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ANTITRUST, INSTITUTIONS, AND MERGER CONTROL

D. Daniel Sokol[*]

INTRODUCTION

The dynamic interrelationship of a number of institutions shape antitrust's ability to reduce anticompetitive distortions on economic activity. Complexity affects institutional quality, and antitrust institutions respond to this complexity.[1] Institutions work in complex ways akin to an ecosystem.[2] Post-World War II, brown snakes found their way to Guam. The snakes threatened Guam's bird population, which was not accustomed to the predators. To combat the snakes, the government introduced mongooses to eliminate the snake threat. Instead, the mongoose developed a taste for bird and bird eggs.[3] Similarly, change the relative power of one institution within the antitrust institutional ecosystem, and unforeseen results may occur.

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[1] Antitrust is not alone among complex areas of regulation that confront these problems. Areas as distinct as corporate/securities law and environmental law must address institutional complexity. Other fields seem to have similar problems in terms of tackling issues of complexity in multiple levels. My sense is that much of this work tends to focus on some sub-issues rather than addressing all the comparative institutions. This may be a function of works being article length rather than book length. For how some authors address various institutional issues across fields, see Chris Brummer, *Corporate Law Preemption in an Age of Global Capital Markets*, 81 S. CAL. L. REV. 1067, 1067-68 (2008) (noting the importance of international rather than federalism concerns in contemporary corporate law); Stephen J. Choi, *Do the Merits Matter* Less *After the Private Securities Litigation Reform Act?*, 23 J.L. ECON. & ORG. 598, 600-01 (2007) (explaining the effects of legislative changes on securities litigation); Victor B. Flatt, *Act Locally, Affect Globally: How Changing Social Norms to Influence the Private Sector Shows a Path to Using Local Government to Control Environmental Harms*, 35 B.C. ENVTL. AFF. L. REV. 455, 455-457 (2008) (providing an institutional analysis for state level public and private environmental enforcement); J.B. Ruhl, *Keeping the Endangered Species Act Relevant*, 19 DUKE ENVTL. L. & POL'Y F. 275, 275, 293 (2009) (noting the limitations of expanding the Endangered Species Act to combat climate change); Michael D. Klausner, *Are Securities Class Actions 'Supplemental' to SEC Enforcement? An Empirical Analysis* 3-4, 43-44 (4th Annual Conference on Empirical Legal Studies, Working Paper, 2009) (on file with the George Mason Law Review) (suggesting that public and private rights are not compliments in securities litigation).

[2] *See generally* Craig A. Arnold, *Fourth-Generation Environmental Law: Integrationist and Multimodal*, 25 J. LAND USE & ENVTL. L. (forthcoming 2010).

[3] *See History of the Brown Treesnake Invasion on Guam*, U.S. GEOLOGICAL SURV., http://www.fort.usgs.gov/resources/education/bts/invasion/history.asp (last visited July 25, 2010). The

Institutional complexity is such that a "fix" to one institutional problem may merely shift the problem to another institution. For example, to fix the problem of generalist judges adjudicating complex antitrust cases, a jurisdiction might introduce a specialized court.[4] However, a specialized court might itself rule in suboptimal ways or may be limited in its adjudication based upon a higher-level court overturning it.[5] A specialized court also might result in more forum shopping across jurisdictions to get substantive remedies but in friendlier venues.[6]

In spite of the complex interconnection of institutions, antitrust scholarship has suffered from a lack of more rigorous comparative institutional analysis—one that analyzes the relative strengths and weaknesses of all these institutions to better determine an optimal institutional design.[7] Antitrust scholarship on comparative institutional analysis has been lacking. This article makes two primary contributions to the antitrust literature. First, it identifies the dynamic interrelationship across antitrust institutions. Second, it provides new empirical evidence from practitioner surveys to explore how the dynamic institutional interrelationship plays out in the area of merger control.

Antitrust scholars primarily focus on case analysis and the theoretical and empirical economics underlying these cases.[8] Therefore it is not surprising that antitrust institutional analysis is generally limited to courts and

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Simpsons television show illustrates the problem of unintended changes in the ecosystem in *The Simpsons: Bart the Mother*, (FOX television broadcast Sept. 27, 1998).

[4] *See* Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 383-89 (2000).

[5] Elina Cruz & Sebastian Zarate, *Building Trust in Antitrust: The Chilean Case*, *in* COMPETITION LAW AND POLICY IN LATIN AMERICA 157, 161-63 (Eleanor M. Fox & D. Daniel Sokol eds., 2009) (discussing the Chilean Supreme Court's ability to overrule the Chilean Competition Tribunal, a specialized competition tribunal); Aldo González, *Quality of Evidence and Cartel Prosecution: The Case of Chile*, *in* COMPETITION LAW AND POLICY IN LATIN AMERICA, *supra*, at 189, 196-99 (discussing how the Chilean Competition Tribunal rulings leave collusion in a grey area between per se and rule of reason analysis).

[6] Damien Geradin, *The Perils of Antitrust Proliferation: The Globalization of Antitrust and the Risks of Overregulation of Competitive Behavior*, 10 CHI. J. INT'L L. 189, 210-11 (2009) (lamenting that competitors will push for action in the most restrictive jurisdictions for dominant firms).

[7] A number of other works examine institutional design and comparative institutional analysis, but do so outside of antitrust. *See, e.g.*, MASAHIKO AOKI, TOWARD A COMPARATIVE INSTITUTIONAL ANALYSIS 3 (2001); THRÁINN EGGERTSSON, IMPERFECT INSTITUTIONS: POSSIBILITIES AND LIMITS OF REFORM 1-6 (2005); NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 3 (1994); Eric Maskin, *Mechanism Design: How to Implement Social Goals*, 98 AM. ECON. REV. 567, 567 (2008); Jonathan B. Wiener & Barak D. Richman, *Mechanism Choice*, *in* PUBLIC CHOICE AND PUBLIC LAW (Daniel A. Farber & Anne Joseph O'Connell eds., forthcoming 2010), *available at* http://ssrn.com/abstract=1408163. These works take a somewhat different approach than the present Article, in part because the complexity of antitrust requires a somewhat different set of institutional responses than some other substantive fields of law.

[8] *E.g.*, Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 336-37; Arthur, *supra* note 4, at 337.

HeinOnline -- 17 Geo. Mason L. Rev. 1056 2009-2010

agencies. It is hard for law professors to undertake institutional analysis when they are themselves embedded in institutions. As courts and agencies are the two antitrust institutions that academics and practitioners are likely to experience, these are the focus of institutional analysis. However, an analysis limited merely to these institutions is incomplete. Similarly, institutional issues are generally not of interest to antitrust industrial organization ("IO") economists. Often antitrust IO economists simply assume the institutions for their models in both theory and data-driven articles.[9]

This Article does not intend to denigrate the nature of most antitrust scholarship.[10] Instead, it claims that an analysis of cases and of agency decision making underemphasizes the important role that other institutional actors play in shaping the dynamics of the antitrust system. The meaning of "institutions" varies.[11] In the context of this Article, I am concerned with designing institutions that apply to all facets of antitrust. Although this comparative analysis is global (e.g., one can undertake a comparative analysis of European or Japanese antitrust institutions), I focus the institutional analysis in this Article on the United States' experience. Nevertheless, I do include insights from other jurisdictions to illustrate alternative institutional designs to the U.S. system.

This Article's major claim is that scholars have not undertaken a truly comparative institutional analysis of antitrust institutions. My normative claim is that only by undertaking this sort of analysis can we properly structure the institutional design of antitrust. In many cases, scholars are accidental institutionalists. They focus on a particular institution (such as courts through an analysis of a particular antitrust doctrine's shortcomings) without placing it within a larger antitrust interinstitutional context.[12] Absent a comparative analysis, scholars may inadvertently be introducing the equivalent of a mongoose into the antitrust institutional ecosystem.

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[9] *See* David J. Gerber, *Competition Law and the Institutional Embeddedness of Economics*, *in* ECONOMIC THEORY AND COMPETITION LAW 20, 20-23 (Josef Drexel, Laurence Idot & Joël Moneger eds., 2009).

[10] Indeed, I have been guilty of this sin as much as the next scholar.

[11] There are many overlapping and conflicting meanings to both the terms "institutions" and "comparative institutional analysis." For purposes of this Article, I use North's conceptualization of institutions. Institutions under this framework are the various governance structures based upon formal rules, informal norms, their organization, and the ways in which these structures enforce governance. Douglass C. North, *Economic Performance Through Time*, 84 AM. ECON. REV. 359, 360 (1994). By comparative institutional analysis, I utilize Williamson's conceptualization as "an examination of the *comparative costs of planning, adapting, and monitoring task completion under alternative governance structures*." OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 2 (1985).

[12] *E.g.*, ROBERT A. KATZMANN, REGULATORY BUREAUCRACY: THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY 3-10 (1980) (focusing on the FTC); SUZANNE WEAVER, DECISION TO PROSECUTE: ORGANIZATION AND PUBLIC POLICY IN THE ANTITRUST DIVISION 4-5 (1977) (focusing on the DOJ); Darren Bush & Salvatore Massa, *Rethinking the Potential Competition Doctrine*, 2004 WIS. L. REV. 1035, 1036-38 (suggesting a rethink of the potential competition doctrine).

HeinOnline -- 17 Geo. Mason L. Rev. 1057 2009-2010

This Article explores the various dynamic interrelationships using qualitative analysis across antitrust generally, with an emphasis on descriptive analysis and categorization. It does so to better identify and conceptualize the institutions that constitute a necessary part of an antitrust comparative institutional analysis. First, it explains why there is a need for using a comparative institutional analysis in antitrust. It then identifies the various institutions in the antitrust system—the market, courts, agencies, the interaction between public and private rights of action, the legislature, sector regulators, state versus federal government enforcement, and national versus international enforcement.

Institutions are complex. A vast literature in law, economics, and political science explores each individual institution. This article does not present a comprehensive view of the various antitrust institutions.[13] Instead it provides a broad, descriptive, analytical overview of the various institutions to better frame the larger institutional interrelations for a comparative institutional analysis. In the next Part, it examines mergers as a case study of how one might apply antitrust institutional analysis across these different kinds and levels of antitrust institutions. The Article utilizes both quantitative and qualitative methods based on survey data of antitrust practitioners on merger issues to better understand institutional choice and the decision-making process. The surveys reveal results that run counter to the popular antitrust discourse about the level of merger enforcement under President George W. Bush. Slightly more than half of all practitioners surveyed found no change in merger enforcement under Bush in their own practice, and the vast majority of the other practitioners found a change in enforcement merely at the margins. The Article concludes with observations from the case study and appeals for more theoretical and empirical work in antitrust institutional analysis.

I. INSTITUTIONAL DESIGN

Institutions matter, as they affect outcomes in society and the ability to create economic growth.[14] A focus on better institutional design has become an antitrust agency priority around the world. However, as a recent report by antitrust agencies on agency effectiveness notes, "[r]elatively little emphasis has been placed on the institutions and operational considerations

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[13] *See generally* DENNIS MUELLER, PUBLIC CHOICE III (2003) (providing an extensive literature review of the executive, legislative, and judicial branches as well as administrative agencies and other institutional arrangements).

[14] DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990).

HeinOnline -- 17 Geo. Mason L. Rev. 1058 2009-2010

through which competition law and policy are implemented."[15] This is surprising because the quality of institutions plays such an integral role in various antitrust outcomes.

Institutional change is a product, in part, of path dependence.[16] Prior institutional structures shape the current framework's ability to respond to issues as they emerge.[17] Institutions also evolve. Over time, competition eliminates weaker organizational structures.[18] Given how institutions react to changing circumstances, any institutional analysis without a robust comparative element that advocates substantial changes or minor modifications to the existing institutional structure of antitrust risks making faulty suggestions.[19] A comparative institutional analysis enables a more thorough examination of the comparative costs and benefits of existing and potential antitrust institutions. Such work would provide a sense of the costs and benefits of any given institutional design.[20]

Let us begin with an explanation of what it means to obtain the best institutional outcome at the lowest cost. In short, it is a system that is administrable and reduces societal cost by effectively using various institutions to promote better outcomes.[21] Antitrust measures institutional success in terms of the institution's ability to improve consumer welfare. It could be possible, in some sense, to formally model what the comparative costs and benefits of a particular institution might be. In practice, however, it proves quite difficult to quantify the advantages and disadvantages of a particular institutional structure. How much of this analysis is country-specific, based on the IO, stages of economic development, and strength of political institutions, may vary. It is perhaps easier to understand institutional tradeoffs

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15 COMPETITION POL'Y IMPLEMENTATION WORKING GROUP: SUB GROUP 1, INT'L COMPETITION NETWORK, AGENCY EFFECTIVENESS PROJECT 3 (2008).

16 Path dependence is a term that "posits that the evolution of institutions is based on past experience." Susan Adler Channick, *Will Americans Embrace Single-Payer Health Insurance: The Intractable Barrier of Inertia, Free Market, and Culture*, 28 LAW & INEQ. 1, 33 (2010).

17 *See* Paul A. David, *Why Are Institutions the 'Carriers of History'?: Path Dependence and the Evolution of Conventions, Organizations and Institutions*, *in* 5 STRUCTURAL CHANGE & ECON. DYNAMICS 205, 217-19 (1994).

18 Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211, 213-14 (1950).

19 This does not mean that good work has not been done regarding antitrust agency institutional design. *See, e.g.*, Michael Trebilcock & Edward M. Iacobucci, *Designing Competition Law Institutions*, 25 WORLD COMPETITION L. & ECON. REV. 361, 393-94 (2002). However, many of the articles on institutional design focus almost exclusively on agencies and courts, rather than on a broader institutional analysis as advocated by this Article.

20 This is particularly important because existing institutions suffer from inertia. *See* RONALD N. JOHNSON & GARY D. LIBECAP, THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY: THE ECONOMICS AND POLITICS OF INSTITUTIONAL CHANGE 4-9 (1994); Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 451-52 (1999).

21 KOMESAR, *supra* note 7, at 8.

with a case study, which this Article does by examining U.S. merger control.

Institutional effectiveness plays a role in the decision making of the various actors who must navigate the legal and regulatory institutions, primarily companies and the lawyers that represent them.[22] How institutions affect the decision-making process is a critical issue, as decision making is a function of institutional effectiveness.[23] The decision-making process by lawyers and companies is somewhat murky. In part, this is because antitrust always operates in a world of uncertainty, which makes predictions about future behavior of firms and markets difficult.[24] Despite this, antitrust policy should improve its management of uncertainty by creating a better institutional design for any given jurisdiction—and also worldwide—by properly analyzing the strengths and weaknesses of the institutional alternatives. However, the complex web of antitrust institutions makes this task difficult. Institutional alternatives span across, at least in the United States, three jurisdictional levels—state, federal, and international—as well as across public and private rights of action. Moreover, overlapping institutional actors exist at each of these levels.

In terms of institutional design, should one focus on the goals first? If so, how do the goals of antitrust shape the design (or revision) of institutions to achieve these goals? Some antitrust scholars suggest that without identifying the goals, it is difficult to measure agency effectiveness.[25] This is certainly true. However, at a certain point the goals are a function of existing institutional capabilities. Current institutional constraints shape the goals of antitrust to the same extent as the broader goal-setting process. For example, we cannot expect a brand-new antitrust agency with no previous experience to undertake enforcement in the area of bundled discounts. This task challenges even the most experienced antitrust agencies and antitrust systems.[26] For a new antitrust system, a focus on a difficult issue like bundling would overwhelm the system. This could lead to public apprehension about the abilities of antitrust more broadly.

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22 *See* Philip J. Weiser, Deputy Assistant Att'y Gen., Antitrust Division, U.S. Dep't of Justice, Toward an International Dialogue on the Institutional Side of Antitrust 8 (Feb. 19, 2010), *available at* http://www.justice.gov/atr/public/speeches/255363.pdf.

23 *Id.* at 1.

24 Ken Heyer, *A World of Uncertainty: Economics and the Globalization of Antitrust*, 72 ANTITRUST L.J. 375, 379 (2005) ("In dealing with antitrust issues, even economic theory does not have all the answers and probably never will.").

25 *See* William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903, 907-09 (2009).

26 *See* Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 399-402 (2009); *see also* Patrick Greenlee et al., *An Antitrust Analysis of Bundled Loyalty Discounts*, 26 INT'L J. INDUS. ORG. 1132, 1134-35 (2008); Barry Nalebuff, *Bundling as an Entry Barrier*, 119 Q.J. ECON. 159, 159 (2004).

A better way to conceptualize institutional choice is to consider a link between goals and capabilities. How to determine the best mix of these factors, given institutional limits, is a job for comparative institutional analysis. This Article includes certain assumptions of sequential design into institutional construction in a cross-country setting. Without certain prerequisites, antitrust will not be effective, regardless of the country's antitrust system. These necessary requirements include: high levels of financial and human resources for the antitrust agency; a lack of government over-intervention and regulation; low-level country corruption; strong physical infrastructure for the country in critical sectors (e.g., electricity, telecom); an independent judiciary; and a strong legal infrastructure that includes property and contractual rights to promote private-sector growth.[27] This Article also presumes that there is an academic community that continues to undertake important theoretical and empirical work on antitrust issues and that the various antitrust institutions can absorb this learning into their decision-making processes.[28] Finally, an effective antitrust system requires administrability of legal rules and standards.[29]

Institutional design represents only one factor in the success of the antitrust system. Outputs also matter. This leads to a critical question. What should agencies do and how does one measure the type of outputs that antitrust produces? This Article does not address issues of quality versus quantity of enforcement. On the one hand, ignoring quality can lead to misleading inferences about antitrust enforcement. Without looking at the quality of a case, one might suggest that percentage wins of total cases brought or total number of cases brought might be good measures of institutional success. On the other hand, not all cases the enforcement agencies pursue are equally meritorious, and too many "bad" cases, even if won by the enforcers, would constitute losses for the antitrust system.[30]

On the other hand, a discussion about quality assumes that there is an appropriate measure of quality. Rather, an absence of good measures of "quality" outcomes exists. We cannot effectively quantify business decisions not taken as a result of antitrust court decisions.[31] Nor can we easily quantify the effects of decisions taken.

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[27] CYNTHIA L. CLEMENT ET AL., INSTITUTIONAL REFORM & THE INFORMAL SECTOR, COMPETITION POLICIES FOR GROWTH: LEGAL AND REGULATORY FRAMEWORK FOR SSA COUNTRIES 4 (2001).

[28] D. Daniel Sokol, *The Development of Human Capital in Latin American Competition Policy*, *in* COMPETITION LAW AND POLICY IN LATIN AMERICA, *supra* note 5, at 13, 13-14.

[29] HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 7-10 (2005) (explaining the importance of administrability in antitrust).

[30] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15 (1984) ("For a number of reasons, errors on the side of excusing questionable practices are preferable.").

[31] But in the environmental realm, see Nathaniel O. Keohane, Erin T. Mansur & Andrey Voynov, *Averting Enforcement: Strategic Response to the Threat of Environmental Regulation*, 1 (Ctr. for the

II. THE ANTITRUST INSTITUTIONS

This Article analyzes the antitrust institutions that make up the U.S. antitrust enforcement arena, while also touching on the relevant global aspects. This Part identifies the relevant institutions—the market, the judiciary, agencies, public and private rights of action, the legislature, sector regulators, state enforcement, and international enforcement—to facilitate further discussion.

A. *Market*

The first order question for antitrust is to determine the optimal amount of antitrust. Put differently, in an antitrust context, how much antitrust through formal institutions is necessary as opposed to using the free market as the default institution? There are three types of institutional designs for antitrust. One is to keep the current antitrust system as it is. As this Article will demonstrate, such an institutional structure creates significant redundancies and other costs that outweigh the relative benefits of the current system. One alternative is to create an institutional system designed for more aggressive antitrust enforcement. The other alternative is to optimize the antitrust institutional system for less enforcement if the belief is that less enforcement will yield better outcomes. This Article is a review and initial critique of the existing institutional alternatives. I leave to a future article how to best design U.S. antitrust institutions.

A related concern to establishing the ideal amount of enforcement is determining which is more costly from an institutional standpoint—false positives (over-enforcement) or false negatives (under-enforcement). The basis for antitrust enforcement is the belief that markets work.[32] Choosing formal institutions in antitrust involves understanding the nature of the market failure, identifying the possible antitrust institutional responses, and creating an optimal set of institutions or instruments to correct this failure.[33] Intervention, given the institutional realities of formal antitrust institutions (the market is informal in its organization), must be shown to outweigh the costs of such intervention. Judge Easterbrook in his seminal work provided

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Study of Energy Markets, Working Paper No. 160, 2006), *available at* http://escholarship.org/uc/item/6c79b2b1 ("We find that the threat of action did have a significant effect on emissions . . . .").

[32] HOVENKAMP, *supra* note 29, at 7 ("Those administering the antitrust laws are generally more aware that antitrust is a form of regulation—a type of market intervention in an economy whose nucleus is private markets.").

[33] *See* STEPHEN BREYER, REGULATION AND ITS REFORM 8-9 (1982); MICHAEL C. MUNGER, ANALYZING POLICY: CHOICES, CONFLICTS, AND PRACTICES 6-11 (2000); Oliver E. Williamson, *Public and Private Bureaucracies: A Transaction Cost Economics Perspective*, 15 J.L. ECON. & ORG. 306, 306-08 (1999).

an error/cost framework based on the different types of costs associated with false positives and negatives.[34] Even if one begins with the opposite set of assumptions about which set of errors are more costly, one still needs to determine when formal institutions, with all of their defects, outweigh the market and its defects.

B. *Judiciary*

The judiciary is a key player in the antitrust system via judicial evaluation of antitrust cases. In the U.S. context, generalized courts have evolved over time as a result of shifts in judicial interpretation, economic thinking, and government policies and priorities.[35] As Congress enacted purposely vague antitrust statutes,[36] courts have developed and refined antitrust jurisprudence through the common law rather than through agency rulemaking.[37] This is the case even for the Federal Trade Commission ("FTC"), which, although an independent agency, lacks the rulemaking functions of other independent agencies, such as the Securities Exchange Commission ("SEC").[38]

Since the mid-1970s and the Chicago antitrust revolution (which some argue is better understood as a Chicago/Harvard revolution,[39] or some merely a Harvard revolution[40]), the Supreme Court has shifted to a pro-defendant

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34 Easterbrook, *supra* note 30, at 2-3.

35 HOVENKAMP, *supra* note 29, at 7-9.

36 William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 663 n.8 (1982).

37 *Id.* at 663 ("The antitrust laws were written with awareness of the diversity of business conduct and with the knowledge that the detailed statutes which would prohibit socially undesirable conduct would lack the flexibility needed to encourage (and at times even permit) desirable conduct. To provide this flexibility, Congress adopted what is in essence enabling legislation that has permitted a common-law refinement of antitrust law through an evolution guided by only the most general statutory directions."); *see also* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983) ("The statute books are full of laws, of which the Sherman Act is a good example, that effectively authorize courts to create new lines of common law."); William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 380 (2003) ("[Antitrust] enforcement programs are shaped by the evolution of antitrust 'norms'—consensus views of what public competition authorities ought to do.").

38 Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1199 (2008).

39 HOVENKAMP, *supra* note 29, at 37-38 (referring to this fusion as the "new Harvard" position); William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 13-14 (arguing the complementary nature of contributions of the Chicago and Harvard views); William H. Page, *Areeda, Chicago, and Antitrust Injury: Economic Efficiency and Legal Process*, 41 ANTITRUST BULL. 909, 909-11 (1996) (explaining the Chicago roots of Areeda's antitrust).

40 *See* 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶112d (3d ed. 2006) (offering a summary of the doctrinal differences between and the analytical assumptions of the Chicago and Harvard Schools); Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent*

view. The shift in case law has accelerated since the mid-2000s with an increased Supreme Court antitrust docket.[41] The Chicago/Harvard School has had a substantial impact on both procedural and substantive antitrust decisions.

The impact of the Chicago/Harvard view on the judiciary is illustrated by a lower level of antitrust enforcement measured by cases filed, as compared to the 1960s or 1970s.[42] At its core, the Chicago School is about price theory and advocates legal rules based on an error cost framework.[43] Harvard focuses on administrability concerns for both antitrust agencies and courts and draws its roots from the Harvard legal process tradition.[44] The Chicago/Harvard approach did not go unanswered. A post-Chicago School developed, which questioned some of Chicago's assumptions that certain business practices could not be inefficient or anticompetitive.[45] For the most part, however, courts have not accepted these post-Chicago claims.[46]

Even the debates surrounding which view has the better set of theories and assumptions (Chicago, Harvard, or post-Chicago), though seemingly fundamental, are not actually so important. The idea that big is bad has been superseded by an informed analysis of the latest economic theory, which posits efficiency as the sole goal of antitrust.[47] The debate over which economic theory provides superior explanatory value persists at the margins

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Supreme Court Decisions, 3 COMPETITION POL'Y INT'L 59, 59-60 (2007) (suggesting a Harvard victory in recent Supreme Court decisions); Herbert Hovenkamp, *The Harvard and Chicago Schools and the Dominant Firm*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 109, 109-10 (Robert Pitofsky ed., 2008) [hereinafter HOW THE CHICAGO SCHOOL OVERSHOT THE MARK] (arguing that Harvard won in the courts on unilateral conduct).

41 Elhauge, *supra* note 40, at 59-60; Daniel J. Gifford & E. Thomas Sullivan, *The Roberts Antitrust Court: A Transformative Beginning*, 52 ANTITRUST BULL. 435, 435-36 (2007); Joshua D. Wright, *The Roberts Court and the Chicago School of Antitrust: The 2006 Term and Beyond*, 3 COMPETITION POL'Y INT'L 24, 25-27 (2007).

42 *See* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43, 55-58 (2000); Wright, *supra* note 41, at 25-27.

43 William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221, 1228-43 (1989) (explaining the emergence of the Chicago School); Wright, *supra* note 41, at 33.

44 Page, *supra* note 39, at 911 (providing a treatment of Harvard's roots and its interplay with the Chicago School).

45 Hovenkamp, *supra* note 8, at 258 (providing an overview of the changes in post-Chicago analysis); *see also* Herbert Hovenkamp, *The Reckoning of Post-Chicago Antitrust*, *in* POST-CHICAGO DEVELOPMENTS IN ANTITRUST LAW 1, 7-9, 16-19 (Antonio Cucinotta, Roberto Pardolesi & Roger Van den Bergh eds., 2002); Hovenkamp, *supra* note 40, at 109; Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209, 211-13 (1986); Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837, 837-40 (1990) (discussing the complexities of tying arrangements in modern antitrust law).

46 Hovenkamp, *supra* note 40, at 109-10.

47 Stacey L. Dogan & Mark A. Lemley, *Antitrust Law and Regulatory Gaming*, 87 TEX. L. REV. 685, 696-97 (2009) (explaining the convergence of goals and rules in antitrust).

of antitrust, even though it remains very contentious.[48] At the core of modern antitrust law and policy is an understanding that economics as a discipline has triumphed and shapes antitrust analysis.[49]

The adoption of economic analysis has had a pronounced effect on both the number and type of antitrust cases filed and decided. Decided cases impact future cases. These dispositions matter because potential future plaintiffs are emboldened or chastened depending on the successes or failures of other cases.

Let us examine the standards for summary judgment and for dismissal as examples of changes at the Supreme Court level. Both have had an impact on subsequent cases. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[50] and *Bell Atlantic Corp. v. Twombly*[51] concerned the costs of litigation and the possibility that juries might not understand antitrust's complexity.[52] Hence, the Supreme Court has increased the antitrust threshold for reaching juries to prevent juries from addressing difficult issues.[53]

Matsushita made it more difficult for plaintiffs to survive a summary judgment motion challenge.[54] In *Twombly*, the Court pushed the inquiry to an earlier point in the docket—to the Rule 12(b)(6) motion to dismiss for failure to state a claim.[55] Courts may not have confined Section 2 of the Sherman Act so tightly if the scope for private actions in the United States were not so great. That is, if the combination of treble damages and distortions in the class action system did not exist, courts would have been less

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48 *See* Daniel A. Crane, *Chicago, Post-Chicago, and Neo-Chicago*, 76 U. CHI. L. REV. 1911, 1912-14 (2009).

49 *Id.*

50 475 U.S. 574 (1986).

51 550 U.S. 544 (2007).

52 *See id.* at 559-60, 573; *Matsushita*, 475 U.S. at 594 ("Mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect.").

53 Daniel A. Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1, 33 (2008) ("The civil antitrust jury is a particularly suboptimal manifestation of antitrust antifederalism, first because juries are usually not competent to decide the highly technical issues that modern civil antitrust law involves and secondly because, fearing what will happen if a case reaches the jury, courts contort the rules of civil antitrust procedure to avoid jury trials.").

54 Randal C. Picker, *Twombly, Leegin, and the Reshaping of Antitrust*, 2007 SUP. CT. REV. 161, 174 ("We will not just let juries flip coins: if the plaintiff can't do more than just assert agreement, if the plaintiff can't *with evidence* exclude the possibility that the defendants were acting independently, the plaintiff loses, and indeed, the judge must not let the case go to the jury."); E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571, 1608-10 (2004) (exploring empirically the impact of *Matsushita* on summary judgment motions).

55 William H. Page, Twombly *and Communication: The Emerging Definition of Concerted Action Under the New Pleading Standards*, 5 J. COMPETITION L. & ECON. 439, 468 (2009) ("The Supreme Court's decision in *Twombly* has imposed a new, more challenging standard of plausibility for alleging agreement under Section 1 of the Sherman Act.").

HeinOnline -- 17 Geo. Mason L. Rev. 1065 2009-2010

likely to create procedural hurdles to prevent what courts perceive as sub-optimal outcomes.[56]

Procedural issues account for only one part of the institutional analysis of the judiciary. Agencies might not like the way that generalist judges rule on substantive issues. Therefore, through their administrative adjudication, agencies may try to circumvent judicial review in the first place. The various mechanisms available to agencies include guidelines, agency adjudication, and rulemaking, among other tools.[57] Using such tools requires a tradeoff between their effectiveness (and the agency's cost of using them) on the one hand, and the cost/likelihood of judicial review on the other. Thus, agencies might create burdensome regulatory instruments to reduce judicial reversal.[58]

Another factor that shapes the judiciary is the quality of judges. It is not clear that generalized judges do a good job (or indeed a better job than ten or twenty years ago) distilling the complex economics of antitrust into well-reasoned decisions in substantive antitrust cases. A forthcoming article by Professors Michael Baye and Joshua Wright finds that judges face considerable problems with technically-difficult antitrust issues.[59] Their results suggest that economics training improves outcomes in simple cases (in terms of appeal and reversal rates, which they argue are an acceptable proxy for quality), but not in economically-complex cases.[60] Their evidence supports the claim that generalist federal judges do not perform particularly well in complex antitrust cases. However, neither do "specialists," who in their sample are judges with economics training.[61]

Judicial quality is only a part of the total litigation equation. Statistically, more than 90 percent of antitrust cases involve the potential use of juries for criminal cartel cases or private actions.[62] The institutional dilemmas involving juries differ from those involving judges. Juries, like judges, are randomly selected. However, juries and judges possess different capabilities. Over time, judges may develop expertise in antitrust as they see a significant caseload in the area. Juries have no such realistic possibility.

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56 Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1119-23 (1986).

57 F. Andrew Hanssen, *Independent Courts and Administrative Agencies: An Empirical Analysis of the States*, 16 J.L. ECON. & ORG. 534, 539 (2000).

58 Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J.L. ECON. & ORG. 349, 349-51, 369-70 (1999); *see* Joseph L. Smith & Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J. LEGAL STUD. 61, 61 (2002) (providing evidence of how this works in the environmental regulatory context).

59 *See* Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity & Judicial Training on Appeals*, 54 J.L. & ECON. (forthcoming 2011) (manuscript at 21-23), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1319888.

60 *Id.*

61 *Id.*

62 Crane, *supra* note 38, at 1182 & n.92.

Most antitrust issues that confront juries are highly technical, and expertise is unlikely in areas such as predatory pricing or bundling.[63]

With all of these potential concerns about juries, it may be surprising to learn that juries actually play a very limited role in the antitrust system. Perhaps because of the weaknesses of juries in antitrust cases, only 1 percent of all private federal antitrust cases reach a jury trial.[64] Most criminal cases result in a plea bargain, and most private cases either do not survive motions for summary judgment or dismissal, or settle.[65] Over time, courts have removed as much decision making as possible from juries in antitrust cases in part because of the fear that juries will be overwhelmed by information.[66] What a jury actually decides, such as conflicting opinions by experts on the economic issues, is a function of how much courts are willing to restrict the testimony that parties present to juries.[67]

Because of antitrust's complexity, general courts may be overwhelmed. One possibility is to use clear standards to limit judicial implementation of antitrust doctrine.[68] Alternatively, antitrust could become more like other areas of complex regulation in the United States. Antitrust could entrust its adjudication to specialized courts in an administrative law setting.[69] In a number of ways, such specialization would solve the problem of general courts and their limited ability to properly integrate antitrust thinking into careful and accurate decision making.

The solution of specialized antitrust adjudication through administrative law has its own problems. Specialized adjudication thus far has not been effective in the U.S. antitrust context. The record of the Administrative Law Judges ("ALJs") at the FTC has been mixed. The ALJs did not come to their positions with an antitrust background. Though they may have gained knowledge over time with repeat exposure to antitrust,[70] there are reasons to believe that the antitrust capabilities of FTC ALJs are not

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63 *Id.* at 1184 ("[I]n modern antitrust there are few, if any, nontechnical questions to cabin. Juries, to the extent that they are performing any function in antitrust cases, are usually performing a highly technical one.").

64 *Id.* at 1184.

65 *Id.*; Crane, *supra* note 53, at 37.

66 Crane, *supra* note 53, at 37.

67 John E. Lopatka & William H. Page, *Economic Authority and the Limits of Expertise in Antitrust Cases*, 90 CORNELL L. REV. 617, 618-21 (2005) (calling courts "gatekeepers" of economic information for juries).

68 Thomas C. Arthur, *Workable Antitrust Law: The Statutory Approach to Antitrust*, 62 TUL. L. REV. 1163, 1235-36 (1988) ("Nearly one thousand federal judges cannot be expected to produce predictable and consistent policy, let alone results, in concrete cases without statutory guidance.").

69 Arthur, *supra* note 4, at 388-89 (advocating for use of the FTC to adjudicate antitrust disputes outside of mergers and cartels because of better relative institutional capabilities to generalized courts).

70 J. Robert Robertson, *FTC Part III Litigation: Lessons from* Chicago Bridge *and* Evanston Northwestern Healthcare, ANTITRUST, Spring 2006, at 12, 15; Mark Whitener, *Assessing Part III Administrative Litigation: Interview with Timothy J. Muris*, ANTITRUST, Spring 2006, at 6, 7.

HeinOnline -- 17 Geo. Mason L. Rev. 1067 2009-2010

particularly high.[71] Indeed, one problem ALJ litigation may present is that some of the issues argued before the ALJs may overwhelm their limited resources.[72]

What might the alternative be? Oftentimes, when faced with generalized courts of highly-variable abilities, commentators suggest the creation of a specialized court. In many ways Chile is the best example of the limitations of an antitrust specialist court. Since 2003, Chile has had a competition tribunal, the Tribunal de Defensa de la Libre Competencia ("TDLC"), which has direct appeal to the Chilean Supreme Court. The TDLC has five judges.[73] According to the law, two of the five judges must have an economics background.[74] The two current economists who serve as Judges have PhDs in economics.[75] The three lawyer-members of the Tribunal have advanced law degrees, and two had antitrust backgrounds prior to their appointment.[76] The pay for this part-time position is approximately $120,000.[77] While not as high as a private-sector job, the salary is sufficient to attract high-quality judges. TDLC members are permitted to have additional income from other sources, including law practice. This salary compares favorably to the United States where the top Department of Justice ("DOJ") antitrust enforcer makes $153,200 for a full-time job[78] and where the cost of living in Washington, DC is much higher than Santiago, Chile.

The TDLC integrates recent economic thinking into its decisions. It has addressed a number of complex issues. Three cases stand out for being particularly interesting on the facts and analysis. In merger analysis, the TDLC judgment in *Falabella/D&S*[79] rejected a merger using the concept of "integrated retail" to determine that the merger would reduce competition.[80] *Chiletabacos/Phillip Morris*[81] involved an abuse of dominance through discounting, exclusivity, and other practices.[82] A third case, *Guerra del Plas-*

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71 Whitener, *supra* note 70, at 7.

72 *Id.*

73 Law No. 20361, Julio 13, 2009 (Chile), *available at* http://www.leychile.cl/Navegar?idLey=20361.

74 *Id.*

75 Telephone Interview with Radoslav Depolo, Minister (Judge) of the TDLC (Feb. 20, 2010).

76 *Id.*

77 Law. No. 20361, *supra* note 73.

78 Salary data was provided by the Executive Office of the Department of Justice Antitrust Division. Telephone Interview with Executive Office, Antitrust Div., Dep't of Justice (Jan. 2010); *see also Salaries, Promotions, and Benefits*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/oarm/arm/hp/hpsalary.htm (last visited July 25, 2010).

79 Tribunal de Defensa de la Libre Competencia [T.D.L.C.] [Defense of Free Competition Tribunal], 31 enero 2008, "Falabella/D&S," Rol de la causa: 199-07, Resolución No. 24-2008 (Chile).

80 *Id.*

81 Tribunal de Defensa de la Libre Competencia [T.D.L.C.] [Defense of Free Competition Tribunal], 5 agosto 2005, "Chiletabacos/Phillip Morris," Sentencia No. 26-2005 (Chile).

82 *Id.*

HeinOnline -- 17 Geo. Mason L. Rev. 1068 2009-2010

ma,[83] was a joint abuse of dominance/collusion case involving retail stores.[84]

The problem with the Chilean system is that the issue of a generalized judiciary lacking antitrust expertise has not disappeared. Rather, the malfunction has only moved from a lower judicial level to the Chilean Supreme Court. In two cases involving tacit collusion, the Chilean Supreme Court overturned the TDLC, despite the validity of the TDLC's economic analysis.[85] That the generalist Chilean Supreme Court has overruled the TDLC on highly procedural grounds has chilled the TDLC in its own decision making. The TDLC has changed the way it decides cases when the possibility exists for the Chilean Supreme Court to overrule its decision, even when the application of economics to the law suggests an alternative outcome.[86]

In the United States, the best analogy to a specialized antitrust court is the Federal Circuit. Congress established the Federal Circuit in 1982 in an attempt to bring uniformity, predictability, expertise, and better decision making to patent law.[87] Some academics suggest that the Federal Circuit succeeded in these regards.[88] However, another strand of writing suggests that the institutional design of the Federal Circuit is fundamentally flawed because of the lack of judicial diversity, which creates an absence of jurisprudential diversity.[89] Whether judicial diversity is important seems to be in part a function of whether a scholar believes the court reaches the "right" result in its decisions.[90]

In the United States, the judiciary as an antitrust institution has a number of different components. Perhaps the greatest challenge facing the judiciary involves generalist judges deciding complex antitrust cases. One poss-

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83 Tribunal de Defensa de la Libre Competencia [T.D.L.C.] [Defense of Free Competition Tribunal], 10 abril 2008, "Guerra del Plasma," Sentencia No. 63-2008 (Chile).

84 *Id.*

85 *E.g.*, Cruz & Zarate, *supra* note 5, at 171; González, *supra* note 5, at 199-201.

86 Cruz & Zarate, *supra* note 5, at 187.

87 S. REP. NO. 97-275, at 5-6 (1981).

88 *E.g.*, Rochelle Cooper Dreyfuss, *In Search of Institutional Identity: The Federal Circuit Comes of Age*, 23 BERKELEY TECH. L.J. 787, 788-89 (2008); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Continuing Experiment in Specialization*, 54 CASE W. RES. L. REV. 769, 800 (2004); Lee Petherbridge & R. Polk Wagner, *The Federal Circuit and Patentability: An Empirical Assessment of the Law of Obviousness*, 85 TEX. L. REV. 2051, 2084 (2007); R. Polk Wagner & Lee Petherbridge, *Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance*, 152 U. PA. L. REV. 1105, 1156 (2004).

89 Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 NW. U. L. REV. 1619, 1627 (2007) ("[S]upporters of the creation of the Federal Circuit made a key mistake in too easily concluding that if having thirteen appellate courts with jurisdiction over patent appeals created too much inconsistency and diversity, then the correct solution was to centralize all authority into one court.").

90 *See* Lee Petherbridge, *Patent Law Uniformity?*, 22 HARV. J.L. & TECH. 421, 464 (2009) (finding that the Federal Circuit has a diversity of jurisprudence).

HeinOnline -- 17 Geo. Mason L. Rev. 1069 2009-2010

ible solution to this problem is to implement specialized antitrust courts, but these courts in turn have their own strengths and weaknesses.

C. *Antitrust Agencies*

1. Agency Capacity

A well-functioning antitrust agency can effectively combat anticompetitive conduct. However, such an outcome assumes that an antitrust agency has the ability to identify anticompetitive conduct and to bring both enforcement and non-enforcement (such as competition advocacy) actions. A number of factors affect the ability of an agency to do so. These include the legal structure of antitrust, human resources within the agency, and an agency's capacities within the larger, country-wide regulatory system.[91]

It is important to measure the impact of an antitrust agency.[92] Ultimately, the institution must have a coherent system for setting priorities. One way to set priorities is to perform a self-diagnostic or self-study to review past successes and failures.[93] In a sports context, this would be akin to reviewing a video of how a hitter approaches each at-bat to analyze any flaws in mechanics of the swing or strategy against each pitcher. Without these self-studies, an agency will not understand its own strengths and weaknesses or its ability to successfully undertake certain types of work.[94] Yet self-studies are costly. They require significant time and resources, which would be diverted away from enforcement and advocacy. In the short term, such self-study does not result in quick "wins" for the agency. In the short term, self-studies are politically and financially costly, even if the long-term benefits prove substantial.

While there has been an increased push towards performance benchmarks in antitrust,[95] such benchmarks are more difficult to quantify in antitrust than in other regulatory fields. This difficulty stems from endogeneity concerns. Those issues in which antitrust enforcement or advocacy may

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[91] William Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 77 CHI.-KENT L. REV. 265, 301-02 (2001); D. Daniel Sokol, *Order Without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements*, 83 CHI.-KENT L. REV. 231, 242 (2008).

[92] Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165, 165-66 (2005).

[93] Kovacic, *supra* note 25, at 923-24.

[94] *Id.* at 905-06.

[95] THE COMPETITION POL'Y IMPLEMENTATION WORKING GROUP, INT'L COMPETITION NETWORK, REPORT ON THE AGENCY EFFECTIVENESS PROJECT SECOND PHASE—EFFECTIVENESS OF DECISIONS 7 (2009).

HeinOnline -- 17 Geo. Mason L. Rev. 1070 2009-2010

play a role also may be affected by sector regulation, trade agreements, or new legislation.[96] Determining causality is very difficult.[97]

One way to measure the success of a country's antitrust system might be to benchmark the system globally against peers. In college football, there are polls to determine which teams are better. Does such indexing make sense in the global antitrust context? Creating an effective rating is difficult.[98] One reason that indexing effectiveness presents challenges is that such a measurement portends a single "right" way in which to prioritize and enforce antitrust law. Competition enforcement simply does not fit easily into this framework.

Antitrust enforcement contains nothing akin to the win-loss record, strength of conference opponents, and the margin of victory methods of comparison found in games. One recent DOJ official stated, "[a]nti-cartel enforcement is our top priority at the Department of Justice, and we believe it should be a top priority for every antitrust agency."[99] Despite the allure of such a strong and clear position, it is not obvious that cartel enforcement should be the priority for every antitrust agency.[100] That is, the allocation of scarce resources towards enforcement vis-à-vis the payoff is likely to differ across nations and regions. Detection and litigation costs are not the same in every jurisdiction.[101] Merger control is almost always situation-specific, and it changes in response to technical advances, political shifts, and economic growth. Agency priorities are also a function of the local conditions in a particular country.

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96 Omar Licandro & Antonio Navas-Ruiz, *Trade Liberalization, Competition and Growth* 2-3 (Groupement de Recherche en Economie Quantitative d'Aix-Marseille, Working Paper No. 2007-18, 2007), *available at* http://www.eui.eu/Personal/Licandro/navas110907.pdf.

97 *See* D. Daniel Sokol, *Law and Development—The Way Forward or Just Stuck in the Same Place?*, 104 NW. U. L. REV. 238, 240 (2010).

98 D. Daniel Sokol, *Designing Antitrust Agencies for More Effective Outcomes: What Antitrust Can Learn from Restaurant Guides*, 41 LOY. U. CHI. L.J. 577, 578 (2010).

99 Makan Delrahim, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks on Antitrust Enforcement Priorities and Efforts Towards International Cooperation at the U.S. Department of Justice 2 (Nov. 15, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/208479.pdf; *see also* Gerald F. Masoudi, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Address on Cartel Enforcement in the United States (and Beyond) 9-10 (Feb. 16, 2007), *available at* http://www.justice.gov/atr/public/speeches/221868.pdf. There is an institutional element to such claims. The DOJ pushes cartel enforcement because it undertakes such enforcement, whereas the FTC does not undertake criminal cartel enforcement. Similarly, FTC officials tend to focus on the strength of competition advocacy, which they undertake, but DOJ does not. *See* James C. Cooper, Paul A. Pautler & Todd J. Zywicki, *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091, 1091-92 (2005); Kovacic, *supra* note 25, at 920-21.

100 Frédéric Jenny, *Cartels and Collusion in Developing Countries: Lessons from Empirical Evidence*, 29 WORLD COMPETITION L. & ECON. REV. 109, 109 (2006).

101 *See* Michal S. Gal, *Free Movement of Judgments: Increasing Deterrence of International Cartels Though Jurisdictional Reliance*, 51 VA. J. INT'L L. (forthcoming 2010) (manuscript at 7), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1291844.

For the most part, changes in antitrust enforcement are incremental.[102] There is also an element of path dependence to agencies.[103] However, as an agency's needs shift, the changes the agency must make to achieve its goals increase significantly.[104] In times of crisis, larger-scale change is possible. Yet agencies still require constant tinkering, even after significant change in institutional design, because outside events cause institutions to evolve. In a business context, firms innovate or they fail. They fail either through takeover or through bankruptcy. Institutional design within the firm will change based on the organization's internal and external needs.[105] Government is different. Agencies, for the most part, tend to grow in scope and size.[106] Rather than reduce the number of agencies, bureaucracy often creates new layers to existing agencies or creates new agencies altogether to move beyond the current limitations and malfunctions in the existing institutional design and practice.[107] This, however, does not solve the problem in the long term. It merely adds to the patchwork of overlapping authority and creates the potential for problems to reemerge in the future.

2. Antitrust Agency Public Choice Concerns

Public choice affects antitrust agencies as it does other facets of government. That is, antitrust is not immune from political concerns.[108] Public choice considerations limit the role that agencies can play to reduce or eliminate government-created and facilitated anticompetitive restraints.[109] These limits are based on the capacity of an antitrust agency and the agency's ability to use its political capital. For example, there is a flip side to competition advocacy. Competition advocacy can be used to limit government-created anticompetitive distortions. In this sense, competition advocacy may be politically controversial and risky. Competition advocacy exposes

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102 Kovacic, *supra* note 25, at 925.

103 Fabrizio Gilardi, *The Formal Independence of Regulators: A Comparison of 17 Countries and 7 Sectors*, 11 SWISS POL. SCI. REV. 139, 143 (2005).

104 Michael Krakowski, *Competition Policy Works: The Effect of Competition Policy on the Intensity of Competition—An International Cross-Country Comparison* 13-14 (Hamburg Inst. of Int'l Econ., HWWA Discussion Paper No. 332, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=854908.

105 *See* MICHAEL L. TUSHMAN & CHARLES A. O'REILLY III, WINNING THROUGH INNOVATION: A PRACTICAL GUIDE TO LEADING ORGANIZATIONAL CHANGE AND RENEWAL 46-47 (1997).

106 WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 41 (1971).

107 MUELLER, *supra* note 13, at 359-85.

108 *See, e.g.*, David J. Gerber, *Transatlantic Economic Governance: The Domains and Dimensions of Competition Law, in* THE FUTURE OF TRANSATLANTIC ECONOMIC RELATIONS: CONTINUITY AMID DISCORD, 81, 93 (Mark A. Pollack & Gregory C. Shaffer eds., 2005) ("The assumption that antitrust officials are strongly influenced by political considerations is encouraged by US antitrust history.").

109 D. Daniel Sokol, *Limiting Anticompetitive Government Interventions That Benefit Special Interests*, 17 GEO. MASON L. REV. 119, 127 (2009).

antitrust agencies to criticism and potential retribution from interest groups, captured legislators, and other governmental actors.[110]

Both antitrust's statutory authority and each country's current policy outlook are functions of policy choice discretion. Antitrust agencies must take into account their political capital and how to expend it vis-à-vis other government actors, states, and privately-owned enterprises that wield significant political power.[111] These public choice calculations color how agencies order their enforcement priorities. Agency discretion through agency inaction illustrates the limits of competition advocacy and other forms of antitrust enforcement against public restraints.

The history of U.S. antitrust enforcement illustrates public choice concerns. In 1890, Congress enacted antitrust legislation at the federal level.[112] At its very roots, antitrust emerged in part as a result of political bargaining. Some of the rationale behind the Sherman Act was to protect producer interests against more efficient large-scale operations.[113] To think that antitrust is not influenced by political interests naively suggests that public choice theory applies in other regulatory settings but not antitrust.

In some instances, antitrust enforcers may be subject to capture.[114] Antitrust agencies may act politically in a number of ways. Agencies are political players that attempt to increase their size and power.[115] Agencies may

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110 *See* Cooper, Pautler & Zywicki, *supra* note 99, at 1103.

111 Donald I. Baker, *Antitrust and Politics at the Justice Department*, 9 J.L. & POL. 291, 291 (1993) ("Antitrust and politics are inevitably intertwined, not only in the United States but in any country having an effective antitrust program.").

112 Sherman Act § 1, 15 U.S.C. § 1 (1890). Though Canada enacted its national competition law one year prior to the enactment of the Sherman Act, there was no corresponding subfederal Canadian legislation analogous to state antitrust laws in the United States that preceded the national law.

113 RUDOLPH J. R. PERITZ, COMPETITION POLICY IN AMERICA, 1888-1992 15 (1996) (Sherman's faction had greater concern with "industrial liberty" than consumer welfare); Thomas J. DiLorenzo, *The Origins of Antitrust: An Interest-Group Perspective*, 5 INT'L REV. L. & ECON. 73, 75 (1985); Thomas W. Hazlett, *The Legislative History of the Sherman Act Re-Examined*, 30 ECON. INQUIRY 263, 273-74 (1992); Fred S. McChesney, *Economics* Versus *Politics in Antitrust*, 23 HARV. J.L. & PUB. POL'Y 133, 136 (1999); George J. Stigler, *The Origin of the Sherman Act*, 14 J. LEGAL STUD. 1, 4-5 (1985). Richard Hofstadter suggests that the enactment of the Sherman Act was based on some political economy concerns but that some of the goals of the drafters of the Sherman Act were political, moral, social, and based on notions of "competition" and populism. Richard Hofstadter, *What Happened to the Antitrust Movement*, *in* THE PARANOID STYLE IN AMERICAN POLITICS (1965), *reprinted in* THE POLITICAL ECONOMY OF THE SHERMAN ACT: THE FIRST ONE HUNDRED YEARS 23-24 (E. Thomas Sullivan ed., 1991). Other scholars who have extensively studied the early period of U.S. antitrust also suggest that public choice is not a complete explanation for the motivations of the Sherman Act. *See, e.g.*, WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 53-100 (1981); HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 227 (1955).

114 Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1, 18 & n.90 (1997) (recounting that Reagan asked the DOJ to drop an investigation of British Airways as a favor to Prime Minister Thatcher).

115 MUELLER, *supra* note 13, at 523.

act politically in case selection. The more high profile the case successfully brought, the greater the potential rewards are for antitrust lawyers going forward as they advance within government or exit government for private practice.[116] Cases not brought are equally important. Agencies may choose not to bring difficult cases because they could result in a defeat. A decision against the agency may affect the future budget of the agency and the quality of its staff.[117] Antitrust agencies also may be chilled from bringing a case, if in doing so they threaten the interests of government officials that have budgetary or oversight authority over the agency.[118] For example, when an enforcer rules the "wrong" way because she looks to efficiency rather than industrial policy concerns, political repercussions may ensue.[119]

Both the executive and the legislative branches may push the antitrust agencies toward certain goals. Antitrust agencies face potential cuts in funding if their enforcement and non-enforcement priorities are inconsistent with Congressional wishes. Such threats limit the potential scope of agency decision making.[120] Similarly, the executive branch may try to influence the DOJ Antitrust Division to push an enforcement agenda based on its own policy agenda.[121] The antitrust bar may also influence the antitrust agencies.[122] Prestige in the eyes of the practitioner community and potential private firm opportunities after government service may shape some agency decision making at both staff and leadership levels of the antitrust agencies.[123]

3. How Many Antitrust Agencies Are Optimal?

Most antitrust systems around the world have one agency, and in many countries that agency is independent. Overall, the literature on agencies suggests that independent agencies are better suited to dealing with both

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116 McChesney, *supra* note 113, at 140-41.

117 Sokol, *supra* note 109, at 146.

118 *See* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 181-85 (1989) (discussing how government executives protect their "turf"). The DOJ/FTC had to drop a proposed Memorandum of Agreement on merger enforcement when Senator Ernest Hollings, because of interest group pressure, threatened budget cuts to DOJ/FTC if the two did not drop the agreement.

119 William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 623-25 (1982).

120 Baker, *supra* note 111, at 291.

121 Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1448-50 (2009) (providing details of Nixon's political use of the Antitrust Division).

122 D. Daniel Sokol, *Explaining the Importance of Public Choice for Law*, 109 MICH. L. REV. (forthcoming 2011) (manuscript at 12-18), *available at* http://ssrn.com/abstract=1624956.

123 Cynthia R. Farina, *Faith, Hope, and Rationality or Public Choice and the Perils of Occam's Razor*, 28 FLA. ST. U. L. REV. 109, 110 (2000) (explaining the "revolving door" between public administration and private industry more broadly).

HeinOnline -- 17 Geo. Mason L. Rev. 1074 2009-2010

time consistency and credible commitment problems.[124] Such advantages exist because independent agencies are more insulated from political pressures and less likely to succumb to the majoritarian impulse of unpopular decisions.[125] Legislatures reduce decision-making costs by creating an expert agency that has specific knowledge of regulation. Independent agencies also enhance the credibility of policy commitments because they are better shielded from political influence than executive agencies.[126] The political pressures from which independence shields an agency are both majoritarian pressure (i.e., populist pressure)[127] and public choice/capture pressure from interest groups regulated by the agency.[128]

Majoritarianism arises when majority parties cannot precommit to policies post-election.[129] Moreover, it occurs when the majority party fails to include the preferences of the minority party in policymaking.[130] In an antitrust context, majoritarian anticompetitive restraints may result in legislation that creates price controls.[131] It also may push executive agencies to respond to predatory pricing allegations suboptimally by punishing firms

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124 *See* Brian Levy & Pablo T. Spiller, *The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation*, 10 J.L. ECON. & ORG. 201, 231-32 (1994) (discussing the success of independent regulators in the U.K. versus other countries).

125 Mark Thatcher & Alec Stone Sweet, *Theory and Practice of Delegation to Non-Majoritarian Institutions*, 25 W. EUR. POL. 1, 4 (2002). *But see* Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 55 (2008) ("[A] moderate degree of bureaucratic insulation alleviates rather than exacerbates the countermajoritarian problems inherent in bureaucratic policymaking.").

126 *E.g.*, Stéphane Jacobzone, Org. for Econ. Co-Operation & Dev., *Designing Independent and Accountable Regulatory Authorities: A Comparative Overview Across OECD Countries*, *in* DESIGNING INDEPENDENT AND ACCOUNTABLE REGULATORY AUTHORITIES FOR HIGH QUALITY REGULATION 33, 33 (2005), *available at* http://www.oecd.org/dataoecd/15/28/35028836.pdf; Giandomenico Majone, *The Rise of the Regulatory State in Europe*, 17 W. EUR. POL. 77, 84 (1994); Antonio Estache & David Martimort, *Politics, Transaction Costs, and the Design of Regulatory Institutions* 2 (World Bank Econ. Dev. Inst., Pol'y Research Working Paper No. 2073, 1999), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=620512.

127 For this reason, the Supreme Court has shown concern about the excesses of majoritarianism. William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 399 (1988) ("The Court is correct in its concern to police legislative infringements of the political rights of minorities, because there is nothing inherent in the legislative or representative process that prevents such infringement.").

128 Jon Stern & Stuart Holder, *Regulatory Governance: Criteria for Assessing the Performance of Regulatory Systems* 8 (London Bus. Sch. Reg. Initiative, Regulation Initiative Discussion Paper No. 20, 1999), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=321421.

129 Gene M. Grossman & Elhanan Helpman, *A Protectionist Bias in Majoritarian Politics*, 120 Q. J. ECON. 1239, 1265 (2005) (discussing the majoritarian bias that results when national parties cannot precommit to a policy).

130 *Id.* at 1265-66.

131 *See, e.g.*, Claudio Monteiro Considera & Paulo Corrêa, *The Political Economy of Antitrust in Brazil: From Price Control to Competition Policy*, *in* INTERNATIONAL ANTITRUST LAW & POLICY: FORDHAM CORPORATE LAW 2001 (Barry Hawk ed., 2001).

that charge low prices.[132] Yet low prices are exactly what one wants in the market because they likely result from fierce competition.

The United States operates differently in terms of agency structure than most antitrust systems. There are two federal agencies: the DOJ and the FTC. The former is an executive agency, and the latter is an independent agency with both competition and consumer protection missions. There is much overlap and some differences between the two agencies. The FTC undertakes competition advocacy.[133] It also focuses enforcement on certain industries (e.g., supermarkets, oil and gas), whereas the DOJ has an antitrust cartel unit and focuses enforcement on other industries (e.g., airlines, banking).[134] Agency overlap has always been an issue in the United States. However, two recent developments have exacerbated tensions between the two agencies. These developments support a need for a comparative institutional analysis. The first issue relates to a divergence in practice for merger standards between Section 13(b) of the FTC Act and Section 7 of the Clayton Act. The second development is in the area of single-firm conduct and the differences between Section 2 of the Sherman Act and Section 5 of the FTC Act.

The potential for divergence between the FTC and the DOJ on mergers has always existed.[135] Under Section 7 of the Clayton Act, to meet the burden for a preliminary injunction, the enforcers must show that the merger "may be substantially to lessen competition, or to tend to create a monopoly."[136] Under Section 13(b) of the FTC Act, the FTC has a lower burden of proof.[137] This is the "serious and substantial" standard.[138] The recent *Federal Trade Commission v. Whole Foods Market, Inc.*[139] decision changed the standard for granting a preliminary injunction in noting that the FTC should be able to get injunctive relief more easily under 13(b).[140] As explained by the D.C. Circuit, the FTC can readily meet this lower standard and likely

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132 William J. Baumol, *Principles Relevant to Predatory Pricing*, *in* THE PROS AND CONS OF LOW PRICES 15, 15 (2003).

133 Cooper, Pautler & Zywicki, *supra* note 99, at 1091.

134 *See* ABA SECTION OF ANTITRUST LAW, THE MERGER REVIEW PROCESS: A STEP-BY-STEP GUIDE TO U.S. AND FOREIGN MERGER REVIEW apps. 9-1 to -13 (3d ed. 2006) (providing a list of sectors of agency expertise).

135 *See generally* FTC v. H.J. Heinz Co., 246 F.3d 708, 714-15 (D.C. Cir. 2001) ("This court and others have suggested that the standard for likelihood of success on the merits is met if the FTC 'has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation . . . .'" (quoting FTC v. Beatrice Foods Co., 587 F.2d 1225, 1229 (D.C. Cir. 1978))); D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 ANTITRUST L.J. 319, 320-25 (2003) (providing a historical analysis of the development of administrative litigation at the FTC).

136 15 U.S.C. § 18 (2006).

137 FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1034-35 (D.C. Cir. 2008).

138 *Id.* at 1049.

139 548 F.3d 1028 (D.C. Cir. 2008).

140 *Id.* at 1034-35.

HeinOnline -- 17 Geo. Mason L. Rev. 1076 2009-2010

block most deals with a preliminary injunction, or even the threat of preliminary injunction.[141]

Courts apply a four-part preliminary injunction test under Section 15 of the Clayton Act, the most important of which is the likelihood of success on the merits.[142] *Whole Foods* signaled a change from this approach for the FTC. Under the D.C. Circuit's analysis from *Whole Foods*, the FTC must demonstrate that a merger presents "questions going to the merits so serious, substantial, difficult[,] and doubtful as to make them fair grounds for thorough investigation [by the FTC]" to reach the preliminary injunction threshold.[143] *FTC v. CCC Holdings Inc.*[144] reaffirmed this lower threshold for the FTC.[145] It stated the "precedents irrefutably teach that [for the FTC] 'likelihood of success on the merits' has a less substantial meaning than in other preliminary injunction cases."[146]

The preliminary injunction decisions must be read in conjunction with *FTC v. Inova Health System Foundation*,[147] a case that demonstrates the agency's institutional move of pushing merger challenges out of the court system and into FTC adjudication.[148] The switch to increased use of Part 3 adjudication,[149] considering the time involved from the ALJ to the Commission and then to the Court of Appeals, reduces the appetite of firms to litigate merger challenges.[150] These recent decisions have given the FTC significant leverage to dictate their merger terms to potentially merging firms. These divergent outcomes across agencies affect the business planning and the merging parties' bargaining positions with the agencies in terms of possible divestitures or other concessions that parties might offer in exchange for merger approval.[151]

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141 Transcript of Responses to Qualitative Survey (on file with author).

142 United States v. Gillette Co., 828 F. Supp. 78, 80 (D.D.C. 1993).

143 *Whole Foods*, 548 F.3d at 1035 (quoting FTC v. H.J. Heinz Co., 246 F.3d 708, 714-15 (D.C. Cir. 2001)) (internal quotation marks omitted).

144 605 F. Supp. 2d 26 (D.D.C. 2009).

145 *Id.* at 35.

146 *Id.* at 36 n.11.

147 No. 1:08CV460-CMH/JFA (E.D. Va. May 12, 2008), *available at* http://www.ftc.gov/os/caselist/0610166/080513complaint.pdf.

148 *See* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Reflections on Procedure at the Federal Trade Commission (Sept. 25, 2008), *available at* http://www.ftc.gov/speeches/rosch/080925rosch reflections.pdf (discussing developments at the FTC to litigate cases in administrative courts and not federal courts).

149 Part 3 adjudication allows the FTC to pursue an enforcement action within the FTC's own adjudicatory structure, which involves an ALJ issuing an initial decision and then an appeal to the Commission for de novo review. *See* Hoffman & Royall, *supra* note 135, at 322-25.

150 Transcript of Responses to Qualitative Survey (on file with author).

151 Transactions abandoned by the parties, in the past year, in the face of FTC opposition or merely full-investigation include: (1) Newpark and CCS (oil-drilling waste disposal services; abandoned after lawsuit filed by FTC); Herff Jones/AAC (class rings; abandoned in the face of challenge); CRH/Pavestone (concrete hardscape products; abandoned in the face of challenge); CCC/Mitchell (auto-

Timing is an important factor in whether or not a deal will be consummated from a business perspective. Delay can be fatal to a deal because it creates uncertainty.[152] This distracts the merging parties' managers from their day-to-day operations. Delay also presents problems for customers, as they are less willing to sign additional contracts without knowledge of a potentially significant change for a company in the long term.[153] Competitors may try to poach customers or managers because of the uncertainty.[154] By undermining business planning, different substantive standards pose a threat to the antitrust system. Timing also plays into clearance battles between the agencies. For example, the DOJ may ask for a secondary request, when it might not have otherwise done so if it had not fought with the FTC over which agency should get clearance for most of the Hart-Scott-Rodino ("HSR") review's thirty-day window. As the Antitrust Modernization Commission observed, divergent standards also decrease public confidence in the U.S. antitrust system.[155] This Article does not address what the ap-

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repair databases and software; abandoned after FTC wins in court); CSL/Talecris (blood plasma; abandoned in the face of challenge); Thoratec/HeartWare (ventricular assist devices; abandoned in face of challenge); Utz/Snyder (salty snacks; abandoned during investigation); Endocare/Galil (prostate and renal cancer treatment; abandoned during investigation); and Carilion Clinic (medical clinics; agreement to divest already-acquired outpatient center). *See* Press Release, Newpark Res., Inc., Newpark Resources and CCS, Inc. Mutually Agree to Terminate the Sale of Newpark's U.S. Environmental Services Business (Nov. 24, 2008) (on file with the George Mason Law Review) (Newpark and CCS); Press Release, Fed. Trade Comm'n, Statement of FTC's Bureau of Competition Regarding Announcement that Herff Jones and American Achievement Group Have Terminated Their Acquisition Agreement (Dec. 8, 2008) (on file with the George Mason Law Review) (Herff Jones/AAC); Press Release, Fed. Trade Comm'n, Statement of the FTC's Bureau of Competition Regarding the Announcement that Oldcastle Architectural, Inc. Will Not Proceed with its Proposed Acquisition of the Pavestone Companies (Jan. 15, 2009) (on file with the George Mason Law Review) (CRH/Pavestone); Press Release, Mitchell Int'l, Inc., CCC-Mitchell Mutually Agree to Terminate Merger (Mar. 11, 2008) (on file with the George Mason Law Review) (CCC-Mitchell); Press Release, CSL Ltd., CSL and Talecris Biotherapeutics Agree to Terminate Merger Agreement (Sept. 6, 2009) (on file with the George Mason Law Review) (CSL/Talecris); Press Release, Thoratec Corp., Thoratec Corporation and HeartWare International, Inc. Announce Termination of Proposed Transaction (July 31, 2009) (on file with the George Mason Law Review) (Thoratec/HeartWare); *Snyder's and Utz Throw in the Chips: Pa. Companies Point to FTC Review as Merger Talks End*, BALTIMORE SUN, Nov. 6, 2009, at 14A (Utz/Snyder); Press Release, Galil Med. Ltd., Endocare and Galil Medical Announce Settlement of Litigation (July 7, 2009) (on file with the George Mason Law Review) (Endocare/Galil); Press Release, Fed. Trade Comm'n, Commission Order Restores Competition Eliminated by Carilion Clinic's Acquisition of Two Outpatient Clinics (Oct. 7, 2009) (on file with the George Mason Law Review) (Carilion Clinic). Thanks to Ken Glazer for pointing me to these transactions.

152 *See* ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 139 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf [hereinafter AMC REPORT].

153 *See* William J. Kolasky, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, The International Competition Network Guiding Principles for Merger Review 3 (Sept. 20, 2002), *available at* http://www.justice.gov/atr/public/speeches/200234.pdf.

154 *See id.*

155 AMC REPORT, *supra* note 152, at 131.

propriate standard should be as a normative question. It merely notes that there is room to debate what the appropriate unified preliminary injunction standard for merger review ought to be. This Article, however, does make the normative claim that a split-level system of standards creates an unsustainable institutional framework in the long term.[156]

A similar unsustainable institutional issue exists with regard to single-firm conduct. The standards under Section 5 of the FTC Act and Section 2 of the Sherman Act are distinct.[157] This Article does not suggest that Section 5 cannot be construed to cover conduct that is not covered under Section 2. Case law and legislative history suggest that such an interpretation is possible.[158] This Article merely points to the fact that—just as with merger conduct—having two agencies with two separate standards for firm conduct is not a long-term, sustainable equilibrium.

An expansive reading of Section 5 allows the FTC to prohibit conduct that the DOJ cannot. It does so with language that might take on non-economic justifications, as in prohibiting conduct that is "unjust," "oppressive," or "immoral."[159] Under Section 5, there is the institutional bias that favors the Commission's position in administrative litigation.[160] For instance, in cases with disputed facts, the FTC won all Sherman Act cases in administrative adjudication.[161] Moreover, when taken in its totality, the Commission has a winning record of 95 percent.[162] The dynamics of FTC administrative litigation and the potential pressure on parties to settle are functions of the Commission's success rate.

The divergence between the DOJ and the FTC leads to a basic question. Why should the United States have two agencies? The current agency structure is a function of historical accident and path dependency. The two agencies have certain redundancies.[163] If one were to design U.S. antitrust

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156 Additional developments have changed the nature of merger review between the two agencies. The FTC made revisions to its Part 3 rules that changed the playing field regarding preliminary injunctions. Now the Commission will be more aggressive, even as the *Inova* case suggests, because of the procedural changes that increase its power in its adjudicatory role. *See* Jeffrey W. Brennan & Sean P. Pugh, Inova *and the FTC's Revamped Merger Litigation Model*, ANTITRUST, Fall 2008, at 28, 28.

157 *See* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Wading Into Pandora's Box: Thoughts On Unanswered Questions Concerning the Scope and Application of Section 2 & Some Further Observations on Section 5 19 (Oct. 3, 2009), *available at* http://www.ftc.gov/speeches/rosch/091003roschlecg speech.pdf.

158 Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 244-47 (1979).

159 Robert H. Lande, *Revitalizing Section 5 of the FTC Using 'Consumer Choice' Analysis*, ANTITRUST SOURCE, February 2009, at 1, 2.

160 Philip J. Weiser, *Institutional Design, FCC Reform, and the Hidden Side of the Administrative State*, 61 ADMIN. L. REV. 675, 707 (2009).

161 A. DOUGLAS MELAMUD, COMMENTS SUBMITTED TO THE FEDERAL TRADE COMMISSION, WORKSHOP CONCERNING SECTION 5 OF THE FTC ACT 19 (2008).

162 *Id.*

163 AMC REPORT, *supra* note 152, at 132.

from scratch, very few would suggest replicating the current structure. Generally, such a reevaluation is very difficult politically. For example, the Antitrust Modernization Commission stated, "[t]he Commission recommends no comprehensive change to the existing system in which both the FTC and the DOJ enforce the antitrust laws."[164]

There are a number of different alternatives to the existing structure. One option involves creating a single antitrust agency. For example, the FTC could undertake all competition functions, and the DOJ could continue to conduct criminal enforcement, but with the abolition of the Antitrust Division.[165] A number of countries separate criminal functions from other, more technical antitrust enforcement functions in their institutional design.[166] Another alternative structure would look like that of energy regulation in the United States between the Department of Energy and the Federal Energy Regulatory Commission.[167] In such a model, the DOJ would undertake distinct activity, and the FTC would become an independent agency housed within the DOJ. Another alternative would be to abolish the FTC and move its competition functions to the DOJ, keeping the FTC as a standalone consumer protection agency with a policy/advocacy arm and a research arm.

Antitrust agencies are integral to the success of the enforcement regime. Agency efficacy is difficult to evaluate, and institutional change typically occurs slowly over time. Like other government entities, antitrust agencies face public choice constraints. The United States maintains two antitrust agencies, which creates confusion due to differing substantive standards and also creates certain redundancies. Alternatives to the current system include dividing enforcement responsibilities between the two agencies or housing the FTC within the DOJ.

D. *Public Versus Private Rights of Action*

Most litigation to enforce federal statutes in the United States is done through private rights rather than by government action.[168] This general

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164 *Id.* at 129.

165 This also might have repercussions as to whether or not there would be private rights.

166 This occurs in both common law (e.g., Canada, U.K.) and civil law (e.g., Japan, Chile) circumstances. *See* Competition Act, R.S.C. 2010, c. C-34 (Can.); Harry First & Tadashi Shiraishi, *Concentrated Power: The Paradox of Antitrust in Japan* 7 (N. Y. Univ. School of Law, N. Y. Univ. L. & Econ. Working Papers No. 11, 2005), *available at* http://lsr.nellco.org/cgi/viewcontent.cgi?article=1013&context=nyu_lewp (discussing how public prosecutors prosecute criminal acts under Japan's Antimonopoly Act).

167 42 U.S.C. § 7134 (2006).

168 Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821, 823 (2008).

HeinOnline -- 17 Geo. Mason L. Rev. 1080 2009-2010

observation holds for antitrust as well.[169] Agencies may be resource-limited or under-aggressive in enforcement.[170] In a private rights system, an agency may not need to spend as many resources to remedy certain types of anti-competitive conduct because private litigants may serve as a substitute for any non-enforcement by the antitrust agency.[171] This complementary role of public and private rights may be by design. The legislative intent of private rights might be to shift the cost of enforcement from government to private parties.[172]

There are a number of different theoretical approaches to private rights in antitrust that address the pros and cons of such a system. Richard Posner makes the case that private damages in antitrust could result in antitrust over-enforcement.[173] More generally, private rights might be overly costly and distort the sort of norms that government-based enforcement creates.[174] Dan Crane argues that the structure of private enforcement in the United States is ineffective on both compensation and deterrence grounds.[175] The alternative case is that public and private antitrust should work together to address anticompetitive conduct because dual enforcement leads to better outcomes.[176]

A number of theoretical articles suggest that private enforcement is neutral for the antitrust system.[177] Others argue that private enforcement may lead to increased social welfare if there is a sufficiently large damage multiple.[178] Some theoretical reasons support private rights in antitrust. These include making the plaintiff whole, preventing unjust enrichment,

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169 Institutional analysis would be different in countries without private rights.

170 On the make-up of antitrust laws across legal systems and what they include, see Keith N. Hylton & Fei Deng, *Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and Their Effects*, 74 ANTITRUST L.J. 271, 272-73 (2007).

171 Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879, 905 (2008).

172 Farhang, *supra* note 168, at 827; *see* Karen O'Connor & Lee Epstein, *Bridging the Gap Between Congress and the Supreme Court: Interest Groups and the Erosion of the American Rule Governing Awards of Attorneys' Fees*, 38 W. POL. Q. 238, 240 (1985); *see also* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 45-46 (2001) (discussing private individuals bearing the costs of civil rights enforcement).

173 RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 35 (1976).

174 *See* Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1320-21 (1982).

175 Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 678-98 (2010).

176 Spencer Weber Waller, *Towards a Constructive Public-Private Partnership to Enforce Competition Law*, 29 WORLD COMPETITION L. & ECON. REV. 367, 368 (2006).

177 *See, e.g.*, Jonathan B. Baker, *Private Information and the Deterrent Effect of Antitrust Damage Remedies*, 4 J.L. ECON. & ORG. 385, 386 (1988); Stephen W. Salant, *Treble Damage Awards in Private Lawsuits for Price Fixing*, 95 J. POL. ECON. 1326, 1330 (1987).

178 *See* David Besanko & Daniel F. Spulber, *Are Treble Damages Neutral? Sequential Equilibrium and Private Antitrust Enforcement*, 80 AM. ECON. REV. 870, 883 (1990).

HeinOnline -- 17 Geo. Mason L. Rev. 1081 2009-2010

and creating incentives for private plaintiffs to bring cases when they possess better information than the government.[179] However, there are also costs to the private rights system. These include, but are not limited to, whether to allow recovery by indirect purchasers as a result of *Illinois Brick Co. v. Illinois*,[180] and using treble damages as an incentive to bring meritless claims that can be settled for profit.[181]

There may be substitutability between private and public enforcement. In McAfee, Mialon, and Mialon's recent theoretical article, a firm is initially better informed than the government about its competitor's possible antitrust violations, but the government's incentives are better aligned with those of society, as compared to the firm, since the firm may be incentivized to strategically abuse the antitrust laws.[182] They assume that the government chooses whether to litigate before the firm does.[183] In this context, when private and public enforcement are potentially both in play, public enforcement tends to give way to private enforcement.[184] In most cases, firms have sufficient incentive to sue if they learn that their rivals have actually violated the antitrust laws. Knowing this, the government has little reason to sue, since it can expect that most worthy suits have already been privately initiated.[185]

Private rights of action create a dynamic interplay between public and private antitrust enforcement. Given the importance and potential consequences of public and private litigation, the lack of systematic empirical study of the interaction between public and private litigation is remarkable. In 1985, an important set of empirical articles emerged from the Georgetown conference on private antitrust litigation.[186] Data collected from all private antitrust actions filed from 1973 to 1983 in five federal district

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179 Franklin M. Fisher, *Economic Analysis and Antitrust Damages*, 29 WORLD COMPETITION L. & ECON. REV. 383, 383 (2006).

180 431 U.S. 720 (1977).

181 Fisher, *supra* note 179, at 383, 391-92.

182 R. Preston McAfee, Hugo M. Mialon & Sue H. Mialon, *Private v. Public Antitrust Enforcement: A Strategic Analysis*, 92 J. PUB. ECON. 1863, 1864 (2008).

183 *Id.*

184 *Id.*

185 *Id.*

186 *See, e.g.*, Stephen Calkins, *Equilibrating Tendencies in the Antitrust System, with Special Attention to Summary Judgment and Motions to Dismiss*, *in* PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING 185 (Lawrence J. White ed., 1988); Kenneth G. Elzinga & William C. Wood, *The Costs of the Legal System in Private Antitrust Enforcement*, *in* PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING, *supra*, at 107; Jeffrey M. Perloff & Daniel L. Rubinfeld, *Settlements in Private Antitrust Litigation*, *in* PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING, *supra*, at 149; Steven C. Salop & Lawrence J. White, *Private Antitrust Litigation: Introduction and Framework*, *in* PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING, *supra*, at 3; *see also* Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551 (1991).

courts formed the empirical basis of the articles. To date, this has been the most important set of empirical studies on private rights.[187]

Since that study, empirical work on private rights has been limited primarily to case studies.[188] A number of quantitative articles study DOJ enforcement.[189] These studies are incomplete because they do not examine the interplay of public and private antitrust. However, no robust empirical work has been done to answer questions related to whether public and private litigation primarily act as complements (broadly defined) or substitutes.

Given the limitations of empirical work in this area, how does one assess the strengths and weaknesses of private rights to better refine theory? Let us consider the following question at a broad overview level in the area of monopolization. If public antitrust monopolization litigation decreases, does this lead to an increase or decrease in private monopolization litigation? The answer is ambiguous in general. One scenario is that a decrease in public actions results in a decrease in total private litigation due to a decline in private follow-on litigation. In this scenario, public and private monopolization litigation would be viewed as complements. A second scenario is that as public antitrust actions decrease, the total private actions increase due to an increase in independent private actions. In this scenario, public and private litigation are substitutes.[190]

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187 *See* Snyder & Kauper, *supra* note 186, at 554 & n.15.

188 *See, e.g.*, Lande & Davis, *supra* note 171, at 879.

189 *See, e.g.*, Joseph C. Gallo et al., *Department of Justice Antitrust Enforcement, 1955-1997: An Empirical Study*, 17 REV. INDUS. ORG. 75, 76 (2000); Vivek Ghosal & Joseph Gallo, *The Cyclical Behavior of the Department of Justice's Antitrust Enforcement Activity*, 19 INT'L J. INDUS. ORG. 27, 30 (2001); Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 365 (1970); Vivek Ghosal, *Regime Shift in Antitrust* 21-22 (Munich Personal RePEc Archive, Paper No. 5460, 2007), *available at* http://mpra.ub.uni-muenchen.de/5460/1/MPRA_paper_5460.pdf.

190 Private and public enforcement are likely to be complements with regard to private suits piggybacking on public suits. Even if follow-on suits are excluded from the analysis, perhaps private and public enforcement may still be either complements or substitutes. In a model where the government moves before private parties, public enforcement might tend to give way to private enforcement, as mentioned above. But in a model where private parties, who initially have superior information, move before the government, an increase in private actions may be a signal of possible violations to the government, which may lead the government to increase scrutiny, which may in turn eventually increase public actions. So, in the end, it is really an empirical issue whether private and public enforcement are complements or substitutes. What exactly is meant by substitution is that private enforcement *could* substitute for government enforcement, not that it *would*. For example, the Solicitor General wrote amicus briefs in all of the three big unilateral conduct Supreme Court cases of recent vintage. Pac. Bell Tel. Co. v. LinkLine Commc'ns, Inc., 129 S. Ct. 1109, 1122 n.4 (2009); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007); Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 400 (2004). In all three cases, the Solicitor General wrote an amicus brief for the defendant. Clearly the Solicitor General did not regard these private actions as "complements," but it is not entirely clear that they should be thought of as substitutes either—if they are, then they are highly-imperfect substitutes. The cases functioned as substitutes in the sense that private parties were bringing them and not the government, but the government would not have brought

Scholars have not undertaken an institutional analysis on whether a reduction in government enforcement results in substitution to other types of enforcement, namely, private litigation. What is difficult to find is an exogenous shock to public enforcement to test the impact of reduced public enforcement on the overall composition of antitrust actions. On the one hand, it is not clear that Supreme Court case law is exogenous. After all, the cases that are decided depend on what types of cases are being brought. For example, *Twombly* appears very concerned with the costs associated with low-quality private enforcement actions.[191] On the other hand, exogenous shocks might affect Supreme Court case law. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[192] serves as an example of a lawsuit bringing case law in line with existing empirical economic studies.[193] To what end? Might *Leegin* result in more private litigation over resale price maintenance ("RPM") relative to government enforcement? It is unclear. It may reduce both public and private RPM litigation. Furthermore, there might be an important effect from a disproportionate reduction in either private or public enforcement changing the overall composition.

Along the same lines, how the FTC and the DOJ respond to significant losses may play an important role in understanding why agencies bring few cases. Some speculate that the DOJ was concerned about bringing, but not winning, a merger case post-*United States v. Oracle Corp.*[194] The same theory could hold for unilateral conduct. Unfortunately, there is probably not enough "post" data to test the decline of public enforcement under the Bush years as a causal dynamic. However, historically one might think that a significant FTC/DOJ loss in a monopolization case might impact public enforcement and provide a test for its impact on private enforcement. Such empirical work has yet to be undertaken.

One of the biggest empirical challenges in understanding the dynamic behavior between public and private rights of action is that firm behavior and litigation decisions are not exogenous.[195] With respect to the latter, the types of cases that the government or private actors chooses to bring will presumably vary with their expectations about the likely rulings. So while

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them at all in any event. When examining whether private and public suits are substitutes or complements, it is not clear for what they might be substitutes or complements. One question to ask is: will more public suits crowd out or encourage private suits? That is of some interest, but more important is the question of whether they are substitutes or complements for the purpose of optimally enforcing the antitrust laws. Of course, this is a much harder question to answer.

191 *See id.* at 559.

192 551 U.S. 877 (2007).

193 *See, e.g.*, James C. Cooper et al., *A Comparative Study of United States and European Union Approaches to Vertical Policy*, 13 GEO. MASON L. REV. 289, 294 (2005).

194 331 F. Supp. 2d 1098 (N.D. Cal. 2004); *see* Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, *supra* note 40, at 235, 248-51.

195 *Id.* at 257-58.

more Democrat-appointed judges might mean that for a given case the plaintiff is more likely to win, this might lead plaintiffs of all types to file weaker cases.[196] Even more importantly, the types of actions that a dominant firm might undertake will be affected by anticipated litigation outcomes. That is, they will be more likely to engage in behavior that is problematic under antitrust laws if they anticipate a more favorable Republican judiciary. The relationship between public and private rights constitutes an integral component of antitrust's institutional design, but the area suffers from a dearth of empirical analysis.

E. *Legislature*

While the U.S. antitrust institutions—courts, agencies at both state and federal levels, Congress, and the market—are mature, in recent years, important developments have created a need to reconsider the optimal institutional structure of antitrust. Congress might try to overturn antitrust decisions by the Supreme Court. Such may be the case with RPM post-*Leegin*. Congress may provide explicit statutory exemptions from antitrust law. For example, the government does not need to file antitrust HSR notification when it acquires businesses.[197] As the government has taken an ownership stake in financial institutions,[198] it seems odd that the government should not be subject to the same antitrust review for competitive effects as private firms.

To examine antitrust merely through antitrust law omits an important variable—larger competition policy. In the United States, competition issues in the financial and healthcare sectors, and potential legislation in those areas, are important issues that cover the front pages of every newspaper. Antitrust has a role both in understanding competition in these sectors and in shaping legislative responses.[199]

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196 *See* Warren F. Schwartz & Abraham L. Wickelgren, *Advantage Defendant: Why Sinking Litigation Costs Makes Negative Expected-Value-Defenses but Not Negative-Expected-Value Suits Credible*, 38 J. LEGAL STUD. 235 (2009) (explaining the calculations involved in plaintiff suits).

197 In 2008, the U.S. government gained control of numerous financial institutions, including a near-80 percent stake in AIG without an HSR filing. One reason the government may not be required to file is because it structures temporary acquisitions such as these in the form of loans and not permanent acquisitions. *See* Edmund L. Andrews et al., *Fed's $85 Billion Loan Rescues Insurer*, N.Y. TIMES, Sept. 16, 2008, http://www.nytimes.com/2008/09/17/business/17insure.html (discussing various government takeovers through loans).

198 *E.g.*, J.W. Verret, *Implications and Analysis of Government Shareholding in the Financial Sector*, MERCATUS ON POL'Y, Apr. 2009, at 1, *available at* http://mercatus.org/publication/implications-and-analysis-government-shareholding-financial-sector.

199 *See, e.g.*, FED. TRADE COMM'N, EMERGING HEALTH CARE ISSUES: FOLLOW-ON BIOLOGIC DRUG COMPETITION: FEDERAL TRADE COMMISSION REPORT *passim* (2009), *available at* http://www.ftc.gov/os/2009/06/P083901biologicsreport.pdf; ORG. FOR ECON. CO-OPERATION & DEV.,

One way to improve the legislative process to make it friendlier to competition is through competition advocacy. Competition advocacy is the process through which an agency produces speeches, testimony, and reports to increase transparency in the legislative process.[200] Antitrust agencies use competition advocacy to influence legislation and regulation in an effort to limit their potential anticompetitive effects.[201]

This process provides a more accurate estimate of the costs of regulation for the general public. Competition advocacy thereby reduces the participation costs of complex legislation[202] and also overcomes the public-choice problem of legislative capture.[203] Competition advocacy may be a cheaper solution than enforcement of antitrust laws in comparing resources expended to results achieved.[204] Increased transparency and interest in antitrust issues may force politicians to focus on competition. Because competition issues become important news items, interest groups will be more likely to mobilize due to lower information costs. As an antitrust agency becomes more influential and increases its political legitimacy, consumers will be increasingly likely to trust the agency and gather information for possible cases.[205]

Liberalization across large parts of the economy involves an increase in both legislation and rulemaking by administrative agencies to create a more market-oriented regulatory regime. Competition advocacy allows for an antitrust agency to influence the mechanisms and dynamics of government regulation. In some situations, the intervention may be prior to the enactment of a law or regulation. Competition advocacy as a tool to fight unjustified government restraints is particularly important in the early stages of government economic policies because of policy-choice path dependence.[206] Through advocacy, antitrust agencies may intervene in law and regulation-making processes *ex ante*, when the cost of participation in the process to create a procompetitive result is lower. Advocacy helps to over-

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COMPETITION AND FINANCIAL MARKETS: KEY FINDINGS *passim* (2009), *available at* http://www.oecd.org/dataoecd/9/22/43067294.pdf.

200 Cooper, Pautler & Zywicki, *supra* note 99, at 1091 (providing an overview of competition advocacy theory and practice).

201 *See id.* at 1105.

202 *See id.* at 1111.

203 Advocacy is not limited merely to legislative interventions. Effective advocacy extends to sector regulation, the judiciary, and in creating a "competition culture" for society.

204 Cooper, Pautler & Zywicki, *supra* note 99, at 1110-11.

205 *See* JOHN W. CLARK, COMPETITION ADVOCACY: CHALLENGES FOR DEVELOPING COUNTRIES 10 (2004), *available at* http://iadb.org/res/publications/pubfiles/pubS-208.pdf ("[A] competition agency's reputation will be built largely upon its record in enforcing the competition law, and this reputation will significantly affect its influence as an advocate in other forums.").

206 On path dependence generally, see EVOLUTION AND PATH DEPENDENCE IN ECONOMIC IDEAS: PAST AND PRESENT (Pierre Garrouste & Stavros Ioannides eds., 2001).

HeinOnline -- 17 Geo. Mason L. Rev. 1086 2009-2010

come legislative and administrative agency failure to create procompetitive rules of play.[207]

Competition advocacy may attempt to mitigate or eliminate existing government restraints. In combating existing legislation and regulations, competition advocacy allows for antitrust agencies to help countries transition from "temporary" policies.[208] Without competition advocacy, such measures become permanent and a hindrance to a competitive market.[209] It is more difficult to remove a law or regulation once it is in place.[210] However, competition advocacy that produces outputs, such as a report or a hearing on anticompetitive regulation, increases the transparency of such regulation and reveals the societal cost. This may reduce the costs of limiting the legislation's reach as citizens may become mobilized to fight against special interests.

The legislature interacts with agencies in complex ways.[211] According to one model, the legislature creates constraints upon agencies so that the agencies create outcomes in policy that are palatable to the legislature.[212] Legislatures do so because by creating constraints to "lock in" agency behavior, the legislature can respond more effectively than by responding to agency decisions that are inconsistent with Congress's position.[213] Empirical work that studies the FTC shows that this applies in the antitrust setting.[214] The President can play the same game with executive agencies.[215]

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207 Cooper, Pautler & Zywicki, *supra* note 99, at 1091-92.

208 Sokol, *supra* note 109, at 144-45.

209 CAPACITY BLDG. & COMPETITION POL'Y IMPLEMENTATION WORKING GROUP: SUBGROUP 4, INT'L COMPETITION NETWORK, COMPETITION ADVOCACY IN REGULATED SECTORS: EXAMPLES OF SUCCESS 48, 48-49 (2004).

210 *See* DAVID CURRIE & JOHN CUBBIN, REGULATORY CREEP AND REGULATORY WITHDRAWAL: WHY REGULATORY WITHDRAWAL IS FEASIBLE AND NECESSARY 2 (2002), *available at* http://www.staff.city.ac.uk/~sm340/Consulting&Policy/Regulatory%20Withdrawal%20Report%200203 17.pdf ("More generally, there is a prevalent view that regulatory creep is inevitable; that regulators will be unwilling to let go and indeed will be inclined to increase over time the range and scope of what they control.").

211 *See, e.g.*, MUELLER, *supra* note 13, at 386-91. *See generally* EDWARD L. RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE (2005) (analyzing the complexity of the administrative state).

212 Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 432 (1989).

213 *Id.* at 441-43; *see also* Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 756 (1984) (explaining organization based upon a principal-agent model).

214 *See, e.g.*, Timothy J. Muris, *Regulatory Policymaking at the Federal Trade Commission: The Extent of Congressional Control*, 94 J. POL. ECON. 884, 884 (1986); William F. Shughart II, Jon D. Silverman & Robert D. Tollison, *Antitrust Enforcement and Foreign Competition*, *in* THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE 179, 183 (Fred S. McChesney & William F. Shughart II eds.,1995); *see also* Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control?: Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 792-93 (1983) (concluding that the FTC was responsive to Congressional demands).

Overall, the legislature has a key role in formulating antitrust institutional design, and the antitrust agencies interact with the legislature in a number of ways, including exerting influence over the legislators with competition advocacy.

F. *State Versus Federal Enforcement*

Issues of federalism are at play in the U.S. antitrust system. What role, if any, is there for state antitrust enforcement? The history of federal versus state antitrust illustrates the complementarity of the two systems.[216] Yet, given the reinvigoration of state antitrust enforcement since the mid-1990s, the questions remain whether resource-poor state attorneys general ("AGs") are merely "barnacles on the ship of federal antitrust,"[217] as Posner claims, or whether an important role for state antitrust enforcement exists? States also differ in their capabilities across states and across legislation. Some states allow for indirect purchaser suits under *Illinois Brick*, while others do not.[218]

Professor Harry First has identified a number of different institutional possibilities for state-level involvement in antitrust.[219] The first involves stripping the states of their power to bring *parens patriae* suits.[220] The second involves creating allocation rules between federal and state institutions.[221] This is not as easy as it might appear, as the distinction between local and national is not always clear. Similarly, allocation could be by type of case.[222] Yet a third option would involve first refusal rights by federal

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215 Mark Fenster, *Designing Transparency: The 9/11 Commission and Institutional Form*, 65 WASH. & LEE L. REV. 1239, 1260 (2008); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277-84 (2001); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 3-7 (1995).

216 Andrew I. Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism*, 61 GEO. WASH. L. REV. 657, 658-60 (1993).

217 Douglas C. Nelson, *Consumer News*, 17 LOY. CONSUMER L. REV. 121, 123 (2004) (quoting Jaret Seiberg, *Checks and Imbalances*, DAILY DEAL, July 26, 2004) (internal quotation marks omitted); *see also* Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940 (2001) ("I would like to see, first, the states stripped of their authority to bring antitrust suits, federal or state, except under circumstances in which a private firm would be able to sue, as where the state is suing firms that are fixing the prices of goods or services that they sell to the state.").

218 Andrew I. Gavil, *Thinking Outside the* Illinois Brick *Box: A Proposal for Reform*, 76 ANTITRUST L.J. 167, 167-68 (2009).

219 Harry First, *Modernizing State Antitrust Enforcement: Making the Best of a Good Situation*, 54 ANTITRUST BULL. 281, 286 (2009).

220 *Id.* at 286.

221 *Id.* at 287.

222 *Id.* at 288.

enforcers, although First notes the problems with such rights, including who gets to make the decision and when.[223]

One reason to support a reduced state role has to do with limited state resources, and thus competency, relative to the federal government.[224] An additional justification involves the greater propensity for special interest capture of state enforcers relative to federal enforcers.[225] Such limitations on the part of the states may hurt optimal antitrust enforcement. States lack the resources of federal enforcers in terms of budget and antitrust expertise.[226] Moreover, states may be more likely to put local parochial interests ahead of national consumer welfare.[227] These factors increase the possibility of bad decision making in terms of what kinds of cases to bring. States have incentives to piggyback onto national cases because the cases are high profile and generate political rewards to the state AGs.[228] How much state involvement adds in such cases is debatable.[229]

In terms of institutional resource allocation, state involvement in federal enforcement of mergers or single-firm conduct cases may increase coordination costs for potential resolution of the legal issue.[230] Central enforcement therefore may reduce compliance costs.

An alternative view is that state law is a substitute for federal enforcement, particularly for single-firm conduct. If we believe that cases such as the NY Attorney General's investigation of Intel, which resulted in a suit prior to the FTC suit against Intel, are representative of a larger trend, states may be stepping into what they view as a federal enforcement gap. In some areas, states do the sort of work that falls through federal cracks, such

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223 *Id.* at 290-91.

224 *See* Robert Hahn & Anne Layne-Farrar, *Federalism in Antitrust*, 26 HARV. J.L. & PUB. POL'Y 877, 888-90 (2003).

225 Posner, *supra* note 218, at 940-41.

226 Hahn & Layne-Farrar, *supra* note 225, at 887-90; *see also* Douglas H. Ginsburg & Scott H. Angstreich, *Multinational Merger Review: Lessons from Our Federalism*, 68 ANTITRUST L.J. 219, 227-28 (2000); Robert H. Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance*, 35 N.Y.L. SCH. L. REV. 1047, 1072-73 (1990) ("[States should not challenge] specified exceptionally large, truly national transactions, and transactions that primarily do not affect that state [in view of a state's limited resources].").

227 Ginsburg & Angstreich, *supra* note 227, at 228.

228 *See* Posner, *supra* note 218, at 940-41.

229 It is hotly contested whether the states added much in the *Microsoft* litigation. *See* Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004, 1032-34 (2001); *see also* Posner, *supra* note 218, at 940-42 (arguing for a decreased role of the states in antitrust enforcement). *Microsoft*, however, may have been an exceptional case. Michael DeBow, *State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal*, *in* COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 267, 268 (Richard A. Epstein & Michael S. Greve eds., 2004).

230 For example, the state role in the *Microsoft* litigation was costly. Hahn & Layne-Farrar, *supra* note 225, at 878 ("[The state antitrust enforcement] lengthened the lawsuit, complicated the settlement process, and increased both legal uncertainty and litigation costs.").

HeinOnline -- 17 Geo. Mason L. Rev. 1089 2009-2010

as localized cartels and dominance cases.[231] States have better knowledge of these subnational markets.[232] As with general arguments regarding federalism,[233] state antitrust enforcement allows for greater experimentation across policy choices.[234]

G. *Antitrust Versus Sector Regulation*

Recent Supreme Court decisions in *Credit Suisse Securities (USA) LLC v. Billing*[235] and *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*[236] concern how antitrust interacts with sector regulation competition issues. Sometimes regulators pursue antitrust objectives and antitrust enforcers pursue regulatory objectives. Major deregulatory initiatives, such as telecommunications or transportation, affect antitrust policy. The interrelationship of institutional choice on competition issues between antitrust enforcers and sector regulators remains understudied quantitatively.[237]

Overlapping regulation effectively means that there are multiple regulators and each impacts the development of a particular sector.[238] When

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231 *See* Kathleen E. Foote, *State Antitrust Enforcement*, *in* 2 ANTITRUST LAW INSTITUTE 2009 (50TH ANNUAL) 747, 757-59 (2009).

232 Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673, 679-81 (2003).

233 For the Supreme Court's explanation for federalism, see, for example, John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2028 (2009).

234 First, *supra* note 220, at 295.

235 551 U.S. 264 (2007).

236 540 U.S. 398 (2004).

237 Much of the time, there is an endogeneity problem with measuring the impact of antitrust law in sector regulation. This limits potential empirical projects. There are two possible cases that I identify in which empirical work can be done to measure the impact of competition policy in which there is not the sector regulation/antitrust overlap. These are (1) the extent (penetration) of cable television; and (2) the choice of both-parties-pay in mobile services (i.e., the opposite of calling-party pays). Both developed exogenously with respect to fixed-wire telephony. The first is a reflection of the degree to which governments avoided building and protecting national broadcast services. The second is as a result of a historical accident. To my knowledge, there is no academic work that studies the competition issues in either circumstance.

238 When the sector regulator and antitrust agency have divergent views, it is difficult to measure the impact of how much change one agency caused and not the other. A series of case studies undertaken by antitrust agencies provide some limited guidance on areas of potential complementarity or substitutability between competition agencies and sector regulation. *See, e.g.*, INT'L COMPETITION NETWORK, ANTITRUST ENFORCEMENT IN REGULATED SECTORS WORKING GROUP, SUBGROUP 1: LIMITS AND CONSTRAINTS FACING ANTITRUST AUTHORITIES INTERVENING IN REGULATED SECTORS 2-7 (2004) [hereinafter ICN LIMITS AND CONSTRAINTS], *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc378.pdf; Org. for Econ. Co-Operation & Dev., *Global Forum on Competition: Roundtable on Bringing Competition into Regulated*

concurrent jurisdiction exists, collaboration between sector and antitrust authorities may not always be easy. Concurrent powers with sector regulators may make it more difficult for antitrust agencies to create and maintain a competitive environment in regulated sectors. Remedies available and approaches to the creation of a competitive market may vary between sector regulators and antitrust agencies. The task may be even more difficult in dynamic markets where the market forces and regulations may evolve in ways that are not predictable, such as in telecommunications.[239] The problem of inconsistent decisions for the same conduct when there is not an appropriate division of labor between sector regulator and antitrust authority may complicate efforts to create a more efficient competition system.[240]

Public choice helps to explain how sector regulators are likely to be captured by special interests.[241] The interests that affect sector regulators are more concentrated than those in antitrust[242] and therefore more successful in their efforts to capture regulators. In this sense, the sector regulators are more likely to be captured and will behave more politically than antitrust agencies.

Interest groups have an advantage in crafting policy for two reasons. First, there are informational costs to political participation.[243] Individuals need to determine their interests. To do so, they must expend resources. Such expenditure for information can be significant, especially when the benefit is small for an individual consumer.[244] Because information itself is a public good, markets are suboptimal at generating information.[245] Information costs limit the ability of parties to participate effectively in the legislative process.

The second participation cost is the cost of political mobilization.[246] Once interests are properly identified, political forces must be mobilized to fight for legislation. This creates free-rider problems for public goods such

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Sectors, *in* 2005 GLOBAL FORUM ON COMPETITION *passim* (2005), *available at* http://www.oecd.org/dataoecd/47/0/41635848.pdf.

239 *See* ICN LIMITS AND CONSTRAINTS, *supra* note 239, at 9-10.

240 DAMIEN GERADIN & MICHEL KERF, CONTROLLING MARKET POWER IN TELECOMMUNICATIONS: ANTITRUST VS SECTOR-SPECIFIC REGULATION 23 (2003).

241 *See* Todd J. Zywicki, Dir., Office of Pol'y Planning, Fed. Trade Comm'n, Competition Policy and Regulatory Reform: Means and Ends, How Should Competition Policy Transform Itself? Designing the New Competition Policy 9 (Nov. 20, 2003), *available at* http://www.ftc.gov/speeches/other/031120zywickijapanspeech.pdf.

242 Sokol, *supra* note 109, at 134.

243 *See* Cooper, Paulter & Zywicki, *supra* note 99, at 1100.

244 *See* George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213, 216 (1961); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGM'T SCI. 3, 11 (1971).

245 F. M. Scherer, *Pricing, Profits, and Technological Progress in the Pharmaceutical Industry*, 7 J. ECON. PERSP. 97, 98-101 (1993); *see also* JOSEPH E. STIGLITZ, ECONOMICS OF THE PUBLIC SECTOR 79 (1988) ("There are some goods that either will not be supplied by the market or, if supplied, will be supplied in insufficient quantity.").

246 Cooper, Pautler & Zywicki, *supra* note 99, at 1101.

as laws of general societal benefit, like antitrust.[247] Each individual has an incentive to shirk on his organizational responsibility because someone else can do his work for him.[248] This makes majority groups unlikely to be as effective as smaller groups with lower organizational costs.[249]

These informational and organizational costs make it possible for a well-organized interest group to push for legislation that will benefit the group instead of society at large.[250] Because of lower informational and organizational participation costs, these groups tend to be effective in their rent seeking. Rent seeking in the antitrust setting creates immunities from antitrust or shifts regulatory intervention to sector regulators more prone to capture than antitrust enforcers. Firms may have strong political clout to restrict competition.[251] These firms have an incentive to shape government policy to be receptive to their needs through policies that facilitate anticompetitive restraints rather than the needs of consumers as a whole.[252] In both regulated and unregulated sectors, firms may try to curry favor with government to raise barriers to prevent new entry or to raise rivals' costs.[253] In a recent article, Professors Dogan and Lemley conclude that antitrust and the use of generalized courts are more efficient than regulatory agencies because generalized courts are less likely to pursue regulatory gaming strategies.[254] Sector regulation and antitrust enforcement overlap in many respects. Such overlap creates the potential for inconsistency between these two institutions, as well as increased fear of regulatory capture.

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247 *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 14-16, 21 (2d ed. 1971); ICN LIMITS AND CONSTRAINTS, *supra* note 239, at 21.

248 *See* OLSON, *supra* note 248, at 14-16.

249 *See id.* at 57, 165-67.

250 *See* Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 213 (1976).

251 *See, e.g.*, Vladimir Capelik & Ben Slay, *Antimonopoly Policy and Monopoly Regulation in Russia*, *in* DE-MONOPOLIZATION AND COMPETITION POLICY IN POST-COMMUNIST ECONOMIES 57, 84 (Ben Slay ed., 1996).

252 Sokol, *supra* note 109, at 128-31.

253 This can take the form of creating pricing schemes to appeal to political allies or paying employees inflated salaries to mobilize a constituency that would be highly interested in influencing government. Richard A. Posner, *The Effects of Deregulation on Competition: The Experience of the United States*, 23 FORDHAM INT'L L.J. 7, 10 (2000).

254 Dogan & Lemley, *supra* note 47, at 686 ("Economic theory teaches that antitrust courts are better equipped than regulators to assure efficient outcomes in many circumstances. Public choice theory and long experience both suggest that agencies that start out trying to limit problematic behavior by industries often end up condoning that behavior and even insulating those industries from market forces.").

HeinOnline -- 17 Geo. Mason L. Rev. 1092 2009-2010

H. *International Antitrust*

Increasingly, antitrust has an international dimension. In a sense, the issue of international governance in antitrust is one of global antitrust federalism.[255] At what level of governance are most antitrust decisions best made? If there are significant spillovers of substantive antitrust harm that individual countries cannot reach, then global antitrust institutions may be more effective than domestic ones.[256] One area in which international antitrust institutions have some potential effect is in cross-border anticompetitive conduct. The second area is with regard to coordinating antitrust decision making as to enforcement and policymaking. A third area is the convergence around global standards for antitrust liability.

The coordination problems in antitrust are familiar to those who study coordination game theory issues and, in particular, the "battle of the sexes" game.[257] The issue in such coordination games is that multiple Nash equilibria exist that would create mutual gains for the parties so long as they remain consistent in their decision making, but unlike the "driving game," in the battle of the sexes there are substantial differences in which coordination strategy each side will prefer.[258] In the antitrust context, the coordination problems are how to share information in cross-border cartel cases or cross-border merger analysis.[259] Coordination issues also include how to coordinate leniency requests in cartels and the time sequence of merger review filings.[260] Coordination and increased harmonization across antitrust jurisdictions have the potential to reduce costs for both agencies and private parties.

For coordination problems, institutional analysis is largely based on information costs and which institution will be more likely to have better information to create effective solutions. Antitrust enforcement suffers from information costs both in situations of cross-border conduct and in purely-domestic cases where one agency has less expertise than another in remedying anticompetitive conduct, or less expertise concerning a competition advocacy issue. Any one antitrust agency has more substantive information available to it on the firms, firm behavior, and markets within its jurisdic-

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255 Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1781-82 (2000).

256 D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37, 118 (2007).

257 *See generally* MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 209-14 (2009) (describing the "battle of the sexes" game theory model).

258 *Id.* at 196-209 (describing the "driving game" game theory model).

259 Andrew T. Guzman, *International Competition Law*, *in* RESEARCH HANDBOOK IN INTERNATIONAL ECONOMIC LAW 418, 437-38 (Andrew T. Guzman & Alan O. Sykes eds., 2007).

260 *Id.* at 433-34.

HeinOnline -- 17 Geo. Mason L. Rev. 1093 2009-2010

tion than an agency from a different country.[261] When antitrust agencies increase the exchange of information, this reduces information costs across jurisdictions. Some information exchange on firms, markets, and firm conduct may occur informally through meetings of regulators via soft law institutions and the establishment of personal relationships among counterparts in different jurisdictions.[262]

Substantive global antitrust concerns involve different legal and economic approaches to the types of conduct agencies find anticompetitive and the burdens of proof that the parties must meet. On an international level, a key concern is when one of the major powers in antitrust, the European Union or the United States, has a lower standard for a finding of wrongdoing than other countries. The lower standard effectively operates as the global standard because remedies often have global implications.[263] Even if the United States and the European Union have a similar substantive approach, if other jurisdictions have vastly different analytical approaches, some of these approaches may still create increased costs for doing business in a given jurisdiction.

There are now more than one hundred antitrust agencies across jurisdictions worldwide.[264] These include established antitrust agencies in the Organisation for Economic Co-operation and Development ("OECD"), whose members include countries such as in the United States, the United Kingdom, Canada, Japan, and Germany. They also include large developing jurisdictions—such as Brazil, China, India, and Russia—and either very small or lesser developing jurisdictions—such as Mauritius, Jersey, Zambia, and Honduras.[265] These agencies have different abilities based on their underlying legal, economic, and political systems and their levels of institutional development. Nearly all agencies discuss antitrust in the context of efficiency.[266] What exactly "efficiency" means varies across jurisdictions.[267] These differences in substantive approach lead to the possibility of different outcomes for the same behavior across jurisdictions.

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261 John J. Parisi, Counsel for European Union Affairs, Fed. Trade Comm'n, Enforcement Cooperation Among Antitrust Authorities §§ III(B)(3), III(C) (May 19, 1999), *available at* http://www.ftc.gov/speeches/other/ibc990599111update.shtm.

262 In other cases, information exchanges may be formalized through agreements across agencies.

263 William E. Kovacic, *Competition Policy in the European Union and the United States: Convergence or Divergence?*, *in* COMPETITION POLICY IN THE EU: FIFTY YEARS ON FROM THE TREATY OF ROME 317, 317 (Xavier Vives ed., 2009).

264 *See Member Directory*, INT'L COMPETITION NETWORK, http://www.internationalcompetitionnetwork.org/members/member-directory.aspx (last visited June 27, 2010).

265 *Id.*

266 Eleanor M. Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, 43 INT'L LAW. 151, 152 (2009).

267 *Id.* at 153.

1. Soft Law

Some of international governance is through "soft law" institutions. Soft law utilizes best practices across jurisdictions to set global benchmarks for appropriate antitrust systems.[268] Best practices allows for flexibility across agencies and countries to implement these practices based upon a country's unique social, legal, political, and economic background.[269]

Soft law antitrust institutions have changed many countries' antitrust systems toward internationally-accepted best practices. However, there are a series of tradeoffs in the decision-making process of soft law governance. These institutions do well in overcoming coordination problems. The OECD and the International Competition Network ("ICN") have developed distinct roles in coordination.[270] It may be that the best institutional choice is not one or the other, but using each one in the area of its relative institutional strength. Both seem to do less well in overcoming substantive disagreements within antitrust as to conduct.

Two modes of soft law institutions exist—transgovernmentalism[271] and transnationalism.[272] There has been a move to greater transgovernmental governance. Professors Robert Keohane and Joseph Nye explain this governance as "sets of direct interactions among sub-units of different governments that are not controlled or closely guided by the policies of the cabinets or chief executives of those governments."[273] In the antitrust context, this form of governance exists through the OECD Competition Committee.[274] Competition Committee members meet on a regular basis to discuss issues in antitrust. Agency heads and other senior agency officials undertake these discussions; and this gathering of agency experts creates an epistemic community.[275] This community allows for the sharing of ideas and experiences. Over time, countries shift their antitrust policies to the norms created by the OECD. For example, the OECD put forward a set of recommendations on cartel enforcement.[276] The OECD member countries

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268 Sokol, *supra* note 257, at 97.

269 Russell W. Damtoft & Ronan Flanagan, *The Development of International Networks in Antitrust*, 43 INT'L LAW. 137, 146 (2009).

270 Sokol, *supra* note 257, at 97-102, 105-15.

271 Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 184 (1997).

272 Thomas Risse-Kappen, *Bringing Transnational Relations Back In: Introduction*, *in* BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES AND INTERNATIONAL INSTITUTIONS 3 (Thomas Risse-Kappen ed.,1995).

273 Robert Keohane & Joseph S. Nye, *Transgovernmental Relations and International Organizations*, 27 WORLD POL. 39, 43 (1974).

274 Sokol, *supra* note 257, at 97-102.

275 Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, *in* KNOWLEDGE, POWER, AND INTERNATIONAL POLICY COORDINATION 1, 3 (Peter M. Haas ed., 1992).

276 Competition Committee, Org. for Econ. Co-Operation & Dev., *Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations*, *in* HARD

have implemented these recommendations.[277] This helps to explain, in part, how cartel enforcement is stronger now in terms of detection and punishment than at any previous point in antitrust history around the world.[278]

Another OECD mechanism to diffuse norms is the process of peer review. A peer review is a diagnostic of the strengths and weaknesses of a country's antitrust system.[279] Peer reviews cover a number of issues. After providing for a background on the antitrust system of a country, they engage in a critical analysis of substantive issues, such as merger control, horizontal and vertical agreements, and monopolization.[280] A second element of the review is to analyze the institutional setting of antitrust. This includes the enforcement structure and practices for the agency, the role of the judiciary, resources, priorities, and international issues.[281] After an analysis of substantive and institutional issues, the peer review provides conclusions and policy options.[282] Other agencies then comment upon the peer review.[283] This process allows for agencies to offer constructive policy criticism to one another. Bad policies subject an agency to shaming by its peers.[284] This is the mechanism by which peer reviews are supposed to create compliance.[285] Though this shaming mechanism may be effective in some circumstances, there has not been sufficient repeal of antitrust immunities among countries, nor does this appear to be an antitrust agency priority.[286]

A more direct method to diffuse norms is through technical assistance. Increasingly, the OECD provides technical assistance, training, and out-

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CORE CARTELS: THIRD REPORT ON THE IMPLEMENTATION OF THE 1998 COUNCIL RECOMMENDATION Annex 2 (2005) [hereinafter OECD HARD CORE CARTELS], *available at* http://www.oecd.org/dataoecd/58/1/35863307.pdf; Competition Committee, Org. for Econ. Co-Operation & Dev., *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, *in* OECD HARD CORE CARTELS, *supra*, Annex 1.

277 OECD HARD CORE CARTELS, *supra* note 277, § 1.1.

278 John M. Connor & Yuliya Bolotova, *Cartel Overcharges: Survey and Meta-Analysis*, 24 INT'L J. INDUS. ORG. 1109, 1135 (2006).

279 D. Daniel Sokol, *The Future of International Antitrust and Improving Antitrust Agency Capacity*, 103 NW. U. L. REV. 1081, 1085 (2009).

280 *See, e.g.*, DIEGO PETRECOLLA, ORG. FOR ECON. CO-OPERATION & DEV., COLOMBIA – PEER REVIEW OF COMPETITION LAW AND POLICY 18-34 (2009), *available at* http://www.oecd.org/dataoecd/32/49/44110853.pdf.

281 *Id.* at 37-49.

282 *Id.* at 57-64.

283 *See, e.g.*, FABRIZIO PAGANI, ORG. FOR ECON. CO-OPERATION & DEV., PEER REVIEW: A TOOL FOR CO-OPERATION AND CHANGE: AN ANALYSIS OF AN OECD WORKING METHOD 7 (2002), *available at* http://www.oecd.org/dataoecd/33/16/1955285.pdf.

284 Sokol, *supra* note 280, at 1085.

285 *See, e.g.*, Sokol, *supra* note 257, at 97-98.

286 Sokol, *supra* note 109, at 148.

reach to developing countries.[287] It has established competition centers in Central Europe and East Asia to coordinate programs regionally.[288] It also cosponsors a yearly conference in Latin America and undertakes work in the Western Hemisphere, such as projects in Mexico, Brazil, and Chile on bid rigging.[289]

Global governance institutional design has taken on an additional dimension—that of transnational governance.[290] Transnational governance is distinct from that of transgovernmental governance because non-state actors are involved in the decision-making process. The antitrust institution that adds this non-governmental dimension is the ICN. Unlike the OECD, the ICN includes practitioners and academics from both developing and developed world countries in its meetings.[291] Also unlike the OECD, the ICN operates virtually, without any headquarters or permanent staff.[292] Consequently, members and advisors of the ICN do the work themselves rather giving it to the ICN staff.[293] This limits opportunities for free-riding and creates a greater sense of ownership over work product. These work products include the creation of manuals for mergers and cartels that provide techniques to improve agency enforcement.

To reduce coordination costs, the ICN has created a series of best practices on a number of different issues. These recommended practices involve a multistep process. First, agencies and non-governmental advisors take stock of existing practices.[294] Then, the group analyzes existing practices to find commonality.[295] Finally, the ICN creates recommended practices on what seems to be the most effective.[296] These globally benchmarked practices are then absorbed by agencies around the world in a way that fits within the local context and institutional setting.

Soft law harmonization has its limits. When antitrust agencies apply the same "harmonized" standards, it may lead to alternative outcomes in practice.[297] Countries have many of the same substantive provisions in their antitrust laws (e.g., limitations on unilateral and coordinated conduct) but

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287 *See, e.g., 2009 OECD Capacity Building/Outreach Events*, ORG. FOR ECON. CO-OPERATION & DEV., http://www.oecd.org/document/15/0,3343,en_40382599_40382958_41926735_1_1_1_1,00.html (last visited June 27, 2010).

288 Sokol, *supra* note 257, at 100.

289 Sokol, *supra* note 91, at 268-69.

290 *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 264 (2004) (describing transnational networks).

291 Sokol, *supra* note 257, at 106-09.

292 *Id.* at 108.

293 *Id.*

294 *Id.* at 110.

295 *Id.*

296 *Id.*

297 Fox, *supra* note 267, at 163-64.

apply these laws differently.[298] The process of harmonization may also create opportunities for strategic behavior. There may be cases where countries increase their switching costs prior to harmonization in an effort to get other countries to be elastic in changing their own systems to comport with harmonization.[299]

The shape of soft law compliance and agenda is a function of power asymmetries. Should the European Union and United States not put their resources and efforts into soft law organizations to combat public restraints, their lack of participation would compromise the ability of any antitrust soft law organization to be effective. In some ways, the power dynamics specific to soft law's ability to address antitrust public restraints may be more severe than that of hard law. Soft law is most effective at cost reduction when the relevant costs involve information and coordination. For example, antitrust soft law organizations have become increasingly effective in reducing the costs associated with merger review and cartels.[300] There is no serious disagreement as to the pernicious effects of cartels or the fact that multiple, overlapping merger-control systems create increased compliance costs. In substantive areas of law, antitrust soft law organizations may face implementation problems where disagreement exists, particularly between the United States and the European Union.[301]

2. Hard Law

The alternative international governance mechanism to soft law is hard law. Hard law relies upon formal law to bind countries.[302] The World Trade Organization ("WTO") is an example of a hard law institution that could address competition matters. The benefit of hard law is the binding effect. This is also its primary cost. Should the wrong global standard be set, this might create suboptimal antitrust laws across jurisdictions around the world.[303]

A number of works have analyzed the limitations of the WTO and bilateral and regional free trade agreements to reach a global standard in anti-

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298 *See* Fox, *supra* note 114, at 16 (describing why nations' antitrust policies may still differ despite a harmonization of antitrust rules).

299 Emanuela Carbonara & Francesco Parisi, *The Economics of Legal Harmonization* 4 (George Mason Univ. Law & Econ. Research Paper Series, Paper No. 05-40, 2005), *available at* http://www.law.gmu.edu/assets/files/publications/working_papers/05-40.pdf.

300 Sokol, *supra* note 257, at 121.

301 Fox, *supra* note 267, at 163-64.

302 Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 421 (2000).

303 John O. McGinnis, *The Political Economy of International Antitrust Harmonization*, 45 WM. & MARY L. REV. 549, 552 (2003).

trust.[304] Overall, these works suggest that the WTO is presently not the best institution with which to push for global antitrust change.[305] One important dynamic at the WTO level is that power dynamics between the major powers in the international trade arena produce the binding law.[306] Even though the WTO requires unanimity, the major powers shape the trade agenda and the substantive rules. While the number of major powers at the WTO level has recently increased to include countries such as China and Brazil without support of the European Union and the United States, the WTO will not create new rules, including in the area of competition policy. Currently, there is no appetite to create additional binding WTO rules in competition policy.[307]

3. Worldwide Enforcer?

Outside of global governance, there is an alternative international force to the United States as a unilateral global antitrust enforcer. There is the European antitrust alternative. We might prefer a regime in which we rely upon foreign judgments because we believe that there is a system of global underdeterrence.[308] The effect of European Commission ("EC") competition law enforcement on U.S.-based multinationals has increased in recent years.[309] To what extent are EC decisions global in their reach because they might be more restricting than the United States' enforcement decisions? Is there decision making by the lowest common denominator?

The developments in Europe have potential repercussions in the United States in terms of the type of behavior businesses will engage in and the global nature of such changes to a business's behavior. To what extent are U.S. firms relying on EC public enforcement against competitors? These questions have not yet been answered, but are necessary to think about (and ideally to test empirically) in undertaking a comparative institutional analy-

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304 *See, e.g.*, Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1545 & n.134 (1998); Anu Piilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 STAN J. INT'L L. 207, 229-34 (2003); Sokol, *supra* note 257, at 81-97; Sokol, *supra* note 280, at 1084-87; Sokol, *supra* note 91, at 241-52; Michael J. Trebilcock & Edward M. Iacobucci, *National Treatment and Extraterritoriality: Defining the Domains of Trade and Antitrust Policy*, *in* COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY, *supra* note 230, at 152, 171; Diane P. Wood, *Antitrust at the Global Level*, 72 U. CHI. L. REV. 309, 312-15 (2005).

305 Paul B. Stephan, *Global Governance, Antitrust, and the Limits of International Cooperation*, 38 CORNELL INT'L L.J. 173, 199-201 (2005); McGinnis, *supra* note 304, at 551-52.

306 Andrew Guzman & Beth A. Simmons, *Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes*, 34 J. LEGAL STUD. 557, 591-92 (2005).

307 Sokol, *supra* note 257, at 50-51.

308 Gal, *supra* note 101, at 1-2.

309 Geradin, *supra* note 6, at 207-08.

HeinOnline -- 17 Geo. Mason L. Rev. 1099 2009-2010

sis. Anecdotally, it seems as if some firms are bringing attention to the EC because they can get favorable results there as opposed to the United States.[310] If this holds true generally, it would suggest that the EC plays a far larger role in the conduct of U.S.-based firms vis-à-vis its U.S.-based competitors than previously assumed in the institutional analysis of the U.S. antitrust system.

Antitrust enforcement has become a global phenomenon. This international aspect can be explored through soft law institutions, which aim to set broad, global goals, or with hard law institutions, which create binding legal rules. An alternative to global governance could involve a worldwide antitrust enforcer; current candidates for this position include the United States and the European Union.

III. CASE STUDY: INSTITUTIONAL ISSUES IN MERGER CONTROL

A. *Introduction*

This Article undertakes a case study of merger control in an attempt to operationalize the comparative institutional analysis of Part II. Merger review is an area in which there is a lot of "action" in terms of the volume of matters, but also one with a relatively small number of agency challenges and judicial decisions.[311] Because courts decide so few merger cases, the case context provides little insight into the larger decision-making process by the parties and their lawyers. Merger review is also an area in which issues of private versus public rights of action come into play, as well as issues of federalism, global federalism, and antitrust versus sector regulation.

Merger review functions as a constant work in progress in terms of improving its predictive abilities.[312] Antitrust institutions respond to these changes and to changes in the law's application of merger economics.[313] Both sets of changes affect the comparative institutional competencies for merger review. As institutions shift in their capacity to respond to these

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310 Transcript of Responses to Qualitative Survey (on file with author).

311 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2008 1 (2009), *available at* http://www.ftc.gov/os/2009/07/hsrreport.pdf (reporting that while 1,726 transactions were reported under the HSR Act in 2008, the FTC only challenged 21 of these mergers).

312 William E. Kovacic, *Assessing the Quality of Competition Policy: The Case of Horizontal Merger Enforcement*, 5 COMPETITION POL'Y INT'L 129, 131 (2009) (explaining the evolution of merger control).

313 *See, e.g.*, Carl Shapiro, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Updating the Merger Guidelines: Issues for the Upcoming Workshops 1 (Nov. 12, 2009), *available at* http://www.justice.gov/atr/public/speeches/251858.pdf.

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changes, their relative strengths in terms of administrability and outcomes also shift.

Merger review is full of presumptions that academics, judges, and agency officials make about policy and the nature of business.[314] These presumptions permeate antitrust case law and the Merger Guidelines[315] as to substance, administrability, and economic behavior.[316] However, oftentimes the empirical basis for many of these presumptions is limited or incomplete. With limited case law in mergers, agency conduct might differ from existing case law.[317]

Yet, it is precisely the broad set of behaviors in antitrust that scholars for the most part ignore—those that involve antitrust decision making. Decision making is fundamental to institutional analysis.[318] Decision making in the context of this Article means what firms actually do with their legal advice and how outside counsel convey risks and rewards to their clients, which in turn shapes client behavior. This area is very important, as it incorporates not merely cases, but also a reading of the "tea leaves" of regular agency interactions, speeches by agency officials, an understanding of the current use of the Merger Guidelines, the interplay of the DOJ and the FTC together, and the interplay of international, federal, and state enforcement. Data collection limitations hamper discovery of patterns of firm behavior, and neither academics nor policymakers have a strong sense of how parties actually respond to government enforcement, to the role of judges, or to other, various institutional actors.

It is very difficult to create formal models of firm behavior that quantify the risk/reward assessment of undertaking a merger, estimating antitrust risk as part of a transaction, dropping a proposed deal, or completing a deal at a certain price based on the risk. Much of merger-related work entails counseling clients at various points in a deal process and meeting with agency staff and leadership, which are not tasks that can be coded through

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314 Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513, 513-16 (2007) (criticizing the influence of rational-choice theory among antitrust lawyers and judges).

315 *Id.* at 516.

316 Robert H. Lande & James Langenfeld, *From Surrogates to Stories: The Evolution of Federal Merger Policy*, ANTITRUST, Spring 1997, at 5, 5; Gregory J. Werden, Luke Froeb & Mikhael Shor, *Behavioral Antitrust and Merger Control* 5-6 (Vanderbilt Univ. Law Sch., Law & Econ. Working Paper No. 10-14, 2010), *available at* http:papers.ssrn.com/sol3/papers.cfm?abstract_id=1612282.

317 For example, questions remain as to the legal treatment of efficiencies in merger analysis. *See, e.g.*, Michael L. Katz & Howard A. Shelanski, *Merger Analysis and the Treatment of Uncertainty: Should We Expect Better?*, 74 ANTITRUST L.J. 537, 547 (2007) ("The overall picture of current merger enforcement practice is, therefore, murky. In some cases the analysis of uncertain events is vague and unspecified, while in others the analysis handles uncertainty by eliminating unlikely events from consideration. There is a tendency to focus on 'the' most likely outcome. The agencies are particularly likely to be dismissive of events that they do not project to take place in the very near future.").

318 KOMESAR, *supra* note 7, at 3-5.

the number of filings, second requests, or case counts.[319] Though there are some good case studies about particular mergers,[320] oftentimes these are written by interested parties. It is unclear if such studies are representative of the larger decision-making process or if the litigated cases are somehow distinct from the larger population of total merger filings or even of filings not made because of merger concerns. Similarly, public discussion of merger control by officials or top practitioners does not focus on the mundane "plain vanilla" merger filings.[321] The merger sessions of the American Bar Association ("ABA") Antitrust Section Spring Meeting rarely discuss a merger that gets cleared within 30 days.[322] Instead, they focus on the high-profile mergers that seem to have greater significance to agency practice and/or case law.[323]

These conferences focus on important cases for good reason. Lots of decision making happens as a result of cases decided by the Supreme Court, the courts of appeal, and the district courts.[324] Decided cases affect the strategy for firms beyond those of the parties involved.[325] They impact the types of cases to bring and not to bring. Yet, decided cases may be unrepresentative of all cases. This is important because if policy recommendations are made on decided cases only, mistaken inferences are likely to guide policy due to the lack of representativeness.[326]

Much of counseling in the merger process surrounds inferences that lawyers make about the current meaning of litigated cases as the agencies choose to view them. Agencies have a gatekeeper function in terms of the kinds of transactions that might be approved or challenged. The stakes are

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319 Transcript of Responses to Qualitative Survey (on file with author).

320 These are primarily high-profile litigated cases. *See, e.g.*, Jonathan B. Baker, *Efficiencies and High Concentration: Heinz Proposes to Acquire Beech-Nut*, *in* THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION AND POLICY 150, 153, 168 (John E. Kwoka, Jr. & Lawrence J. White, eds., 4th ed. 2004); Orley Ashenfelter et al., *Econometric Methods in* Staples 17-18 (Princeton Univ. Program in Law & Pub. Affairs, Working Paper No. 04-007, 2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=529144 (examining the use of econometric evidence in the 1997 Staples/Office-Depot merger litigation).

321 *See* ABA SECTION OF ANTITRUST LAW, 58TH ANTITRUST LAW SPRING MEETING 5 (2010), *available at* http://www.abanet.org/antitrust/at-spring/10/pdf/ATSprMt10_web.pdf (listing a panel discussion on "Vertical and Conglomerate Merger Enforcement Under U.S. and EC Law: Standing Ovation or the Sound of One Hand Clapping?" that discussed recent high-profile cases).

322 *See id.*

323 *See id.*

324 Fredrick Schauer & Richard Zeckhauser, *The Trouble with Cases* 1-2 (Harvard John F. Kennedy Sch. of Gov't, Faculty Research Working Paper RWP09-025, 2009), *available at* http://web.hks.harvard.edu/publications/getFile.aspx?Id=395.

325 *See* Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 49, 49-50 (Thomas Gilovich et al. eds., 2002).

326 *Id.*

high for merging parties to challenge the agency's reading of case law, and such a challenge can take a year or longer.[327]

A number of factors influence the decision-making process of firms on a particular business decision to initiate merger discussions and ultimate merger agreements. These include market dynamics,[328] uncertainty, [329] financing amount and financing time window,[330] personalities and overall quality of the business decision makers,[331] in-house attorneys,[332] outside law firms,[333] agency staff[334] and leadership,[335] and the quality of the judge that might need to adjudicate a merger case.[336] All these factors play a role in the larger decision-making process. The multiple actors involved means there is often no clear-cut answer to explain firm decision making in the antitrust merger setting. While it will be fairly easy to predict the risk/reward tradeoff of Coke announcing that it might try to acquire Pepsi,[337] many other situations are less clear.

In light of the opaqueness surrounding merger control decision making, there is a larger discourse of merger analysis. Discussions on how both antitrust and market forces work in practice create a discourse, which has important ramifications on policy.[338] Who controls discourse can shape the

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327 This risk/reward calculation of challenging an agency's decision making gives the antitrust agencies significant power in the merger review process.

328 Lois M. Shelton, *Merger Market Dynamics: Insights into the Behavior of Target and Bidder Firms*, 41 J. ECON. BEHAVIOR & ORG. 363, 381 (2000); Flavio Toxvaerd, *Strategic Merger Waves: A Theory of Musical Chairs*, 140 J. ECON. THEORY 1, 20 (2008).

329 AVINASH K. DIXIT & ROBERT S. PINDYCK, INVESTMENT UNDER UNCERTAINTY 3 (1994); Vivek Ghosal & Prakash Loungani, *The Differential Impact of Uncertainty on Investment in Small and Large Businesses*, 82 REV. ECON. & STAT. 338, 338 (2000); Jonathan P. O'Brien, Timothy B. Folta & Douglas R. Johnson, *A Real Options Perspective on Entrepreneurial Entry in the Face of Uncertainty*, 24 MGMT. & DECISION ECON. 515, 515 (2003).

330 Sokol, *supra* note 257 , at 60.

331 Dinara Bayazitova, Matthias Kahl & Rossen Valkanov, Which Mergers Destroy Value? Only Mega-Mergers 29 (Oct. 23, 2009) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1502385.

332 Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 292 n.143 (1984) (discussing the relative benefits and costs of certain in-house counsel functions).

333 C.N.V. Krishnan & Paul A. Laux, Legal Advisors: Popularity vs. Performance in Acquisitions 1-2 (Mar. 2007) (unpublished manuscript), *available at* http://www.buec.udel.edu/laux/Prof/Lawyers_070402.pdf.

334 Sokol, *supra* note 280, at 1082-83; Sokol, *supra* note 98, at 582-83.

335 Sokol, *supra* note 98, at 590.

336 Baye & Wright, *supra* note 59.

337 Surely lawyers for Coke and Pepsi would advise against such a merger, while the antitrust enforcers would move to block it (and most probably would succeed in doing so).

338 Michel Foucault, *The Order of Discourse*, *in* LANGUAGE AND POLITICS 108, 110 (Michael J. Shapiro ed., 1984) ("[Discourse] is the thing for which and by which there is struggle, discourse is the power which is to be seized."); Juan F. Perea, *Demography and Distrust: An Essay on American Lan-*

policy agenda among academics and practitioners.[339] If one can control and frame the discourse of antitrust, one can create momentum to affect actual antitrust policy.[340] As Wang Chung sang, "[t]he words we use are strong, they make reality."[341] Practitioners and academics shape the discourse of antitrust at a number of different levels including through articles, hearings, written testimony, comments, and speeches.[342]

Current officials understand this important signaling effect and the use of discourse to create policy.[343] As an example of how discourse shapes policy, Christine Varney stated in her confirmation hearings to head DOJ Antitrust:

> I think that what we've seen in the last eight years is that a lot of economic theory has been used to inhibit prosecuting mergers and other activity that may be impermissible. And when I'm talking about rebalancing economic theory, I'm talking about bringing new rigor to the economic analysis that underpins any prosecution. As I said, I think what we've seen in the sort of—in the shorthand—the Chicago school analysis is a real reluctance for government to go forward and attempt to block mergers in the marketplace.[344]

Varney paints the picture that acceptance of Chicago School beliefs prevented sufficient antitrust enforcement under George W. Bush. If her view of history is correct, then we would have needed to experience a shift in enforcement under Bush that was distinct from enforcement under President Bill Clinton. Her view assumes that the Clinton administration's antitrust enforcement was somehow distinct from the Ronald Reagan and George H.W. Bush administrations that preceded, which used the Chicago School approach.[345] It also assumes that economic analysis was not rigorous under Bush. As some of the existing empirical work and the surveys under-

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guages, Cultural Pluralism, and Official English, 77 MINN. L. REV. 269, 352-54 (1992) (providing an example of the power of discourse in the area of the official use of the English language).

339 *See* Foucault, *supra* note 339, at 110.

340 Kovacic, *supra* note 37, at 377 ("Shape understandings of the past, and you influence views about what the Department of Justice (DOJ) and the Federal Trade Commission (FTC) ought to do in the future.").

341 WANG CHUNG, EVERYBODY HAVE FUN TONIGHT (Geffen Records 1986). How profound can this song be when other lyrics include, "[e]v'rybody have fun tonight, ev'rybody Wang Chung tonight"? The song hit number 2 on the billboard charts in the United States. It was a required song at any dance function that year. Musical taste in the 1980s is even less clear than merger institutional analysis.

342 Kovacic, *supra* note 37, at 377.

343 *See, e.g.*, Jon Leibowitz, Chairman, Fed. Trade Comm'n, Introduction of Philip Lowe and Announcement of Joint FTC/DOJ Project to Modernize the Horizontal Merger Guidelines 1 (Sept. 22, 2009), *available at* http://www.ftc.gov/speeches/leibowitz/090922mergerguideleibowitzremarks.pdf (announcing the beginning of an effort to revise the FTC's and DOJ's Horizontal Merger Guidelines while introducing a conference speaker).

344 *Executive Nominations: Hearing on the Nomination of Christine Varney before the S. Jud. Comm.*, 111th Cong. (2009) (response of Christine Varney to question by Senator Coburn).

345 Kovacic, *supra* note 37, at 377-82 (critiquing the "pendulum" view of antitrust and offering an evolutionary explanation of antitrust development).

taken for this Article suggest, such an interpretation rewrites history somewhat to further Varney's larger political message of the need for a reinvigorated DOJ Antitrust Division.

A focus on discourse leaves any understanding of merger control incomplete. It is not possible to undertake a good institutional analysis based on only a few cases brought or not brought. What does the world really look like, and what do private practitioners, agency staff, and academics really think? How much of existing commentary by practitioners and academics is merely spin? Moreover, after a while, how much do personal views become a function of internalizing client/government positions? A person's personal beliefs may be biased by a few personal experiences or by high-profile agency decisions.[346] Moreover, they might bias their beliefs based on a number of behavioral devices such as availability heuristics[347] and motivated reasoning.[348]

This Article undertakes a survey of antitrust practitioners precisely to weed out some of these biases to create a more informed institutional analysis. In the aggregate, some biases noted above might disappear with enough survey data. Moreover, an anonymous survey allows those practitioners who, at least publicly, may be limited in their ability to speak freely due to client concerns to open up and describe their potentially-opposite personal views. Anonymity allows for an honest conversation about the role of the DOJ, FTC, state and international antitrust enforcers, other regulators, legislators, private parties, and the judiciary without concern for retribution.

B. *Brief Overview of Modern U.S. Merger Control History*

The Merger Guidelines serve as the guiding force in U.S. merger policy.[349] Comparative institutional choice must be weighed with the impact of the Guidelines in mind because of their importance. Prior to the Merger Guidelines, populist tendencies drove U.S. Merger Enforcement.[350]

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346 William E. Kovacic, *Review of* Antitrust Stories, 4 COMPETITION POL'Y INT'L 241, 251-52 (2008) (book review) (discussing the limitations of first person narratives in antitrust).

347 JONATHAN BARON, THINKING AND DECIDING 153-55 (4th ed. 2008); Norbert Schwarz & Leigh Ann Vaughn, *The Availability Heuristic Revisited: Ease of Recall and Content of Recall as Distinct Sources of Information*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 326, at 103, 103.

348 Yuval Feldman & Doron Teichman, *Are All Legal Probabilities Created Equal?*, 84 N.Y.U. L. REV. 980, 995-96 (2009); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 72-73, 90-108 (2004); Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 480-81 (1990).

349 Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 772 (2006).

350 *See, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270, 275-78 (1966).

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Changes in merger enforcement based on economic analysis began with former U.S. Assistant Attorney General Don Turner's 1968 Merger Guidelines.[351] By today's economic standards, the 1968 Merger Guidelines had significant limitations because of their structural emphasis.[352] Yet judged by the IO economics of that time, the 1968 Merger Guidelines made a significant contribution. They pushed economic analysis to the forefront of the merger process.[353]

Other changes shaped merger policy between the 1968 Merger Guidelines and the 1982 Merger Guidelines. In case law, the important turning point occurred in *United States v. General Dynamics Corp.*[354] This case marked the beginning of competitive-effects analysis.[355] In the case, the Supreme Court considered factors that suggested that concentration alone would not impair competition significantly.[356] The Court suggested that competitive effects mattered for merger analysis.[357] At the time of the decision, *General Dynamics* was not viewed as the path-breaking decision that it is today.[358] However, it had a significant impact soon thereafter in the development of case law and policy.[359]

Congress's passage of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 constituted another important change. The Act allowed the antitrust agencies to review mergers prior to consummation by requiring parties to file their proposed mergers for review.[360] It also gave the agencies

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351 U.S. DEP'T OF JUSTICE, MERGER GUIDELINES (1968), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,101, *available at* http://www.justice.gov/atr/hmerger/11247.pdf [hereinafter 1968 MERGER GUIDELINES].

352 *See* DON E. WALDMAN & ELIZABETH J. JENSEN, INDUSTRIAL ORGANIZATION: THEORY AND PRACTICE 598-99 (2d ed. 2001) (summarizing the concentration standards).

353 *See* Oliver E. Williamson, *Economics and Antitrust Enforcement: Transition Years*, ANTITRUST, Spring 2003, at 61, 61 ("With the benefit of hindsight, the field of industrial organization and the enforcement of antitrust were in crisis in the 1960s. Price-theoretic reasoning, with emphasis on monopoly and the real and imagined consequences of barriers to entry, carried the day."). They also paved the way for the incredibly important transformation of the 1982 Merger Guidelines. *See generally* Oliver E. Williamson, The Merger Guidelines of the U.S. Department of Justice—In Perspective 1 (June 4, 2002) (unpublished manuscript), *available at* http://www.usdoj.gov/atr/hmerger/11257.pdf (providing a history of this process). However, economists in both agencies were still relatively marginalized in the 1960s. Lawrence J. White, *Microeconomics and Antitrust in MBA Programs: What's Thought, What's Taught*, 47 N.Y.L. SCH. L. REV. 87, 89 (2003) ("As late as the 1960s, however, economists at both enforcement agencies were generally 'second class citizens' and outside the mainstream of decision-making and policy influence.").

354 415 U.S. 486 (1974).

355 *Id.* at 501-02 (explaining that uncommitted reserves were indicative of a firm's ability to compete in the future in coal rather than historic share of sales).

356 *Id.* at 509-10.

357 *Id.* at 511.

358 Baker & Shapiro, *supra* note 195, at 238.

359 Donald F. Turner, *Observations on the New Merger Guidelines and the 1968 Merger Guidelines*, 51 ANTITRUST L.J. 307, 308-09 (1982).

360 Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (2006).

HeinOnline -- 17 Geo. Mason L. Rev. 1106 2009-2010

better information, included in the filing, with which to determine the competitive effects of a proposed merger.[361] During this same period, the agencies began to hire young economists trained in the latest IO thinking.[362] These economists improved the quality of agency merger analysis.

The emphasis on economic analysis[363] became further embedded in the 1982 Merger Guidelines.[364] Even though the DOJ issued the 1982 Merger Guidelines by itself, the FTC responded the same day with its *FTC Statement on Horizontal Mergers*.[365] The importance of the 1982 Merger Guidelines cannot be overstated. These Guidelines updated the 1968 Merger Guidelines toward a more modern economic understanding.[366] The 1982 Merger Guidelines deemphasized the structural presumption in merger review.[367]

The 1982 Merger Guidelines introduced the hypothetical monopolist test as the paradigm with which to undertake merger analysis.[368] It provided guidance as to which mergers the DOJ might challenge.[369] Introduced as part of the 1982 Merger Guidelines to replace the C4 concentration ratio,[370] the Herfindahl-Hirschman Index provided better guidance for parties to understand market definition and market power issues.[371] Another important effect of the 1982 Merger Guidelines was the use of the Merger Guidelines in shaping case law. The 1982 Merger Guidelines moved antitrust policy beyond where the case law was at the time, in terms of rebuttable presumptions, to focus on the market concentration of the merging firms.[372]

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361 Marian R. Bruno, Assistant Dir., Premerger Notification Office, Fed. Trade Comm'n, Hart-Scott-Rodino at 25 (June 13, 2002), *available at* http://www.ftc.gov/speeches/other/brunohsr25.shtm.

362 Williamson, *supra* note 354, at 6-7 (explaining the importance of developing young staff trained in economic analysis).

363 *Id.* at 4-7 (providing a history of this process).

364 U.S. DEP'T OF JUSTICE, MERGER GUIDELINES (1982), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,102, *available at* http://www.justice.gov/atr/hmerger/11248.pdf [hereinafter 1982 MERGER GUIDELINES].

365 Fed. Trade Comm'n, *FTC Statement on Horizontal Mergers, reprinted in* 42 ANTITRUST & TRADE REG. REP., June 17, 1982, at 12.

366 William F. Baxter, *Responding to the Reaction: The Draftsman's View*, 71 CAL. L. REV. 618, 622-30 (1983) (articulating the basis of the 1982 Merger Guidelines).

367 David Scheffman, Malcolm Coate & Louis Silvia, *Twenty Years of Merger Guidelines Enforcement at the FTC: An Economic Perspective*, 71 ANTITRUST L.J. 277, 280-81 (2003) (explaining the evolution of the 1982 Merger Guidelines in FTC merger analysis).

368 Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, 71 ANTITRUST L.J. 253, 254-59 (2003).

369 *Id.* (providing an overview of the development of the paradigm).

370 The DOJ and the FTC used to measure market concentration using the "four-firm concentration ratio" or "C4 concentration ratio," which looked to the market shares of the top four firms to determine concentration. *See, e.g.*, Tenneco, Inc. v. FTC, 689 F.2d 346, 350, 352-53 (2d Cir. 1982).

371 *See* Stephen Calkins, *The New Merger Guidelines and the Herfindahl-Hirschman Index*, 71 CAL. L. REV. 402, 427-28 (1983) (providing an early critique of HHI because it might mean less enforcement than under CR4); Hillary Greene, *supra* note 350, at 788-96.

372 Baker & Shapiro, *supra* note 195, at 238.

Only in existence for two years, the DOJ revised the 1982 Merger Guidelines in 1984.[373] In comparison to the 1982 Merger Guidelines, the modifications in 1984 were relatively minor. The 1984 Merger Guidelines provided additional changes in five areas:

> First, the market definition test was refined to ensure that 5 percent was not a rule (for evaluating the hypothetical), and the Guidelines hypothetical was generally calibrated to the price at which the product in question currently trades. Second, the structural analysis was expanded to emphasize the potential importance of nonstructural factors . . . . Third, the Guidelines clarified the treatment of foreign competition to ensure that the analysis was analogous to domestic competition. Fourth, the revision indicated that the DOJ would give "appropriate weight to efficiencies in all relevant cases." Finally, the Guidelines indicated that failing divisions would be judged according to standards similar to those applied to failing firms.[374]

The 1984 Guidelines thus solidified a Chicago School approach to merger analysis.[375]

The 1992 Merger Guidelines[376] were an important revision to the 1982 and 1984 Merger Guidelines. The 1992 Merger Guidelines introduced an analytical framework that provided a methodology for working through whether or not a proposed merger might be anticompetitive.[377] The five steps of this analysis, based on the sections of the Guidelines, are: (1) market definition, measurement, and concentration; (2) competitive effects; (3) entry; (4) efficiencies; and (5) failing firm/division. This analytical framework shifted merger analysis from market concentration to competitive effects.[378]

It was not until the 1992 Merger Guidelines that unilateral effects theories became important to merger analysis.[379] Like previous Guidelines,

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373 U.S. DEP'T OF JUSTICE, MERGER GUIDELINES (1984), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,103, *available at* http://www.justice.gov/atr/hmerger/11249.pdf [hereinafter 1984 MERGER GUIDELINES].

374 Scheffman, Coate & Silvia, *supra* note 368, at 283-84.

375 Louis B. Schwartz, *The New Merger Guidelines: Guide to Governmental Discretion and Private Counseling or Propaganda for Revision of the Antitrust Laws?*, 71 CAL. L. REV. 575, 577-78 (1983).

376 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 0 (rev. 1997), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104, *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf [hereinafter HORIZONTAL MERGER GUIDELINES].

377 *Id.* §§0-0.1.

378 Paul T. Denis, *Advances of the 1992 Horizontal Merger Guidelines in the Analysis of Competitive Effects*, 38 ANTITRUST BULL. 479, 503-04 (1993).

379 Paul T. Denis, *The Give and Take of the Commentary on the Horizontal Merger Guidelines*, ANTITRUST, Summer 2006, at 51, 53 (although noting that more recently coordinated effects analysis has been reinvigorated by the Commentary); Gregory J. Werden & Luke M. Froeb, *Unilateral Competitive Effects of Horizontal Mergers*, *in* HANDBOOK OF ANTITRUST ECONOMICS 43, 43 (Paolo Buccirossi ed., 2008); *see also* Jonathan B. Baker, *Why Did the Antitrust Agencies Embrace Unilateral Effects?*, 12 GEO. MASON L. REV. 31, 33-45 (2003). On the importance of coordinated effects and mavericks, see

the 1992 Merger Guidelines allowed for the incorporation of new economic learning.[380] Some areas in which the guidelines had a particularly important impact included entry and uncommitted entry.[381] The 1997 revisions to the Merger Guidelines incorporated efficiencies into merger analysis. The agencies began to challenge mergers in courts using evidence relating to efficiencies.[382]

C. *Bush Antitrust Enforcement*

The perceived decline in antitrust enforcement under the Bush administration and its influence is perhaps the major institutional issue facing merger policy in the United States.[383] It impacts the relative strengths and weaknesses of certain institutions (DOJ versus FTC, private versus public rights of action) and has been the primary focus of antitrust discourse for the past three years.[384] To what extent antitrust enforcement of the Bush years was a function of continuity versus how much was a structural break from the Clinton years remains one of the most controversial issues in antitrust policy.

1. Baker and Shapiro

In 2007, Jonathan Baker and Carl Shapiro released the first version of their "Reinvigorating Merger Enforcement" for the Kirkpatrick Conference on Conservative Economic Influence on Antitrust Policy, held at Georgetown University Law Center in April 2007.[385] The larger paper addressed many complexities in merger enforcement generally—their source, nature, and how to solve them. What caught everyone's attention was the critique of Bush antitrust enforcement. Baker and Shapiro's work had an immediate impact in the academy, among antitrust practitioners, and within the broader non-antitrust community. More than any other work, it has shaped antitrust discourse in the United States since 2007. Its influence is evident in

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Jonathan Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U. L. Rev. 135, *passim* (2002).

380 Jonathan B. Baker, *Responding to Developments in Economics and the Courts: Entry in the Merger Guidelines*, 71 ANTITRUST L.J. 189, 195 (2003).

381 *Id.* at 198-205 (providing discussion of these issues).

382 William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 ANTITRUST L.J. 207, 231-35 (2003).

383 *See, e.g.*, Andrea Agathoklis, *In Their Own Words: Predicting Enforcement Under Varney and Leibowitz*, ANTITRUST, Summer 2009, at 5, 5-6.

384 *Id.*

385 The paper ultimately appeared in final form as a chapter in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, *supra* note 40, at 235.

the popular press,[386] in the Obama antitrust platform,[387] and in the early speeches of Obama's antitrust leadership at both agencies.[388]

Baker and Shapiro claimed there was under-enforcement in mergers under Bush generally and particularly so under the Bush DOJ.[389] There are two bases of support underlying this claim. The first is their historical quantitative analysis of the merger review process.[390] Based upon the number of challenges, as a percentage of adjusted HSR filings (updating the Leary merger study of 2002[391]), merger enforcement was significantly lower than under previous administrations.[392] To translate the percentages into actual cases, Baker and Shapiro claim that for the 2006 and 2007 rates to be in line with historic numbers, the antitrust agencies would have needed to challenge an additional twenty-four mergers per year (with a further breakdown of an additional fifteen challenges at the DOJ and nine at the FTC).[393]

A second basis of support for the claim of Bush under-enforcement is qualitative. Baker and Shapiro interviewed twenty Chambers-ranked[394] antitrust partners in DC. Many respondents suggested that the "'likelihood of successful agency review for the merging firms' for a given horizontal merger is *sharply* higher now (March 2007) than it would have been ten years ago (when Joel Klein ran the DOJ and Robert Pitofsky headed the FTC)."[395] Baker and Shapiro seem to have chosen Chambers-ranked practitioners at least implicitly because elite practitioners in mergers might think differently than non-elite practitioners, perhaps due to deal flow and sophistication of practice.

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386 *See, e.g.*, David Lawsky, *EU's Gain is U.S. Loss in Influence on Antitrust*, REUTERS, Oct. 28, 2007, http://www.reuters.com/assets/print?aid=USL2549299720071028; Steven Pearlstein, *For Consumers, the Raw Deal*, WASH. POST, Apr. 18, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/04/17/AR2007041701820.html.

387 *See* Barack Obama, Statement of Senator Barack Obama for the American Antitrust Institute 1-2 (Sept. 27, 2007), *available at* http://www.antitrustinstitute.org/Archives/pres01.ashx (follow "Read Senator Obama's Statement on Antitrust here" hyperlink).

388 Leibowitz, *supra* note 344; Christine Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Vigorous Antitrust Enforcement in This Challenging Era 5-14 (May 12, 2009), *available at* http://www.justice.gov/atr/public/speeches/245777.pdf.

389 Baker & Shapiro, *supra* note 195, at 235.

390 *Id.* at 244-47.

391 Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105 (2002).

392 Baker & Shapiro, *supra* note 195, at 246.

393 *Id.* at 246-47.

394 Chambers ranks antitrust practitioners via interviews of clients and peers. It seems to be the most important ranking of lawyers around the world.

395 Jonathan B. Baker & Carl Shapiro, *Detecting and Reversing the Decline in Horizontal Merger Enforcement*, ANTITRUST, Summer 2008, at 29, 30 (emphasis added).

2. Harkrider

Baker and Shapiro were not the sole critics of Bush merger policy undertaking empirical work. John Harkrider analyzed 213 transactions that resulted in second requests during the period of 1996 to 2006.[396] He utilized a probit estimation to analyze these transactions for changes across administrations and across the DOJ and the FTC.[397] He found that for second requests reviewed by the Bush DOJ, transactions were 24 percent less likely to have been challenged than under the Clinton DOJ or FTC.[398] This contrasted with the Bush FTC, where second request transactions were not less likely to have been challenged.[399] An open question from his study is whether the change of enforcement between these two periods is a function of over-enforcement in the earlier period or under-enforcement in the later period.[400]

3. Limitations to These Studies

In this Subsection, I identify the various limitations to the Baker and Shapiro and Harkrider studies. The purpose of detailing the limitations to the above studies is not to diminish these important works. Rather, it is to suggest how some of the assumptions and inferences to be drawn from such works may be more limited than the role that these works have assumed in antitrust discourse. These limitations also justify the need for the surveys that I undertook to provide a fuller picture of the relative successes and weaknesses of merger policy in recent years and to explain these outcomes in terms of strengths and weaknesses of broader institutional arrangements.

a. *Different Industries*

The DOJ and the FTC cover different industries, except for cases that go through the clearance process.[401] Whether an agency makes a second request, attempts to a block a deal through preliminary injunction, or grants clearance depends on: (1) which agency has the most competence in the merging industry sector, and (2) the discretion of the agency staff and lea-

396 John D. Harkrider, *Antitrust Enforcement During the Bush Administration—An Economic Estimation*, ANTITRUST, Summer 2008, at 43, 46.

397 *Id.* at 43, 45.

398 *Id.* at 43.

399 *Id.*

400 *Id.* at 47.

401 *See* ABA SECTION OF ANTITRUST LAW, *supra* note 134.

dership. Each agency specializes within certain industries.[402] When certain industries are "hotter" than others, the number of cases that an agency sees could be a function of which industry the agency investigates, as well as the amount of resources the agency has to more fully investigate transactions based upon deal flow. Staff within these merger "shops" may be more or less aggressive than in other shops.[403]

b. *Other Empirical Work Yields Alternative Results*

Traditionally, has there been much of a shift in the priorities and enforcement between administrations? One FTC study that reviewed the Clinton and George H.W. Bush administrations' antitrust records did not find a difference regarding standards across the political divide.[404] A study by Malcolm Coate concludes that FTC merger policy has remained constant across both Republican and Democratic administrations over the past twenty years.[405] His analysis shows that the only significant change in FTC policy has been in the use of efficiencies, as tracked by the Merger Guidelines.[406] Coate also finds that by the mid- to late-1980s, there is no evidence of politics playing a role in merger enforcement.[407] Similarly, academic work by Ghosal finds that merger control has been apolitical since the end of the Ford administration.[408] In yet another study, Coate and Heimert claim—based on confidential data reports—that there has been little change in terms of the types of efficiency claims that merging parties make or the treatment of such claims by FTC staff during the past ten years.[409] There is no similar DOJ study.

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402 *Id.*

403 The more interesting things to measure would be mergers that go through a clearance process through both of the agencies. This would be the natural experiment. However, there is not enough data to determine what the "but for" would be—would the other agency have acted differently?

404 Malcolm B. Coate & Shawn W. Ulrick, *Transparency at the Federal Trade Commission: The Horizontal Merger Review Process 1996-2003*, 73 ANTITRUST L.J. 531, 564 (2005).

405 Malcolm B. Coate, Bush, Clinton, Bush: Twenty Years of Merger Enforcement at the Federal Trade Commission 24 (Sept. 2009) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1314924 ("Little evidence can be found to suggest that the enforcement regime changed [across Bush, Clinton, and Bush administrations] in response to either political control or the specific wording of the Merger Guidelines.").

406 *Id.* at 17-18.

407 *Id.* at 18-19.

408 Vivek Ghosal, *Economics, Politics, and Merger Control*, *in* RECENT DEVELOPMENTS IN ANTITRUST THEORY AND EVIDENCE 125, 148 (Jay Pil Choi ed., 2007).

409 MALCOLM B. COATE & ANDREW J. HEIMERT, MERGER EFFICIENCIES AT THE FEDERAL TRADE COMMISSION 1997–2007 vi (2009), *available at* http://www.ftc.gov/os/2009/02/0902mergerefficiencies.pdf.

c. *Different Levels and Types of Merger and Acquisitions Activity*

The level of merger control activity is not a good indicator for the quality of antitrust enforcement. Mergers and acquisitions ("M&A") activity levels were different in the 1990s than in the 2000s.[410] Overall, merger activity occurs in waves.[411] What is not clear is whether, beyond overall numbers, there were differences in the types of M&A across industries. The differences in horizontal overlaps reported on the initial HSR filings vary over time and, hence, the opportunities to bring merger challenges equally vary. According to Former FTC Chairman Timothy J. Muris, overlaps were higher under Clinton than under Bush.[412] On a related point, some industries may go through waves of consolidation (such as telecommunications in the 1990s) that may make "apples to apples" comparisons difficult to achieve.

Baker and Shapiro counter that Muris's recasting of the horizontal overlaps is not quite apple to apples.[413] They argue that Muris's overlaps were overly broad, based on SIC and NAICS codes.[414] These codes do not correspond with the actual relevant markets involved in horizontal overlap cases.[415] Of course, it is not clear to what extent horizontal overlaps from previous administrations were based upon antitrust relevant markets either. Therefore, even an actual difference might mean that Clinton's antitrust horizontal overlaps are either too large or too small. Of course, this assumes that overlaps were different in the DOJ than in the FTC.[416] Most of the questions of rate and the nature of overlaps will remain unknown because of data limitations.

d. *Different Number of HSR Filings*

One important explanation for the change in the total number of filings involves changes in HSR filing requirements, particularly the increase in the reporting threshold to $50 million in 2001.[417] The threshold for filing

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410 *See* Timothy J. Muris, *Facts Trump Politics: The Complexities of Comparing Merger Enforcement over Time and Between Agencies*, ANTITRUST, Summer 2008, at 37, 38.

411 RALPH L. NELSON, MERGER MOVEMENTS IN THE AMERICAN INDUSTRY 1895-1956 4 (1959); Ramon Fauli-Oller, *Takeover Waves*, 9 J. ECON. & MGMT. STRATEGY 189, 189 (2000).

412 *See* Muris, *supra* note 411, at 38.

413 Baker & Shapiro, *supra* note 396, at 30-31.

414 The SIC and NAICS codes provide industry definitions that enable the agencies to classify mergers and measure market concentration during the merger review process. *North American Industry Classification System Main Page*, U.S. CENSUS BUREAU, http://www.census.gov/eos/www/naics (last visited July 25, 2010).

415 Baker & Shapiro, *supra* note 396, at 30-31.

416 *Id.* at 31.

417 *See* Muris, *supra* note 411, at 37.

has changed substantially such that the total number of mergers and second requests as a percentage of total mergers is not similar.[418] Even given these changes, if one examines the percentage of second requests to enforcement actions of each agency (something akin to field goal percentage of shots made to shots taken) during the Bush years (fiscal year 2002 to January 20, 2009), then the DOJ rate looks similar to previous administrations.[419]

e. *Not Enough Data Points in the Baker and Shapiro Qualitative Study*

Baker and Shapiro only interviewed Chambers practitioners in tiers one through three, and only in the DC market.[420] There are a number of limitations to such interviews. With such a small sample of respondents, the personalities of the individual lawyers and their particular biases may be at play, particularly with regard to limitations on their deals. Further, there may be representativeness problems between the sample and other elite practitioners not included in the survey.

The number of deals in which these elite practitioners were directly involved may be too low overall to be representative of all deals, or even all important deals. It may be that certain merger shops within the DOJ or FTC are overrepresented. The practitioners responding to the survey may be more likely to see deals in certain industries, rather than others, based on the mix of existing clients or on the backgrounds of the partners as DOJ or FTC alumni.

f. *General Data Limitations*

Some level of transparency on mergers exists, as the agencies provide data on merger activity and investigations to Congress.[421] However, this data is reported in the aggregate. The types of evidence and arguments to which the agencies are receptive vary over time.

Although there is not much information from the DOJ on these issues, there is some at the FTC. Early in the Merger Transparency Project, the FTC held discussions with the DOJ on data studies.[422] The Agencies jointly

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418 *See id.*

419 Ilene Knable Gotts & James F. Rill, *Reflections on Bush Administration M&A Antitrust Enforcement and Beyond*, 5 COMPETITION POL'Y INT'L 91, 116 (2009) ("[The DOJ rate] was substantial and well within the historic range of prior administrations.")

420 Baker & Shapiro, *supra* note 195, at 247.

421 *E.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 312.

422 *DOJ/Antitrust: Merger Enforcement Workshop Information (February 17-19, 2004)*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/atr/public/workshops/meworkshop.htm (last visited July 25, 2010).

released an enforcement data report.[423] The FTC followed with the Merger Data summarizing both enforced and closed cases.[424] The DOJ never updated this. A reasonable person might conclude that the DOJ was unable to assemble data on closed cases. With only a single decision maker, the DOJ has less need for formal analysis, and thus cases may close when one person decides that the merger is not anticompetitive. Written records might be scarce. The FTC needs a majority of Commission votes to challenge a merger,[425] so analysis is much more formalized. Given that files exist, coding is just a commitment of resources.

g. *Cheap Consents*

Former FTC Chairman Janet D. Steiger had more cheap consents[426] during her tenure than other FTC chairmen. If the difference in enforcement actions between Pitofsky and Steiger has to do with a difference in the value of cheap consents as part of enforcement, then the underlying numbers that Baker and Shapiro have used do not allow for true "apples to apples" comparisons across administrations. [427] Similarly, the threshold for settling cases at the DOJ may have shifted from the earlier period to the Bush period.[428]

h. *Changes in Case Law, Agency Practice, and Transparency*

Merger case law of decided cases changed between the Clinton and Bush administrations,[429] and these decisions constituted setbacks for agency enforcement. Changes in case law affect the agencies' ability to get future wins in court.[430] Agency leadership may not be willing to bring cases if it knows with enough certainty that it will lose such challenges. One impor-

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423 *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, MERGER CHALLENGES DATA, FISCAL YEARS 1999-2003 1 (2003), *available at* http://www.justice.gov/atr/public/201898.pdf.

424 COATE & HEIMERT, *supra* note 410; Coate & Ulrick, *supra* note 405.

425 Malcom B. Coate & Fred S. McChesney, *Empirical Evidence on FTC Enforcement of the Merger Guidelines*, 30 ECON. INQUIRY 277, 278 (1992).

426 Former FTC Chairman Timothy J. Muris describes a "cheap consent" as a case that an agency settles in which both the agency and the party have invested less effort. Muris, *supra* note 411, at 37. Muris provides the example of "a gerrymandered, small market in a large transaction," explaining that "[t]he parties may grumble, but accept a settlement as a 'tax' on their merger." *Id.*

427 *Id.*

428 Based on practitioner comments.

429 The most important such case was the setback DOJ suffered in *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

430 William H. Page & John E. Lopatka, *Antitrust Injury, Merger Policy, and the Competitor Plaintiff*, 82 IOWA L. REV. 127, 135-36 (1996) (explaining that case law development shapes the differences in agency win totals in court).

HeinOnline -- 17 Geo. Mason L. Rev. 1115 2009-2010

tant case during the Bush years that shifted the government's ability to win a merger challenge in court followed from the DOJ loss in *Oracle/Peoplesoft*.[431]

Changes in case law affect the total number of cases. "Under-enforcement" in mergers is in part a function of the ability to get wins before courts. Pitofsky laments that "the decline of antitrust enforcement against mergers between direct rivals ('horizontal mergers') [under Bush] is the most pronounced and unfortunate effect of the influence of Chicago School economics."[432] Moreover, Pitofsky was one of the biggest critics of Reagan's antitrust enforcement. Nevertheless, the Pitofsky-led FTC of the 1990s did not reach the 1970s levels of FTC enforcement.[433] Since Pitofsky was hostile then and now to the Chicago approach, something else must be at play to explain how Pitofsky's numbers looked similar to those of previous administrations. This is partially due to case law that was less sympathetic to strong enforcement.[434] Empirical work suggests that the dramatic change in merger enforcement began in 1974, the same year that the Supreme Court decided *General Dynamics*.[435]

Other institutional issues might be at play in terms of case counts. The increased use of FTC administrative proceedings to address merger issues simultaneously with court action, which became pronounced at the end of the Bush administration,[436] represents an institutional shift to use the power of the FTC as distinct from the DOJ. This may create a different set of dynamics for practitioners in their decision-making process of whether and when to settle or abandon a deal with the FTC vis-à-vis the DOJ.[437]

One problem in addressing claims of potential under-enforcement is that there are limits on transparency. To have a better sense of what the real world of merger control looks like, one needs to know: who makes the initial HSR filing; which lawyers and law firms represent the merging parties; the particular staffers at the agencies assigned to the transactions; the particular horizontal overlaps in individual HSR filings; and the theories that the parties used before the government in particular cases. Some lawyers may be more prone to second requests than others.[438] It may be that some lawyers appear in more cases with second requests because of greater spe-

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431 *Oracle*, 331 F. Supp. 2d at 1175-76.

432 HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, *supra* note 40, at 233.

433 *See* Ghosal, *supra* note 409, at 146-48.

434 HOVENKAMP, *supra* note 29, at 1-10.

435 Ghosal, *supra* note 409, at 146-48.

436 Brennan & Pugh, *supra* note 156, at 29.

437 As Commissioner Rosch explained in a speech, "Congress concluded that it was in the public interest to grant this judicial authority to the Commission *instead of to the federal district courts*." J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, A Peek Inside: One Commissioner's Perspective on the Commission's Roles as Prosecutor and Judge 11 (July 3, 2008), *available at* http://www.ftc.gov/speeches/rosch/080703nera.pdf.

438 According to my discussions with both current and former DOJ and FTC staff.

cialization. Alternatively, some lawyers may be more prone to second requests as a function of trust (or lack thereof) with the agencies.[439] Other lawyers may simply be more skilled than others in advocating their position regardless of the facts. The same may be true with economic experts hired by the parties to support their positions. The reason why some deals receive second requests more than others might be a function of the agency staff. Sometimes a particular merger shop might be more or less prone to second requests or to challenge a deal.[440]

In a number of ways, transparency on merger issues has increased. Increased transparency can shape the raw numbers of case filings, second requests, deal abandonments, settlements, and court challenges. Increased transparency in merger control includes a series of publications in 2002 and 2003 on the merger review process.[441] Additional efforts culminated in the 2006 joint DOJ/FTC *Commentary on the Horizontal Merger Guidelines*.[442] Greater transparency by the agencies may have contributed to a better sense of what deals might face investigation. In important matters where the DOJ decided not to challenge a proposed merger, such as in the *XM/Sirius* or *Maytag/Whirlpool* mergers, the DOJ released a statement explaining the rationale for allowing the deal to proceed without a challenge.[443] Increased transparency has reduced uncertainty.[444] Consequently, certain types of mergers may not be attempted or certain investigations may be settled earlier or with upfront divestitures suggested because of a better idea of what arguments will prevail.

Finally, it may be that the major point of contention over a transaction may have shifted to earlier in the HSR process. The critical point of negotiation between the parties and the agencies may no longer be before the courts or with agency leadership. Instead, it may occur at the agency staff level. The standards for winning a preliminary injunction against merging

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439 *Id.*

440 *Id.*

441 *Frequently Asked Questions About Merger Consent Order Provisions*, FED. TRADE COMM'N, http://www.ftc.gov/bc/mergerfaq.shtm (last visited July 25, 2010); *FTC Initiates "Best Practices Analysis" for Merger Review Process*, FED. TRADE COMM'N, http://www.ftc.gov/opa/2002/03/bcfaq.shtm (last visited July 25, 2010); *Statement of the Federal Trade Commission's Bureau of Competition On Guidelines for Merger Investigations*, FED. TRADE COMM'N, http://www.ftc.gov/os/2002/12/bcguidelines021211.htm (last visited July 25, 2010); *Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies*, FED. TRADE COMM'N, http://www.ftc.gov/bc/bestpractices/bestpractices03401.shtm (last visited July 25, 2010).

442 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (2006), *available at* http://www.ftc.gov/os/2006/03/Commentaryon theHorizontalMergerGuidelinesMarch2006.pdf.

443 Press Release, U.S. Dep't of Justice, Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings, Inc.'s Merger with Sirius Satellite Radio Inc. (Mar. 24, 2008), *available at* http://www.justice.gov/opa/pr/2008/March/08_at_226.html.

444 Transcript of Responses to Qualitative Survey (on file with author).

parties changed during the Bush administration,[445] and the relevant standards for second requests and challenges alike affect the merging parties' decision-making calculus.[446] Consent decrees are far more the norm rather than court challenges.[447] The kinds of remedies that the agencies might seek and the types of arguments that the agencies may be more or less prone to accept may have changed between the Clinton and Bush administrations and across agencies. This may affect the total amount of mergers filed and challenged.

D. *Methods of Current Study*

The current study aims to move beyond some of the traditional data limitations to develop a more informed view of merger control. By doing so, it is possible to undertake a more nuanced comparative institutional analysis of the strengths and weaknesses of the merger system. The limit of practitioner views is that oftentimes they prove unsystematic and unverifiable.[448] To address these concerns, I attempted to create a more systematic way of reaching a broader set of practitioner experiences that make up the decision-making process. I do so using two survey instruments. Each survey respondent was contacted twice for both types of surveys. I contacted all respondents by e-mail. This survey has collected as much data as possible and has minimized selection bias.[449] Respondents in the qualitative and quantitative web surveys overlap but are distinct.

The first survey was a quantitative online survey of antitrust practitioners. Additionally, I created a qualitative survey of elite antitrust practitioners, as measured by Chambers rankings, that averaged thirty-five minutes per practitioner in asking specific questions as to their practice and issues that emerge from it based on their particular expertise. This second survey was not anonymous in that I selected practitioners because of their expertise (although the actual responses were coded so as to preserve the anonymity of respondents).

Social scientists have recognized the value of combining quantitative and qualitative work.[450] I use both because of the limits of asking close-

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445 *See* FTC v. Whole Foods Market, Inc., 548 F.3d 1028, 1028 (D.C. Cir. 2008).

446 Michael L. Weiner, *Antitrust and the Rise of the Regulatory Consent Decree*, ANTITRUST, Fall 1995, at 4, 4 ("Consent decree settlements resolving . . . Antitrust Division challenges to proposed acquisitions and other conduct are now much more the rule than the exception.").

447 *See id.*

448 Kovacic, *supra* note 313, at 133-34.

449 GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUANTITATIVE RESEARCH 23 (1994); Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 99 (2002) (explaining the importance of properly selecting observations).

450 Sidney Tarrow, *Bridging the Quantitative-Qualitative Divide in Political Science*, 89 AM. POL. SCI. REV. 471, 472 (1995) (citing KING, KEOHANE & VERBA, *supra* note 450).

HeinOnline -- 17 Geo. Mason L. Rev. 1118 2009-2010

ended questions that do not allow for development of the rich complexity of antitrust merger issues.

This Article represents an attempt to understand antitrust compliance as it is practiced. The quantitative survey was sent via e-mail to various ABA antitrust list serves in August 2008 and followed up with a reminder in September 2008. The survey was for private lawyers in the United States to respond to thirty-five questions related to antitrust and their backgrounds.

The survey data (both qualitative and quantitative): (1) uses summaries of the data collected on antitrust to learn about what is really happening in terms of institutional strengths and weaknesses in the merger control process; and (2) uses the findings on merger control to suggest applications of institutional analysis in antitrust more broadly. Causal inferences can also be drawn from the data regarding merger control. First, the DOJ was not less aggressive in enforcement relative to historic standards for over half of the respondents. For nearly half of the respondents, there was a small change "at the margins."[451] Second, there was no change in enforcement levels between the Clinton FTC and Bush FTC. These research questions both contribute to existing knowledge in the area of merger control and have implications for merger practice through potential improvements to its institutional structures.[452] Though previous studies examined merger control under the Bush administration, this is the first such study that uses survey data to explain whether the current institutional structures of merger control are effective and whether there was decreased aggressiveness on the part of the Bush DOJ.

I tested the data with a number of hypotheses. The quantitative survey is more limited because of the number of questions specific to mergers (the survey included cartel and non-cartel enforcement questions as well). The following hypotheses were tested:

(1) There was less merger enforcement under Bush from the DOJ;
(2) There was less merger enforcement under Bush from the FTC;
(3) The analytical quality of judges on antitrust issues has improved relative to ten or twenty years ago;
(4) Greater transparency by the antitrust agencies has improved business decision making;
(5) The merger process is too costly for firms;

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451 The use of the term "at the margins" is important. Baker and Shapiro correctly suggest a change at the margins may be enough to make a relative difference in merger enforcement. Indeed, most antitrust changes with effects occur at the margins. However, it is not a seismic shift in enforcement, as antitrust discourse has labeled it, if slightly over half of respondents felt no shift at all and most of the remainder felt only a small shift.

452 Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 55 (2002) (suggesting that research design must have both academic and real world importance). Section 6 of their article explains selection bias and efforts made to minimize it in the two survey instruments. *Id.* at 76-80.

(6) International merger control has improved in terms of process;
(7) International merger control has improved in terms of substantive analysis employed by non-U.S. agencies;
(8) State merger control is a net loss in national mergers;
(9) Private rights are a net loss in merger control; and
(10) Sector regulation is a net loss in merger control.

Future research into this area could examine longitudinal data. Such data would explain temporal changes in enforcement and reactions by firms to such enforcement. Unfortunately, this was the first such study, so such longitudinal data does not exist.

1. Web-Based Quantitative Survey

Web-based surveys have become increasingly used for data collection.[453] A number of law and economics professors (both antitrust professors and survey methodology professors) reviewed earlier versions of the survey to ensure facial validity of the survey questions. Current DOJ and FTC staff who previously worked in private practice pretested the survey questions. As a result of these efforts, I modified, added, or dropped a number of questions.

The data for this study comes from an online survey, which was launched at www.surveymonkey.com. The survey sample is 234 experienced antitrust lawyers from a survey population of 1,203 practitioners.[454] The survey instrument asked thirty-four questions and was composed of three sections: mergers (business combination of two or more firms), cartels (illegal price fixing among two or more competitors), and non-cartel enforcement (primarily issues of monopolization by a single firm).

The web-based survey was a list-based survey sent to a closed set of potential respondents of target individuals (ABA Antitrust Section Members). The survey was a probability survey in that every member of the ABA antitrust section listserv had an equal chance of being selected. Some studies suggest that internet-based surveys have similar response rates to paper-based surveys.[455] Web response rates range from 7 percent to 44 percent.[456] My response rate of 19 percent falls within this survey range.

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453 DON A. DILLMAN, MAIL AND INTERNET SURVEYS 8 (2d ed. 2006).

454 This number is based on removing foreign practitioners, government practitioners, law school students, non-lawyer economic consultants, and others from the membership lists of the listservs.

455 Philip Ritter et al., *Internet Versus Mailed Questionnaires: A Randomized Comparison*, 6 J. MED. INTERNET RES. 1, 6 (2004). *But see* Pam Leece et al., *Internet Versus Mailed Questionnaires: A Randomized Comparison (2)*, 6 J. MED. INTERNET RES. 30, 38 (2004) (suggesting lower response rates from internet based surveys).

456 MATTHIAS SCHONLAU, RONALD D. FRICKER, JR. & MARC N. ELLIOTT, CONDUCTING RESEARCH SURVEYS VIA E-MAIL AND THE WEB 20 (2002).

The survey used "radio buttons" rather than drop down pick lists because radio buttons are less prone to non-responsiveness and accidental answer changes.[457] Answers were based on questions one through five to create mean responses to survey questions.

2. Descriptive Findings of the General Practitioner Survey

Survey question one asked "[i]n the past two years, what percentage of all of your professional legal time on matters is merger related?" Of those that answered for whom the question was applicable, for 52 percent of respondents, it was between 0-20 percent of their work. For 19 percent of respondents, merger work was between 21-40 percent of their work. For the remaining 29 percent, it was 41 percent or more of their work.

The next survey question, question two, asked "[i]n the past two years, how many proposed mergers (from early thoughts about the proposed deal to the point of just before an HSR filing) were you personally (at any stage of the process) consulted by the parties that required an HSR filing?" The purpose of this question was to capture all potential merger-related activity by practitioners that would not necessarily be included in the government-released amount of HSRs filed, and to see how many practitioners had a significant merger practice in terms of deal volume. Of those respondents for whom the question was applicable, 46 percent were personally involved in one to five deals, whereas the remainder had more than five such deals.

Question three followed up on question two. It asked of those proposed mergers in question two, "how many of the deals were abandoned (rather than restructured) primarily on antitrust grounds as part of the risk-reward calculation of doing the deal prior to HSR filings?" The idea behind this question was to gauge how much antitrust risk factors impeded potential mergers. For most respondents, the question was not applicable. For those who did respond, the vast majority (89 percent) reported it happened one to five times during the two-year period. Question four also followed up by asking "[w]hat is the percentage of these abandoned deals as a percentage of all of your number of deals for merger work?" Of those who responded for whom the question was applicable, 84 percent said that such abandoned deals encompassed between 0 and 20 percent of their total merger work. The remainder responded that it happened more frequently.

In question five, the survey asked respondents "[o]f those HSR filings that were made, how many of the deals were abandoned (as opposed to restructured) after filing because of antitrust concerns?" For most respondents, this question was not applicable. For those respondents for which the

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457 Benjamin Healey, *Drop Downs and Scroll Mice: The Effect of Response Option Format and Input Mechanism Employed on Data Quality in Web Surveys*, 25 SOC. SCI. COMPUTER REV. 111, 111 (2007).

question was applicable, 96 percent stated that it happened one to five times. The remainder responded that it happened more frequently. Question six put question five into context by asking about the frequency of such outcomes to total deal work. It asked "[w]hat is the percentage of these abandoned deals as a percentage of number of deals of your merger work?" For the respondents for whom the question was applicable, 95 percent answered that it was not more than 20 percent of their total merger work. The remainder stated that it was greater than 20 percent.

Question seven focused on the costs of merger control in regard to competition and over-deterrence. It asked, "[h]ow often do you think, on the matters that you personally have worked on, that the U.S. antitrust regime deters mergers that would not be anticompetitive (not including the cost of delay)?" Of those who responded for whom the question was applicable to their practice, 5 percent answered that it was frequent, 24 percent answered often, whereas 70 percent answered never. This suggests that most antitrust enforcement decisions undertaken are sound, even according to the lawyers that represent the merging parties. The results were very interesting as between those that answered "often" and "never." Statistical analysis of these responses in Subsection 3, infra, sheds light on the nature of these differences.

The purpose of question eight was to gauge the Baker and Shapiro claim that Bush antitrust merger enforcement needed reinvigoration. Question eight asked, "[w]hat is your perception of the current merger enforcement by U.S. federal antitrust agencies?" For those that found the question applicable to their own practice, 39 percent found that current practice (at that time, under the Bush administration) was efficiency enhancing, 32 percent found that current agency practice was neutral, and 30 percent found that current practice was efficiency degrading. With only 30 percent of respondents believing that Bush antitrust was efficiency degrading, this weakens the basis of the Baker and Shapiro claim of Bush under-enforcement.

Questions nine and ten asked about the effectiveness of the antitrust agencies on merger issues under Bush in historical context vis-à-vis enforcement ten and twenty years ago. Ten years prior to the survey (i.e., 1998) coincided with the aftermath of the *FTC v. Staples, Inc.*[458] case. That case was a landmark decision because of its use of econometric analysis and the application of a credible evidence standard for efficiencies.[459] In terms of analytical shifts during that same time, one milestone was the FTC's 1996 report, *Anticipating the 21st Century: Competition Policy in*

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458 970 F. Supp. 1066 (D.D.C. 1997).

459 Orley Ashenfelter et al., *Empirical Methods in Merger Analysis: Econometric Analysis of Pricing in* FTC v. Staples, 13 INT'L. J. ECON. BUS. 265, 277 (2006).

HeinOnline -- 17 Geo. Mason L. Rev. 1122 2009-2010

the New High-Tech, Global Marketplace.[460] The report articulated the need to consider issues of magnitude and probability in its merger efficiency analysis.[461] Roughly the same percentage of respondents thought that merger enforcement was significantly or moderately efficiency enhancing ten years prior (i.e., 1998) while 20 percent found the opposite to be true. This suggests that there has been a small increase in the number who find merger enforcement to be less efficiency enhancing now than before.

When asked about the quality of merger enforcement twenty years prior to the survey (i.e., 1988), 19 percent responded that it was either significantly or moderately efficiency enhancing, while 26 percent thought the opposite. One important change between ten and twenty years prior to the survey was the 1992 Merger Guidelines. These questions on perception suggest that practitioners believe that the 1992 Merger Guidelines have improved the quality of merger analysis.

The final merger-related question went to the issue of merger costs. The question asked, "[i]n your personal experience in terms of the internal costs of antitrust merger review (time spent on lawyer hours, internal client hours, economic experts hours, etc.), is the U.S. merger-review process more costly now than ten years ago?" Of respondents for whom the question was applicable, 76 percent responded that the cost of mergers had increased, 12 percent responded that costs had remained constant, and 12 percent believed that merger costs had decreased.

The survey used a number of questions to identify the characteristics of respondents. Some of these questions explored potential ideological bias, as the questions had a subjective element to them. Among respondents, in presidential elections, 38 percent tended to vote Republican, 58 percent voted Democratic, and 4 percent voted "Other." To determine antitrust ideological bias, the survey asked about the respondent's views on antitrust economics and asked the respondent to identify himself as either Chicago School (43 percent) or Post-Chicago School (57 percent). That so many respondents self-identify as both Democrats and post-Chicago in their orientation strengthens the validity of the findings that the quality of merger analysis under Bush, as measured in questions eight to ten, was efficiency enhancing or neutral, as opposed to Pitofsky's lamentation.[462]

Some of the bias of respondents might have to do with the number of years of practice that they bring to their understanding of antitrust. Of those that responded to the survey, 4 percent identified as having practiced for

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460 1 FED. TRADE COMM'N, ANTICIPATING THE 21ST CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE (1996), *available at* http://www.ftc.gov/opp/global/report/gc_v1.pdf (addressing changes in the high tech marketplace).

461 *Id.* at 27.

462 Perhaps the deciding factor is not political or economic ideology but that sixty-seven respondents primarily represented the defense side of antitrust enforcement. Lawyers may believe their clients' positions.

HeinOnline -- 17 Geo. Mason L. Rev. 1123 2009-2010

one to five years, 12 percent as having practiced five to ten years, 24 percent with a practice of eleven to twenty years, 25 percent as practicing twenty-one to thirty years, and 36 percent as practicing thirty-one or more years.

An antitrust practitioner's type of work might lead to various biases in terms of what he believes to be the frequency and the type of antitrust enforcement occurring nationally. The survey distinguished between in-house and law firm practitioners. No respondents identified as exclusively in-house plaintiff, and a mere 1 percent identified as in-house primarily plaintiff. On the defense side, 3 percent of respondents identified as in-house exclusively defense, while 9 percent of respondents identified as in-house primarily defense. Law firm practitioners constituted the remainder of respondents to the survey. 1 percent identified as exclusively plaintiff, and 6 percent as primarily plaintiff. 13 percent of respondents identified as law firm exclusively defense, while 67 percent identified as primarily defense.

Previous government experience might also shape the way that practitioners feel about government antitrust enforcement. The survey asked "[p]rior to private practice, have you ever worked as an attorney for the Department of Justice Antitrust Division, Federal Trade Commission[,] or for a State antitrust enforcer on antitrust matters?" 32 percent responded yes, and 69 percent responded no.

Another factor that might affect a respondent's subjective responses would be the breadth of work that they see based on the position that they hold within their law firm. A more senior person might have oversight over a significant number of people even though their ability to spend time on any one particular matter might be more limited. 57 percent of respondents identified themselves as a Partner, 20 percent as Counsel/Of Counsel, 12 percent as an Associate, and 12 percent as "Other."

3. Statistical Analysis of the General Practitioner Survey

The web-based study employs cross-tabulations to identify the relationship between independent and dependent variables and to determine whether the factors made a difference by comparing differences between groups. Z tests are used to compare the proportions from two groups to determine if they are significantly different from one another.[463] Since most of the variables have more than two groups, the Bonferroni method[464] is used to adjust the significance values of the Z tests for multiple comparisons.

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463 *Z-Test—Basics and the Different Z-Tests*, EXPERIMENT-RESOURCES.COM, http://www.experiment-resources.com/z-test.html (last visited July 25, 2010).

464 Sture Holm, *A Simple Sequentially Rejective Multiple Test Procedure*, 6 SCANDINAVIAN J. STAT. 65, 68 (1979).

In attempting to run regression analysis on the practitioner survey data results, I found that almost all of the independent variables were not significant. Given this problem, I used cross tables.[465] Most questions did not show significant group differences. After I combined some categories, some groups' sample sizes were still too small to make a group comparison, such as question five ("Of those HSR filings that were made, how many of the deals were abandoned (as opposed to restructured) after filing because of antitrust concerns?") and question six ("What is the percentage of these abandoned deals as a percentage of number of deals of your merger work?"). The results can be found in Appendix B to this Article. The following sub-subsections address merger-related questions using cross tables.

a. *Question Two: "In the past two years, how many proposed mergers (from early thoughts about the proposed deal to the point of just before an HSR filing) were you personally (at any stage of the process) consulted by the parties that required an HSR filing?"*

According to lawyers' answers about the number of proposed mergers requiring a HSR filing, on which lawyers were personally consulted by the parties in the past two years, I divided the lawyers into three groups: one to five proposed mergers ("group A"), more than five proposed mergers ("group B"), and not applicable ("N/A") ("group C"). Compared to group A lawyers, group B lawyers are significantly more likely to spend more than 40 percent of professional time on merger-related matters. In addition, the proportion of group B lawyers who have six to ten years of practice experience is greater than the proportion of group A lawyers with six to ten years of practice experience.

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[465] For statistical analysis, larger samples are better than smaller samples (all other things being equal) because larger samples tend to minimize the probability of errors, maximize the accuracy of population estimates, and increase the generalizability of the results. So sample size is very important for regression analysis. Since Multiple Linear Regression ("MLR") runs every analysis on a different sample, it requires the sample size to be adequate in each categorical level. As a rule of thumb, Peduzzi et al. recommend that the smaller of the classes of the dependent variable have at least 10 events per parameter in the model. *See* Peter Peduzzi et al., *A Simulation Study of the Number of Events Per Variable in Logistic Regression Analysis*, 49 J. CLINICAL EPIDEMIOLOGY 1373, 1373 (1996). The reason for this is that with too small a class, any estimates generated may not be both reliable and unbiased estimates of the qualities of a larger universe of antitrust practitioners. The practitioner survey data results did not fit this rule very well. First, the goodness of fit test in the regression analysis assumes that for cells formed by the categorical independents, all cell frequencies are ≥ 1 and no more than 20 percent of cells are < 5. However, for question two in the data, 57 percent of cells are <5. So the data does not meet this requirement. Second, when I ran the models, I always got high parameter estimates, which may also signal inadequate sample size. I tried to combine levels of some variables and rerun the models, but the results were still not good.

Similar to group A lawyers, more than half of group B lawyers have over eleven years of practice experience, currently handle primarily defense at a law firm, have a current title of "Partner," and have never worked as an attorney for the DOJ Antitrust Division, the FTC, or a State antitrust enforcer on antitrust matters.

b. *Question Seven: "How often do you think on the matters that you personally have worked on that the U.S. antitrust regime deters mergers that would not be anticompetitive (not including the cost of delay)?"*

Lawyers who work on antitrust matters are asked how often—based on the matters that they have worked on personally—they think the U.S. antitrust regime deters non-anticompetitive mergers. Based on their answers about the frequency, lawyers are divided into four groups: frequently/often ("group A"), sometimes ("group B"), seldom/never ("group C"), and N/A ("group D"). It is not surprising that most of lawyers in group C who seldom/never think that their past experiences indicate that the U.S. antitrust regime prevents mergers that would not have anticompetitive effects. Compared to group C, group B lawyers are more likely to think the current merger enforcement by U.S. federal antitrust agencies is moderately/significantly efficiency degrading. The group comparison results indicate that there is no other significant difference among group A, B, and C.

4. Qualitative Interviews of Elite Practitioners

Qualitative methodology has some advantages over quantitative methods. Qualitative methods allow for more contextualized data.[466] They also provide for a more detailed examination of issues through closeness to people and the daily issues that they confront. Qualitative interviews provide for greater interaction and the study of dialogue understandings of phenomena.[467] Specific to the antitrust merger study, the qualitative interviews provided greater depth in exploring outcomes of respondents, as compared to the quantitative survey, and the ability to evaluate evolving antitrust enforcement.

From August to September 2009, I completed 117 phone interviews of Chambers-ranked antitrust specialists located in California, Florida, Illinois, Pennsylvania, Massachusetts, New York, North Carolina, Texas, and

466 Jeff Goodwin & Ruth Horowitz, *Introduction: The Methodological Strengths and Dilemmas of Qualitative Sociology*, 25 QUALITATIVE SOC. 33, 44 (2002).

467 *See* BENT FLYVBJERG, MAKING SOCIAL SCIENCE MATTER: WHY SOCIAL INQUIRY FAILS AND HOW IT CAN SUCCEED AGAIN 83 (Stephen Sampson trans., 2001).

Washington, DC. There are 319 Chambers-ranked antitrust practitioners in those states.[468] This was a response rate of 37 percent for the qualitative survey of elite practitioners. Both the number and geographic scope of practitioner responses were significantly greater than the Baker and Shapiro interviews.

The qualitative interviews of elite antitrust practitioners were intended to determine if the general survey reflected the same sort of concerns that elite practitioners faced in practice. Elite practitioners are more likely to have client matters that represent the more difficult cases decided "at the margins," and they are more likely to deal with cutting-edge issues in merger analysis and agency responses to novel theories.

I conducted each of the interviews by myself. I took notes during all interviews. All interviews were phone interviews. Each of the interviews began with close-ended questions regarding employment background. Thereafter, the qualitative interviews took an "Interview Guide" approach. This approach utilizes open-ended questions with similar questions across interviewees. The Interview Guide approach uses an outline of issues that will be covered and where the order or working can be changed flexibly during the conversation to guide the discussion.[469] The order and flow of questions varied somewhat due to the answers provided. I pretested the survey in summer 2009 among current DOJ and FTC staff that had prior private practice experience and among antitrust law professors.

In this study, the qualitative survey conversations only went into detail on merger analysis if the practitioner spent at least 40 percent of their time on merger-related work. This cutoff was to ensure that practitioners who responded had expertise on merger issues.

5. Qualitative Interview Findings

a. *Hypothesis One: There Was Less Merger Enforcement Under Bush from the Department of Justice*

The results are ambiguous. A little over half of respondents stated that, in their practice, they experienced no change in enforcement from Clinton to Bush. Of the remaining roughly half of respondents, on the margins, DOJ enforcement was less aggressive specifically when it came to the use of

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468 CHAMBERS & PARTNERS, CHAMBERS USA: AMERICA'S LEADING LAWYERS FOR BUSINESS 391, 607, 785, 976, 1260, 1558, 1822, 1951, 2083 (2008).

469 The disadvantage to this approach is that some data comparisons will be difficult because different respondents respond to questions that are not all the same. On qualitative interview methodology, see generally STEINAR KVALE, INTERVIEWS: AN INTRODUCTION TO QUALITATIVE RESEARCH INTERVIEWING 144-46 (1996) (discussing qualitative interview methodology); MICHAEL QUINN PATTON, QUALITATIVE EVALUATION AND RESEARCH METHODS 283-89 (2d ed. 1990).

efficiency or entry arguments. Some deals that should have gone to a second request did not. Other deals that went to a second request that might have been challenged were not. This seemed to be particularly true for three to two mergers and sometimes even for two to one mergers. Part of the change on the margins was attributed to a shift in DOJ leadership under Tom Barnett, though some of the practitioners believed that the shift happened earlier under Hew Pate.

In terms of whether there was a "sharply higher" rate of success of merger clearance against the DOJ (to use the Baker and Shapiro language), only three practitioners believed that there was a sharply higher success rate. I asked about a sharply higher success rate in the following context. If an elite practitioner thought that there was a sharply higher success rate, as a good business counselor to clients, they would actively suggest that their clients and/or the corporate partners at their firm do deals because the chances of success were better. In nearly all cases, elite practitioner respondents did not actively suggest that their firm's transactional partners or their clients create deals that they otherwise would not have thought to do based on their perception of sharply less antitrust scrutiny by the DOJ.

A number of practitioners believed that *Oracle/Peoplesoft* chilled the DOJ's appetite to challenge mergers. Part of this had to do with the perception that the DOJ did not have a strong litigation team even if they found a case that they wanted to try because there had been so little litigation at the agency. Some suggested that morale suffered at the DOJ as more aggressive case handlers at the agency were frustrated by front office reluctance to support these cases. In some instances, the practitioners believed that this created a chilling effect within the agency that made staff less likely to recommend aggressive enforcement in cases on the margins.

A slight majority of practitioners felt that there was no change because the particular industries in which they had clients had the same staff as during the Clinton years and that those staffers were equally aggressive under Bush. Some economists assigned to particular industries were just as aggressive under the Bush DOJ as they were during the Clinton years.

As between the DOJ and the FTC, practitioners felt that there was a difference in enforcement, although for reasons different than those given by Baker and Shapiro. The big issue for differences in the enforcement record of the agencies was attributed to their disparate institutional structures. Respondents generally believed that regardless of administration, it is more difficult to get a deal through the FTC than the DOJ because of the dynamics among agency staff, front office leadership, and the Commissioners. Certain Commissioners have particular issues of interest which interjects additional deal complexity. Adding to the dynamics of FTC agency decision making was the particular mix of Commissioners under Bush.

HeinOnline -- 17 Geo. Mason L. Rev. 1128 2009-2010

b. *Hypothesis Two: There Was Less Merger Enforcement Under Bush from the FTC*

Baker and Shapiro claim that there was less enforcement at the FTC under Bush, although this was less pronounced than the decline in merger enforcement at the DOJ.[470] They make the point that the FTC challenged mergers at roughly the historical rate during Muris's tenure.[471] The shortfall occurred when Deborah Platt Majoras was Chairman. The overwhelming majority of practitioners believed that FTC merger control remained constant between the Clinton and Bush years.

Uniformly, respondents did not have firsthand experience of reduced enforcement in mergers under the Bush FTC. Practitioners overall gave Chairmen Muris and William Kovacic very strong marks for their leadership and intellectual abilities. The dynamics within the Commission seemed to change after Majoras left the Chairman position. Many respondents viewed Commissioner Tom Rosch as a wildcard Commissioner. Moreover, most respondents believed that Rosch had significant influence over Commissioners Jon Liebowitz and Pamela Jones Harbour.

Practitioners also mentioned that particular merger shops within the FTC pushed for more scrutiny on deals than others. Data backs up these observations. The FTC provides industry-specific tables in the Merger Retrospective Reports 1996-2003, 1996-2005, and 1996-2007. The tables break out oil, chemicals, grocery, and pharmaceutical data. These tables show that, in some areas (such as the oil industry), there is enforcement at lower levels of concentration.[472]

c. *Hypothesis Three: The Analytical Quality of Judges on Antitrust Issues Has Improved Relative to Ten or Twenty Years Ago*

Respondents expressed mixed feelings on judicial quality. A strong majority of practitioners stated that the overall quality of analysis had improved, but that the quality remained highly variable. Most of the practitioners mentioned that not all judges had the analytical ability to comprehend antitrust cases. Practitioners also noted that some of the judges perceived to be "smarter" overall and/or with antitrust experience were at times involved in poor quality decisions if they were too busy to devote sufficient time to the antitrust issues in the case.

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470 Baker & Shapiro, *supra* note 195, at 244-51.

471 *Id.* at 246.

472 FED. TRADE COMM'N, HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996-2005 7-13 (2007), *available at* http://www.ftc.gov/os/2004/08/040831horizmergersdata96-03.pdf.

Respondents did not provide uniform answers as to why it was that judicial quality had improved. Some suggested that it was judicial training programs in law and economics. Others suggested that it was favorable case law (pro-defendant) that meant that judges were more effective. The more plaintiff-side work that a lawyer did, the more concerned the lawyer was on the ideological impact of Republican-appointed judges. According to plaintiff-lawyer respondents, Republican appointees decided cases "incorrectly" when they made pro-defense decisions. Defense side respondents showed similar bias in claiming improved judicial quality stemming from judicial understanding of complex issues when it meant pro-defense outcomes. This strong belief in judicial variance on antitrust matters supports the recent empirical work of Baye and Wright discussed earlier in this Article.

d. *Hypothesis Four: Greater Transparency by the Agency Has Improved Business Decision Making*

The survey results indicate a divide between those practitioners within the beltway and those outside the beltway. Those practitioners outside the beltway whose firms did not have a DC office or who themselves were not frequently in DC for merger discussions with the agencies (in nearly all cases NY practitioners) indicated the existence of an insider community on merger issues, which had better day-to-day understandings of subtle shifts in language and practice at the agencies. This seems to be due to a revolving door between law firms and the agencies at both junior and senior levels and to regular repeat interactions with the agencies. For outsiders to this group, some believed that they could get enough information by reading agency official speeches and following latest developments from agency releases and court cases. Others believed that there was not enough transparency, particularly at the individual case level. A number of respondents believed that the DOJ has not been as forthcoming with information as the FTC.

Transparency is an important issue in the area of merger control, and a number of practitioners discussed its importance. How much transparency is sufficient? This question led to a wide variety of responses. The variation may be due to the fact that too much transparency might be viewed as bad for antitrust lawyers. After all, antitrust lawyers bill at premium rates precisely because of the great complexity of their work. If others could replicate it, then it would not be as valuable to clients.

Current FTC Chairman Jon Liebowitz recently stated, "[f]rom my perspective, the current Guidelines do not explain clearly enough to busi-

HeinOnline -- 17 Geo. Mason L. Rev. 1130 2009-2010

nesses how the agencies review transactions."[473] At some fundamental level this will always be the case. In a specialized area of complex regulatory law, there are whatever guidelines an agency (or in our case agencies) will promulgate and then small groups of insider lawyers who will have enough repeat business to really understand the meaning of the guidelines via their agency contacts. For others, the guidelines will remain unclear unless the agencies create a 600-page set of merger guidelines. Sometimes too much transparency by government has drawbacks.[474] The language of the Merger Guidelines is difficult to comprehend because it is written for antitrust experts rather than for lawyers generally or laymen. A 600 page set of guidelines written in plain English would allow non-elite practitioners without lots of agency interaction to better understand the meaning of the Merger Guidelines. However, such a set of Guidelines would be impractical and potentially counter-productive because it would not provide enough flexibility.

Perhaps the lack of plain language clarity creates a problem for judges rather than for practitioners or non-lawyer business executives. As the Guidelines recognize, the judiciary plays a role in enforcing merger law.[475] However, who is the end user of the Guidelines? Is it the firms practicing before the agencies, or is it judges? If the Guidelines have a purpose for judges, there is an important institutional issue at play as there has not been a merger case before the Supreme Court for many years.[476]

These questions lead to a meta-question. Is the law Section 7 of the Clayton Act, or is it the Guidelines as defined by the agencies at any given time? Many respondents believe that when talking to the agencies, the Merger Guidelines are only the starting point in a conversation, whereas the same agencies in their court documents press the importance of the language of the Guidelines because the courts are likely to accept the Guidelines in support of their rulings.

In this sense, the Merger Guidelines have become somewhat of precedent for courts. As economic ideas have been adopted by the guidelines, courts have shifted their rulings in favor of such ideas.[477] The agencies recognize this and may use the Guidelines strategically to get support for

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473 Jon Leibowitz, Chairman, Fed. Trade Comm'n, Federal Trade Commission Enforcement of the Antitrust Laws 3 (Sept. 24, 2009), *available at* http://www.ftc.gov/speeches/leibowitz/090924fordham speech.pdf.

474 Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 902-14 (2006) (noting the limits of government transparency).

475 HORIZONTAL MERGER GUIDELINES, *supra* note 377, § 0.01.

476 Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 866 (1997) ("[T]here has not been a substantive Supreme Court merger decision . . . since 1974 . . . .").

477 Greene, *supra* note 350, at 775-77 ("[T]hese guidelines have acted as a stealth force on the development of antitrust merger law.").

HeinOnline -- 17 Geo. Mason L. Rev. 1131 2009-2010

their positions from the courts once Guidelines are adopted, even when the case law does not support such positions.[478]

A number of respondents mentioned the importance of the recent "FTC at 100" self-study as a transparency-creating device for business counseling purposes. Respondents were positive about the FTC self-study's goals.[479] Some questioned whether the self-study would lead to changes under a Democratic administration.

e. *Hypothesis Five: The Merger Process Is Too Costly for Firms*

Overwhelmingly, practitioner comments focused on the high cost of agency merger review. These concerns echo those raised by the business community and suggest that merger costs have increased because of e-discovery and overly-large second requests.[480] The amount of data required to comply with discovery has increased the cost of mergers. Respondents suggested that second requests typically reached the $4 million to $8 million range.

That respondents focused on the increased costs of second requests suggests that changes by the agencies to limit these costs have met only limited success. Agency attempts include the FTC 2006 Merger Process Reforms and the DOJ 2006 Merger Process Initiative Amendments.[481] Most respondents suggested that they were convinced that DOJ and FTC staff do not go through all of the data. One practitioner summarized, "I know from my days at the FTC that sometimes rows of boxes go unopened."

A problem that practitioners emphasized was the overly large number of custodians whose documents must be produced. Another problem was the actual time involved in fulfilling a second request. Second requests seemed to be shorter for some as a result of their "repeat business" and the consequent trust that they build up with agency staff.

Technological changes constitute one explanation for increasingly large second requests. Because of e-mails and other electronic documents,

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478 Paul T. Denis, *Horizontal Merger Guidelines Revision: A Draftsman's Perspective*, ANTITRUST CHRON., Dec. 2009, at 1, 5.

479 WILLIAM E. KOVACIC, FED. TRADE COMM'N, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY 13 (2009), *available at* http://www.ftc.gov/os/2009/01/ftc100rpt.pdf.

480 AMC REPORT, *supra* note 152, at 162 ("The burdens of second requests are high and increasing."); William Blumenthal, *Overenforcement in the Hart-Scott-Rodino Second Request Process*, *in* THE ECONOMICS OF THE ANTITRUST PROCESS 15, 26 (Malcolm B. Coate & Andrew N. Kleit eds., 1996).

481 Press Release, U.S. Dep't of Justice, Antitrust Division Announces Amendments to Its 2001 Merger Review Process Initiative (Dec. 15, 2006), *available at* http://www.usdoj.gov/atr/public/press_releases/2006/220302.pdf; Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Reforms to the Merger Review Process 2 (Feb. 16, 2006), *available at* http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf.

companies can collect far more data now than in past years. Another factor is that the agency demand for data has increased, as the agencies undertake more econometric analysis.[482] Economic analysis seems to have become the victim of its own success. On a number of these issues, practitioners did not suggest solutions (other than fewer custodians) that would fundamentally fix the problem.

One problem that a number of respondents mentioned is clearance. Clearance is not an issue in many mergers. However, most practitioners believed that when a clearance battle emerges, it raises a potentially significant problem. As one practitioner recounted, "It is not a problem except when it is and when it is, it is a big problem." Clearance battles between the two agencies, over which agency will review the merger, add to increasing costs for mergers by creating deal delays for the merging parties.[483] Clearance battles create additional business uncertainty for clients and do not give clients the thirty-day comfort that they want.[484] On the margins, a number of practitioners mentioned that this creates problems for financing some deals. The turf battle, respondents believed, could have been solved with the ill-fated clearance deal of 2002.[485] Some respondents confided they were glad that clearance was not solved in 2002 because they had better personal contacts in one agency than the other and because the clearance deal would have meant a loss in their client-billable matters.

f. *Hypothesis Six: International Merger Control Has Improved in Terms of Process*

Respondents reported that one problem in merger review has been the number of jurisdictions that require a filing even when the merger effects will be minimal. This adds to the cost of the transaction, especially given that a number of practitioners complained of overly-high filing fees. As of 2009, there are 115 jurisdictions worldwide that have some form of merger control.[486]

The rapid growth and sheer number of jurisdictions involved in merger control has had an impact on the practice of a number of the respondents.

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482 AMC REPORT, *supra* note 152, at 165.

483 *Id.* at 134-35.

484 After the merging parties complete an HSR filing, the antitrust agency reviewing the merger typically takes thirty days to decide whether to challenge the merger. If a clearance battle ensues, this increases the likelihood of a second request because the antitrust agencies waste time fighting the clearance battle instead of investigating the merger, and the agency who ends up doing the review runs out of time under the thirty-day window. AMC REPORT, *supra* note 152, at 130.

485 Press Release, Fed. Trade Comm'n, FTC and DOJ Announce New Clearance Procedures for Antitrust Matters (Mar. 5, 2002), *available at* http://www.ftc.gov/opa/2002/03/clearance.shtm.

486 J. MARK GIDLEY & GEORGE L. PAUL, WORLDWIDE MERGER NOTIFICATION REQUIREMENTS (2009).

HeinOnline -- 17 Geo. Mason L. Rev. 1133 2009-2010

Most respondents felt that the process of merger control, in terms of notifications, has improved significantly in the past few years. They tended to suggest that this is a result of soft law efforts headed by the ICN and the OECD. As a result of these efforts, both developed and emerging antitrust jurisdictions have changed their practices to be in greater compliance.[487]

In the wake of *GE/Honeywell*,[488] the soft law institutions improved coordination across jurisdictions. The ICN created Guiding Principles for Merger Notification and Review Procedures in 2002 and followed up with Recommended Practices for Merger Notification and Review Procedures in 2005.[489] Early work that tracks implementation of these principles reports success in implementation around the world.[490] Similarly, the OECD created best practices for coordination and cooperation in merger review.[491]

Recent ICN work has focused on notification thresholds for mergers and has encouraged benchmarking.[492] ICN released a report on notification based on the responses to a survey of twenty-one jurisdictions that had revised their reporting regimes in recent years. The report highlighted effective strategies for jurisdictions looking to revise their notification thresholds.[493]

The ICN Recommended Practices for Merger Notification Procedures suggests a six-month period for second reviews.[494] More and more transactions around the world seem to be conforming to this recommended practice. However, some practitioners expressed concern that on important transactions the period is longer. Respondents noted that enforcers appear to be coordinating second requests more than before and sharing more information. This has reduced redundancies in the international merger review process. In a purely European context, some practitioners complained

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487 J. William Rowley & A. Neil Campbell, *Implementation of the ICN's Recommended Merger Practices: A Work-in-(Early)-Progress*, ANTITRUST SOURCE, July 2005, at 1, 2.

488 *See generally*, Eleanor M. Fox, *GE/Honeywell: The U.S. Merger that Europe Stopped—A Story of the Politics of Convergence*, *in* ANTITRUST STORIES 331 (Eleanor M. Fox & Daniel A. Crane eds., 2007) (providing detail of the proposed merger).

489 *See* MERGER WORKING GROUP, INT'L COMPETITION NETWORK, RECOMMENDED PRACTICES FOR MERGER NOTIFICATION AND REVIEW PROCEDURES (2005), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf.

490 J. William Rowley & A. Neil Campbell, *Implementation of the International Competition Network's Recommended Practices for Merger Notification Procedures: Final Report*, 5 BUS. L. INT'L 110, 111-12 (2004); Rowley & Campbell, *supra* note 488, at 1-2.

491 OECD HARD CORE CARTELS, *supra* note 277, at 3.

492 RECOMMENDED PRACTICES FOR MERGER NOTIFICATION AND REVIEW PROCEDURES, *supra* note 490, at *passim*.

493 MERGER WORKING GROUP, INT'L COMPETITION NETWORK, SETTING NOTIFICATION THRESHOLDS FOR MERGER REVIEW 3-13 (2008), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc326.pdf.

494 RECOMMENDED PRACTICES FOR MERGER NOTIFICATION AND REVIEW PROCEDURES, *supra* note 490, § 4A.

about divergence on the part of national competition authorities on merger process for multijurisdictional filings.

g. *Hypothesis Seven: International Merger Control Has Improved in Terms of Substantive Analysis Employed by Non-U.S. Agencies*

Overall, practitioners were positive about convergence on substantive merger issues, although less positive than on procedural issues such as notification. [495] Respondents suggested an improvement in the quality of European Commission substantive analysis. Nevertheless, they also felt that decision making at the lowest common denominator (the strictest regime) can kill deals even when such deals do not create anticompetitive harm as a result of the merger. The lower standard becomes the global standard.[496]

Divergent opinion on mergers is not a typical problem. As one practitioner put it, "[s]ubstantive antitrust merger standards across jurisdictions generally don't matter because most of the time, particularly the easy cases, agencies will get it right. When it comes to hard cases, it really matters, and most agencies get the substantive economic analysis wrong." Respondents believe that setbacks in court such as *Airtours*,[497] *Schneider*,[498] and *Tetra Pack*[499] have forced the Commission to back up ideas with economic analysis. Respondents also note that the creation of the position of Chief Economist at the Directorate General for Competition has institutionalized economic analysis and improved substantive merger control at the Commission.

For those practitioners who have significant contact with Asian antitrust enforcers, all expressed concern over the quality of substantive Chinese enforcement. However, they all noted that the merger regime is young in China and may improve with time.[500] A few suggested that the OECD, the ABA Antitrust Section, and direct technical assistance on the part of

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495 In terms of soft law convergence, the ICN has proposed a set of recommended practices for merger analysis. *Id.* at *passim*. More recommended practices for merger analysis are under evaluation. Thus far the Recommended Practices for Merger Analysis adopted to date cover: (1) the framework for merger analysis, (2) the use of market shares, (3) entry and expansion, (4) competitive effects analysis: overview, (5) unilateral effects, and (6) coordinated effects. As these were just adopted in 2009, they have yet to be fully integrated into the thinking of many competition agencies around the world. *Id.*

496 Geradin, *supra* note 6, at 203-10.

497 Case T-342/99, *Airtours v. Comm'n*, 2002 E.C.R. II-2585.

498 Case T-310/01, *Schneider Elec. SA v. Comm'n*, 2002 E.C.R. II-4071.

499 Case T-5/02, *Tetra Laval BV v. Comm'n*, 2002 E.C.R. II-4381, *aff'd in part*, Case C-12/03P, 2005 OJ C82/1 (ECJ).

500 Xinzhu Zhang & Vanessa Yanhua Zhang, *Chinese Merger Control: Patterns and Implications*, 6 J. COMPETITION L. & ECON. 477, 480 (2009) (examining the limits of Chinese merger control).

HeinOnline -- 17 Geo. Mason L. Rev. 1135 2009-2010

various antitrust agencies have ameliorated some of the worst potential problems that might have emerged from China.[501]

h. *Hypothesis Eight: State Merger Control Is a Net Loss for National Mergers*

Respondents viewed state enforcement as highly variable. They felt that most state merger enforcement, at best, piggybacked federal enforcement efforts. Respondents believed that state enforcement efforts created increased transaction costs for deals.

Overall, the vast majority of practitioners felt that there was a role for state antitrust enforcement. However, they noted that state level involvement should be limited to those cases in which there was a local impact that federal enforcers would not otherwise investigate. These comments echoed some of the concerns raised generally about state enforcement addressed earlier in the Article.

i. *Hypothesis Nine: Private Rights Are a Net Loss in Merger Control*

Antitrust laws and legislative history provide a dual enforcement role for public and private enforcement, including enforcement in the merger area.[502] Given the gradual transformation of antitrust law, private rights play a smaller role in mergers than they do in price-fixing or single-firm conduct cases. Very few practitioners surveyed dealt with private rights in the merger process with any regularity. The small number of practitioner-respondents (all defense side) who addressed this issue believed that private rights are a net loss to merger review.[503]

By elevating the antitrust injury requirement for challenging mergers, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[504] and *Cargill, Inc. v. Monfort of Colorado, Inc.*[505] have made it far harder for competitors to sue for Clay-

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501 Sokol, *supra* note 280, at 1084 (providing a descriptive analysis of technical assistance efforts); D. Daniel Sokol & Kyle W. Stiegert, *Exporting Knowledge Through Technical Assistance and Capacity Building*, 6 J. COMPETITION L. & ECON. 233, 235-36 (2009) (providing a quantitative analysis of technical assistance efforts).

502 Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 11-12 (1995).

503 *But see id.* (advocating stronger private rights in merger control).

504 429 U.S. 477 (1977).

505 479 U.S. 104 (1986).

ton Section 7 violations.[506] Yet recently, a number of private party claims have been made during the pendency of merger filings, including claims against Anheuser-Busch/InBev and Pfizer/Wyeth.[507]

Some private suits emerge after the fact as well.[508] An empirical void remains in this area. What remains unclear from the reports is what happened after the injunction was granted. Most of these cases involved ex ante complaints, and few of them are recent. There are few recent cases in which private plaintiffs have succeeded and secured relief where the DOJ or the FTC failed to act, or where there was a government suit and the court rewarded additional relief.[509] Most private cases now involve customer-plaintiffs because antitrust injury has proven to be a serious obstacle to the competitor suits.

Customers have some probability of blocking a merger, though how great this is has yet to be empirically studied. Even in these cases, customers may be interested in a payoff to withdraw their complaints. They may not really want to stop the merger. Merger litigation is very expensive, and one would guess that serious challenges would not be made unless the plaintiffs expected a significant payoff. It might be a little easier if the plaintiff is only seeking injunctive—as compared to monetary—relief, but not much more so. Even if the odds of success are relatively low, if the benefits from success would be more than the cost of litigation, it may be worth the effort by plaintiffs. If a plaintiff can obtain at least a temporary injunction, or can impose costs on its competitors, these have peripheral benefits.

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506 *See Brunswick*, 429 U.S. at 484-89 (offering the first articulation of the antitrust injury doctrine); *see also* Page & Lopatka, *supra* note 431, at 129 ("[C]ourts have interpreted the doctrine so strictly that competitors and takeover targets can never establish standing to challenge mergers.").

507 In *Ginsburg v. InBev NV/SA*, 649 F. Supp. 2d 943 (E.D. Mo. 2009), a group of beer consumers and purchasers challenged the proposed merger of defendant domestic beer manufacturer with defendant foreign corporation. *Id.* at 945-46. Plaintiffs claimed that the proposed merger violated Section 7 of the Clayton Act, 15 U.S.C. § 18, because it eliminated defendant foreign corporation as a "perceived" and "actual" potential competitor in the U.S. beer market. Defendants moved for summary judgment on the pleadings, and their motion was granted. *Id.* The lawsuit was dismissed. *Id.*; *see also* Ginsburg v. InvBev SA/NV, No. 4:08CV01375 JCH, 2008 U.S. Dist. LEXIS 93636, at *18 (E.D. Mo. Nov. 18, 2008) (showing how, when the same plaintiffs sought a preliminary injunction in the case, it was denied). In *Golden Gate Pharmacy Services, Inc. v. Pfizer, Inc.*, No. C-09-3854 MMC, 2009 U.S. Dist. LEXIS 111862 (N.D. Cal. Dec. 2, 2009), the plaintiffs were a number of pharmacies that filed suit to stop the merger of the two pharmaceutical companies, asserting that the merger would be a violation of the Clayton Act. *Id.* at *2-3. The court found for the defendant on all claims. *Id.* at *21-22.

508 Most of these are settled. Practitioners who were interviewed can think of only a handful. Transcript of Responses to Qualitative Survey (on file with author).

509 *See, e.g.*, AlliedSignal, Inc. v. B.F. Goodrich Co., 183 F.3d 568 (7th Cir. 1999); New England Carpenters Health Benefits Fund v. First DataBank, Inc., 602 F. Supp. 2d 277 (D. Mass. 2009); Bon-Ton Stores, Inc. v. May Dep't Stores Co., 881 F. Supp. 860 (W.D.N.Y. 1994).

HeinOnline -- 17 Geo. Mason L. Rev. 1137 2009-2010

j. *Hypothesis Ten: Sector Regulation Is a Net Loss in Merger Control*

Respondents uniformly believed that antitrust should play a role in mergers of regulated industries. They expressed concerns with the types of "public interest" conditions to mergers that sector regulators create. Many believed that sector regulator demands were nothing other than interest group-based rent seeking. A number of respondents suggested that on competition issues, antitrust enforcers should be the sole reviewers of mergers in regulated industries for competitive effects.

6. Potential Limitations to the Surveys

a. *Potential Selection Bias*

The survey measures opinions by people who work in antitrust mergers. They are proxies not only of experts in the field, but also of the sophisticated clients that they represent.[510] Selection bias occurs when a researcher chooses the wrong set of individuals to study.[511] Selection for the quantitative survey was based upon membership of ABA antitrust section committee e-mail listservs. It may be the case that not all antitrust practitioners are members of the ABA Antitrust Section and that all members of the Section are not members of various committee listservs. However, the listserv is by far the most accurate and comprehensive list of people with serious antitrust experience and interest relative to Martindale Hubell[512] or to looking through law firm websites around the country, where claims of antitrust "expertise" may be as much advertizing as actual expertise.

There may be a selection bias if people self-select into the listserv. They may be younger (more tech savvy). The listserv seems representative of the underlying antitrust attorneys based on the general population of antitrust attorneys and the antitrust section. If the assumption is that most people who are involved in the antitrust section are also most of the people involved in antitrust (something that most ABA Section of Antitrust officers with whom I spoke believe), there may not be a significant selectivity bias.

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510 Lois A. Weithorn, *Conceptual Hurdles to the Application of* Atkins v. Virginia, 59 HASTINGS L.J. 1203, 1222-25 (2008) (explaining the importance of good measurement techniques).

511 Christopher Winship & Robert D. Mare, *Models for Sample Selection Bias*, 18 ANN. REV. SOC. 327, 328 (1992).

512 Martindale Hubbell is really an advertising service in which someone can be a self-proclaimed "expert" with a single case in a substantive area of law. It is not uncommon to see practitioners list at least ten areas of "expertise."

b. *Potential Sampling Bias*

Sampling bias might be a concern because some groups may have been over-represented or under-represented in the survey. The survey has the potential for sampling bias based on the lack of data on the non-respondents to the survey. For law firm practitioners, sampling error in terms of lack of internet use is not a significant problem.[513] After all, law firm lawyers are on call to their clients twenty-four hours a day, seven days a week, and it is not clear that non-respondents are any different than respondents. This also overcomes potential age bias overall in web surveys.[514]

It may be that my data sample did not measure the right kinds of people. The practitioner survey may not be representative because it was administered via the internet. This is less of a problem with the current survey than with internet surveys generally. Unlike the overall U.S. population, antitrust law firm practitioners are internet savvy because of client demand. However, respondents would need to have the time to answer the questions for thirty minutes, answer honestly, and assume that case decisions and antitrust policy are right on their merits and not because they support client positions. Another way that the survey in question overcame the problem of sample bias is that by interviewing a large number of survey respondents, it was more difficult for bias results to push a position that would give advantage to a particular viewpoint.

c. *Potential Response Rate Bias*

There might be a difference in those people who respond versus those who do not respond to surveys. People interested in responding (especially those that bill at high rates) will respond if they are interested in the topic.[515] Even in surveys with low response rates, if the survey follows proper research methods and analysis, the low response rate should not affect the validity of the inferences.[516] As one article argues, "[m]ost current research shows that lower response rates do not have nearly as much of an effect on survey results as might have been thought . . . . [Such rates] don't seem to

513 JENNIFER C. DAY ET AL., U.S. CENSUS BUREAU, COMPUTER AND INTERNET USE IN THE UNITED STATES: 2003 8-9 (2005) (explaining the limitations of internet based surveys for the population as a whole).

514 Kieren Diment & Sam Garrett-Jones, *How Demographic Characteristics Affect Mode Preference in a Postal/Web Mixed-Mode Survey of Australian Researchers*, 25 SOC. SCI. COMPUTER REV. 410, 411-14 (2007) (finding that web respondents were more likely to be young, male, middle income, and IT savvy).

515 Shirley A. Dobbin et al., *Surveying Difficult Populations: Lessons Learned from a National Survey of State Trial Court Judges*, 22 JUST. SYS. J. 287, 288 (2001).

516 B.K. Atrostic et al., *Nonresponse in U.S. Government Household Surveys: Consistent Measures, Recent Trends, and New Insights*, 17 J. OFFICIAL STATS. 209, 223-25 (2001).

seriously harm the quality or the representativeness of the data."[517] Indeed, bias can be introduced just as easily in high-response rate surveys as low-response rate ones.[518] Non-response rates seem to be less of a problem than previously thought. Recent research suggests similar results for both high and low response rates.[519]

The survey literature suggests that busy people are more unlikely to undertake surveys than those that are less busy.[520] However, other work suggests that busier people might be over-represented in surveys.[521] One of the assumptions in probability sampling, to draw an unbiased set of inferences from the survey population, is that all segments of the survey population have an equal chance at measurement. When some people do not respond, this non-responsive group may bias the survey results.[522]

CONCLUSION

Institutions are messy, as are interinstitutional arrangements. Malfunctions that affect one institution tend to appear in all institutions. Each of the formal antitrust institutions has problems in its ability to create a system that is administrable and effective in reducing anticompetitive conduct. More theoretical work on comparative institutional analysis in antitrust needs to be undertaken, as well as more empirical work to test these assumptions. Complicating policy prescriptions further is that antitrust institutions are constantly adapting. What may work now may not work later. This suggests that comparative institutional analysis needs to be a continuing process. Based on the current institutional setup for merger control, a number of conclusions emerge.

Overall, there has been an increasing convergence, based upon soft law institutions, in both merger procedures and substantive analysis across countries. This convergence has reduced the costs associated with merger

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517 Frank Newport, *Looking Closely at Survey Response Rates*, GALLUP POLL (Jan. 6, 2003), http://www.gallup.com/poll/7510/looking-closely-survey-response-rates.aspx.

518 Robert M. Groves, *Nonresponse Rates and Nonresponse Bias in Household Surveys*, 70 PUB. OPINION Q. 646, 665 (2006).

519 ROBERT M. GROVES ET AL., SURVEY NONRESPONSE 120-22 (2002); Richard Curtin, Stanley Presser & Eleanor Singer, *Changes in Telephone Survey Nonresponse over the Past Quarter Century*, 69 PUB. OPINION Q. 87, 96-97 (2005).

520 ROBERT M. GROVES & MICK P. COUPER, NONRESPONSE IN HOUSEHOLD INTERVIEW SURVEYS 122 (1998).

521 JOHN P. ROBINSON & GEOFFREY GODBEY, TIME FOR LIFE: THE SURPRISING WAYS AMERICANS USE THEIR TIME 63 (1997).

522 AM. ASS'N FOR PUB. OPINION RES., STANDARD DEFINITIONS: FINAL DISPOSITION OF CASE CODES AND OUTCOME RULES FOR SURVEYS 5 (6th ed. 2009), *available at* http://www.aapor.org/Home.htm (search "standard definitions"; then follow "2009 Standard Definitions" hyperlink).

HeinOnline -- 17 Geo. Mason L. Rev. 1140 2009-2010

review globally, increased business certainty, and potentially increased the quality of agency analysis in mergers. The exact contours of where there should be a more global, rather than domestic, response to merger control is not clear and may be situational. Generally, there seem to be too many countries involved in merger control where their links to the deal are tenuous. A future article might suggest institutional mechanisms to overcome this problem.

A significant set of institutional problems concern U.S. domestic institutional choice. There seems to have been some divergence in recent years between the DOJ and the FTC, although not as extreme as articulated within the dominant antitrust discourse. That there are two federal antitrust agencies with different substantive standards for preliminary injunction, different levels of intensity of merger enforcement, and different institutional designs remains a potential problem. These problems appear fundamental. The best institutional solution may depend in part on the optimal level of antitrust enforcement desired. The FTC seems to be capable of a stronger level of enforcement based on broader standards. The answer to the question of what particular agency structure is optimal is beyond the scope of this Article.

Generally, the ability of the judiciary to understand antitrust merger cases seems to have improved. Unfortunately, the judiciary remains highly variable in its decision making. In the U.S. context, either a specialized antitrust court or more effective use of ALJs by the FTC might lead to better outcomes. However, these solutions do not overcome the ultimate need to have a non-specialized court review decisions.

The current use of private rights seems not to be particularly effective in the merger context. State enforcement, though useful, seems at times to be redundant and increases costs too often when the states could instead focus on more local cases, which the federal enforcers do not touch. Sector regulation of merger control based on competition concerns seems to be redundant at best and efficiency reducing at worst because of increased capture by sector regulators.

Overall, institutional analysis provides a mechanism to better weigh the potential costs and advantages to antitrust institutional design. This Article focused on merger control as an area in need of institutional analysis. The analysis suggests that the current system is overly burdensome for either strong or weak antitrust enforcement. The next stage of institutional analysis is to think about the optimal level of antitrust in merger control and design an institutional structure based upon the optimal level to make the institutions complementary to their purpose.

HeinOnline -- 17 Geo. Mason L. Rev. 1141 2009-2010

APPENDIX A-1: MERGERS

Question		Count	Percent
Q1. In the past two years, what percentage of all of your professional legal time on matters is merger related?	0-20% 21-40% 41-100% Not applicable	115 42 63 12	49.6% 18.1% 27.2% 5.2%
Q3. Of these proposed mergers, how many of deals were abandoned (rather than restructured) primarily on antitrust grounds as part of the risk-reward calculation of doing the deal prior to HSR filings?	1-5 5+ Not applicable	87 11 130	38.2% 4.8% 57.0%
Q4. What is the percentage of these abandoned deals as percentage of all of your number of deals for merger work?	0-20% 21-100% Not applicable	108 20 98	47.8% 8.8% 43.4%
Q5. Of those HSR filings that were made, how many of the deals were abandoned (as opposed to restructured) after filing because of antitrust concerns?	1-5 6-10 Not applicable	48 1 173	21.6% .5% 77.9%
Q6. What is the percentage of these abandoned deals as a percentage of number of deals of your merger work?	0-20% 21-100% Not applicable	99 5 118	44.6% 2.3% 53.2%
Q7. How often do you think, on the matters that you personally have worked on, that the U.S. antitrust regime deters mergers that would not be anticompetitive (not including the cost of delay)?	Frequently Often Never Not applicable	9 40 116 60	4% 18% 52% 27%
Q8. What is your perception of the current merger enforcement by U.S. federal antitrust agencies?	Efficiency-enhancing Neutral Efficiency-degrading Not applicable	75 61 57 30	34% 27% 26% 13%
Q9. How would you answer question eight based on enforcement ten years ago (1998)?	Efficiency-enhancing Neutral Efficiency-degrading Not applicable	81 39 46 56	36% 18% 21% 25%
Q10. How would you answer question eight based on enforcement twenty years ago (1988)?	Efficiency-enhancing Neutral Efficiency-degrading Not applicable	42 27 62 91	19% 12% 28% 41%

Q11. In your personal experience in terms of the internal costs to a merger (time spent on lawyer hours, internal client hours, economic experts hours, etc.) on antitrust merger review by merging firms, is the U.S. merger review process more costly now than ten years ago?	More	124	55%
	Neutral	21	9%
	Fewer	19	8%
	Not applicable	60	27%

Note:

– These percentages were calculated after first removing those for whom the question was not applicable.

HeinOnline -- 17 Geo. Mason L. Rev. 1143 2009-2010

APPENDIX A-2: DEMOGRAPHIC

Question		Count	Percent
Q30. In presidential elections I more often than not vote:	Republican	61	38.6%
	Democratic	92	58.2%
	Other	5	3.2%
Q31. The antitrust economics views closest to my own are:	Chicago School	65	42.2%
	Post-Chicago School	89	57.8%
Q32. Years of practice:	1-5	6	3.7%
	6-10	19	11.6%
	11-20	39	23.8%
	21-30	41	25.0%
	31+	59	36.0%
Q33. You currently have the following type of practice:	In-house: Exclusively plaintiff	4	2.5%
	In-house: Primarily plaintiff	1	.6%
	In-house: Primarily defense	15	9.3%
	Law firm: Exclusively plaintiff	1	.6%
	Law firm: Primarily plaintiff	10	6.2%
	Law firm: Exclusively defense	21	13.0%
	Law firm: Primarily defense	109	67.7%
Q34. Prior to private practice, have you ever worked as an attorney for the Department of Justice Antitrust Division, Federal Trade Commission or for a State antitrust enforcer on antitrust matters?	Yes	52	31.7%
	No	112	68.3%
Q35. Your current title is:	Partner	93	57.1%
	Counsel/Of Counsel	32	19.6%
	Associate	19	11.7%
	Other	19	11.7%

APPENDIX B-1: CROSSTABLE 1

I divided the lawyers into three groups: one to five proposed mergers ("group A"), more than five proposed mergers ("group B"), and not applicable ("N/A") ("group C").

Question		Groups		
		1-5 Mergers (group A)	5+ Mergers (group B)	N/A (group C)
		N (Percent)	N (Percent)	N (Percent)
Q1. In the past two years, what percentage of all of your professional legal time on matters is merger related?	0-20%	55 (71%) [B]	8 (9%)	51 (77%) [B]
	21-40%	13 (17%) [C]	28 (32%) [C]	1 (2%)
	41-100%	9 (12%)	52 (59%) [A C]	2 (3%)
	Not applicable	0 (0%)	0 (0%)	12 (18%)
Q8. What is your perception of the current merger enforcement by U.S. federal antitrust agencies?	Efficiency enhancing	29(40%) [C]	38(44%) [C]	8(13%)
	Neutral	24(33%)	23(27%)	14(22%)
	Efficiency degrading	17(23%)	23(27%)	17(27%)
	Not applicable	3(4%)	2(2%)	25(39%) [A B]
Q9. How would you answer question eight based on enforcement ten years ago (1998)?	Efficiency enhancing	33(45%) [C]	38(44%) [C]	10(16%)
	Neutral	12(16%)	16(19%)	11(17%)
	Efficiency degrading	18(25%)	16(19%)	12(19%)
	Not applicable	10(14%)	16(19%)	30(48%) [A B]
Q10. How would you answer question eight based on enforcement twenty years ago (1988)?	Efficiency enhancing	17(23%)	15(17%)	10(16%)
	Neutral	14(19%) [C]	10(12%)	3(5%)
	Efficiency degrading	20(27%)	31(36%) [C]	11(17%)
	Not applicable	22(30%)	30(35%)	39(62%) [A B]
Q30. In presidential elections I more often than not vote:	Republican	26(46%)	26(36%)	9(31%)
	Democratic	28(50%)	44(60%)	20(69%)
	Other	2(4%)	3(4%)	0(0%)
Q31. The antitrust economics views closest to my own are:	Chicago School	21(38%)	34(46%)	10(40%)
	Post-Chicago School	34(62%)	40(54%)	15(60%)
Q32. Years of practice:	1-5	3(5%)	1(1%)	2(6%)
	6-10	3(5%)	15(20%) [A]	1(3%)
	11-20	13(23%)	20(26%)	6(19%)
	21-30	13(23%)	19(25%)	9(29%)
	31+	25(44%)	21(28%)	13(42%)

Q33. You currently have the following type of practice:	In-house: Exclusively plaintiff	2(4%)	1(1%)	1(3%)
	In-house: Primarily plaintiff	0(0%)	1(1%)	0(0%)
	In-house: Primarily defense	9(16%)	6(8%)	0(0%)
	Law firm: Exclusively plaintiff	0(0%)	0(0%)	1(3%)
	Law firm: Primarily plaintiff	2(4%)	1(1%)	7(24%) [A B]
	Law firm: Exclusively defense	5(9%)	12(16%)	4(14%)
	Law firm: Primarily defense	38(68%)	55(72%)	16(55%)
Q34. Prior to private practice, have you ever worked as an attorney for the Department of Justice Antitrust Division, Federal Trade Commission or for a State antitrust enforcer on antitrust matters?	Yes	20(35%)	28(37%) [C]	4(13%)
	No	37(65%)	48(63%)	27(87%) [B]
Q35. Your current title is:	Partner	30(53%)	44(59%)	19(61%)
	Counsel/Of Counsel	13(23%)	15(20%)	4(13%)
	Associate	4(7%)	12(16%)	3(10%)
	Other	10(18%)	4(5%)	5(16%)

Notes:

- Superscripts are used to indicate statistical significant group differences.
- N means total counts.
- Due to rounding, the percentages for Appendix do not necessarily equal 100.

APPENDIX B-2: CROSSTABLE 2

Question		Groups			
		Frequently-often (Group A)	Sometimes (Group B)	Seldom-never (Group C)	N/A (Group D)
		N (Percent)	N (Percent)	N (Percent)	N (Percent)
Q1. In the past two years, what percentage of all of your professional legal time on matters is merger related?	0-20%	2(22%)	11(28%)	53(46%)	45(75%) [A B C]
	21-40%	3(33%) [D]	11(28%) [D]	26(22%) [D]	2(3%)
	41-100%	4(44%) [D]	18(45%) [D]	37(32%) [D]	2(3%)
	Not applicable	0(0%)	0(0%)	0(0%)	11(18%)
Q8. What is your perception of the current merger enforcement by US federal antitrust agencies?	Efficiency enhancing	1(11%)	11(28%)	58(50%) [D]	5(9%)
	Neutral	3(33%)	12(30%)	34(29%)	12(21%)
	Efficiency degrading	5(56%)	17(43%) [C]	22(19%)	13(22%)
	Not applicable	0(0%)	0(0%)	2(2%)	28(48%) [C]
Q9. How would you answer question eight based on enforcement ten years ago (1998)?	Efficiency enhancing	2(22%)	15(38%)	54(47%) [D]	10(18%)
	Neutral	1(11%)	8(20%)	21(18%)	9(16%)
	Efficiency degrading	4(44%)	12(30%)	22(19%)	8(14%)
	Not applicable	2(22%)	5(13%)	19(16%)	30(53%) [B C]
Q10. How would you answer question eight based on enforcement twenty years ago (1988)?	Efficiency enhancing	0(0%)	8(20%)	28(24%)	6(11%)
	Neutral	1(11%)	6(15%)	16(14%)	4(7%)
	Efficiency degrading	4(44%)	16(40%) [D]	33(28%)	9(16%)
	Not applicable	4(44%)	10(25%)	39(34%)	38(67%) [B C]
Q30. In presidential elections I more often than not vote:	Republican	3(43%)	14(45%)	39(41%)	5(22%)
	Democratic	3(43%)	16(52%)	55(57%)	17(74%)
	Other	1(14%)	1(3%)	2(2%)	1(4%)
Q31. The antitrust economics views closest to my own are:	Chicago School	5(71%)	18(55%)	34(37%)	8(38%)
	Post-Chicago School	2(29%)	15(45%)	58(63%)	13(62%)

HeinOnline -- 17 Geo. Mason L. Rev. 1147 2009-2010

Q32. Years of practice:	1-5	0(0%)	1(3%)	4(4%)	1(4%)
	6-10	2(29%)	3(9%)	12(12%)	1(4%)
	11-20	3(43%)	8(24%)	22(23%)	6(24%)
	21-30	2(29%)	9(27%)	23(24%)	6(24%)
	31+	0(0%)	12(36%)	36(37%)	11(44%)
Q33. You currently have the following type of practice:	In-house: Exclusively plaintiff	0(0%)	0(0%)	4(4%)	0(0%)
	In-house: Primarily plaintiff	0(0%)	1(3%)	0(0%)	0(0%)
	In-house: Primarily defense	1(14%)	4(12%)	8(8%)	2(9%)
	Law firm: Exclusively plaintiff	0(0%)	0(0%)	0(0%)	1(4%)
	Law firm: Primarily plaintiff	0(0%)	1(3%)	3(3%)	6(26%)[BC]
	Law firm: Exclusively defense	0(0%)	2(6%)	17(18%)	2(9%)
	Law firm: Primarily defense	6(86%)	25(76%)	64(67%)	12(52%)
Q34. Prior to private practice, have you ever worked as an attorney for the Department of Justice Antitrust Division, Federal Trade Commission or for a State antitrust enforcer on antitrust matters?	Yes	2(29%)	15(45%)	28(29%)	6(24%)
	No	5(71%)	18(55%)	69(71%)	19(76%)
Q35. Your current title is:	Partner	4(57%)	19(59%)	56(58%)	13(52%)
	Counsel/Of Counsel	0(0%)	7(22%)	23(24%)	2(8%)
	Associate	3(43%)	3(9%)	10(10%)	2(8%)
	Other	0(0%)	3(9%)	8(8%)	8(32%)[C]

Notes:

- Superscripts are used to indicate statistical significant group differences.
- N means total counts.
- Due to rounding, the percentages for Appendix do not necessarily equal 100.