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ECONOMICS, POLITICS AND COMPETITION POLICY IN TRANSITION: PERSPECTIVES FROM EXPERIENCE IN THE UNITED STATES

by

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Introduction

National competition laws invariably arise from a collection of economic, political, and social forces. No single impulse -- such as attaining superior economic efficiency, creating an egalitarian economic order, or dispersing political power -- accounts for the establishment of a competition policy system. To some extent, all of these concerns have motivated the adoption and enforcement of controls on anticompetitive conduct since Canada and the United States passed the first antitrust laws in the late 19th Century.

The multiplicity of formative influences raises a basic question about competition policy in older market economies and emerging markets alike: What are the proper aims of competition policy? Where the lawmakers seek to attain varied goals, the competition policy agency must decide how to effectuate each goal. Fulfilling the expectations of lawmakers and the public is difficult where attaining some objectives prevents the achievement of other aims.

This paper uses experience with antitrust legislation in the United States to discuss the capacity of competition laws to promote the attainment of varied economic, political, and social aims.[1] Part I reviews the origins of the U.S. antitrust system, including the adoption of the Sherman, Clayton, and Federal Trade Commission Acts. Part II considers the major institutional and policy implications of the choices made by U.S. lawmakers at the turn of 20th Century. The paper concludes by suggesting possible lessons of the U.S. experience for emerging markets as they adopt and implement competition policy systems.

I. The Origins of the U.S. Antitrust System

In the eyes of the common law in the 19th Century in the United States, the market place protected the public as long as the legal right to trade -- primarily, freedom to enter and compete -- was guaranteed. This safeguard's inadequacy first became apparent as railroads were believed to have abused their privileged position. Capital requirements of railroad construction precluded competitive service to sparsely settled territories. Nor was the right to build railroads freely available (even with eminent domain authority) in densely populated areas. Without competition, railroad rates and service seemed beset by discrimination among shippers and localities, traffic and earning pools, and secret rebates to powerful shippers or buyers. Railroads also

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[1] Parts of this paper are adapted from Ernest Gellhorn & William E. Kovacic, **Antitrust Law and Economics in a Nutshell** (4th Edition 1994) and William E. Kovacic & Carl Shapiro, **Antitrust Policy: A Century of Economic and Legal Thinking**, 14 **Journal of Economic Perspectives** 43 (Winter 2000). The views expressed in this paper are those of the author and do not necessarily reflect the views of the Federal Trade Commission or any individual member of the Federal Trade Commission.

appeared to boost rates where they had monopolies and to use the resulting profits unfairly to cut prices on competitive routes.[2]

Several state governments responded by forming regulatory agencies to oversee rates and service. When business interests challenged the constitutionality of such measures, the Supreme Court ruled that railroads were businesses "affected with a public interest" subject to state regulation.[3] But state jurisdiction was limited and constitutionally ineffective for interstate commerce. As a result, Congress created the Interstate Commerce Commission (ICC) in 1887 and charged the ICC with assuring just and reasonable rates and barring undue discrimination.

If the railroads' trade abuses first illuminated the common law's inadequacy, its limits were exposed more forcefully by the tactics of the Standard Oil Company and other "trusts" controlling many major industries -- including fuel oil, sugar, cotton and linseed oil, lead, and whiskey.[4] Lawsuits attacked the trusts from several angles. The primary challenge was that the participating companies had acted beyond their charters by forming trust arrangements.[5] A second argument was that trust practices constituted unreasonable trade restraints and created unlawful monopolies. Such attacks took time, were costly, and did not always prevail.

The trusts' opponents assailed them on several policy grounds. Foremost was the concern that fewer and fewer enterprises were dominating more and more business each year. The transportation and communications revolution after the Civil War linked once insular geographic areas into unified markets, enabling low-cost producers to capture sales in regions previously served by local firms alone. Investors and financial institutions obtained better information about investment opportunities, causing capital to flow more rapidly to new and growing firms.[6]

To many Americans, the resulting industrial upheaval endangered democratic institutions and threatened social and political corporate hegemony. Legal scholar Frederic Jesup Stimson warned that "American ingenuity has invented a legal machine which may swallow a hundred corporations or a hundred thousand individuals; and then, with all the corporate irresponsibility, their united power be stored, like a dynamo, in portable compass, and wielded by one or two men. Not even amenable to the restraints of corporation law, these 'trusts' may realize the Satanic ambition -- infinite and irresponsible power free of check or conscience."[7]

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[2] See Herbert Hovenkamp, Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem, 97 **Yale Law Journal** 1017 (1988).

[3] Munn v. Illinois, 94 U.S. 113 (1876).

[4] See Morton J. Horwitz, **The Transformation of American Law 1870-1960**, at 80-85 (1992).

[5] See People ex rel Peabody v. Chicago Gas Trust Co., 130 Ill. 268 (1889).

[6] See Robert H. Wiebe, **The Search for Order 1877-1920**, at 11-75 (1967).

[7] Frederic J. Stimson, Trusts, 1 **Harvard Law Review** 132, 132 (1887).

A second basis for challenging the trusts dealt with their methods for subduing rivals. Predatory tactics such as below-cost pricing and business espionage often seemed to spur consolidation. The public thought the trusts gained power with coercive threats of "sell or be ruined," and their record showed that they had the means and the will to execute the threats.[8] Such tactics outraged small firms and the agrarian West, spurring the formation of the Populist Party.[9]

A third and related objection involved the trusts' use of sharp practices to achieve improper ends beyond destroying competitors. The trusts were seen to defraud investors with watered stocks; to discard workers as worn out tools by indiscriminate and harsh plant closings; to endanger liberty by bribing public officials; to threaten civil peace and property by arson; and to disturb fair competition with bogus companies and harassing lawsuits. Frequent depressions or severe business cycles and scandalous financial transactions, invariably involving trusts or railroads, further shocked the public and sapped its confidence in unregulated markets. The atmosphere is hard to recapture. The public was naive, and the trusts were ruthless.[10]

The trusts had few defenders. The public clamored for action to destroy the trusts' power. By 1888 both major political parties had received the message, and their platforms contained strongly worded antimonopoly planks.[11] Though the public's mandate was clear, it was not specific. Little thought had focused on how to constrain the trusts without destroying business and jobs at the same time.

Professional economists and academics expert in corporate law generally thought prohibiting the massive enterprises to be futile, needless, or counterproductive, mainly because the trusts were "natural" and desirable results of competition. Why else, many wondered, would they have occurred and flourished in the first place? This benign view of industrial concentration emerges in the correspondence of Justice Oliver Wendell Holmes, Jr. with Lord Pollock in the early 1900s. Holmes complained that "the Sherman Act is a humbug based on economic ignorance and

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[8] To gain its fuel oil monopoly, Standard Oil first drove the price of kerosene to a penny or two per gallon in isolated markets, well below cost. After forcing all competitors to sell or close down, Standard raised the price far above the previous market level and charged monopoly prices. Distant observers have interpreted these events differently. Compare John S. McGee, Predatory Price Cutting: The Standard Oil (N.J.) Case, 1 **Journal of Law & Economics** 137 (1958) (finding little evidence in Standard Oil trial record that Standard attained monopoly power through predatory pricing) with F.M Scherer & David Ross, **Industrial Market Structure and Economic Performance** 388-91 (3d ed. 1990) (finding that McGee underestimated the usefulness of predatory pricing to enable Standard to reduce the cost of buying out rivals).

[9] See Samuel P. Hays, **The Response to Industrialism 1885-1914**, at 27-32 (1957).

[10] See Robert Higgs, **Crisis and Leviathan** 77-82 (1987).

[11] See Hans J. Thorelli, **The Federal Antitrust Policy** 149-51, 157-59 (1955).

incompetence." Holmes disdained trust critics who slighted "the originality, the courage, the insight shown by the great masters of combinations" and who insisted that such entrepreneurs "can be summed up as tricksters." Holmes deemed the organizational skill of the trusts' managers to be at least as important as "the more obvious contributions of professional inventors and the like."[12] For this and other reasons, most economists shared the view of Richard T. Ely, who declared "[i]f there is any serious student of our economic life who believes that anything substantial has been gained by all the laws passed against trusts ... this authority has yet to be heard from."[13]

Proponents of antimonopoly measures favored a different tack and took direction from the common law. Generally they recommended statutes to prohibit monopolies and other combinations to which the common law only denied enforcement. This view drew support from a small set of academics who favored banning conduct, such as local price discrimination, that was believed to create and sustain monopoly power.[14] Their work meshed with the view of many lawyers, judges, and legislators that most monopolies were not "natural" evolutionary phenomena, but instead were "unnatural" intrusions upon the economy and could stand only with "artificial" buttresses such as publicly imposed tariffs or private contrivances such as cartel agreements.[15]

A. Adoption of the Sherman Act in 1890

As the Twentieth Century approached, Congress found a common ground between these conflicting visions of the trusts. It built a statute along common law principles, barring excesses such as combinations in restraint of trade and monopolizing activity. At the same time, it sought to permit fair competition and healthy combinations. Like many legislative watersheds, the debates and events surrounding the passage of the Sherman Act contain something for everyone. To generations of commentators, the Sherman Act's legislative record has supplied a wishing well into which one can peer to glimpse evidence that supports preferred policies. Despite substantial ambiguity and contentious modern debate about the origins of the American antitrust laws, some features of the formative era assist in understanding the Sherman Act and subsequent case developments.

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[12] 1 **Holmes-Pollack Letters** 141, 163 (Mark D. Howe ed. 1941). See also Alfred D. Chandler, Jr., **The Visible Hand** (1977) (trusts' emergence explained as result of search for an optimal corporate structure for attaining scale economies and lower unit costs).

[13] Richard T. Ely, **Monopolies and Trusts** 243 (1900).

[14] See F.M. Scherer, Efficiency, Fairness, and the Early Contributions of Economists to the Antitrust Debate, 29 **Washburn Law Journal** 243 (1989).

[15] See James May, Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918, 135 **University of Pennsylvania Law Review** 495, 563-71 (1987).

Senator Sherman assured his colleagues that the statute "does not announce a new principle of law, but applies old and well recognized principles of the common law."[16] Yet many of the common law's dimensions were hazy, and the 51st Congress may not have grasped the diversity and instability of existing common law solutions to restraint of trade issues in 1890. To define and apply critical concepts such as "restraint of trade" and "monopolize" in specific cases, courts would be required to consider the goals that Congress intended to achieve.

The legislative record contains many declarations favoring free enterprise and unrestricted competition. From such statements, Robert Bork has concluded that "[t]he legislative history of the Sherman Act ... displays the clear and exclusive policy intention of promoting consumer welfare" which he defines as improving allocative efficiency.[17] Other scholars dispute Bork's efficiency thesis and discern other congressional aims of equal or greater significance. These include preserving opportunities for firms and individuals to compete,[18] preventing unfair redistributions of wealth from consumers to producers,[19] and sustaining the vitality of democratic institutions.[20] Still other scholars reject Bork's view that "public interest" goals spawned the Sherman Act; instead, they argue that the Act is best understood as the product of private interest rent-seeking -- mainly, efforts by small merchants and farmers to shift wealth from large manufacturers to themselves.[21]

Modern research about the Sherman Act's aims often assumes that the 51st Congress espoused many potentially conflicting goals without indicating how courts should make tradeoffs among competing goals. As James May has shown, to assume that Congress consciously embraced inconsistent aims misconceives the intellectual framework that molded the Sherman Act. May finds that Congress in 1890 saw no need for "tradeoffs," for it thought its aims to be consistent and mutually

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[16] 21 Congressional Record 2456 (1890).

[17] Robert H. Bork, **The Antitrust Paradox** 61 (1978).

[18] See Eleanor M. Fox, The Modernization of Antitrust: A New Equilibrium, 66 **Cornell Law Review** 1140 (1981);

[19] See Robert H. Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 **Hastings Law Journal** 65 (1982)

[20] See David Millon, The Sherman Act and the Balance of Power, 61 **Southern California Law Review** 1219 (1988)

[21] See Thomas J. DiLorenzo, The Origins of Antitrust: An Interest Group Perspective, 5 **International Review of Law & Economics** 73 (1985); Thomas W. Hazlett, The Legislative History of the Sherman Act Re-examined, 30 **Economic Inquiry** 263 (1992).

reinforcing.[22] Congress believed it could attain its varied objectives without collisions among them.

Notwithstanding disputes about the Sherman Act's intended aims, Congress made a clear, momentous choice about implementing its competition policy commands. The Act did not specify prohibited conduct in detail. Rather, Congress gave federal courts a new jurisdiction to create a common law of federal antitrust within the general aim of -- but apparently not confined by -- the prior common law.

The major substantive provisions of the U.S. antitrust laws are few and brief. The Sherman Antitrust Act of 1890[23] is no exception. Its two main sections are:

> § 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal [and is a felony punishable by fine and/or imprisonment].
>
> § 2: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony [and is similarly punishable].

Section 1 addresses improperly restrictive agreements while Section 2 examines the creation or misuse of monopoly power through wrongfully exclusionary means. Both sections seek the same end -- to curtail practices yielding market control -- but Section 2's reach is generally limited by a threshold finding of monopoly power. Section 2 does not forbid "monopoly" per se, but instead bars "monopolization" and attempts to monopolize. Thus, Section 2 cases focus not on the fact of monopoly alone, but rather on how a monopoly has been gained or sustained. The crucial interpretative challenge posed by the Sherman Act is to define the specific forms of collective and unilateral conduct that pose unacceptable competitive dangers.

Finally, the statute proscribes rather than prescribes conduct. It does not authorize positive administrative regulation of business conduct. Yet the Sherman Act moved well past the common law's mere refusal to enforce offensive contracts. Its most important addition to the existing legal regime was to authorize public bodies and private parties to enforce the statute. To this end, the Act supplies powerful remedies: trade restraints and monopolization are punishable as crimes; equity's broad powers are available to enjoin specific behavior and otherwise service antitrust policy; and treble damages and attorneys fees are available for aggrieved claimants. The legal risks of illegal restraints and monopolistic acts are significant, especially when contrasted with the common law where there was only a remote chance that

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[22] James May, Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 50 **Ohio State Law Journal** 258, 391-94 (1989).

[23] 15 U.S.C. §§ 1-7 (1997).

questioned acts would be challenged as unenforceable. Despite this stringency, the statute defines the boundary between permissible and illegal conduct vaguely.

In sum, the Sherman Act's primary effect when compared to the common law was to enable government agencies and private parties to enforce prohibitions against trade restraints and monopolization. Final responsibility for defining the Sherman Act's broad commands lay with the courts, which were not limited to common law decisions in performing that task.

B. Early Enforcement and Interpretation of the Sherman Act

Early judicial reaction to the Sherman Act was extreme. The Supreme Court first curbed the Act's coverage by an unrealistically narrow reading and then applied the Act so rigidly as to render it unworkable unless broad exceptions were allowed. Finally the Court adopted a flexible "rule of reason," reading the statute as condemning only unreasonable conduct. But a clear standard was not provided. Even this reading was widely criticized as being too hospitable to anticompetitive conduct on the one hand, or allowing excessive judicial discretion to rule the economy on the other.

Not until 1895 did the Supreme Court first interpret the Sherman Act. The decision foreshadowed future difficulties. In United States v. E.C. Knight Co.,[24] the Court refused to apply the statute to the sugar trust, which controlled over 98% of the country's sugar refining capacity. The Court held that the law ignored restraints affecting merely the manufacture of commodities, noting that "[c]ommerce succeeds to manufacture, and is not a part of it." Because the trust's refining capacity was concentrated in Pennsylvania, the government had not proven a "direct" restraint on interstate commerce within the Sherman Act's jurisdiction. If followed, *E.C. Knight* would have interred the Act, at least for manufacturing monopolies.[25] President Grover Cleveland's Justice Department welcomed the outcome in the failed sugar trust prosecution. Soon after *E.C. Knight* was decided, Attorney General Richard Olney wrote to a friend: "You will have observed that the government has been defeated in the Supreme Court on the trust question. I always supposed it would be and have taken the responsibility of not prosecuting under a law I believe to be no good ...."[26]

Another way to destroy legislation is to stifle its capacity to adjust to practical necessities. Whether this was the original judicial design, the Supreme Court's early reading of Section 1 threatened to have this effect. In a series of closely divided

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[24] 156 U.S. 1 (1895).

[25] The Supreme Court overruled *E.C. Knight* in Mandeville Is. Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948). Sherman Act claimants still must show that challenged conduct is in or affects interstate commerce, but subsequent decisions have severely attenuated this requirement.

[26] Alan Nevins, **Grover Cleveland: A Study in Courage** 671 (1932).

opinions, beginning with United States v. Trans-Missouri Freight Ass'n,[27] the Court forbade price-fixing agreements and territorial divisions because Section 1 condemned "every" trade restraint, without exception. Later cases quickly softened this absolute position in dicta by limiting condemnation to "direct" and "immediate" restraints with no aim to promote the legitimate business of either participant[28] and by concluding that some restraints lawful at common law fell outside the category of restraints banned by the Sherman Act.[29]

This doctrinal dispute had little effect on popular support for antitrust enforcement. Antimonopoly agitation ebbed after 1890, and for a time the public accepted quixotic judicial approaches and executive indifference. All this changed when Theodore Roosevelt became President and even more so during the term of his successor, William Howard Taft. Amid great public excitement generated by Roosevelt, the Supreme Court in Northern Securities Co. v. United States[30] ruled that holding companies were not exempt from the Sherman Act and that an arrangement placing two competing railroads under one entity (a profit-pooling agreement) illegally restrained trade.

Fueled by the successful challenge to the trust building efforts of financiers James J. Hill and J.P. Morgan, the public reacted sharply to the Court's opinion in Standard Oil Co. v. United States.[31] The Court dissolved the oil trust into 33 companies, but it also ruled that the Sherman Act outlawed only restraints whose character or effect were unreasonably anticompetitive. Some critics worried that conservative federal judges would quickly render the Act insignificant again. Others feared a return to lackluster enforcement by the Justice Department. Business leaders contended that if the Sherman Act now prohibited only unreasonable restraints, businessmen should be advised in advance about which restraints were lawful and which were not. During the 1912 Presidential campaign, public debate again focused on the role of government in the economy -- including antitrust legislation. After the victory of Woodrow Wilson's "New Freedom," Congress created the Federal Trade Commission and enacted the Clayton Act. With the Sherman Act, these enactments set in place the essential framework of the federal antitrust laws.

C. The Clayton and Federal Trade Commission Acts

Woodrow Wilson won the 1912 presidential election, but most of his opposition's arguments became law. Wilson believed that effective antitrust enforcement required specification of unlawful business practices. The "rule of reason" denied businessmen guidance, and gave courts excessive discretion to emasculate the law through interpretation. Wilson proposed supplementing the

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[27] 166 U.S. 290 (1897).

[28] Hopkins v. United States, 171 U.S. 578 (1898).

[29] United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898).

[30] 193 U.S. 197 (1904).

[31] 221 U.S. 1 (1911).

Sherman Act with legislation enumerating illegal acts precisely (in what became the Clayton Act) and providing criminal sanctions to ensure compliance.[32]

Wilson also urged the creation of an administrative agency, an interstate trade commission, to promote fair competition by investigating and publicizing (but not otherwise prosecuting) trade abuses as well as by advising business about the legality of specific practices. Wilson assailed his chief adversary (Theodore Roosevelt) for proposing a federal commission with power to investigate any business activity and to set maximum prices for goods produced by monopolists. "If the government is to tell big business men how to run their business," Wilson warned, "then don't you see that big business men have to get closer to the government even than they are now? Don't you see that they must capture the government, in order not to be restrained too much by it?"[33]

As his proposals traveled through Congress, Wilson became persuaded by Louis Brandeis (his closest adviser on antitrust and later to become a Supreme Court justice) that his preferred mix of specific prohibitions and criminal penalties was ill-conceived. Detailing prohibited practices might be somewhat effective, but only if criminal penalties were not assessed. Otherwise courts probably would construe the new law narrowly; and, in any case, Congress was unwilling to endorse criminal penalties unless the trade abuse was universally condemned (and therefore already reachable by the Sherman Act). Another pitfall of clarity was that it might in practice invite ingenious (and successful) efforts at evasion by business. In this vein, the Conference Committee Report on the Clayton Act and the FTC Act warned that "[i]t is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field ...."[34] A growing consensus, therefore, favored a general condemnation of undesirable trade practices, especially for its capacity to respond flexibly to changing conditions and business techniques. Owing to growing concern over judicial hostility to antitrust enforcement, it was decided that an administrative agency also should be entrusted with enforcement responsibilities.

The Clayton Act of 1914[35] subjected five basic practices to control by civil enforcement: price discrimination, tying, exclusive dealing, mergers undertaken by the acquisition of stock, and interlocking directorates. Each prohibition was qualified (under somewhat different tests) by the condition that the practice was illegal only "where the effect ... may be substantially to lessen competition" or "tend to create a monopoly in any line of commerce." Section 2, dealing with price discrimination, was rewritten by the Robinson-Patman Act of 1936, and jurisdictional holes in Section 7, the antimerger law, were patched and its prohibitions were expanded by the Celler-Kefauver Act of 1950.

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[32] Woodrow Wilson, **The New Freedom** 172 (1913).

[33] Id. at 201-02.

[34] H.R. Rep. No. 1142, 63rd Cong., 2d Sess. 18 (1914).

[35] 15 U.S.C. §§ 12-27 (1997).

Section 5 of the FTC Act of 1914 (as amended in 1938 and 1975) provides that "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful."[36] The Act provides no criminal penalties and limits the FTC to issuing prospective decrees. With the Justice Department, the FTC shares enforcement of the Clayton Act. (The Justice Department cannot enforce the FTC Act.) The Commission also can attack Sherman Act violations because courts have ruled that Section 5's ban upon unfair methods of competition includes Sherman Act offenses.[37]

In creating an administrative agency with antitrust authority, Congress sought to ensure greater fidelity to its own competition policy goals. This choice stemmed mainly from the Supreme Court's *Standard Oil* decision in 1911, which ruled that the Sherman Act's ban upon "every" contract in restraint of trade proscribed only unreasonable trade restraints. Many legislators feared that a judiciary predisposed to distrust government intervention in the economy routinely would apply the rule of reason to exculpate business defendants. Although some legislators believed the rule of reason standard to be deficient in substance, Congress' chief aim was to vest adjudicatory power in a body more responsive to its own preferences.

D. Enforcement by Independent Agency: The Early Experience of the FTC

A striking feature of early U.S. antitrust experience is the turbulent beginning of the FTC, whose independent status often is proposed by Western advisors as a model for transition economy competition enforcement bodies. Formed in 1914, the Commission was afflicted from the start by insipid leadership. Louis Brandeis, the FTC's chief architect, called President Woodrow Wilson's early appointments to the agency "a stupid administration."[38] The Commission's inability to pursue a substantial antitrust program in its first decade led contemporary observers to view the agency as ill-suited to perform a useful competition policy role.[39]

In the few instances where the FTC used its powers aggressively, it encountered hostility in Congress and the federal courts. In the early 1920s, Congress condemned the FTC for issuing a study that accused the nation's largest meatpackers of various anticompetitive acts.[40] Congress threatened the FTC's existence and withdrew its

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[36] 15 U.S.C. § 45 (1997).

[37] Federal Trade Commission v. Cement Institute, 333 U.S. 683, 694 (1948); Neil W. Averitt, The Meaning of Unfair Methods of Competition in Section 5 of the Federal Trade Commission Act, 21 **Boston College Law Review** 227, 239-40 (1980).

[38] Arthur S. Link, **Woodrow Wilson and the Progressive Era 1910-1917**, at 74 (1954).

[39] Id. at 75.

[40] See William E. Kovacic, The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement, 17 **Tulsa Law Journal** 587, 623-25 (1982) (hereinafter *Congressional Oversight*) (discussing congressional reaction to the FTC's meatpacking investigation and report).

jurisdiction to address antitrust concerns involving meatpackers.[41] The episode demonstrated the political hazards to a new competition policy institution of using its authority to challenge politically powerful economic interests.[42]

The most sobering feature of the FTC's early experience was its unwelcome reception in the courts.[43] The FTC was the federal government's second independent regulatory commission,[44] an innovation in public administration that combined functions previously dedicated to the executive branch, the judiciary, and the legislature. In Section 5 of the FTC Act, Congress gave the agency a broad mandate to ban unfair methods of competition and intended the FTC to use a broad mix of policymaking tools, including administrative adjudication and the publication of reports, to establish new principles of competition policy.[45]

Ambitious congressional expectations about the FTC's competition policy role were soon dashed in the courts. In its early years, the FTC received little sympathy from a federal judiciary that found scant evidence of superior expertise in the Commission's sketchy opinions and otherwise begrudged vesting broad adjudication responsibilities in the new institution.[46] From the early 1920s through the mid-1930s, the federal courts issued decisions that severely limited the FTC's power to define new standards of commercial conduct, to compel the production of business records, and to impose remedies to restore competition.[47] Not until the 1960s, fully 50 years after the

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[41] Id. at 624.

[42] See Pendleton Herring, **Public Administrtion and the Public Interest** 118 (1936) (congressional reaction to FTC's meatpacking study provided "a concrete illustration of the political and administrative problems involved in attempting to regulate a powerful industry").

[43] See Kovacic, *Congressional Oversight*, at 611-16 (discussing pattern of FTC defeats in federal courts in 1910s and 1920s).

[44] The Interstate Commerce Commission, created in 1887, had been the first.

[45] Senator Francis Newlands, one of the chief sponsors of the FTC Act, observed during the legislative debates on the statute that "as a result of investigation and as a result of long experience [the Commission] will build up a body of information and of administrative law that will be of service not only to them but to the country itself, and that gradually standards will be established that will be accepted and will constitute our code of business morals." 51 Congressional Record 11083 (1914).

[46] See Carl McFarland, **Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission, 1920-1930**, at 92-99 (1933) (describing how federal courts embraced restrictive interpretations of the powers of the FTC). McFarland's study shows that the ICC faced similar judicial opposition when it sought to perform its assigned adjudicatory responsibilities. Id. at 102-24. The FTC's poor record in the courts was attributable partly to its failure to provide well-reasoned rationales for its decisions. See Gerard Henderson, **The Federal Trade Commission: A Study of Administrative Law and Procedure** 334 (1924).

Commission's creation, did the FTC obtain Supreme Court rulings that clearly vindicated the broad grant of policymaking authority embodied in the 1914 statute.[48]

II. Institutional and Policy Implications

The form and substance of the early U.S. antitrust statutes has important institutional and policy implications that help explain how antitrust doctrine and enforcement policy have developed over time and will change in the future. The U.S. antitrust system's institutional traits ensure that existing doctrine and policy will remain subject to continuing pressures that adjust enforcement approaches and judicial standards over time. Since 1977, antitrust has moved considerably toward accepting an efficiency orientation. This perspective has been, and will continue to be, criticized by those who prefer a different goals hierarchy and by those who believe that efficiency, properly conceived, dictates more expansive enforcement. The antitrust system's decentralized character ensures that competing views will press upon enforcement officials and federal judges.

A. Open ended Substantive Commands

Congress cast many provisions of the antitrust statutes in broad terms and thereby gave federal judges a pivotal role in defining the statutes' prohibitions. No scheme of federal economic regulation in the United States grants judges comparable discretion to determine litigation outcomes through their interpretations of statutory commands. How judges exercise their discretion depends heavily on their policy preferences, training, and experience. Next to persuading Congress to amend the antitrust laws, a president's surest means for leaving a lasting imprint on antitrust policy is the power to choose federal judges.[49]

B. The Choice of Goals

In exercising their discretion under the antitrust statutes, judges must decide which criteria will guide their choice among competing analytical approaches. In a formative statement of this point, Bork observes that "[a]ntitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law -- what are its goals? Everything else follows from the answer we give. Is the antitrust judge to be guided by one value or by several? If by several, how is he to decide cases where a conflict in value arises? Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules."[50]

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[47] See Kovacic, *Congressional Oversight*, at 611-17 (describing judicial decisions from 1920-1934 that narrowed FTC's authority).

[48] See id. at 616 (describing Supreme Court decisions in the 1960s that adopted a more expansive view of the FTC's authority).

[49] See William E. Kovacic, Reagan's Judicial Appointees and Antitrust in the 1990s, 60 **Fordham Law Review** 49 (1991).

[50] R. Bork, **Antitrust Paradox**, at 50.

Bork's answer to this question -- that the legislative history of the Sherman Act and other antitrust statutes demonstrates an overriding aim to increase consumer welfare by enhancing allocative efficiency -- has inspired a heated debate about the aims of antitrust. As noted above, many commentators have disputed this view and proposed other goal structures. As a group, Bork's critics have shown that Congress conceived the antitrust system to embrace objectives reaching beyond the attainment of allocative efficiency.

Many historians object to how Bork and some of his critics have scanned the historical record in search of "an immediately usable historical past."[51] These historians find that legal scholars tend to rest their modern policy prescriptions on studies that brush aside significant ambiguities in the historical record surrounding antitrust's formative era. By doing so, they neglect the possibility that Congress pursued no single aim in the Sherman Act, but acted from a "powerful, widely shared vision of a natural, rights-based political and economic order that simultaneously tended to ensure opportunity, efficiency, prosperity, justice, harmony, and freedom."[52]

Congress in 1890 may have seen no need to make tradeoffs among an array of goals, but subsequent experience and developments in economic theory have undermined important factual assumptions that shaped original legislative expectations about the harmonious attainment of varied economic, political, and social ends. It is now evident that achieving certain of the original goals sometimes will come at the expense of others. (For example, large scale production and distribution may reduce costs but also eliminate competitive opportunities for small firms.) It also seems unlikely that antitrust specialists will devise a contemporary enforcement approach that gives full effect to an original intent that foresaw no conflict in the simultaneous pursuit of a host of economic, social, and political aims. Consequently, future adjudication and enforcement practice probably will be guided less by understandings of original intent and more by modern views of what constitutes sound policy. Judicial receptivity to a suggested goals structure is likely to depend heavily on its administrability. Despite its questionable statement of original intent, Judge Bork's efficiency prescription offers federal judges the attractive quality of apparent simplicity in application. Commentators proposing multi-dimensional goals structures generally have not provided judges an assuring method for ranking efficiency and non-efficiency goals and resolving possible conflicts among them.

The goals debate is not a mere academic concern. Modern Supreme Court antitrust decisions show that judicial views about antitrust's proper aims influence doctrine. In Brown Shoe Co. v. United States,[53] the Supreme Court for the first time interpreted the 1950 Cellar-Kefauver Amendment, which extended the Clayton Act's original antimerger provision to cover acquisitions of assets. Midway through the Court's opinion, Chief Justice Earl Warren observed that "[t]aken as a whole, the legislative

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[51] Daniel R. Ernst, The New Antitrust History, 35 **New York Law School Law Review** 879, 885 (1990).

[52] J. May, Antitrust in the Formative Era, 50 **Ohio State Law Journal** at 391.

[53] 370 U.S. 294 (1962).

history [of the 1950 Amendment] illuminates congressional concern with the protection of *competition*, not *competitors*, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition."[54] At the opinion's end, Chief Justice Warren concluded that the amended statute forbade Brown Shoe's purchase of Kinney, which yielded a post-acquisition market share of five percent of shoe retailing:

> Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.[55]

Fifteen years later, in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,[56] the Court reviewed a bowling alley operator's challenge to Brunswick's acquisition of the assets of one of the plaintiff's bankrupt competitors. The plaintiff asserted that its profits would have increased had Brunswick not purchased the failing rival. A unanimous Court rejected the claim, holding that the plaintiff failed to prove "*antitrust* injury, which is to say injury of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful."[57] Justice Thurgood Marshall's opinion said "[t]he antitrust laws ... were enacted for `the protection of *competition* not *competitors*.'" Here Justice Marshall quoted the first of *Brown Shoe*'s two admonitions about antitrust's concern for "competition, not competitors." He did not cite the later passage where Chief Justice Warren repeated the "competition, not competitors" aphorism, but condemned the merger to vindicate the desire of Congress to protect small firms. In *Brunswick* the Court studied the Janus-like features of *Brown Shoe* and ignored the face of business egalitarianism.

Since *Brunswick*, courts in the U.S. have embraced an efficiency orientation more often than judicial decisions of the Warren Era. Many cases cite Judge Bork for the view that Congress designed the Sherman Act as a "consumer welfare prescription."[58] Although a "consumer welfare" standard is consistent with an efficiency perspective, no court has retraced and endorsed the logic by which Judge Bork equates "consumer welfare" with a singleminded concern with allocative efficiency. Nor have courts that

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[54] *Brown Shoe*, 370 U.S. at 320 (emphasis in original).

[55] Id. at 344.

[56] 429 U.S. 477 (1977).

[57] Id. at 488.

[58] See, e.g., Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (legislative debates "suggest that Congress designed the Sherman Act as a 'consumer welfare prescription'" [citing R. Bork, **Antitrust Paradox**, at 66]).

have adopted a "consumer welfare" standard indicated that such a formula excludes consideration of other goals.[59]

Although mainstream judicial antitrust analysis today reflects a goals hierarchy dominated by efficiency, this pattern is not universal. Populist solicitude for small entrepreneurs and the dispersion of economic and political power remains an important impulse in the antitrust system. Until the Supreme Court precludes reliance on other goals, judges sometimes will permit nonefficiency arguments to trump efficiency concerns.

Even if the Supreme Court declines to resolve the goals issue, efficiency probably will remain paramount in antitrust litigation for the foreseeable future. This has less to do with original legislative intent or concerns about administrability than with the courts' awareness of global economic conditions. Since World War II, decisions such as *Brown Shoe* (1962) have emphasized non-efficiency goals when American firms were preeminent.[60] The ascent of Western Europe and Japan in the 1970s as potent economic rivals to the United States created strong political pressure to reexamine national policies, including antitrust, that affect the competitive position of American firms. Today it is more difficult for courts to discount efficiency and vindicate other aims as American companies struggle against formidable foreign competitors.

C. Permeability of the Adjudication Process

Congress provided a highly decentralized mechanism for adjudicating antitrust disputes. Thirteen courts of appeals, 94 district courts, and the FTC share power to decide cases and interpret the statutes' broad commands. New ideas can (and do) enter the antitrust system on a small scale. A well-reasoned opinion by one federal judge can establish a new theory or conduct standard as an acceptable basis for decision. The Supreme Court hears few antitrust cases, and genuine analytical differences among the lower federal courts are common. Dispersed adjudicatory power gives litigants many paths through which to inject preferred theories into the antitrust system.

Decentralization also results from Congress' decision to confer antitrust standing on many entities, including two federal agencies, state governments, private companies, and consumers. No single gatekeeper controls access to the courts or decides what ideas may be asserted to support antitrust claims. Decentralized prosecution means that one entity's rejection of certain theories does not bar others from using those theories. For example, in the 1980s, state governments impeded the Reagan Administration's efforts to retrench public enforcement policy concerning distribution restraints and mergers by bringing cases that the Reagan antitrust agencies disfavored.

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[59] William E. Kovacic, The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy, 36 **Wayne Law Review** 1413, 1446-51 (1990).

[60] See Phillip A. Areeda, Antitrust Law as Industrial Policy, in **Antitrust, Innovation, and Competitiveness** 29, 34-35 (Thomas M. Jorde & David J. Teece eds. 1992).

The antitrust system's permeability influences the direction of antitrust doctrine and analysis over time. The openness of the adjudication process means that today's orthodoxy will face periodic challenges by rival theories that may become prevailing analytical approaches. Because the system is susceptible to new ideas, changing political and economic conditions, coupled with ferment in economic learning, impart instability to existing doctrine and analysis.[61] To predict future litigation outcomes accurately not only requires mastery of existing standards and analytical techniques but also appreciation for the power of new theories and changing political trends to alter judicial decisionmaking.

D. Coexistence with Other Economic Regulatory Regimes and Economic Policies

Since 1890, U.S. antitrust policy has depended fundamentally on how dearly the country has valued competition over rival systems of economic organization. The antitrust laws embody a social preference for the primacy of market forces and limited government supervision of the economy. These measures, however, are neither the sole nor final expressions of national economic policy. The antitrust laws coexist with many other statutes and policies that either stress more intrusive government efforts to guide economic activity or exempt various industries from the competition rules applying to business generally.

Antitrust's economic policy role has varied dramatically over time as a function of three opposing forces. One is the cooperative or planning vision of business-government relations, which urges that the government allow competitors to coordinate production and product development activities under guidance of public agencies. In 1914, Walter Lippmann's formative indictment of antitrust barriers to cooperation attacked "the antitrust people" for their efforts at "breaking up the beginning of a collective organization, thwarting the possibility of cooperation, and insisting upon submitting industry to the wasteful, the planless scramble of little profiteers." In a scathing assessment of the antitrust laws, Lippmann said that "[h]ow much they have perverted the constructive genius of this country it is impossible to imagine."[62] Charles Van Hise, an economist and major figure in economic policy debates in the early Twentieth Century, likewise argued that "[i]f we isolate ourselves and insist upon the subdivision of industry below the highest economic efficiency and do not allow cooperation, we shall be defeated in the world's markets."[63]

From the end of World War I until the late 1930s, the ascent of cooperation and planning theories severely diminished antitrust enforcement. In the 1920s, the Justice Department and the FTC concentrated more on promoting "fair" competition,

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[61] See William E. Kovacic, The Influence of Economics on Antitrust Law, 30 **Economic Inquiry** 294 (1992).

[62] Walter Lippmann, **Drift and Mastery** 78-79 (1914: Prentice-Hall Edition, 1961).

[63] Charles Van Hise, **Concentration and Control** 277-78 (1912).

particularly through trade associations and other "sentinels" of fair business conduct, than on wiping out restrictive practices and attacking monopoly power. In the first half of the 1930s, U.S. economic policy emphasized industry-wide coordination of output and pricing under the aegis of government-sponsored cartels. Only by the decade's end, after the collapse of the New Deal's National Recovery Administration and the appointment of Thurman Arnold to head the Justice Department's Antitrust Division did antitrust emerge from what the historian Richard Hofstadter has called the "era of neglect."[64]

Since the late 1930s, except for a hiatus during World War II, significant antitrust enforcement generally has been serious force affecting business practices and the organization of American industry. During the post-war era, however, some commentators who otherwise favor government intervention to promote economic growth have argued that antitrust is counterproductive.[65] Their view emerges today in an debate about the proper role of government in promoting the development of specific industries and in allowing cooperation among rival firms. A number of areas of U.S. antitrust policy, including the treatment of horizontal restraints and joint ventures, reflect concessions to the view that antitrust has unduly impeded collaboration among competitors.

A second constraining force on antitrust has been the successful efforts of firms to enlist the government's help to suppress competitors. Privately imposed trade restraints tend to decay over time, mainly because firms eventually defect from anticompetitive agreements in search of private gain. By contrast, publicly imposed trade restraints are more durable due to the state's superior ability to block new entry and enforce compliance with output restrictions. Efforts to impose public restraints on private rivalry have led U.S. courts to devise doctrines to reconcile antitrust's competition mandate with conflicting policies that protect attempts by private economic actors to persuade government bodies to curtail rivalry.

A third constraining force consists of modern commentary that doubts the antitrust system's capacity to distinguish effectively between procompetitive and anticompetitive conduct and warns of antitrust's potential to reduce consumer welfare.[66] Some observers emphasize inherent limits on the ability of government agencies and courts to understand the purpose and effect of business conduct.[67] Others stress the antitrust system's susceptibility to rent-seeking by firms that use

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[64] Richard Hofstadter, What Happened to the Antitrust Movement?, in **The Paranoid Style in American Politics and Other Essays** 193 (1965).

[65] See, e.g., Lester C. Thurow, **The Zero-Sum Society** 146 (1980).

[66] See Fred S. McChesney, Be True to Your School: Conflicting Chicago Approaches to Antitrust and Regulation, 10 **Cato Journal** 775 (1991).

[67] See George Bittlingmayer, Decreasing Average Cost and the Addyston Pipe Case, 25 **Journal of Law & Economics** 201 (1985); Harold Demsetz, How Many Cheers for Antitrust's 100 Years?, 30 **Economic Inquiry** 207 (1992).

antitrust suits to handicap rivals[68] or by public officials who face weak incentives to make policy choices that maximize taxpayer interests.[69] This perspective has not exerted the influence of the two forces mentioned above, but it has inspired a reexamination of the widely-assumed public interest rationales for antitrust.

Conclusion: Possible Implications of the Establishment of U.S. Competition Policy Institutions for Emerging Markets

Differences in individual national circumstances dictate caution in using one country's experience with competition policy to inform another country's creation of a similar legal regime. National experiences provide admittedly imperfect sources of wisdom for another country's law reform efforts. Despite its limits as a tool for analysis, comparative studies can help identify issues or phenomena with universal attributes. The origins and history of U.S. antitrust law supplies some useful perspectives about tensions that arise between varied economic, political, and social aims that attend the establishment of new competition policy systems in a transition environment.

One possible implication of U.S. experience is that nations usually create competition policy systems to achieve a collection of economic, political, and social goals. It is hardly remarkable that a nation would seek to pursue a number of aims, including some that collide with or coexist poorly with improving economic efficiency. National competition laws routinely display a basic tension between policies that favor economic efficiency and those that seek, among other ends, to serve distribution-minded objectives such as protecting specific classes of economic actors.

The U.S. experience suggest several points for consideration as nations construct competition policy commands atop a structure of varied and potentially inconsistent objectives. The first is to recognize explicitly that there often are tradeoffs between enhancing efficiency and, for example, ensuring the survival of specific economic entities. Recognition of tradeoffs should lead to a conscious effort to specify a methodology by which different goals are to be ranked and weighed in practice. The effort to establish a goals hierarchy and to prepare a transparency calculus for applying the hierarchy in individual cases can clarify the costs and benefits of enforcement programs.

A second, closely-related matter for consideration is that attempting to apply competition policy without a well-specified goals structure can inject considerable uncertainty into the operation of legal rules. Efforts to use antitrust as a redistribution mechanisms or to achieve a more egalitarian political environment without a well-defined analytical calculus have attracted sharp criticism for their impressionistic

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[68] See William J. Baumol & Janusz A. Ordover, Use of Antitrust to Subvert Competition, 28 **Journal of Law & Economics** 247 (1985); Michael E. DeBow, The Social Costs of Populist Antitrust: A Public Choice Perspective, 14 **Harvard Journal of Law & Public Policy** 205 (1991),

[69] See William F. Shughart, III, **Antitrust Policy and Interest Group Politics** 82-120 (1990)

quality. The U.S. experience raises serious questions about whether, compared to other instruments of national policy, competition laws are particularly effective tools for effectuating an equitable distribution of political and social power.

A third possible implication is that competition policy institutions can serve as a useful buffer against demands for comprehensive state control of economic activity. It is impossible to offer a rigorous proof for the following proposition, but the existence of antitrust laws in the United States probably has served to deflect demands for more intrusive forms of regulation. Even when the U.S. has embraced comprehensive regulatory regimes (as in the early 1930s), the antitrust system served as a vehicle for delimiting the scope of such policies and forcing a reevaluation of their usefulness. In a transition environment, antitrust commands -- even strongly interventionist commands -- might serve as a necessary transition device by which the state's role in the economy changes from being a comprehensive regulator to that of a facilitator of economic activity.

A fourth phenomenon for consideration is the value of a competition system as an educational device. Even when their operations have been comparatively feeble, the U.S. antitrust agencies have acted as a force within the government, the business community, and the public generally to explain the virtues of market processes and the limits of central economic control. The existence of the antitrust system has inspired extensive research and analysis of market processes and careful study of the asserted justifications for state control of commercial activity.

A fifth possible implication from the history of the U.S. antitrust system is that creating new competition policy institutions will be a difficult, gradual process, particularly where the institutions alter the government's political structure and redistribute power among government bodies. Forming new entities for public administration is difficult under the best of circumstances, much less in an environment lacking the supporting institutions -- such as well-established professional associations, a broad reservoir of relevant substantive expertise and research, and deeply-ingrained traditions that favor market processes -- that help a new competition agency prosper. It is difficult to imagine that transition economy governments could dramatically accelerate the timetable by which new competition bodies have taken shape and grown to maturity in Western countries.[70]

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[70] I have used the example of the United States, but the antitrust histories of Australia and Canada also would demonstrate the point. Australian antitrust policy originated in 1906 with a law aimed at foreign producers of agricultural equipment. Early judicial rulings rendered the measure ineffective. Antitrust policy in Australia remained dormant for decades. In the 1960s the government required the registration of restrictive business practices, and in 1974 Australia adopted its current law, the Trade Practices Act. See Roger A. Boner & Reinard Krueger, *The Basics of Antitrust Policy: A Review of Ten Nations and the European Communities* 41-42 (World Bank Technical Paper No. 160: 1991). Canada enacted an antitrust law in 1889, but enforcement under the statute was infrequent and ineffective until passage of a new statute in 1986. See Michael J. Trebilcock, *The Evolution of Competition Policy: A Comparative Perspective, in* **The Law and Economics of Competition Policy** 1, 3 (Frank Mathewson et al., eds. 1990); Paul Collins & D. Jeffry Brown, *National Antitrust Laws in a Continental Economy: A Comparison of Canadian and American Antitrust Laws*, 65 **Antitrust Law Journal** 495, 497-503 (1997).