

Antitrust, Institutions and Merger Control  
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**I. Introduction**

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Antitrust's ability to reduce anti-competitive distortions on economic activity is the product of the dynamic interrelationship of a number of institutions. However, complexity affects institutional quality and antitrust institutions respond. Institutions are dynamic as they need to be both forward and backward looking in response to shifting goals. Antitrust is not alone among complex area of regulation that confront these problems. Areas as distinct as corporate/securities law and environmental law must address institutional complexity.<sup>2</sup>

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.<sup>3</sup> However, a specialized court might itself rule in sub-optimal ways or may be limited in its adjudication based upon a higher level court overturning it.<sup>4</sup> A specialized court also might result in more forum shopping across jurisdictions to get the same sort of substantive remedies but in friendlier venues.<sup>5</sup>

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 of these institutions the better to determine an optimal institutional design.<sup>6</sup> It has suffered because the primary focus of

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<sup>2</sup> Other fields seem to have similar issues 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 attacking 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 e.g., Stephen J. Choi, *Do the Merits Matter Less After the Private Securities Litigation Reform Act?*, 23 J.L. ECON. & ORG. 598 (2007) (explaining the effects of legislative changes on securities litigation); Chris Brummer, *Corporate Law Preemption in an Age of Global Capital Markets*, 81 S. CAL. L. REV. 1067 (2008) (noting the international rather than federalism concerns in contemporary corporate law); Michael D. Klausner, *Are Securities Class Actions 'Supplemental' to SEC Enforcement? An Empirical Analysis* (July 13, 2009). CELS 2009 4th Annual Conference on Empirical Legal Studies Paper. Available at SSRN: <http://ssrn.com/abstract=1433577> (suggesting that public and private rights are not compliments in securities litigation); J.B. Ruhl, *Keeping the Endangered Species Act Relevant*, 19 DUKE ENVTL. L. & POL'Y F. 275 (2009) (noting the limitations of expanding the Endangered Species Act to combat climate change); [cite Tony Arnold]; Victor Byers Flatt, *Act Locally, Affect Globally: How the Structure of Local Government Makes it the Best Arena for Engagement and Work with the Private Sector to Control Environmental Harms*, 35 B.C. ENVTL. AFF. L. REV. 455 (2008)(providing an institutional analysis for state level public and private environmental enforcement).

<sup>3</sup> 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).

<sup>4</sup> Elina Cruz and Sebastian Zarate, *Building Trust in Antitrust: The Chilean Case* in LATIN AMERICAN COMPETITION LAW AND POLICY (Eleanor M. Fox and D. Daniel Sokol eds., 2009); Aldo Gonzalez, *Quality of Evidence and Cartel Prosecution: The Case of Chile* in LATIN AMERICAN COMPETITION LAW AND POLICY (Eleanor M. Fox and D. Daniel Sokol eds., 2009).

<sup>5</sup> 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 (2009)(lamenting that competitors will push for action in the most restrictive jurisdictions for dominant firms).

<sup>6</sup> A number of other works examine institutional design and comparative institutional analysis but do so outside of antitrust. See e.g., Jonathan B. Wiener and Barak D. Richman, *Mechanism Choice* in PUBLIC CHOICE AND PUBLIC LAW (Daniel A. Farber and Anne Joseph O'Connell eds.)(Edward Elgar forthcoming); NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC

scholars has been on cases analysis and the theoretical and empirical economics underlying these cases. This Article does not mean to denigrate the nature of most antitrust scholarship.<sup>7</sup> Instead, it claims that an analysis of cases and of agency decision-making underplays the important role that other institutional actors have in shaping the dynamics of the antitrust system. A better approach to the study of the antitrust system is to undertake a comparative analysis of these institutions.<sup>8</sup>

Perhaps it is not surprising that antitrust institutional analysis generally is limited to courts and agencies. It is hard for law professors to undertake institutional analysis when one is embedded in an institution. As courts and agencies are the two antitrust institutions academics and practitioners are likely to experience, these are the ones that are the focus of institutional thoughts. An analysis limited merely to these institutions is incomplete. Similarly, the institutional issues are generally not of interest to antitrust IO economists. Often antitrust IO economists assume the institutions in their models in terms of both theory and data driven articles.<sup>9</sup>

This Article explores the various dynamic inter-relationships across antitrust. It does so the better to identify the institutions that are a necessary part of an antitrust comparative institutional analysis. First, it explains why there is a need for the use of a comparative institutional analysis in antitrust. It then identifies the various institutions in the antitrust system – 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. 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 approaches based on survey data of antitrust practitioners on merger issues to better understand institutional choice and the decision-making process. The Article concludes with observations from the case study and appeals for more theoretical and empirical analysis in antitrust institutional analysis.

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POLICY (University of Chicago Press 1994); MASAHIKO AOKI, *TOWARD A COMPARATIVE INSTITUTIONAL ANALYSIS* (MIT Press 2001); THRÁINN EGGERTSSON, *IMPERFECT INSTITUTIONS: POSSIBILITIES AND LIMITS OF REFORM* (University of Michigan Press 2005); Eric Maskin, *Mechanism Design: How to Implement Social Goals*, 98 AM. ECON. REV. 567 (2008). These works take a somewhat different approach than this article, in part because the complexity of antitrust requires a somewhat different set of institutional responses than some other substantive fields of law.

<sup>7</sup> Indeed, I have been guilty of this sin as much as the next scholar.

<sup>8</sup> 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 AMER. ECON. REV. 359, 360 (1994). By comparative institutional analysis, I utilize Williamson’s conceptualization. OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* (1985) 2 (“an examination of the comparative costs of planning, adapting, and monitoring task completion under alternative governance structures”).

<sup>9</sup> David J. Gerber, “Competition Law and the Institutional Embeddedness of Economics” in *ECONOMIC THEORY AND COMPETITION LAW 20* (Josef Drexel, Laurence Idot, and Joel Moneger eds. 2009).

## II. Institutional Design

Institutions matter, as they effect outcomes in society and the ability to create economic growth.<sup>10</sup> A focus on better institutional design has become a priority of antitrust agencies around the world. However as a recent report by antitrust agencies on agency effectiveness notes, “Relatively little emphasis has been placed on the institutions and operational considerations through which competition law and policy are implemented.”<sup>11</sup> This is perhaps surprising since the quality of institutions play such an integral role in the various outcomes in antitrust. Yet overall, antitrust scholarship has not been particularly good in embracing institutional analysis into its analysis of the decision-making process.

Institutional change is a product in part of path dependence because prior institutional structures shape the current framework to respond to issues as they emerge.<sup>12</sup> Institutions also evolve as over time competition eliminates weaker organizational structures.<sup>13</sup> Given how institutions react to changing circumstances, any institutional analysis without a robust comparative element that advocates minor modifications or more substantial changes to the existing institutional structure of antitrust risks making faulty suggestions.<sup>14</sup> 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 one institutional design.<sup>15</sup>

Let us begin with an explanation of what it means to get the best institutional outcome at the lowest cost. In short, it is a system that is administrable, and reduces societal cost through effective use of various institutions to promote better outcomes. Antitrust measures better performance and outcomes of institutions in terms their ability to improve consumer welfare. It might be possible in some sense to formally model what the comparative costs and benefits of what a particular institution might be. In practice it is quite difficult to quantify the advantages and disadvantages of a particular institutional structure. How much of this analysis is country specific based on the industrial organization, stages of economic development, strength of political institutions may vary.

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<sup>10</sup> DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990).

<sup>11</sup> ICN, *Agency Effectiveness Report*, April 2008.

<sup>12</sup> Paul A. David, *Why Are Institutions the “Carriers of History”, Path Dependence and the Evolution of Conventions, Organizations and Institutions*, 5 *STRUCTURAL CHANGE AND ECONOMIC DYNAMICS* 205 (1994).

<sup>13</sup> Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 *J. Pol. Econ.* 211 (1950).

<sup>14</sup> This does not mean that good work has not been done regarding antitrust agency institutional design. See for example, Michael Trebilcock and Edward Iacobucci, *Designing Competition law Institutions*, 25 *WORLD COMPETITION* 361 (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.

<sup>15</sup> This is particularly important because existing institutions suffer from inertia. RONALD N. JOHNSON & GARY D. LIBECAP, *THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY* 4-9 (1994); Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 *ADMIN. L. REV.* 429, 451-52 (1999).

It is perhaps easier to understand institutional trade-offs with a case study, which this Article does in the case of merger control from a US perspective.

Institutional effectiveness plays a role in the decision-making of the various actors who must navigate the legal and regulatory institutions such as companies and the lawyers that represent them. How institutions affect the decision-making process is a critical issue, as decision-making is a function of the relative effectiveness of institutions. The decision-making process by lawyers and companies is somewhat murky. In part, this is because antitrust always will operate in a world of uncertainty. This uncertainty makes predictions about future behavior of firms and of markets difficult. Even with such uncertainty, antitrust policy should do a better job of managing uncertainty by creating a better institutional design for any given jurisdiction and world-wide by properly analyzing the strengths and weaknesses of the institutional alternatives. What makes this task so difficult is that the web of antitrust institutions is quite complex and spans across, at least in the case of the United States, three jurisdictional levels – state, federal and international as well as the interplay between public and private rights. Moreover, there are overlapping institutional actors 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 these goals? Some antitrust scholars suggest that without knowing what the goals are, it is difficult to measure agency effectiveness.<sup>16</sup> This is certainly true. However, at some point the goals are a function of the existing capabilities of institutions. Current institutions shape the goals of antitrust as much as setting goals do. For example, we cannot expect a brand new antitrust agency with no previous experience to undertake enforcement in the area of bundled discounts. This is a difficult task even for the most experienced of antitrust agencies and antitrust systems.<sup>17</sup> For new antitrust systems, 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.

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 design in a cross country setting. Without certain prerequisites, antitrust will not be effective regardless of the country's antitrust system. These include: high levels of financial and human resources for the antitrust agency; a lack of government over-intervention and regulation; low country level corruption; strong physical infrastructure for the country in critical sectors (electricity, telecom, etc.); an independent judiciary; and a strong legal infrastructure that

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<sup>16</sup> William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903 (2009).

<sup>17</sup> Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 Harv. L. Rev. [ ](forthcoming 2009); Patrick Greenlee et al., *An Antitrust Analysis of Bundled Loyalty Discounts*, 26 INT'L J. INDUS. ORG. 1132 (2008); Barry Nalebuff, *Bundling as an Entry Barrier*, 119 Q.J. ECON. 159 (2004).

includes property and contractual rights to promote private sector growth.<sup>18</sup> 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 are able to absorb this learning into their decision-making processes.<sup>19</sup> Finally, an effective institutional requires administrability of legal rules and standards.<sup>20</sup>

Institutional design is only one issue in the success of the antitrust system. Outputs 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. Not all cases brought are good cases and too many of the wrong sort of case would be losses for the antitrust system even if such cases resulted in wins in litigation.

On the other hand, a discussion about quality assumes that there is an appropriate measure of quality. However, there is an absence of good measures of “quality” outcomes. We cannot effectively quantify business decisions not taken as a result of antitrust court decisions.<sup>21</sup> Nor can we easily quantify effects of decisions taken.

## 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 the use as the free market as the default institution. A related concern is to determine which is more costly from an institutional standpoint - false positives (over-enforcement) versus false negatives (under-enforcement). The basis for antitrust enforcement is the belief that markets work.<sup>22</sup> Choosing formal institutions in antitrust is based upon the nature of the market failure and based upon the possible institutional responses, creating an optimal set of institutions or instruments to correct for

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<sup>18</sup> Cynthia L. Clement, Andrew Gavil, George Korsun and William E. Kovacic, “Competition Policies for Growth: Legal and Regulatory Framework for SSA Countries.” IRIS Center, U. of Maryland 2001.

<sup>19</sup> D. Daniel Sokol, *The Development of Human Capital in Latin American Competition Policy* in LATIN AMERICAN COMPETITION LAW AND POLICY (Eleanor M. Fox & D. Daniel Sokol eds. 2009).

<sup>20</sup> HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* (2006) (explaining the importance of administrability in antitrust).

<sup>21</sup> But in environmental realm see Nathaniel O. Keohane, Erin T. Mansur, and Andrey Voynov, “Averting Enforcement: Strategic Response to the Threat of Environmental Regulation,” working paper (November 27, 2006), available <http://www.som.yale.edu/faculty/nok4/files/papers/nsr.pdf> (“We find that the threat of action did have a significant effect on emissions”).

<sup>22</sup> HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 7 (2006) (“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.”).

this failure.<sup>23</sup> Intervention, given the institutional realities of the strength of formal antitrust institutions (the market is informal in its organization), must be shown to outweigh the costs of such intervention. Easterbrook in his seminal work provided an error/cost framework based on the different types of costs associated with false positives and negatives.<sup>24</sup> 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 US context, generalized courts have evolved over time as a result of shifts in judicial interpretation, economic thinking and government policies and priorities.<sup>25</sup> As the antitrust statutes are purposely vague, courts have developed and refined antitrust jurisprudence through the common law rather than through agency rule-making.<sup>26</sup> This is the case even for the FTC, which although an independent agency, lacks the rule-making functions of other independent agencies such as the SEC.<sup>27</sup>

Since the mid 1970s and the Chicago antitrust revolution (which some argue is better understood as a Chicago/Harvard revolution,<sup>28</sup> or some merely a Harvard revolution<sup>29</sup>), the

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<sup>23</sup> STEPHEN G. BREYER, *REGULATION AND ITS REFORM* (Harvard 1982); MICHAEL C. MUNGER, *ANALYZING POLICY* (Norton 2000); Oliver Williamson, *Public and Private Bureaucracies: A Transaction Cost Economics Perspective*, 15 J.L. ECON & ORG. 306.

<sup>24</sup> Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2-3 (1984).

<sup>25</sup> HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* (2005).

<sup>26</sup> William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEXAS L. REV. 661, 663 (1982) ("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."); 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.").

<sup>27</sup> Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1199 (2008).

<sup>28</sup> William H. Page, *Areeda, Chicago, and Antitrust Injury: Economic Efficiency and Legal Process*, 41 ANTITRUST BULL. 909 (1996) (explaining the Chicago roots of Areeda's antitrust); 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 complimentary of contributions of the Chicago and Harvard views); HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 37-38 (2005) (referring to this fusion as the "new Harvard" position).

<sup>29</sup> See 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶112d, at 135-40 (3d ed. 2006) (offering a summary of the doctrinal differences and analytical assumptions between Chicago and Harvard Schools); 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 (Robert Pitofsky ed., 2008) (arguing that Harvard won in the courts on unilateral conduct); Einer

Supreme Court has shifted to a pro-defendant view. The shift in case law has accelerated since the mid 2000s with an increased Supreme Court antitrust docket.<sup>30</sup> This view embraces an analytical framework that is more concerned with false positives than negatives and one that focuses increasingly on a rule of reason inquiry and judicial administrability. The shift to the Chicago/Harvard school has had an impact on both procedural and substantive antitrust decisions. Part of this shift has been an implicit choice of the market as the default antitrust institution.

The impact of the Chicago/Harvard view upon the judiciary has been a current total level of antitrust enforcement in terms of cases filed and decided that is lower than compared to the 1960s or 1970s because of the acceptance by the courts of Chicago/Harvard views.<sup>31</sup> At its core, the Chicago School is about price theory and a theory of institutional design of legal rules based on an error costs framework.<sup>32</sup> Harvard focuses on administrability concerns for both antitrust agencies and courts and draws its roots from the Harvard legal process tradition.<sup>33</sup> The Chicago (and Harvard) approach did not go unanswered. A post-Chicago School developed that questioned some of the Chicago assumptions that certain business practices could not be inefficient or anti-competitive.<sup>34</sup> For the most part, courts have not accepted these post-Chicago claims.

Even with the debates surrounding who has a better set of theories and assumptions (Chicago, post-Chicago, Harvard), though they seem fundamental, are not actually so important. The idea that big is bad has been superseded by an informed analysis of the latest economics thinking based on efficiency as the sole goal of antitrust.<sup>35</sup> The debate on which

Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent Supreme Court Decisions*, 3 COMPETITION POL'Y INT'L 59 (2007) (suggesting a Harvard victory in recent Supreme Court decisions).

<sup>30</sup> Daniel J. Gifford & E. Thomas Sullivan, *The Roberts Antitrust Court: A Transformative Beginning*, 52 ANTITRUST BULL. 435 (2007); Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent Supreme Court Decisions?*, 3 COMPETITION POLICY INT'L 59, (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 (2007).

<sup>31</sup> William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43 (2000); Joshua D. Wright, *The Roberts Court and the Chicago School of Antitrust: The 2006 Term and Beyond*, 3 COMPETITION POL'Y INT'L 24 (2007).

<sup>32</sup> 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); ; Joshua D. Wright, *The Roberts Court and the Chicago School of Antitrust: The 2006 Term and Beyond*, 3 COMPETITION POL'Y INT'L 24 (2007).

<sup>33</sup> William H. Page, *Areeda, Chicago, and Antitrust Injury: Economic Efficiency and Legal Process*, 41 ANTITRUST BULL. 909 (1996) (providing an extensive treatment of Harvard's roots and its interplay with the Chicago School).

<sup>34</sup> Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257 (2001) (providing an overview). See also, Thomas Krattenmaker & Steve Salop, *Antitrust Analysis of Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986); Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837 (1990); ROBERT PITOFSKY, HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 109 (2008); ANTONIO CUCINOTTA, ROBERTO PARDOLESI & ROGER VAN DEN BERGH, POST-CHICAGO DEVELOPMENTS ON ANTITRUST LAW (2002).

<sup>35</sup> Stacey L. Dogan and Mark A. Lemley, *Antitrust Law and Regulatory Gaming*, 87 TEXAS L. REV. 685, 696-97 (2009)(explaining the convergence of goals and rules in antitrust).

economic theory has superior explanatory value is at the margins of antitrust. At the core is that economics as a discipline has triumphed in antitrust analysis.

The effect of the adoption of economic analysis has been pronounced on both the number and kinds of antitrust cases. Decided cases impact future cases. These dispositions matter because potential future plaintiffs are emboldened or chastened depending on the success or failures of other cases. Let us examine the standards for summary judgment and for dismissal as examples of change at the Supreme Court level that have had an impact on subsequent cases. Both *Matsushita*<sup>36</sup> and *Twombly*<sup>37</sup> concerned the costs of litigation and the possibility that juries might not understand the complexity of antitrust. Hence, the antitrust threshold for making reaching juries has increased to prevent juries from addressing difficult issues.<sup>38</sup>

*Matsushita* made it more difficult for plaintiffs to survive a summary judgment motion challenge.<sup>39</sup> In *Twombly*, the Court pushed the skepticism to an earlier point in the docket – to the Rule 12(b)(6) motion of a failure to state a claim. Courts may not have confined Section 2 of the Sherman Act so tightly if the scope for private actions in the US 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 likely to have created procedural hurdles to prevent what courts perceived to be suboptimal outcomes.<sup>40</sup>

Procedural issues are only one part 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.<sup>41</sup> Using such tools is a tradeoff between the effectiveness of these tools (and the agency's cost in using them)

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<sup>36</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (“Mistaken inferences and the resulting false condemnations ‘are especially costly, because they chill the very conduct the antitrust laws are designed to protect.’”).

<sup>37</sup> *Bell Atlantic v. Twombly*, 570 U.S. 544 (2007).

<sup>38</sup> 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.”).

<sup>39</sup> Randal C. Picker, *Twombly, Leegin and the Reshaping of Antitrust*, 2007 SUP. CT. REV. 161, 174 (explaining *Matsushita* as “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, 1606, 1608-10 (2004) (exploring the impact of *Matsushita*).

<sup>40</sup> 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).

<sup>41</sup> F. Andrew Hanssen, *Independent Courts and Administrative Agencies: An Empirical Analysis of the States*, 16 J.L. ECON. & ORG. 534 (2000).

on the one hand and the cost/likelihood of judicial review. Thus, agencies might create burdensome regulatory instruments to reduce reversal by the judiciary.<sup>42</sup>

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 10 or 20 years ago) in terms of their ability to distill the complex economics of antitrust into well reasoned decisions in substantive antitrust cases. A recent paper by Baye and Wright finds that judges face considerable problems with technically difficult antitrust issues. Their results suggest that economics training improves outcomes in simple cases (in terms of appeals and reversal rates, which they argue are an acceptable proxy for quality) but not economically complex cases. Their evidence supports 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.<sup>43</sup>

The issue of 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 either criminal cartel cases or private actions.<sup>44</sup> The institutional dilemmas involving juries are somewhat different from those involving judges. Juries, like, judges, are randomly selected. However, the capabilities of juries and judges differ. Over time judges may develop expertise in antitrust as they see a significant case load in the area. Juries have no such realistic possibility. Most antitrust issues that confront juries are highly technical and expertise is unlikely in areas such as predatory pricing or bundling.<sup>45</sup>

With all of these potential concerns about juries, in fact juries play a very limited role in the antitrust system. Perhaps because of the weaknesses of juries in antitrust cases, only one percent of all private federal antitrust cases get to the point of a jury trial. Most criminal cases result in a plea bargain while most private cases either do not survive summary judgment or a motion to dismiss and many settle.<sup>46</sup> Over time courts have removed as much decision-making as possible from juries in part because of the fear that juries will be overwhelmed by information. 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 alter both the limit and scope of testimony that parties present to juries.<sup>47</sup>

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<sup>42</sup> Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J.L. ECON. & ORG. 349 (1999); Joseph L. Smith & Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J. LEGAL STUD. 61 (2002) (providing evidence of how this works in the environmental regulatory context).

<sup>43</sup> Michael R. Baye and Joshua D. Wright, “Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity & Judicial Training on Appeals,” George Mason Law & Economics Research Paper No. 09-07. Available at SSRN: <http://ssrn.com/abstract=1319888>.

<sup>44</sup> Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1182 (2008).

<sup>45</sup> Id. at 1184 (2008) (“[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.”).

<sup>46</sup> Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1184 (2008); Daniel A. Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1, 37 (2008).

<sup>47</sup> John Lopatka & William H. Page, *Economic Authority and the Limits of Expertise in Antitrust Cases*, 90 CORNELL L. REV. 617, 619-621 (2005) (calling courts “gatekeepers” of economic information for juries).

Because of the complexity of antitrust, general courts may be overwhelmed by the complexity of the field. One possibility is to limit what judges should do to limit implementation of antitrust based on clear standards.<sup>48</sup> One therefore might suggest that antitrust should become more like other areas of complex regulation in the United States and entrust adjudication to specialized antitrust courts in an administrative setting.<sup>49</sup> 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 good 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 US antitrust context. The record of the ALJs at the FTC has been mixed. The ALJs did not come to their positions with an antitrust background. Though they may have gotten better over time (and with repeat exposure to antitrust),<sup>50</sup> there are reasons to believe that the antitrust capabilities of FTC ALJs are not particularly high. Indeed, one problem of the FTC ALJs may be that some of the issues argued before them may overwhelm their limited resources.<sup>51</sup>

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) that has direct appeal to the Chilean Supreme Court. The TDLC has five judges. Two of the five judges by law must have an economics background. The two economists have PhDs in economics. The three lawyer members of the tribunal have advanced law degrees and two had antitrust backgrounds prior to their appointment. The pay for this part time position is approximately US\$120,000.<sup>52</sup> 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 DOJ antitrust enforcer makes US\$153,200 for a full time job<sup>53</sup> and where the cost of living in Washington, DC is much higher than Santiago, Chile.

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<sup>48</sup> 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.”).

<sup>49</sup> Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 338-39, 388-89 (2000) (advocating for use of the FTC to adjudicate antitrust disputes outside of mergers and cartels because of better relative institutional capabilities to generalized courts).

<sup>50</sup> *Assessing Part III Administrative Litigation: Interview with Timothy J. Muris*, 20 ANTITRUST 6, 7 (Spring 2006); J. Robert Robertson, *FTC Part III Litigation: Lessons from Chicago Bridge and Evanston Northwestern Healthcare*, 20 ANTITRUST 12, 15 (Spring 2006).

<sup>51</sup> *Assessing Part III Administrative Litigation: Interview with Timothy J. Muris*, 20 ANTITRUST 6, 7 (Spring 2006); J. Robert Robertson, *FTC Part III Litigation: Lessons from Chicago Bridge and Evanston Northwestern Healthcare*, 20 ANTITRUST 12, 15 (Spring 2006).

<sup>52</sup> LEY Núm. 20.361, MODIFICA EL DECRETO CON FUERZA DE LEY N°1 DEL MINISTERIO DE ECONOMÍA, FOMENTO Y RECONSTRUCCIÓN, DE 2005, SOBRE TRIBUNAL DE DEFENSA DE LA LIBRE COMPETENCIA available at <http://www.leychile.cl/Navegar?idLey=20361>.

<sup>53</sup> Salary data provided by the Executive Office of DOJ Antitrust.

The TDLC integrates the latest in 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* rejected a merger using a concept of “integrated retail” to determine that the merger would reduce competition. *Chiletabacos/Phillip Morris* involved an abuse of dominance through discounting, exclusivity, and other practices. A third case, *Guerra del Plasma*, was a joint abuse of dominance/collusion case involving retail stores.

The problem with the Chilean system is that the malfunction that a generalized judiciary has when it decides a case for which it does not have expertise has not disappeared. Rather than occurring at a lower level within the judiciary, the malfunction has moved to Chilean Supreme Court. In two cases involving tacit collusion, the Chilean Supreme Court overturned the TDLC, even though the TDLC’s analysis was correct on the economics. That the generalist Chilean Supreme Court has ruled the TDLC on highly procedural grounds has chilled the TDLC in its own decision-making. The TDLC has shifted the way it decides cases in certain ways when it knows that it will be overruled by the Chilean Supreme Court, even when the application of economics to the law would suggest an alternative viewpoint.<sup>54</sup>

### C. 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.<sup>55</sup> This general observation holds in antitrust in the United States.<sup>56</sup> Agencies may be resource limited or under-aggressive in enforcement.<sup>57</sup> In a private rights system an agency may not need to spend as many resources against certain types of anti-competitive conduct because private litigants may serve as a substitute for any non-enforcement by the antitrust agency. This complimentary 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.<sup>58</sup>

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.<sup>59</sup> More generally, private

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<sup>54</sup> Elina Cruz and Sebastian Zarate, *Building Trust in Antitrust: The Chilean Case* in LATIN AMERICAN COMPETITION LAW AND POLICY (Eleanor M. Fox and D. Daniel Sokol eds., 2009); Aldo Gonzalez, *Quality of Evidence and Cartel Prosecution: The Case of Chile* in LATIN AMERICAN COMPETITION LAW AND POLICY (Eleanor M. Fox and D. Daniel Sokol eds., 2009).

<sup>55</sup> Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AMER. J. POL. SCI. 821, 823 (2008).

<sup>56</sup> Institutional analysis would be different in countries without private rights.

<sup>57</sup> 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. 2 (2007).

<sup>58</sup> Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AMER. J. POL. SCI. 821, 827 (2008); 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 (1985); ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (Harvard 2001).

<sup>59</sup> RICHARD POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 35 (1976).

rights might be overly costly and might distort the sort of norms that government based enforcement might create.<sup>60</sup> Dan Crane argues that the structure of private enforcement in the US is not effective on either compensation or deterrence grounds.<sup>61</sup> The alternative case is that public and private antitrust should work together to address anticompetitive conduct because the combination of public and private enforcement leads to better outcomes.<sup>62</sup>

A number of theoretical articles suggest that private enforcement is neutral for the antitrust system.<sup>63</sup> Others argue that private enforcement may lead to increased social welfare if there is a sufficiently large damage multiple.<sup>64</sup> A number of theoretical reasons support private rights in antitrust, such as: making the plaintiff whole, preventing unjust enrichment, and creating incentives to private plaintiffs to bring cases where they may have better information than the government.<sup>65</sup> 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* and the creation of incentives due to treble damages to bring meritless cases that can thereafter be settled for profit.<sup>66</sup>

Some theoretical work suggests substitutability between private and public enforcement. In McAfee, Mialon, and Mialon's recent article, a firm is initially better informed than the government about possible antitrust violations by its competitor, but the government's incentives are better aligned with those of society than the firm's incentives since the firm may have incentives to strategically abuse the antitrust laws. They assume that the government chooses whether to litigate before the firm does. In this context, when private and public enforcement potentially are both in play, public enforcement tends to give way to private enforcement. 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 of the rightful suits are already being initiated privately.<sup>67</sup>

Private rights of action create a dynamic interplay between public and private antitrust enforcement. Given the importance and potential consequences of public and

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<sup>60</sup> Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982).

<sup>61</sup> Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, [ ] VAND. L. REV. [ ] (forthcoming 2010).

<sup>62</sup> Spencer Waller, *Towards a More Constructive Public-Private Partnership for Enforcing Competition Law*, 29 WORLD COMP. L. & ECON. REV. 367 (2006).

<sup>63</sup> Stephen W. Salant, *Treble Damage Awards in Private Lawsuits for Price Fixing*, 95 J. POL. ECON. 1326 (1987); Jonathan B. Baker, *Private Information and the Deterrent Effect of Antitrust Damages Remedies*, 4 J.L. ECON. & ORG. 385 (1988).

<sup>64</sup> David Besanko & Daniel Spulber, *Are Treble Damages Neutral? Sequential Equilibrium and Private Antitrust Enforcement*, 80 AMER. ECON. REV. 870 (1990).

<sup>65</sup> Franklin M. Fisher, *Economic Analysis and Antitrust Damages*, 29 WORLD COMP. L. & ECON. REV. 383 (2006).

<sup>66</sup> Franklin M. Fisher, *Economic Analysis and Antitrust Damages*, 29 WORLD COMP. L. & ECON. REV. 383 (2006).

<sup>67</sup> R. Preston McAfee, Hugo M. Mialon & Sue H. Mialon, *Private v. Public Antitrust Enforcement: A Strategic Analysis*, 3-6 (Aug. 1, 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=775245](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=775245).

private litigation, the lack of systematic empirical study of the interaction between public and private litigation is remarkable. There was an important set of empirical articles that emerged from the Georgetown conference on private antitrust litigation in 1985. The empirical basis of the articles was data collected from all private antitrust actions filed from 1973 to 1983 in five federal district courts. To date, this has been the most important set of empirical studies on private rights.<sup>68</sup>

Since that study, empirical work on private rights in monopolization cases has been limited primarily to case studies.<sup>69</sup> A number of quantitative articles study DOJ enforcement.<sup>70</sup> These studies are incomplete because they do not examine the interplay of public and public 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 the better to 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 could result 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 increase in independent private actions. In this scenario, public and private monopolization litigation would be seen as substitutes.<sup>71</sup>

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<sup>68</sup> 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, IN PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING* (Larry White ed., 1988); Steven C. Salop & Lawrence J. White, *Private Antitrust Litigation: Introduction and Framework*, in *PRIVATE ANTITRUST LITIGATION, IN PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING* (Larry White ed., 1988); Kenneth G. Elzinga & William C. Wood, *The Costs of the Legal System in Private Antitrust Enforcement*, in *PRIVATE ANTITRUST LITIGATION, IN PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING* (Larry White ed., 1988); Jeffrey M. Perloff & Daniel L. Rubinfeld, *Settlements in PRIVATE ANTITRUST LITIGATION, IN PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING* (Larry White ed., 1988); Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551 (1991).

<sup>69</sup> See e.g., Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879 (2008).

<sup>70</sup> Joseph C. Gallo et al., *Department of Justice Antitrust Enforcement 1955-1997: An Empirical Study*, 17 REV. INDUS. ORG. 75, (2000); Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365 (1970); 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); Vivek Ghosal, *Regime Shift in Antitrust 21-22* (Feb. 2007), available at <http://ssrn.com/abstract=1020448>.

<sup>71</sup> Private and public enforcement are likely to be complements with regard to private suits piggy-backing 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

Articles 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 on the composition. On the one hand, it is not clear that Supreme Court case law is exogenous. After all, the cases that are litigated 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. On the other hand, there might in fact be this effect of an exogenous shock by Supreme Court case law. Take *Leegin* as an example of a case cleaning up case law to follow existing empirical economic studies. 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 forms of RPM litigation (public and private enforcement). 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 DOJ respond to significant losses may play an important role in understanding why agencies bring few cases. Some authors speculate that the DOJ was concerned about bringing but not winning a merger case post-*Oracle* because.<sup>72</sup> The same theory could hold for unilateral conduct. Unfortunately, there is probably not enough “post” data to test that as a causal dynamic in the decline of public enforcement under the Bush years. 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 dominant firm behavior and litigation decisions are not exogenous. With respect to the latter, the types of cases that the government or private actors choose to bring will presumably vary with their expectations about the likely rulings. So, while more Democrat appointed judges might mean that for a given case the plaintiff is more likely to win, this might lead plaintiffs of

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government enforcement, not that it *would*. For example, the Solicitor General /DOJ wrote amicus briefs in all of the three big unilateral conduct Supreme Court cases of recent vintage – *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 549 U.S. 312 (2007), and *Pac. Bell Tel. Co. v. LinkLine Commc'ns, Inc.*, 129 S. Ct. 1109, 1124 (2009). 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. They were substitutes in the sense that private parties were bringing them and not the government, but the government would not have brought them at all in any event. When examining whether private and public suits are substitutes or complements, it is not clear as to for what they might be substitutes or complements for. One question to ask is if 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.

<sup>72</sup> Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, in *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON ANTITRUST* (Robert Pitofsky ed., 2008).

all types to file weaker cases.<sup>73</sup> 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 behavior that is problematic under Section 2 if they anticipate a more favorable Republican judiciary.

#### D. Legislature

While the US antitrust institutions (courts, agencies both state and federal, Congress, the market) are mature, in recent years important developments have caused the need for a rethink of the optimal institutional structure of antitrust. Congress might try to overturn antitrust decisions by the court. Such may be the case with resale price maintenance post *Leegin*.<sup>74</sup> 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. As the government has taken an ownership stake in financial institutions, it seems odd that government should not be subject to the same antitrust review for competitive effects as private firms.

To examine antitrust merely through antitrust law omits a large variable –larger competition policy. In the United States, competition issues in the financial and health care sectors and potential legislation in these areas are important issues that take up the front pages of every newspaper. Yet, antitrust has a role both in understanding competition in these sectors and in shaping legislative responses.<sup>75</sup>

One way to improve the legislative process to make it friendlier to competition is through competition advocacy by the antitrust agency. The purpose of competition advocacy is to influence legislation and regulation to limit potential anti-competitive effects. Competition advocacy is the process through which an agency produces speeches, testimony and reports to increase transparency in the legislative process. This process provides a more accurate estimate of costs of regulation for the general public. Competition advocacy thereby reduces the participation cost of complex legislation and overcomes some public choice issues of legislative capture.<sup>76</sup> This form of competition policy may be a cheaper solution than enforcement of antitrust laws.<sup>77</sup> Increased transparency and interest in antitrust issues may force politicians to focus on competition matters. Because competition issues become important news items, interest groups will be more likely to mobilize because of the lower information costs. As an antitrust agency

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<sup>73</sup> 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).

<sup>74</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

<sup>75</sup> See e.g., OECD, Competition and financial markets: issues in the current financial crisis, 2009 available at <http://www.oecd.org/dataoecd/9/22/43067294.pdf>; FTC, Emerging Health Care Issues: Follow-on Biologic Drug Competition: A Federal Trade Commission Report (2009) available at <http://www.ftc.gov/os/2009/06/P083901biologicsreport.pdf>.

<sup>76</sup> Advocacy is not limited merely to legislative interventions. Effective advocacy extends to sector regulation, the judiciary and in creating a “competition culture” for society.

<sup>77</sup> James C. Cooper, Paul A. Pautler, & Todd J. Zywicki, *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091, 1111 (2005).

becomes more influential and increases its political legitimacy, consumers will be more likely to trust the agency and gather information for possible cases.<sup>78</sup>

Liberalization across large parts of the economy involves an increase in both legislation and rule making 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 path dependence of policy choices.<sup>79</sup> 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 pro-competitive result is lower. Advocacy helps to overcome legislative and administrative agency failure to create pro-competitive rules of play.<sup>80</sup>

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. Without competition advocacy, such measures become permanent and a hindrance to a competitive market.<sup>81</sup> It is more difficult to remove a law or regulation once it is in place.<sup>82</sup> However, competition advocacy that produces outputs such as a report or a hearing on anti-competitive regulation increases the transparency of such regulation and reveals the societal cost. This may reduce the costs of limiting the reach of such legislation as citizens may get mobilized to fight against special interests.

## E. Antitrust Agencies

### 1. Agency capacity

A well functioning antitrust agency effectively combats anti-competitive actions. However, such an outcome assumes that an antitrust agency has the ability to identify anti-competitive conduct and to bring both enforcement and non-enforcement actions. There are a number of factors that affect the ability of an agency to do so. These include

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<sup>78</sup> John W. Clark, Competition Advocacy: Challenges for Developing Countries, OECD - Inter-American Development Bank 2<sup>nd</sup> Annual Latin American Competition Forum, June 14-15, 2004 at 10 (“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.”)

<sup>79</sup> On path dependence generally, see PIERRE GARROUSTE & STAVROS IOANNIDES, *EVOLUTION AND PATH DEPENDENCE IN ECONOMIC IDEAS: PAST AND PRESENT* (2001).

<sup>80</sup> Oliver E. Williamson, *Why Law, Economics, and Organization?*, 54 *KOBE L.J.* 63 (2004).

<sup>81</sup> ICN, Competition Advocacy in Regulated Sectors: Examples of Success, International Competition Network, 2004 Annual Conference, Seoul, Korea.

<sup>82</sup> John Cubbin, & David Currie, *Regulatory Creep and Regulatory Withdrawal: Why Regulatory Withdrawal is Feasible and Necessary*, *Utility Week*, (2002) (“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.”).

the legal structure of antitrust, human resources within the agency, and an agency's capacities within a larger country-wide regulatory system.<sup>83</sup>

It is important to measure the impact of an agency.<sup>84</sup> 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.<sup>85</sup> In a sports context, this would be akin to reviewing video of how a hitter approaches each at-bat to analyze any flaws in mechanics of the swing or strategy against each pitcher. Without them an agency will not understand its own strengths and weaknesses and its ability to undertake successfully certain types of work.<sup>86</sup> Yet, self studies are costly. They require significant time and resources spent away from enforcement and advocacy. In the short term, such self study does not result in quick "wins" for the agency and politically support of self study is costly even if long term the benefits are substantial.

While there has been an increased push towards performance benchmarks in antitrust,<sup>87</sup> such benchmarks are more difficult to quantify in antitrust than in other regulatory fields. The reason for this difficult is due to endogeneity concerns. Those issues in which antitrust enforcement or advocacy may play a role also may be affected by sector regulation, trade agreements or new legislation. Determining causality is very difficult.

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 antitrust context globally? Such a rating is difficult. One reason indexing effectiveness is difficult is that such a measurement portends a single "right" way in which to prioritize and enforce antitrust law. The business of competition enforcement simply does fit into this framework.

There is nothing akin to won-loss record, strength of conference opponents and the margin of victory in games. One recent U.S. Department of Justice official stated, "Anti-cartel enforcement is our top priority at the Department of Justice, and we believe it should be a top priority for every antitrust agency."<sup>88</sup> Despite the allure of such a

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<sup>83</sup> 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 (2008); 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 (2001).

<sup>84</sup> Timothy Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165 (2005).

<sup>85</sup> William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903 (2009).

<sup>86</sup> William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903, 905-06 (2009).

<sup>87</sup> ICN, Report on the Agency Effectiveness Project Second Phase – Effectiveness of Decisions (2009).

<sup>88</sup> Makan Delrahim, "Antitrust Enforcement Priorities and Efforts Towards International Cooperation," Taipei, Taiwan (November 15, 2004) available at <http://www.usdoj.gov/atr/public/speeches/208479.htm>. See also Gerald F. Masoudi, "Cartel Enforcement in the United States (and Beyond)," Cartel Conference Budapest, Hungary (February 16, 2007). 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

strong and clear position, it is not clear that cartel enforcement should be the priority for every antitrust agency.<sup>89</sup> That is, the allocation of scarce resources towards enforcement vis-à-vis the payoffs is likely to differ across nations and/or regions. Detection and litigation costs are not the same in every jurisdiction. Merger control is almost always situation specific and it changes in response to technical advances, political shifts and economic growth. Agency priorities also are a function of the local conditions in a particular country.

For the most part antitrust change is incremental.<sup>90</sup> There is also an element of path dependence to agencies.<sup>91</sup> However, as needs of agencies change, the actual changes necessary to allow for an agency to innovate the better to reach its goals increases significantly.<sup>92</sup> In times of crisis, larger scale change is possible. Yet, even after significant change in institutional design, constant tinkering is necessary because institutions evolve as a function of events outside of the institution. In a business context, firms innovate or they fail either through takeover or through bankruptcy. Institutional design within the firm will change based on the organizational internal and external needs.<sup>93</sup> Government is different. Agencies for the most part tend to grow in scope and size.<sup>94</sup> Rather than reduce the number of agencies, often bureaucracy creates new layers to existing agencies or new agencies altogether to move beyond the current limitations and malfunctions in the existing institutional design and practice of existing agencies. This, however, does not solve the problem 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.<sup>95</sup> Public choice considerations

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cartel enforcement. Similarly, FTC officials tend to focus on the strength of competition advocacy, which they undertake but DOJ does not. See William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 *Geo. Mason L. Rev.* 903 (2009); Todd Zywicki, James C. Cooper & Paul A. Pautler, *Theory and Practice of Competition Advocacy at the FTC*, 72 *ANTITRUST L.J.* 1091 (2005).

<sup>89</sup> Frédéric Jenny, *Cartels and Collusion in Developing Countries: Lessons from Empirical Evidence*, 29 *WORLD COMP. L & ECON. REV.* 1 (2006).

<sup>90</sup> William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 *GEO. MASON L. REV.* 903, 925(2009).

<sup>91</sup> Fabrizio Gilardi, *The Formal Independence of Regulators: A Comparison of 17 Countries and 7 Sectors*, 11 *SWISS POL. SCI. REV.* 139 (2005).

<sup>92</sup> Michael Krakowski, *Competition Policy Works: The Effect of Competition Policy on the Intensity of Competition--An International Cross-Country Comparison 4* (HWWA Discussion Paper, Paper No. 332, 2005), available at <http://ssrn.com/abstract=854908>.

<sup>93</sup> MICHAEL L. TUSHMAN & CHARLES A. O'REILLY III, *WINNING THROUGH INNOVATION: A PRACTICAL GUIDE TO LEADING ORGANIZATIONAL CHANGE AND RENEWAL* (2002).

<sup>94</sup> WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971).

<sup>95</sup> 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 Pollack & Greg Shaffer eds., 2005) ("The assumption that antitrust officials are strongly influenced by political considerations is encouraged by US antitrust history.").

limit the role that agencies can play to reduce or eliminate government created and facilitated anti-competitive restraints. 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. It can be used to limit government created anti-competitive distortions, competition advocacy may be politically controversial and risky. Competition advocacy exposes antitrust agencies to criticism and potential retribution from interest groups, captured legislators, and other governmental actors.<sup>96</sup>

Both antitrust's statutory authority and its current policy outlook in each country is a function of discretion and of policy choices. Antitrust agencies must take into account their political capital and how to expend it vis-à-vis other government actors, state and private owned enterprises that wield significant political power.<sup>97</sup> 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.<sup>98</sup> In its very roots, antitrust came about 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.<sup>99</sup> To think that antitrust is not influenced by political interests naively suggests that public choice theory applies in other regulatory settings but somehow antitrust is immune from such behavior.

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<sup>96</sup> James Cooper, Paul Pautler & Todd Zywicki, *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L. J. 1091 (2005).

<sup>97</sup> Former DOJ Antitrust head Donald Baker admits, "Antitrust and politics are inevitably intertwined, not only in the United States but in any country having an effective antitrust program." Donald I. Baker, *Antitrust and Politics at the Justice Department*, 9 J.L. & POL. 291, 291 (1993).

<sup>98</sup> 15 USC § 1. Though Canada enacted its national competition law one year prior to the enactment of the Sherman Act, there was no corresponding sub-federal Canadian legislation analogous to state antitrust laws in the United States that preceded the national law.

<sup>99</sup> George Stigler, *The Origin of the Sherman Act*, 14 J. LEGAL STUD. 1 (1985); Fred S. McChesney, *Economics Versus Politics in Antitrust*, 23 HARV. J.L. & PUB. POL'Y 133 (1999). Thomas J. DiLorenzo, *The Origins of Antitrust: An Interest-Group Perspective*, 5 INT'L REV. L. & ECON. 73 (1985); Thomas W. Hazlett, *The Legislative History of the Sherman Act Re-examined*, 30 ECON. INQUIRY 263, 273-74 (1992); RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA, 1888-1992* 15 (1996) (Sherman's faction had greater concern with "industrial liberty" than consumer welfare). 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 and social and based on notions of "competition" and populism. Richard Hofstadter, "What Happened to the Antitrust Movement," in RICHARD HOFSTADTER, *THE PARANOID STYLE IN AMERICAN POLITICS: AND OTHER ESSAYS* (1965) reprinted in E. THOMAS SULLIVAN, *THE POLITICAL ECONOMY OF THE SHERMAN ACT: THE FIRST ONE HUNDRED YEARS* (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 for the Sherman Act. See e.g., WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* (1981); HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* (1955).

In some instances, antitrust enforcers may be subject to capture.<sup>100</sup> Antitrust agencies may act politically in a number of ways. Agencies are political players who act as an independent force to try to increase their size and power.<sup>101</sup> Agencies may 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 exit government and join private practice or advance within government.<sup>102</sup> Cases not brought are equally important. Agencies may not bring difficult cases because they may result in a defeat. A decision against the agency may affect the future budget of the agency and the quality of its staff. 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.<sup>103</sup> For example, when an enforcer rules the “wrong” way because she looks to efficiency rather than industrial policy concerns, political repercussions may ensue.<sup>104</sup>

### 3. How many antitrust agencies are optimal?

Most antitrust systems around the world have one agency. The agency structure in many countries is that of an independent agency. Overall, the literature on agencies suggests that independent agencies are better suited to dealing with time consistency/credible commitment problems.<sup>105</sup> The reasons for this are that independent agencies are better insulated from political pressures and less likely to succumb to the majoritarian impulse of unpopular decisions.<sup>106</sup> 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 by creating agencies that are better shielded from political influence than would be the case with an executive agency.<sup>107</sup> The political pressures that independence shields an agency are

<sup>100</sup> In one instance Reagan asked the Department of Justice to drop an investigation of British Airways as a favor to Prime Minister Thatcher. See Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1, 18 (1997).

<sup>101</sup> DENNIS C. MUELLER, *PUBLIC CHOICE III* 523 (2003).

<sup>102</sup> Fred S. McChesney, *Economics Versus Politics in Antitrust*, 23 HARV. J.L. & PUB. POL'Y 133 (1999).

<sup>103</sup> See generally, JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* (1989). 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.

<sup>104</sup> William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 623-25 (1982).

<sup>105</sup> Brian Levy & Pablo T. Spiller, *The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation*, 10 J.L. ECON. & ORG. 201 (1994).

<sup>106</sup> Mark Thatcher & Alec Stone Sweet, *Theory and Practice of Delegation to Non-Majoritarian Institutions*, 25 W. EUR. POL. 1 (2002). But see Matthew Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 55 (2008) (suggesting that “a moderate degree of bureaucratic insulation alleviates rather than exacerbates the counter-majoritarian problems inherent in bureaucratic policymaking.”).

<sup>107</sup> OECD, *Designing Independent and Accountable Regulatory Authorities for High Quality Regulation* (2005), available at <http://www.oecd.org/dataoecd/15/28/35028836.pdf>; Antonio Estache and David Martimort, *Politics, Transaction Costs, and the Design of Regulatory Institutions* (March 1999), World Bank Policy Research Working Paper No. 2073. Available at SSRN: <http://ssrn.com/abstract=620512>; Giandomenico Majone, *The Rise of the Regulatory State in Europe*, 17 WEST EURO. POL. 77 (1994).

both majoritarian impulse (populist pressures)<sup>108</sup> and public choice capture by interest groups regulated by the agency.<sup>109</sup>

Majoritarianism arises when majority parties cannot pre-commit to policies post-election. Moreover, it occurs when the majority party fails to include the preferences of the minority party in policy making.<sup>110</sup> In an antitrust context, majoritarian anti-competitive restraints may result in legislation that creates price controls.<sup>111</sup> It also may push executive agencies to respond to “unfair” pricing cases sub-optimally by punishing firms that charge low prices. Yet, low prices are exactly what one wants in the market – because they most probably are the result of fierce competition.

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

The potential for divergence between the FTC and the DOJ on mergers has always existed.<sup>112</sup> The burden for a preliminary injunction that enforcers need to meet under Section 7 of the Clayton Act is that the effect of a merger “may be substantially to

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<sup>108</sup> 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.”).

<sup>109</sup> Jon Stern and Stuart Holder, *Regulatory Governance: Criteria for Assessing the Performance of Regulatory Systems* (May 1999), London Business School Regulation Initiative Working Paper No. 20. Available at SSRN: <http://ssrn.com/abstract=321421> or DOI: 10.2139/ssrn.321421

<sup>110</sup> Gene Grossman & Elhanan Helpman, *A Protectionist Bias in Majoritarian Politics*, 120 QUART. J. ECON. 1239 (2005).

<sup>111</sup> 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).

<sup>112</sup> D. Bruce Hoffman and M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 ANTITRUST L. J. 1, 320 (2003) (providing a historical analysis of the development of administrative litigation at the FTC); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714-15 (D.C. Cir. 2001) (“Therefore, the FTC will usually be able to obtain a preliminary injunction blocking a merger by “rais[ing] questions going to the merits so serious, substantial, difficult[,] and doubtful as to make them fair ground for thorough investigation.”).

lessen competition, or to tend to create a monopoly.”<sup>113</sup> Under 13(b) of the FTC Act, the FTC needs to meet a lower burden proof. This is the “serious substantial” standard. The recent *Whole Foods* decision changed the analysis of granting the preliminary injunction by noting that the FTC should be able to get injunctive relief more easily under 13(b).<sup>114</sup> The FTC can easily meet this lower standard and block most deals with a preliminary injunction or even the threat of preliminary injunction.

Courts apply a four part preliminary injunction test for under Section 15 of the Clayton Act, the most important of which is the likelihood on the merits.<sup>115</sup> *Whole Foods* signaled a change from this approach for the FTC. Under the D.C. Circuit’s analysis under *Whole Foods*, the FTC standard is that when a merger that presents “questions going to the merits so serious, substantial, difficult, and doubtful as to make them fair grounds for thorough investigation [by the FTC]” will reach the preliminary injunction threshold.<sup>116</sup> The *CCC Mitchell* case reaffirmed this lower threshold for the FTC.<sup>117</sup> 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.”<sup>118</sup>

The preliminary injunction decisions must be read in conjunction with the *Inova* case, a case that makes the institutional move of pushing merger challenges out of the court system and into FTC adjudication. The push to increased use of Part 3 adjudication with the time involved from ALJ to Commission and then to Court of Appeals reduces the appetite of firms to litigate out merger challenges. These recent decisions have given the FTC significant leverage to dictate their merger terms to potentially merging firms. The divergent outcomes across agencies change the business planning and bargaining positioning of merging parties with the agencies in terms of possible divestitures, or other concessions that parties might make as part of getting a merger approved.<sup>119</sup>

An important factor in whether or not a deal will be consummated from a business perspective is a function of timing. Delay can be fatal to a deal because it creates uncertainty.<sup>120</sup> This distracts managers from the merging parties from their day to day operations. Delay also presents problems for customers as they are less willing to sign additional contracts without knowledge of what may be a significant change for a

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<sup>113</sup> 15 U.S.C. § 18.

<sup>114</sup> *FTC v. Whole Foods*, 533 F.3d 869, 1034-35 (D.C. Cir. 2008).

<sup>115</sup> *United States vs. Gillette Co.*, F. Supp. 78, 80 (D.D.C. 1993).

<sup>116</sup> *FTC v. Whole Foods*, 533 F.3d 869, 875 (D.C. Cir. 2008).

<sup>117</sup> *FTC v. CCC Holdings Inc.*, 605 F.Supp. 2d 26 (D.D.C. 2009).

<sup>118</sup> *Id.* at 36.

<sup>119</sup> Transactions abandoned by the parties, in the last year, in the face of FTC opposition or merely full investigation include: Redsky/Newpark (oil-drilling waste disposal services; abandonment after lawsuit filed by FTC); Herff Jones/AAC (class rings; abandonment in the face of challenge); CRH/Pavestone (concrete hardscape products; abandonment in the face of challenge); CCC/Mitchell (auto-repair databases/software; abandonment after FTC wins in court); CSL/Talecris (blood plasma; abandonment in the face of challenge); Thoratec/Heartware (ventricular assist devices; abandonment in face of challenge); Utz/Snyder (salty snacks; abandonment during investigation); Endocare/Galil (prostate and renal cancer treatment; abandonment during investigation); and Carillion Clinic (medical clinics; agreement to divest already-acquired outpatient center). Thanks to Ken Glazer for pointing me to these transactions.

<sup>120</sup> ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 139 (2007).

company in the long term. Competitors may try to poach customers or managers because of the uncertainty. From a standpoint of business planning having different substantive standards poses a threat to the antitrust system. It undermines business planning. As the Antitrust Modernization Commission observed, it also undermines the public's confidence in the US antitrust system.<sup>121</sup> This Article does not address what the appropriate 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, but a split-level system of standards is unsustainable institutionally.<sup>122</sup>

A similar unsustainable institutional issue exists with regard to single firm conduct. The standards under FTC 5 Section 5 and Sherman Act Section 2 are distinct. 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 such an interpretation is possible.<sup>123</sup> 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 run sustainable equilibrium.

A more 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 such as conduct that is "unjust," "oppressive," or "immoral."<sup>124</sup> In the case of Section 5, there is the institutional bias that favors the Commission position in administrative litigation. In cases with disputed facts the Commission won all Sherman Act cases in administrative adjudication. Moreover, when taken in its totality, the Commission has a winning record of 95 percent.<sup>125</sup> The dynamics of FTC administrative litigation and whether parties will settle are a function of these realities of the success rate against the Commission.

The divergence between DOJ and FTC leads to a basic question. Why should the US have two agencies? This is a function of historical accident and path dependency. The two agencies have certain redundancies. If one were to design US antitrust from scratch, very few would suggest replicating the current structure. Generally, such a rethink is very difficult politically. For example, the recent Antitrust Modernization Commission in its report stated, "The Commission recommends no comprehensive change to the existing system in which both the FTC and the DOJ enforce the antitrust laws."<sup>126</sup>

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<sup>121</sup> Id. at 131.

<sup>122</sup> 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. Jeffrey W. Brennan, Sean P. Pugh, *Inova and the FTC's Revamped. Merger Litigation Model*, 23-FALL Antitrust 28 (2008).

<sup>123</sup> 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 (1979–1980).

<sup>124</sup> Robert H. Lande, *Revitalizing Section 5 of the FTC Using 'Consumer Choice' Analysis*, 8 Antitrust Source, February 2009. Available at SSRN: <http://ssrn.com/abstract=1287218>.

<sup>125</sup> A. Douglas Melamud, Comments at the FTC Workshop on Section 5 at 19.

<sup>126</sup> ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 129 (2007).

There are a number of different alternatives to the existing structure. One option would be for the creation of a single antitrust agency. The FTC could undertake all competition functions with criminal enforcement being done separately within the DOJ but with the abolition of the Antitrust Division.<sup>127</sup> The institutional design of a number of other countries separates cartel criminal functions from those of other, more technical, antitrust enforcement.<sup>128</sup> Another alternative structure would look like that of energy regulation in the United States between the Department of Energy and Federal Energy Regulatory Commission.<sup>129</sup> In such a model certain, the DOJ would undertake distinct activity. The FTC would become an independent agency housed within DOJ. Another alternative would be to abolish the FTC and move its competition functions to DOJ, keeping the FTC as a stand-alone consumer protection agency with a policy/advocacy arm and a research function.

### *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 was born of the recognition of complementarity of the two systems.<sup>130</sup> Are resources poor state attorneys general (AGs) merely “barnacles on the ship of antitrust”<sup>131</sup> as Posner claims or is there an important role for state antitrust enforcement? 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.<sup>132</sup>

Harry First has identified a number of different institutional possibilities for state level involvement in antitrust. The first involves stripping the states of their power to bring *parens patriae* suits.<sup>133</sup> The second involves creating allocation rules between federal and state. This is not as easy as it might at first seem as the distinction between local and national is not always clear. Similarly, allocation could be by type of case.<sup>134</sup> A yet third option would involve first refusal rights by federal enforcers, although First notes the problems with such rights including who gets to make the decision and when.<sup>135</sup>

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<sup>127</sup> This also might have repercussions as to whether or not there would be private rights.

<sup>128</sup> This occurs in both common law (e.g., Canada, UK) and civil law (e.g., Japan and Chile) circumstances.

<sup>129</sup> 42 U.S.C. § 7134.

<sup>130</sup> Andrew I. Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism*, 61 GEO. WASH. L. REV. 657 (1993).

<sup>131</sup> Jaret Seiberg, *Checks and Imbalances*, Daily Deal, July, 26 2004. 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.”).

<sup>132</sup> Andrew I. Gavil, *Thinking Outside the Illinois Brick Box: A Proposal for Reform*, 76 ANTITRUST L.J. 167 (2009).

<sup>133</sup> Harry First, *Making the Best of a Good Situation: Modernizing State Antitrust Enforcement*, 54 ANTITRUST BULL. 281, 286 (2009).

<sup>134</sup> *Id.* at 287-90.

<sup>135</sup> *Id.* at 290-91.

The reason to support a reduced state role has to do with limited state resources competencies relative to the federal government as well as greater capture by special interests relative to federal enforcers.<sup>136</sup> Such limitations on the part of the states may hurt optimal antitrust enforcement. States lack the resources of federal enforcers in terms of budget or expertise in antitrust.<sup>137</sup> These factors increase the possibility for bad decision-making in terms of what kinds of cases to bring. States have incentives to piggy back onto national cases because the cases are high profile and generate political rewards to the state AGs. How much state involvement adds in such cases is debatable.<sup>138</sup> In terms of institutional resource allocation, state involvement in federal enforcement of mergers or single firm conduct cases may serve to increase coordination costs for potential resolution of the legal issue.<sup>139</sup> States have fewer resources in terms of staffing compared to federal antitrust enforcers and to use their scarce resources on duplicative action may waste such resources. It is not clear that states add value in the area of mergers. States may be more likely to put local parochial interests ahead of national consumer welfare.<sup>140</sup> Central enforcement may also therefore reduce compliance costs.

An alternative view is that state law is a substitute for federal enforcement, particularly of single firm conduct. If we believe that cases such as the NY Attorney General's investigation of Intel that resulted in a suit prior to the FTC suit against Intel is representative of a larger trend, states may be stepping into what they believe is a federal enforcement gap. In some areas states do the sort of work that falls through federal cracks such as localized cartels and dominance cases. States have better knowledge of these sub-national markets.<sup>141</sup> As with general arguments regarding federalism,<sup>142</sup> state antitrust enforcement allows for greater experimentation across policy choices.<sup>143</sup>

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<sup>136</sup> Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940-41 (2001).

<sup>137</sup> Robert H. Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance*, 35 N.Y. L. SCH. L. REV. 1047, 1072-73 (1990)(explaining that it is not a good use of state resources to challenge "specified exceptionally large, truly national transactions, and transactions that primarily do not affect that state."); Douglas H. Ginsburg and Scott H. Angstreich, *Multinational Merger Review: Lessons From Our Federalism*, 68 ANTITRUST L.J. 219, 288 (2000); Robert Hahn and Anne Layne-Farrar, *Federalism in Antitrust*, 26 HARV. J.L. & PUB. POL'Y 877, 887-890 (2003).

<sup>138</sup> It is hotly contested whether the states added much in the *Microsoft* litigation. *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 (Richard A. Epstein and Michael S. Greve, eds, AEI 2004); Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925 (2001); Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004 (2001).

<sup>139</sup> For example, the state role in the *Microsoft* litigation was costly. Robert W. Hahn & Anne Layne-Farrar, *Federalism in Antitrust*, 26 HARV. J.L. & PUB. POL'Y 877, 878 (2003) (arguing that state antitrust enforcement "lengthened the lawsuit, complicated the settlement process, and increased both legal uncertainty and litigation costs").

<sup>140</sup> Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General* in COMPETITION LAWS IN CONFLICT (Richard A. Epstein and Michael S. Greve, eds, AEI 2004).

<sup>141</sup> Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673 (2003).

<sup>142</sup> John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2028 (2009)(exploring the Supreme Court's development of this idea).

<sup>143</sup> Harry First, *Making the Best of a Good Situation: Modernizing State Antitrust Enforcement*, 54 ANTITRUST BULL. 281, 295 (2009).

### *G. Antitrust versus sector regulation*

Recent Supreme Court decisions in *Billings*<sup>144</sup> and *Trinko* concern how antitrust interacts with sector regulation competition issues. Sometimes regulators pursue antitrust objectives or antitrust pursues regulatory objectives. Major deregulatory initiatives, such as telecommunications or transportation, would tend to affect antitrust policy. This interrelationship of institutional choice remains under-studied quantitatively.<sup>145</sup>

Overlapping regulation means that effectively there are multiple regulators and each has an impact upon the development of a particular sector. Worse, 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 between competition agencies and sector regulation.<sup>146</sup>

Collaboration between sector and antitrust authorities when there is concurrent jurisdiction may not always be easy. Concurrent powers with sector regulators may make it more difficult for antitrust agencies to create 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.<sup>147</sup> 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 market.<sup>148</sup> In a recent article, 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.<sup>149</sup>

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<sup>144</sup> *Credit Suisse Sec. (USA) LLC v. Billings*, 551 U.S. 264 (2007).

<sup>145</sup> 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.

<sup>146</sup> See e.g., ICN, *Limits and Constraints Facing Antitrust Authorities Intervening in Regulated Sectors* (2004); OECD, *Global Forum on Competition: Roundtable on Bringing Competition into Regulated Sectors* (2005).

<sup>147</sup> ICN, *Limits and Constraints Facing Antitrust Authorities Intervening in Regulated Sectors* (2004).

<sup>148</sup> DAMIEN GERADIN & MICHEL KERF, *CONTROLLING MARKET POWER IN TELECOMMUNICATIONS: ANTITRUST VS. SECTOR-SPECIFIC REGULATION* 23 (2003).

<sup>149</sup> Stacey L. Dogan and Mark A. Lemley, *Antitrust Law and Regulatory Gaming*, 87 TEXAS L. REV. 685, 686 (2009) (“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.”).

Public choice helps to explain how sector regulators are likely to be captured by special interests. In this sense, they are more likely to be captured and will behave more politically than antitrust agencies. The advantage interest groups have in crafting policy is due to two particular factors. First, there are informational costs to political participation.<sup>150</sup> Individuals need to determine what their interests are. To do so, they must expend resources. Such expenditure for information can be significant, especially when the benefit is small for an individual consumer.<sup>151</sup> Because information itself is a public good, markets are sub-optimal at generating information.<sup>152</sup> Information costs limit the ability of parties to participate effectively in the legislative process.

The second participation cost is the cost of political mobilization.<sup>153</sup> Once interests are properly identified, political forces must be mobilized to fight for legislation. This creates free rider problems for public goods such as laws of general societal benefit, such as antitrust. Each individual has an incentive to shirk on his organizational responsibility because someone else can do their work for her. This makes majority groups unlikely to be as effective as smaller groups with lower organizational costs.

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.<sup>154</sup> 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 regulators. Firms may have strong political clout to restrict competition.<sup>155</sup> These firms have an incentive to shape government policy to be receptive to their needs through policies that facilitate anti-competitive restraints rather than the needs of consumers as a whole.<sup>156</sup> In both regulated and unregulated sectors, firms may try to curry favor with government to raise barriers to prevent entry of competitors or to raise rival's costs.<sup>157</sup>

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<sup>150</sup> MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

<sup>151</sup> George Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGM'T SCI. 3 (1971).

<sup>152</sup> JOSEPH E. STIGLITZ, *ECONOMICS OF THE PUBLIC SECTOR* (1988), 79; F.M. Scherer, *Pricing, Profits, and Technological Progress in the Pharmaceutical Industry*, 7 J. ECON. PERSP. 97, 98-101 (1993).

<sup>153</sup> James C. Cooper, Paul A. Pautler & Todd J. Zywicki, *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091, 1101 (2005).

<sup>154</sup> Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 213 (1976).

<sup>155</sup> Paul Joskow, Vladimir Capelik & Ben Slay, "Antimonopoly Policy and Antimonopoly Regulation in Russia" in *DE-MONOPOLIZATION AND COMPETITION POLICY IN POST-COMMUNIST ECONOMIES* 84 (Ben Slay ed., 1996).

<sup>156</sup> D. Daniel Sokol, *Limiting Anti-Competitive Government Interventions That Benefit Special Interests*, 17 GEO. MASON L. REV 119 (2009).

<sup>157</sup> This can take the form of creating pricing schemes to appeal to political allies or paying its 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 (2000).

## *H. International Antitrust*

Increasingly antitrust has an international dimension. In a sense, the issue of international governance in antitrust is one of global federalism.<sup>158</sup> At what level of governance are most antitrust decisions best made? If there are significant spillovers of substantive antitrust harm that countries cannot reach then global institutions may be more effective than domestic ones.<sup>159</sup> Where international antitrust institutions have some potential effects include cross border anti-competitive conduct, such as to assist in coordination across agencies. The second area is with regard to substantive antitrust decision-making as to enforcement and policy-making.

The coordination problems in antitrust are ones familiar to those who study coordination game theory issues. The issue in such coordination games is that multiple Nash equilibria exist that would create mutual gains for the parties so long as the parties are consistent decision-making. Coordination games include whether to drive on the left or right hand of the road or whether to use red for “stop” or green for “stop” instead of for “go”. In the antitrust context the coordination problems are how to share information in cross-border cartel cases or cross-border merger analysis. It also includes how to coordinate leniency requests in cartels or the time sequence of merger review filings. Coordination and increased harmonization across antitrust jurisdictions has the potential to reduce costs for both agencies and private parties.

For coordination problems, the institutional analysis is largely based on information costs and which institution may 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 in which one agency may have less expertise than another in remedying similar types of anti-competitive conduct or in the case of competition advocacy similar types of legislation. Any one antitrust agency has more substantive information available to it as to the firms, firm behavior and markets within their jurisdiction than does an antitrust agency from a different country.<sup>160</sup> When antitrust agencies increase the exchange of information, this reduces the 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.<sup>161</sup>

Substantive global antitrust concerns involve differences in both legal and economic approaches to the types of conduct that agencies find to be anticompetitive and the burdens of proof that firms must show. On an international level, a key concern is

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<sup>158</sup> Eleanor M. Fox, *Antitrust and Regulatory Federalism--Races Up, Down, and Sideways*, 75 N.Y.U. L. Rev. 1781 (2000).

<sup>159</sup> D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L. J. 37 (2007).

<sup>160</sup> John J. Parisi, *Enforcement Co-operation Among Antitrust Authorities*, 20 EURO. COMP. L. REV. 133 (1999).

<sup>161</sup> In other cases, information exchanges may be formalized through agreements across agencies.

that when one of the major powers in antitrust (the European Union and the United States) has a standard that is too low for a finding of wrongdoing. This lower standard effectively operates as the global standard because remedies often have global implications.<sup>162</sup> Even if the United States and the EU 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 100 antitrust agencies across jurisdictions worldwide. These include established antitrust agencies in Organisation for Economic Co-operation and Development (OECD) countries such as in the United States, the United Kingdom, Canada, Japan and Germany. They include large developing regimes such as Brazil, China, India and Russia and either very small or lesser developing regimes such as Mauritius, Jersey, Zambia, and Honduras. These agencies have different abilities based on different legal and underlying economic and political systems and levels of developments. All agencies now will discuss antitrust in the context of efficiency but what exactly “efficiency” means varies across jurisdictions. These differences in substantive approach lead to the possibility of different outcomes for the same behavior across jurisdictions.

## 1. Soft Law

Some of international governance is through “soft law” institutions. Soft law utilizes best practices across jurisdictions to set a global benchmark for appropriate antitrust systems. 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.

Soft law antitrust institutions have changed the antitrust systems of many countries towards internationally accepted best practices. However, there are a series of trade-offs 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. It may be that the best institutional choice is not one or the other but the use of both, with the use of each in the area of its relative institutional strength. Both seem to do less well in overcoming substantive disagreement within antitrust.

Two modes of soft law institutions exist – transgovernmentalism and transnationalism. There has been a move to greater transgovernmental governance. Keohane and 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 executives of those governments.”<sup>163</sup> In the antitrust context this form of governance

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<sup>162</sup> William E. Kovacic, *Competition Policy in the European Union and the United States: Convergence or Divergence?*, in FIFTY YEARS OF THE TREATY: ASSESSMENT AND PERSPECTIVES OF COMPETITION POLICY IN EUROPE (IESE Barcelona)(forthcoming).

<sup>163</sup> Robert Keohane & Joseph S. Nye, *Transgovernmental Relations and International Organizations*, 27 *World Politics* 39, 43 (1974).

exists through the OECD Competition Committee. Competition Committee members meet on a regular basis to discuss issues in antitrust. Agency heads and other senior agency officials undertake these discussions. This gathering of agency experts creates an epistemic community.<sup>164</sup> This community allows for sharing of ideas and experiences. Over time, countries shift their antitrust policies to the norms created by the OECD. For example, in the area of cartel enforcement the OECD created a set of recommendations on cartel enforcement.<sup>165</sup> These recommendations have been implemented by OECD member countries. 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.<sup>166</sup>

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. 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. 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. After an analysis of substantive and institutional issues, the peer review provides conclusions and policy options. Other agencies comment upon the peer review.<sup>167</sup> This process allows for agencies to offer constructive criticism to one another of their policies. Bad policies may be subject to shaming of an agency by its peers. This is the mechanism in which peer reviews are supposed to create compliance.<sup>168</sup> Though this shaming mechanism may be effective in some circumstances, there has not been sufficient repeal of antitrust immunities among countries, nor is it necessarily a priority for antitrust agencies.

A more direct method to diffuse norms is through technical assistance. Increasingly the OECD provides technical assistance, training and outreach to developing countries. It has established competition centers in Central Europe and East Asia to coordinate programs regionally.<sup>169</sup> It also co-sponsors a yearly conference in Latin

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<sup>164</sup> Peter M. Haas, Introduction: Epistemic Communities and International Policy Coordination, in *Knowledge, Power, and International Policy Coordination* (Peter M. Haas ed., 1992).

<sup>165</sup> OECD, Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, 25 March 1998 [C(98)35/FINAL]; OECD, Recommendation of the Council on Merger Review, 23 March 2005- C(2005)34; OECD, Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations (2005).

<sup>166</sup> John M. Connor & Yuliya Bolotova, *A Meta-Analysis of Cartel Overcharges*, 24 INT'L J. INDUS. ORG. 1109 (2006).

<sup>167</sup> Fabrizio Pagani, Peer Review: A Tool For Co-operation and Change, OECD SG/LEG(2002)1.

<sup>168</sup> See e.g., Charles F. Sabel & William H. Simon, "Epilogue: Accountability Without Sovereignty," in *LAW AND NEW APPROACHES TO GOVERNANCE IN THE EU AND US* (Joanne Scott & Grainne de Burca eds., 2006); D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L. J. 37 (2007).

<sup>169</sup> D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L. J. 37 (2007).

America and undertakes work in the Western Hemisphere such as projects in Mexico, Brazil and Chile on bid rigging.<sup>170</sup>

Global governance institutional design has taken on an additional dimension – that of transnational governance.<sup>171</sup> Transnational governance is distinct from that of transgovernmental governance because of non-state actors that 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. Also unlike the OECD, the ICN operates virtually, without any headquarters or permanent staff. Consequently, members and advisors of the ICN do the work themselves rather than give it to ICN staff to do. This limits opportunities for free riding and creates a greater sense of ownership of the work products by ICN members. These work products include the creation of manuals for mergers and cartels manual that includes 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 multi step process. First, agencies and non-governmental advisors take stock of existing practices. Then, the group analyzes existing practices to find commonality. Finally, the ICN creates recommended practices best on what seems to be the most effective. These globally benchmarked practices are then absorbed by agencies around the world in a way that fits within the local context and set of institutions.

Soft law harmonization has its limits. When antitrust agencies apply the same “harmonized” standards, it may lead to alternative outcomes in practice. Countries have many of the same substantive provisions in their antitrust laws (e.g., unilateral and coordinated conduct) but apply these laws differently.<sup>172</sup> The process of harmonization also may 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.<sup>173</sup>

The shape of soft law compliance and agenda is a function of power asymmetries. Should the EU and United States not put their resources and efforts into soft law organizations to combat public restraints, the lack of participation will 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

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<sup>170</sup> 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, 268-69 (2008)

<sup>171</sup> ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) (describing transnational networks).

<sup>172</sup> Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT’L. L. 1, 16 (1997). More generally, the law in action instead of the law on the books is what matters. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489 (1912); Howard Erlanger, Bryant Garth, Jane Larson, Elizabeth Mertz, Victoria Nourse & David Wilkins, *Is it Time for a New Legal Realism?*, 2005 WIS. L. REV. 335 (2005).

<sup>173</sup> Emanuela Carbonara & Francesco Parisi, “The Economics of Legal Harmonization,” George Mason Law & Economics Research Paper No. 05-40 (2005).

severe than that of hard law. Soft law is most effective on reducing costs when the costs are information and coordination costs. For example, antitrust soft law organizations have become increasingly effective in reducing the costs associated with merger review or cartels.<sup>174</sup> There is no serious disagreement as to the pernicious effects of cartels or the fact that multiple and overlapping merger control systems create increased compliance costs. In substantive areas of law, antitrust soft law organizations may have difficulty in implementation where there is disagreement, particularly between the United States and the EU.

## 2. Hard Law

The alternative international governance mechanism to soft law is hard law. Hard law relies upon formal law to bind countries.<sup>175</sup> The 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 serve to create sub-optimal antitrust across jurisdictions around the world.<sup>176</sup>

A number of works have analyzed the limitations of the WTO and bilateral and regional free trade agreements to reach a global standard in competition analysis.<sup>177</sup> Overall, these works suggest that the WTO is at this time not yet the best institutional with which to push for global antitrust change. One important dynamic at the WTO level is that binding law is a product of power dynamics of the major powers in the international trade arena. Even though the WTO requires unanimity, it is the major powers that shape the trade agenda and the substantive rules. While recently the number of major powers has increased to include countries such as China and Brazil at the WTO level, without support of the EU and the United States, the WTO will not create new rules, including in the area of competition policy. Currently, there is not an appetite to create additional binding WTO rules in competition policy.

## 3. Worldwide Enforcer?

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<sup>174</sup> D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L. J. 37 (2007).

<sup>175</sup> Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L Org. 421 (2000).

<sup>176</sup> John O. McGinnis, *The Political Economy of International Antitrust Harmonization*, 45 WM. & MARY L. REV. 549 (2003).

<sup>177</sup> D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L. J. 37 (2007); COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY (Michael S. Greve & Richard A. Epstein eds., 2004); Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501 (1998); Diane P. Wood, *Antitrust at the Global Level*, 72 U. CHI. L. REV. 309 (2005); D. Daniel Sokol, *The Future of International Antitrust and Improving Antitrust Agency Capacity*, 103 NW. U. L. REV. 1081 (2009); 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 (2008); Anu Piilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 STAN J. INT'L L. 207, 223 (2003).

Outside of the global governance level, there is an alternative international to US institutional analysis for conduct. This is a 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 under-deterrence.<sup>178</sup> The effect of EC competition law enforcement on US based multinationals has increased in recent years. To what extent are European Commission decisions global in their reach because they might be more restrictive than the US? 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 the businesses will be willing to undertake and the global nature of such changes to a business' behavior. To what extent are US 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 analysis. Anecdotally, it seems as if that some firms are brining attention to the European Commission because they can get favorable results there as opposed to the United States. If this holds true generally, it would suggest that the European Commission plays a far larger role in the conduct of US based firms vis-à-vis its US based competitors than previously assumed in the institutional analysis of the US antitrust system.

### III. Case Study: Institutional Issues in Merger Control

#### A. Introduction

Merger review is a constant work in progress in terms of improving its predictive abilities.<sup>179</sup> Antitrust institutions respond to these changes and respond to changes in the law's application of merger economics. Both sets of changes affect the comparative institutional competencies for merger review. As institutions shift in their capacity to respond to these changes, their relative strength in terms of administrability and outcomes shift.

Merger review is full of presumptions that academics, judges, and agency officials make about policy and the nature of business. These presumptions permeate antitrust case law and the Merger Guidelines as to substance, administrability, and economic behavior.<sup>180</sup> However, oftentimes the empirical basis for many of these presumptions is limited or incomplete. With a limited case law in mergers, it is

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<sup>178</sup> Michal S. Gal, *Free Movement of Judgments: Increasing Deterrence of International Cartels Through Jurisdictional Reliance* (October 29, 2008). NYU Law and Economics Research Paper No. 08-44.

Available at SSRN: <http://ssrn.com/abstract=1291844>

<sup>179</sup> William E. Kovacic, *Assessing the Quality of Competition Policy: The Case of Horizontal Merger Enforcement*, 5 *Competition Policy International* 129, 131 (2009) (explaining the evolution of merger control).

<sup>180</sup> Luke Froeb, *On Revising the Horizontal Merger Guidelines*, GCP The Antitrust Chronicle, December 2009; Paul Denis, *Horizontal Merger Guidelines Revision: A Draftsman's Perspective*, GCP The Antitrust Chronicle, December 2009; Robert H. Lande & James Langenfeld, *From Surrogates to Stories: The Evolution of Federal Merger Policy*, 11 *ANTITRUST* 5 (1997).

somewhat difficult to tease out because agency conduct might differ from existing case law.<sup>181</sup>

Merger control serves as a good case study for institutional analysis because it is an area in which there is lots of “action” in terms of the volume of matters but one in which there are a relatively smaller number of agency challenges and court based decisions. Because there are so few decided merger cases, it is also an area in which the limitations of studying only decided cases do not capture the larger decision-making process by the parties and their lawyers. It 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.

There is a broad set of behaviors in antitrust that scholars for the most part ignore – those that involve antitrust decision-making. Decision-making in this context means what firms actually do with their legal advice and how outside counsel convey risks and rewards to their clients that in turn shape client behavior. This area is very important as it incorporates not merely cases but also reading the “tea leaves” of regular agency interactions, speeches by agency officials, understanding the current use of the Merger Guidelines, the interplay of the DOJ and FTC together, and the interplay of international, federal and state enforcement. Because it is very difficult to find patterns of firm behavior because of data collection limitations, neither academics nor policy-makers in government have a good sense of how parties respond to behavior of government enforcement, to the role of judges or to adversaries in the litigation process.

It is very difficult to come up with formal models of firm behavior that quantify the risk/reward assessment of undertaking a merger, of estimating antitrust risk as part of the transaction and of potentially giving up the deal or the deal at a certain price based on the risk. Much of merger related work is counseling clients at various points in a deal process, meeting with agency staff and leadership, and not merely something that can be coded through the number of filings, second requests, or case counts. Though there are some good case studies about particular mergers (mostly high profile litigated cases),<sup>182</sup> oftentimes these are written by interested parties. It is not clear if these are representative of the larger decision making process or if the cases that get litigated are somehow distinct. Similarly, public discussion of merger control by officials or top practitioners do not focus on the mundane “plain vanilla” merger filings. The merger sessions of the ABA Antitrust Section Spring Meeting rarely discuss a merger than gets cleared within

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<sup>181</sup> For example, questions remain as to the legal treatment of efficiencies in merger analysis. 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.”).

<sup>182</sup> See e.g., Orley Ashenfelter, David Ashmore, Jonathan B. Baker, Suzanne Gleason & Daniel S. Hosken, *Econometric Methods in Staples*, Princeton L. & Pub. Affairs Paper No. 04-007 (Apr. 9, 2004); Jonathan B. Baker, *Efficiencies and High Concentration: Heinz Proposes to Acquire Beech-Nut*, in *THE ANTITRUST REVOLUTION* 150 (John E. Kwoka, Jr. & Lawrence J. White, eds., 4th ed., 2004).

30 days. Instead, they focus on the high profile mergers that seem to have greater significance to agency practice and/or case law.

These meetings focus on important cases for good reason. Lots of decision-making happens as a result of decided cases at the Supreme Court, courts of Appeal and district courts.<sup>183</sup> Decided cases affect the strategy for firms beyond those of the parties involved. They impact the types of cases to bring and those not to bring. Yet, decided cases may be unrepresentative of all cases. This is important because if one makes policy recommendations on decided cases only, there is likely to be mistaken inferences that guide policy because of the lack of representativeness.<sup>184</sup>

So much of counseling in the merger process is about 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 high for merging parties to challenge the agency view on the agency's reading of the case law and such a challenge can take a year or longer.<sup>185</sup>

A number of factors influence the decision-making process of firms on a particular business decision to initiate merger discussions and ultimate mergers. These include: market dynamics,<sup>186</sup> uncertainty,<sup>187</sup> financing amount and financing time window,<sup>188</sup> personalities and overall quality of the business decision-makers,<sup>189</sup> in-house attorneys,<sup>190</sup> outside law firms,<sup>191</sup> agency staff<sup>192</sup> and leadership,<sup>193</sup> and the quality of the

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<sup>183</sup> Fredrick Schauer & Richard Zeckhauser, *The Trouble with Cases*, RWP09-025 1-2 (2009).

<sup>184</sup> Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 49-51 (Thomas Gilovich et al. eds., 2002)

<sup>185</sup> This risk/reward calculation of challenging an agency's decision-making gives the antitrust agencies significant power in the merger review process.

<sup>186</sup> Lois Shelton, *Merger Market Dynamics: Insights into the Behavior of Target and Bidder Firms*, 41 J. ECON. BEHAVIOR & ORG. 363 (2000); Flavio Toxvaerd, *Strategic Merger Waves: A Theory of Musical Chairs*, 140 J. ECONOMIC THEORY 1, (2008).

<sup>187</sup> JOHN SUTTON, *SUNK COSTS AND MARKET STRUCTURE* 52-54 (1991); AVINASH DIXIT & ROBERT PINDYCK, *INVESTMENT UNDER UNCERTAINTY* (1996); Vivek Ghosal & Prakash Loungani, *The Differential Impact of Uncertainty on Investment in Small and Large Businesses*, 82 REV. ECON. & STAT., 2000, 338; Jonathan O'Brien, Timothy Folta, & Douglas Johnson, *A Real Options Perspective on Entrepreneurial Entry in the Face of Uncertainty*, 24 MANAG. & DECISION ECON. 515 (2003).

<sup>188</sup> D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L. J. 37, 60 (2007).

<sup>189</sup> Dinara Bayazitova, Matthias Kahl, and Rossen I. Valkanov, "Which Mergers Destroy Value? Only Mega-Mergers" (2009), available at SSRN: <http://ssrn.com/abstract=1502385>.

<sup>190</sup> Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 243 (1984).

<sup>191</sup> Id.; C.N.V. Krishnan & Paul A. Laux, *Legal Advisors: Popularity vs. Performance in Acquisitions*, CORP. OWNERSHIP & CONTROL, (2009 forthcoming).

<sup>192</sup> D. Daniel Sokol, *The Future of International Antitrust and Improving Antitrust Agency Capacity*, 103 NW. U. L. REV. 1081 (2009); D. Daniel Sokol, *Designing Antitrust Agencies for More Effective Outcomes: What Antitrust Can Learn From Restaurant Guides*, 41 LOY. U. CHI. L. J. [ ] (forthcoming 2010).

<sup>193</sup> Id.

judge that might need to adjudicate a merger case.<sup>194</sup> All these factors play a role in the larger decision-making process. The multiple number of actors involved means that there is oftentimes no clear cut answer in terms of explaining the decision-making of firms in an 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 (surely a merger that under present conditions would be blocked by the agencies and one that lawyers advising the parties would counsel against), 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 how both antitrust and market forces work in practice create a policy discourse. Discourse has important ramifications on policy.<sup>195</sup> Who controls discourse can shape the policy agenda among academics and practitioners. If one can control and frame the discourse of antitrust, one can create momentum to affect actual antitrust policy.<sup>196</sup> As Wang Chung sang, “The words we use are strong, they make reality.”<sup>197</sup> Practitioners and academics shape the discourse of antitrust at a number of different levels including through articles, hearings, written testimony, comments, and speeches.

Current officials understand this important signaling effect and the use of discourse to create policy.<sup>198</sup> 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

<sup>194</sup> Michael R. Baye and Joshua D. Wright, “Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity & Judicial Training on Appeals,” George Mason Law & Economics Research Paper No. 09-07. Available at SSRN: <http://ssrn.com/abstract=1319888>.

<sup>195</sup> 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 .... [D]iscourse is the power which is to be seized.”); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992)(providing an example of the power of discourse in the area of the official use of the English language).

<sup>196</sup> William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 377 (2003)(“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.”).

<sup>197</sup> Wang Chung, “Everybody Have Fun Tonight”, Mosaic (1986). How profound can this song be when other lyrics include “Everybody have fun tonight, everybody Wang Chung tonight”? The song hit number 2 on the billboard charts in the United States and it was a must pay during that year's party scene. Musical taste in the 1980s is even less clear cut than merger institutional analysis.

<sup>198</sup> See e.g., Introduction of Philip Lowe and Announcement of Joint FTC/DOJ Project to Modernize the Horizontal Merger Guidelines, Remarks of FTC Chairman Jon Leibowitz as prepared for delivery at the Third Annual Georgetown Law Global Antitrust Enforcement Symposium (September 22, 2009) available at <http://www.ftc.gov/speeches/leibowitz/090922mergerguideleibowitzremarks.pdf>.

government to go forward and attempt to block mergers in the marketplace.<sup>199</sup>

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 see a shift in enforcement under Bush that was distinct from that of Clinton. It assumes that the Clinton administration's antitrust was somehow distinct from the Regan and George H.W. Bush administrations that preceded it that were themselves Chicago School in their approach.<sup>200</sup> It also assumes that economic analysis was not rigorous under Bush. As some of the existing empirical work and the surveys undertaken for in this Article suggest, such an interpretation of history rewrites history somewhat for Varney's larger political ends to create change in enforcement priorities and in policies such as revision of the 1992 Merger Guidelines.

A focus on discourse leaves any understanding of merger control incomplete. What does the world really look like and what do practitioners in private practice and within the agency and academics really think? How much of existing commentary by practitioners and academics is merely spin? Moreover, after a while how much of personal views become a function of internalizing client/government positions? People's personal beliefs may be biased by a few personal experiences or high profile agency decisions.<sup>201</sup> Moreover, they might bias their beliefs based on a number of behavioral devices such as availability heuristics<sup>202</sup> and motivated reasoning.<sup>203</sup>

This Article undertakes a survey of antitrust practitioners precisely to weed out some of these biases. In the aggregate, some of these biases might disappear with enough survey data. Moreover, an anonymous survey allows those practitioners who publicly may be limited in what they can say because of what their clients want 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.

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<sup>199</sup> Varney Confirmation Hearing Testimony (Mar. 10, 2009, response to question by Senator Colburn)

<sup>200</sup> William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377 (2003)(critiquing the "pendulum" view of antitrust and providing an evolutionary alternative to antitrust development).

<sup>201</sup> William E. Kovacic, *Review of Antitrust Stories*, 4 COMPETITION POL'Y INT'L 241 (2008) (discussing the limitations of first person narratives in antitrust).

<sup>202</sup> 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 103, 103 (Thomas Gilovich et al. eds., 2002); JONATHAN BARON, THINKING AND DECIDING 141-43 (3d ed. 2000).

<sup>203</sup> Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 482-95 (1990); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 90-114 (2004); Yuval Feldman. & Doron Teichman, *Are All Legal Probabilities Created Equal?*, 84 N.Y.U. L. REV. 980, 995-96 (2009).

## B. Brief Overview of Modern US Merger Control History

The Merger Guidelines serve as the guiding force in US merger policy. Comparative institutional choice must be weighed with the impact of the Guidelines in mind because of their importance. In the antitrust world before the merger guidelines, populist tendencies drove US Merger Enforcement.<sup>204</sup>

Changes in merger enforcement based on economic analysis began with Don Turner's 1968 Merger Guidelines.<sup>205</sup> By the standard of today's economics, the 1968 Merger Guidelines had significant limitations because of their structural emphasis. Judged by the industrial organization economics of that time, the 1968 Merger Guidelines made a significant contribution because it pushed economic analysis to the forefront of the merger process.<sup>206</sup>

Other changes were underway between the 1968 Merger Guidelines and the 1982 Merger Guidelines that shaped merger policy. In case law, the important turning point occurred in *United States v. General Dynamics Corp.*, which marked the beginning of the examination of the competitive effects based on efficiencies of a merger.<sup>207</sup> In that case, the Supreme Court considered factors that suggested that concentration alone would not impair competition significantly because effects mattered. At the time of the decision, *General Dynamics* was not seen as path breaking a decision as it is today.<sup>208</sup> However, it had a significant impact soon thereafter in the development of case law and policy.<sup>209</sup>

The 1976 Hart-Scott-Rodino Antitrust Improvements Act of 1976 was another important change. The Act allowed the antitrust agencies to review mergers prior to consummation. During this same period, the agencies began to hire young economists trained in the latest of industrial organizational thinking.<sup>210</sup>

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<sup>204</sup> See e.g., *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

<sup>205</sup> Merger Guidelines, reprinted in 4 Trade Reg. Rep. (CCH) ¶¶ 13,101 (May 20, 1968) [hereinafter 1968 Merger Guidelines].

<sup>206</sup> Oliver E. Williamson, Economics and Antitrust Enforcement: Transition Years, 17 *Antitrust* 61, 61 (Spring 2003) ("With the benefit of hindsight, the field of industrial organization and the enforcement of antitrust were in crisis in the 1960s."). They also paved the way for the incredibly important transformation of the 1982 Merger Guidelines. See Oliver E. Williamson, The Merger Guidelines of the U.S. Department of Justice--In Perspective (June 4, 2002) (paper prepared for the 20th Anniversary of the Department of Justice Merger Guidelines) (providing a history of this process), available at <http://www.usdoj.gov/atr/hmerger/11257.pdf>.

<sup>207</sup> 415 U.S. 486 (1974)(explaining that uncommitted reserves were indicative of a firm's ability to compete in the future in coal rather than historic share of sales).

<sup>208</sup> Baker & Shapiro, *Reinvigorating Merger Enforcement* 238.

<sup>209</sup> Donald F. Turner, *Observations on the New Merger Guidelines and the 1968 Merger Guidelines*, 51 *ANTITRUST L.J.* 307, 308-09 (1982).

<sup>210</sup> Oliver E. Williamson, The Merger Guidelines of the U.S. Department of Justice--In Perspective (June 4, 2002) (paper prepared for the 20th Anniversary of the Department of Justice Merger Guidelines) (explaining the importance of developing young staff trained in economic analysis), available at <http://www.usdoj.gov/atr/hmerger/11257.pdf>.

The emphasis on the importance of economic analysis<sup>211</sup> became further embedded in the 1982 Merger Guidelines.<sup>212</sup> Even though the DOJ issued the 1982 Merger Guidelines by itself, the FTC responded the same day with its *Statement of Federal Trade Commission Concerning Horizontal Mergers*.<sup>213</sup> The importance of the 1982 Merger Guidelines cannot be overstated. It updated the 1968 Merger Guidelines towards a more modern economic understanding.<sup>214</sup> The 1982 Merger Guidelines de-emphasized the structural presumption in merger review.<sup>215</sup> This shift was very important. The 1982 Merger Guidelines introduced the hypothetical monopolist test as the paradigm with which to undertake merger analysis. It provided guidance as to which mergers the Department of Justice might challenge.<sup>216</sup> Introduced as part of the 1982 Merger Guidelines to replace the C4 concentration ratio, the Herfindahl-Hirschman Index provided better guidance for parties to understand market definition and market power issues.<sup>217</sup> 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 market concentration of the merging firms.<sup>218</sup>

Only in existence for two years, the DOJ revised the 1982 Merger Guidelines in 1984.<sup>219</sup> The modifications in 1984 were relatively minor. The 1984 Guidelines provided additional change in five areas:

First, the market definition test was refined to ensure that five percent was not a rule (for evaluating the hypothetical) and the Guidelines hypothetical was 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

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<sup>211</sup> Oliver E. Williamson, *The Merger Guidelines of the U.S. Department of Justice--In Perspective* (June 4, 2002) (paper prepared for the 20th Anniversary of the Department of Justice Merger Guidelines) (providing a history of this process), available at <http://www.usdoj.gov/atr/hmerger/11257.pdf>.

<sup>212</sup> Merger Guidelines, reprinted in 4 Trade Reg. Rep. (CCH) ¶¶ 13,102 (June 14, 1982) [hereinafter 1982 Merger Guidelines].

<sup>213</sup> *Statement of Federal Trade Commission Concerning Horizontal Mergers*, reprinted in 42 Antitrust & Trade Reg. Rep. (BNA) S-12 (Special Supp. June 17, 1982).

<sup>214</sup> William F. Baxter, *Responding to the Reaction: The Draftsman's View*, 71 CAL. L. REV. 618 (1983) (articulating the basis of the 1982 Merger Guidelines).

<sup>215</sup> David Scheffman, Malcolm Coate & Louis Silvia, *Twenty Years of Merger Guidelines Enforcement at the FTC: An Economic Perspective*, 71 ANTITRUST L.J. 277 (2003) (explaining the evolution of the 1982 Merger Guidelines in FTC merger analysis).

<sup>216</sup> Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, 71 Antitrust L.J. 253 (2003) (providing an overview of the development of the paradigm).

<sup>217</sup> Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 788-96 (2006); Stephen Calkins, *The New Merger Guidelines and the Herfindahl-Hirschman Index*, 71 CAL. L. REV. 402 (1983) (providing an early critique of HHI because it might mean less enforcement than under CR4).

<sup>218</sup> Baker & Shapiro, *Reinvigorating Merger Enforcement* 238.

<sup>219</sup> Merger Guidelines, reprinted in 4 Trade Reg. Rep. (CCH) ¶¶ 13,103 (June 14, 1984) [hereinafter 1984 Merger Guidelines]

"appropriate weight to efficiencies in all relevant cases." Finally, the Guidelines indicated that failing divisions would be judged with standards similar to those applied to failing firms.<sup>220</sup>

The 1984 Guidelines thus solidified a Chicago School economics approach to merger analysis.<sup>221</sup>

The 1992 Merger Guidelines<sup>222</sup> were an important revision to the 1982 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 anti-competitive.<sup>223</sup> This analytical framework shifted merger analysis from market concentration to competitive effects.<sup>224</sup>

It was not until the 1992 Merger Guidelines that unilateral effects theories began to be taken seriously in merger analysis.<sup>225</sup> Like previous Guidelines, the 1992 Merger Guidelines allowed for the incorporation of new economic learning.<sup>226</sup> Some areas in which the guidelines had a particularly important impact included in areas such as entry and uncommitted entry.<sup>227</sup> 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.<sup>228</sup>

### *C. Bush Antitrust Enforcement*

The perceived decline in antitrust enforcement under the Bush administration and its impact is perhaps the major institutional issue facing merger policy in the United States. It impacts the relative strengths and weaknesses of certain institutions (DOJ vs. FTC, private versus public rights of action) and has been the primary focus of antitrust

<sup>220</sup> David Scheffman, Malcolm Coate & Louis Silvia, 20 Years of Merger Guidelines Enforcement at the FTC: An Economic Perspective available at <http://www.justice.gov/atr/hmerger/12881.htm>.

<sup>221</sup> Louis Schwartz, *The New Merger Guidelines: Guide to Governmental Discretion and Private Counseling or Propaganda for Revision of the Antitrust Laws?*, 71 CALIF. L. REV. 575, 577-78 (1983).

<sup>222</sup> Horizontal Merger Guidelines, reprinted in 4 Trade Reg. Rep. (CCH) ¶¶ 13,104 (Apr. 7, 1992) [hereinafter 1992 Horizontal Merger Guidelines].

<sup>223</sup> 1992 Merger Guidelines §§0-0.1. 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.

<sup>224</sup> Paul T. Denis, *Advances of the 1992 Horizontal Merger Guidelines in the Analysis of Competitive Effects*, 38 ANTITRUST BULL. 479 (1993)

<sup>225</sup> Gregory J. Werden & Luke M. Froeb, "Unilateral Competitive Effects of Horizontal Mergers," in HANDBOOK OF ANTITRUST ECONOMICS 42-43 (Paolo Buccirossi ed., 2008); Paul T. Denis, *The Give and Take of the Commentary on the Horizontal Merger Guidelines*, 20-SUM ANTITRUST 51, 53 (although noting that more recently coordinated effects analysis has been reinvigorated by the Commentary). On the importance of coordinated effects and mavericks, see Jonathan Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects. Under the Antitrust Laws*, 77 N.Y.U. L. Rev. 135 (2002).

<sup>226</sup> Jonathan B. Baker, *Responding to Developments in Economics and the Courts: Entry in the Merger Guidelines*, 71 ANTITRUST L.J. 189 (2003).

<sup>227</sup> Jonathan B. Baker, *Responding to Developments in Economics and the Courts: Entry in the Merger Guidelines*, 71 ANTITRUST L.J. 189 (2003) (providing discussion of these issues).

<sup>228</sup> 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).

discourse for the past three years. How much 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.<sup>229</sup> The impact of 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 for the past three years. It has done so in the popular press,<sup>230</sup> in the Obama antitrust platform<sup>231</sup> and in the early speeches of Obama’s antitrust leadership. Baker and Shapiro’s primary claim is that there was under-enforcement in mergers under Bush generally and particularly so under the Bush DOJ.

There are two bases of support underlying the Baker and Shapiro claim. The first is their historical quantitative analysis of the merger review process. Based upon the number of challenges as a percentage of adjusted HSR filings (updating the Leary merger study of 2002<sup>232</sup>), merger enforcement was significantly lower than under previous administrations. To translate the percentages into actual cases, Baker and Shapiro claim that for 2006 and 2007 rates to be in line with historic numbers, the antitrust agencies would have needed to challenge an addition 24 mergers per year (with a further breakdown of an addition 15 challenges at the DOJ and nine at the FTC).<sup>233</sup>

A second basis of support for the claim of Bush under-enforcement is qualitative. Baker and Shapiro interviewed 20 Chambers<sup>234</sup> ranked antitrust partners in DC. Many of their respondents suggested that the “‘likelihood of successful agency review for the merging firm’ 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

<sup>229</sup> The paper ultimately appeared in final form as a chapter in ROBERT PITOFSKY, *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST* 233 (2008).

<sup>230</sup> See e.g., David Lawsky, *EU's gain is U.S. loss in influence on antitrust*, Reuters, Sun Oct 28, 2007; Steven Pearlstein, *For Consumers, the Raw Deal*, Wash. Post, Wed., April 18, 2007.

<sup>231</sup> Statement of Senator Barack Obama for the American Antitrust Institute, [http://www.antitrustinstitute.org/archives/files/aai-%20Presidential%20campaign%20-%20Obama%209-07\\_092720071759.pdf](http://www.antitrustinstitute.org/archives/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf); Barack Obama, “Statement of President-elect Barack Obama for the American Antitrust Institute,” ¶3 (2007), [http://www.antitrustinstitute.org/archives/files/aai-%20Presidential%20campaign%20-%20Obama%209-07\\_092720071759.pdf](http://www.antitrustinstitute.org/archives/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf).

<sup>232</sup> Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 *ANTITRUST L.J.* 105 (2002).

<sup>233</sup> Baker & Shapiro, *Reinvigorating Merger Enforcement* 246-7.

<sup>234</sup> Chambers ranks antitrust practitioners via interviews of clients and peers. It seems to be the most important ranking of lawyers around the world.

the FTC).”<sup>235</sup> (italics added for emphasis). 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.

## 2. Harkrider

Harkrider undertook an analysis of 213 transactions that resulted in second requests during the period 1996 and 2006. He utilized a probit estimation to analyze these transactions for changes across administrations and across the DOJ and FTC. 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. This contrasted with the Bush FTC, where second request transactions were not less likely to have been challenged.<sup>236</sup> As he notes, an open question that remains from this study is if 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.<sup>237</sup> There are more potential limitations based on his assumptions, as described below.

## 3. Limitations to These Studies

Below I identify the various limitations to the Harkrider and Baker & Shapiro studies. The purpose of detailing the limitations to the above studies is not to diminish these 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 FTC have different industries that they cover, except in cases that go through the clearance process. Whether a deal receives a second request, an agency attempts to block a deal through preliminary injunction, or settles is dependent on the particular industry dynamics that are the competence of each agency, and the discretion of the agency staff and leadership. Each agency has specialization within certain industries. These industries may at various times be “hotter” than at other times and the number of cases that an agency might see might be a function of which industry that it investigates as well as the amount of resources the agency has to more fully investigate

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<sup>235</sup> Jonathan B. Baker & Carl Shapiro, *Detecting and Reversing the Decline in Horizontal Merger Enforcement*, 22 *Antitrust – Sum* 29, 30 (2008).

<sup>236</sup> John D. Harkrider, *Antitrust Enforcement During the Bush Administration, An Economic Estimation*, 22 *SUM ANTITRUST* 43, 43 (2008).

<sup>237</sup> *Id.* At 47.

transactions based upon deal flow. Staff within these merger “shops” may be less or more aggressive than in other shops.<sup>238</sup>

(b) Other empirical work

Traditionally, has there been much of a shift in the priorities and enforcement between administrations? An internal FTC study that reviewed Clinton and George H.W. Bush administration antitrust records did not find a difference regarding standards across the political divide.<sup>239</sup> Work by Malcolm Coate concludes that FTC merger policy has remained constant over both Republican and Democratic administrations over the past twenty years.<sup>240</sup> His analysis shows that the only significant change in FTC policy has been in the use of efficiencies, as tracked by the Merger Guidelines.<sup>241</sup> Coate also finds that by the mid to late 1980s there is no evidence of politics playing a role in merger enforcement.<sup>242</sup> Similarly, Ghosal finds that merger control has been apolitical since the end of the Ford administration.<sup>243</sup> 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 10 years. There is no similar DOJ study.<sup>244</sup>

(c) Different levels and types of merger and acquisitions activity

The level of merger control activity and the case counts are not good indicia for the quality of antitrust enforcement. Mergers and acquisitions (M&A) activity levels were different in the 1990s than in the 2000s. Overall, merger activity occurs in waves.<sup>245</sup> What is not clear is whether beyond overall numbers, if there were differences in the types of M&A across industries. The differences in horizontal overlaps reported on

<sup>238</sup> The more interesting thing to measure would be mergers that go through a clearance process between 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?

<sup>239</sup> MALCOLM B. COATE & SHAWN W. ULRICK, *TRANSPARENCY AT THE FEDERAL TRADE COMMISSION: THE HORIZONTAL MERGER REVIEW PROCESS 1996 – 2003*, available at <http://www.ftc.gov/os/2005/02/0502economicissues.pdf>.

<sup>240</sup> Malcolm B. Coate, Bush, Clinton, Bush: Twenty Years of Merger Enforcement at the Federal Trade Commission (January 30, 2009). Available at SSRN: <http://ssrn.com/abstract=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”) at 24.

<sup>241</sup> Malcolm B. Coate, Bush, Clinton, Bush: Twenty Years of Merger Enforcement at the Federal Trade Commission (January 30, 2009). Available at SSRN: <http://ssrn.com/abstract=1314924> at 2, 24.

<sup>242</sup> Malcolm B. Coate, Bush, Clinton, Bush: Twenty Years of Merger Enforcement at the Federal Trade Commission (January 30, 2009). Available at SSRN: <http://ssrn.com/abstract=1314924> at 18.

<sup>243</sup> Vivek Ghosal, *Economics, Politics, and Merger Control*, in *Recent Developments in Antitrust Theory and Evidence* 148 (Jay Pil Choi, MIT Press 2006).

<sup>244</sup> Malcolm B. Coate & Andrew J. Heimert, *Merger Efficiencies at the Federal Trade Commission 1997–2007*, FTC Economic Issues Paper (Feb. 2009).

<sup>245</sup> RONALD J. GILSON & BERNARD S. BLACK, *THE LAW AND FINANCE OF CORPORATE ACQUISITIONS* ch. 1 (2<sup>nd</sup> ed. 1995 & Supp. 2000); Ralph L. Nelson, *Merger Movements in the American Industry, 1895–1956* (Princeton 1959); Ramon Fauli-Oller, *Takeover Waves*, 9 J. ECON. & MANAG. Strat 189 (2000).

the initial HSR filings vary over time and hence the opportunities to bring merger challenges equally vary. Overlaps were higher under Clinton than under Bush.<sup>246</sup> 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.

(d) Different number of HSR filings

One important shift has been the change in HSR requirements for filing, particularly the increase in the reporting threshold to \$50 million in 2001. The threshold for filing has changed substantially such so that the total number of mergers and second requests as a percentage of total mergers are not similar.<sup>247</sup> 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 (FY 2002 – January 20, 2009), then the DOJ rate looks similar to previous administrations.<sup>248</sup>

(e) Not enough data points in the Baker and Shapiro qualitative study

Baker & Shapiro only interviewed Chambers practitioners in tiers 1-3 and only for the DC market.<sup>249</sup> 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 DOJ or FTC are overly represented. The law firms in question may be more likely to see deals in certain industries rather than others based on the mix of existing clients or the backgrounds of the partners as alumni of one the agencies.

(f) General data limitations

There is some level of transparency on mergers as the agencies provide data on merger activity and investigations to Congress. However, this data is reported in the

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<sup>246</sup> Timothy J. Muris, *Facts Trump Politics: The Complexities of Comparing Merger Enforcement Over Time and Between Agencies*, 22 SUM ANTITRUST 37, 38 (2008).

<sup>247</sup> Timothy J. Muris, *Facts Trump Politics: The Complexities of Comparing Merger Enforcement Over Time and Between Agencies*, 22 SUM ANTITRUST 37, 37 (2008).

<sup>248</sup> Ilene Knable Gotts & James Rill, *Reflections on Bush Administration M&A Antitrust Enforcement and Beyond*, 5 COMPETITION POL'Y INT'L 91, 108 (2009) (“[DOJ rate] was substantial and well within the historic range of prior administrations.”)

<sup>249</sup> Baker & Shapiro, *Reinvigorating Merger Enforcement* 247.

aggregate. The types of evidence and arguments to which the agencies are receptive vary over time.

There is not much information from DOJ as to these issues although there is at the FTC. Early on in the Merger Transparency Project, the FTC held discussions with the DOJ on data studies. The Agencies jointly released a joint report on enforcement data. The FTC followed with the Merger Data summarizing both enforced and closed cases. 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 the merger isn't anticompetitive. Written records might be scarce. The FTC needs three, so analysis is much more formalized. Given the files exist, coding is just a commitment of resources.

(g) Cheap consents

Muris notes that Chairman Steiger had more cheap consents 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.<sup>250</sup> Similarly, the threshold for settling cases at the DOJ may have shifted.

(h) Changes in case law, agency practice and transparency

The case law changed between Clinton and Bush where decisions established a number of setbacks against agency enforcement. Changes in case law affect the agencies' ability to get future wins in court.<sup>251</sup> Agency leadership may not be willing to bring cases if they know with enough certainty that they will lose such challenges. One important 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/Peoplsoft*.<sup>252</sup>

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.”<sup>253</sup> Moreover, Pitofsky was one of the biggest critics of

<sup>250</sup> Timothy J. Muris, *Facts Trump Politics: The Complexities of Comparing Merger Enforcement Over Time and Between Agencies*, 22 SUM ANTITRUST 37, 37 (2008).

<sup>251</sup> William H. Page & John E. Lopatka, *Antitrust Injury, Merger Policy, and the Competitor Plaintiff Antitrust Injury, the Competitor Plaintiff, and Merger Policy*, 82 IOWA L. REV. 127, 135-37 (1996)(explaining that case law development shapes the differences in agency win totals in court).

<sup>252</sup> *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

<sup>253</sup> Robert Pitofsky, *Reinvigorating Merger Enforcement That Has Declined as a Result of Conservative Economic Analysis* in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 233 (Robert Pitofsky ed., 2008).

Regan antitrust. Nevertheless, the Pitofsky FTC did not reach the same level of enforcement by the FTC in the 1970s because case law was less sympathetic to strong enforcement. Empirical work argues that the dramatic change in merger enforcement began in 1974, the same year that the Supreme Court decided *General Dynamics*.<sup>254</sup>

Other institutional issues might be at play in terms of case counts. The increased use of FTC administrative proceedings to address merger issues simultaneously to court action has been 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. As Commissioner Rosch explained in a speech, “Congress concluded that it was in the public interest to grant judicial authority to the Commission instead of to the federal district courts.”<sup>255</sup> To be sure, this FTC shift appeared to be pronounced only at the end of the Bush administration.

One problem to addressing claims of potential under-enforcement is that there are limits on transparency. These include: who makes the initial HSR, which lawyers and law firms represent merging parties, 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. It may be that some lawyers appear in more cases with second requests because of greater specialization. Alternatively, some lawyers may be more prone to second requests a function of a matter of trust (or lack thereof) with the agencies. Some 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 staff at the agencies. Sometimes a particular merger shop might be more or less prone to second requests or to challenge a deal.

In a number of ways, transparency on merger issues has increased. Increased transparency may 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.<sup>256</sup> Additional efforts culminated in the 2006 joint DOJ/FTC *Commentary on the Horizontal Merger Guidelines*.<sup>257</sup> 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 merger such as *XM/Sirius* or *Maytag/Whirlpool*, the DOJ released a statement explaining the rationale for allowing the

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<sup>254</sup> Vivek Ghosal, *Economics, Politics, and Merger Control*, in *Recent Developments in Antitrust Theory and Evidence* 146-48 (Jay Pil Choi, MIT Press 2006).

<sup>255</sup> Thomas Rosch, “A Peek Inside: One Commissioner’s Perspective on the Commission’s Roles as Prosecutor and Judge”, NERA 2008 Antitrust and Trade Regulation Seminar, Santa Fe, NM (July 3, 2008).

<sup>256</sup> FTC, *Frequently Asked Questions About Merger Remedies* (2002); FTC, *Best Practices on Cooperation in Merger Investigations* (2002); FTC, Statement of the Federal Trade Commission's Bureau of Competition On Guidelines for Merger Investigations (2002); FTC, Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies (2003).

<sup>257</sup> DOJ/FTC, *Commentary on the Horizontal Merger Guidelines* (2006).

deal to proceed without a challenge. This reduced uncertainty and so certain types of mergers may not be attempted or certain investigation investigations may be settled earlier or with upfront divestitures suggested because of a better sense of what kinds of arguments might work.

Finally, it may be that the major point of contention in the timeline of a transaction in the HSR process may have shifted. The critical point of negotiation between the parties and agencies occurs may no longer be before the courts or with agency leadership but at the agency staff level. As standards for winning a preliminary injunction against merging parties shifted during the Bush administration, what the standards are for second requests and challenges and when the serious negotiating between the government and the parties shifts the calculus in the decision-making. The kinds of remedies that the agencies might seek and the types of arguments to which 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 count of mergers filed and challenged.

### *E. Methods of Current Study*

The purpose of the current study is to get 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 are unsystematic and unverifiable.<sup>258</sup> To address these concerns I attempted to create a more systematic way of reaching a broader set 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. All respondents were contacted by email. This survey has collected as much data as is possible and has minimized selection bias.<sup>259</sup> Respondents between the qualitative and quantitative web survey 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 35 minutes per practitioner to ask specific questions as to their practice and issues that emerge from it based on their particular expertise. This second survey was not anonymous in the sense that I selected practitioners because of their expertise (although the actual responses were coded so as to preserve the anonymity of respondents).

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<sup>258</sup> William E. Kovacic, *Assessing the Quality of Competition Policy: The Case of Horizontal Merger Enforcement*, 5. COMP. POL'Y INT'L 129, 133-34 (2009).

<sup>259</sup> Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 99 (2002)(explaining the importance of properly selecting observations); GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, *DESIGNING SOCIAL INQUIRY* 23 (1994).

Social scientists have recognized the value of combining quantitative and qualitative work.<sup>260</sup> I use both because of the limits of asking close ended questions that do not allow for a richness of the complexity of antitrust merger issues to be developed.

This Article represents an attempt to understand antitrust compliance as it is practiced. The quantitative survey was sent via email to various ABA antitrust list-serves in August 2008 and a reminder in September 2008. The survey was for private lawyers in the United States to respond to 35 questions related to antitrust and their backgrounds.

The survey data (both qualitative and quantitative): (1) use summaries of the data collected on antitrust to learn about what is really happening in terms of institutional strengths and weaknesses of the merger control process, and (2) use the findings on merger control to suggest applications of institutional analysis in antitrust more broadly. The data also makes causal inferences regarding merger control: First, the Department of Justice was not less aggressive in enforcement relative to historic standards except perhaps at the margins. Second there was no change in enforcement levels between the Clinton and Bush FTC. These research questions both contribute to existing knowledge in the area of merger control and have implications for the practice of mergers through potential improvements to its institutional structures.<sup>261</sup> Though previous studies examine 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 or not there was decreased aggressiveness on the part of the Department of Justice during the Bush administration.

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

1. There was less merger enforcement under Bush from the Department of Justice
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 agency has improved business decision making
5. The merger process is too costly for firms
6. International merger control has improved in terms of process
7. International merger control has improved in terms of substantive analysis employed by non-US agencies
8. State merger control is a net loss in national mergers
9. Private rights are a net loss in merger control
10. Sector regulation is a net loss in merger control

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<sup>260</sup> Sidney Tarrow, *Bridging the Quantitative-Qualitative Divide in Political Science*, 89 AMER. POL. SCI. REV. 471, 472 (1995).

<sup>261</sup> 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).

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 and so such longitudinal data does not exist.

## 1. Web based survey quantitative survey

Web based surveys have become increasingly used for data collection.<sup>262</sup> A number of law and economics professors (both antitrust professors and survey methodology professors) reviewed earlier versions of the survey to ensure face validity of the survey questions. Current DOJ and FTC staff who previously worked in private practice pre-tested the survey questions. As a result of these efforts, I modified, added or dropped a number of questions.

The data for this study was from an online survey which was launched at [www.surveymonkey.com](http://www.surveymonkey.com). The survey sample is 234 experienced antitrust lawyers from a survey population of 1,203 practitioners.<sup>263</sup> The survey instrument had a total of 34 questions which was divided into three sections, mergers (combination of two firms- the antitrust issue is whether the combined firm will be able to exercise market power), 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 list-serve had an equal chance of being selected. Some studies suggest that internet based surveys have similar response rates to paper based surveys.<sup>264</sup> Web response rates range from 7 percent to 44 percent.<sup>265</sup> My response rate of 19 percent falls within this survey range.

The survey used “radio buttons” rather than drop down pick lists because radio buttons are less prone to non-responsiveness and accidental answer changes.<sup>266</sup> Answers were based on questions 1-5 to create mean responses to survey questions.

## 2. Limitations

### a. Potential selection bias

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<sup>262</sup> DON DILLMAN, *MAIL AND INTERNET SURVEYS* (2006 2<sup>nd</sup> ed.).

<sup>263</sup> 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 list-serves.

<sup>264</sup> Philip Ritter, Kate Lorig, Diana Laurent, and Katy Matthews, *Internet Versus Mailed Questionnaires: A Randomized Comparison*, 6 J. MED. INTERNET RES. 30 (2004); but see Pam Leece, Mohit Bhandari, Sheila Sprague, Marc F. Swiontkowski, Emil H. Schemitsch, Paul Tornetta, P.J. Devereaux, and Gordon H. Guyatt, *Internet Versus Mailed Questionnaires: A Randomized Comparison* (2), 6 J. MED. INTERNET RES. 30 (2004)(suggesting lower response rates from internet based surveys).

<sup>265</sup> MATTHIAS SCHONLAU, RONALD D. FRICKER, MARC N. ELLIOTT, *CONDUCTING RESEARCH SURVEYS VIA E-MAIL AND THE WEB* (2002).

<sup>266</sup> 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 (2007).

Selection bias occurs when a researcher chooses the wrong set of individuals to study.<sup>267</sup> Selection for the quantitative survey was based upon membership of ABA antitrust section committee email list-serves. It may be the case that not all antitrust practitioners are members of the ABA Antitrust Section and are not members of various committees. However, this is by far the most accurate and comprehensive list of people with serious antitrust experience and interest relative to Martindale Hubel (which is basically an advertizing service) or looking through law firm websites around the country, which also may be as much advertizing as real expertise. However, the measurement is of opinions by people who work in this area. They are proxies not only of themselves as experts in the field but also of the sophisticated clients that they represent.<sup>268</sup>

There may a selection bias if people self select into the list-serve. They may be younger (more tech savvy). The list-serve 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) we may not have a significant selectivity bias.

#### b. Potential sampling bias

Sampling bias might be a concern because some groups may have been over or under represented in the survey. There is the potential for sampling bias of the survey 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.<sup>269</sup> After all, law firm lawyers are on call to their clients 24 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.<sup>270</sup>

It may be that my sample of data 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 US 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 30 minutes, answer honestly and assume that results of cases

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<sup>267</sup> Christopher Winship & Robert D. Mare, *Models for Sample Selection Bias*, 18 ANNUAL REV. OF SOC. 327 (1992).

<sup>268</sup> 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).

<sup>269</sup> Jennifer C. Day, Alex Janus & Jessica Davis, *Computer and Internet Use in the United States: 2003 8-9 US Census Bureau 2005* (explaining the limitations of internet based surveys for the population as a whole).

<sup>270</sup> 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 (2007)(finding that web respondents were more likely to be young, male, middle income and IT savvy).

and antitrust policy are right on their merits and not because they support client positions. Another way to overcome this problem is because of a large number of survey respondents, it was more difficult to 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 interesting in responding (especially those that bill at high rates) will respond if they are interested in the topic.<sup>271</sup> 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.<sup>272</sup> As one article argues, “Most current research shows that lower response rates do not have nearly as much as an effect on survey results as might have been thought... [Such rates] don’t seem to seriously harm the quality or the representativeness of the data.”<sup>273</sup> Indeed, bias can be introduced just as easily in high response rate surveys as low response rate ones.<sup>274</sup> Non-response rates seem to be less of a problem than previously thought. Recent research suggests similar results to both high and low response rates.<sup>275</sup>

The survey literature suggests that busy people are more difficult to undertake surveys than those that are less busy.<sup>276</sup> However, other work suggests that busier people might be over-represented in surveys.<sup>277</sup> 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.<sup>278</sup>

### 3. Descriptive Findings of the General Practitioner Survey

Question 1 asked “In the past 2 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 in was between 0-20 percent of their work.

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<sup>271</sup> Shirley A. Dobbin, Sophia I. Gatowski, Gerald P. Ginsburg, Mara L. Merlino, Veronica Dahir, and James T. Richardson, *Surveying Difficult Populations: Lessons Learned from a National Survey of State Trial Judges*, 22 JUSTICE SYSTEM J. 287, 288 (2001).

<sup>272</sup> B.K. Atrostic, et al., *Nonresponse in U.S. Government Household Surveys: Consistent Measures, Recent Trends, and New Insights*, 17 J. Official Stats. 2209 (2001).

<sup>273</sup> Frank Newport, *Looking Closely at Survey Response Rates*, <http://www.gallup.com/poll/7510/looking-closely-survey-response-rates.aspx>.

<sup>274</sup> Robert M. Groves, *Nonresponse Rates and Nonresponse Bias in Household Surveys*, 70 PUBLIC OPINION QUART. 646, 665 (2006).

<sup>275</sup> Richard Curtin, Stanley Presser & Eleanor Singer, *Changes in Telephone Survey Nonresponse Over the Past Quarter Century*, 69 PUB. OPIN. QUART. 87 (2005); ROBERT M. GROVES, DON A. DILLMAN, JOHN L. ELTINGE & ROBERT J.A. LITTLE, *SURVEY NONRESPONSE* (2002).

<sup>276</sup> ROBERT M. GROVES AND MICK P. COUPER, *NONRESPONSE IN HOUSEHOLD SURVEYS*(1998).

<sup>277</sup> John P. Robinson, *Activity Patterns of Time-Diary Dropouts*, 21 SOCIETY AND LEISURE 2551 (1999).

<sup>278</sup> AAPOR, *STANDARD DEFINITIONS: FINAL DISPOSITION OF CASE CODES AND OUTCOME RULES FOR SURVEYS* (4<sup>th</sup> ed. 2006).

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 2, asked “In the past 2 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 number of HSRs and to see how many practitioners had a significant merger practice in terms of a volume of deals. Of those respondents for whom the question was applicable, 46 percent personally were involved in one to five deals whereas the remainder had more than five such deals.

Question 3 was a follow up to Question 2. It asked of those proposed mergers in Question 2, “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?” 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 1 to 5 times during the two year period. Question 4 followed up by asking “What is the percentage of these abandoned deals as percentage of all of your number of deals for merger work?” Of those who responded that 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 5, the survey asked respondents “Of 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 question was applicable, 96 percent stated that it happened 1-5 times. The remainder responded that it happened more frequently. Question 6 put Question 5 into context by asking about the frequency of such outcomes to total deal work. It asked “What 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 answered that it was greater than 20 percent.

Question 7 focused on the question of the costs of merger control with regards to competition and over-deterrence. It asked, “How often do you think on the matters that you personally have worked on that the US antitrust regime deters mergers that would not be anti-competitive (not including the cost of delay)?” The results were very interesting. Of those who responded for whom the question was applicable to their practice, five 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 by the lawyers that represent the parties.

The purpose of Question 8 was to gauge the Baker & Shapiro claim that enforcement under Bush at the antitrust agencies needed reinvigoration. Question 8 asked, “What is your perception of the current merger enforcement by US 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 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 9 and 10 asked about the effectiveness of the antitrust agencies under Bush in historical context vis-à-vis enforcement ten and twenty years ago. Ten years ago (1998) coincided with the aftermath of the *FTC v. Staples* case.<sup>279</sup> That case was a landmark decision because of its use of econometric analysis and the application of a credible evidence standard for evidence of efficiencies.<sup>280</sup> In terms of analytical shifts during that same time, one milestone was the FTC’s 1996 report, *Anticipating the 21st Century: Competition Policy in the New High-Tech Global Marketplace*.<sup>281</sup> The report articulated the need to consider issues of magnitude and probability in its analysis of merger efficiencies.<sup>282</sup> Roughly the same percentage of respondents thought that merger enforcement was significantly or moderately efficiency enhancing 10 years prior (1988) while twenty 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.

In asking about the quality of merger enforcement based on 20 years ago (1988), 19 percent that it to be either significantly or moderately efficiency enhancing while 26 percent though the opposite. One important change between 10 and 20 years ago 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. Question 10 asked, “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, the US merger review process is more costly now than 10 years ago.” Of respondents for whom the question was applicable, 76 percent responded that the cost of mergers had increased, 12 percent that costs had remained constant and 12 percent believed that merger costs had decreased.

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<sup>279</sup> 970 F. Supp. 1066 (D.D.C. 1997).

<sup>280</sup> Orley Ashenfelter, David Ashmore, Jonathan B. Baker, Suzanne Gleason & Daniel S. Hosken, *Empirical Methods in Merger Analysis: Econometric Analysis of Pricing in FTC v. Staples*, 13 INT’L J. ECON. BUS. 265 (2006).

<sup>281</sup> FTC, *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](http://www.ftc.gov/opp/global/report/gc_v1.pdf) (addressing changes in the high tech marketplace).

<sup>282</sup> Fed. Trade Comm’n, *Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace* 27 (1996), available at [http:// www.ftc.gov/opp/global/report/gc\\_v1.pdf](http://www.ftc.gov/opp/global/report/gc_v1.pdf).

The survey used a number of questions to identify the types of respondents. Some of these questions explored potential ideological bias in the questions that 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 to identify 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 as measured in question 8 to 10 under Bush was efficiency enhancing or neutral rather than Pitofsky's lamentation.<sup>283</sup>

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 1-5 years, 12 percent having practiced 5-10 years, 24 percent with a practice of 11-20 years, 25 percent practicing 21-30 years and 36 percent practicing 31 or more years.

The type of work that someone undertakes might lead to various biases in terms of what they believe the frequency and types of antitrust may be occurring national. 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 made up the remainder of respondents to the survey. One percent identified as exclusively plaintiff and 6 percent as primarily plaintiff. Thirteen percent of respondents identified as law firm exclusively defense while 67 percent identified as primarily defense.

Previous government experience might shape the way that practitioners might feel about government enforcement. The survey asked "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?" Thirty two 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 job. A more senior person might have oversight of 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 Associate and 12 percent as "Other".

#### 4. Statistical Analysis

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<sup>283</sup> Perhaps the deciding factor is not political or economic ideology but the 67 primarily defense side make-up of respondents. Lawyers may have started to believe their clients' positions.

The web based study employs cross-tabulations to identify the relationship between independent and dependent variables and determine whether the factors made a difference through comparing groups' difference. Z tests are used to compare the proportions from two groups to determine if they are significantly different from one another. Since most of variables have more than two groups, Bonferroni method<sup>284</sup> is used to adjust the significance values of the Z tests for multiple comparisons.

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 MLR runs every analysis on a different sample, it requires the sample size must 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.<sup>285</sup> 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 results practitioner survey data did not fit this rule very well.

First, goodness of fit test in the regression analysis assume that for cells formed by the categorical independents, all cell frequencies are  $\geq 1$  and no more than 20% of cells are  $< 5$ . However, for Q2 in the data, 57% 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. Almost all independent variables were not significant. Given this problem I used cross tables. Most questions did not show significant group differences. After I combined some categories, some groups' sample size were still too small to make a group comparison, such as 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?") and Q6 ("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 II to this Article. On merger related questions using cross tables:

Q2 "In the past 2 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 which lawyers were personally consulted by the parties on that required an HSR filing in the past 2 years, lawyers are divided into three groups: 1-5(group A), more than 5 (group B), and N/A (group C). Compared to group A lawyers, group B lawyers who were consulted

<sup>284</sup> Sture Holm, *A Simple Sequentially Rejective Multiple Test Procedure*, 6 Scandinavian J. Statistics, 65 (1979).

<sup>285</sup> Peter Peduzzi et al., *A Simulation Study of the Number of Events per Variable in Logistic Regression Analysis*, 49 J. CLINICAL EPIDEMIOLOGY 1373 (1996)

more than 5 proposed mergers are significantly more likely to spend more than 40% of professional time on merger related matters. In addition, the proportion of group B lawyers who have 6-10 years of practice experience is greater than the proportion of group A lawyers with 6-10 years of practice experience.

Similar to group A lawyers, more than half of group B lawyers have over 11 years of practice experience, currently handle primarily defense at law firm, have current title as partner, and have never worked as an attorney for the DOJ Antitrust Division, FTC or for a State antitrust enforcer on antitrust matters.

Q7 “How often do you think on the matters that you personally have worked on that the US antitrust regime deters mergers that would not be anti-competitive (not including the cost of delay)?”

Lawyers are asked how often they think on the matters that they personally have worked on that the US antitrust regime deters mergers that would not be anti-competitive. 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 are in group C who seldom/ never think their past experience on that the US antitrust regime prevent mergers that would not be anti-competitive. Compared to group C, group B lawyers are more likely to think the current merger enforce by US federal antitrust agencies are moderately/significantly efficiency degrading. The group comparison results indicate that there is no other significant difference among group A, B and C.

## 5. Qualitative Interviews

Qualitative methodology has some advantages over quantitative methods. Qualitative methods allow for more contextualized data.<sup>286</sup> They also provide for a closer examination of issues through closeness to people and the daily issues that they confront. They allow for greater interaction and dialogue understandings of phenomena to be studied.<sup>287</sup> Specific to the antitrust merger study, the additional advantages that qualitative interviews provided was greater depth in exploring outcomes of respondents than did the quantitative survey and the ability to evaluate evolving antitrust enforcement.

From August to September 2009, I undertook 117 phone interviews of Chambers ranked antitrust specialists from the states in which there are Chambers rankings of antitrust practitioners: California, Florida, Illinois, Pennsylvania, Massachusetts, New York, North Carolina, Texas, and Washington, DC. Both the number and geographic cover are of practitioner responses were significantly greater than those of the Baker & Shapiro interviews. The purpose of the qualitative interviews was to interview elite

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<sup>286</sup> Jeff Goodwin & Ruth Horowitz, *The Methodological Strengths and Dilemmas of Qualitative Sociology*, 25 *QUALITATIVE SOC.* 33, 44 (2002).

<sup>287</sup> BENT FLYVBJERG, *MAKING SOCIAL SCIENCE MATTER: WHY SOCIAL INQUIRY FAILS AND HOW IT CAN SUCCEED AGAIN* (2001).

antitrust practitioners to see if the general survey reflected the same sort of concerns as what elite practitioners face in their practice. Elite practitioners are more to have client matters that represent the more difficult cases decided “at the margins” and 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. The interviews averaged 34 minutes in length. I took notes during all interviews. All interviews were phone interviews. Each of the interviews began with close ended questions around employment background. Thereafter, the qualitative interviews took an “Interview Guide” approach which utilizes open ended questions with similar questions. This 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.<sup>288</sup> The order and flow of questions varied somewhat due to the answers to the questions. I pre-tested the survey in summer 2009 among current DOJ and FTC staff that had prior private practice experience.

## 6. Findings

Hypothesis 1. There was less merger enforcement under Bush from the Department of Justice

The results are ambiguous. Half of respondents stated that in their practice, they saw no change in enforcement from Clinton to Bush. Roughly half found that on the margins, DOJ enforcement was less aggressive specifically when it came to the use of efficiency or entry arguments. They stated that some deals that should have gone to second request did not. Other deals that went to second request that might have been challenged were not. This seemed to be particularly true for 3 to 2 mergers and sometimes even for 2 to 1 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 a under Hew Pate.

In terms of whether there was a “sharply higher” rate of success 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 suggested to their clients and/or to corporate partners at their firm to do deals in the last two years of the Bush administration because the chances of success were so high. In nearly all cases, elite practitioner respondents did not actively suggest to transactional partners in their firm or to clients directly to create deals they otherwise would not have thought to do based on less antitrust scrutiny by DOJ.

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<sup>288</sup> The disadvantage to this approach is that some data comparisons will be difficult since different respondents respond to questions that are not all the same. On qualitative interview methodology, see generally MICHAEL QUINN PATTON, *QUALITATIVE RESEARCH & EVALUATION METHODS* (1990 2d ed.); STEINAR KVALE, *INTERVIEWS: AN INTRODUCTION TO QUALITATIVE RESEARCH INTERVIEWING* (1996).

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 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 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 Bush DOJ as they were under the Clinton years.

Hypothesis 2. 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.<sup>289</sup> They make the point that the FTC was challenging mergers at roughly the historical rate during Muris' tenure, and that the shortfall was when Majoras was chair. The overwhelming majority of practitioners believed that FTC merger control remained constant between Clinton and Bush years.

As between the DOJ and FTC, practitioners felt that there was a difference in enforcement, although for reasons different than those of 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 added bureaucracy – agency staff, front office leadership and the Commissioners. Certain Commissioners have particular issues of interest which interjected additional deal complexity. Adding to the dynamics of decision-making at the agency was the particular mix of Commissioners under Bush. Practitioners overall gave Muris and Kovacic very strong marks for their leadership and intellectual abilities. The dynamics within the Commission seemed to change after Majoras left because many respondents viewed Commissioner Tom Rosch as a wildcard as a Commissioner. Moreover, most respondents believed that Rosch had significant influence over Commissioners Liebowitz and Jones Harbor.

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 all the Merger Retrospective Reports 1996-2003, 1996-2005 and 1996-2007. The tables break out oil, chemicals, grocery and

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<sup>289</sup> Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement* in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 244-51 (Robert Pitofsky ed., 2008).

pharmaceutical data. These tables show that in some areas (such as the oil industry), there is enforcement at lower levels of concentration.<sup>290</sup>

Hypothesis 3. The analytical quality of judges on antitrust issues has improved relative to ten or twenty years ago

Responses expressed mixed feelings by practitioners on judicial quality. A strong majority of practitioners stated that the overall quality 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 involved in poor quality decisions at times if such judges were too busy to devote sufficient time to the antitrust issues in the case.

Respondents did not provide uniform answers as to why it was that quality of judges had improved. Some suggested that it was judicial training programs in law and economics. Some 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 had a similar bias where they claimed that the quality of the judiciary has improved in part because judges had improved their ability to understand complex issues when it meant pro-defense outcomes. The belief of high variance of the judiciary on antitrust matters supports the recent empirical work of Baye and Wright discussed in Part II of this Article.

Hypothesis 4. Greater transparency by the agency has improved business decision making

There was a divide between those practitioners within the beltway 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) felt that there was an insider community on merger issues who had better day to day understandings of subtle shifts in language and practice at the agencies. This seems to be due to more of 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 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? FTC

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<sup>290</sup> FTC, Horizontal Merger Investigation Data, Fiscal Years 1996-2005 (Jan. 25, 2007), 7-13.

Chairman Liebowitz recently stated, “From my perspective, the current Guidelines do not explain clearly enough to businesses how the agencies review transactions.”<sup>291</sup> At some fundamental level this will always be the case. In a specialized area of complex regulatory law, there is whatever guidelines an agency (or in our case agencies) will promulgate and then small group 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 would create a 600 page set of merger guidelines. Sometimes too much transparency by government has drawbacks.<sup>292</sup> The language of the Merger Guidelines makes comprehension difficult because the language 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 may a problem with judges rather than with practitioners or non-lawyers business executives. As the Guidelines recognize, the judiciary plays a role in enforcing merger law.<sup>293</sup> However, who is the end user of the Guidelines? Is it the firms practicing before the agencies or for judges to use? 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.

These questions lead to a meta-question. Is the law Section 7 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.<sup>294</sup> The agencies recognize this and indeed may use the guidelines strategically to get support for their positions from the courts once guidelines are adopted even when the case law does not support such positions.<sup>295</sup>

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<sup>291</sup> Jon Liebowitz, “Federal Trade Commission Enforcement of the Antitrust Laws”, 36th Annual Conference on International Antitrust Law & Policy of the Fordham Competition Law Institute at Fordham Law School

September 24, 2009.

<sup>292</sup> Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 902-14 (2006) (noting the limits of government transparency).

<sup>293</sup> 1992 Merger Guidelines, Section .01.

<sup>294</sup> Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 775-77 (2006) (arguing that “these guidelines have acted as a stealth force on the development of antitrust merger law”).

<sup>295</sup> Paul Denis, *Horizontal Merger Guidelines Revision: A Draftsman's Perspective*, GCP: The Antitrust Chronicle 5 (Dec. 2009).

A number of respondents mentioned the importance of the recent FTC self study and a transparency creating device for business counseling purposes. Respondents were positive about the FTC self study goals.<sup>296</sup> Some questioned if the self study would lead to new changes under a different administration.

Hypothesis 5. The merger process is too costly for firms

Overwhelming practitioner comments focused on the high cost of merger review by the agencies. These concerns echo those raised by the business community suggest that merger costs have increased because of e-discovery and overly large second requests.<sup>297</sup> The amount of data required 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 suggest that changes by the agencies to limit these costs have met only limited success, such as the FTC 2006 Merger Process Reforms and the DOJ 2006 Merger Process Initiative Amendments.<sup>298</sup> 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. A second problem was the actual time involved for a second request. Second requests seemed to be shorter for some because of their large amount of repeat business and the trust that they build up with agency staff.

One issue in the size of second requests is inevitable because of changes in technology. Because of emails and other electronic documents, companies can collect far more data now than in past years. A yet other factor is that with the agencies undertaking more econometric analysis, the demand for data has grown. 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 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 add to increasing costs for mergers because of deal

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<sup>296</sup> The Federal Trade Commission at 100: Into Our 2nd Century - The Continuing Pursuit of Better Practices, A Report by Federal Trade Commission Chairman William E. Kovacic (January 2009) available at <http://www2.ftc.gov/os/2009/01/ftc100rpt.pdf>.

<sup>297</sup> William Blumenthal, “Overenforcement in the Hart-Scott-Rodino Second Request Process,” in MALCOLM B. COATE & ANDREW N. KLEIT, *THE ECONOMICS OF THE ANTITRUST PROCESS* 26 (2003); AMC Report 162 (“The burdens of second requests are high and increasing.”).

<sup>298</sup> <http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf>;  
[http://www.usdoj.gov/atr/public/press\\_releases/2006/220302.htm](http://www.usdoj.gov/atr/public/press_releases/2006/220302.htm).

delays for the parties seeking merger review.<sup>299</sup> Clearance battles create additional business uncertainty for clients and do not get people the 30 day comfort that they want. On the margins, a number of practitioners mentioned this creates problems for some financing of deals. The turf battle, respondents believed, could have been solved with the ill fated and short lived clearance deal of 2002.<sup>300</sup> Some respondents were glad clearance was not solved in 2002 because they had personal contacts in one agency but not the other and it would have meant a loss in their business.

Hypothesis 6. International merger control has improved in terms of process

Respondents reported one problem has been the number of jurisdictions that want a filing made even when the 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.<sup>301</sup> The explosion of merger control may be even larger. One hornbook on merger law has coverage of 217 jurisdictions worldwide.<sup>302</sup>

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. Most respondents felt that the process of merger control in terms of notifications has improved significantly in the past few years. They tend to suggest that it 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.<sup>303</sup>

In the wake of GE/Honeywell, the soft law organizations worked to improve coordination across the Atlantic and more generally across jurisdictions. The ICN created Guiding Principles for Merger Notification and Review Procedures<sup>304</sup> in 2002 and followed up with Recommended Practices for Merger Notification and Review Procedures in 2005.<sup>305</sup> Early work that tracks implementation of these principles reports success in implementation around the world.<sup>306</sup> Similarly, the OECD created best practices for coordination and cooperation in merger review.<sup>307</sup>

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<sup>299</sup> AMC Report 134-35.

<sup>300</sup> <http://www.ftc.gov/opa/2002/03/clearance.shtm>.

<sup>301</sup> J. MARK GIDLEY & GEORGE L. PAUL, *WORLDWIDE MERGER NOTIFICATION REQUIREMENTS* (Aspen 2009)

<sup>302</sup> *Id.*

<sup>303</sup> J. William Rowley & A. Neil Campbell, *Implementation of the ICN's Recommended Merger Practices: A Work-in-(Early)-Progress*, *Antitrust Source*, July 2005.

<sup>304</sup> ICN, Merger Working Group, *Guiding Principles for Merger Notification and Review Procedures* (2003), available at <http://www.internationalcompetitionnetwork.org/index.php/en/publication/294>.

<sup>305</sup> ICN, *Guiding Principles for Merger Notification and Review Procedures and Recommended Practices for Merger Notification and Review Procedures* (2005), <http://www.internationalcompetitionnetwork.org/index.php/en/publication/294>.

<sup>306</sup> 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* 111, 111-12 (2004); 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.

<sup>307</sup> OECD, *Recommendation of the Council on Merger Review*, C(2005)34, Mar. 23, 2005.

Recent ICN work has focused on notification thresholds for mergers and encouraged benchmarking.<sup>308</sup> It released a report on notification based on the responses to a survey of 21 jurisdictions that had revised their reporting regimes in recent years. The report highlighted effective strategies for jurisdictions looking to revise their notification thresholds.<sup>309</sup>

The ICN Recommended Practices for Merger Notification Procedures suggest a six month period for second reviews.<sup>310</sup> 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 seem 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 about divergence on the part of national competition authorities on merger process for multijurisdictional filings.

Hypothesis 7. International merger control has improved in terms of substantive analysis employed by non-US agencies

Overall, practitioners were positive about convergence on substantive merger issues although less positive than on procedural issues such as notification.<sup>311</sup> Respondents suggested an improvement in the quality of European Commission level substantive analysis. Nevertheless, they also feel that decision-making at the lowest common denominator (the strictest regime) can kill deals even when such deals do not create anti-competitive harm as a result of the merger. The lower standard becomes the global standard.<sup>312</sup>

Divergent opinion on mergers is not a typical problem. As one practitioner put it, “Substantive 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*, *Schneider* and *Tetra Pack* have forced the Commission to back up ideas with economic analysis.<sup>313</sup>

<sup>308</sup> ICN, Setting Notification Thresholds for Merger Review (2008),

[http://www.internationalcompetitionnetwork.org/media/library/mergers/Merger\\_WG\\_2.pdf](http://www.internationalcompetitionnetwork.org/media/library/mergers/Merger_WG_2.pdf).

<sup>309</sup> ICN, Setting Notification Thresholds for Merger Review, Report to the ICN Annual Conference, Kyoto, Japan (April 2008).

<sup>310</sup> ICN Recommended Practices for Merger Notification Procedures at §4A.

<sup>311</sup> In terms of soft law convergence, the ICN has proposed Recommended Practices for Merger Analysis. 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) 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. ICN, Recommended Practices for Merger Analysis (2009).

<sup>312</sup> Damien Geradin, *The Perils of Antitrust Proliferation - The Process of 'Decentralized Globalization' and the Risks of Over-Regulation of Competitive Behaviour*, 10 CHI. J. INT'L L. 189, 203-210 (2009).

<sup>313</sup> Case T-342/99, *Airtours v Commission* [2002] ECR II-2585; Case T-310/01, *Schneider Elec v*

Respondents also note that the creation of the position of Chief Economist at DG Competition has institutionalized economic analysis and improved substantive merger control.

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 more time.<sup>314</sup> A few suggested that soft law networks such as the OECD and direct technical assistance on the part of various antitrust agencies has ameliorated some of the worst potential problems that might have emerged from China.<sup>315</sup>

Hypothesis 8. 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 to deals.

Overall, the vast majority of practitioners felt that there was a role for state antitrust enforcement. However, involvement should, in their opinion, 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 addresses earlier in the Article.

Hypothesis 9. Private rights are a net loss in merger control

Antitrust laws and legislative history provide a dual enforcement role for between public and private enforcement, including in the merger area.<sup>316</sup> 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 in mergers.<sup>317</sup>

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*Commission* [2002] ECR II-4071; Case T-5/02, *Tetra Laval v Commission* [2002] ECR II-4381, aff'd in part, Case C-12/03P, [2005] OJ C82/1 (ECJ).

<sup>314</sup> Xinzhu Zhang & Vanessa Yanhua Zhang, *Chinese Merger Control: Patterns and Implications*, [ ] J. COMPETITION L. & ECON. (forthcoming) (examining the limits of Chinese merger control).

<sup>315</sup> D. Daniel Sokol & Kyle W. Stiegert, *Exporting Knowledge Through Technical Assistance and Capacity Building*, [ ] J. COMPETITION L. & ECON. (forthcoming) (providing a quantitative analysis of technical assistance efforts); D. Daniel Sokol, *The Future of International Antitrust and Improving Antitrust Agency Capacity*, 103 NW. U. L. REV. 1081 (2009) (providing a descriptive analysis of technical assistance efforts).

<sup>316</sup> Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 11-12 (1994).

<sup>317</sup> But see Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1 (1995) (advocating stronger private rights in merger control).

By elevating the antitrust injury requirement for challenging mergers, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*<sup>318</sup> and *Cargill, Inc. v. Monfort of Colorado, Inc.*<sup>319</sup> have made it far harder for competitors to sue for Clayton section 7 violations.<sup>320</sup> Yet, recently a number of private party claims have been made during the pendency of merger filings, including *Anheuser-Busch /InBev*, *Pfizer/Wyeth*, *XM/Sirius* and *Delta/Northwest*. Some private suits emerge after the fact as well. There are some, and injunctions have been entered over time in a subset of these cases.

An empirical void remains in this area. What is not clear from the reports, of course, is what happened after the injunction was granted. Most of these cases involved ex ante complaints, and few of them are recent. In a few recent cases private succeeded where DOJ or the FTC failed to act and have secured relief. 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 empirically has not yet been studied. Even in these cases, customers may well be interested in a payoff of some kind 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 may 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. If a plaintiff can obtain at least a temporary injunction, or can impose costs on its competitors, these have peripheral benefits.

Hypothesis 10. Sector regulation is a net loss in merger control

Respondents believed that antitrust should have a role in mergers of regulated industries. They expressed concerns with the types of “public interest” conditions to mergers that sector regulators create. Many believe 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 mergers in regulated industries for competitive effects and the sole enforcer to craft potential remedies to problematic mergers that can be approved subject to certain conditions.

#### IV. Conclusion

Institutions are messy. 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 anti-competitive conduct.

<sup>318</sup> 429 U.S. 477, 484-89 (1977) (offering the first articulation of the antitrust injury doctrine).

<sup>319</sup> 479 U.S. 104 (1986).

<sup>320</sup> William H. Page & John E. Lopatka, *Antitrust Injury, Merger Policy, and the Competitor Plaintiff Antitrust Injury, the Competitor Plaintiff, and Merger Policy*, 82 IOWA L. REV. 127 (1996)(explaining the impact of the antitrust standing doctrine).

If comparative institutional analysis is ultimately a study of imperfect alternatives, where does this leave us from a policy standpoint?

In an analysis of the relative costs and benefits of the existing overlapping institutional structures in merger control, a number of key findings emerge. Many of the survey responses echo what seems in many cases to be conventional wisdom, although in some instances there is divergence from the dominant discourse merger control.

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 set-up 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. This convergence has reduced the costs associated with merger 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. Overall, 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 US domestic institutional choice. There seems to have been some divergence in recent years between the DOJ and FTC, although not as extreme as articulated within the dominant antitrust discourse. Why there are two federal antitrust agencies with different substantive standards for preliminary injunction, different levels of intensity of merger enforcement, and different institutional designs remain a problem. It seems that these problems are fundamental. What the best institutional solution may be depends in part on the optimal level of antitrust enforcement desired where the FTC seems to be capable of a stronger level of enforcement. The answer to this question of what particular agency structure is optimal is beyond the scope of this Article.

Overall, the quality of the judiciary to understand antitrust merger cases has improved. Unfortunately, the judiciary remains highly variable in its decision-making. In the US 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. Overall, the use of specialized adjudication would seem to be an improvement over the current system.

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 increase costs too often when the states could instead focus on more local cases where the

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federal enforcers do not. 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.

## Mergers:

Question		Count	Column %
Q1. In the past 2 years, what percentage of all of your professional legal time on matters is merger related?	0-20%	115	49.6%
	21-40%	42	18.1%
	41-100%	63	27.2%
	Not applicable	12	5.2%
Q2. In the past 2 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 on that required an HSR filing?	1-5	77	33.2%
	5+	89	38.4%
	Not applicable	66	28.4%
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	87	38.2%
	5+	11	4.8%
	Not applicable	130	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%	108	47.8%
	21-100%	20	8.8%
	Not applicable	98	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	48	21.6%
	6-10	1	.5%
	Not applicable	173	77.9%
Q6. What is the percentage of these abandoned deals as a percentage of number of deals of your merger work?	0-20%	99	44.6%
	21-100%	5	2.3%
	Not applicable	118	53.2%
Q7. How often do you think on the matters that you personally have worked on that the US antitrust regime deters mergers that would not be anti-competitive (not including the cost of delay)?	Frequently	9	4%
	Often	40	18%
	Never	116	52%
	Not applicable	60	27%
	Efficiency enhancing	75	34%
Q8. What is your perception of the current merger enforcement by US federal antitrust agencies?	Neutral	61	27%
	Efficiency degrading	57	26%
	Not applicable	30	13%
	Efficiency enhancing	81	36%
Q9. How would you answer question 8 based on enforcement 10 years ago (1998)?	Neutral	39	18%
	Efficiency degrading	46	21%
	Not applicable	56	25%
Q10. How would you answer question 8 based on enforcement 20 years ago (1988)?	Efficiency enhancing	42	19%
	Neutral	27	12%
	Efficiency degrading	62	28%
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, the US merger review process is more costly now than	Not applicable	91	41%
	More	124	55%
	Neutral	21	9%
	Fewer	19	8%
	Not applicable	60	27%

## Demographic

Question		Count	Column %
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%
	1-5	6	3.7%
	6-10	19	11.6%
	11-20	39	23.8%
Q32. Years of practice:	21-30	41	25.0%
	31+	59	36.0%
	In-house: Exclusively plaintiff	4	2.5%
	In-house: Primarily plaintiff	1	.6%
	In-house: Primarily defense	15	9.3%
Q33. You currently have the following type of practice:	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%
	Yes	52	31.7%
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?	No	112	68.3%
	Partner	93	57.1%
Q35. Your current title is:	Counsel/Of Counsel	32	19.6%
	Associate	19	11.7%
	Other	19	11.7%

## Appendix II – Crosstables

Q2.

		Groups	
		1-5 (group A)	5+ (group B)
		N (Column %)	N (Column %)
Q1. In the past 2 years, what percentage of all of your professional legal time on matters is merger related?	0-20%	55 (71%) <sup>B</sup>	8 (9%)
	21-40%	13 (17%) <sup>C</sup>	28 (32%) <sup>C</sup>
	40%-100%	9 (12%)	52 (59%) <sup>A,C</sup>
	Not applicable	0 (0%)	0 (0%)
Q8. What is your perception of the current merger enforcement by US federal antitrust agencies?	Efficiency enhancing	29(40%) <sup>C</sup>	38(44%) <sup>C</sup>
	Neutral	24(33%)	23(27%)
	Efficiency degrading	17(23%)	23(27%)
	Not applicable	3(4%)	2(2%)
Q9. How would you answer question 8 based on enforcement 10 years ago (1998)?	Efficiency enhancing	33(45%) <sup>C</sup>	38(44%) <sup>C</sup>
	Neutral	12(16%)	16(19%)
	Efficiency degrading	18(25%)	16(19%)
	Not applicable	10(14%)	16(19%)
Q10. How would you answer question 8 based on enforcement 20 years ago (1988)?	Efficiency enhancing	17(23%)	15(17%)
	Neutral	14(19%) <sup>C</sup>	10(12%)
	Efficiency degrading	20(27%)	31(36%) <sup>C</sup>
	Not applicable	22(30%)	30(35%)
Q30. In presidential elections I more often than not vote:	Republican	26(46%)	26(36%)
	Democratic	28(50%)	44(60%)
	Other	2(4%)	3(4%)
Q31. The antitrust economics views closest to my own are:	Chicago School	21(38%)	34(46%)
	Post-Chicago School	34(62%)	40(54%)
Q32. Years of practice:	1-5	3(5%)	1(1%)
	6-10	3(5%)	15(20%) <sup>A</sup>
	11-20	13(23%)	20(26%)
	21-30	13(23%)	19(25%)
	31+	25(44%)	21(28%)
Q33. You currently have the following type of practice:	In-house: Exclusively plaintiff	2(4%)	1(1%)
	In-house: Primarily plaintiff	0(0%)	1(1%)
	In-house: Primarily defense	9(16%)	6(8%)
	Law firm: Exclusively plaintiff	0(0%)	0(0%)
	Law firm: Primarily plaintiff	2(4%)	1(1%)
	Law firm: Exclusively defense	5(9%)	12(16%)

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	Law firm: Primarily defense	38(68%)	55(72%)
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%) <sup>c</sup>
	No	37(65%)	48(63%)
Q35. Your current title is:	Partner	30(53%)	44(59%)
	Counsel/Of Counsel	13(23%)	15(20%)
	Associate	4(7%)	12(16%)
	Other	10(18%)	4(5%)

Note:

- Superscripts are used to indicate statistical significant group differences.
- N means total counts.

Q7

		Groups		
		Frequently-often (Group A)	Sometimes (Group B)	S
		N (Column %)	N (Column %)	N
Q1. In the past 2 years, what percentage of all of your professional legal time on matters is merger related?	0-20%	2(22%)	11(28%)	5
	21-40%	3(33%) <sup>D</sup>	11(28%) <sup>D</sup>	2
	40%-100%	4(44%) <sup>D</sup>	18(45%) <sup>D</sup>	3
	Not applicable	0(0%)	0(0%) <sup>a</sup>	0
Q8. What is your perception of the current merger enforcement by US federal antitrust agencies?	Efficiency enhancing	1(11%)	11(28%)	5
	Neutral	3(33%)	12(30%)	3
	Efficiency degrading	5(56%)	17(43%) <sup>C</sup>	2
	Not applicable	0(0%)	0(0%)	2
Q9. How would you answer question 8 based on enforcement 10 years ago (1998)?	Efficiency enhancing	2(22%)	15(38%)	5
	Neutral	1(11%)	8(20%)	2
	Efficiency degrading	4(44%)	12(30%)	2
	Not applicable	2(22%)	5(13%)	1
Q10. How would you answer question 8 based on enforcement 20 years ago (1988)?	Efficiency enhancing	0(0%)	8(20%)	2
	Neutral	1(11%)	6(15%)	1
	Efficiency degrading	4(44%)	16(40%) <sup>D</sup>	3
	Not applicable	4(44%)	10(25%)	3
Q30. In presidential elections I more often than not vote:	Republican	3(43%)	14(45%)	3
	Democratic	3(43%)	16(52%)	5
	Other	1(14%)	1(3%)	2
Q31. The antitrust economics views closest to my own are:	Chicago School	5(71%)	18(55%)	3
	Post-Chicago School	2(29%)	15(45%)	5
	1-5	0(0%)	1(3%)	4
	6-10	2(29%)	3(9%)	1
Q32. Years of practice:	11-20	3(43%)	8(24%)	2
	21-30	2(29%)	9(27%)	2
	31+	0(0%)	12(36%)	3
	In-house: Exclusively plaintiff	0(0%)	0(0%)	4
	In-house: Primarily plaintiff	0(0%)	1(3%)	0
Q33. You currently have the following type of practice:	In-house: Primarily defense	1(14%)	4(12%)	8
	Law firm: Exclusively plaintiff	0(0%)	0(0%)	0
	Law firm: Primarily plaintiff	0(0%)	1(3%)	3
	Law firm: Exclusively defense	0(0%)	2(6%)	1
	Law firm: Primarily defense	6(86%)	25(76%)	6
	Yes	2(29%)	15(45%)	2
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?	No	5(71%)	18(55%)	6
	Partner	4(57%)	19(59%)	5
	Counsel/Of Counsel	0(0%)	7(22%)	2
Q35. Your current title is:	Associate	3(43%)	3(9%)	1
	Other	0(0%)	3(9%)	8

Note:

- Superscripts are used to indicate statistical significant group differences.
- N means total counts.