

WE SHOULD NOT LET THE ONGOING  
RATIONALIZATION OF ANTITRUST  
LEAD TO THE MARGINALIZATION OF ANTITRUST

*David L. Meyer\**

INTRODUCTION

Courts play a key role in formulating and implementing antitrust policy in this country. One of our two federal antitrust agencies—the Department of Justice Antitrust Division (DOJ)—can enforce the law only by persuading courts to use their remedial powers. The other—the Federal Trade Commission (FTC)—has administrative powers that are subject to judicial review, and as a result the agency must adhere to the legal standards developed in antitrust cases brought in court by others. And, in any event, most antitrust cases are brought by private plaintiffs, not government enforcers. As a result, how courts view the antitrust laws says a lot about the role antitrust enforcement will play in the economy: if the antitrust enforcement agencies cannot win merger cases, for example, because of a court’s attitudes toward antitrust standards, the role of merger enforcement will necessarily wane.

The past three decades or so have seen sweeping changes in attitudes toward antitrust—attitudes that are not limited to courts. I would characterize most of the developments in antitrust jurisprudence and enforcement over that period as highly beneficial: as what I will call a rationalization of antitrust, which has better matched the antitrust laws to their goal of protecting competition and thereby enhancing consumer welfare. But there are signs recently of an undercurrent of antipathy to antitrust itself: a distrust of the antitrust laws’ ability to do more good than harm, and skepticism as to whether antitrust is ever necessary. This undercurrent appears to stem in part from the perceived abuses of private treble-damages antitrust litigation, where some see “bet-your-industry” cases being brought without any reasonable basis for thinking an antitrust violation was committed. Reining in these excesses is not simple. In the main, antitrust jurisprudence is a unitary body of law, applicable equally to private cases and government cases, so changing legal standards in order to reduce excessive private litigation could threaten the role of government enforcement as well.

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\* Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice. Remarks presented at the George Mason Law Review 11th Annual Symposium on Antitrust, Washington, DC, Oct. 31, 2007.

Those of us who believe that antitrust still plays an important role in the economy should be concerned. As I will argue, we need to continue our efforts to rationalize antitrust and educate the public about the role of antitrust. It is important that antitrust not come to be viewed as a misguided regulatory impulse of the last century, but as a vital means of safeguarding competitive markets so that there is less need to regulate them.

## I. THE COURT-DRIVEN RATIONALIZATION OF ANTITRUST LAW

By the middle of the last century, the antitrust laws had assumed a larger-than-life role in American jurisprudence and law enforcement. Competition had become a sacrosanct precept that guided the American economy, allocating resources efficiently for the benefit of American consumers. By 1972, the Supreme Court was able to observe that the antitrust laws in general, and the Sherman Act in particular, had become “the Magna Carta of free enterprise,” “as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”<sup>1</sup> The antitrust laws were viewed as statutory enactments on a plane above other federal legislation. They rarely yielded to other enactments, even when Congress explicitly ousted antitrust enforcement. Plain repugnancy was the standard for implied repeal, and even express exemptions were narrowly construed.<sup>2</sup>

On one level, antitrust’s role in the economy may have been at its zenith in the 1950s and 1960s. Viewed through our more modern and economically enlightened lens, however, antitrust as practiced in that era was a mess. Courts were too solicitous of protecting the firms that inevitably are injured in the rough and tumble of free markets—of “driving out of business the small dealers and worthy men . . . who might be unable to readjust themselves to the[] altered surroundings”<sup>3</sup> caused by competition. Some perceived Congress’s passage of the 1950 Clayton Act amendments as “not concerned about increased efficiency” but instead “concerned about the competitor . . . the small business man whose ‘little, independent units are gobbled up by bigger ones,’ and about other competitors whose opportunities to meet the prices of the larger concern and hence compete with it might be diminished by a merger which increased the concentration of

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<sup>1</sup> *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

<sup>2</sup> *See Nat’l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 388-89 (1981) (“Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system. Repeal is to be regarded as implied only if necessary to make the [subsequent law] work, and even then only to the minimum extent necessary.”) (internal quotation marks omitted) (citations omitted) (alteration in original).

<sup>3</sup> *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 323 (1897).

power in the large organization.”<sup>4</sup> Antitrust law had in many ways come unmoored from the goal of “protecting competition,” at least as we understand that concept today. Instead, antitrust law and enforcement often was itself interfering with the competitive process and the goals of efficiency and welfare.

Some time in the 1970s or 80s—and I will not attempt to pinpoint a date or a specific cause—a shift occurred towards the rationalization of antitrust law, by which I mean greater sophistication in applying the law in a manner that serves its goals of safeguarding the competitive process, harnessing market forces and competition to serve the aim of allocating resources efficiently, growing the pie, and ultimately benefiting consumers and the economy as a whole. We’ve come a very long way since then, very much to the good for the antitrust enterprise and, more importantly, the welfare goals that the law seeks to protect.

I don’t think I need to belabor this point with this audience. Consider just for a moment the effect of cases like *Brunswick*<sup>5</sup> and *Cargill*<sup>6</sup> that reformed standing doctrine and emphasized that antitrust really was about protecting competition and not competitors. Consider the effect of cases like *Brooke Group*,<sup>7</sup> *Trinko*,<sup>8</sup> and *Weyerhaeuser*<sup>9</sup> on Section 2 jurisprudence. Consider how cases like *Matsushita*<sup>10</sup> and *Twombly*<sup>11</sup> have dismantled the previous bias against summary adjudication in antitrust cases and made it harder for antitrust to be misused as a tool for conducting baseless administrative investigations of entire industries. And consider how far we have come in merger enforcement since the days when the government could bring—much less win—a case like *Von’s Grocery*.<sup>12</sup>

I could say the same about developments in joint venture law (*BMI*,<sup>13</sup> *Dagher*<sup>14</sup>), the IP/antitrust interface (remember the Nine No-Nos<sup>15</sup>), and of course the law of vertical restraints—where the Supreme Court just last

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<sup>4</sup> *Crown Zellerbach Corp. v. FTC*, 296 F.2d 800, 825 (9th Cir. 1961) (quoting *United States v. Columbia Steel Co.*, 334 U.S. 495, 534 (1938) (Douglas, J., dissenting)).

<sup>5</sup> *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

<sup>6</sup> *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104 (1986).

<sup>7</sup> *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

<sup>8</sup> *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

<sup>9</sup> *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007).

<sup>10</sup> *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

<sup>11</sup> *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

<sup>12</sup> *United States v. Von’s Grocery Co.*, 384 U.S. 270 (1966).

<sup>13</sup> *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979).

<sup>14</sup> *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006).

<sup>15</sup> See generally Makan Delrahim, Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, *The Long and Winding Road: Convergence in the Application of Antitrust to Intellectual Property*, Address at the George Mason Law Review Symposium 6-7 (Oct. 6, 2004) (discussing the DOJ’s creation and later rejection of the Nine No-Nos), available at <http://www.usdoj.gov/atr/public/speeches/205712.pdf>.

term removed the sole remaining out-of-date per se rule applicable to vertical arrangements in *Leegin*.<sup>16</sup>

Treatises could be written about the evolution in antitrust over the past half century. I will not attempt to summarize all of the important changes, but will offer a few reminders that illustrate some of the key themes.

A. *The Law Protects Competitors Less, and Competition More*

At one time, competitors could readily use the antitrust laws—and particularly Section 2—opportunistically to protect themselves from potentially efficient forms of competition. An emphasis often on protecting competitors and their “opportunities,” rather than the competitive process and consumers, led to cases such as *Kiefer-Stewart Co.*<sup>17</sup> in 1951, where the Supreme Court held that an agreement by corporate distillers to fix their wholesalers’ maximum resale prices violated Section 1 of the Sherman Act, even where the corporations were under common ownership and control. This case improperly focused on the effect of a practice on a particular class of competitors (wholesalers), rather than upon the competitive process as a whole or the effect on short- or long-term efficiency. And more generally, any injured victim could sue regardless of whether the harm flowed from the antitrust violation.

How times have changed. Courts have developed rigorous principles of antitrust standing. Cases like *Brunswick* and *Cargill* and countless other lower court rulings have recognized that the law is about protecting competition and not the opportunities of individual competitors. The need to demonstrate a causal nexus between a plaintiff’s injury and a cognizable harm to competition has made it much harder for opportunistic plaintiffs to use antitrust law as a way of short-circuiting the competitive process.

We are likewise in the midst of an ongoing rationalization of the law of monopolization—in particular a recognition that competition is often at its most robust when firms are motivated to take actions that have the effect of harming rivals and achieving dominance for themselves. Cases like *Brooke Group*, *Trinko*, and *Weyerhaeuser* are key examples of this trend, but more work remains to be done.

B. *Invoking “Antitrust” No Longer Automatically Entitles Plaintiffs To an Industry Fishing License*

At one time, plaintiffs could conduct extensive near-administrative reviews of entire industries based on bare bones allegations of misconduct,

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<sup>16</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

<sup>17</sup> *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951).

secure in reliance on Supreme Court case law (like *Poller v. CBS*<sup>18</sup>) advising that summary judgment should rarely be granted in antitrust cases. Now, cases like *Monsanto*<sup>19</sup> and *Matsushita* have admonished courts to grant summary judgment when the only evidence of an antitrust conspiracy is circumstantial evidence that does not “tend[] to exclude the possibility of independent action.”<sup>20</sup> And last Term, in *Twombly*, the Court similarly recognized the danger of allowing unbridled industry-wide investigations when the complaint alleging conspiracy fails to provide any reasonable expectation that discovery will reveal evidence of illegal agreement.<sup>21</sup>

C. *Merger Law Is No Longer Fixated with Preserving Industry Structure*

During much of the last century, merger law and merger enforcement inhibited the efficient reallocation of capital by focusing unduly on preserving extant market structure, precluding most alterations in that structure other than through organic growth. *Von's Grocery* in 1966 was perhaps the crowning achievement of this era—the Department successfully sued to block a grocery store merger where the merged firm's combined market share would have been only 7.5 percent. This was the case in which Justice Stewart famously observed that “the sole consistency [in merger law] . . . is that . . . the government always wins.”<sup>22</sup> Merger enforcement has undergone a sweeping transformation. We now focus intensely on whether a transaction is likely to reduce competition significantly and harm consumers. Historical market shares can be important evidence in this inquiry, but we also recognize that most mergers are likely to be procompetitive or competitively neutral—and often are so even when they significantly disrupt pre-merger market structure (and sometimes precisely because they do so).

D. *Potentially Procompetitive Collaboration Is No Longer Condemned by Over-Zealous Application of Per Se Rules*

Joint ventures and other collaborations among competitors short of merger were once frowned upon and quite often treated as per se illegal. For example, in 1953, in *United States v. General Electric Corp.*,<sup>23</sup> the government broke up a patent pool as to electric light bulbs. At the Department's suggestion, the court imposed a compulsory license remedy not only

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<sup>18</sup> *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464 (1962).

<sup>19</sup> *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).

<sup>20</sup> *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007) (citing *Monsanto*, 465 U.S. 752).

<sup>21</sup> *See id.* at 1972-74.

<sup>22</sup> *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

<sup>23</sup> 115 F. Supp. 835 (D.N.J. 1953).

to patents that existed at the time of the government's antitrust suit, but also to patents that might be developed in the future—coming perilously close to destroying the firm's right to hold patents altogether.<sup>24</sup> Making matters worse, firms were often required to compete even against themselves, with courts inquiring whether firms' internal decision-making amounted to a so-called intra-enterprise conspiracy. Now, after cases like *BMI*, *Dagher*, *NCAA*,<sup>25</sup> and *Northwest Wholesale Stationers*,<sup>26</sup> bona fide joint ventures and many forms of competitor collaboration are viewed with tolerance and subjected to a rule of reason analysis that inquires whether they are on balance likely to enhance rather than destroy competition. And *Copperweld*<sup>27</sup> underscores that antitrust is interested in the substance of economic decision-making rather than the form.

And, of course, we have moved from a realm in which per se rules reflected in such cases as *Dr. Miles*,<sup>28</sup> *Albrecht*,<sup>29</sup> and *Schwinn*<sup>30</sup> foreclosed many procompetitive avenues to efficient distribution and marketing. Now, we have the more rational world of *GTE Sylvania*,<sup>31</sup> *State Oil v. Kahn*,<sup>32</sup> and *Leegin*, where vertical restraints of all sorts are analyzed under the rule of reason.

#### E. *Intellectual Property Is No Longer Viewed with Suspicion*

Once, at the interface between antitrust and IP, there was a distrust of intellectual property as a source of market power inherently in tension with the antitrust laws, and antitrust rules were sometimes used to restrict the ability of IP holders to decide how to license. The Nine No-Nos of the 1970s—an unwritten policy at the DOJ, reflected in a 1975 speech by this name—were one manifestation of this distrust. The Nine No-Nos presumed certain now-common IP-licensing practices to be illegal based on a belief they tended to increase prices for the licensor's IP, without considering the potential role the practices played in enhancing competition with other products or technologies, and without considering the impact on firms' long-term incentives to create new technology and creative works. Now, the antipathy to IP has faded. *Illinois Tool Works Inc. v. Independent Ink, Inc.*<sup>33</sup> confirmed that the mere fact that a tying product is patented does not sup-

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<sup>24</sup> See *id.* at 843-46.

<sup>25</sup> Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

<sup>26</sup> Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284 (1985).

<sup>27</sup> Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

<sup>28</sup> Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

<sup>29</sup> Albrecht v. Herald Co., 390 U.S. 145 (1968).

<sup>30</sup> United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

<sup>31</sup> Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

<sup>32</sup> State Oil Co. v. Khan, 522 U.S. 3 (1997).

<sup>33</sup> 547 U.S. 28 (2006).

port a presumption of market power, for purposes of antitrust tying analysis. The 1995 Antitrust Guidelines for the Licensing of Intellectual Property<sup>34</sup> and the April 2007 “IP2” Report<sup>35</sup> avoid rule-based approaches like the Nine No-Nos and prescribe a rule of reason analysis for most licensing restraints.

## II. RATIONALIZATION MEANS BETTER ANTITRUST, NOT LESS

To some, perhaps, this shift in antitrust over the past several decades could be viewed as a shrinkage in the reach of antitrust—a shift to less enforcement, and less-binding legal rules. But I submit that this is the wrong way of thinking about the evolution. All of these trends have been driven not by a desire for less antitrust, but a desire for *better* antitrust, for rules and standards more closely tailored to the proper goals of antitrust enforcement. Note in particular that this shift in antitrust policy proceeded hand in hand with the push to deregulate many sectors of the American economy, an initiative driven by a strong preference for harnessing competition and market forces as a mechanism for determining economic outcomes. In this vision, antitrust retained a critical role in keeping markets competitive.

Consider the contemporaneous views of Christopher DeMuth, Executive Director of President Reagan’s Office of Management and Budget Task Force on Regulatory Reform. Speaking at the Antitrust Section’s Spring Meeting in 1984, he said: “I think we have been almost entirely consistent in urging that: (1) in competitive markets, regulatory restraints on price, output and entry should be removed as promptly as circumstances permit; and (2) the antitrust laws should then be applied exactly as they are in unregulated markets.”<sup>36</sup> He also noted that “we will continue to urge that the antitrust laws have been applied too expansively from an economic point of view, sometimes with highly perverse results.”<sup>37</sup> Then-Judge Breyer, writing in 1987 about the implications of the ongoing deregulation of U.S. industry, identified the following “special risks the public faces in the newly deregulated world . . . which should alert us to four corresponding policy

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<sup>34</sup> U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995), available at <http://www.usdoj.gov/atr/public/guidelines/ipguide.pdf>.

<sup>35</sup> U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007), available at <http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf>. The shorthand title “IP2” is used to distinguish this from an earlier report issued by the FTC. FED. TRADE COMM’N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (2003), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>.

<sup>36</sup> Christopher C. DeMuth, *Deregulation Review*, 53 ANTITRUST L.J. 189, 190 (1984).

<sup>37</sup> *Id.* at 192.

needs.”<sup>38</sup> Three of these needs are: “(1) the need for a strong antitrust policy to maintain competitive market structures; (2) the need to avoid protecting competitors where doing so is inconsistent with promoting competition; [and] (3) the need to minimize the potential anticompetitive impact of residual monopoly power in newly deregulated industries.”<sup>39</sup>

Underscoring that modern antitrust means better antitrust and not necessarily less enforcement, some of the improvements in our ability to analyze the effect of practices on competition have arguably led to an increased role for enforcement. One example is our analysis of potential unilateral effects in merger cases, where the old market structure paradigm—which tended to focus on market share in formally defined markets—might have overlooked potential harm to significant groups of consumers. Our challenge last year to the Exelon/PSE&G transaction offers one possible illustration.<sup>40</sup>

### III. IMPLICATIONS AND CAUSE FOR CAUTION

There is no doubt that antitrust law and enforcement today is much better tailored to its legitimate aim of protecting competition, and much less likely to be misused as an instrument for impeding competition. Of course, there remains more to do in the Section 2 arena, where case law has not succeeded in developing standards that uniformly provide clear guidance to businesses, and we are working on that. And there is always room for incremental improvement across the board, including in the efficiency of merger enforcement. Similarly, there are issues raised by the regime of multi-layered/multi-jurisdictional enforcement of the antitrust laws with treble-or-more multiplied recovery. But I want to spend the rest of my time not on the room for further rationalization—about which you’ve heard plenty from the Antitrust Division in recent years—but to offer some words of caution about how antitrust is viewed in some quarters, including some courts, and the need to renew efforts to guard against impulses that threaten to take the antitrust enterprise away from the path of rationalization and send it down a course towards marginalization.

There are signs that, despite the progress in rationalizing antitrust, some view antitrust itself (and not just its excesses) in a negative light. Some perceive it as another form of regulation that inherently stands in the

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<sup>38</sup> Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CAL. L. REV. 1005, 1044 (1987).

<sup>39</sup> *Id.* at 1044-45.

<sup>40</sup> The unilateral effects analysis that underlay the Division’s challenge is described in some detail in the Division’s Competitive Impact Statement, available at <http://www.usdoj.gov/atr/cases/f217700/217717.htm>. See also Elizabeth Armington et al., *The Year in Review: Economics at the Antitrust Division, 2005-2006*, 29 REV. INDUS. ORG. 305 (2006).



way of market outcomes—as part of the regulatory problem rather than as part of the solution. Others acknowledge the desirability of the goals of antitrust but—perhaps laboring under a dated view of the law’s intrusiveness—are unduly skeptical about the good antitrust can do in protecting competition. This skepticism about the role of antitrust threatens to shrink antitrust too far, potentially undermining its still-vital role in protecting the competitive process.

There have long been a variety of academic commentators who hold views along these lines. For example, the Competitive Enterprise Institute has said:

For more than two decades, the willingness of policy makers to rethink the presumption that economic regulation automatically benefits consumers has driven the deregulation of the transportation, telecommunications, banking, and electricity sectors. Yet antitrust regulation enjoys continued esteem in both the business and popular press. High-profile antitrust enforcement actions increasingly constitute a business hazard for aggressive, successful firms, threatening to disrupt innovation and economic growth.<sup>41</sup>

Chicago Professor Richard Epstein has said: “[t]he two competing forms of regulation are direct administrative scrutiny and competition (or antitrust) law”; “[c]ompetition law for its part offers imaginative lawyers a hunting license to attack the innocent practices of dominant firms.”<sup>42</sup> Thomas DiLorenzo has said: “[t]he truth is that monopoly is impossible in a free market; government is the true source of monopoly; and antitrust itself has never done anything but render American industry less competitive while inflicting great harm on consumers.”<sup>43</sup>

These ideas also have cropped up in the popular business press from time to time. Some of the editorial commentary about the FTC’s unsuccessful challenge to the Whole Foods/Wild Oats transaction has this flavor, often without regard to the factual or theoretical underpinnings of the FTC’s case, as if antitrust has no proper role to play in protecting competitive markets from transactions that threaten competition, and as if antitrust had not evolved since the days of *Von’s Grocery*. I hasten to add that the DOJ has been the target at least as often in recent years. In fact, some have criticized even DOJ’s criminal enforcement of the antitrust laws against hard-core cartel behavior:

Nobody came out looking a hero in the [DOJ’s successful] trial . . . in New York for . . . the price-fixing scandal at the famous Christie’s and Sotheby’s auction houses. The media lapped it up, but it’s a sad thing when a government sponsors the degradation of reputable

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<sup>41</sup> Competitive Enter. Inst., Antitrust & Competition Policy, <http://cei.org/gencon/030,05269.cfm> (last visited Oct. 23, 2007).

<sup>42</sup> Richard Epstein, Double Trouble for American Telecoms (June 18, 2007), <http://www.law.uchicago.edu/news/epstein-telecomm/index.html>.

<sup>43</sup> Thomas J. DiLorenzo, Anti-Trust, Anti-Truth (June 1, 2000), <http://www.mises.org/story/436>.

people by threatening them with jail for something that nobody should go to jail for . . . . The right to throw your fist is supposed to stop at somebody else's nose. In all the annals of antitrust, however, no one has shown where a nose enters the picture. Firms that engage in conversations with competitors are doing no more than exercising their freedom of speech, property rights and freedom of contract. Their customers . . . have no rights that are violated when competitors get together to agree on terms for offering their services to the public.<sup>44</sup>

This sort of debate about antitrust is healthy, and perhaps expected in a free society. More troubling are indications in the case law that might reflect a similar skepticism about whether antitrust plays a productive role in preserving competition. I see these signs in three areas: the interface between antitrust and regulation; the interface between antitrust and intellectual property; and merger enforcement.

#### A. *Interface with Regulation*

In two recent Supreme Court cases addressing the application of antitrust in partially-regulated fields, there are indications that the Court doubts whether antitrust can be applied in a principled and precise manner that avoids doing more harm than good. I start with *Trinko*, a case that I hasten to add was rightly decided (the United States having urged the result). Justice Scalia's dicta about the "slight benefits of antitrust intervention" and the need to "weigh a realistic assessment of its costs"<sup>45</sup> arguably suggest a view of antitrust as an inherently costly double-layer of regulation and a drag on free markets rather than an effective way of preserving them. His opinion states:

One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny.

Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs. . . . The cost of false positives counsels against an undue expansion of § 2 liability.<sup>46</sup>

This perspective was reinforced last Term in Justice Breyer's majority opinion in *Credit Suisse*,<sup>47</sup> where it is potentially more troubling given that, unlike in *Trinko*, antitrust was being invoked to address an alleged horizon-

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<sup>44</sup> Holman W. Jenkins Jr., Editorial, *Playing The Stooge: Silly Trial, Silly Law*, WALL ST. J., Dec. 14, 2001, at A13.

<sup>45</sup> *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004).

<sup>46</sup> *Id.* at 412-14.

<sup>47</sup> *Credit Suisse Securities (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007).

tal conspiracy—the “supreme evil of antitrust”<sup>48</sup>—rather than to regulate interactions between a dominant firm and its rivals. The *Credit Suisse* complaint alleged laddering and other conduct, similar to traditional price fixing, which would violate both the antitrust and securities laws. The Court stated the issue as follows: “Is there a conflict that rises to the level of incompatibility? Is an antitrust suit such as this likely to prove practically incompatible with the SEC’s administration of the Nation’s securities laws?”<sup>49</sup> The case should be viewed as driven by the unique setting of the SEC’s extensive regulation of the IPO process, but even so it is plain the Court had doubts about antitrust courts and the possibility that, especially in treble damages actions brought by private plaintiffs,<sup>50</sup> they might act in blunderbuss, imprecise fashion, causing more harm than good:

It will often be difficult for someone who is not familiar with accepted syndicate practices to determine with confidence whether an underwriter has insisted that an investor buy more shares in the immediate aftermarket (forbidden), or has simply allocated more shares to an investor willing to purchase additional shares of that issue in the long run (permitted). And who but a securities expert could say whether the present SEC rules set forth a virtually permanent line, unlikely to change in ways that would permit the sorts of “laddering-like” conduct that it now seems to forbid?<sup>51</sup>

Consider Justice Breyer’s skepticism towards the role of antitrust courts in this passage:

[T]here is no practical way to confine antitrust suits so that they challenge only activity of the kind the investors seek to target, activity that is presently unlawful and will likely remain unlawful under the securities law. Rather, these factors suggest that antitrust courts are likely to make unusually serious mistakes in this respect. And the threat of antitrust mistakes, *i.e.*, results that stray outside the narrow bounds that plaintiffs seek to set, means that underwriters must act in ways that will avoid not simply conduct that the securities law forbids (and will likely continue to forbid), but also a wide range of joint conduct that the securities law per-

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<sup>48</sup> *Trinko*, 540 U.S. at 408.

<sup>49</sup> *Credit Suisse*, 127 S. Ct. at 2393.

<sup>50</sup> Concern about the costs of misguided antitrust private treble damages actions can also be observed in *Bell Atl. Corp. v. Twombly*:

It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive. That potential expense is obvious here, where plaintiffs represent a putative class of at least 90 percent of subscribers to local telephone or high-speed Internet service in an action against America’s largest telecommunications firms for unspecified instances of antitrust violations that allegedly occurred over a 7-year period. It is no answer to say that a claim just shy of plausible entitlement can be weeded out early in the discovery process, given the common lament that the success of judicial supervision in checking discovery abuse has been modest.

127 S. Ct. 1955, 1959 (2007).

<sup>51</sup> *Credit Suisse*, 127 S. Ct. at 2394.

mits or encourages (but which they fear could lead to an antitrust lawsuit and the risk of treble damages).<sup>52</sup>

What is remarkable here is not the observation that courts may get antitrust cases wrong; this is certainly true, and probably inevitable. What is remarkable is the implied confidence that, in the face of some risk of antitrust courts creating false positives, antitrust should yield entirely without regard to the potential that SEC regulation might lead to false negatives from the perspective of competition, and without more of an attempt to hone the antitrust tools to minimize the potential for interference with SEC prerogatives.

### B. *Interface with IP*

In cases involving intellectual property, and particularly patents, there are signs that the much-needed rationalization of the IP/antitrust interface has sometimes swept antitrust too far outside of the picture, failing to acknowledge the legitimate role for antitrust in addressing anticompetitive behavior involving IP rights.

The patent settlement cases provide one illustration. As the Department said to the Supreme Court in both *Schering*<sup>53</sup> and *Tamoxifen*,<sup>54</sup> the lower courts there went too far in giving holders of patents of uncertain validity *carte blanche* to enter agreements restraining competition under the guise of a patent settlement. The *DDAVP* case, in which the DOJ recently filed an amicus brief, provides another illustration. *DDAVP* involved a claim that the defendant improperly listed its fraudulently obtained patent in the Orange Book, foreclosing generic entry. The district court denied standing to plaintiffs because they were consumers rather than competitors, and had not been sued by the defendant for patent infringement. The United States filed an amicus brief in the Second Circuit, arguing that the district court erred in applying antitrust standing doctrine, seemingly out of a concern that antitrust not provide avenues for challenging patents separate from the patent law regime. We believe that the district court overlooked the “important public interest in permitting full and free competition in the use of ideas which are in reality a part of the public domain,” as in the situation

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<sup>52</sup> *Id.* at 2395-96.

<sup>53</sup> Brief for the United States as Amicus Curiae, *FTC v. Schering-Plough Corp.*, 126 S. Ct. 2929 (2006) (No. 05-275), *denying cert. to* 402 F.3d 1056 (11th Cir. 2005), *available at* <http://www.usdoj.gov/osg/briefs/2005/2pet/6invit/2005-0273.pet.ami.inv.pdf>.

<sup>54</sup> Brief for the United States as Amicus Curiae, *Joblove v. Barr Labs., Inc.*, 127 S. Ct. 3001 (2007) (No. 06-830), *denying cert. to* 466 F.3d 187 (2006), *available at* <http://www.usdoj.gov/osg/briefs/2006/2pet/6invit/2006-0830.pet.ami.inv.pdf>.

where a patent was procured by fraud.<sup>55</sup> As of this writing, the case is fully briefed and waiting for the court to schedule oral argument.

### C. *Merger Enforcement*

Finally, there is merger enforcement. The skepticism toward antitrust as an enterprise is somewhat less overt in this arena; however, the antitrust enforcement agencies have lost five significant merger cases in recent years: *Arch Coal*, *Oracle*, *Equitable*,<sup>56</sup> *Western Refining*, and *Whole Foods*. In two of these cases, *Oracle* and *Arch Coal*, the courts' carefully-written opinions—neither of which were taken up on appeal—are susceptible to the interpretation that courts may be inclined to hold the government's claims to a higher standard of proof than in the past. To some extent this is appropriate, since part of the rationalization of antitrust that we have pursued is a recognition that the mere fact that a merger will increase concentration is not dispositive, and in fact is no more than one starting point of a proper merger analysis.<sup>57</sup> But I submit there are signs that point to an inappropriate degree of skepticism about the role of antitrust in blocking (or remedying) potentially anticompetitive mergers.

Consider the *Oracle* case for a moment. I should emphasize that, although we disagree with the ruling in that case—and Assistant Attorney General Thomas Barnett has said that he would bring the same case again—we respect the decision that the court reached. I observe, however, that one can read in the decision a skepticism toward the role of antitrust. One can find that skepticism in the court's insistence on sharp demarcations between products that are in the market and those that are outside, in the court's rejection of testimony by sophisticated customers about the options available to them (dismissing such testimony as stating only "preferences"), and in the court's apparent insistence on "thorough econometric analysis such as diversion ratios showing recapture effects."<sup>58</sup> And throughout, the court seemed to express skepticism regarding the government's ability to understand a "complex" market such as enterprise software. In effect, the court at least in part rejected credible *direct* evidence on the ultimate question—what is the effect on price of the competition between Oracle and PeopleSoft that the merger would extinguish?

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<sup>55</sup> Brief for the United States and Federal Trade Commission as Amici Curiae Supporting Plaintiffs-Appellants at 15, *In re DDAVP Direct Purchaser Antitrust Litig.*, No. 06-5525-cv (2d Cir. May 25, 2007) (quoting *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969)), available at <http://www.usdoj.gov/atr/cases/f223700/223731.pdf> (internal quotation marks omitted).

<sup>56</sup> *FTC v. Equitable Res., Inc.*, No. 07cv0490, 2007 WL 1437447 (W.D. Pa. May 14, 2007).

<sup>57</sup> See Charles F. Rule & David L. Meyer, *Toward a Merger Policy That Maximizes Consumer Welfare: Enforcement by Careful Analysis, Not by the Numbers*, 35 ANTITRUST BULL. 251, 265 (1990).

<sup>58</sup> *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1172 (N.D. Cal. 2004).

Now, I do not suggest that customers should be given a vote on whether their suppliers' mergers can proceed, or should be given free rein merely to speculate about a transaction's effects, but it strikes me that when sophisticated customers testify on issues they are in the best position of all witnesses to know—such as their own preferences, which writ large make up the firms' demand curve—their testimony is entitled to greater weight than it seems to have received in this case.<sup>59</sup>

Similarly, in *Arch Coal*, the court gave little credence to customer testimony opposing the transaction and described as “novel” the FTC's theory that producers post-merger could tacitly coordinate a decline in production, leading to direct consumer harm and leading indirectly to a higher price.<sup>60</sup>

To be sure, the government's position in merger cases need not always prevail, and courts are entitled to view the evidence differently from the plaintiff agency. Testing the government's case is indeed the role of federal courts in merger cases. But there was nothing novel about the government's theory in either of these cases, and it is hard to dispute that there was at least substantial evidence supporting the government's concern in both cases that the transaction at issue would harm competition and consumers.

## CONCLUSION

If I am right in perceiving signs of an apparent antagonism towards antitrust—as distinct from a desire to rationalize it to make it more effective—this should be troubling to anyone who believes in the importance of competitive markets and antitrust's role in protecting the competitive process. In application, such skepticism threatens to hinder sound antitrust enforcement. Consider the potential implications if *Credit Suisse* were applied broadly in any number of partially regulated industries where antitrust and the regulatory regime have traditionally played complementary roles. Consider the implications for merger enforcement if courts, skeptical at the intrusion of antitrust law, insist on a degree of certainty about likely competitive harm that the agencies' already-extensive investigations are unable to satisfy.

An aversion to antitrust would have several ironic implications:

First, as antitrust becomes more sophisticated and more closely linked to its consumer welfare goals, there ought to be less, not more, need to shy away from its application when the more sophisticated analysis indicates harm to competition. Rationalized antitrust should be less likely to generate false positives and should be less of a drag on healthy procompetitive behavior or proposed transactions.

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<sup>59</sup> See generally Ken Heyer, *Predicting the Competitive Effects of Mergers by Listening to Customers*, 74 ANTITRUST L.J. 87 (2007).

<sup>60</sup> See *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 131-32 (D.D.C. 2004).

Second, as rationalized antitrust gives firms a freer hand to pursue unilateral conduct—and to collaborate with their rivals in procompetitive ways—it is arguably more rather than less important for antitrust to be applied to keep collaborations from going too far, and to preserve competitive market structure where entry barriers exist and mergers threaten lasting harm.

Third, if antagonism towards antitrust does end up leading to a shrinkage of antitrust beyond that entailed in honing antitrust to its pro-competition goals, we may face a legislative backlash that prompts a counterproductive return to invigorated antitrust-for-antitrust's sake—possibly reversing some of the progress that has been made toward rational antitrust enforcement.

And fourth, I harken back to the words of the Reagan-era deregulators: sound antitrust, and the principles of competition that undergird it, are the best defense to future efforts to re-regulate markets. It would be ironic indeed if in the name of freeing business from the constraints of antitrust, one created a system in which businesses would face more probing scrutiny and far-reaching constraints via sector regulation.

If I am right to have these concerns, is there anything we should be doing? Yes. First and foremost, we need to continue to push for rational development and application of antitrust laws, not just here but around the world. The best antidote to antagonism likely is continued improvement in antitrust and education about how antitrust can be executed well. Of course, we need to continue to keep our enforcement efforts focused where they are likely to advance the law's underlying welfare goals, and not where the costs exceed the benefits.

But more broadly, all of us who believe in antitrust need to be vigilant about the rhetoric we use to support the rationalization of antitrust: we should be more careful to distinguish between *less* antitrust and *better* antitrust. All of us need to reinvigorate our competitive advocacy efforts to remind regulators, courts, the bar, and the public why competition is a good thing, and why sound antitrust enforcement plays an important role in preserving competition. And we all should remember that a system of sound and robust antitrust enforcement, while it might never be perfect, is far preferable to the likely alternatives.

Thank you for the opportunity to speak today.