, commentators who espouse a *laissez-faire* ideology predictably suggest government get out of the way,[398] which may be good for incumbents in the industry, but ignores the fate of the consumer. An alternative approach is once again structural in nature: isolate the bottleneck and make it available to competitors at a price that both encourages investment by the incumbent as well as new entry, and allows competition to flourish elsewhere.[399] Fortunately, the essential facilities doctrine, if implemented as a form of economic regulation, offers a cogent approach to address this problem.

The essential facilities doctrine carves out an exception to the general rule that a firm has no obligation to deal with its competitors by stating that under certain circumstances, a refusal to deal is subject to a monopolization claim under § 2 of the Sherman Act.[400] The clearest judicial articulation of the doctrine is in *MCI Communications Corp. v. AT&T*,[401] where the United States Court of Appeals for the Seventh Circuit developed a four-part test that must be met to invoke the essen-

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398. *See, e.g.*, Huber, *Antitrust Legacy*, *supra* note 199 ("Regulators and antitrust courts must come to grips with the economic realities of network industries. Huge economies of scope and scale mean that competition will inevitably involve small numbers of very large players.").

399. An early application of this idea was the breakup of AT&T in order to introduce competition into the telecommunications market. As Joskow & Noll note:

> The fundamental theory underpinning the Modification of Final Judgement (MFJ) . . . is that regulated monopolies have the incentive and opportunity to monopolize related markets in which their monopolized service is an input, and that the most effective solution to this problem is to 'quarantine' the regulated monopoly segment of the industry by separating its ownership and control from the ownership and control of firms that operate in potentially competitive segments of the industry.

Joskow & Noll, *supra* note 83, at 1249–50.

400. For a recent overview of the doctrine, see ROBERT PITOFSKY, THE ESSENTIAL FACILITIES DOCTRINE UNDER UNITED STATES LAW (2002), *available at* http://www.ftc.gov/os/comments/intelpropertycomments/pitofskyrobert.pdf [hereinafter PITOFSKY, ESSENTIAL FACILITIES].

401. 708 F.2d 1081 (7th Cir. 1983).

tial facilities doctrine. The test consists of showing "(1) control of the essential facility by the monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."[402] Essential facilities thus typically tend to be "capital assets that cannot be economically duplicated given the size of the market—a communications network, a central terminal facility, stadium, or energy transmission facilities."[403] Incumbents control such "bottlenecks" across a variety of industries. Commentators have addressed the importance of unbundling networks to secure access and interconnection in the context of natural monopolies such as telecommunications,[404] energy, [405] and railroads.[406]

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402. *Id.* at 1132–33.

403. Robinson, *supra* note 5, at 1207.

404. Perhaps the best example is Hausman & Sidak, *supra* note 299, at 479–80 (combining the four elements of the *MCI* test with a fifth based on changes in market power to assess which elements of an incumbent's telephone network should be unbundled). Similarly, I have argued that the essential facilities doctrine is an important tool to ensure competition in the local telephone and cable markets. *See* Dibadj, *Local Telephony*, *supra* note 169; Dibadj, *Cable Competition*, *supra* note 154; *see also* Eli M. Noam, *Will Universal Service and Common Carriage Survive the Telecommunications Act of 1996?*, 97 COLUM. L. REV. 955, 956 (1997) ("[I]n a competitive regime, *interconnection* rights will achieve most of the goals that lie behind common carriage. Interconnection rights, indeed, have become the major battleground in American telecommunications."); Joskow & Noll, *supra* note 83, at 1277 ("The most significant new regulatory problem is to develop interconnection arrangements between competing local access providers."). For a history of the essential facilities in the telecommunications context, see John T. Soma et al., *The Essential Facilities Doctrine in the Deregulated Telecommunications Industry*, 13 BERKELEY TECH. L.J. 565 (1998).

405. The value chain in the electricity and natural gas industries can be thought of as proceeding from generation to transmission to distribution to sales. *See* Joskow & Noll, *supra* note 83, at 1291–97. Given their high fixed costs, local distribution and transmission do represent bottlenecks to competition, implying that these elements of incumbents' networks should be unbundled and made available to competitors. *See* Joskow, *Electric Power Sector*, *supra* note 89, at 177 ("A retail competition program must start by unbundling competitive services (generation service supplies and their associated costs) from regulated monopoly services (transmission, distribution, and designated stranded-cost charges)."). In addition, the network operations component is unsuited to competition, and could be regulated in a similar manner to these bottlenecks. In contrast, Jaskow observes:

> All of the credible models for creating new competitive electricity markets recognize that there must be a single network operator responsible for controlling the physical operation of a control area, coordinating generator schedules, balancing loads and resources in real time, acquiring ancillary network support services required to maintain reliability, and coordinating with neighboring control areas.

There is already a heated debate in regulatory law as to whether the new entrants should be given access to portions of incumbents' networks.[407]

The essential facilities model also applies beyond the realm of natural monopoly if one is willing to think about bottlenecks creatively. The airline industry is a telling illustration. During the 1970s, deregulators considered the airline industry contestable based on the theory that planes do not represent not sunk costs.[408] Yet precious few competitors exist three decades after deregulation. The reason is that the bottleneck is elsewhere in the system: airport landing slots and gates. As long as competitors don't have access to these, meaningful competition cannot emerge.[409] Another particularly promising application of the essential facilities doctrine could be in high technology industries where there are conflicting concerns. On the one hand, it is critical to make sure incumbents do not exploit their scale, intellectual property, and networks to squelch competition;[410] on the other, remedies such as divestiture might be too drastic in industries characterized by innovation and Schumpeterian creative destruction.[411] Allowing new competitors ac-

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Joskow, *Electric Power Sector*, *supra* note 89, at 155–56. For additional discussions of new possibilities in electricity restructuring, see Black & Pierce, *supra* note 283; Paul L. Joskow, *Restructuring, Competition and Regulatory Reform in the U.S. Electricity Sector*, 11 J. ECON. PERSP. 119, 120 (1997).

406. Curtis Grimm and Clifford Winston discuss "the problems that could arise when shippers must depend on only one railroad—a growing possibility as the industry consolidates." Grimm & Winston, *supra* note 212, at 46. They even mention unbundling of railroad network elements as one option to overcome this problem. *See id.* at 47.

407. Setting price for access is arguably the most difficult issue, but economists have developed solutions to a problem sometimes thought intractable. *See, e.g.*, William J. Baumol & J. Gregory Sidak, *The Pricing of Inputs Sold to Competitors*, 11 YALE J. ON REG. 171 (1994); Dibadj, *Local Telephony*, *supra* note 169, at 35–39 (discussing the options).

408. *See supra* note 90.

409. *See* Morrison & Winston, *supra* note 212, at 24 ("New entrants could find it difficult to find any available gates at several airports in the country."). As Robert Willig points out, "[t]oday, it is common knowledge that airport space at key network nodes is scarce, and that critical airport assets may be controlled in a concentrated fashion by particular carriers, which may possess market power over travelers as a result." Willig, *supra* note 90, at 699.

410. *See, e.g.*, Shapiro, *Exclusivity*, *supra* note 145, at 682 ("[L]ack of compatibility can be the death-knell of a new technology, even if it is superior in some absolute or stand-alone sense. And incumbent firms often have the incentive to exert their intellectual property rights to deny such compatibility to would-be entrants.").

411. *See, e.g.*, Shelanski & Sidak, *supra* note 18, at 14 ("It would ignore recent

cess to bottleneck portions of an incumbent's network that cannot be duplicated—such as an operating system—would be far less drastic, while at the same time giving smaller players a chance to compete. It even seems that after years of litigation and countless court cases, the outcome of the Microsoft antitrust litigation has moved away from divestiture[412] to emerge along the lines of access. Though not presented under the rubric of essential facilities, the final court settlement seeks to force Microsoft to allow software developers to interconnect to its operating systems.[413]

Yet despite its broad applicability, the essential facilities doctrine currently inhabits the fringes of antitrust law. For starters, while several Supreme Court cases implicitly seem to support the doctrine,[414] the Court has never explicitly endorsed it.[415] More dramatically, antitrust's leading experts have

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economic history to presume that Microsoft is immune from being leapfrogged and displaced from its dominant market position."); *see also* Kenneth G. Elzinga et al., *United States v. Microsoft: Remedy or Malady?*, 9 GEO. MASON L. REV. 633, 689 (2001) at 689 ("Antitrust remedies—in particular, breaking up a large company and imposing detailed restrictions on its successors' conduct—should be based on more than sweeping assertions about 'unleashing" innovation."). *Cf.* POSNER ANTITRUST, *supra* note 6, at 268 ("Structural remedies such as divestiture are, as we know, slow, costly, frequently ineffectual, and sometimes anticompetitive.").

412. The United States Court of Appeals for the District of Columbia Circuit was uncomfortable with the divestiture remedy. *See* United States v. Microsoft Corp., 253 F.3d 34, 105 (D.C. Cir. 2001) ("On remand, the District Court must reconsider whether the use of the structural remedy of divestiture is appropriate with respect to Microsoft, which argues that it is a unitary company.").

413. *See* United States v. Microsoft Corp., No. 98-1232, 2002 U.S. Dist. LEXIS 22864, at *9–*10 (D.D.C. Nov. 12, 2002). The court ordered that:

> Microsoft shall disclose . . . for the sole purpose of interoperating with a Windows Operating System Product . . . the APIs [application programming interfaces] and related Documentation that are used by Microsoft Middleware to interoperate with a Windows Operating System Product. . . . Microsoft shall make available for use by third parties, for the sole purpose of inter-operating or communicating with a Windows Operating System Product, on reasonable and non-discriminatory terms . . . any Communications Protocol that is . . . (i) implemented on a Windows Operating System Product installed on a client computer, and (ii) used to interoperate, or communicate, natively . . . with a Microsoft server operating system product.

Id.

414. In chronological order, the most important Supreme Court cases in this vein are *Terminal Railroad*, *Otter Tail Power*, and *Aspen Skiing*. *See* United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383 (1912); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

415. *See* Verizon Communications v. Law Offices of Curtis V. Trinko, 540 U.S.

roundly criticized the doctrine. Phillip Areeda believes that it is "less a doctrine than an epithet,"[416] adding that "[n]o one should be forced to deal unless doing so is likely substantially to improve competition in the marketplace by reducing price or by increasing output or innovation."[417] Herbert Hovenkamp writes that the "so-called 'essential facility' doctrine is one of the most troublesome, incoherent and unmanageable bases for Sherman § 2 liability. The antitrust world would almost certainly be a better place if it were jettisoned."[418] Another commentator has called it a doctrine of "dubious character" and "embarrassing weakness."[419]

Part of the disdain is a discomfort with the duty of competitors having to share, something Keith Hylton calls the "potential for parasitism in the essential facilities doctrine."[420] This criticism is based on the premise that competitors should compete based on their own facilities.[421] What this point of view ignores, of course, are the often prohibitive costs and inefficiencies of duplicating infrastructure. By and large, competitors who have tried this route have failed miserably[422]—

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__ (2004), 124 S.Ct. 872, 881 ("We have never recognized such a doctrine. . . and we find no need either to recognize it or to repudiate it here."). *Cf.* AT&T v. Iowa Util. Bd., 525 U.S. 366, 428 (1999) (Breyer, J., concurring) ("[T]he provision describing which elements must be unbundled does not explicitly refer to the analogous 'essential facilities' doctrine (an antitrust doctrine that this Court has never adopted) . . . ."). *But see* PITOFSKY, ESSENTIAL FACILITIES, *supra* note 400, at 1 ("[T]he Supreme Court and lower courts have consistently applied the 'essential facilities' doctrine throughout this century in appropriate circumstances.").

416. Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 841 (1990).

417. *Id.* at 852.

418. HOVENKAMP, ANTITRUST POLICY, *supra* note 29, at 305.

419. Boudin, *supra* note 346, at 397, 402. For other skeptical views on the essential facilities doctrine, see Lemley & McGowan, *supra* note 13, at 62; Scott D. Makar, *The Essential Facility Doctrine and the Health Care Industry*, 21 FLA. ST. U. L. REV. 913, 943 (1994); David J. Gerber, Note, *Rethinking the Monopolist's Duty to Deal: A Legal and Economic Critique of the Doctrine of "Essential Facilities,"* 74 VA. L. REV. 1069 (1988).

420. HYLTON , ANTITRUST, *supra* note 15, at 206.

421. For example, FCC Chairman Michael Powell believes that "facilities-based" competition may be the only tenable form of telecommunications competition. *See* Michael K. Powell, Chairman, Federal Communications Commission, Remarks at the Goldman Sachs Communicopia XI Conference (Oct. 2, 2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226929A1.pdf (last visited Feb. 14, 2004); *see also* HOVENKAMP, ANTITRUST POLICY, *supra* note 29, at 311 ("[O]nce the plaintiff has been given the right to share the defendant's pipeline, it loses its incentive to build its own pipeline.").

422. *Cf.* Joskow & Noll, *supra* note 83, at 1281 ("[N]owhere in the world are there working examples of a structurally competitive, facilities-based local access

imagine trying to create your own electricity distribution grid or build your own airport. Additionally, some critics argue that new technologies will make such natural monopolies obsolete,[423] but this is often wishful thinking. Basic infrastructure, whether it be telephone or electricity lines or railroad track, remains important.[424] To assume otherwise is to create a legal framework that assumes an often nonexistent technological leapfrogging.[425]

New economic research along these lines further buttresses the importance of overcoming bottlenecks. In the language of Post-Chicago law and economics, essential facilities are a quintessential barrier to entry.[426] Moreover, denying access to a bottleneck facility is at heart nothing but an extreme example of foreclosure.[427] Given these insights, scholarly attitudes are slowly changing.[428] What seems unappreciated in the literature to this point, however, is that the essential facilities doctrine is also congruent with core theory which stipulates that competition is often ill-advised where supply is indivisible

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industry.").

423. *See, e.g.*, HUBER, CYBERSPACE, *supra* note 107, at 4.

424. I have made this argument in the telecommunications context. *See* Dibadj, *Cable Competition*, *supra* note 154, at 275–76; Dibadj, *Local Telephony*, *supra* note 169, at 7–10.

425. This is ironic, of course, since the law is usually criticized for lagging technology. Even if we assume that technology creates a new mode of competition—for example that wireless internet access can give wireline providers a competitive challenge—why should we resign ourselves to not having intramodal competition?

426. Even contestability theorists recognized early on the possibility of isolating sunk costs. *See* Bailey & Baumol, *Contestable Markets*, *supra* note 57, at 124 (noting how regulators can "isolate the sunk investments, leaving a relatively contestable part of the industry's operations to be controlled by market forces").

427. *See, e.g.*, Rey & Tirole, *supra* note 159, at 1 ("[F]oreclosure refers to any dominant firm's practice that denies proper access to an essential input it produces to some users of this input, with the intent of extending monopoly power from one segment of the market (the bottleneck segment) to the other (the potentially competitive segment)."); Laffont & Tirole, *supra* note 256, at 98.

428. Recent commentary seems significantly more favorable to the essential facilities doctrine. *See, e.g.*, Robinson, *supra* note 5, at 1203 ("[A]cademics and practitioners ought to be searching for ways to define and limit the obligation to deal with competitors. Ultimately, the best way to accomplish this is to use a *narrowly defined* essential facilities doctrine as the sole foundation for imposing such a duty."); Piraino, *High Technology*, *supra* note 99, at 107–09; Chen, *supra* note 375, at 1498. For an argument that supports the essential facilities doctrine, but within the context of antitrust litigation, see Elizabeth A. Nowicki, Note, *Competition in the Local Telecommunications Market: Legislate or Litigate?*, 9 HARV. J.L. & TECH. 353 (1996).

due to large fixed costs.[429] This is precisely the situation at the bottleneck—by mandating access, competition law can devise a public solution to the problem of the empty core.[430]

The upshot is isolation of the bottleneck (barrier) to allow access to new entrants, allowing competition to flourish elsewhere (where the core is not empty). Confining regulation to bottlenecks is not only good competition policy—avoiding divestiture remedies and providing a framework to assess when a competitor can refuse to deal with rivals[431]—but has the added benefit of limiting the scope of regulation.[432] Eventually, real options theory might be combined with the essential facilities doctrine to develop increasingly sophisticated ways of ensuring competition where there are sunk costs.[433]

Even if one accepts the new economics, however, there is an often overlooked cause behind the discomfort eminent antitrust scholars feel: the essential facilities doctrine is difficult to implement within the confines of traditional antitrust institutions. Examining why provides an excellent illustration of how economics and institutions are intertwined. In their detailed study of the doctrine, Abbott Lipsky and Gregory Sidak "conclude that mandatory access remedies, such as the essential facilities doctrine, do not fit comfortably within antitrust law. They are the stuff of regulatory bodies, not courts."[434] As they point out, successfully deploying the essential facilities doctrine requires a hands-on approach since:

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429. *See supra* note 126 and accompanying text.

430. *See supra* notes 132–36 and accompanying text.

431. *See* Robinson, *supra* note 5, at 1203 ("[A]cademics and practitioners ought to be searching for ways to define and limit the obligation to deal with competitors. Ultimately, the best way to accomplish this is to use a *narrowly defined* essential facilities doctrine as the sole foundation for imposing such a duty.").

432. *See also* Kearney & Merrill, *supra* note 239, at 1361–62 ("If one conceives of the regulator under the original paradigm as a sort of ice cap, covering all aspects of the regulated industry, then the objective under the new paradigm is to melt away the sphere of regulatory oversight to the smallest industry segment possible—the so-called bottleneck monopoly."). *Cf.* Crandall & Hausman, *U.S. Telecommunications Services, supra* note 87, at 75–76 ("A much less regulatory regime stressing open entry and simplified reciprocal compensation for interconnection would have been far more effective in promoting entry and investment.").

433. For an application of real options theory to railroad regulation, see Hausman & Myers, *supra* note 88.

434. Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1195 (1999); *see also* Gregory J. Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 ST. LOUIS U. L.J. 433, 479 (1987) ("the essential facility doctrine should not be invoked unless there is a pre-existing regulatory agency capable of adequately supervising relief").

> [c]ourts must be prepared (1) to command that access be provided to others, (2) to regulate the prices, terms, and conditions for the provision of such access, (3) to command the capacity expansion required to make such access feasible, and (4) to command that the service of the facility—as expanded to make access feasible—actually be provided to those who demand it.[435]

Using similar reasoning, the United States Supreme Court has recently declined to allow new entrants the opportunity to share incumbents' essential facilities, since "[e]nforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited."[436] The problem, then, seems to be more with the administrative difficulties of the essential facilities doctrine than with its inherent incoherence. If the doctrine is taken out of conventional antitrust, and implemented within the institutional structure of a new competition law, these issues should recede and it can enter the mainstream. There is no reason why the courts should be the frontline purveyors of competition policy. Unfortunately, regulatory agencies have to this point approached the unbundling of incumbent's networks with precious little economic discipline,[437] much like their efforts at defining markets.[438] They would improve their lot by becoming "limited-jurisdiction enforcer[s] of antitrust principles, applying a version of the 'essential facilities' doctrine in a single industry."[439] While this would be a valuable start, I envision a different institutional structure to address cross-industry issues of competition policy.

435. Lipsky & Sidak, *supra* note 434, at 1222–23.

436. Verizon Communications v. Law Offices of Curtis V. Trinko, 540 U.S. __ (2004) 8 (No. 02-682, 2003 Term), slip op. at. 8, 124 S.Ct. at 879.

437. *See, e.g.,* Hausman & Sidak, *supra* note 299; Dibadj, *Local Telephony*, *supra* note 169.

438. *See supra* notes 374–75 and accompanying text.

439. Kearney & Merrill, *supra* note 239, at 1361; *see also id.* at 1323 ("[T]he goals of regulation have become the promotion of competition and maximization of consumer choice. The role of agencies has been reduced to monitoring access and pricing of 'bottleneck' monopolies such as the local telecommunications loop and electricity distribution systems.").

B. Simplifying Institutions

Alongside revamped economics, a new institutional structure for antitrust enforcement is necessary—one capable of ex ante policy setting, yet at the same time streamlined and limited in scope.

1. Public Policy, Public Law[440]

Part I.B. has highlighted a number of problems with existing common law institutions to set competition policy: the unusual burden it places on a generalist judiciary,[441] the fact that the ad hoc and ex post nature of decisionmaking creates uncertainty,[442] and the peculiar irony in attempting to set public policy via predominantly private lawsuits.[443] There seems to be agreement among antitrust commentators—many of whom otherwise disagree on the substantive law—that any serious reform of antitrust must squarely address these institutional limitations.[444]

Some scholars, while acknowledging many of the problems with the current litigation scheme, curiously profess a belief that antitrust's woes can be cured by an even greater reliance on the court system. These suggestions typically come in two flavors, both of which are well-intentioned, but miss the mark. The first is to contemplate an even greater role for courts, either in their fact-finding function[445] or in their equitable pow-

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440. I am indebted to Professors Susan Freiwald, Alice Kaswan, and Josh Rosenberg whose comments have contributed significantly to this section.

441. *See supra* notes 169–84 and accompanying text.

442. *See supra* notes 185–89 and accompanying text.

443. *See supra* notes 190–92 and accompanying text.

444. *See, e.g.*, POSNER ANTITRUST, *supra* note 6, at 43 ("Besides difficulties with substantive doctrine, the antitrust area has been plagued by problems of remedy and enforcement."); Hovenkamp, *Areeda-Turner Treatise*, *supra* note 4, at 821 ("Antitrust is an extreme example of 'applied' economics, and the institutional limitations on application are considerable."); Lande, *supra* note 13, at 147 ("A realistic merger enforcement policy must consider severe and potentially overwhelming implementation problems."); Hammer & Sage, *supra* note 169, at 638 ("Another lesson that emerges from our data is that one must pay attention both to substantive law and to legal institutions.").

445. *See, e.g.*, Sullivan, *supra* note 17, at 59 ("[F]act-finders should be given access to all relevant information and credible analysis about why given conduct in a given setting may or may not do competitive harm."). This view is consistent with Sullivan's overall belief that "so long as the courts adhere to core commitments, and remain open to relevant information and analysis, progress will be made." *Id.* at 52.

ers.[446] Unfortunately, this further strains the already weak institutional capabilities of the judiciary as antitrust arbiter of first resort.[447] The second consists of placing roadblocks to hinder plaintiffs; for instance, by imposing a higher burden of proof.[448] Without a concomitant increase in public antitrust enforcement, however, this simply means that many genuine cases of anticompetitive behavior will go unpunished. It is particularly telling that those, like Frank Easterbrook, who propose such restrictions inexplicably assume that "many *plaintiffs* are interested in restraining rather than promoting competition."[449] Aren't defendants interested in doing the same thing as well?[450] The argument is decidedly one-sided.

Staying within the confines of the common law, there are, however, a series of more realistic measures to improve antitrust litigation. Interestingly, other Chicago School scholars have offered many of these workable solutions. Richard Posner suggests streamlining the litigation by using neutral experts much like those employed by arbitral tribunals.[451] Another re-

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446. For instance, Joseph Brodley suggests that "the courts themselves must take an active role in assuring that private suits promote the public interest, using their equity powers to control and modify the litigation conduct and incentives of private enforcers." Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 107 (1995). His specific suggestions include the appointment of an equity trustee and the use of litigation bonds. *See id.* at 32–33.

447. Even commentators who are able to offer an incisive critique of antitrust's plight suggest that the judiciary can somehow emerge as savior. For instance, Rowe notes that

> [l]ike the essence of sound judgment in important business matters, sound antitrust comes foremost from wise judges and good lawyers who read the antitrust statutes with an eye on history, heed court precedents with an ear to Congress, sense today's currents and tomorrow's drifts, and know the skills and the tilts of revolving enforcement officials.

Rowe, *supra* note 6, at 1567

448. *See, e.g.*, Easterbrook, *Limits*, *supra* note 2, at 17–39 (proposing a series of filters through which the plaintiff's case must pass). Thomas Piraino makes a similar argument in the context of high technology joint ventures:

> the party seeking access to an existing network joint venture must rebut an initial presumption that open access need not be compelled. The excluded party can only rebut the presumption by proving that 'but for' access to the network, it would be unable to compete effectively in the relevant market.

Thomas A. Piraino, Jr., *The Antitrust Analysis of Network Joint Ventures*, 47 HASTINGS L.J. 5, 10 (1995).

449. Easterbrook, *Limits*, *supra* note 2, at 39 (emphasis added).

450. *See supra* notes 224–26 and accompanying text.

451. *See* POSNER ANTITRUST, *supra* note 6, at 280.

form would be to collect treble damages from a losing defendant, but award only one-third of the bounty to the plaintiffs; the other two-thirds would be given to enforcement agencies, in a manner somewhat analogous to that in a qui tam lawsuit.[452] This has at least two major benefits. The first is that it would provide sorely needed funding for the enforcement agencies.[453] The second is that it would mitigate application of the awkward standing doctrine the Supreme Court has created to limit plaintiffs from bringing suit:[454] without the lure of treble damages, presumably fewer dubious cases would be brought. The danger of frivolous plaintiff suits could further be reduced by modifying § 4 of the Clayton Act to disallow successful plaintiffs from recovering legal fees.[455]

A more fundamental reform would be to give preference to public enforcement. Richard Posner, who finds that "the influ-

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452. This suggestion builds on a variety of studies that have examined the effects of treble damages. *See supra* note 192. One study notes that:

> the defendant who is found guilty might continue to pay three times (or some other multiple of) the estimated damages. But the plaintiff can be made eligible to a smaller multiple (and perhaps even a multiple less than unity) of that damages figure. The difference would then go into the public treasury as a tax on violators of the antitrust laws.

Baumol & Ordover, *supra* note 189, at 264. It has also been noted that:

> higher multiples might be applied to cases of covert action, or to more complex cases, or both, so as to reduce the costs of error. Lower multiples might be applied to cases with the opposite characteristics. . . . Consideration should also be given to decoupling the penalties and rewards; successful plaintiffs would receive a different multiple than would be paid by losing defendants.

Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 1052 (1986) (footnotes omitted). For a survey of issues related to private enforcement and treble damages, see William Breit & Kenneth G. Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J.L. & ECON. 405 (1985).

453. Even commentators with very different views on antitrust agree on this. *See, e.g.*, Skitol, *supra* note 25, at 264 ("While antitrust, moreover, certainly remains an 'institutionalized' enforcement program, it is seriously underfunded and understaffed.") (footnote omitted); POSNER ANTITRUST, *supra* note 6, at 275 ("[T]raditionally the appropriations for antitrust enforcement have been parsimonious in relation to the universe of potential antitrust suits.").

454. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

455. For a combination of these proposals, see Snyder & Kauper, *supra* note 183, at 598 ("More modest reform proposals include (1) reducing the multiplier for competitor plaintiffs from treble to single damages and (2) eliminating the one-way fee shifting (in favor of successful plaintiffs) for competitor plaintiffs."). William Baumol & Janusz Ordover go further to propose that if defendants win, plaintiffs should reimburse their legal costs. *See* Baumol & Ordover, *supra* note 189, at 264.

ence of the private action on the development of antitrust doctrine has been on the whole a pernicious one,"[456] suggests the agencies should be given "a right of first refusal to bring damages suits."[457] Even Robert Bork, generally not a fan of government intervention, advocates "creat[ing] more Antitrust Division field offices"[458] and acknowledges that the "Antitrust Division is not merely a litigating agency; it has important responsibilities in the formulation of new legislation. It should expand its portfolio to encompass testimony on the merits of new legislation that has implications for competition."[459]

While some commentators have suggested abolishing private remedies,[460] such an approach might lead to the underenforcement of the antitrust laws. A better approach would be to have a government agency formulate policy, then allow both private and public suits. To the extent that the incentives of private parties to cooperate with federal authorities would be reduced, one could experiment with allowing enforcement officials to distribute a portion of the damages to aggrieved competitors.[461]

While these are all steps that would improve the status quo, achieving true institutional reform requires streamlining our enforcement agencies. Specifically, I propose an administrative agency of limited powers, called a Competition Office (CO), to develop and implement competition law across industries—using tools from both traditional antitrust and economic regulation.[462] Such an institutional framework explicitly recognizes the historical reality that the Sherman and Clayton

456. POSNER ANTITRUST, *supra* note 6, at 275.

457. *Id.* at 276. Posner also suggests increasing fines for antitrust violations. *See id.* at 271. For a critique of Posner's suggestions for institutional reform, see Carrier, *supra* note 77, at 294–97.

458. BORK, PARADOX, *supra* note 1, at 406.

459. *Id.* at 407.

460. *See, e.g.,* William Breit & Kenneth G. Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages*, 17 J.L. & ECON. 329 (1974). *Cf.* Baker, *Damage Remedies*, *supra* note 182, at 405 ("A system of public antitrust enforcement, awarding government enforcers rather than private plaintiffs the authority to seek damages, is the most practical way to institute the efficient remedy.").

461. *See* Snyder & Kauper, *supra* note 183, at 597 (recommendation "to abolish the private antitrust remedy for competitor plaintiffs, but broaden the authority of the federal antitrust agencies to collect judgments on their behalf in the event an antitrust violation harms competitors").

462. The sketch below is obviously meant as a starting point for discussion, not a definitive and detailed exposition.

Acts are not simply an extension of the more contractarian, *laissez-faire* common law of restraint of trade—something which the Supreme Court acknowledged in one of its earliest antitrust cases,[463] and that historically sensitive commentators have aptly noted more recently.[464] It is also inherently more public than the common law, consistent with the notion that competition law must necessarily be a form of public policy.

Having an administrative agency be the front line in competition policy avoids many of antitrust's current institutional ills. The fact that the CO would have its own ongoing staff sidesteps having to rely exclusively on paid litigation "experts." Not having to reconcile decisions with precedent also helps increase decision-making speed and flexibility.[465] Moving away from litigation as the prime method of antitrust enforcement also prevents multiple lawsuits from mushrooming out of an initial case, something Richard Posner has termed the "cluster-bomb effect."[466] Another downside to litigation is that it is ex post—by contrast, having rules better defined ex ante should help decrease uncertainty.[467]

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463. *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 327 (1897) ("It is to the statute itself that resort must be had to learn the meaning thereof, though a resort to the title here creates no doubt about the meaning of and does not alter the plain language contained in its text.").

464. *See* PERITZ, *supra* note 26, at 11 ("Given the social and economic conditions of its development, common-law regulation did not address adequately the new threat of entirely 'private' monopoly—whether appearing as an individual, trust, or cartel.").

465. *See* Breyer, *Newly Liberated*, *supra* note 179:

> The regulatory agency is more flexible. It has a staff that can conduct factual investigations. Because it has less need to consider the precedential value of what it does, it can more easily experiment and make exceptions. Finally, perhaps because it can rely more easily upon its expertise to justify its decisions, it hesitates less to balance competing factors to reach a result.

Id. at 1043. Richard Cudahy makes the interesting point that the very existence of an administrative agency can "help avert extreme swings in regulatory policy." Cudahy, *supra* note 93, at 14.

466. POSNER ANTITRUST, *supra* note 6, at 279.

467. *Cf.* LAFFONT & TIROLE, *supra* note 256:

> By and large, [traditional] competition policy operates ex post (after the fact), with the exception of merger control . . . . Conversely, regulators operate ex ante by defining the prices of utilities or the rules for the industry . . . .
>
> Perhaps the implication of all this is that the decision rights endowed upon regulatory agencies and antitrust enforcers have a different nature. Regulators define ex ante a set of feasible moves for operators. Antitrust enforcers, in contrast, check ex post that anticompetitive moves in the

Particularly in the context of historically regulated industries, the CO would also be able to provide ongoing enforcement of injunctive remedies,[468] such as the essential facilities doctrine.[469] For instance, regardless of how one feels about Federal District Court Judge Greene's supervision of the telephone industry during the breakup of AT&T,[470] a well-designed CO—different in ambition and form than the FCC—would have been a more attractive way of dealing with the issues ex ante. In fact, New Zealand, which had tried a common law approach to telecommunications competition, has needed to reinstate its administrative agency.[471]

> feasible set were not selected.

Id. at 277–78; Kolstad et al., *supra* note 187 (proposing a combination of ex ante regulation and ex post liability in the context of safety regulation).

468. *See, e.g.*, Robinson, *supra* note 5, at 1215 ("Regulation by antitrust decree is problematic to the extent that it gives courts and enforcement agencies a regulatory role they are ill-equipped to handle."); Wiley, *supra* note 125, at 589; Cudahy, *supra* note 93, at 5–8. For example, Richard Posner apparently dislikes injunctions in the antitrust context not necessarily because they are wrong, but because of courts' institutional limitations. *See* POSNER ANTITRUST, *supra* note 6, at 273 ("Injunctions of indefinite length cast the enforcement agency or other antitrust plaintiff and the court in the role of a regulatory agency.").

469. *See supra* Part III.A.2.c; *see also* Hausman & Sidak, *supra* note 299:

> [R]emedies in essential facilities cases necessarily require some form of regulation. . . . The central thesis derived from this analysis is that the wisdom of judicial regulation of essential facilities requires an assessment of the administrative complexity of the relief proposed. But this consideration is not applicable to a regulatory agency like the FCC, which already has the expertise and resources to administer a regime of mandatory access, if one is deemed necessary.

Id. at 470; Lipsky & Sidak, *supra* note 434. More generally, antitrust orders are becoming decidedly more regulatory in the context of high technology competition. For various examples of this phenomenon, see Pitofsky, *New Economy*, *supra* note 140, at 547–56.

470. *See supra* note 358. Some scholars view Judge Greene's tenure positively. *See, e.g.*, Lawrence A. Sullivan, *Elusive Goals Under the Telecommunications Act: Preserving Long Distance Competition Upon Baby Bell Entry and Attaining Local Exchange Competition: We'll Not Preserve the One Unless We Attain the Other*, 25 SW. U. L. REV. 487, 534 (1996) ("[H]ow safe is the public interest when complex economic issues are subject to enforcement by a talented and dedicated judge? The answer proved to be: remarkably safe, indeed."). Others are less sanguine. *See, e.g.*, Eli M. Noam, *The Future of Telecommunications, The Future of Telecommunications Regulation*, 50 HASTINGS L.J. 1473, 1477 (1999), *available at* www.citi.columbia.edu/elinoam/articles/Naruc9.htm ("Remember Judge Greene[? W]as it any better, as a process, to have an elderly judge with two law clerks slowly and non-expertly running the American telecom industry structure?"). Peter Huber, who occasionally lionizes the common law is also critical of Judge Greene's tenure. *See* HUBER, CYBERSPACE, *supra* note 107, at 99 ("Getting an answer to a simple question [during Judge Greene's tenure] often took years.").

471. For a discussion of problems with New Zealand's former common law

An agency's institutional advantages also allow it to understand and apply newer, more complex economic models that go beyond the Chicago School's simplicity.[472] Post-Chicago School scholars have too often overlooked the importance of revamping institutions as a necessary prerequisite to better acceptance of new economic ideas. As Herbert Hovenkamp laments:

> It now seems quite clear that Chicago School economic orthodoxy is no longer the best, or certainly not the only, analytic tool for evaluating markets. But the sad fact is that judges have not come close to developing antitrust rules that takes [sic] this messier, more complex economics into account. An even sadder fact is that in many instances Judges may not be capable of doing so. As a result, the rather benign Chicago School rule may be the best one for policy purposes even though it does not do the best job of expressing what we know about economic theory.[473]

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approach, see Michel Kerf & Damien Geradin, *Controlling Market Power in Telecommunications: Antitrust vs. Sector-Specific Regulation: An Assessment of the United States, New Zealand and Australian Experiences*, 14 BERKELEY TECH. L.J. 919, 1018 (1999) ("New Zealand, with its dominant incumbent operator, its lack of specific pro-competition rules, and its absence of specialized regulator, is the country in which the strongest case could be made that a need exists for some pro-competition structural reforms."). In late 2001, the government of New Zealand created the role of Telecommunications Commissioner. *See* New Zealand Ministry of Economic Development, Landmark Telecommunications Act Passed (Dec. 18, 2001), *available at* http://www.med.govt.nz/pbt/telecom/minister20011218a.html. This action was partly in response to evidence that the incumbent, Telecom, was abusing its market power to the detriment of new entrants such as Clear. *See, e.g.,* Liam Dann & Rosemary Howard, *Change a Way of Life for "Other Woman"*, THE SUNDAY STAR-TIMES (AUCKLAND), Mar. 3, 2002, at 4.

472. *See, e.g.,* Joskow, TCE, *supra* note 79, at 99 ("The ability of the trial courts to perform or evaluate complex economic analysis, economic efficiency studies, and economic welfare trade-offs is extremely limited. . . . Antitrust enforcement agencies are, however, in a much better position to perform these types of economic analysis . . . ."); Bruce M. Owen, *Determining Optimal Access to Regulated Essential Facilities*, 58 ANTITRUST L.J. 887, 893 (1990). Laffont and Tirole note:

> Regulators often have expertise superior to that of their [traditional] antitrust counterparts . . . . This wedge has three origins: Regulatory oversight is industry specific; antitrust enforcement is not. Regulators have long-term relationships with regulated firms; antitrust enforcers (Judge Greene notwithstanding) do not. Last, regulators have larger professional staffs as well as continued procedures of data collection.

LAFFONT & TIROLE, *supra* note 256, at 278

473. Hovenkamp, *Post-Chicago*, *supra* note 69, at 271; *see also id.* at 269 ("[T]he danger is that antitrust tribunals will be confronted with antitrust solu-

Indeed, some critics have sought to limit the application of Post-Chicago concepts by painting them as speculative, then arguing that they do not meet the evidentiary requirements of federal courts.[474] Moving competition law to an agency takes the air out of such arguments.

The current alternative—that of allowing anticompetitive behavior simply because it passes undetected under the facile assumptions of neoclassical economics—is simply unacceptable. As Steven Salop and Craig Romaine write:

> to the extent that it is concluded that judges or juries are not competent to deal with these issues in a judicial context, then that forum must be replaced with some other venue for deciding the case. The answer cannot be that the issues are too complicated for judges and juries so, therefore, monopolists should be unconstrained.[475]

Universally stricter antitrust enforcement is, of course, not always desirable. To be most effective, competition law must understand where *not* to intervene just as much as where to intervene.[476] The CO must look beyond conduct to industry structure in making decisions[477] to appreciate differences in

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tions that they are not capable of administering. Indeed, the major shortcoming of post-Chicago antitrust analysis is its failure to take seriously problems of judicial or agency administration."). *Cf.* Timothy J. Muris, *Economics and Antitrust*, 5 GEO. MASON L. REV. 303, 312 (1997) ("Antitrust must continue to tie fact to theory. The successes of integrating economics into antitrust law have performed that task. The new theories of Industrial Organization, unless they can accomplish this goal, will not have lasting influence.").

474. *See* Coate & Fischer, *supra* note 164, at 795.

475. Salop & Romaine, *supra* note 113, at 671. *Cf.* Hovenkamp, *Post-Chicago*, *supra* note 69:

> [I]n antitrust it is not the case that for every wrong there is a remedy. Rather, antitrust should intervene only when it can be confident that it will not do more harm than good to competitive processes, and this may entail that at least some anticompetitive acts go unpunished.
>
> To date, we have not come close to overcoming the basic problem that antitrust tribunals are unable to distinguish competitive from anticompetitive above cost pricing strategies.

Id. at 313.

476. *See* Hovenkamp, *Post-Chicago*, *supra* note 69, at 298 ("Antitrust as an institution loses its credibility when market power is found too readily.").

477. As Laffont and Tirole point out:

> By and large, regulatory agencies have wider control rights than competition agencies and courts. Competition policy assesses the lawfulness of *conduct*. In contrast, regulatory agencies engage in detailed regulation of wholesale and retail prices, profit sharing, and investments, and im-

markets and market players.[478] For instance, merger analysis could be different where there is a failing firm being acquired.[479] More importantly, industry lifecycle is important: a company competing vigorously in a nascent industry should be treated differently from the same company enjoying a monopoly in the now-stagnant industry years later. Industries which compete primarily based on innovation or technology, not price, present special challenges[480] and require different analyses[481] —analyses that antitrust has so far been unable to provide.[482]

Having a CO is also to acknowledge that competition law necessarily has a political component. It represents a middle ground between the exclusively economic approach of the Chicago School, and the resulting exasperation that it has created among opposing commentators who seek to move away from

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> pose lines-of-business restrictions.
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> . . . .
>
> . . . [I]t is fair to say that regulatory agencies have more extensive powers than antitrust enforcers.

LAFFONT & TIROLE, *supra* note 256 at 277.

478. As Paul Joskow and Alvin Klevorick argue, "[w]hat is needed is an approach that can accommodate important market differences: the characteristics of firms and markets that affect the probabilities of error, the error costs, and the implementation costs of alternative policy approaches." Joskow & Klevorick, *supra* note 98, at 218.

479. *See, e.g.,* Breyer, *Newly Liberated, supra* note 179, at 1017; Bok, *supra* note 15, at 339–347.

480. Pitofsky notes:

> In addition to raising the issue of speed of review, antitrust enforcement actions involving high technology raise questions that are unusually complicated and highly technical: for example, whether new technologies are likely to persist in the face of future competition, or whether a highly technical chip was designed to preclude a particular form of competition.

Pitofsky, *New Economy, supra* note 140 at 556–57.

481. There have been numerous proposals along these lines. *See, e.g.*, Sidak, *supra* note 155, at 26–29 (arguing that less stringent antitrust rules should apply in technologically dynamic markets and proposing a method that looks at the price-adjusted performance and novelty of the product); Ordover & Willig, *supra* note 139, at 312 (showing that research joint ventures "ought to be accorded special treatment under the antitrust laws"); Lemley, *supra* note 135, at 1938 (arguing that in limited circumstances, less antitrust scrutiny of intellectual property rights could enhance interoperability); Shelanski & Sidak, *supra* note 18, at 18 (discussing the concept of dynamic efficiency); Bolton et al., *supra* note 103, at 2329; Becker, *supra* note 382 ("But we should resist proposals for greater government oversight of computing and other network industries with rapid progress.").

482. Hammer and Sage make this point in the healthcare antitrust context. *See* Hammer & Sage, *supra* note 169, at 636 ("[T]he results of our investigation lead us to conclude that no cogent theory of nonprice competition has been developed to guide courts in specific cases.").

economic paradigms.[483] Competition law certainly strives for better economics, but should have no illusions that competition policy is set exclusively by economics, no matter how pragmatic and empirical.[484] After all, the vigorousness of antitrust enforcement has waxed and waned over the past century based largely on the political ideology of the day.[485] The idea is to create an institution that makes the political and economic tradeoffs explicit, rather than obfuscates them in a medley of antitrust enforcement agencies, courts, and industry-specific regulatory agencies. While the economic paradigm must in-

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483. *See supra* notes 306–308 and accompanying text.

484. Hovenkamp comments:

> [E]conomists—even free market economists—have recognized an important difference between theoretical economics and public policymaking, particularly if the policies are being made in a democratic State.
>
> The public purpose of theoretical economics is not to eliminate distributive justice as a public policy concern. Rather, it is to enable policymakers to make some judgments about the cost or effectiveness of a particular policy.

Hovenkamp, *After Chicago*, *supra* note 15 at 223–24 (citation omitted). Adams and Brock note:

> Economic theory provides only the most general kind of guidance in suggesting the factual questions which the proceedings should raise for investigation. As a consequence, the implications drawn from the application of economic theory, and the meaning which is attached to the facts that are found in the course of the proceedings, will depend decisively on the particular vision of antitrust which guides the analysis.

Adams & Brock, *supra* note 18, at 297. Curiously enough, even Robert Bork seems to acknowledge this reality despite his brilliant redefinition of consumer welfare. *See* BORK, PARADOX, *supra* note 1, at 8 ("Because the issues of goals and of economic means must both be faced, antitrust is necessarily a hybrid policy science, a cross between law and economics that produces a mode of reasoning somewhat different from that of either discipline alone.").

485. *See, e.g.*, Page, *supra* note 210, at 3 ("Over the century of antitrust history, the Supreme Court has repeatedly recast antitrust rules in light of shifting economic and political conceptions."); Sullivan, *supra* note 17, at 47 (describing "the movement from the excessive populism in the merger law of the 1950s and 1960s, to the implosion of per se and rule of reason analysis in the 1970s, to the price theory extremes of the 1980s, to post-Chicago analysis in the 1990s."); Bok, *supra* note 15, at 353 ("In the field of antitrust, particularly, where statutes have been written with extreme generality, the law has never had a fixed meaning but has necessarily evolved through changing judicial opinions."). For a classic example of the belief in more aggressive antitrust enforcement characteristic of beliefs in the middle of the twentieth century, see Eugene V. Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567 (1947). For a survey of the political shifts in antitrust since the adoption of the Sherman Act, see Skitol, *supra* note 25; Laurence Zuckerman, *How the Antitrust Wars Wax and Wane*, N.Y. TIMES, Apr. 11, 1998, at B7.

form competition law, we should not aspire to pseudo-scientific rigor where none exists.[486]

Given the dual reality of economics and politics, there are few, if any, other workable options. Congress is suitably political—and it should, of course, create the statutory framework that enables the CO—but its size and broad supervisory mandate make it an inappropriate body to implement competition policy.[487] Courts are inappropriate not only because of the limitations of a generalist judiciary, but because they should be the least political of the three branches of government. It is time to stop miring courts in antitrust's political vagaries. The bottom line is that a CO presents a number of striking institutional advantages over alternative options, while at the same time providing a mechanism that explicitly acknowledges antitrust's mixed political and economic reality.[488]

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486. *See also* Adams & Brock, *supra* note 18, at 294 (stating that the "assertion of economic theory as the *deus ex machina* for resolving the nettlesome issues of antitrust may be extravagant and unrealistic"); Hovenkamp, *Areeda-Turner Treatise*, *supra* note 4, at 824 ("[C]oncerns for efficiency do not always dominate legislative outcomes. But when that happens, the duty of the antitrust policymaker such as the judge is to follow the statute, not implicitly repeal it by taking an exclusively economic approach that the statute (or its history) does not permit."). Analogously, Bloche states:

> The alternative approach to health care law that I have urged here begins by conceding our cognitive failings and moral differences. It acknowledges that we want many contradictory things from medicine. . . . Rather than settling for the false simplicity of some reductionist formula, legal decision makers should wrestle with the often poignant, incommensurable concerns that animate health law disputes.

M. Gregg Bloche, *The Invention of Health Law*, 91 CAL. L. REV. 247, 321 (2003).

487. *See, e.g.*, BORK, PARADOX, *supra* note 1, at 412 ("Congress as a whole is institutionally incapable of the sustained, rigorous, and consistent thought that the fashioning of a rational antitrust policy requires. No group of that size could accomplish the task."). In contrast, Owen asks:

> Why not turn to the legislature to deal with issues of industrial structure and access? Such broad policy decisions as whether to have a disintegrated telephone system or electrical grid certainly are proper subjects for congressional policy making. However, the sad truth is that legislators often avoid or postpone dealing with such issues.

Owen, *supra* note 472 at 893.

488. This is precisely what existing antitrust institutions have failed to do. For instance, after a detailed study of antitrust court decisions in the healthcare sector, Hammer and Sage note:

> the importance of developing a broader 'competition policy' for health care and other transitional industries in which antitrust law would work in concert with regulatory, private purchasing, and self-regulatory initiatives to assure that both price competition and nonprice competition are vigorous, and that social objectives not reducible to competition are ad-

2. Minimalism and Reconciliation

To analogize to today's institutions, the CO would be a unification *and reconfiguration* of the Department of Justice's Antitrust Division, and the Federal Trade Commission's Competition Bureau.[489] Consistent with the powers already inherent in the DOJ and FTC, the CO will have the power to investigate, compel evidence and subpoena parties;[490] without such powers, it would be at a severe disadvantage vis-à-vis defendants.[491]

It is critically important, however, that the CO not descend into bureaucracy in its attempt to address the significant shortcomings of today's antitrust.[492] It must not fall prey to post-New Deal idealism that granted ever expansive powers to administrative agencies.[493] The CO should exist only under a

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dressed.

Hammer & Sage, *supra* note 169, at 640.

489. The FTC itself could then become focused exclusively on consumer protection issues such as fraud and false advertising.

490. *See, e.g.*, 15 U.S.C. §§ 46, 49, 57a (b)(1) (2003) (giving the FTC these powers); Marquis, *supra* note 290, at 785 ("Congress has provided federal antitrust enforcers with the tools to compel third parties, such as customers and competitors of the merger partners, to produce documents and testify under oath.")

491. As Keith Hylton points out:

> [a]n economically defensible reasonableness inquiry would seek to determine whether a practice, challenged as a restraint of trade, generates economic benefits in excess of its social costs. . . . *However, such a standard, in the antitrust realm, would tend to put courts and enforcement agencies in a disadvantaged position relative to defendants.* Courts and enforcement agencies often do not have enough information to rigorously assess the economic reasonableness of a challenged practice. Such an assessment often requires information privately held by the defendant and his business associates.

HYLTON, ANTITRUST, *supra* note 15, at xiii–xiv (emphasis added).

492. *See also* Duffy, *supra* note 199, at 1123 ("The better point is that we should resist the temptation to replace the fallen heroes of the Progressive era with new idols. Unchecked pessimism in the administrative form is as unjustified as the unbridled optimism of the Progressives."); Dibadj, *CLE*, *supra* note 27 (discussing the need to mediate between the inequalities of neoclassicism and the bureaucracy of the modern administrative state); Ayres & Braithwaite, *supra* note 337.

493. Breyer states:

When administrative agencies began to grow in power at the beginning of the twentieth century, the source of their authority was seen to be Congress, and the role of administrative law was to ensure that the agency faithfully carried out its congressional mandate. The agency was a 'transmission belt,' applying a congressional statute to changing factual circumstances. . . .

> This procedural model broke down with the New Deal. As congressional delegations were made in broader and broader language, the traditional model could not adequately check the agency's power.

limited delegation of power; namely, to carry out the mandate of the Sherman Act. In some sense, the model I propose harkens back to what Richard Stewart describes as the "traditional model of administrative law"[494] that emerged during the late nineteenth century: the agency only enjoys a limited delegation of power, and is further limited by judicial review.[495] It should be emphasized that the CO's mission is not one of the "command and control" omniscient uber-regulator who seeks to override markets,[496] but one that seeks to enhance the market by correcting for its failures.[497]

Analogizing from John Duffy's vision for the FCC,[498] one model for the CO is the existing United States Patent and Trademark Office (PTO). There are a number of appealing features about this model which has flourished for over two hundred years. As Duffy points out, "[u]nlike the sweeping delegations conferred in the Progressive and New Deal eras, the delegations of governmental power for the patent system were, and still are, extraordinarily narrow."[499] Similarly, the CO's mandate would be narrowly circumscribed to preventing collusion and monopolization. There are even interesting parallels between Congress' constitutional mandate "To promote the

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BREYER, REGULATION, *supra* note 182, at 350–51.

494. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1672 (1975).

495. Stewart outlines the four characteristics of the traditional model:

> (1) The imposition of administratively determined sanctions on private individuals must be authorized by the legislature through rules which control agency action. . . .
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> . . . .
>
> (2) The decisional procedures followed by the agency must be such as will tend to ensure the agency's compliance with requirement (1). . . .
>
> (3) The decisional processes of the agency must facilitate judicial review to ensure agency compliance with requirements (1) and (2).
>
> (4) Judicial review must be available to ensure compliance with requirements (1) and (2).

Id. at 1671–76.

496. *Cf.* Duffy, *supra* note 199, at 1140 ("The failure [of Progressive-era agencies] occurred because the Progressives constructed heroic institutions that, with their broad delegations, long-tenured officials, absence of effective constraints on self-interested activity, and impossibly ambitious regulatory agenda, were doomed to fail.").

497. *See also* Bhagwat, *supra* note 73, at 1502 ("The purpose of the [regulatory] intervention is not to displace market forces with permanent oversight, but rather to foster competition, by creating the conditions necessary for competition to flourish.").

498. *See* Duffy, *supra* note 199.

499. *Id.* at 1133.

Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"[500] and the succinct goals of the Sherman Act.[501]

Given the increasing interaction between competition law and intellectual property in the new economy,[502] it might be particularly fitting to place the CO, like the PTO, within the auspices of the Commerce Department. Other striking similarities exist. Competition and intellectual property are highly specialized legal areas that require specific expertise. Both represent a "a well-documented failure of the common law to regulate effectively without the assistance of an administrative agency."[503] Both must be focused on structure, not simply conduct.[504] Both attempt not to create "a public good directly, but merely to create incentives that spur other actors to generate the public good."[505] It should also be emphasized that the CO's structure is different from that of the FTC,[506] something which should address the concerns of the FTC's current critics.[507]

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500. U.S. CONST. art. I, § 8, cl. 8.

501. *See supra* note 13.

502. *See supra* Part I.A.4.

503. Duffy, *supra* note 199, at 1080. Duffy makes this point with regard to the patent system. As shown in Part I.B. above, however, a similar conclusion is reached in antitrust.

504. Duffy notes that the patent system "provides structural regulation and otherwise leaves the course of economic and technological development to private trial and error." *Id.* at 1136. In Part III.A., I have argued for precisely these goals for competition law.

505. *Id.* at 1148. The language commentators use in the intellectual property and antitrust realms are strikingly similar. For example:

> In contrast, the patent system attempts only a specific correction of the market by restructuring private incentives in a technologically neutral manner. Such a regulatory approach has two great advantages. First, *it does not demand that the government predict technological or industrial winners and losers.* Government probably is not competent to make such decisions and, moreover, centralized decision making has no special advantage in the task. Second, government regulation does not become obsolete when technology changes.

Id. at 1136 (emphasis added); Max Schanzenbach, *Network Effects and Antitrust Law: Predation, Affirmative Defenses, and the Case of* U.S. v. Microsoft, 2002 STAN. TECH. L. REV. 4, ¶ 32 ("The purpose of antitrust law is to protect consumers from anti-competitive actions by firms, *not to pick technological winners.*") (emphasis added).

506. These differences occur on at least three major dimensions. First, the FTC is an independent agency. As Stephen Breyer points out, independent agencies like the FTC "are directly responsible neither to the president nor to Congress." BREYER, REGULATION, *supra* note 182, at 354. The CO, by contrast is directly accountable to the political branches via the Commerce Department.

The CO would have a Board of Competition Appeals, much like the PTO has a Board of Patent Appeals and Interferences and a Trademark Trial and Appeal Board.[508] Similarly, a right of appeal would exist to the United States Court of Appeals for the Federal Circuit, which currently handles appeals from the PTO appeals boards.[509] Thus, even though the frontlines of competition law would be occupied by an administrative agency, a specialized federal court would still serve to keep agency decisionmaking in check. Though such an institutional structure might appear novel, it is not as radical as it might first appear. Internationally, though the institutional structures vary from what I propose, similar offices exist. For example, the European Union has entrusted the European Commission with responsibility for competition policy,[510] and

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Second, the FTC has major responsibilities outside competition policy. *See* FED. TRADE COMM'N, GUIDE TO THE FEDERAL TRADE COMMISSION, *at* http://www.ftc.gov/bcp/conline/pubs/general/guidetoftc.htm (last visited Mar. 4, 2004) (noting that the FTC is comprised of three Bureaus: Consumer Protection, Competition, and Economics. Consumer Protection Bureau, in turn, is comprised of six divisions.). The CO would be exclusively focused on competition policy. Third, the FTC has a strong quasi-judicial component: if a settlement is not reached, the parties appear before an Administrative Law Judge who can then issue a "cease and desist" order. *See id.*; POSNER ANTITRUST, *supra* note 6, at 44. As Richard Posner points out, "the FTC is the prototype of a specialized trade-regulation court." *Id.* at 280. The CO, like the PTO with its Board of Appeals, is more focused on ex ante decision making. *See infra* note 508 and accompanying text.

507. Opinions differ on the FTC. *See, e.g.*, Pitofsky, New Approaches, *supra* note 146, at 7–8 ("[T]he Federal Trade Commission has perhaps the best of both worlds: a clear mission and a consistent forum that develops expertise in particular issues over time."); POSNER ANTITRUST, *supra* note 6, at 280 ("I have never heard anyone argue that [the FTC] has displayed superior expertise to the courts when it comes to deciding antitrust cases.").

508. *See* U.S. PATENT & TRADEMARK OFFICE, USPTO Organizational Structure, *at* http://www.uspto.gov/web/menu/offices.html (last visited Mar. 4, 2004). An alternative would be to set up an Article I court for competition law. Hazlett puts forth an analogous idea in the limited context of network access:

> To enforce a simple set of rules regarding access to local bottleneck facilities, parties should be allowed to negotiate cost-based agreements subject to the authority of an expert NIC [Network Interconnection Court]. (This court need not be limited to telecommunications markets, but could use its expertise to adjudicate disputes in other network industries. . . .

Hazlett, *supra* note 274 at 239. Unfortunately, such proposals remain an ex post method of adjudication.

509. *See* 28 U.S.C. § 1295(a)(4) (2003).

510. *See* EUROPEAN UNION, ACTIVITIES OF THE EUROPEAN UNION: COMPETITION, *at* http://europa.eu.int/pol/comp/overview_en.htm (last modified Oct. 2003).

Australia has a "Competition and Consumer Commission."[511] In the domestic context, one commentator has suggested a "federal Commission on Industrial Structure."[512]

There are a number of benefits to such a cross-industry administrative model. To begin with, it reduces clutter and confusion. Right now, the Department of Justice and FTC have overlapping authority, creating the additional administrative burden of having to coordinate efforts.[513] In addition, numerous industry-specific regulatory bodies have at least some form of antitrust authority, most notably to review mergers.[514] This

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511. *See* AUSTRALIAN COMPETITION & CONSUMER COMM'N, ABOUT ACCC – WHAT WE DO, *at* http://www.accc.gov.au/content/index.phtml/itemId/54137/fromItemId/3744 (last visited Mar. 4, 2004); *see also* Kerf & Geradin, *supra* note 471, at 989–1010.

512. Owen, *supra* note 472, at 894; *see also* Marquis, *supra* note 290, at 789.

513. Regarding the overlap, Hovenkamp points out:

> Since the jurisdiction of the two agencies overlaps, they have developed clearance procedures for notifying each other before conducting investigations or filing actions. If both are found to be pursuing the same inquiry, the two agencies decide which will handle it, based generally on considerations of expertise, staff availability, and so on.

HOVENKAMP, ANTITRUST POLICY, *supra* note 29, at 584; *see also* POSNER ANTITRUST, *supra* note 6, at 280 ("[T]he dual enforcement of the antitrust laws by the Department of Justice and the courts, on the one hand, and the FTC (which combines prosecution with adjudication) with judicial review on the other, is peculiar, to say the least."). A more modest, but nonetheless beneficial, proposal would be to focus on better coordination between the DOJ and FTC. *See* James R. Weiss & Martin L. Stern, *Serving Two Masters: The Dual Jurisdiction of the FCC and the Justice Department Over Telecommunications Transactions*, 6 COMMLAW CONSPECTUS 195, 209–12 (1998).

514. § 11 of the Clayton Act vests authority:

> in the Surface Transportation Board where applicable to common carriers subject to jurisdiction under subtitle IV of title 49; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Secretary of Transportation where applicable to air carriers and foreign air carriers subject to part A of subtitle VII of title 49; in the Board of Governors of the Federal Reserve System where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows . . . .

15 U.S.C. § 21 (2003). For example, the FCC has the authority to approve the entry and exit of common carriers, as well as to approve the transfer of broadcast licenses. *See* 47 U.S.C. §§ 214(a), 310(d) (2003). Similarly, the Department of Transportation's Surface Transportation Board has merger approval authority. *See* 49 U.S.C. § 11324(c). In addition, agencies not specifically enumerated in the Clayton Act possess antitrust powers. For example, FERC has the power to approve a merger if "[a]fter notice and opportunity for hearing . . . the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest . . . ." 16 U.S.C. § 824b(a) (2003).

creates regulatory confusion[515] in exchange for questionable benefits.[516] A cross-industry office presents a number of major advantages. It streamlines the process to avoid duplication and offer clarity. It helps speed decisionmaking along for the businesses involved—in the process saving taxpayer dollars,[517] while at the same time facilitating the dissemination of ideas across industries.[518] Ideally, the CO could even follow in the PTO's footsteps and become at least partially self-financing through user fees, thereby reducing the burden on general tax revenues.

An alternative to the CO that still avoids relying on the federal courts in the first instance, would be to give antitrust authority exclusively to industry-specific agencies.[519] There are a number of problems with such a solution. The first is that competition law's institutions will remain scattered—not only among the different industry-specific agencies, but between these agencies and the cross-industry agency that would need to address competition issues in unregulated industries. In

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515. *See, e.g.*, Joskow, *Mixing*, *supra* note 254, at 184 (lamenting the "complex, overlapping web of antitrust scrutiny of regulated electric utilities"); Morrison & Winston, *supra* note 212, at 36, n.78 ("There is also no reason why the airline industry should continue to be scrutinized by the Justice and Transportation departments."); Weiss & Stern, *supra* note 513, at 195 (noting the "confusing and unpredictable nature of dual agency review of telecommunications mergers. Despite years of precedent and the existence of so-called guidelines, telecommunications merger review remains an *ad hoc* process.").

516. Some commentators suggest having dual agency review "may be appropriate, given the volume and enormity of these mergers and their potential impact on public policy and consumer welfare." Weiss & Stern, *supra* note 513, at 196. Presumably, this is because the locus of decisionmaking power is dispersed. However, it is unclear why this cannot be done more simply via the CO Board of Appeals, followed by the possibility of federal judicial review.

517. *See, e.g.*, *id.* ("From the perspective of the merging parties, dual agency review imposes significant delays and costs both explicitly in terms of out-of-pocket legal and administrative costs as well as an implicit cost associated with the distraction of the enterprise and its executives from their business."); Kerf & Geradin, *supra* note 471, at 1016 ("[T]he allocation of concurrent responsibilities to the FCC and the DOJ with respect to mergers increases costs, delays, and uncertainty.").

518. For example, in the context of telecommunications, Michel Kerf and Damien Geradin note that the "United States model, with its emphasis on detailed sector-specific rules applied by a sector-specific regulator, could be criticized for losing sight of the growing similarities which are developing between telecommunications and other sectors of the economy . . . ." *Id.* at 1013.

519. *See, e.g.*, Gina M. Killian, Note, *Bank Mergers and the Department of Justice's Horizontal Merger Guidelines: A Critique and Proposal*, 69 NOTRE DAME L. REV. 857, 858 (1994) (recommends "vesting exclusive jurisdiction over bank mergers with the Fed.").

addition, industry-specific agencies have traditionally been unsophisticated enforcers of the antitrust laws,[520] leading commentators to call for greater involvement from the Department of Justice and FTC.[521]

This weakness reflects a number of realities: historically, these agencies have not been focused on antitrust,[522] tend to be less comfortable with the economic tools antitrust already provides,[523] and typically do not have power to compel evidence.[524] Additionally, having a CO might also at least partially assuage the fear of public interest scholars. Specifically, as Mancur Olson has shown based on his analysis of group dynamics,[525] nar-

520. For example, transportation regulators have been criticized. *See, e.g.*, Kahn, *supra* note 93, at 1065 ("I think the Department of Transportation's dismissal of some of the complaints of the Justice Department [about mergers] were unconscionable."); Breyer, *Newly Liberated*, *supra* note 179, at 1016 ("The Department of Transportation's relative inexperience in enforcing antitrust law suggests that it should scrutinize with special care the airline mergers opposed by the Antitrust Division."); Kearney, *supra* note 258, at 1167 (noting how the Interstate Commerce Commission had been notoriously slow in analyzing railroad mergers). Similarly, the FCC has historically been criticized for its failure to break the AT&T monopoly. *See* Joskow & Noll, *supra* note 83, at 1270. More recently, commentators have lamented the FCC's lax merger approvals. *See, e.g.*, Jim Chen, *The Authority to Regulate Internet Broadband Access over Cable*, 16 BERKELEY TECH. L.J. 677, 721–22 (2001) ("Perhaps one should not make too much of the FCC's relative passivity vis-à-vis the FTC; after all, the FCC is completing its fifth consecutive decade of forgoing its power to enforce the Clayton Act."); Rosemary C. Harold, *Cable Open Access: Exorcising the Ghosts of "Legacy" Regulation*, 28 N. KY. L. REV. 721, 757–58 (2001) (also noting the FCC's passivity). In fact, the FCC has only denied one merger in the past thirty years. *See* News Release, Federal Communications Commission, FCC Declines to Approve EchoStar-DirecTV Merger (Oct. 10, 2002), *available at* http://hraunfoss.fcc.gov/edocs_public/ attachmatch/DOC-227263A1.pdf.

521. *See, e.g.*, Kearney, *supra* note 258, at 1181–82. *Cf.* Hammer & Sage, *supra* note 169, at 638.

522. *Cf.* Marquis, *supra* note 290, at 788. Some scholars suggest the industry-specific regulators become primarily focused on consumer protection issues, like the Federal Aviation Administration (FAA) and Food and Drug Administration (FDA) already are. *See* Kearney, *supra* note 258, at 1196. By moving the responsibility for competition law out of the FTC, my proposal envisions a similar role for the FTC. *See supra* note 489.

523. As discussed in Part III.A., traditional regulatory agencies have been weak in defining markets and applying the essential facilities doctrine. *See supra* notes 377–378, 440–442.

524. *See* Marquis, *supra* note 290, at 785 ("[U]nder the regulatory approach, the sectoral regulator does not have the power to compel information from third parties and is thus dependent on the application of the merger partners and voluntary submissions of third party interveners for information.").

525. Olson warns that "[o]nly when groups are small, or when they are fortunate enough to have an independent source of selective incentives, will they organize or act to achieve their objectives." MANCUR OLSON, THE LOGIC OF

row industry lobbies are significantly more powerful than diffuse business interests such as the Chamber of Commerce.[526] To the extent one believes in public choice methodologies, a cross-industry institution should be less susceptible to capture than industry-specific regulators.[527] When industry expertise is required,[528] this is best done by having specific divisions under the auspices of the CO.[529]

Finally, having a coherent institutional structure for competition law will help reconcile the growing confusion between antitrust and regulation. As discussed in Part II.B., the two have traditionally been conceived as distinct.[530] Regulation's

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COLLECTIVE ACTION 167 (1971). As a consequence, the "multitude of workers, consumers, white-collar workers, farmers, and so on are organized only in special circumstances, but business interests are organized as a general rule." *Id.* at 143. "Selective incentives" can be thought of as by-products of a group's main purpose, such as professional organizations offering insurance and technical publications to their members. *See id.* at 132–39.

526. *See id.* at 146. Interestingly, Olson appears to support an analysis of industry structure similar to that discussed in Part III.A.2.a. *See id.* at 143 ("The high degree of organization of business interests, and the power of these business interests, must be due in large part to the fact that the business community is divided into a series of (generally oligopolistic) 'industries,' each of which contains only a fairly small number of firms.").

527. *See also* Krattenmaker, *supra* note 329, at 173 (noting that regulatory agencies that are not industry-specific "are much less susceptible to capture by private interests"); Kerf & Geradin, *supra* note 471, at 1019 ("The importance of protecting the regulatory process from undue political and industry pressures cannot be over-emphasized. . . . [E]conomy-wide regulators, such as the Commerce Commission or the ACCC, would tend to have an advantage over sector-specific entities such as the FCC in that respect."). *Cf.* Peltzman & Winston, *Conclusion*, *supra* note 239, at 191 ("Additional steps must be taken to free even a deregulated industry from regulatory bodies that could be used by organized groups to acquire rents and potentially undermine deregulation.").

528. For example, in the context of newly deregulated industries, Robert Pitofsky argues that "antitrust, if it is to be effective . . . must take into account the special circumstances of each industry." Pitofsky, New Approaches, *supra* note 146, at 1.

529. This is analogous to the Australian experience. *See* Kerf & Geradin, *supra* note 471, at 1013 ("Efforts have been deployed to ensure the overall coherence of the regulatory framework by incorporating sector-specific rules within the economy-wide antitrust legislation, and by conferring responsibility for implementing those rules to a single economy-wide antitrust authority."). The list of industry-specific bureaus need not be limited to regulated industries. For instance, the manufacturing sector could present a different set of competitive issues than the retailing sector.

530. *See also* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 438 (2d ed. 2001) ("Congress has committed several industries to extensive agency regulation. In these industries, regulation not competition is usually the watchword, to the extent that sometimes these industries are exempted from the antitrust laws.").

increasingly pro-competitive mandate—absent a coordinating institution like the CO—engenders a host of thorny questions, central among them whether antitrust or regulatory law takes precedence.[531] Some courts have found that the existence of a specific regulatory regime precludes challenges under the general antitrust laws;[532] others have found the opposite.[533] The

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531. BREYER, REGULATION, *supra* note 182 at 161. Breyer asserts:

> Courts considering antitrust and regulatory matters must deal with such questions as: To what extent should ordinary principles of merger law apply to mergers in the regulated trucking or airline industries? To what extent should such industries be exempt from the scope of the antitrust laws? To what extent should antitrust principles apply to competitively structured portions of industries that are in part naturally monopolized?

Id.

532. For example, in *United States v. FCC*, the D.C. Circuit noted:

> The agency's determination about the proper role of competitive forces in an industry must therefore be based, not exclusively on the letter of the antitrust laws, but also on the 'special considerations' of the particular industry. . . . We therefore reject American Satellite's and Western Union's attempt to constrict the FCC's discretion within the parameters of the antitrust laws.

652 F.2d 72, 88 (D.C. Cir. 1980). Similarly, the Court in *Town of Concord v. Boston Edison Co.* stated:

> Full price regulation dramatically alters the calculus of antitrust harms and benefits. First, regulation significantly diminishes the likelihood of major antitrust harm. In particular, it diminishes the likelihood of 'entry barrier' harm, namely the risk that (1) prices will rise because (2) new firms will hesitate to enter a market and compete after (3) a squeeze has driven pre-existing independent competitors from the marketplace.

915 F.2d 17, 25 (1st Cir. 1990); *see also* N.E. Utils. Serv. Co. v. FERC, 993 F.2d 937, 947 (1st Cir. 1993) ("There is no explicit reference to antitrust policies or principles. There is no evidence that Congress sought to have the Commission serve as an enforcer of antitrust policy in conjunction with the Department of Justice and the Federal Trade Commission."). As the Seventh Circuit stated:

> The fundamental fallacy in the plaintiffs' theory is that the duties the 1996 Act imposes on ILECs are coterminous with the duty of a monopolist to refrain from exclusionary practices. They are not.
>
> . . . .
>
> . . . We think it both illogical and undesirable to equate a failure to comply with the 1996 Act with a failure to comply with the antitrust laws.

Goldwasser v. Ameritech Corp., 222 F.3d 390, 399–400 (7th Cir. 2000).

533. *See, e.g.*, United States v. Phila. Nat'l Bank, 374 U.S. 321, 350–51 (1963) ("Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.") (citation omitted). The Supreme Court, in *Silver v. N.Y. Stock Exchange*, held:

> The Securities Exchange Act contains no express exemption from the antitrust laws or, for that matter, from any other statute. This means that any repealer of the antitrust laws must be discerned as a matter of im-

Supreme Court's most recent pronouncement on the subject is limited to confirming that the 1996 Telecommunications Act does not provide implied immunity from the antitrust statutes.[534]

The question of consistency still endures. On the one hand, wanting to supplement existing regulation with general antitrust laws is understandable and driven by the frustration litigants feel toward industry-specific regulatory bodies who lack expertise in competition law.[535] On the other hand, having overlapping, often contradictory, legal schemes is both inelegant and confusing. The CO would not only improve competition law, but would have the welcome side effect of preventing antitrust and regulation from working at cross-currents.[536]

CONCLUSION

Saving antitrust is not easy.[537] At one level, the effort engages a plethora of specific analyses and prescriptions: internalizing the legislative history, incorporating the latest eco-

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> plication . . . .
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> . . . .
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> . . . There is nothing built into the regulatory scheme which performs the antitrust function of insuring that an exchange will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends.

373 U.S. 341, 357–58 (1963); *see also* Law Offices of Curtis V. Trinko v. Bell Atl. Corp., 294 F.3d 307, 329 (2d Cir. 2002) ("[T]here is no authority for the proposition that entering into an interconnection agreement exempts a telecommunications carrier from the antitrust laws.").

534. *See* Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, 124 S. Ct. 872 (2004) (No. 02-682, 2003 Term).

535. *See also* Kearney & Merrill, *supra* note 239, at 1375–76. An analogy can be drawn to the fact that the Bell monopoly was dismantled by antitrust authorities, not the FCC. *See supra* note 358.

536. *See also* Klein, Transition, *supra* note 345, at 2 ("The affected industry participants and the public deserve consistency across the governmental spectrum."). Congress can, of course, explicitly immunize regulatory action from the antitrust laws. *See, e.g.*, 49 U.S.C. § 11321(a) (2003) ("A rail carrier, corporation, or person participating in that approved or exempted transaction [by the Surface Transportation Board] is exempt from the antitrust laws . . . ."). However, such explicit direction is rare, leaving courts to ponder the question of implied immunity.

537. *Cf.* Boudin, *supra* note 346, at 403 ("Antitrust law is a difficult subject, and the underlying economics are even more baffling to must judges and lawyers."); Moore, *supra* note 299, at 246 ("[T]here are few simple answers to antitrust questions."); Lande, *supra* note 13, at 149 ("Congress never promised that the administration of the antitrust laws would be easy.").

nomics, and revamping enforcement institutions. At this level of abstraction, the agenda is about deconstructing the messy reality of barriers to entry, network effects, and economies of scale. It involves reconstructing the law using a variety of new concepts with intimidating names like "core theory," "consumer monopsony," and "dynamic market analysis."

At a more profound level, however, the clutter recedes to reveal three broad themes. The first is the need for legal reformers to look beyond strict doctrinal boundaries.[538] To a large extent, antitrust is in a rut because of an unwillingness or inability to learn from the sea change underway in economic regulation. For example, we remain stuck with defining "consumer welfare" as allocative efficiency because any standard directly focused on helping consumers smacks of direct government involvement; similarly, we refuse to implement the essential facilities doctrine because it smells too much like regulation. This ignores the fact that both strive for the same goals and can learn from one another.

Second, remaking competition law requires looking beyond the pitched economic and institutional battles that at first blush paint a simple caricature of "more" versus "less" antitrust enforcement. This article has hopefully revealed a much more subtle reality: sometimes antitrust enforcement has been too lax; at other times, it has been unnecessarily strict. If anything, this bifurcation has created unintended consequences—for instance, by outlawing agreements among firms, the law has unwittingly created merger waves; by focusing too heavily on anticompetitive effects in narrow horizontal markets, it has hurt small business and paved the way for corporate behemoths. The upshot reveals a desperate need to use common sense to understand the big picture implications beyond the narrow rule or case at hand. Additionally, while one can disagree with their economic views on antitrust, several Chicago School scholars have made excellent suggestions for institutional reform that, ironically, include a greater role for public agencies over private litigation.

Third and most importantly, overcoming antitrust's current malaise necessarily requires getting beyond the seduction of neoclassical economics. Underneath the veneer of elegance

538. *Cf.* Jim Chen & Daniel Gifford, *Law as Industrial Policy: Economic Analysis of Law in a New Key*, 25 U. MEM. L. REV. 1315 (1995).

and simplicity lie nonfalsifiable assumptions, blind faith in the ability of self-interested private parties to make public policy, and a consequent disregard for the law's distributional goals. Naïve methodological assumptions underlie a masterful rhetoric that all but ignores consumer interests. I have tried to begin sketching out an alternative vision of competition law—avowedly less elegant, but significantly more realistic. It rests on economics that are pragmatic, empirical and behavioral. It struggles with the need to develop public institutions reflective of a democracy rather than simply to collapse political discourse into the realm of private contract.

Ironically, developing a new competition law is perhaps most important for reasons that have very little to do with competition law itself. Having spent much of the article offering alternatives to the vision of Judge Bork and his Chicago-school brethren, I end by agreeing with his description of antitrust's importance:

> Its mystique, its legends, its celebration by all branches of the federal government constitute an exceptionally potent educative force that affects our thought, for better or for worse and in ways we do not fully realize, about all the aspects of society the law touches. I have referred to it as a subcategory of ideology; it is not far-fetched to view antitrust as a microcosm in which larger movements of our society are reflected and perhaps, in some small but significant way, reinforced or generated. *The walls of ideological subcategories are permeable; battles fought and won or lost in one are likely to affect the outcome of parallel struggles in others.*[539]

During the 1970s and 1980s, *laissez-faire* law and economics scholars, perhaps recognizing the implications of Bork's observation to their normative agenda, cleverly used antitrust as a beachhead to disseminate their vision—of impeccable supply and demand schedules and magically efficient common law—into other doctrinal areas. Twenty years later, it is high time for a new generation of scholars to offer a modernized economic and institutional vision of competition law that can, much like its neoclassical predecessor, then have its principles applied across legal disciplines. Saving antitrust is only the beginning of the journey.

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539. BORK, PARADOX, *supra* note 1, at 10 (emphasis added).