

BETTER COMPETITION ADVOCACY

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INTRODUCTION

Competition authorities from around the world disagree over substantive and procedural issues, such as the standard for anticompetitive unilateral conduct. But one undisputed topic is competition advocacy.¹ Competition advocacy, as that term is commonly used, targets potentially anticompetitive governmental regulations or protections.² These governmental

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¹ The International Competition Network (“ICN”) in 2002 adopted the following definition of competition advocacy: “Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationship with other governmental entities and by increasing public awareness of the benefits of competition.” ADVOCACY WORKING GROUP, INT’L COMPETITION NETWORK, ADVOCACY AND COMPETITION POLICY REPORT 25 (2002), http://www.internationalcompetitionnetwork.org/OutreachToolkit/media/assets/resources/advocacy_report.pdf [hereinafter ICN ADVOCACY REPORT]. Formed in 2001 by antitrust agencies from fourteen jurisdictions, the ICN is an “international body devoted exclusively to competition law enforcement.” International Competition Network: About the ICN, <http://internationalcompetitionnetwork.org/index.php/en/about-icn> (last visited Mar. 30, 2008). Its membership is “open to all national or multinational competition authorities entrusted with the enforcement of a competition law.” International Competition Network: Join the ICN, <http://internationalcompetitionnetwork.org/index.php/en/get-involved/join-the-icn> (last visited Mar. 30, 2008). It currently has one hundred competition agency members from eighty-eight jurisdictions, including the U.S. Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”).

² As a former Deputy Assistant Attorney General of the DOJ stated,

But it is equally critical that antitrust enforcement not become a bureaucratic obstacle to efficient business conduct and that antitrust enforcers not unnecessarily regulate—and thereby stifle—the competitive forces we mean to protect. Antitrust agencies must also work to nurture and strengthen a culture of competition within their economies and to

regulations include insulating German economists,³ Italian hairstylists,⁴ and Kentucky real estate agents⁵ from competition. As its former chairman stated, the Federal Trade Commission ("FTC") has secured many victories with its competition advocacy efforts over the past few decades and has "largely won the intellectual debate."⁶ His successor similarly stressed the

advocate wherever necessary the importance of freeing consumers in competitive markets from overly burdensome regulation.

William J. Kolasky, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, A Culture of Competition for North America, Address at "Economic Competition Day: Shared Experiences" 2 (June 24, 2002), <http://www.usdoj.gov/atr/public/speeches/11351.pdf> [hereinafter 2002 Kolasky Address, A Culture of Competition].

³ Germany recently abolished its fifty-seven year old ritual of exclusively relying on five German economic research institutions to predict growth and advise on economic policy. These five institutions were paid \$1.7 million for their biannual projections. The government officials said that more competition would keep the economists at these five think-tanks "on their toes." Hugh Williamson, *Rivals Move in Germany's Cosy Think-Tank Club*, FIN. TIMES (London), May 1, 2007, at 7.

⁴ Italy's center-left government sought to introduce more competition to heavily protected professions and services by abolishing rules "governing who can do what job, where and when." Regulations limiting the number of bakeries in a given Italian city were dropped, and at least 500 new shops opened. Non-prescription drugs, once the domain of pharmacies, are now sold in 800 outlets, including the French hypermarket Carrefour. Supermarkets can now sell petrol; banks can no longer penalize homeowners for paying off their mortgages early. Hairdressers can now work on Mondays, and decide if and when they will close during the week. Cinemas need not be a minimum distance from each other. There will no longer be caps on the number of tourist guides or any residency requirements. Pierangelo Raineri, General Secretary of Fisascat, a union representing tourism industry workers, said: "This risks pushing qualified and specialist professionals out of the market and leaving customers at the mercy of anyone who decides to define himself as a tourist guide." Tony Barber & Adrian Michaels, *Italy's Bastions of Protection and Privilege Resist Liberal Assault*, FIN. TIMES (London), Feb. 2, 2007, at 7; see also Tony Barber & Adrian Michaels, *In for a Trim—An Italy Anxious for Growth Tries To Stimulate Competition*, FIN. TIMES (London), Feb. 28, 2007, at 15.

⁵ See *United States v. Ky. Real Estate Comm'n*, No. 3:05-cv-00188-S, Am. Final J. at 5–6, 8 (W.D. Ky. July 15, 2005), <http://www.usdoj.gov/atr/cases/f210100/210142.pdf>.

⁶ Timothy J. Muris, Chairman, Fed. Trade Comm'n, Creating a Culture of Competition: The Essential Role of Competition Advocacy, Prepared Remarks Before the ICN Panel on Competition Advocacy and Antitrust Authorities (Sept. 28, 2002), <http://www.ftc.gov/speeches/muris/020928naples.shtm>. Two FTC economists characterized the agencies' earlier experience of competition advocacy as "disappointing." A.E. Rodriguez & Mark D. Williams, *The Effectiveness of Proposed Antitrust Programs for Developing Countries*, 19 N.C. J. INT'L L. & COM. REG. 209, 229–30 (1994). "The agencies are almost never asked to comment on proposed legislation" and "suffer political pressure from above, from the President and Congress, who both are lobbied by producer interest groups, to limit their advocacy roles." *Id.*

dangers of government institutions displacing competition, and praised the FTC's "increasingly active" competition advocacy program.⁷

This Article recognizes that certain governmental restraints diminish competition and deserve censure. The competition agencies should continue to inform the legislative debate of a proposed governmental measure's likely anticompetitive effects.⁸ But the prevailing competition advocacy glosses over four fundamental questions: First, what is competition? Second, what are the goals of a competition policy? Third, how does one achieve, if one can, the objectives of such desired competition? Fourth, how does one know if the economy is progressing toward these goals?

Many have criticized government restraints and praised competition advocacy; few have critically examined competition advocacy from this broader viewpoint. This examination is important for several reasons. First, although some United States competition officials have remarked that the intellectual debate is over, many countries that are creating their competition regulatory and enforcement bodies are asking these questions, and the answers are not self-evident.⁹ Countries can

⁷ Deborah Platt Majoras, *State Intervention: A State of Displaced Competition*, 13 GEO. MASON L. REV. 1175, 1178 (2006). The federal antitrust agencies' advocacy efforts at times have engendered congressional hostility. See *Federal Trade Commission Authorization: Hearing on H.R. 2897 Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the Comm. on Energy and Commerce*, 100th Cong. (1987); James C. Cooper et al., *The Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091, 1092, 1104 (2005).

⁸ For example, the FTC filed comments with the Texas State Bar concerning online attorney matching services, designed to help consumers find attorneys who can handle their legal needs. The Professional Ethics Committee was considering whether its ethical rules prohibited attorneys from participating in such online legal matching services. The FTC commented on the value of the services in reducing consumers' search costs for finding legal representation and its potential to increase competition among attorneys. At the same time, the FTC staff saw "no indication that consumers are likely to suffer harm from online legal matching services that would justify banning them." Letter from the Fed. Trade Comm'n to W. John Glancy, Chairman, Prof'l Ethics Comm. for the State Bar of Tex. (May 26, 2006), <http://www.ftc.gov/os/2006/05/V060017CommentsonaRequestforAnEthicsOpinionImage.pdf>. The state bar permitted lawyers to participate provided that the requirements in the opinion were met. Prof'l Ethics Comm. for the State Bar of Tex., Op. 573 (2006), <http://www.legalmatch.com/attorneys/company/texas-opinion-573.pdf>. For the FTC's advocacy filings, see Federal Trade Commission, *Advocacy Filings*, <http://www.ftc.gov/be/advofile.shtm> (last visited Mar. 30, 2008).

⁹ See, e.g., CUTS CENTRE FOR COMPETITION, INV. & ECON. REGULATION, TOWARDS A HEALTHY COMPETITION CULTURE... (2003),

rally around consensus-building (though meaningless) goals such as “protecting the competitive process” or “promoting efficiency.” Despite the consensus on a loosely defined competition advocacy, there is no consensus domestically or internationally among the growing number of competition authorities on the definition of competition, the goals of competition policy, or whether such goals are an end or the means to some higher end.

Second, competition authorities here and abroad conflate the goals of antitrust enforcement with the goals of competition generally. They need not, nor should not, be the same. Antitrust enforcement is bound by the rule of law. Enforcers or the courts cannot rank antitrust’s multiple social goals based on their ideology, by prosecuting only bad cartels (bid-rigging on milk) versus good cartels (cigarette manufacturers, where a reduction in output may be desirable). On the other hand, competition authorities must engage other institutional stakeholders on how competition policy interacts with, is inconsistent with, or subsumes other social goals.

Third, the prevailing United States competition advocacy assumes competition as a “self-initiating process” that evolves on its own accord, which the federal, state, or local agencies can inhibit, but not necessarily improve. Rather than a self-initiating, self-correcting sphere independent of the government, competition may be an open, complex process whereby firms interact with government and informal institutions. The government thus plays a key role in providing or promoting the necessary institutions for these markets to remain or become competitive. As economies evolve, the government must provide the necessary institutions to support this complexity. Rather than a moral dualism where exogenous government forces are bad and self-initiating free market forces are good, governmental and private forces instead may interact to provide the necessary infrastructure for that economy to flourish—for example, institutions that assist in defining and protecting property rights. Absent this examination, competition policy at best may be incomplete, and at worst self-defeating with its simplistic view of the competitive process and the evils of government.

international.org/THC.pdf [hereinafter CUTS]; Robert H. Lande, *Professor Waller’s Un-American Approach to Antitrust*, 32 LOY. U. CHI. L.J. 137, 138 (2000) [hereinafter Lande, *Professor Waller’s Un-American Approach to Antitrust*].

Part I of this Article outlines the conventional wisdom underlying today's competition advocacy. Part II examines what is meant by competition, and what is being valued. Part III examines the goals of competition, as expressed by various governmental agencies. Part IV examines the structural mechanisms that the government can provide to help achieve the competition goals. Market failure may have numerous causes, both public and private, and may be caused not only by governmental action, such as an anticompetitive regulation, but by governmental inaction, such as the lack of well-defined land titling institutions to ensure that property rights are easily transferred. Part V concludes with several signposts to gauge whether United States competition policy is progressing toward its goals.

I. CONVENTIONAL COMPETITION ADVOCACY—KEEPING THE GOVERNMENT OUT

As part of their advocacy initiatives, the Department of Justice (“DOJ”) and the FTC typically (1) “eliminate unnecessary and costly existing government regulation,” (2) “inhibit the growth of unnecessary new regulation,” (3) “minimize the competitive distortions caused where regulation is necessary by advocating the least anticompetitive form of regulation consistent with the valid regulatory objectives,” and (4) “ensure that regulation is properly designed to accomplish legitimate regulatory objectives.”¹⁰ They attempt to inform lawmakers of the proposed legislation's likely anticompetitive effects before such legislation is enacted. Because of the implied immunity under the state action doctrine, once such laws are passed, the federal antitrust agencies are limited in remedying the ensuing anticompetitive results. The “effective competition advocacy program by a committed and independent competition authority will encourage the greatest scope for allowing markets to allocate resources, thereby improving productivity and economic growth to the benefit of consumers.”¹¹ The DOJ, for example, advocated competition in the real estate industry,¹² to state legislators and

¹⁰ 2002 Kolasky Address, A Culture of Competition, *supra* note 2, at 8.

¹¹ *Id.* at 9.

¹² See FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY (2007), <http://www.usdoj.gov/atr/public/reports/223094.pdf>. For additional antitrust background on competition in the real estate

bar associations to permit non-lawyers to compete for certain services,¹³ to Congress to repeal its exemption for shipping monopolies in our Shipping Act,¹⁴ and to other federal governmental agencies, such as the Department of Transportation and the Federal Maritime Commission.¹⁵ Despite the DOJ's and FTC's efforts, at times, anticompetitive laws are enacted. The agencies' second effort is to limit such anticompetitive conduct to its narrowly-defined immunity and exception.¹⁶ Otherwise, if left unchecked, activities done under the cloak of immunity may sprawl to non-immunized activities, especially when the standard for immunity is imprecise, with differing—at times inconsistent—interpretations. The competition agencies' third effort is to encourage the revocation or modification of anticompetitive laws, regulations, or judgments. The DOJ, for example, approached the handful of states that ban rebates and discounts for real estate brokerage services, and some states thereafter rescinded their anticompetitive regulations.¹⁷

industry, see generally NORMAN W. HAWKER, AM. ANTITRUST INST., *COMPETITION IN THE RESIDENTIAL REAL ESTATE BROKERAGE INDUSTRY: A SUMMARY OF THE AAI SYMPOSIUM* (2006), <http://www.antitrustinstitute.org/archives/files/535.pdf>.

¹³ See, e.g., Press Release, Antitrust Div., U.S. Dep't of Justice, Justice Department and FTC Urge Rhode Island Legislature To Continue Allowing Nonlawyers To Close Real Estate Deals (Apr. 1, 2003), http://www.usdoj.gov/opa/pr/2003/April/03_at_203.htm.

¹⁴ See *The Free Market Antitrust Immunity Reform Act of 2001: Hearing on H.R. 1253 Before the H. Comm. on the Judiciary*, 107th Cong. (2002) (statement of Charles A. James, Assistant Att'y Gen., Antitrust Div. of the U.S. Dep't of Justice), <http://www.usdoj.gov/atr/public/testimony/11244.pdf>.

¹⁵ See Comments of the U.S. Dep't of Justice to the Fed. Mar. Comm'n on the Petition of the United Parcel Serv. for an Exemption Pursuant to Section 16 of the Shipping Act of 1984 to Permit Negotiation, Entry and Performance of Serv. Contracts, Petition No. P3-03 (Oct. 10, 2003), <http://www.usdoj.gov/atr/public/comments/201372.pdf>. The Federal Maritime Commission responded by enacting the exemption for which the DOJ advocated. See Fed. Mar. Comm'n Non-Vessel-Operating Common Carrier Service Arrangements, 46 C.F.R. pt. 531 (2008).

¹⁶ See, e.g., *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 671–72 (7th Cir. 1992) (“When special interests claim that they have obtained favors from Congress, a court should ask to see the bill of sale” and should “read exceptions to the antitrust laws narrowly, with beady eyes and green eyeshades.”).

¹⁷ See Press Release, Antitrust Div., U.S. Dep't of Justice, South Dakota Real Estate Commission Permits Real Estate Brokers To Offer Rebates and Inducements: Rescission of Rulings Will Benefit Consumers of Real Estate Services (Aug. 17, 2005), http://www.usdoj.gov/atr/public/press_releases/2005/210637.htm; Press Release, Antitrust Div., U.S. Dep't of Justice, West Virginia Real Estate Commission Permits Real Estate Brokers To Offer Rebates and Other Discounts: Rescission of Regulation Will Benefit Consumers of Real Estate Services (May 4,

This approach to competition advocacy is consistent with the Chicago School's view of removing or minimizing governmental restraints on the free market.¹⁸ Competition is assumed to be "a self-initiating process," which, when left alone by government regulators, will generally allocate resources efficiently toward users who value them the most.¹⁹ Any company's attempt to secure or maintain market power would likely be defeated by other well-informed profit maximizers, either new entrants or existing competitors. Under the Chicago School's assumptions, most markets are competitive, mergers and vertical arrangements often create efficiencies, and market forces will likely redress any attempt to exercise market power.²⁰

The government, under this theory, operates outside the free market,²¹ and must justify the necessity of its intervening and "displacing" competition. Any suggestion to improve or manage

2006), http://www.usdoj.gov/opa/pr/2006/May/06_at_274.html.

¹⁸ As Antitrust Modernization Commissioner and now University of Chicago Professor Dennis W. Carlton wrote, the FTC and DOJ economists and lawyers "should be, but are not always, used effectively as a resource by other federal and local government agencies for structuring regulations in a way so as to not interfere too much with the competitive process." ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 401 (2007), http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf [hereinafter AMC REPORT].

¹⁹ UNILATERAL CONDUCT WORKING GROUP, INT'L COMPETITION NETWORK, REPORT ON THE OBJECTIVES OF UNILATERAL CONDUCT LAWS, ASSESSMENT OF DOMINANCE/SUBSTANTIAL MARKET POWER, AND STATE-CREATED MONOPOLIES 29 (2007), http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Objectives%20of%20Unilateral%20Conduct%20May%2007.pdf [hereinafter 2007 ICN REPORT]. As the Antitrust Division's manual states: "[R]egulation can be an imperfect and very costly substitute for 'regulation' by market forces. Accordingly, exceptions to the general rule of free market competition, protected by antitrust enforcement, should be permitted only on compelling evidence that competition cannot work or is inimical to some overriding social objective." U.S. DEPT OF JUSTICE, ANTITRUST DIVISION MANUAL ch. V, <http://www.usdoj.gov/tr/foia/divisionmanual/ch5.htm#ch5> (last visited Mar. 30, 2008) [hereinafter DOJ MANUAL].

²⁰ A former head of the DOJ's Antitrust Division during the Reagan Administration, and now Circuit Court Judge for the District of Columbia, argued for "an enforcement policy that resolves close cases in favor of nonintervention," and stated that a civil rule of reason enforcement action will "rarely be justified." Douglas H. Ginsburg, *The Appropriate Role of the Antitrust Enforcement Agencies*, 9 CARDOZO L. REV. 1277, 1280, 1282 (1988). Market forces "are, after all, self-correcting in the long run." *Id.* at 1280. But Keynes' popular refrain is that "this long run is a misleading guide to current affairs. In the long run we are all dead." JOHN MAYNARD KEYNES, A TRACT ON MONETARY REFORM ch. 3 (MacMillan & Co. 1923) (emphasis omitted).

²¹ Rodriguez & Williams, *supra* note 6, at 216 n.34 (stating that economists "traditionally viewed government policy as an exogenous *dues-ex-machina*").

competition smacks of socialism and industrial policy. Antitrust law “does not authorize the government (or any private party) to seek to ‘improve’ competition. Instead, antitrust enforcement seeks to deter or eliminate anticompetitive restraints.”²²

Government intervention should be limited to clear and sustained instances of market failure, of which “only explicit price fixing and very larger horizontal mergers (mergers to monopoly) [are] worthy of serious concern.”²³ For some, even then, the government must proceed with caution. The spontaneous free market forces eventually will defeat, through expansion or de novo entry, this temporary market power. In attempting to preempt this exercise of market power, the government may chill pro-competitive behavior.²⁴ The concern is that unlike market-created impediments, market forces may not readily overcome these government-imposed impediments to competition.²⁵ The greater concern of governmental intervention

²² AMC REPORT, *supra* note 18, at 3.

²³ Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 933 (1979) [hereinafter Posner, *Chicago School*]; see also 2007 ICN REPORT, *supra* note 19, at 29; Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1701 (1986). This view is not unique to the Chicago School, but is the core of neoclassical economic theory with its “faith in non-intervention by government in the economic process as a general principle and in only limited intervention in practice.” William M. Dugger, *Two Twists in Economic Methodology: Positivism & Subjectivism*, 42 AM. J. ECON. & SOC. 75, 75 (1983).

²⁴ See Ginsburg, *supra* note 20, at 1287 (“It is rare indeed that government intervention, except the repeal of some prior misstep, will improve the performance of a market.”).

²⁵ As a former head of the DOJ’s Antitrust Division stated:

Government-imposed restraints on competition are an area where competition authorities need to act. . . . Competitors often are under challenge from new forms of competition, perhaps through the Internet. The first place that many competitors will go for help is to the government. A government-imposed impediment is the one type of market competition impediment that the market will never be able to correct by itself. Earlier, one of our panelists emphasized that governments have a monopoly on this type of action and when they act, there is no possibility for market self-correction. We need to be aware of competitors seeking help of this kind in our own enforcement activities. Sometimes competitors will try to get governments to act in ways that do not promote competition, but instead promote their private interest as a competitor. We must be wary of government decisions or actions that restrain competition.

R. Hewitt Pate, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Competition and Politics, Remarks at the 12th International Conference on Competition in Bonn, Germany 7–8 (June 6, 2005), <http://www.usdoj.gov/atr/public/speeches/210522.pdf>. Similarly, the FTC in describing its competition advocacy efforts wrote that “[e]xperience has shown that government-imposed

lies with the risk of false positives, which can chill pro-competitive market behavior and which market forces cannot readily redress, than false negatives, which entry or expansion eventually corrects. Coinciding with the Reagan Administration's view of governmental institutions as a necessary evil,²⁶ competition advocacy underscores how government interference likely causes greater harm, in inhibiting the market's efficient allocation of scarce resources, than good. Consequently, the debate among some neoclassical economists is whether the government should intervene at all.

Operating under this conventional wisdom, the competition advocacy literature typically: (1) highlights the evils of government restraints, such as protecting Italian barbers or Kentucky real estate brokers from the gales of competition; (2) focuses on procedural issues, such as when and how the competition agency can intervene in the legislative process to prevent such evils²⁷ and the extent to which newer competition agencies should devote resources to competition advocacy versus antitrust enforcement;²⁸ and (3) takes a few whacks at immunities and exemptions to the competition laws, such as the state action doctrine.²⁹

restrictions are among the most effective and durable constraints on competition." FED. TRADE COMM'N, THE FTC IN 2007: A CHAMPION FOR CONSUMERS AND COMPETITION 18 (2007), <http://www.ftc.gov/os/2007/04/ChairmansReport2007.pdf>. The FTC similarly focuses on "limit[ing] or eliminat[ing]" anticompetitive "public impediments" on competition. *Id.*

²⁶ As President Reagan told the nation, "government is not the solution to our problem; government is the problem." Ronald Reagan, First Inaugural Address (Jan. 20, 1981), <http://www.reaganlibrary.com/reagan/speeches/first.asp>.

²⁷ See ICN ADVOCACY REPORT, *supra* note 1, at vi–vii. Based on its survey of competition agencies, the ICN found three key factors likely to affect the effectiveness of competition advocacy: First is whether authorities are informed in a timely manner. Second is the "compulsory or non-compulsory status of the consultation," such as whether competition agencies can undertake the advocacy on their own initiative or only after being requested by another governmental agency for comments or recommendations. The third factor is the "degree of bindingness of the recommendations made." *Id.* at 59.

²⁸ See *id.* at iii.

²⁹ See, e.g., Majoras, *supra* note 7, at 1179–80. One antitrust scholar, however, has questioned some of the conventional wisdom concerning competition advocacy and its applicability to developing countries. See Simon J. Evenett, *Competition Advocacy: Time for a Rethink?*, 26 NW. J. INT'L L. & BUS. 495 (2006) (arguing for further analysis of which forms of competition advocacy are more successful, why such advocacy works, and the benefits that flow from it).

Indeed, such governmental restraints can have several harms. For example, at the DOJ, I prosecuted a regulatory ban on discounts, in the form of rebates and inducements, in connection with real estate brokerage services.³⁰ First, consumers pay more for the products or services in that industry. A second harm is that such “rent-seeking” behavior can impose additional social costs. Economic regulation attracts special interest groups to lobby the government for regulatory measures that benefit them to the detriment of society overall.³¹ Thus, competitors, when challenged by new rivals or new forms of competition, may turn to government regulators for help. Competitors may ask federal, state, and local agencies under the guise of consumer protection to prohibit or restrict certain pro-competitive activity, such as allowing professionals to offer discounts to their clients. They may enlist the government to increase trade barriers or for other protectionist measures.³²

³⁰ Complaint at 12, *United States v. Ky. Real Estate Comm'n*, No. 3:05CV188-H (W.D. Ky. Mar. 31, 2005), <http://www.usdoj.gov/atr/cases/f208300/208393.pdf>. The Commonwealth of Kentucky had created the Kentucky Real Estate Commission “to regulate the licensing and education of [real estate b]rokers and to safeguard and protect the public interest.” *Id.* at 2. The Commission’s Board, which was composed overwhelmingly of real estate brokers, *id.* at 4, introduced a regulation prohibiting brokers licensed in Kentucky from offering their customers rebates or inducements, *id.* at 7–8. A real estate broker might offer a home buyer a cash rebate, such as \$1,000, or an inducement, like a free television, if the buyer used that broker. This ban on discounting was anticompetitive. Indeed, if the real estate brokers secretly agreed to eliminate such discounts, they likely faced criminal fines and incarceration. Instead, the brokers went to the state commission, whose board is overwhelmingly composed of realtors, and got them to pass this regulation banning such discounts.

³¹ ICN ADVOCACY REPORT, *supra* note 1, at ii.

³² “Cross-country and cross-industry studies of industrial and developing countries have found evidence that industries in decline, industries that are highly unionized, and industries that make substantial campaign contributions all tend to be rewarded with higher tariff protection.” WORLD BANK, WORLD DEVELOPMENT REPORT 2002: BUILDING INSTITUTIONS FOR MARKETS 105 (2002), available at <http://www.worldbank.org/wdr/2001/fulltext/fulltext2002.htm>. Likewise, the former FTC Chairwoman noted that much of the agency’s competition advocacy “involves commenting on state and federal regulations or legislation that erect barriers to entry.” Deborah Platt Majoras, *The Federal Trade Commission: Learning From History as We Confront Today’s Consumer Challenges*, 75 U. MO.-KAN. CITY L. REV. 115, 124 (2006). Concentrated markets can be competitive if contestable. “In Canada, for example, where the five largest banks [control] 80 percent of all banking assets, researchers have found no evidence of monopolistic behavior.” WORLD BANK, *supra*, at 88. Similarly, analysis of bank-level data from eighty countries showed that concentration had little effect on bank profitability or margins. On the other hand, another study cited by the World Bank indicated that tighter restrictions on

They may seek from the legislature or courts immunities from the competition laws.³³ As a testament to such special interest legislation, the DOJ Manual³⁴ cites agriculture,³⁵ export activities,³⁶ insurance,³⁷ labor,³⁸ fishing,³⁹ defense

entry into banking were associated with higher average interest rate margins and overhead expenditures. The study found that “[a]dditional restrictions on foreign entrants [were] associated with lower sector portfolio quality and greater likelihood of a banking crisis.” *Id.*

³³ As the ICN noted: “Virtually every jurisdiction has exemptions from anti-cartel laws, either in connection with regulation of an industry or because a legislative choice has been made not to apply antitrust laws to certain conduct or industries.” WORKING GROUP ON CARTELS, INT’L COMPETITION NETWORK, DEFINING HARD-CORE CARTEL CONDUCT: EFFECTIVE INSTITUTIONS, EFFECTIVE PENALTIES 13 (2005), available at http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Effective_Anti-Cartel_Regimes_Building_Blocks.pdf.

³⁴ See DOJ MANUAL, *supra* note 19, at ch. II, pt. C.

³⁵ Cooperative Marketing Association (Capper-Volstead) Act, 7 U.S.C. §§ 291–92 (2000) (allowing persons engaged in the production of agricultural products to act together for purpose of “collectively processing, preparing for market, handling, and marketing” their products and permitting cooperatives to have “marketing agencies in common”); Cooperative Marketing Act, 7 U.S.C. § 455 (2000) (authorizing agricultural producers and associations to acquire and exchange “past, present, and prospective” pricing, production, and marketing data); Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608–08c (2000) (providing the U.S. Secretary of Agriculture authority to enter into (1) marketing agreements with producers and processors of agricultural commodities, and (2) marketing orders, except for milk, that control amount of an agricultural product reaching the market and thus serve to enhance the price); 15 U.S.C. § 17 (2000) (permitting, inter alia, operation of agricultural or horticultural mutual assistance organizations when such organizations do not have capital stock or are not conducted for profit).

³⁶ Export Trade (Webb-Pomerene) Act, 15 U.S.C. §§ 61–66 (2000) (providing antitrust immunity for the formation and operation of associations of otherwise competing businesses, allowing them to engage in collective export sales that do not extend to actions that have an anticompetitive effect within the United States or that injure domestic competitors of members of export associations); Export Trading Company Act of 1982, 15 U.S.C. §§ 4001–20 (2000) (permitting limited antitrust immunity for export trade, export trade activities, and methods of operation specified in certificate of review issued by Secretary of Commerce with Attorney General’s concurrence).

³⁷ See McCarran-Ferguson Act, 15 U.S.C. §§ 1011–15 (2000) (exempting from antitrust laws the “business of insurance” to the extent “regulated by [s]tate law”).

³⁸ 15 U.S.C. § 17 (2000) (providing that “labor of a human being is not a commodity or article of commerce” and that the Act permits labor organizations to carry out their legitimate objectives); 29 U.S.C. § 52 (2000) (immunizing collective activity by employees relating to disputes concerning terms or conditions of employment); Norris-LaGuardia Act of 1932, 29 U.S.C. §§ 101–10, 113–15 (2000) (providing that U.S. courts do not have jurisdiction to issue restraining orders or injunctions against certain union activities on the basis that such activities constitute unlawful combination or conspiracy under antitrust laws).

³⁹ Fishermen’s Collective Marketing Act, 15 U.S.C. §§ 521–22 (2000) (permitting “persons engaged in the fishing industry, as fishermen . . . [to] act together . . . in

preparedness,⁴⁰ newspapers,⁴¹ professional sports,⁴² small business joint ventures,⁴³ and local governments,⁴⁴ as enjoying limited or general statutory immunity from the federal antitrust laws. Such “rent-seeking” behavior, while beneficial to lobbyists and lawyers, may lead to a substantial waste of scarce resources, and is condemned by the Chicago School, post-Chicago, and non-Chicago commentators.⁴⁵ In the Kentucky Real Estate

collectively catching, producing, preparing for market, processing, handling, and marketing” their products).

⁴⁰ Defense Production Act of 1950, 50 App. U.S.C. § 2158 (2000) (providing that the President or his delegate, in conjunction with the Attorney General, may approve voluntary agreements among various industry groups for development of “preparedness programs” to meet potential national emergencies). The Act further provides that persons participating in such an agreement are immunized from the operation of antitrust laws with respect to good faith activities undertaken to fulfill their responsibilities under agreement. *Id.*

⁴¹ Newspaper Preservation Act of 1970, 15 U.S.C. §§ 1801–04 (2000) (granting limited exemption for joint operating arrangements between newspapers to share production facilities and combine commercial operations, provided that newspapers retain separate editorial and reporting staffs, determine their editorial policies independently, and so long as one newspaper party to the joint venture is classified as failing).

⁴² Sports Broadcasting Act, 15 U.S.C. §§ 1291–95 (2000) (exempting, with some limitations, agreements among professional football, baseball, basketball, and hockey teams to negotiate jointly, through their leagues, for the sale of television rights).

⁴³ Small Business Act, 15 U.S.C. §§ 631–57 (2000) (granting the Small Business Administration authority to, after consultation with the Attorney General and the Chair of the FTC, and with the Attorney General’s prior written approval, approve any agreement between small business firms providing for a joint program of research and development if the Administrator finds that such program will “strengthen the free enterprise system and the economy of the Nation”). To the extent the President has delegated his authority under section 640, the DOJ may also be asked to approve—on the Attorney General’s behalf—proposed voluntary agreements or programs among small business concerns to further objectives of the Small Business Act found to be in the public interest as contributing to national defense.

⁴⁴ Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34–36 (2000) (providing antitrust immunity for local government officials and employees thereof acting in an official capacity with respect to actions brought under the Clayton Act for damages, fees, or costs). The Act provides similar immunity for claims directed at a person, as that term is defined in 15 U.S.C. § 12 (2000), based on official action directed by local government. *See id.* § 36.

⁴⁵ *See, e.g.,* Rodriguez & Williams, *supra* note 6, at 226 & n.79 (collecting literature); *see also* ICN ADVOCACY REPORT, *supra* note 1, at ii. One observation in Washington, D.C., was that Microsoft (before its antitrust headaches) had devoted little energy in lobbying officials, which left it exposed to the government’s antitrust prosecution. Jeffrey H. Birnbaum, *Learning from Microsoft’s Error, Google Builds a Lobbying Engine*, WASH. POST, June 20, 2007, at D01. As the *Post* commented: “For a couple of embarrassing years in the mid-1990s, Microsoft’s primary lobbying

Commission case, for example, the social costs included the costs in promulgating and maintaining this anticompetitive regulation, in educating real estate brokers not to compete by offering such rebates, and the Commission's costs of policing and punishing violators who offered rebates.⁴⁶ A third harm is that such anticompetitive laws may impact the effectiveness of competition policies elsewhere.⁴⁷ Some of the corporate executives in America's electrical price-fixing cases in the 1960s reported that they were introduced to such price fixing as part of the federally-approved price-control programs during and after World War II.⁴⁸

In addition to the risks of imperfect information and regulatory capture, the government can undertake anticompetitive intervention because of weaker incentives to avoid mistakes than private actors who fully bear the costs of their mistakes, "political myopia," and the lack of direct accountability to the public.⁴⁹ As Avinash Dixit stated, "there is no market failure so bad that the U.S. government and political process could not do even worse."⁵⁰

presence was 'Jack and his Jeep'—Jack Krumholz, the software giant's lone in-house lobbyist, who drove a Jeep Grand Cherokee to lobbying visits." After the DOJ filed the antitrust lawsuit in 1998, Microsoft "began what was then considered the largest government-affairs makeover in corporate history" and now has "one of the most dominating, multifaceted, and sophisticated influence machines around—one that spends tens of millions a year." Of the twenty-three people working out of Microsoft's government affairs office in Washington, sixteen are lobbyists. *Id.*

⁴⁶ Real estate brokers in Kentucky who advertised such rebates, no matter how small, were often turned in by fellow brokers. Consequently, not only were consumers harmed by not being offered discounts, but there are the costs from the regulatory capture of the Commission, as funds were spent in policing and punishing such pro-competitive behavior.

⁴⁷ AMC Commissioner Donald G. Kempf, Jr. asked: "How do you reconcile the ever increasing demand for higher fines and higher sentences with the free pass to so much of the price fixing that goes on under the immunities and exemptions?" Criminal Remedies, Public Hearing Before the Antitrust Modernization Commission 71 (2005), http://govinfo.library.unt.edu/amc/commission_hearings/criminal_remedies.htm.

⁴⁸ Richard Austin Smith, *The Incredible Electrical Conspiracy*, FORTUNE, Apr. 1961, at 132, 136.

⁴⁹ François Moreau, *The Role of the State in Evolutionary Economics*, 28 CAMBRIDGE J. ECON. 847, 850 (2004).

⁵⁰ Avinash Dixit, *In Honor of Paul Krugman: Winner of the John Bates Clark Medal*, 7 J. ECON. PERSP. 173, 182 n.7 (1993). The federal government in turn may blame state and local governments. Cooper et al., *supra* note 7, at 1102 n.40 (statement of FTC Chairman Daniel Oliver) ("It is now convincingly argued that state and local governments create some of the most blatantly anticompetitive

Thus, competition advocacy and antitrust enforcement unite under a single banner: promoting efficiency. Competition enforcers serve as zealous bouncers: The antitrust enforcers should hesitate intervening inside the club (the free market) to attack private restraints—except that some Chicago School adherents permit intervention in the rare cases of sustained market failure. But competition enforcers should aggressively bounce their brethren from entering the club, especially those government agents seeking to improve the market or help some patrons at the others' expense. By aggressively keeping these government agents out, the free market forces will lead to greater allocative, productive, and dynamic efficiency.

A. *What Is Competition? Reexamining Competition Advocacy*

Competition advocacy appears uncontroversial. For legislation that condones such naked horizontal restraints on competition, the quick response is to eliminate the statute and allow market forces to allocate efficiently goods and services. If everyone advocated and applied this conception of competition advocacy, there would be little left to advocate and competition officials would prosecute cartels and the few mergers to monopoly.

But upon scrutiny, competition advocacy is not so straightforward. First, how does one define competition? Second, what are the goals of that competition policy? What, exactly, are we advocating when we advocate competition? Does competition policy have non-economic or strictly economic objectives? If the latter, is competition policy concerned about total welfare or consumer welfare? Are these objectives an end or the means to some greater end? Third, how does one achieve these goals? This depends on our understanding of the various conditions that are the most favorable to achieving the objectives of competition.⁵¹ What role does the government play? Is the government an exogenous force that often distorts competitive forces? Or does an effective competitive system need “an intelligently designed and continuously adjusted legal framework[?]”⁵² For a competitive market to remain competitive

combinations to be found in the economy.”).

⁵¹ 2 THE COLLECTED WORKS OF F.A. HAYEK, THE ROAD TO SERFDOM: TEXT AND DOCUMENTS 71 (Bruce Caldwell ed., Univ. of Chicago Press 2007).

⁵² *Id.* at 88.

may require not only the basic legal institutions, such as the rule of law, contract and property rights, and transparent efficient courts, but additional institutions, such as a competitive and independent media. Informal social norms may support or hinder the attainment of these competition goals, such as norms that create entry barriers based on gender, race, age, sexual orientation, or religion. If so, government action or inaction is much more nuanced than under the Chicago School's dogma and can be evil, good, or amoral.

Why delve into these issues? Why not focus on the straightforward government restraints that prevent Italian barbers from cutting hair on Monday or Kentucky real estate agents from offering a photo with Santa as an inducement? Advocating competition is meaningless if your audience does not share your conception of competition or its objectives. Moreover, viewing competition as a self-initiating force that ultimately attains a stable equilibrium may be wrong. Competition is far more complex and dynamic, and the proper focus may not be short-term efficiencies or even price, but fostering open markets to better promote dynamic efficiencies. Competition may also differ across countries with different political and economic histories, levels of state ownership, and legal and informal cultural norms, so the international consensus of "competition advocacy" may not be such a consensus after all.

B. Imperfections of Perfect Competition

In advocating competition, one must have some concept of competition in mind. Despite the passage of the Sherman Act over a century ago, and the growth of over one hundred competition authorities worldwide, there is no generally accepted definition among competition authorities for the term "competition." Although central to competition policy and economic thinking in general, the concept of competition, as John Vickers recognized, is "one that has taken on a number of interpretations and meanings, many of them vague."⁵³ The Chilean Competition Tribunal, for example, recently said, "the only objective of competition policy is to promote and protect

⁵³ John Vickers, *Concepts of Competition*, 47 OXFORD ECON. PAPERS 1, 3 (1995); see also Jay B. Barney, *Types of Competition and the Theory of Strategy: Toward an Integrative Framework*, 11 ACAD. MGMT. REV. 791, 798 (1986) ("Competition . . . is a concept that can mean different things at different times to different firms.").

competition,” but then recognized that “one of the main difficulties is to define legally what ‘free competition means,’ or to articulate why competition itself should be protected.”⁵⁴

Under neoclassical economic theory, competition in its perfect form is where “buyers and sellers are so numerous and well informed that each can act as a price-taker, able to buy or sell any desired quantity without affecting the market price.”⁵⁵ A perfect market assumes transparent prices, highly elastic demand curves, easy entry and exit, and informed profit-maximizing producers and consumers. Price will equal marginal cost, and the market will produce the efficient level of outputs with the most efficient techniques, using the minimum quantity of inputs.⁵⁶

But this economic model cannot serve as the definition of competition for policy purposes. First, “the real world contains very few such markets.”⁵⁷ A second problem with the perfect competition model is that the one market today that closely approximates it is hardly free of governmental restraints. The economic model of perfect competition is remarkable in its absence of laws, regulations, or norms.⁵⁸ But today’s approximation of that model, the stock market, can hardly be described as a “self-initiating process.”⁵⁹ The securities market is

⁵⁴ 2007 ICN REPORT, *supra* note 19, at 8. In 2004, when Chile’s competition act was amended, “the executive and legislative powers discussed whether ‘free competition’ should be defined more narrowly as a right to participate in economic activities, a means of promoting economic efficiency, or a means of enhancing consumer welfare.” The legislators, as reported by the ICN, “decided that the meaning of ‘free competition,’ that is, an effective competitive process, should be left to the Tribunal’s interpretation, on a case-by-case basis.” *Id.*

⁵⁵ JOHN BLACK, A DICTIONARY OF ECONOMICS 348 (1997); William J. Kolasky, *What Is Competition? A Comparison of U.S. and European Perspectives*, 49 ANTITRUST BULL. 29, 31 (2004) [hereinafter Kolasky, *What Is Competition?*].

⁵⁶ PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 106–41 (15th ed. 1995).

⁵⁷ AMC REPORT, *supra* note 18, at 2.

⁵⁸ Jean-Luc Gaffard & Michel Quéré, *What’s the Aim for Competition Policy: Optimizing Market Structure or Encouraging Innovative Behaviors*, 16 J. EVOLUTIONARY ECON. 175, 179 (2006).

⁵⁹ RICHARD A. POSNER, ANTITRUST LAW 164 (2d ed. 2001). The behavioral finance literature has questioned the Efficient Market Hypothesis. As Andrew Lo observed, “[e]ven after several decades of research and literally thousands of studies, many published in this journal, economists have not yet reached a consensus about whether markets—particularly financial markets—are, in fact, efficient.” Andrew W. Lo, *The Adaptive Markets Hypothesis: Market Efficiency from an Evolutionary Perspective*, 30 J. PORTFOLIO MGMT. (30TH ANNIVERSARY ISSUE 2004) 15, 16 (2004);

built upon a complex regulatory infrastructure, which in turn interacts with contract, property, corporate, and banking law. The Securities and Exchange Commission has “comprehensive authority,” as the Supreme Court recently noted with respect to IPOs, “to forbid, permit, encourage, discourage, tolerate, limit, and otherwise regulate virtually every aspect of the practices in which underwriters engage.”⁶⁰ Indeed, the Court recently held that when the securities and antitrust laws were clearly incompatible to the alleged conduct, the competition laws are displaced.⁶¹ The Court had little faith in competition laws, competition policy experts, or even non-experts such as judges or juries to determine when an IPO commission is excessive: “[W]ho but the SEC itself could do so with confidence?”⁶² Thus, for a competition policy official, the cruelest irony is that the Court entrusted price regulation to a bureaucracy far removed from direct political accountability, which has minimal expertise in competition policy.

A third problem with the model of perfect competition is its incompleteness, as it has “little to say about productive and dynamic efficiency.”⁶³ It is also inconsistent with the popular conception of competition; Friedrich Hayek noted that

[t]he peculiar nature of the assumptions from which the theory of competitive equilibrium starts stands out very clearly if we ask which of the activities that are commonly designated by the verb “to compete” would still be possible if those conditions were

see also 2 ADVANCES IN BEHAVIORAL FINANCE (Richard H. Thaler ed., 2005); ROBERT J. SHILLER, IRRATIONAL EXUBERANCE (2d ed. 2005); Robert A. Prentice, *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 VAND. L. REV. 1663, 1704–05 nn.208–11 (2003) (citing additional articles); Lynn A. Stout, *The Mechanisms of Market Inefficiency: An Introduction to the New Finance*, 28 J. CORP. L. 635 (2003).

⁶⁰ Credit Suisse Sec. (USA) LLC v. Billing, 127 S. Ct. 2383, 2392 (2007).

⁶¹ *Id.* at 2395. The Court reached its holding, despite the federal securities laws’ broad savings clauses that preserve rights and remedies existing outside of the securities laws. Justice Thomas, dissenting, noted that the savings clauses explicitly save the very remedies the Court holds to be impliedly precluded. *Id.* at 2399 (Thomas, J., dissenting). Of course, if the Court had held differently in permitting challenges to these securities practices under the federal antitrust laws, one could argue that the district courts and federal antitrust agencies likewise would engage in normative judgments removed from the public opinion.

⁶² *Id.* at 2395 (majority opinion).

⁶³ Vickers, *supra* note 53, at 7; *see also* Douglass C. North, *Economic Performance Through Time*, 84 AM. ECON. REV. 359, 359 (1994) (“Neoclassical theory is simply an inappropriate tool to analyze and prescribe policies that will induce development.”).

all satisfied. Perhaps it is worth recalling that, according to Dr. Johnson, competition is “the action of endeavoring to gain what another endeavors to gain at the same time.” Now, how many of the devices adopted in ordinary life to that end would still be open to a seller in a market in which so-called “perfect competition” prevails? I believe that the answer is exactly none. Advertising, undercutting, and improving (“differentiating”) the goods or services produced are all excluded by definition—“perfect” competition means indeed the absence of all competitive activities.⁶⁴

A fourth shortcoming of the perfectly competitive market is its anti-democratic stance. Homogeneity in products and knowledge is idealized: No individual can affect the market; all are price takers. There is little incentive to innovate, as price equals marginal cost. Even in markets not characterized by perfect competition, the emphasis is on total welfare. Competitors can readily absorb individuals, fringe firms, and de novo entrants if greater productive efficiencies ensue. Anyone can be crushed under the wheel for the sake of the unmeasurable total welfare. But individuals, fringe firms, and de novo entrants do matter and can play a far greater role as their creativity and distinctiveness profoundly alter the industry's future.⁶⁵

A fifth problem with any idealized market condition is its dispensability. The neoclassical economic model of perfect competition assumes that profit-maximizing market participants pursue their economic self-interest, with perfect knowledge and willpower. If these simplistic assumptions of human behavior were true, then these profit-maximizers' behavior should be easy to predict. A state planner arguably could model any scenario using the hypothetical profit-maximizer, and then centrally plan for the same outcome. There would be no compelling reason to favor free competition without any government involvement over a centrally planned economy. It is precisely because of the complexity and unpredictability of the competitive process, the imperfections of human knowledge, and the variety of conditions intrinsic to or affecting markets, such as legal and cultural norms, technology, production, and service norms, that necessitate against an ideal market or a centrally planned

⁶⁴ FRIEDRICH A. HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* 96 (1948).

⁶⁵ See C. Mantzavinos, *The Institutional-Evolutionary Antitrust Model*, 22 EUR. J.L. & ECON. 273, 276 (2006).

economy. An inverse relationship exists between the two concepts: The greater the infirmities of the assumptions underlying perfect competition, the less practical a centrally planned economy becomes.

Indeed the behavioral economics literature has critiqued for decades the “rationality” assumptions as being unrealistic.⁶⁶ Actual firm behavior—characterized as bounded rationality—may vary.⁶⁷ Consumers may react differently, depending on how the choice is phrased.⁶⁸ Contrary to the neoclassical economic theory, individuals may elect suboptimal outcomes based on

⁶⁶ For interesting surveys of the many areas of research by behavioral economists, see Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1487 (1998); Prentice, *supra* note 59, at 1666 n.7. For a broader survey of literature attacking the conventional economic theories, see generally ERIC D. BEINHOCKER, *THE ORIGIN OF WEALTH: THE RADICAL REMAKING OF ECONOMICS AND WHAT IT MEANS FOR BUSINESS AND SOCIETY* (2007). At the recent annual meeting of the American Economic Association, the Nobel laureate George A. Akerlof also questioned the assumptions of human behavior underlying neoclassical economic theory and called for a greater focus on actual human nature and the detailed facts of experience. See Louis Uchitelle, *Encouraging More Reality in Economics*, N.Y. TIMES, Jan. 6, 2007, at C1.

⁶⁷ See B. Verspagen, *The Use of Modelling Tools for Policy in Evolutionary Environments*, in ENVIRONMENTAL POLICY AND MODELLING IN EVOLUTIONARY ECONOMICS 19, 22 (A. Faber et al. eds., 2006).

⁶⁸ One example of such “framing effects” is with respect to credit cards. After the credit card companies’ “No-Discrimination Rule” was abolished, Dutch merchants could impose surcharges or offer discounts based on how the customer was going to pay. Suppose the customer has credit cards A, B, and C in her wallet. Although the customer may be ambivalent about which particular credit card to use for that transaction, the merchant bears a different cost depending on the credit card that the customer ultimately takes out of her wallet—for example, on a \$1000 transaction, the merchant may net \$990, \$985, or \$980 for transactions with cards A, B, and C, respectively. The merchant has a strong incentive to steer the customer to the credit card that costs the merchant the least for that transaction. To incentivize the customer to use credit card A, which has the lowest interchange fee, the merchant can (1) impose surcharges for transactions with the higher cost cards, or (2) offer discounts for transactions with lower cost cards. Under neoclassical economic theory, the two options are equivalent, and self-interested profit-maximizers should not care whether the option is framed as a discount or surcharge. In reality, of the consumers surveyed, 74 percent thought it (very) bad if a merchant asked for a surcharge for using a credit card. But when asked about a merchant offering a discount, only 49 percent thought it (very) bad, with 22 percent neutral and 21 percent saying it is a (very) good thing. See ITM RESEARCH, *THE ABOLITION OF THE NO-DISCRIMINATION RULE* 11–12 (2000), <http://ec.europa.eu/comm/competition/antitrust/cases/29373/studies/netherlands/report.pdf>. It is interesting that over 72 percent of the merchants surveyed were unaware of the rule’s abolition, and 89 percent of the merchants did not surcharge customers. Nine percent of the merchants offered discounts to customers who paid by different means. *Id.* at 7–8.

certain heuristics.⁶⁹ Firms, at times, enter markets when irrational to do so under neoclassical economic theory, and firms, at other times, do not enter markets when in theory it would be the profit-maximizing response. Neither the state nor the private economic agents are endowed with perfect knowledge, but adopt a “*satisficing* and adaptive behavior.”⁷⁰

Ultimately, competition cannot be an ideal state, such as the perfectly competitive market with many buyers and sellers, none of whom individually can affect the market price. Competition occurs on various dimensions (price, quality, choice, innovation) across markets with different levels of product differentiation, entry barriers, transparency, stages of the product life cycle, demands for technological innovation, and operating at different levels of efficiency, none of which can be shoe-horned into a single state of perfect competition.

C. *How Does Competition Work?*

Because competition in most industries does not resemble the model of perfect competition, the first order is to understand better how actual competition works in particular markets in particular communities at particular time periods and the interplay among private institutions, government institutions, and informal social, ethical, and moral norms. This has been competition policy's greatest failing. Understanding the

⁶⁹ Among these heuristics are

[1] loss aversion (namely having significantly greater concern about losing a given amount than in the utility of gaining the same amount); [2] the endowment effect (when we demand much more to give up and sell an object than what they would be willing to pay to acquire that object); [3] status quo bias (when the choice of default option impacts the outcome); [4] framing effects (the way the choice is framed—such as a sure gain or avoiding a loss—alters the way we decide); [5] availability heuristic (when we assess the probability of an event by asking whether relevant examples come readily to mind); [6] representative heuristic (when we ignore the “base rates and overestimate the correlation between what something appears to be and what something actually is”); [7] overconfidence bias (when we believe that good things are more likely (and bad things less likely) than average to happen to us); and [8] hindsight bias (our tendency to overestimate the ex ante prediction that we had concerning the likelihood of an event's occurrence after learning that it actually did occur).

Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513, 527–28 (2007) [hereinafter Stucke, *Behavioral Economists*] (citations omitted).

⁷⁰ See Moreau, *supra* note 49, at 851.

competitive process cannot be arrived at deductively from the model of a perfectly competitive market composed of self-interested profit-maximizers, but inductively through empirical research. As Friedrich Hayek noted over sixty years ago:

The systematic study of the forms of legal institutions which will make the competitive system work efficiently has been sadly neglected; and strong arguments can be advanced that serious shortcomings here, particularly with regard to the law of corporations and of patents, not only have made competition work much less effectively than it might have done but have even led to the destruction of competition in many spheres.⁷¹

When receiving his Nobel Prize in 1992, Ronald H. Coase raised a similar criticism: “These ex-communist countries are advised to move to a market economy, and their leaders wish to do so, but without the appropriate institutions no market economy of any significance is possible. If we knew more about our own economy, we would be in a better position to advise them.”⁷² Today, we remain ignorant about institutions.⁷³ The federal antitrust agencies do not systematically review across industries how governmental institutions and informal norms support market activity and promote competition.⁷⁴ Instead, antitrust authorities since the Reagan Administration remain grounded in the Chicago School’s simplistic theories deduced from the model of perfect competition and flawed assumptions of “rational” profit-maximizing behavior.⁷⁵

⁷¹ HAYEK, *supra* note 51, at 87.

⁷² R.H. Coase, *The Institutional Structure of Production*, 82 AM. ECON. REV. 713, 714 (1992).

⁷³ See Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. ECON. LITERATURE 595, 595 (2000).

⁷⁴ The DOJ and FTC occasionally evaluate particular industries, such as in the 1930s when the congressional Temporary National Economic Committee investigated the state of competition in various industries. As the DOJ later reported, this empirical analysis was helpful. The factual data from this effort

revealed the urgent need for a vigorous attack on monopoly power and concentration of economic resources and gave added impetus in 1938 and subsequently to the effort to reverse or at least check the trend toward concentration which had prevailed for most of the preceding half century, and to overcome some of the obstacles to effective enforcement of the antitrust laws.

U.S. DEP’T OF JUSTICE, A STUDY OF THE DEVELOPMENT OF THE ANTITRUST LAWS AND CURRENT PROBLEMS OF ANTITRUST ENFORCEMENT, SUBMITTED TO THE U.S. SENATE SUBCOMMITTEE ON MONOPOLY 9 (2d Sess. 1952).

⁷⁵ See Posner, *Chicago School*, *supra* note 23, at 928. As Posner admitted, “[i]t is a curiosity, and a source of regret, that to this day [1979] very few of [one of the

1. Is Competition a Zero-Sum Game?

By undertaking more empirical research, policy makers may question the assumption of competition as necessarily a zero-sum game: two tired dogs fighting for the last bone.⁷⁶ The winners monopolize; the losers exit the marketplace or scramble to join other firms.

This assumption has several implications for competition policy. First, if the default rule is for competitors to fight, cooperation among competitors is viewed with suspicion.⁷⁷ Second, companies enter markets with the expectation of taking revenues away from competitors to achieve monopoly rents.⁷⁸ Third, in pursuing their economic self-interest, individuals will often free-ride when confronted with public goods and in the absence of vertical restraints.⁷⁹ Finally, when they conflict, economic self-interest trumps cooperation.⁸⁰

movement's founders Aaron] Director's ideas have been subjected to systematic empirical examination." *Id.* at 931 n.13. Indeed Judge Posner criticized the Harvard School's fondness of studying competition in particular industries, and discarding the "powerful simplifications of economic theory . . . in favor of microscopic examination of the idiosyncrasies of particular markets." *Id.* at 931.

⁷⁶ Professor Stigler described competition as arising "whenever two or more parties strive for something that all cannot obtain." George J. Stigler, *Competition*, in 1 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 531, 531 (John Eatwell et al. eds., 1987). As the recent FTC Chairwoman said: "To compete effectively, we look for ways to improve our performance, including taking advantage of a competitor's weakness." Majoras, *supra* note 7, at 1178. Spectators come to athletic contests to cheer for a winner, but even here, a degree of cooperation is required to arrange the contest. Spectators expect that the winner prevails in this zero-sum game within the norms of fairness.

⁷⁷ See *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407–08 (2004) (expressing concern that compelling negotiation between competitors may facilitate collusion).

⁷⁸ The Court surmised that monopolies and the charging of monopoly prices were "an important element of the free-market system," and the inducement to "attract[] 'business acumen' in the first place." *Id.* at 407. See Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. (forthcoming 2009), available at <http://ssrn.com/abstract=1116463> (discussing how the Court's economic assumptions in *Trinko* are wrong and inconsistent with the Sherman Act's concerns of monopolies' political, social, and ethical implications).

⁷⁹ See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2715 (2007).

⁸⁰ See, e.g., George Stigler, *Economics or Ethics?*, in 2 THE TANNER LECTURES ON HUMAN VALUES 145, 176 (Sterling M. McMurrin ed., 1981), available at <http://www.tannerlectures.utah.edu/lectures/documents/stigler81.pdf> ("[When] self-interest and ethical values with wide verbal allegiance are in conflict[,] [m]uch of the time, most of the time in fact, the self-interest theory . . . will win.").

Although competition has a zero-sum aspect, which is ascribed to Darwinian survival of the fittest,⁸¹ one cannot exclusively rely on this assumption. First, our species' survival depends upon cooperation and our ability to look beyond narrow self-interest.⁸² The behavioral economics literature has pointed to evidence of "strong reciprocity," which entails "a predisposition to cooperate with others and to punish those who violate the norms of cooperation, at personal cost, even when it is implausible to expect that these costs will be repaid either by others or at a later date."⁸³ Distrust and the naked pursuit of

⁸¹ Charles Darwin, who wrote of natural selection, did not introduce this phrase. Instead, British economist Herbert Spencer wrote: "This survival of the fittest, which I have here sought to express in mechanical terms, is that which Mr. Darwin has called 'natural selection,' or the preservation of favoured races in the struggle for life." HERBERT SPENCER, *THE PRINCIPLES OF BIOLOGY* 444 (Univ. Press of the Pac. 2002).

⁸² See, e.g., Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 *CHI.-KENT L. REV.* 23, 45–46 (1989) (arguing that cultural institutions that promote cooperation are more likely to endure). Rather than driven by pecuniary self-interest, individuals may act contrary to their self interest for reason of praise as well as "shame, guilt, empathy, or sensitivity to social sanction." See Samuel Bowles & Herbert Gintis, *Origins of Human Cooperation, in GENETIC AND CULTURAL EVOLUTION OF COOPERATION* 429, 432–33 (Peter Hammerstein ed., 2003). "Without [these] prosocial emotions, we would all be sociopaths, and human society would not exist, however strong the institutions of contract, governmental law enforcement, and reputation." *Id.* at 433. Individuals may aspire toward benevolence in accordance with some religious or social norm of fairness even though such behavior deviates from the tenets of wealth maximization. Rational choice theory predicts that the dominant strategy will be to free ride when confronted with a public good. But in public good experiments, many did not free ride at all, or not to the extent predicted under rational choice theory: "[P]eople have a tendency to cooperate until experience shows that those with whom they're interacting are taking advantage of them." RICHARD H. THALER, *THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE* 14 (1992). Individuals at times act benevolently when not in their financial interest; conversely, individuals may sacrifice monetary gains to punish those they feel are acting unfairly—deviating from an established reference point of what is fair. See generally Stucke, *Behavioral Economists*, *supra* note 69, at 513–18 (discussing the intersection of antitrust and behavioral economics).

⁸³ Herbert Gintis et al., *Explaining Altruistic Behavior in Humans*, 24 *EVOLUTION & HUM. BEHAV.* 153, 154 (2003). These authors argue that "the evolutionary success of our species and the moral sentiments that have led people to value freedom, equality, and representative government are predicated upon strong reciprocity and related motivations that go beyond inclusive fitness and reciprocal altruism." *Id.* The early economists did not equate wealth maximization with rational behavior. Adam Smith, for example, defined prudence as "[w]ise and judicious conduct, when directed to greater and nobler purposes than the care of the health, the fortune, the rank and reputation of the individual." ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 253 (Knud Haakonssen ed., 2002) (1759). Prudence

self-interest may not only be normatively undesirable, but at times lead to sub-optimal economic outcomes.

One common experiment that reflects such sub-optimal outcomes is the Ultimatum Game.⁸⁴ When researchers expanded this experiment beyond university students to fifteen small-scale economies from twelve countries on four continents,⁸⁵ these group members, like the university students, behaved in a reciprocal manner and did not offer the nominal amount. But the range of offers varied more amongst members of these small-scale economies than did the range of offers by university students.

Differences among societies in “market integration” and “cooperation in production” explain[ed] a substantial portion of the behavioral variation between groups: The higher the degree of market integration and the higher the payoffs to cooperation, the greater the level of cooperation and sharing in experimental games. The societies were rank-ordered in five categories—

should be “combined with many greater and more splendid virtues, with valour, with extensive and strong benevolence, with a sacred regard to the rules of justice, and all these supported by a proper degree of self-command.” *Id.* Benevolence was not simply a normative ideal for Smith; individuals acted, at times, out of goodness, even when they derived nothing financially from it. *Id.* at 11 (“How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it.”).

⁸⁴ In the Ultimatum Game, two players are shown a sum of money, for example \$100, of which one player, the “proposer,” must offer an amount of his discretion to the second player, the “responder.” Gintis et al., *supra* note 83, at 157. If the recipient accepts the offer, the money is shared as the first player proposed, but if the recipient rejects the offer, both get nothing. *Id.* Under rational choice theory, where players pursue their economic self-interest, the offer would be a nominal sum, for example one penny, which the recipient would accept. *Id.* When actually played, however,

the self-interested outcome is never attained and never even approximated.

In fact, as many replications of this experiment have documented, under varying conditions and with varying amounts of money, proposers routinely offer respondents very substantial amounts (50% of the total generally being the modal offer) and respondents frequently reject offers below 30%.

Id. (emphasis omitted) (citing various experiments).

⁸⁵ The groups studied included:

[T]hree foraging groups (the Hadza of East Africa, the Au and Gnaou of Papua New Guinea, and the Lamalera of Indonesia), six slash-and-burn horticulturists (the Aché, Machiguenga, Quichua, and Achuar of South America and the Tsimane and Orma of East Africa), four nomadic herding groups (the Turguud, Mongols, and Kazakhs of Central Asia, and the Sangu of East Africa), and two sedentary, small-scale agricultural societies (the Mapuche of South America and Zimbabwe farmers in Africa).

Id. at 158.

“market integration” (how often do people buy and sell, or work for a wage), “cooperation in production” (is production collective or individual), plus “anonymity” (how prevalent are anonymous roles and transactions), “privacy” (how easily can people keep their activities secret), and “complexity” (how much centralized decision-making occurs above the level of the household). Using statistical regression analysis, only the first two characteristics, market integration and cooperation in production, were significant, and they together accounted for 66 of the variation among societies in mean ultimatum game offers.⁸⁶ Moreover, “the nature and degree of cooperation and punishment in the experiments,” they found, were “generally consistent with economic patterns of everyday life in these societies. In a number of cases, the parallels between experimental game play and the structure of daily life were quite striking.”⁸⁷

⁸⁶ *Id.*

⁸⁷ *Id.* at 159. As the behavioral economists reported:

The Orma immediately recognized that the public goods game was similar to . . . a locally initiated contribution that households make when a community decides to construct a road or school . . . and [they] gave generously (mean 58% with 25% maximal contributors).

Among the Au and Gnau, many proposers offered more than half the pie [fifty percent], and many of these “hyperfair” offers were rejected! This reflects the Melanesian culture of status-seeking through gift giving. Making a large gift is a bid for social dominance in everyday life in these societies, and rejecting the gift is a rejection of being subordinate.

Among the whale hunting Lamalera, 63% of the proposers in the ultimatum game divided the pie equally . . . (the mean offer was 57%). In real life, a large catch, always the product of cooperation among many individual whalers, is meticulously divided into predesignated parts and carefully distributed among the members of the community.

Among the Aché, 79% of proposers offered either 40% or 50% and 16% offered more than 50%, with no rejected offers. In daily life, the Aché regularly share meat, which is being distributed equally among all other households, irrespective of which hunter made the kill.

[In contrast,] the Hadza . . . made low offers and had high rejection rates in the ultimatum game. This reflects the tendency of these small-scale foragers to share meat, but a high level of conflict and frequent attempts of hunters to hide their catch from the group.

Both the Machiguenga and Tsimane made low ultimatum game offers, and there were virtually no rejections. These groups exhibit little cooperation, exchange, or sharing beyond the family unit. Ethnographically, both show little fear of social sanctions and care little about “public opinion.”

The Mapuche’s social relations are characterized by mutual suspicion, envy, and fear of being envied. This pattern is consistent with the

Likewise, in reviewing traits that appear with regularity in studies of cultures of high-performing and adaptive companies, a senior advisor to McKinsey & Co. identified ten illustrative performing, cooperating, and innovating norms. These coincide with religious and ethical norms involving respect and reciprocity (for example, do unto others as you would have them do unto you), honesty, and trust.⁸⁸ Why would we internalize ethical and religious norms fostering cooperation in many facets of our daily life, with our family members, neighbors, co-workers, customers, and suppliers,⁸⁹ but then encourage self-interest, disrespect, distrust, and dishonesty toward our competitors?

On a macro level, as economist Benjamin Friedman describes, whenever America was mired in economic stagnation its democratic values stagnated as well. Hostility toward immigrants, the poor, and other competing groups, whether by nationality, religion, race, or gender, increased as these groups were seemingly threatened by others stealing their fixed, or dwindling, share of the pie. In contrast, during periods of economic growth, our society slowly progressed from this zero-sum mentality toward openness, mobility, and democracy.⁹⁰

Mapuche's postgame interviews in the ultimatum game. Mapuche proposers rarely claimed that their offers were influenced by fairness, but rather [by a] fear of rejection. Even proposers who made hyperfair offers claimed that they feared rare spiteful responders, who would be willing to reject even 50/50 offers.

Id.

⁸⁸ BEINHOCKER, *supra* note 56, at 370–71.

⁸⁹ The internalization of such norms has many beneficial attributes, including reducing the costs to police and punishing deviant behavior, as

[a]ll successful cultures foster internal norms that enhance personal fitness, such as future orientation, good personal hygiene, positive work habits, and control of emotions. Cultures also universally promote altruistic norms that subordinate the individual to group welfare, fostering such behaviors as bravery, honesty, fairness, willingness to cooperate, and empathy with distress of others.

Bowles & Gintis, *supra* note 82, at 440.

⁹⁰ BENJAMIN M. FRIEDMAN, *THE MORAL CONSEQUENCES OF ECONOMIC GROWTH* 79–102 (2005). Professor Friedman identifies several historical time periods where society, in response to economic growth, moved toward greater openness, tolerance, mobility, fairness, and democracy: (1) the Horatio Alger era (1865–1880), (2) the Progressive era (1895–1919), (3) the Civil Rights era (1945–1973), and (4) tentatively the New beginnings (1993 onward, which early on had widely distributed rising incomes, but is questionable today). *Id.* at 214. In contrast, American society moved away from these Enlightenment ideals in response to periods of economic stagnation, such as (1) the Populist era (1880–95), (2) the Klan era (1920–29), and (3) the Backlash era (1973–93). *Id.* The one great exception, as Professor Friedman

Rather than assume competition policy as refereeing a zero-sum game, competition authorities may want to promote some non-zero-sum forms of cooperation that promote overall welfare, such as joint venturers pooling resources and labor to develop new products or technologies. Antitrust enforcers would still punish forms of cooperation that harm consumers, such as competitors colluding to fix prices and transfer wealth from consumers to themselves.⁹¹ Indeed, the United States antitrust policies over the past twenty years have increasingly acknowledged the procompetitive benefits of such cooperation among competitors. The FTC and DOJ Joint Venture Guidelines recognize that: (1) “[i]n order to compete in modern markets, competitors sometimes need to collaborate,” (2) “[c]ompetitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs,” and (3) “[s]uch collaborations often are not only benign but procompetitive.”⁹² Such cooperation among competitors may not

describes, was the New Deal era (1929–39). Not only did this economic disaster have an extraordinarily widespread impact, but “the socially corrosive power of a more ordinary economic distress [was] overwhelmed by still stronger forces of a different kind if the distress [was] so great as to constitute an out-and-out crisis.” *Id.* at 178. If America can no longer sustain its rising standard of living for its citizens, then our democratic ideals are under greater risk as we move toward a zero-sum game mentality. As Professor Friedman concludes, “[o]nly with sustained economic growth, and the sense of confident progress that follows from the advance of living standards for most of its citizens, can even a great nation find the energy, the wherewithal, and most importantly the human attitudes that together sustain an open, tolerant, and democratic society.” *Id.* at 436.

⁹¹ BEINHOCKER, *supra* note 56, at 274 (“Complex, large-scale cooperation is impossible without a well-functioning legal and regulatory system.”).

⁹² FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 1 (2000), <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>. In the last twenty years, “the federal antitrust agencies have brought relatively few civil cases against competitor collaborations. Nevertheless, a perception that antitrust laws are skeptical about agreements among actual or potential competitors may deter the development of procompetitive collaborations.” *Id.* Moreover, “Congress has protected certain collaborations from full antitrust liability by passing the National Cooperative Research Act of 1984 (“NCRA”) and the National Cooperative Research and Production Act of 1993 (“NCRPA”) (codified together at 15 U.S.C. §§ 4301–06).” *Id.* at 1 n.1. See generally 15 U.S.C. §§ 4301–06 (2000).

necessarily lead to procompetitive results,⁹³ but it may not cause anticompetitive effects either.

Another implication for viewing competition broadly to include non-zero-sum aspects is the positive spillover effects of localized competition. Under a zero-sum view of competition, one firm's gain is another firm's loss. One concern in developing countries is that "cut throat" competition leads to firms exiting the market "to the detriment of the sector and the economy overall."⁹⁴ But Michael Porter and others have identified how competitors mutually gain from localized competition, such as improving the quality of their labor pool and strengthening their network of suppliers.⁹⁵ Such localized competition may spur variety in products, as competitors strive to differentiate from their rivals' products, as well as in production techniques and strategies, which will lead to further innovation. Under a dynamic evolutionary process, such competition might have informational benefits, as firms learn from their rivals' mistakes and mimic and improve upon their rivals' successes. One empirical study found a positive correlation between industry variety and performance.⁹⁶ In considering why the entire industry benefits when firms pursue a variety of competitive strategies, the study's authors posit that with less variety, there will be less opportunity for the firms to learn of the changing conditions and demands and appropriate responses thereto.⁹⁷

⁹³ Professor Porter, for example, "collected data on all [Japanese] government-sponsored cooperative research projects, which involved several if not most industry competitors. [He] found that those industries in which cooperative research projects occurred were no more likely than the average industry to be competitive, and many cooperative research projects actually worked against industry competitiveness." Michael E. Porter, *Competition and Antitrust: A Productivity-Based Approach*, in *UNIQUE VALUE: COMPETITION BASED ON INNOVATION: CREATING UNIQUE VALUE FOR ANTITRUST, THE ECONOMY, EDUCATION AND BEYOND* 154, 160 (Charles D. Weller ed., 2004), available at <http://www.isc.hbs.edu/053002antitrust.pdf>. Professor Porter also noted that "[t]here have been many collaborative projects in the West involving multiple industry competitors growing out of the efforts to emulate the Japanese case, such as the electric vehicle project. With few if any exceptions, these have proven disappointing." *Id.*

⁹⁴ CUTS, *supra* note 9, at 28.

⁹⁵ See, e.g., Grant Miles et al., *Industry Variety and Performance*, 14 *STRATEGIC MGMT. J.* 163, 164 (1993) (collecting studies); Porter, *supra* note 93, at 161–65.

⁹⁶ Miles et al., *supra* note 95, at 166–72. The study also found that such variety decreased as the industry matured and declined. *Id.* at 172.

⁹⁷ *Id.* at 174.

To evolve, economies must rely on such complex, large-scale cooperation. Technological innovation is often non-zero-sum, servicing a need currently unmet, rather than zero-sum, taking revenues away from entrenched competitors. With the proliferation of brands and increasing product differentiation, competition may no longer be characterized as zero-sum, but as the continual development of products and services to satisfy diverse and unsatisfied needs.⁹⁸ Increased competition can lead firms to differentiate and develop new products and experiment with new processes, technologies, or designs, which will lead to greater variety and interest in that category.

2. Competition as a Dynamic Complex Evolutionary Process

By undertaking more empirical research, policy officials will better understand the dynamics of particular markets. The federal agencies' *Horizontal Merger Guidelines*, like microeconomic theory generally, assume markets are characterized by a static equilibrium, and do not distinguish between manufacturers of computer software and toilet paper.⁹⁹

⁹⁸ In my experience with consumer product mergers, retailers were not interested in devoting shelf space to new products that simply diverted sales from existing products. Instead, retailers wanted products that offered consumers something new and generated incremental demand and sales in the category.

⁹⁹ U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1997), *reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,104, *available at* http://usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html [hereinafter HORIZONTAL MERGER GUIDELINES]. In 1984, the DOJ revised the 1982 Merger Guidelines "to correct any misperception that the [1982] Guidelines are a set of rigid mathematical formulas that ignore market realities and rely solely on a static view of the marketplace." DEP'T OF JUSTICE, STATEMENT TO ACCOMPANY RELEASE OF 1984 MERGER GUIDELINES (June 14, 1984), *reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,103. THE HORIZONTAL MERGER GUIDELINES NOTE CHANGING MARKET CONDITIONS. SEE HORIZONTAL MERGER GUIDELINES, *supra* § 1.521. The competition agencies later discussed an "innovation market," which consists of "research and development directed to particular new or improved goods or processes, and the close substitutes for that research and development." U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 3.2.3 (1995), <http://www.usdoj.gov/atr/public/guidelines/0558.pdf>. This is a narrow view of an innovation market. It assumes that the input—specialized research and development ("R&D") assets or characteristics of specific firms—is a proxy for the output, technological innovation. It depends on the identification of other rival R&D efforts, technologies, and goods that significantly constrain the exercise of market power by the R&D effort. Two antitrust practitioners recently noted the significant omission of innovation in the FTC and DOJ's guidelines and commentary. Darren S. Tucker & Bilal Sayyed, *The Merger Guidelines Commentary: Practical Guidance and Missed Opportunities*, ANTITRUST SOURCE, May 2006, at 11–

When subject to an exogenous force, such as entry, government regulation, new technology, or an energy crisis, this equilibrium is temporarily disrupted, and then ultimately comes to rest at the new equilibrium. Many markets, however, may not be static equilibrium systems; rather, they are complex adaptive systems. In recent years, evolutionary economic theory, building upon Schumpeter's disequilibrium dynamics, has identified the shortcomings of competition, under neoclassical economic theory, in explaining industries where technological change drives economic growth.¹⁰⁰

One shortcoming of the neoclassical conception of competition is its assumption of an equilibrium. "[E]volutionary theory refutes the neoclassical economic theory's focus on a steady state of the economic system."¹⁰¹ Firms, as individuals, make mistakes, readjust, and undertake new strategies. The competitive process "is inherently a process of trial and error with no stable end-state considered by the participants in the process."¹⁰²

A second shortcoming of the neoclassical conception of competition is its assumption that market forces curb the exercise of market power and veer the market toward allocative and productive efficiency. It is silent on path dependency. Private and government agents' prior choices ultimately constrain the set of future choices.¹⁰³ Some industries, like evolutionary processes generally, may be characterized by a degree of persistence of random events. "Rather than being additive to a deterministic equilibrium, small random events in evolutionary processes may accumulate into larger factors that may change the nature of the system and its history."¹⁰⁴ For example, George Black chronicles how small random events (such as a leak in a dam) shaped the economic development along western Connecticut's three rivers, so that hiking today along the Appalachian Trail in Kent is a far different experience than

12, <http://www.abanet.org/antitrust/at-source/06/05/May06-Tucker5=24f.pdf>.

¹⁰⁰ For an antitrust litigator's discussion of the application of evolutionary theories of diversity to antitrust, see Thomas J. Horton, *Competition or Monopoly? The Implications of Complexity Science, Chaos Theory and Evolutionary Biology for Antitrust and Competition Policy*, 51 ANTITRUST BULL. 195 (2006).

¹⁰¹ Moreau, *supra* note 49, at 851.

¹⁰² *Id.*

¹⁰³ *Id.* at 852.

¹⁰⁴ Verspagen, *supra* note 67, at 4.

along the Naugatuck River in Waterbury.¹⁰⁵ Thus, history does matter. Market power, if left unchecked, may have greater implications beyond that industry.

Third, unlike the neoclassical theory of a single equilibrium, industries may have multiple equilibria. The speed with which the market approaches these equilibria may vary over time, and the equilibria themselves may change because of change in the system itself.¹⁰⁶ The result is that “equilibrium points in an evolutionary system are rarely actually reached.”¹⁰⁷ Instead, these equilibrium points “serve as an attractor that pulls the system towards itself for a prolonged period, before giving way to a new attractor.”¹⁰⁸

What do these shortcomings mean for competition policy? First, it shows that it is much harder to predict competitive outcomes in these dynamic markets than under the single equilibrium models of neoclassical economic theory. It means that “[f]or better or for worse, economic life is an adventure.”¹⁰⁹ As competitive dynamics change in unforeseen ways, firms must continually accommodate and adjust to make the most of these changes.¹¹⁰ Those adjustments and accommodations, in turn, lead to further change by private and public institutions.¹¹¹ For example, take the three adjacent Connecticut Rivers: the Housatonic, the Shepaug, and the Naugatuck. Over time, the persistence of random events, such as a failed company, a leak in a dam, and the growth in demand for brass “will lead to an accumulation of random events that is different from every realization of a stochastic process, again leading to completely different outcomes” among the three rivers.¹¹² Today, the Housatonic River in northwestern Connecticut is heavily wooded, with trout anglers; the Naugatuck is heavily industrialized. If the history tape was rewound, and events again unfolded, the situation today among the three rivers might differ. Thus, under

¹⁰⁵ See GEORGE BLACK, *THE TROUT POOL PARADOX: THE AMERICAN LIVES OF THREE RIVERS* 10–11 (2004).

¹⁰⁶ Verspagen, *supra* note 67, at 4.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ RICHARD R. NELSON & SIDNEY G. WINTER, *AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE* 370 (1982).

¹¹⁰ *Id.*

¹¹¹ See *id.*

¹¹² Verspagen, *supra* note 67, at 5.

an evolutionary economic process, “chance plays a significant role” and “small, random (and therefore unpredictable) events may have severe long-run consequences.”¹¹³

A second policy implication of dynamic competitive processes is in assessing the predictive quality of any economic model. Although economic life is an adventure, it is not a roller coaster. Waking up tomorrow morning, I would not expect the price of my newspaper or bagel to have doubled overnight, or my employer to have slashed my salary in half. So why does my comfort level decrease when trying to forecast bagel prices over a larger geographic area over a longer time? These models’ predictive quality will lessen as the heterogeneity of what is being studied increases. In these larger scale systems, “contingencies and random factors” are more likely to play a key and unforeseen role.¹¹⁴

It is unclear how accurately the agencies currently predict a merger’s likely anticompetitive effect across different industries.¹¹⁵ For antitrust enforcers conducting merger simulations, the narrower the product category and geographic market and the shorter the time horizon, the less likely that contingencies and random factors will play a material role in making outcomes indeterminate.¹¹⁶ But these static single-

¹¹³ *Id.* at 6.

¹¹⁴ *Id.* at 10–11.

¹¹⁵ For further examination of this issue, and proposals to foster ex-post merger review, see Stucke, *Behavioral Economists*, *supra* note 69, at 516, 579.

¹¹⁶ For example, suppose two leading manufacturers of white pan bread decide to merge. Using retailers’ in-store scan data, econometricians can examine what impact changes in the retail price of one brand, such as Wonder white-pan bread, recently had on the unit sales of other branded or private label products, such as rye bread, bagels, or wheat bread. Using the scan data for white pan bread purchases in a specific market, such as Chicago, an econometrician may predict accurately the price of white bread shortly after the merger. But predicting bread prices across the United States (or globally) over a longer time period invites uncertainty as unforeseen events may affect demand, such as diet fads, or supply, such as weather impacting crops. See Daniel Hosken et al., *Demand System Estimation and Its Application to Horizontal Merger Analysis* 5 (Fed. Trade Comm’n Bureau of Econ., Working Paper No. 246, 2002), available at <http://www.ftc.gov/be/workpapers/wp246.pdf> (discussing use of scanner data for demand estimation); David Scheffman & Mary Coleman, FTC Perspectives on the Use of Econometric Analyses in Antitrust Cases 9 (undated) (draft document), <http://www.ftc.gov/be/ftcperspectiveson-econometrics.pdf> (discussing the use of scanner data for demand estimation and other relevant economic analyses); David Scheffman, Best Practices for Data, and Economics and Financial Analyses in Antitrust Investigations (Apr. 2002) (unpublished manuscript), <http://www.ftc.gov/be/ftcbebp.pdf> (providing guidelines on

equilibrium models may be unsuitable for competition policy, which typically looks at larger scale systems, such as consumer goods industries, on a national or international scale, over a longer period. Given the heterogeneity of these large-scale systems, contingencies and random factors are more likely to play a key and unforeseen role, lessening the model's predictive quality.¹¹⁷ Even on the micro level, assessing a merger's impact on technological innovation may be difficult given the importance of path dependence arising from network effects.¹¹⁸ With multiple equilibria and the role of chance, the government may be unable to predict accurately *ex ante* the winning technology.

A third important implication of dynamic markets is determining where this newness will emerge. Policy-makers generally recognize Schumpeter's "creative destruction" thesis that capitalism "is by nature a form or method of economic change and not only never is but never can be stationary."¹¹⁹ Some also accept that competition from new commodities, technologies, sources of supply, and types of organization may be of greater import than static price competition.¹²⁰ But where and

economic analysis for meeting with FTC Bureau of Economics); *see also* FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 6, 8, 9, 14 (2006), <http://www.usdoj.gov/atr/public/guidelines/215247.pdf> (describing use of scan data to estimate demand elasticities for branded consumer products).

¹¹⁷ Verspagen, *supra* note 67, at 10–11.

¹¹⁸ In markets with network effects, the value of a product or service increases as others use the products or service. The classic examples are found in the communication industries; for example, the telephone, the facsimile machine, and the Internet.

¹¹⁹ JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 82 (Unwin Paperbacks 1987) (1942). As Jay Barney indicated, Schumpeter's view of competition has not been applied to normative theories of strategies as well as the Industrial Organization and Chaberlinian conceptions of competition. This is not because Schumpeterian competition is less realistic than the other two, but it is less translatable into strategic models. Moreover, Schumpeter relies on random events and the "concept of luck is difficult to incorporate into normative theories of strategy, for luck typically is not subject to managerial manipulation." Jay B. Barney, *Types of Competition and the Theory of Strategy: Toward an Integrative Framework*, *supra* note 53, at 796. Telling managers that luck, rather than their skill, may yield success will not sell many management strategy books either. The better formula is to tell managers what they are doing wrong, and how implementing the book's novel management strategy will yield commercial success.

¹²⁰ Several economists testifying before the AMC also expressed this view. AMC REPORT, *supra* note 18, at 45 n.59 ("[D]ynamic competition to develop new products and to improve existing products [in innovation-driven industries] can have much greater impacts on consumer welfare than static price competition. . . . Everyone

when will this newness arrive? Schumpeter hypothesized “that firms that have market power, not just the prospect of market power, were the driving force in this process—a view that empirical studies have somewhat called into question.”¹²¹ The economic department for the Organization for Economic Co-operation and Development (“OECD”) found “little empirical support” for Schumpeter’s hypothesis that large firm size or high concentration is strongly associated with a higher level of innovative activity.¹²² This presents an important policy issue. At times, some defend the short-run allocative efficiency losses from firms with significant market power with the belief that such industrial concentration is conducive to innovation.¹²³ But the dynamics of competition is such that neither the government nor the dominant firm can predict who will provide these disruptive technologies in the future. Moreover, technological innovation is only one component of innovation, which encompasses improvements in government institutions and corporate organizational structures.

A fourth implication of such evolutionary economic processes is in keeping markets open. Competition policy should not preserve monopolies or tolerate their anticompetitive abuses in

should understand that small increases in productivity from innovation dwarf even significant reductions in static efficiency over time. . . . [A]t least over the medium to long term, the lion’s share of consumer benefits associated with competition in our most dynamic industries results from innovation.”); *see also* Porter, *supra* note 93, at 156–57 (questioning whether antitrust should be focused primarily on price competition when other parameters of competition, such as innovation or productivity, may play a more important role).

¹²¹ Vickers, *supra* note 53, at 16.

¹²² Sanghoon Ahn, *Competition, Innovation and Productivity Growth: A Review of Theory & Evidence* 5 (Org. for Econ. Co-operation & Dev., Econ. Dep’t, Working Paper No. 317, 2002). Ahn nicely summarizes the difficulties in measuring innovation, including the drawbacks of relying on patent and research and development (“R&D”) data. *See id.* at 14. This is more fully discussed in my upcoming article. *See* Stucke, *supra* note 78.

¹²³ The head of the Antitrust Division during the Clinton Administration disagreed:

In a world driven by rapid changes in technology, empirical evidence indicates that the firms that prosper are far more likely to be those that face fierce rivalry in their home markets than the sheltered monopolists. In a very real sense, the fear of being left behind is more likely to spur innovation than the security bred of stable market power.

Anne K. Bingaman, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, *Competition and Innovation: Bedrock of the American Economy*, Address Before the University of Kansas Law School (Sept. 19, 1996), <http://www.usdoj.gov/atr/public/speeches/0877.pdf>.

the hopes that these national champions will provide technological change. Nor can competition officials wait passively for the Schumpeterian creative destruction; such passivity at times delays its arrival. But dynamic markets create a problem for competition authorities, given that competition officials, like private actors, suffer informational asymmetries; the degree to which may differ, however. Given the government's ability to depose numerous market participants and subpoena their records, the government may be little better in predicting outcomes. Suppose Firm *A* engages in anticompetitive practices. Given the acceleration of Firm *A*'s market power through network effects, the government may be unable to react quickly to remedy the anticompetitive harm.¹²⁴ At other times, by the time the government investigates and successfully challenges Firm *A* for its anticompetitive restraint, market conditions have evolved.¹²⁵ Rather than trying to preempt or belatedly react, competition policy instead should focus on promoting (1) the introduction of variation, (2) a consistent selection process by end-users, (3) mechanisms that preserve and propagate the selected variation, and (4) mechanisms that further promote the introduction of variation on the selected variation.¹²⁶ To promote this process, competition authorities may want to (1) define specific actions by entrenched dominant firms that are presumptively illegal,¹²⁷ (2) keep structural entry barriers as low

¹²⁴ See Moreau, *supra* note 49, at 865.

¹²⁵ In reviewing the history of seven monopolization cases, for example, Professor Scherer found that by the time the courts were ready for judgment, "technological and economic changes had radically altered the environment in which the remedies originally sought would apply." F.M. Scherer, *Technological Innovation and Monopolization* 63 (Harvard Univ. John F. Kennedy Sch. of Gov't, Working Paper No. RWP07-043, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103594.

¹²⁶ Mantzavinos, *supra* note 65, at 4 n.4.

¹²⁷ Several antitrust commentators, for example, identified categories of "cheap" predation and exclusion which (1) "costs or risks little" to the entrenched firm, "both in absolute terms and when compared to the gains (or potential for gains) it brings," and (2) does not raise any cognizable efficiency claims. Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 977 (2005) (writing for the Federal Trade Commission Ninetieth Anniversary Symposium).

as possible,¹²⁸ (3) eliminate subsidies that distort demand,¹²⁹ and (4) stimulate the firms' and government's learning processes.¹³⁰

Rather than support a command-and-control approach to technological change, for example, by protecting national champions or subsidizing their research and development ("R&D") efforts, the government may seek to promote the evolutionary change from the bottom up. Competition officials may want to promote, or at least not penalize, user-centered innovation, such as open-source software. Such user-centered innovation, whereby users simultaneously experiment and provide variation, may lead quickly and efficiently to better

¹²⁸ Professor Scherer, as many others, argues that the "for limited times" the language in Article I, Section 8, of the U.S. Constitution "should be taken seriously in order to promote the progress of science and the useful arts." Scherer, *supra* note 125, at 49. An informed discussion of the optimal level of intellectual property protection to promote innovation, which may vary by the nature of the intellectual property, however, is beyond the scope of this Article.

¹²⁹ The frequent target is direct industry subsidies through state-aid, such as the subsidizing of water costs for Saudi alfalfa and wheat farmers, which use three times the global average of water to produce one ton of wheat in the desert and have production costs 4 to 6 times the world price. Rice and wheat farmers in California's central valley, which use one-fifth of the state's water, also pay low water prices, with an estimated annual subsidy of \$416 million. See Alan Beattie & Fiona Harvey, *Subsidies Interrupt Flow of 'Virtual Water,'* FIN. TIMES (London), Nov. 10, 2006, at 6. Another hindrance is when the government—or public—indirectly subsidizes certain negative externalities. For example, suppose the government wishes to combat global warming through innovation. The government may be unable to pick the winning technology or technologies, but feels pressure to do something. Rather than subsidize one or more technologies that it predicts will be the winning technologies, the government may instead choose to reduce entry barriers into this field, and distortionary subsidies to stimulate consumption. Thus, some fuels today may be cheaper because their retrieval is subsidized and their environmental harms are not internalized. If certain fuels, such as coal, impose greater social costs—such as health problems, acid rain, or global warming—but these costs are not internalized in the product (through a carbon tax, for example), consumers have little incentive to switch from these fuels to more efficient, less harmful energy sources. The government can internalize the externalities of each energy source through an energy tax. Consumers can still opt for coal or switch to a cleaner fuel source, depending on the relative costs. The social pressures for demand will be created for these alternatives, and ultimately as consumers increasingly switch to certain technologies, economies of scale as well as network effects will arise. Unforeseen intervening events may further shape consumer attitudes and demand for these energy sources, such as a melt-down of a nuclear reactor. Ultimately, the government does not select the winners from the losers.

¹³⁰ A central role of policy is promoting the free flow of information about the ongoing experiments and feedback from that experimentation, which in turn enables the private and government agents to adapt and experiment with more changes. See Moreau, *supra* note 49, at 852–53.

solutions than a dominant firm's trying to anticipate the designs or improvements that meet future needs of its customers.¹³¹ Fundamentally, the competition policy should seek to promote innovation coming not solely from the top down, such as central planning by an entrenched firm or the government, but also from the bottom up, as users tinker with, change, and improve the design that continuously evolves. Subject to legitimate welfare issues, such as protecting health and safety, the government should also encourage experimentation by removing controls on the range or type of goods and services that companies can offer.¹³²

Under this evolutionary theory of competition, it is unclear who will provide tomorrow's technological advancements, innovation, and dynamic improvements. The hubris of a centrally-planned socialist state or corporate bureaucracy is its confidence in predicting winners and losers. There may be several technological designs at work, some of which for quality, mistake, luck, or opportunity, become dominant; others for the same reasons recede. Thus, by undertaking more empirical research, policy makers can learn more about the various industries' market dynamics and the extent to which promoting access to that marketplace to new entrants or small rivals may be more important than reaping static economies of scale.

II. WHAT ARE THE OBJECTIVES OF COMPETITION?

A. *Competition as a Process*

Rather than being seen as an idealized state, such as perfect competition or an independent good, competition instead can be defined as a means—a utilitarian device—to achieve certain goals such as efficiency, consumer welfare, or individual autonomy. Competition is not the end, but instead is the more efficient and democratic means to achieve a particular end.

¹³¹ A positive feedback loop emerges from the learning effects from the diffused technologies. Rather than internally creating and testing variations to its technology, the supplier can promote experimentation by the end-user. As users experiment and alter the technology, the supplier learns from this diffusion. In the next round, the supplier, in turn, can offer this greater diffusion of offerings, which various users can further modify. See J.S. Metcalfe, *Evolutionary Economics and Technology Policy*, 104 *ECON. J.* 931, 939 (1994).

¹³² Italian petrol operators are limited, for example, on the goods they can offer.

Competition, so defined, presents two critical questions: (1) what do we want?; and (2) what is the best way to get there?

If competition is not an end, but “a policy tool to achieve broader government objectives for the economy or for a given industry,”¹³³ then the critical question is what are the objectives of competition? One highly regarded antitrust treatise states that the general goal of the antitrust laws is “to promote ‘competition’ as the economist understands that term.”¹³⁴ But the antitrust community has debated for years over (1) whether competition policy can have multiple goals or a single goal, and (2) the nature of the particular goals, including whether the goal or goals should encompass non-economic objectives.

The United States competition agencies recently stated that the “promotion of consumer welfare and the organization of the free market economy are the only goals of its antitrust laws . . . with other economic or social objectives better pursued by other instruments.”¹³⁵ A former FTC chairman argued for centering the goals of competition *policy* on narrow economic concerns, such as efficiency, which he stated is free from normative judgments. He praised the Reagan Administration’s bringing to antitrust agencies a “solid framework” for antitrust policy: “Antitrust finally regarded enhancing consumer welfare as the single unifying goal of competition policy, and it used a framework that was based on sound economics, both theoretical and empirical.”¹³⁶ Similarly, under the Chicago School’s neoclassical economic theories, antitrust analysis is primarily concerned with efficiency.¹³⁷ Judge Bork summarized the whole

¹³³ DIRECTORATE FOR FIN. & ENTER. AFFAIRS COMPETITION COMM., ORG. FOR ECON. CO-OPERATION AND DEV., GLOBAL FORUM ON COMPETITION: ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS 2 (2005), <http://www.ftc.gov/bc/international/docs/compcomm/2005-Roundtable%20on%20Bringing%20Competition.pdf> [hereinafter OECD, REGULATED SECTORS].

¹³⁴ PHILLIP E. AREEDA & HERBERT HOVENKAMP, 1 ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 100, at 4 (3d ed. 2006).

¹³⁵ 2007 ICN REPORT, *supra* note 19, at 31.

¹³⁶ Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*, 2003 COLUM. BUS. L. REV. 359, 388 (2003).

¹³⁷ See ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 91–92 (1993); Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1, 1 (1982) (“The view that the federal antitrust laws ought to promote allocative efficiency in American business and markets has come to dominate antitrust policy in the last decade.”); Posner, *supra* note 23, at 928 (“From

task of antitrust “as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.”¹³⁸ Although antitrust has a built-in preference for property, these adherents, following the familiar path of utilitarian welfare economics, argue that competition policy “has nothing to say about the ways prosperity is distributed or used.”¹³⁹ Thus, for some scholars, antitrust has no ethical component.¹⁴⁰

Others disagree. In reviewing the Sherman Act’s legislative histories, several antitrust scholars and the Supreme Court noted Congress’s non-economic concerns about the concentration of wealth and power in the hands of the few.¹⁴¹ Former FTC

these various analyses, a conclusion of great significance for antitrust policy emerges: firms cannot in general obtain or enhance monopoly power by unilateral action—unless, of course, they are irrationally willing to trade profits for position.”). Maximizing economic efficiency, which is the maximization of aggregate consumer and producer surplus, requires the maximization of (1) allocative (Pareto) efficiency—allocating resources to their “highest valued use[],” such that it is “not possible to make anyone better off without making someone worse off,” and (2) productive (technological) efficiency—producing the products or services at the lowest possible cost. See ORG. FOR ECON. CO-OPERATION & DEV., GLOSSARY OF INDUSTRIAL ORGANISATION ECONOMICS AND COMPETITION LAW 41, 65 (1993), <http://www.oecd.org/dataoecd/8/61/2376087.pdf> [hereinafter OECD GLOSSARY]; Daniel J. Gifford & Robert T. Kudrle, *Rhetoric and Reality in the Merger Standards of the United States, Canada, and the European Union*, 72 ANTITRUST L.J. 423, 428 (2005).

¹³⁸ BORK, *supra* note 137, at 91.

¹³⁹ *Id.* at 90.

¹⁴⁰ See Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 609 (2003) (“[A]ntitrust has no moral content and is unconcerned about the distribution of wealth.”); see also BORK, *supra* note 137, at 90 (“Consumer welfare, as that term is used in antitrust, has no sumptuary or ethical component, but permits consumers to define by their expression of wants in the marketplace what things they regard as wealth.”).

¹⁴¹ The debates in 1890 show that

the main cause which led to the legislation was the thought that it was required by the economic condition of the times; that is, the vast accumulation of wealth in the hands of corporations and individuals . . . and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.

Standard Oil Co. v. United States, 221 U.S. 1, 50 (1911). “[T]he conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people; namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations . . .” *Id.* at 83 (Harlan, J., concurring in part and dissenting in part); see also United States v. Aluminum Co. of Am., 148 F.2d 416, 448 n.1 (2d Cir. 1945) (“The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that

Chairman Robert Pitofsky said, “[i]t is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws.”¹⁴² One such political value is a “fear that excessive concentration of economic power will breed antidemocratic political pressures.”¹⁴³ An antitrust policy that neglected to consider such political values “would be unresponsive to the will of Congress.”¹⁴⁴ Professor Sullivan agreed, stating that

[t]o argue, as do the Chicago economists, that antitrust ought to be used solely to inhibit expressions of market power in a technical economic sense, is not only to miss much in the history and development of the law, but to ignore much of its potential. . . . The political consensus that supports antitrust comes from other sources. Americans continue to value institutions the scale and the workings of which they can comprehend. Many continue to value the decentralization of decisionmaking power and responsibility. Many favor structures in which power in one locus may be checked by power in another. Antitrust, broadly perceived and sensitively administered, may contribute to the realization of these values.¹⁴⁵

Oliver Williamson in his famous trade-off calculus for weighing the effects on total welfare, also included, to the extent quantifiable: (1) the cost from slower—or the lack of—technological progress once a monopolist or cartel lays claims to a national market, and (2) the other social costs imposed, or incurred, by the monopolist or cartel, such as the political implications of control over wealth, which are “a matter for serious concern.”¹⁴⁶

has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition.”); Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 CAL. L. REV. 917, 919 (1987) (citing concern for the “little man” and consumers as a goal of antitrust).

¹⁴² Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979) [hereinafter Pitofsky, *The Political Content of Antitrust*].

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1052.

¹⁴⁵ Lawrence Anthony Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214, 1222–23 (1977).

¹⁴⁶ Oliver E. Williamson, *Economics as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 24, 28–32 (1968). With a powerful domestic producer, for example, the government may be swayed to erect protectionist measures. *Id.* at 29. The political implications may be beyond quantification, but as

There is even a debate today about the transparency of competition goals. Judge Posner surmised that

[a]lmost everyone professionally involved in antitrust today—whether as litigator, prosecutor, judge, academic, or informed observer—not only agrees that the only goal of the antitrust laws should be to promote economic welfare, but also agrees on the essential tenets of economic theory that should be used to determine the consistency of specific business practices with that goal.¹⁴⁷

Michael Porter disagreed, arguing that

[t]he goals of antitrust and its link to society's goals are often not convincingly articulated. The benefits of competition that underpin antitrust have not been made clear, and the tools for measuring impacts on competition are frequently controversial. Too often the discussion between business and government in antitrust proceedings concerns arcane matters such as HHI that erodes the legitimacy of antitrust with the private sector. By relying too heavily on narrowly conceived consumer welfare theory, antitrust analysis may be overlooking some of the most important benefits of competition for society. Antitrust is not living up to its full promise in deterring behavior that is not in society's interest.¹⁴⁸

B. *Competition Policy's Multiple Goals*

In creating or reforming their competition agencies, competition authorities from many developing countries are considering the objectives of their nation's competition policy. They are discussing with the various constituents the fundamental questions of what is meant by competition, the goals of the competition policy, and how the various stakeholders will benefit from such a policy.¹⁴⁹ What have emerged are different competition policy objectives in different countries. As the International Competition Network ("ICN") noted, the "objectives of competition laws vary widely from one jurisdiction to another. . . . [P]arallel objectives, possibly conflicting with that

Professor Williamson recognized, the issue is nevertheless important, and cannot be ignored. *Id.*

¹⁴⁷ POSNER, *supra* note 59, at ix. The basis for that assertion is not attributed to any survey or other empirical research.

¹⁴⁸ Porter, *supra* note 93, at 157.

¹⁴⁹ CUTS, *supra* note 9, at i.

of economic efficiency or consumer welfare, are present in many competition laws."¹⁵⁰

One nation's objectives may conflict with other nations' competition policies. At times, the nation's objectives for its competition policy may conflict, such as ensuring a level playing field while simultaneously maximizing efficiencies. Competition policy can become a tautology, such as "promoting competition by discouraging anti-competitive behaviour."¹⁵¹

The ICN recently surveyed thirty-three of its members to identify their competition policy's objectives regarding unilateral (monopolistic) anticompetitive behavior. What emerged were the following ten objectives:

- Ensuring an effective competitive process
- Promoting consumer welfare
- Enhancing efficiency
- Ensuring economic freedom
- Ensuring a level playing field for small and mid-sized enterprises
- Promoting fairness and equality
- Promoting consumer choice
- Achieving market integration
- Facilitating privatization and market liberalization
- Promoting competitiveness in international markets.¹⁵²

The diversity of goals of competition policy suggests that, in regard to the first issue, competition policy does not have a single, unified goal. As the ICN survey reflects, the more abstract and meaningless the goal, the greater the likelihood of consensus. All but one of the surveyed competition agencies cited "[e]nsuring an effective competitive process" as an objective of the unilateral conduct laws. Presumably, no one advocates for an "ineffective" competitive process. What then is an "effective

¹⁵⁰ ICN ADVOCACY REPORT, *supra* note 1, at 32.

¹⁵¹ CUTS, *supra* note 9, at i.

¹⁵² 2007 ICN REPORT, *supra* note 19, annex A. In its survey of competition laws in fifty countries, the World Bank found "different conceptions of competition . . . across countries." WORLD BANK, *supra* note 32, at 140.

competitive process?” The survey does not explore this. Nor does it further explore whether the process represents the end or the means to some greater end, which must also be defined.¹⁵³

The second most popular objective cited in the ICN survey was “promoting consumer welfare.” Despite its pleasant democratic ring (who, after all, advocates hindering consumer welfare?) it too suffers the same infirmities. Although thirty of thirty-three ICN respondents identified this objective, most “do not specifically define consumer welfare and appear to have different economic understandings of the term.”¹⁵⁴

Similarly, the AMC, after spending three years and nearly \$4 million, could not reach unanimity on the term. Although their 449-page report addresses how “antitrust law and enforcement can best serve *consumer welfare* in the global, high-tech economy that exists today,”¹⁵⁵ the debate before and within the AMC was “about the precise definition of ‘consumer welfare.’”¹⁵⁶ The twelve United States Commissioners, all with distinguished backgrounds in competition policy, disagreed over a relatively straightforward question: “Should efficiencies that benefit only the [merging] parties, with no prospect of being passed along to consumers, be counted in favor of a merger?”¹⁵⁷

¹⁵³ Fifteen competition agencies, including the United States’, cited “[e]nsuring an effective competitive process as a goal and/or a means” to achieve other goals. 2007 ICN REPORT, *supra* note 19, annex A. Four of the thirty-two agencies cited this objective exclusively as a means to achieve other goals, while thirteen agencies cited this objective as a goal. *Id.*

¹⁵⁴ 2007 ICN REPORT, *supra* note 19, at 9.

¹⁵⁵ AMC REPORT, *supra* note 18, at 1 (emphasis added).

¹⁵⁶ *Id.* at 26 n.22. The OECD defined “consumer welfare” as

the individual benefits derived from the consumption of goods and services. In theory, individual welfare is defined by an individual’s own assessment of his/her satisfaction, given prices and income. Exact measurement of consumer welfare therefore requires information about individual preferences.

In practice, applied welfare economics uses the notion of consumer surplus to measure consumer welfare. When measured over all consumers, consumers’ surplus is a measure of aggregate consumer welfare. In anti-trust applications, some argue that the goal is to maximize consumers’ surplus, while others argue that producer benefits should also be counted.

OECD GLOSSARY, *supra* note 137, at 29.

¹⁵⁷ AMC REPORT, *supra* note 18, at 422–23. The *Horizontal Merger Guidelines* treat efficiencies as a defense available for the merging parties. HORIZONTAL MERGER GUIDELINES, *supra* note 99, § 4. The parties may argue that the merger will generate efficiencies, which, in turn, will lead to lower prices for consumers. Some have argued for expanding the availability of the efficiencies defense to mergers where consumers would likely pay higher prices, but where the merging parties

Commissioner Carlton, a University of Chicago professor, argued yes. Total surplus is “used routinely in cost-benefit analysis, a tool of widespread use in public policy.”¹⁵⁸ Commissioner Jacobson disagreed: “Any doubts that a consumer welfare

would yield even greater productive efficiencies (the cost savings attributable to the merger). For a discussion of the varying efficiency defenses, including the consumer welfare and total welfare standards, see generally Gifford & Kudrle, *supra* note 137. Under this total welfare standard, society would be better off since the merged entity would consume fewer resources, which would be freed up for other consumers. The problem is that no one knows whether, and to what extent, mergers in different industries actually generate significant efficiencies. Management consulting firms, for example, have noted that the merging parties’ executives, at times, overstate the likely efficiencies. For a summary of various management consulting studies, see generally Paul A. Pautler, *The Effects of Mergers and Post-Merger Integration: A Review of Business Consulting Literature* (Jan. 21, 2003) (unpublished manuscript), <http://www.ftc.gov/be/rt/businesreviewpaper.pdf>. Several have outlined the benefits of verifying, after the merger, the parties’ ex ante efficiency claims. See Stucke, *Behavioral Economists*, *supra* note 69, at 582; see also Joseph F. Brodley, *Post-Chicago Economics and Workable Legal Policy*, 63 ANTITRUST L.J. 683, 691–93 (1995); Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 GEO. L.J. 195, 222–27 (1992) (proposing enforcement agencies’ conditional clearance of certain mergers subject to post-merger verification of efficiencies); Dennis A. Yao & Thomas N. Dahdough, *Information Problems in Merger Decision Making and Their Impact on Development of an Efficiencies Defense*, 62 ANTITRUST L.J. 23, 26–27 (1993) (stating that post-merger review of efficiencies equivalent to performance bonding by merging parties verify their assertion that merger will realize efficiencies).

¹⁵⁸ AMC REPORT, *supra* note 18, at 401. A senior economist at the DOJ, Antitrust Division, however, has recently challenged the neoclassical economic orthodoxy, and advocated a consumer welfare standard. Russell W. Pittman, *Consumer Surplus as the Appropriate Standard for Antitrust Enforcement* (U.S. Dep’t of Justice Econ. Analysis Group, Discussion Paper No. 07-9, 2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=996643. The Chicago School of antitrust also views a cartel’s net harm narrowly—typically, its deadweight welfare loss. Deadweight loss refers to the triangular area under a downward sloping demand curve representing the purchases foregone as a result of the supracompetitive pricing. See BORK, *supra* note 137, at 111. Although others may view the wealth transfer from the consumers to the cartel members as theft, the Chicago School adherents view it agnostically as it does not lessen total wealth, so any inequities of such wealth transfers should be addressed by the legislature. *Id.*; see also William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 653 (1983) (“The standard economic rationale for making a cartel illegal is not that it charges too high a price or that it redistributes income from consumers to cartel members, but that it restricts output, causing a deadweight or efficiency loss . . . a loss to consumers without an offsetting gain to producers.”); DIRECTORATE FOR FIN., FISCAL & ENTER. AFFAIRS COMPETITION COMM., ORG. FOR ECON. CO-OPERATION & DEV., REPORT ON THE NATURE AND IMPACT OF HARD CORE CARTELS AND SANCTIONS AGAINST CARTELS UNDER NATIONAL COMPETITION LAWS 6 (2002), <http://www.oecd.org/dataoecd/16/20/2081831.pdf> (noting economists’ agnosticism about whether society is made worse off by a mere wealth transfer from consumers to cartel members).

standard better reflects the goals of the antitrust laws than a standard based on total welfare will serve only to undermine antitrust enforcement in the future.”¹⁵⁹

Thus, positing a single unifying goal, such as happiness, efficiency, or consumer welfare is relatively easy. Both the socialist central planner and dogmatic laissez faire adherent may agree on the concept of a unifying social goal for competition policy. They may even agree on the goal, if sufficiently broad to embed their normative views. But this general objective simply shifts the debate to the means of attaining that end. Everyone wants happiness, but how does one achieve it—through wealth, fame, power, virtuous life, or allocative, productive, and dynamic efficiency? The challenge for the socialist or the dogmatic laissez faire adherent is (1) to discount the means proposed by her opponents, or (2) to define an end that is sufficiently narrow in scope to preclude any means other than the idealist’s. The problem with the latter route is that, much to the idealist’s frustration, others may not share the idealist’s narrowly defined goal or its urgency. The idealist questions why others do not recognize the self-evident benefits of her narrowly defined goal, and bemoans to her compatriots that others do not accord their goal the primacy it deserves. The idealist then represents the ultimate central planner, for she has defined for society both the goal and the particular means to achieve that goal. Any impediment to her ideal, such as governmental restraints to protect workers or small businesses, must be shorn, to nurture the growth of her idealized form of competition. Democracies hinder such idealists if others do not share their view of competition or the primacy of that particular competition policy goal.¹⁶⁰ Thus, faced with opposition, the idealist, whether a socialist or laissez faire adherent, may seek to remove competition policy from the legislature, other federal or state

¹⁵⁹ AMC REPORT, *supra* note 18, at 423. Although the use of the total versus consumer surplus standard can have various implications for antitrust analysis, “the cases in which the choice of standard would make a difference,” the AMC concluded, “are relatively few.” *Id.* at 26 n.22.

¹⁶⁰ As the ICN reported, it is unlikely that any will become Competition Czar anytime soon: “It should be borne in mind, however, that competition authorities do not usually possess a democratic mandate as direct as Government or Parliament. Therefore, it does not seem realistic that such wide-ranging powers be given to competition authorities, apart from the accountability problems it would raise.” ICN ADVOCACY REPORT, *supra* note 1, at 65.

agencies, the generalist courts, or the general population and place it in the hands of policy experts who share her ideal and abhor seeing their shared conception of competition debased.¹⁶¹

It becomes apparent that besides an idealist operating in a totalitarian state, there cannot be a marriage between a unifying single goal and single means. As the developing countries took their competition policies to different stakeholders, each expressed its own wants: Domestic competitors may advocate protecting choice for consumers, as these less efficient domestic companies may want protection from the efficiencies of international competitors.¹⁶² Entrepreneurs may agree but emphasize greater access to the market place. Entrenched large firms may want greater protection to achieve productive efficiencies. Consumers may want it all: lower prices, greater choices, better quality, while preserving their jobs at the domestic firms. At the day's end, the competition agency accumulates a bundle of objectives, some of which conflict, such as "[f]reedom of trade, freedom of choice, access to markets, and achievement of economic efficiency to maximise consumer welfare."¹⁶³ Although many competition authorities would approve a policy that aimed for the highest quality of goods and services at the lowest cost, competition policy when actually applied involves competing goals. For example, the goal of promoting "open" competition and the freedom of firms and individuals to participate in the market—also known as economic freedom—competes with the goal of leaving entrenched firms free to contract, inhibit market access, or not help their competitors. In addition, the goal of ensuring a level playing field for small

¹⁶¹ Some competition agencies attributed their country's weak competition culture in part to inexperienced generalist courts and authorities' and economic agents' lack of acceptance of competition principles. *Id.* at x. The competition agencies surveyed noted particular strong opposition to competition policy by entrepreneurial associations, local governments, and labor unions. *Id.* at xi.

¹⁶² For example, certain developing nations noted that transnational companies "enjoy advantages over domestic firms because of their size, reach and control over intellectual property (technologies, brands, copyright etc)." CUTS, *supra* note 9, at 17. One necessity of competition policy, as envisioned by CUTS, is "to prevent these firms from unfairly exploiting these advantages." *Id.* One cannot dismiss this as third-world protectionism; Congress and the Supreme Court in the past shared this concern. See *United States v. Von's Grocery Co.*, 384 U.S. 270, 275 (1966) ("Like the Sherman Act in 1890 and the Clayton Act in 1914, the basic purpose of the 1950 Celler-Kefauver Act was to prevent economic concentration in the American economy by keeping a large number of small competitors in business.").

¹⁶³ CUTS, *supra* note 9, at i.

and medium-sized enterprises competes with the goal of allowing industrial concentration to achieve productive efficiencies.

Likewise, among the goals cited by the ICN-surveyed agencies were protecting consumers,¹⁶⁴ encouraging creativity in business activities,¹⁶⁵ achieving efficiency and fairness to small and medium-sized enterprises,¹⁶⁶ and safeguarding jobs.¹⁶⁷ Thus, both the United States and German competition authorities identify the same general objective of assuring an effective competitive process, but disagree over whether that process should be aimed at protecting small enterprises.¹⁶⁸

It is noteworthy that the ICN's multiplicity of goals arose from a small sample group of thirty-three competition agencies discussing one parameter of competition law—monopolies. If the survey is broadened beyond competition policy specialists to other specialists, such as environmentalists and advocates of international trade, labor, or human rights, the objectives will multiply accordingly. The only way this broader group could agree on a single objective is if the end were sufficiently open-ended, for example, promoting individual happiness and well-being. The broadly defined goal would embed their personal values but point to no particular course of action. The reality facing international firms today is, as the ICN recognized, such divergence of

policy goals that prevail in one jurisdiction [that] are not necessarily equally important in other jurisdictions. Predictable and transparent policy objectives and enforcement standards in a large number of jurisdictions will enable firms to better anticipate the rules to which they are subject and adjust their conduct accordingly. Greater transparency will, in turn, also enable jurisdictions to learn each other's ideas and experiences, thus preparing the ground for greater divergence in the area of unilateral conduct rules and objectives.¹⁶⁹

¹⁶⁴ 2007 ICN REPORT, *supra* note 19, at 7.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Shaped by the current Chicago School's orthodoxy, some antitrust policy makers have rejected fairness to small enterprises or workers as an artifact of 1960s' antitrust jurisprudence. See AMC REPORT, *supra* note 18, at 33–35.

¹⁶⁹ 2007 ICN REPORT, *supra* note 19, at 37.

Not surprisingly, Congress, in enacting the Sherman Act, did not endorse a unifying single objective.¹⁷⁰ With the Supreme Court's gloss, the Sherman Act seeks to punish "unreasonable" restraints of trade. The Sherman Act identifies neither these restraints nor any specific objective to clarify which restraints are unreasonable. An "unreasonable" restraint ultimately reflects a normative judgment of what is or is not socially desirable.¹⁷¹ Nor does the legislative intent of the Sherman Act suggest a single objective. Although Judge Bork argued that Congress's singular goal was to optimize efficiency, others noted that economists were ambivalent at best when the Sherman Act was enacted,¹⁷² and that the Act encompassed political, non-economic concerns.¹⁷³ It is no surprise that the Act's legislators, like the developing countries' competition agencies today, voiced multiple objectives for competition policy, as competition serves different purposes for different constituents.

¹⁷⁰ Section 1 of the Sherman Act, 15 U.S.C. § 1 (2000 & Supp. IV 2004), outlaws every unreasonable "contract, combination . . . or conspiracy, in restraint of trade." Section 2 of the Sherman Act, 15 U.S.C. § 2 (2000 & Supp. IV 2004), makes it unlawful for a company to "monopolize, or attempt to monopolize . . . trade or commerce." Section 7 of the Clayton Act, 15 U.S.C. § 18 (2000), prohibits mergers and acquisitions when the effect "may be substantially to lessen competition, or to tend to create a monopoly."

¹⁷¹ Similarly, the expression "competition on the merits," wrote the OECD, has "never been satisfactorily defined," which has "led to a discordant body of case law that uses an assortment of analytical methods," which in turn has "produced unpredictable results and undermined the term's legitimacy along with policies that are supposedly based on it." ORG. FOR ECON. CO-OPERATION & DEV., POLICY BRIEF: WHAT IS COMPETITION ON THE MERITS? 1 (2006), <http://www.oecd.org/dataoecd/10/27/37082099.pdf>.

¹⁷² See George J. Stigler, *The Economists and the Problem of Monopoly*, 72 AM. ECON. REV. 1, 3 (1982) ("A careful student of the history of economics would have searched long and hard, on July 2 of 1890, the day the Sherman Act was signed by President Harrison, for any economist who had ever recommended the policy of actively combatting collusion or monopolization in the economy at large.").

¹⁷³ See BORK, *supra* note 137, at 61–66. For further discussion of the Sherman Act's legislative history, including Judge Bork's interpretation and the criticisms thereto, see generally Daniel R. Ernst, *The New Antitrust History*, 35 N.Y.L. SCH. L. REV. 879, 882–83 (1990); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 HASTINGS L.J. 871, 889–94 (1999). For the political dimensions of the Sherman Act, see generally Pitofsky, *The Political Content of Antitrust*, *supra* note 142, at 1060–65; Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249, 258–59 (2001). As one antitrust scholar noted, "[a]ntitrust law has been a long struggle over fear of power." Spencer Weber Waller, *Bringing Globalism Home: Lessons from Antitrust and Beyond*, 32 LOY. U. CHI. L.J. 113, 117 (2000).

Consequently, a uniform standard is readily available; the trade-off is greater abstraction until one is left with the goal of promoting an “effective competitive process” or “consumer welfare.” Like the idealist, one can discount the other purposes as misdirected and adhere to a monolithic aim of competition and social policy, such as promoting efficiency. But the risk is marginalization.¹⁷⁴ Other than for an idealist, competition policy cannot be reduced meaningfully to a single goal. “It is the essence of the economic problem that the making of an economic plan involves the choice between conflicting or competing ends—different needs of different people.”¹⁷⁵ Competition officials, ultimately, must recognize the existence of multiple goals and values.¹⁷⁶

C. Competition Policy Cannot Be Limited to Narrowly Defined Economic Objectives

One common misconception of competition authorities and scholars is to conflate the goals of competition policy and advocacy with the goals of competition enforcement.¹⁷⁷ These competition authorities advocate a single economic goal or

¹⁷⁴ Two FTC economists observed that even if the agencies wrote position papers against the proposed regulation, “these briefs are routinely ignored” and that the politicians “will not necessarily embrace a program on the efficiency grounds advocated by positive economic analysis.” Rodriguez & Williams, *supra* note 6, at 230 & n.95. It may be, however, that the politicians view economics analysis as normative, not positive.

¹⁷⁵ HAYEK, *supra* note 51, at 106.

¹⁷⁶ A recent Justice Department political appointee stated:

Competition will not always be the winning value in the legislative process. That is okay; we should not become so excited about what we do for a living that we lose sight of the fact that there are other values out there that have an appropriate place in the political process. But competition officials need to speak on behalf of competition and make clear that we are not making our decisions on the basis of extraneous factors—cultural, environmental, labor or otherwise political. Competition agencies need to tell politicians when we think competition would demand a different answer in the political process.

Pate, *supra* note 25, at 9–10.

¹⁷⁷ For example, the former Assistant Attorney General argued:

Competition enforcers need to remain narrowly focused. There is a danger in focusing within our discipline on anything other than efficiency and consumer choices in making our decisions. As I will discuss later, in the broader context of political decision-making process, where—I am careful to say—there are other values that need to be taken into account, antitrust agencies should be advocates for sound competition principles.

Id. at 2.

complementary economic goals for competition policy, since competition authorities are ill-equipped to deal with the “difficult and politicized task of adjudicating between incompatible goals,” which “creates uncertainty and ambiguit[ies] in the competition regime.”¹⁷⁸

Competition enforcement involves applying clear legal principles to the relevant facts. One cornerstone of the rule of law is that enforcement authorities apply the clear legal prohibitions to particular facts with sufficient transparency, uniformity, and predictability, so that private actors can reasonably anticipate what actions would be prosecuted and fashion their behavior accordingly. Businesses and individuals need guidance of what behavior is unlawful, which should not be left to the arbitrary discretion of the state to adjudge.

In contrast, the goals of competition policy and competition advocacy are broader. Rather than prosecuting individual behavior, here the various stakeholders weigh what they want to achieve through their competition policy, and decide how, by choosing among many means, to achieve it. The means are diverse, of which legal restraints on individual freedom is only one. The caveat is that if competition authorities wish to achieve their objectives in part through legal restraints, then with respect to such legal restraints the rule of law applies. The goals of competition policy, like tax policy, are much broader than the goal of a specific prosecutorial mechanism to enforce that policy, such as laws governing the reporting of income. Properly viewed then, competition law enforcement represents one non-exclusive mechanism to achieve the goals of a competition policy. The goals of antitrust law enforcement are subsumed by, but not necessarily co-extensive with, the goals of competition policy.

One competition official warned: “[T]he inclusion of other, non-competition values is very dangerous, and we need to be very careful with it.”¹⁷⁹ He warned of the danger of getting involved “in politically charged issues by reference to populism,” which

¹⁷⁸ CUTS, *supra* note 9, at 44–45; *see also* BORK, *supra* note 137, at 114–15 (indicating that legislature rather judiciary should decide issues where “a tradeoff in values is required”); Randolph W. Tritell, *International Antitrust Convergence: A Positive View*, 19 ANTITRUST 25, 26 (2005) (advocating as part of “sound competition policy” the “value of separating social and employment policy from competition policy”).

¹⁷⁹ Pate, *supra* note 25, at 2.

poses a “great danger of diluting our competition principles.”¹⁸⁰ If the competition authorities incorporate “extraneous social and political values into [their] decision making,” then their “competition-based analysis will be polluted by values that, while important, just do not belong in sound competition analysis.”¹⁸¹ These are legitimate concerns when criminally prosecuting an individual or firm for an antitrust violation. These concerns simply do not apply in the context of competition advocacy.

First, the critical assumption is that neoclassical economic theory is a value-free science, inoculated from normative judgments. The competition authorities assume that their conceptions of efficiency and “the laissez-faire market place are pre-political and neutral.”¹⁸² However, once “we move from a regime of zero transaction costs to one of positive transaction costs,” the legal system’s fundamental importance quickly becomes apparent.¹⁸³ “Physical entities” are not being traded on the market; rather, “the rights to perform certain actions,” which have been created by legal institutions.¹⁸⁴ Thus, “the legal system will have a profound effect on the working of the economic system and may in certain respects be said to control it.”¹⁸⁵ Any competition policy, developed in a world with transaction costs, is built upon the legal institutions’ normative judgments. Nor do the positivists inquire about the current distribution of assets, or the normative legal judgments that went into creating, assigning, limiting, and protecting property rights. Competition policy cannot be beyond the judgmental. Behind allocative efficiency’s façade of positivism lie such moral questions as:

- Given utilitarian welfare economic theory’s ambivalence about distributional effects, does economic efficiency necessarily produce the just outcome? If not, what must the state do?¹⁸⁶

¹⁸⁰ *Id.* at 3.

¹⁸¹ *Id.* at 6.

¹⁸² See Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as Regulatory Tool*, 35 U.C. DAVIS L. REV. 581, 591 (2002) (offering similar criticism of corporate law theorists seeking to separate “corporate law from public law concerns”).

¹⁸³ Coase, *supra* note 72, at 717.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 717–18.

¹⁸⁶ One study found that “[t]he welfare loss associated with monopoly power

- Is a vibrant market economy antagonistic or conducive to society's moral progress, as measured by its tolerance, support of the poor, etc.¹⁸⁷
- Is the market's "socio-political function" to "minimize[e] the necessity of resorting to internal ethical constraints on human behavior and/or external legal-governmental-political restrictions[?]"¹⁸⁸
- Is there a "social mortgage" on private property, in that "the very existence of the institution of private property is to ensure that the basic needs of every [individual] are met and sustained[?]"¹⁸⁹
- Is charging supracompetitive prices immoral?
- Is wealth maximization descriptive or normative and what role should the government play in fostering wealth maximization?

A second criticism of treating competition policy as a positive science is that competition as a process seeks to promote a greater end, and the ranking of that end among many ends ultimately represents a normative judgment. Policy makers must determine to what extent (1) maximizing incentives for wealth accumulation promotes total welfare; (2) that increase in total welfare promotes happiness; and (3) other complementary,

was . . . higher for low-income households," including households relying "on government pensions and benefits for their principal source of income," compared with high-income households. John Creedy & Robert Dixon, *The Relative Burden of Monopoly on Households with Different Incomes*, 65 *ECONOMICA* 285, 291 (1998). "The results suggest that, whatever the size of the absolute welfare loss resulting from monopoly, there may be a substantial effect on the distribution of welfare." *Id.*

¹⁸⁷ See generally FRIEDMAN, *supra* note 90 (outlining how economic growth renders a society more inclined toward many of the Enlightenment's conception of moral progress, through greater openness, tolerance, mobility, and democracy).

¹⁸⁸ James M. Buchanan, *Good Economics—Bad Law*, 60 *VA. L. REV.* 483, 486 (1974).

¹⁸⁹ Letter from the Holy See to the Council for Trade-Related Aspects of Intellectual Property Rights of the WTO, *Ethics Cannot Justify Fixing the Highest Prices for Medicines*, in *L'OSSERVATORE ROMANO* (Vatican City), July 11, 2001, at 9, available at <http://www.catholicculture.org/library/view.cfm?recnum=3966&longdesc> (presenting the Holy See's stance on the pharmaceutical industry's responsibility to provide affordably priced medications). For more on the social mortgage on capital, see generally *CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE* (David J. O'Brien & Thomas A. Shannon eds., 2004).

or more effective, means will increase total welfare. Michael Porter, for example, argues that

[w]hile protecting short-run consumer welfare measured by price-cost margins is . . . important, . . . productivity growth through innovation, where innovation is defined broadly to include not only products, but also processes and methods of management . . . [are] the single most important determinant of long-term consumer welfare and a nation's standard of living.¹⁹⁰

Under any policy, who will be left behind, and what social net will protect them?

A third criticism of treating competition policy as a positive science is that individuals do not delineate between economic and non-economic activities, which are necessarily intertwined. Consumers and workers do not enter the marketplace with a blank slate. Instead, years of socialization, and the internalization of social, moral, ethical, and legal norms have already occurred. "When consumers and entrepreneurs begin participating in and exchanging on the market and competing with each other, they are already socialized individuals, sharing a large number of social rules."¹⁹¹ These ethical, moral, and social norms invariably affect economic behavior, so "when economic and non-economic activity are intermixed, non-economic activity affects the costs and the available techniques for economic activity."¹⁹²

Fourth, inoculating a competition policy's objectives from populism is to inoculate it from democracy. Competition policy makers must articulate how their conception of competition will improve living conditions overall and for different constituencies. If the goal of "competition" is not the general improvement of society, what exactly are we advocating? The free market is not an independent constitutionally-protected actor, but whatever the majority wants it to be, subject to any constitutional limitations. For example, if the majority wants to prevent a big-box retailer from entering their New England town, and voluntarily deprive themselves of lower prices and oversized

¹⁹⁰ Porter, *supra* note 93, at 157.

¹⁹¹ Mantzavinos, *supra* note 65, at 6.

¹⁹² Mark Granovetter, *The Impact of Social Structure on Economic Outcomes*, 19 J. ECON. PERSP. 33, 35 (2005). Personal contacts may engender trust, lowering transaction costs. *See id.* at 38 (citing studies). Social interactions, such as friendships, may also lead to certain desirable economic outcomes, like lowering search costs to hire new employees. *See id.* at 41.

parking lots with undersized trees, should a competition authority override the majority for the sake of promoting efficiency? “The greater danger,” warned John Kenneth Galbraith, “is the subordination of belief to the needs of the modern industrial system.”¹⁹³ One intuitive objective of competition policy is to ensure the prudent utilization of society’s limited resources to “maximize total economic welfare.”¹⁹⁴ As a general matter, we do not want our economy to oversupply us with beans and undersupply us with carrots. Industrial policy is a mechanism to improve everyone’s welfare by striving for Pareto optimality. But at what point do we become subservient to this industrial policy? It may be when we permit losses to a growing minority of individuals on the belief that the economy will eventually distribute the gains and losses fairly. It may be when we measure by tablespoons our wants and needs, our educational system, and our social, ethical, legal, and moral norms to accord with this industrial policy, until everything furthers that end. Do we want “the discipline required by the industrial system” to become “the conventional morality of the community[?]”¹⁹⁵ Or do we instead want a stroll in the park? At some point, society may recognize market failure, or even absent such failure, accord greater weight to aesthetic or non-economic goals.

Fifth, utilitarian welfare economics are silent on their distributional effects.¹⁹⁶ What if the chosen competition policy

¹⁹³ John Kenneth Galbraith, *Liberty, Happiness . . . and the Economy*, ATLANTIC MONTHLY, June 1967, at 61, reprinted in *150 Years of the Atlantic*, ATLANTIC MONTHLY, Apr. 2006, at 44, 46.

¹⁹⁴ Kolasky, *What Is Competition?*, *supra* note 55, at 35.

¹⁹⁵ Galbraith, *supra* note 193, at 47.

¹⁹⁶ One study examined child poverty rates both before and after government intervention for sixteen developed countries. Excluding the United States, the average rate of child poverty without governmental assistance was 21.1 percent. Sylvia A. Allegretto, *U.S. Government Does Relatively Little to Lessen Child Poverty Rates*, ECON. SNAPSHOTS (Econ. Policy Inst., Wash., D.C.), July 19, 2006, http://www.epi.org/content.cfm/webfeatures_snapshots_20060719. “Before [distributional] taxes and transfers, the United States had one of the highest market-based rates of child poverty in 2000: 26.6%. Four other countries—New Zealand, France, the United Kingdom, and Ireland—had comparably high market rates of child poverty.” *Id.* After taxes, including refundable taxes and distributional wealth transfers, the United States still had the highest level of child poverty. *See id.*

On average, government taxes and transfers in the other 15 countries reduced child poverty significantly—by about half—dropping 10.4 percentage points to 10.7%. France had the largest redistributive decline of 20.2 percentage points to a child poverty rate of 7.5%. By contrast, the U.S. rate was reduced by just 4.7 percentage points to 21.9%—by far the highest

improves total welfare, by mainly improving the lot of the wealthiest one percent, but at a cost to the poorest ten percent? Under social contract theory, individuals would not consent ex ante to such utilitarian policies. In seeking to inoculate competition policy from other concerns, some of which are of the policy's making, these competition officials invariably point to other legislation to cure their policy's ills. Ask not what competition policy can do to increase happiness or reduce income disparity, ask Congress instead. Congress can redistribute wealth, through income taxation, for example, but will face political pressures from its financial backers.¹⁹⁷ Pointing to the legislative process to ameliorate the distributional effects of one's competition policy also undercuts the utility of competition advocacy. Why should a legislator listen to a competition advocate, if its competition policy aggravates or is divorced from the ills? For example, if the particular competition policy increases the wealth gap, what value would a competition advocate have in arguing for not taxing the rich, as this dulls incentives? Invariably, it breeds more anticompetitive restraints, as legislators are free to ignore competition policy to secure some greater end of happiness, welfare, and safety.

child poverty rate of all 16 developed countries, even after government assistance.

Id. (emphasis omitted). Moreover, "the poverty rates for blacks (24.7%) and Hispanics (21.9%) were more than twice that of whites (10.8%)." MISHAL R. LAWRENCE ET AL., *THE STATE OF WORKING AMERICA 2006–2007* (2006), available at <http://www.stateofworkingamerica.org/news/SWA06Facts-Poverty.pdf>.

¹⁹⁷ While the competition authorities can point to federal tax legislation to effect wealth distribution, tax officials can respond that such tax hikes could undermine competitiveness. See *Higher Taxes 'Will Stifle US Entrepreneurship'*, FIN. TIMES (London), July 12, 2007, at 6. For a discussion on progressive taxation generally, see Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905 (1987); W. Blum & H. Kalvern, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417 (1952); Jeffrey A. Schoenblum, *Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals*, 12 AM. J. TAX POLY 21 (1995); Dan Throop Smith, *High Progressive Tax Rates: Inequity and Immorality*, 20 U. FLA. L. REV. 451 (1968); Lawrence Zelenak & Kemper Moreland, *Can the Graduated Income Tax Survive Optimal Tax Analysis*, 53 TAX L. REV. 51 (1999).

Sixth, this “not-my-job” mentality promotes parochialism.¹⁹⁸ Much has been praised about the division of labor.¹⁹⁹ No doubt, such specialization enables the ever-increasing complexity in the manufacturing and services sectors. But the leading attorneys in the twenty-first century will not be those with the greatest mastery in their narrow field of expertise.²⁰⁰ Rather, they will be problem solvers, identifying issues across disciplines, and assisting their clients in finding answers to those problems. Similarly, competition authorities cannot furrow deeper in their field, ignorant of the issues or concerns in other fields. Instead, when “pressing problem[s]” arise, “current individual disciplines [may] prove inadequate to solve that problem.”²⁰¹ Even if the specialist feels confident that her specialized knowledge can provide the answer, other specialists may disagree, believing that their disciplines carry the solution.

The surveyed “ICN members considered that the most important obstacle to their advocacy work surges from the

¹⁹⁸ As Judge Wood observed:

Related to this observation is . . . that the generalist judge is less likely to become the victim of regulatory capture than her specialized counterpart, despite the best of intentions on the latter's side. If one never emerges from the world of antitrust, to take one field that I know well, one can lose sight of the broader goals that lie behind this area of law; one can forget the ways in which it relates to other fields of law like business torts, breaches of contract, and consumer protection, and more broadly the way this law fits into the loose “industrial policy” of the United States. Economic mumbo-jumbo is already prevalent in the field, but lawyers talk of the trade-off between the deadweight loss “triangle” and the income transfer “rectangle” at their peril in front of a judge who does not live and breathe the field. Specialists need to emerge from their cocoons from time to time and find out how their smaller world fits in with the larger one.

Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755, 1767 (1997).

¹⁹⁹ As Adam Smith remarked:

[T]he improvement of the dexterity of the workman necessarily increases the quantity of the work he can perform, and the division of labour, by reducing every man's business to some one simple operation, and by making this operation the sole employment of his life, necessarily increases very much the dexterity of the workman.

ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 15 (Kathryn Sutherland ed., Oxford Univ. Press 1998) (1776) [hereinafter SMITH, WEALTH OF NATIONS].

²⁰⁰ Indeed, legal outsourcing to India has spread to more analytical functions, and is estimated to become a \$4 billion industry by 2015. See Erin Marie Daly, *Legal Outsourcing Market Booms in India*, COMPETITION LAW360 (N.Y.), Jan. 5, 2007, <http://competition.law360.com/Secure/ViewArticle.aspx?id=15939>.

²⁰¹ See HOWARD GARDNER, FIVE MINDS FOR THE FUTURE 58 (2006).

different objectives and opinions held by other Governmental authorities.”²⁰² Seeking to inoculate competition goals from populism will not bridge this divide. One cannot effectively advocate competition without considering other societal goals, policies, or populist ideals. Because competition policy affects all facets of life, it invites at a minimum a dialogue with other specialties. Although a “multiperspectival approach recognizes that different analytic perspectives can contribute to the elucidation of an issue or problem,”²⁰³ such interdisciplinary synthesis is missing from competition policy today. Lawyers at the DOJ’s Antitrust Division infrequently interact with its sister agency, the FTC, much less other federal agencies. When deciding upon the objectives of competition, and the means to achieve that end, policy makers must take a broader view. Competition authorities must not only have “due regard for the history, culture, politics, and institutions of the affected nations.”²⁰⁴ To succeed, competition policy must operate in the same sphere of these other “populist” social policies, goals, and norms. Competition advocates must ask: How consistent are their policy’s objectives with other societal objectives and ethical, moral, and social norms?

Rather than being fixed, the objectives of competition policy evolve as the needs of society change. As one FTC official noted, “[p]reserving the ability to experiment with different rules and procedures and to adapt them to the local environment is critical to enable competition law and policy to evolve, as has occurred throughout the history of the U.S. antitrust laws.”²⁰⁵ The objectives of competition policy will be continually shaped by many factors, including: the strength and needs of varying stakeholders; geography, as in situations where a country seeks to improve its competitiveness in international trade; its pre-existing economy (for example, many developing countries may have high levels of public ownership and government participation in the economy, which may suggest different goals than for a country with low levels of state ownership and

²⁰² ICN ADVOCACY REPORT, *supra* note 1, at 72.

²⁰³ GARDNER, *supra* note 201, at 71.

²⁰⁴ Lande, *Professor Waller’s Un-American Approach to Antitrust*, *supra* note 9, at 139.

²⁰⁵ Tritell, *supra* note 178, at 25.

minimal governmental participation);²⁰⁶ the legal institutions in place; and the existing legal, social, ethical, and moral norms in that society.

D. Rejoicing over Multiple Goals

So how does a competition advocate respond to multiple economic and non-economic goals from the different stakeholders? As the old appellate advocacy line goes, "Rejoice."²⁰⁷ Rather than an obstruction to achieving an idealized competition policy, these multiple goals reflect the various stakeholders' pressing interests and concerns. As Thurman Arnold observed over sixty years ago, "[t]he antitrust problem must be brought to the public and not reserved for the abstract consideration of the lawyer or the economist."²⁰⁸ So rejoice when different stakeholders actively participate in shaping the objectives of competition policy. One does not develop a competition culture by cutting off the debate and entrusting policy to the experts. Such fiat is a recipe for disaster. As studies of General Motors managers found, compliance with orders was not self-executing. Division heads resisted policies if they had no input in creating these directives.²⁰⁹ So too in dealing with the various stakeholders, one wants to enlist the consumer organizations, business interests, labor, media, academics, and other stakeholders for their input: The more the stakeholders own the idea, the greater the likelihood of endorsement.

²⁰⁶ See CUTS, *supra* note 9, at 14.

²⁰⁷ This is attributed to John W. Davis, a member of the United States House of Representatives and the Democratic Party nominee for President in 1924, who argued many cases before the Supreme Court:

Rejoice when the Court asks questions. And again I say unto you, rejoice! If the question does nothing more it gives you assurance that the court is not comatose and that you have awakened at least a vestigial interest. Moreover a question affords you your only chance to penetrate the mind of the court, unless you are an expert in face reading, and to dispel a doubt as soon as it arises. This you should be able to do if you know your case and have a sound position. . . . If you value your argumentative life do not evade or shuffle or postpone, no matter how embarrassing the question may be or how much it interrupts the thread of your argument.

John W. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 897 (1940).

²⁰⁸ Thurman Arnold, *Antitrust Law Enforcement, Past and Future*, in THE SHERMAN ANTITRUST ACT AND ITS ENFORCEMENT 10 (1940).

²⁰⁹ Granovetter, *supra* note 192, at 43.

Competition policy in a democracy will never be captured by a single economic goal. At times, society may restrict some forms of competition, such as by granting intellectual property rights to stimulate further other forms of competition, like innovation.²¹⁰ At other times, competition policy responds to world events, such as the rise of fascism. Whatever its determinants, the objectives of competition policy, like economies generally, will continue to evolve. Competition policy is sufficiently vibrant to have multiple and evolving goals of varying priority, not all of which need to be consistent. To be successful, as the developing countries recount from their experience, competition policy must extend beyond its coterie of experts and be supported by other stakeholders.²¹¹

III. HOW TO GET THERE: HOW ARE THE GOALS OF COMPETITION ACHIEVED?

In presenting the means for obtaining their policy's objectives, some competition authorities present a stark dichotomy: a centrally planned economy versus a laissez faire economy with no or little government involvement.²¹² Similarly, if the choice were grilling a sirloin steak in one's backyard versus waiting in line for Russian meatloaf, few would choose the latter.

The dogmatic laissez faire adherents view the competitive process as a self-initiating process as individuals pursue their self-interest. Competition will arise naturally as the government restraints recede. Competition is self-regulating, and leads in the long run to a competitive equilibrium. Market distortions are temporary. Private restraints that impede competition dissipate, and the market returns to its optimally efficient level. "Managed competition" has a negative connotation—smacking of socialism when a central decision maker seeks to displace these natural phenomena. Invariably, proponents cite a couple of sentences from one of Adam Smith's books.²¹³

²¹⁰ But these "incentives for innovation do not necessarily require restrictions on competition in production—they may be non-commercial, as in the scientific research, or provided by other measures such as R&D subsidies." Vickers, *supra* note 53, at 4.

²¹¹ See CUTS, *supra* note 9, at 44.

²¹² For example, a former FTC Chairman asked, "[s]hould the economy be based on competition through free enterprise and open markets, on command-and-control regulation, or on public or collective ownership?" Muris, *supra* note 136, at 364.

²¹³ "It is not from the benevolence of the butcher, the brewer, or the baker, that

This conception of competition, which is inconsistent with Adam Smith's,²¹⁴ lacks an empirical basis. Nor can it be deduced from a model of perfect competition, with its assumptions of "rational" behavior.²¹⁵ That model says nothing about what institutions, if any, are needed to support these "rational" profit-maximizers. Absent legal and informal social institutions, some rudimentary forms of barter could exist, but not a self-regulating, self-initiating competitive process sufficient to increase overall welfare. There is "no system that could be rationally defended" where the state would "just do nothing."²¹⁶

The other extreme occurs when the government does everything, as these central planners demand a "central direction of all economic activity according to a single plan, laying down how the resources of society should be 'consciously directed' to serve particular ends in a definite way."²¹⁷ The economic failures of socialist countries discredit this conception of the competitive process.

The ever-evolving conceptions of competition and the interaction between the state and private actors, however, foreclose any stark dichotomy. Effective competition, as Friedrich Hayek proposed, can be "created" and generally requires certain kinds of government action.²¹⁸ Shaped by numerous combinations of legal, ethical, or social norms, the competitive process is not restricted to where the government

we expect our dinner, but from their regard to their own interest." SMITH, WEALTH OF NATIONS, *supra* note 199, at 22. "[B]y directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention." *Id.* at 291–92.

²¹⁴ Adam Smith believed that government had an important role to play in markets, including enforcing contracts, granting patents and copyrights to encourage inventions and new ideas, providing public goods, such as roads and bridges, which, he assumed, would not be worthwhile for individuals to provide. The Concise Encyclopedia of Economics: Library of Economics and Liberty, Biography of Adam Smith, <http://www.econlib.org/library/Enc/bios/smith.html> (last visited Mar. 30, 2008).

²¹⁵ Although no uniform definition has coalesced, rational choice theory generally posits that people, either individually or collectively, "maximize their utility from a stable set of preferences and accumulate an optimal amount of information and other inputs in a variety of markets." GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 14 (1976). The theory assumes that actors are rational, have willpower, and will act in their own self-interest.

²¹⁶ HAYEK, *supra* note 51, at 88.

²¹⁷ *Id.* at 85.

²¹⁸ *Id.* at 86.

centrally plans all facets of the economy, as in socialism, or does nothing, as in laissez-faire economy, but the right mixture for that industry, at that time period, in that social setting. Managed competition ultimately is a course between the extremes of: (1) “dogmatic laissez faire attitude” with its faith in unregulated market forces,²¹⁹ and (2) socialism with its faith in the central economic planner to allocate goods and services to achieve the desired end. A liberal argument—as Hayek and others recognized—is that government, social, and private institutions can work together for competition to work beneficially.

Rather than veering to either extreme or to a middle course, competition authorities must understand first the actual competitive dynamics in particular markets, and the government institutions necessary to promote competition in that market. In considering institutional designs, one size does not fit all countries or all industries therein.²²⁰ Before reaching into their toolkit, competition policy makers must better understand: (1) the market’s competitive dynamics, (2) what tools are available, and (3) how the tools work in various combinations. It is unlikely that these empirical analyses will lead to any unifying theory of competition. The complexity of the competitive dynamics, including the number and changing character of the variables that affect it, may ultimately humble us about the deficiencies of our understanding, and make us better competition advocates.²²¹

A. *To Promote Such Competition, How Can the Government Help?*

If competition is viewed as a dynamic interplay among government institutions, private individuals, and informal norms, it is unrealistic to view government institutions existing outside a free market.²²² Rather than an exogenous and mostly

²¹⁹ *Id.* at 85.

²²⁰ See WORLD BANK, *supra* note 32, at 4.

²²¹ Indeed when the FTC had empirical substantiation for its policy position, it was more effective with policy makers. “These filings tended to be the most convincing work of the [competition advocacy] program because the empirical work made the filings more valuable and more credible than they might otherwise be.” Cooper et al., *supra* note 7, at 1108 n.60.

²²² Government regulation at times creates the market, such as the market for pollution rights. Among the emission trading systems are the SO₂ trading system

anticompetitive force, legal institutions—or the lack thereof—interact with, affect, and shape the competitive process. They can support a “productive and growing market economy . . . like the hidden steel scaffolding that supports a building.”²²³

These legal institutions can be coercive, by restraining certain behavior, or non-coercive, by increasing price transparency, reducing regulatory entry barriers, fostering pro-competitive activities through tax credits, or informing social norms and attitudes. Absent these legal institutions, one cannot simply open the door and wait for the “invisible hand” to appear. “An effective competitive system needs an intelligently designed and continuously adjusted legal framework as much as any other.”²²⁴ The job for the competition agencies of developing countries, therefore, “is not to sustain or support competitive markets, but to create them.”²²⁵ The issue is how and when can institutions assist—or deter—in attaining the competition policy’s goals. The World Bank examined the various legal institutions that can promote competition, and this Article will focus on five: (1) rule of law, (2) competitive marketplace of ideas, (3) ethical, social, and moral norms, (4) adaptive political system, and (5) more vibrant and informed antitrust enforcement.

1. How the Rule of Law Promotes Competition

A “key feature of all industrial market systems,” found the World Bank, “is a strong state that can support a formal legal system that complements existing norms and a state that itself respects the law and refrains from arbitrary actions.”²²⁶ Among the traditional legal institutions, which the World Bank identified as central in supporting a market economy, are: (1) defining, protecting, and enforcing property and contractual rights, (2) assisting in the quick and fair resolution of disputes of

under the “Acid Rain Program” framework created by the 1990 Amendments to the Clean Air Act. See U.S. Env’tl. Prot. Agency, Acid Rain Program Allowance Auction Fact Sheet, <http://www.epa.gov/airmarkets/trading/factsheet-auction.html>. (last visited Mar. 30, 2008); see also Europa, Emission Trading Scheme, <http://ec.europa.eu/environment/climat/emission.htm>. (last visited Mar. 30, 2008) (discussing a scheme in which all twenty-five member states of the European Union participate).

²²³ Bruce M. Owen, *Imported Antitrust*, 21 YALE J. ON REG. 441, 442 (2004) (book review).

²²⁴ HAYEK, *supra* note 51, at 88.

²²⁵ CUTS, *supra* note 9, at 61.

²²⁶ WORLD BANK, *supra* note 32, at 4.

such rights, (3) facilitating the creation of corporate governance structures to promote investment, (4) providing frameworks for operating financial systems, raising capital, and providing for insolvency, and (5) facilitating international trade.²²⁷ Underlying all these legal mechanisms is the rule of law.

Few dispute the rule of law's critical role in supporting our economy, generally, and with respect to prohibiting anticompetitive behavior.²²⁸ If the competition laws create the rules of the game, outlining with sufficient clarity what is impermissible, then all competitors can rely on these rules in fashioning their behavior and predicting their competitors' behavior. The rule of law, if it applies at all, must protect and punish all who are subject to it. Otherwise, a competitor has little incentive to abide by these particular rules and incur costs thereby, while its rival cheats and gains a competitive advantage.

²²⁷ The World Bank, among others, has found that exposure to international markets played a key role in promoting competition in domestic markets. One study compared productivity in Germany, Japan, and the United States and found that "international competition ha[d] a greater impact than regional or local competition in raising productivity because international competition exposes countries to the most efficient production techniques." *Id.* at 142. Canada's and South Africa's competition agencies cited as a specific objective of their competition laws is to "promot[e] [their country's] competitiveness in international markets." 2007 ICN REPORT, *supra* note 19, at 20. Another benefit of promoting international trade is its introduction of innovation into the domestic market, fostering cooperation, the further division of labor, and efficiency. By injecting innovation into domestic markets and promoting the free flow of information, international trade can also pressure the domestic government to provide certain institutions or eliminate other institutional barriers to competition that hinder the domestic company's competitiveness. WORLD BANK, *supra* note 32, at 143. Others have questioned the neoliberal orthodoxy that countries should "privatise state-owned enterprises, maintain low inflation, reduce the size of government, balance the budget, liberalise trade, deregulate foreign investment and capital markets, make the currency convertible, reduce corruption and privatise pensions." Ha-Joon Chang, *Protecting the Global Poor*, PROSPECT, July 2007, available at <http://www.prospect-magazine.co.uk/pdfarticle.php?id=9653>. Instead, they argue that this orthodoxy works with countries at comparable levels of development, and developing countries may require some levels of protection, as the United States, Japan, Korea, and other developed countries did. Indeed, the prescriptions under neoclassical economic theory may constrain policy options, and hamper development. See generally HA-JOON CHANG, *BAD SAMARITANS: RICH NATIONS, POOR POLICIES AND THE THREAT TO THE DEVELOPING WORLD* (2007); ERIK S. REINERT, *HOW RICH COUNTRIES GOT RICH . . . AND WHY POOR COUNTRIES STAY POOR* (2007).

²²⁸ Seeking to foster innovation through heterogeneity, selection, and propagation, the state—through the rule of law—may seek to foreclose certain socially harmful activities. The state, for example, does not want to promote the continual introduction of novel fraudulent practices.

Any failure to enforce uniformly the rules of the contest will invite competitors to cheat. Nor should the complainant's identity matter: Any competitor, customer, supplier, or government agency should enjoin any infraction thereto.

The antitrust laws protect competition and all market participants from anticompetitive abuses. Upon reflection, one recognizes the banality of a U.S. antitrust mantra: That the purpose of the antitrust laws is "the protection of *competition*, not *competitors*."²²⁹ Inexplicably, the AMC claimed as "[m]ost important, [that] antitrust case law has become grounded in the related principles that antitrust protects competition, not competitors, and that it does so to ensure consumer welfare."²³⁰ The suspicion is that if the competitor complains, the challenged action is pro-competitive, as the competitor's incentives (e.g., concern about rival's aggressive behavior and efficiency) are misaligned with the consumers' interests (e.g., lower prices) or society's interest (e.g., allocative and productive efficiency). This suspicion is valid occasionally, but not always.

First, "where force can be used, law is not needed."²³¹ Firms with market power may have little utility for the courts to address violations of the competition laws. Instead, these dominant firms would favor increasing the barriers for challenging anticompetitive behavior, as they are rarely victimized by another competitor. Even if the smaller firm were an annoyance, the powerful entrenched firm may resort to quicker, lower-cost means to resolve their competition disputes: lobbying the government for relief, for example, venturing with or acquiring a financial interest in the smaller firm to increase

²²⁹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2724 (2007) (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990)).

²³⁰ AMC REPORT, *supra* note 18, at 4. The AMC argued that "[t]he adoption of this principle represented a marked change in the direction of antitrust law." *Id.* at 34. The AMC neither addresses the rule of law nor how it should protect consumers and competitors alike. Instead it assumed that protecting small firms "can mean a less efficient economy in which consumers must pay higher prices." *Id.* at 34.

²³¹ In addressing the Spartans, the Athenians were responding to their reputation of being litigious, as they resolved their contractual disputes with their allies through the courts. They noted the irony that an individual's "indignation, it seems, is more excited by legal wrong than by violent wrong; the first looks like being cheated by an equal, the second like being compelled by a superior." THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR 44 (Robert B. Strassler ed., 1996).

mechanisms to punish any unwanted behavior, or retaliating with anticompetitive measures.²³²

Entrants with potentially disruptive technologies may not have comparable alternatives. Although a dominant firm may use litigation strategically to impose costs on its rivals, an entrant with limited resources turns to the courts when it is the only viable—or least costly—alternative. An independent judiciary and the rule of law may be the only protections left for smaller competitors. The World Bank evaluated the literature and found that that “the primary beneficiaries of well-functioning commercial courts are new, small firms unaffiliated with either private business groups or the state, run by those who do not necessarily have established social connections.”²³³

Studies on commercial litigation in Italy, Romania, Russia, Slovakia, Ukraine, and Vietnam show that newly created private enterprises, which do not have established supplier and customer networks or significant market power, are most likely to resort to the use of commercial courts. Older, especially state-owned, enterprises are often able to settle disputes out of court.²³⁴

Second, the goal for any competition policy is a legal system that adjudicates cases “cheaply, quickly, and fairly, while maximizing access.”²³⁵ The Court notes that its legal standards may increase litigation costs by promoting “frivolous” suits.²³⁶ One disturbing trend in the United States is the Supreme Court’s restricting access to—or increasing the party’s cost in accessing—the courts for anticompetitive conduct. Fewer private federal antitrust cases have been brought since the Court’s decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*²³⁷ The Court notes

²³² One could question this belief as U.S.-centric in assuming the efficiency of the common law and that this process can be transplanted elsewhere in the world. Corrupt, incompetent, or inefficient courts can create anticompetitive entry barriers.

²³³ WORLD BANK, *supra* note 32, at 119.

²³⁴ *Id.*

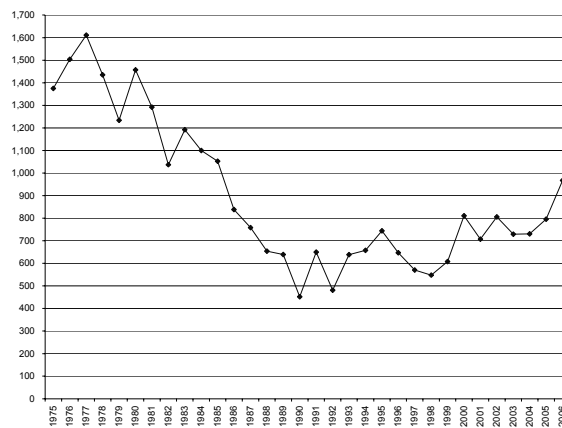
²³⁵ *Id.* at 124.

²³⁶ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2718 (2007).

²³⁷ In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 59 (1977), the Court retreated from its per se standard of liability for nonprice vertical restraints, and adopted the rule-of-reason standard argued by the Chicago School antitrust adherents. For a chart reflecting the number of private antitrust cases filed annually between 1975 and 2006 in federal district court, see SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE (31st ed.), <http://www.albany.edu/sourcebook/pdf/t5412006.pdf>. The following chart has been recreated from the *Sourcebook of Criminal*

that antitrust litigation is expensive, time-consuming, and at times beyond the ken of a generalist court.²³⁸ But, the Court has supplied the murky standards of anticompetitive conduct. While narrowing the scope of its rules of per se illegality, the Court has not offered in return a workable rule-of-reason standard.²³⁹ Litigants and trial courts are subjected to a nebulous weighing standard that consumes armies of attorneys for years in discovery.²⁴⁰ The Court compounded the problem through its implied immunities. The Court's state action doctrine enables special interest groups to solicit shelter from state legislatures. With its "varied and controversial interpretations," this implied immunity promotes at times anticompetitive competitive conduct that hinders consumers and the politically less powerful.²⁴¹ As

Justice Statistics Online (31st ed.):



²³⁸ *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1967 n.6 (2007).

²³⁹ Opting for its rule-of-reason standard, the Court overturned its per se rule for vertical, non-price restraints in *Continental*, 433 U.S. at 58–59, for maximum resale price maintenance in *State Oil Co. v. Khan*, 522 U.S. 3, 3 (1997), and for minimum resale price maintenance in *Leegin*, 127 S. Ct. at 2725.

²⁴⁰ In *Leegin*, the Court asserted that the rule-of-reason standard is now the "accepted" standard for testing whether a practice is an unreasonable restraint of trade. *Leegin*, 127 S. Ct. at 2712. Under this standard, the fact finder "weighs all of the circumstances of a case." *Id.* Among the non-exclusive factors for the fact-finder to weigh are "specific information about the relevant business," the "restraint's history, nature, and effect," and "[w]hether the businesses involved [with the restraint] have market power." *Id.* (internal quotation marks omitted).

²⁴¹ TASK FORCE ON THE FED. ANTITRUST AGENCIES, AM. BAR ASS'N, THE STATE OF FEDERAL ANTITRUST ENFORCEMENT 42 (2001) ("State action immunity drives a large hole in the framework of the nation's competition laws."); Majoras, *supra* note 7, at 1179; Muris, *supra* note 136, at 367–68, 375–77. Professor Waller argued that the state action doctrine, which is inconsistent with the kind of regulatory reform

Professor Waller argued, “At a minimum, a coherent legislative decision would be welcome instead of the ad hoc development of a judicial immunity so otherwise alien to our antitrust experience.”²⁴² Finally, in recent years, the Court readily has ceded antitrust laws’ consumer protections to the politically unaccountable independent agencies or self-regulatory agencies, which under the Chicago School are especially prone to regulatory capture.²⁴³

Given the dangers of central planning generally, it is ironic that the Supreme Court has done more to define the free market and the legal institutions that shape it.²⁴⁴ Advocating competition policy requires evaluating the deficiencies of, and drafting legislative improvements to, the current antitrust standards.

2. How an Adaptive Political System Can Promote Competition

Competition advocacy often targets state-owned enterprises sheltered from the competitive process. These enterprises include railroads, mail, telecommunications, and energy. In addition, similar concerns apply to other state-owned enterprises, such as the courts, administrative agencies, and legislatures. The more insulated these government officials are to public

that the United States normally promotes in the international fora, restricts the United States’ ability to obtain as great a package of concessions from other nations. Waller, *supra* note 173, at 124–25; AMC REPORT, *supra* note 18, at ix (“[C]ourts should adhere more closely to Supreme Court state action precedents. It recommends that the doctrine should not apply where the effects of conduct are not predominantly intrastate. In addition, the doctrine should equally apply to governmental entities when they act as participants in the marketplace.”).

²⁴² Waller, *supra* note 173, at 127.

²⁴³ For example, the Federal Energy Regulatory Commission’s merger review policies were recently criticized for relying on data supplied by the regulated entities, rather than conducting its own independent fact gathering and analysis of market definition. Sara Stefanini, *Think Tank Urges FERC To Reform Merger Policies*, COMPETITION LAW360 (N.Y.), Mar. 15, 2007, <http://competition.law360.com/Secure/ViewArticle.aspx?id=20553>. Perhaps sector regulators may not really understand the prevailing competition policy and do a second rate job when they try to do so.

²⁴⁴ Shaping competition policy is an unsuitable role for the Court. Although the Court may invite the views of amici, there is no assurance of a full and informed debate among stakeholders. The Court deliberates privately. What results is an opinion, which the Justices need not publicly defend. These Justices, who are neither appointed nor approved with the direct input of the public, are not accountable for their poor competition policies, nor can they *sua sponte* correct their errors until another case presents itself.

dissatisfaction, the less accountable they become, the more prone to corruption, and the less likely to change.

Some may decry the interventionist drift of various agencies, and call instead for a centrally coordinated planner. But too much central planning engenders the risk of gridlock and regulatory capture: “[W]here everything is done through the bureaucracy, nothing to which the bureaucracy is really adverse can be done at all.”²⁴⁵ Too little coordination, and one loses the benefits of division of labor and a greater risk of inconsistent legal standards. Finding this balance of securing the advantages of centralized power and intelligence without the government centrally planning too much of human affairs is, as John Stuart Mill observed, “one of the most difficult and complicated questions in the art of government.”²⁴⁶

To what extent are the government institutions responsive to the public? As the Chicago School and public choice theorists warn, and the protections for Italian barbers, German economists, and Kentucky real estate agents reflect, special interest groups, at times, solicit the government to further their parochial interests to the public's detriment. At other times, special interest groups petition the government to improve legal institutions, such as removing restraints that hinder them compared to foreign competitors.²⁴⁷ For example, they may call

²⁴⁵ JOHN STUART MILL, ON LIBERTY 172 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

²⁴⁶ *Id.* at 173. This Article suggests several checks on the regulatory agencies, including greater emphasis on the rule of law, less unfettered discretion by the agencies, and a vibrant marketplace of ideas. Interestingly, the two competition agencies can exert a competitive restraint on the other. The FTC and the DOJ's Antitrust Division currently compete for civil investigations and can serve as a benchmark for activity, such as periods when one agency brings fewer civil cases than the other, or reform. For example, the FTC Commissioner earlier articulated several important reforms for the competition agencies, such as periodic comprehensive reviews of the effectiveness of the competition agencies, post-merger review, greater transparency of agency decisions and enforcement activities, and greater empirical analysis of the competitive process. William E. Kovacic, Gen. Counsel, Fed. Trade Comm'n, Achieving Better Practices in the Design of Competition Policy Institutions, Remarks Before the Seoul Competition Forum 2–5 (Apr. 20, 2004), <http://www.ftc.gov/speeches/other/040420compolicyinst.pdf>. If the FTC implements these reforms, the Antitrust Division would likely undertake similar measures. But two competing bureaucracies, with the attendant costs, is not the ideal long term solution.

²⁴⁷ Industry participants, for example, may seek greater convergence in accounting and securities norms between the United States and other developing nations, providing new institutions to foster private trade with other countries, and

on the administration to follow Europe's steps to enact mechanisms to address global warming, since, as one business group warned, "in the absence of strong federal leadership there is a risk that US business may get left behind, losing ground against competitors in the rapidly growing global market for low-carbon solutions."²⁴⁸ Legal institutions, like private firms, must continually adapt to the competitive environment.²⁴⁹ Exploration by private economic agents is useless if the government institutions hinder, or are passive to, this exploration. To learn

eliminating regulations that have outlived their utility. *See, e.g.*, Bertrand Benoit, *EU & US to Begin Single Market Push*, FIN. TIMES (London), Mar. 20, 2007, at 6 (noting that the E.U. and the United States are commencing initiatives to "harmonize regulations, norms and technical standards in up to 40 economic and industrial sectors," including the "automotive industry, where regulatory incompatibilities are responsible for 10 per cent of the cost of developing and producing new cars"); Jeremy Grant, *SEC Could Trial Global Pact on Listings*, FIN. TIMES (London), Mar. 20, 2007, at 15 (stating that the SEC is considering a pilot program with other foreign regulators whereby "foreign initial public offerings could be marketed and sold in the United States without SEC approval if approved by a regulator abroad with 'equivalent' rules"). The Committee on Capital Markets Regulation, an independent group led by Harvard Law Professor Hal S. Scott, Dean of Columbia Business School Glenn Hubbard, and Chairman of the Brookings Institution John L. Thornton, recently highlighted its areas of concern about the competitiveness of U.S. capital markets and outlined thirty-two recommendations including improvements to government institutions to enhance that competitiveness. *See* LUIGI ZINGALES ET AL., COMM. ON CAPITAL MKTS. REGULATION, INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION 7–21 (2006), http://www.capmktreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf.

²⁴⁸ Edward Luce, *US Investors Join Businesses to Call for Emission Cut*, FIN. TIMES (London), Mar. 20, 2007, at 9 (quoting statement issued by the group Investors and Business for U.S. Climate Action).

²⁴⁹ For example, the DOJ may have successfully prosecuted an antitrust violation years ago, and obtained from the federal court a judgment that prohibits or requires certain conduct. As market dynamics change, that final judgment may have the perverse effect of suppressing competition. In recent years, the DOJ has typically included a sunset provision in the proposed final judgment, whereby the judgment automatically expires ten years after its entry. For older judgments, the DOJ reviews them periodically, and in some instances where they have outlived their usefulness, the DOJ has asked the court to terminate the judgment or modify its terms. *See, e.g.*, Press Release, U.S. Dep't of Justice, Justice Department Moves to Modify Real Estate Consent Decree: Action Allows Consumers to Get More Information on Discounted Real Estate Fees (June 29, 2005), http://www.usdoj.gov/opa/pr/2005/June/05_at_351.htm. The utility of all administrative regulations having such sunset (or built-in review) provisions is less clear. For a public choice theorist, this selection process could have the perverse anticompetitive effect of crowding out pro-competitive or competitively neutral regulations with anticompetitive special interest regulations. Upon renewal, the agency may lack the political will to defend pro-competitive restraints, while special interest groups will seek to preserve, or broaden, the anticompetitive restraints.

and adapt, the government institutions, as part of their competition advocacy, must investigate their impact on the marketplace, their successes and failures, and the alternatives to existing deficient legal norms.²⁵⁰

3. How a Vibrant Marketplace of Ideas Can Promote Competition

In promoting a competitive media, legal institutions, in turn, promote the objectives of competition policy.²⁵¹ First, a competitive media increases political accountability and reduces corruption, which poisons any competition policy.²⁵² The federal

²⁵⁰ To achieve greater accountability, one should also inquire to what extent the electoral rules or process create entry barriers for new candidates or political parties and disenfranchise certain voters or hinder potential candidates. For example, supporters of the Seventeenth Amendment argued that direct elections of U.S. senators rather than state legislatures, would result in “cleaner, less corrupt government and would counter the undue effects of large corporations, monopolies, trusts, and other special-interest groups in the Senate election process.” AKHIL REED AMAR, *AMERICA'S CONSTITUTION* 412 (2005).

²⁵¹ The “marketplace of ideas” is “a sphere in which intangible values . . . compete for acceptance.” See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 1383 (Philip Babcock Gove ed., 1993). Its beneficial social value is based on the theory that truth prevails in the widest possible dissemination of information from diverse and antagonistic sources. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (stating that the theory of the Constitution, as embodied in the First Amendment, is that “the ultimate good desired is better reached by free trade in ideas [and] that the best test of truth is the power of the thought to get itself accepted in the competition of the market”). The First Amendment promotes the marketplace of ideas by restricting to varying degrees governmental restraints on speech. The federal antitrust laws promote the marketplace of ideas by reaching anticompetitive private restraints on this marketplace. See, e.g., *Fed. Commc'ns Comm'n v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 800 n.18 (1978) (“[A]pplication of the antitrust laws to newspapers is not only consistent with, but is actually supportive of the values underlying, the First Amendment.”); *Red Lion Broad. Co. v. Fed. Commc'ns Comm'n*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.”).

²⁵² See WORLD BANK, *supra* note 32, at 105 (“Across countries there is strong evidence that higher levels of corruption are associated with lower growth and lower levels of per capita income.”). Corruption undermines competition policy (1) as a haphazard tax “which distorts the choice between activities and lowers the returns to public and private investments,” (2) as a barrier to entry—“[e]vidence from transition[al] economies indicates that . . . small firms and new entrants were significantly more likely to report corruption as an obstacle to business”—and (3) by subverting the “legitimacy of the state” and its ability “to provide institutions that support markets.” *Id.* at 106. “Corruption is also associated with lower public spending on health and education, which in turn limits opportunities for poor people

government can prosecute corruption by the state agencies, which can prosecute local authorities. But who prosecutes the federal government? The state typically cannot investigate corruption of a federal agency. This is left to Congress and to the Attorney General. If the same political party controls Congress and a weak Attorney General, that oversight is diminished. The only remaining critical check on corruption and bad policymaking by the federal government is the media. And who acts as a check on the media, but competition.

An independent and competitive media (1) informs policy makers of the unintended social effects of their policies, (2) provides a voice to pressure the government for change,²⁵³ and (3) serves as a catalyst for institutional change to promote competition policy. The World Bank found that corruption is lower in countries that are more open to internal trade and have a free press.²⁵⁴ In countries with media monopolies, the World Bank reported, “political, economic, and social outcomes are worse than in those where the media are competitive, in part because the former are less effective in improving institutional quality (governance).”²⁵⁵ Given the media’s important role, any sound competition policy must include fostering a competitive marketplace of ideas.²⁵⁶ This means first keeping the media independent and free from governmental control. As the World Bank noted, “[h]igher levels of perceived media freedom or independence are associated with lower levels of perceived

to invest in their human capital and to participate in markets.” *Id.* To increase transparency of such corruption, one non-profit company collects from businesses “information about the official or quasi-official entities—governments, international organizations, security forces, state-owned enterprises, etc.—around the world that solicit bribes.” Bribeline: Business Registry for International Bribery and Extortion, Incident Reporting, <https://www.bribeline.org/bribelineHome.jsp> (last visited Mar. 30, 2008).

²⁵³ “A study in India found that the media affected how the government responded to floods and famines: the distribution of relief was greater in states with higher newspaper circulations.” WORLD BANK, *supra* note 32, at 19; *see also* Robert D. Putnam, *The Strange Disappearance of Civic America*, AM. PROSPECT, Nov. 30, 2002, available at <http://www.prospect.org/cs/articles?articleId=4972> (finding a positive correlation between newspaper readership and civic involvement, such as association membership).

²⁵⁴ WORLD BANK, *supra* note 32, at 19, 107.

²⁵⁵ *Id.* at 188.

²⁵⁶ For a survey of various nations’ approaches to media mergers, see ORG. FOR ECON. CO-OPERATION & DEV., MEDIA MERGERS 16 (2003), <http://www.oecd.org/dataoecd/15/3/17372985.pdf>.

corruption, regardless of differences in a country's level of income."²⁵⁷

Given traditional media's high fixed costs and significant entry barriers,²⁵⁸ however, many countries have argued for organizing the media as a government-owned monopoly.²⁵⁹ But state ownership has its perils.²⁶⁰ As one World Bank study found, media in countries with high levels of state ownership were much less free, as they transmit much less information to people in economic and political markets. State ownership was also found to be negatively correlated with economic, political, and social outcomes: There was generally "more corruption, inferior economic governance, less-developed financial markets, fewer political rights for citizens, and poorer social outcomes in education and health."²⁶¹

Concentrated private media ownership also hinders competition. Private owners associated with the state or political parties—or protecting their business interest—can shape or control the dissemination of information.²⁶² An underlying

²⁵⁷ WORLD BANK, *supra* note 32, at 182.

²⁵⁸ Television, cable, and radio have regulatory barriers and high fixed costs. Newspapers have high fixed "first copy" costs. Publishing the first copy of a newspaper is high, given the reporting and editorial costs, the infrastructure to print newspapers, and costs to solicit advertisers. The marginal cost of producing the second, third, and fourth copies is very low and remains low up to the newspaper's printing capacity. *See id.* at 183.

²⁵⁹ *See id.*

²⁶⁰ Examining the ownership structure of the five largest newspapers and television stations in each of ninety-seven countries, the World Bank found that state ownership was "pervasive." *Id.* On average, the state controlled about thirty percent of the top five newspapers, sixty percent of the top five television stations, and seventy-two percent of the largest radio stations. *Id.*

²⁶¹ *Id.* at 184–85 (noting also that after Mexico privatized its broadcasting in 1989, the TV station uncovered government corruption scandals and other stories previously unreported by the state-owned station).

²⁶² The FCC reportedly ordered its staff to destroy all copies of a draft study that suggested greater media concentration would hurt local television news. Based on a review of 10,500 clips from local news programs broadcast in twenty markets, two FCC economists found that locally-owned television stations produced more local news—about five and one-half minutes of local news per half-hour program—than non-locally-owned stations. *See* John Dunbar, *FCC Quashed Contrary Reports: Research Supported Notion that Local Ownership of TV Stations Strengthened News*, RICHMOND TIMES-DISPATCH, Jan. 26, 2007, at A4. The study's finding was at odds with the FCC, which was under heavy lobbying from the broadcast industry that media ownership rules were too restrictive and should be loosened. In a meeting with their supervisor, the FCC economists were told that "the front office wasn't going to let it out, and the bureau chief wasn't going to let it out." *Id.* Another reportedly suppressed FCC radio study indicated that over seven years there had

concern of media concentration is self-censorship.²⁶³ The recent debate surrounding News Corporation's acquisition of the *Wall Street Journal* focused in part on how Rupert Murdoch shapes the type of coverage—or, in particular in China, the lack of coverage—in his media empire, and the need for some mechanism to preserve the *Journal's* journalistic independence. If the media is dependent upon government funding²⁶⁴ or a few major advertisers through overall industry concentration, the risk of self-censorship also increases.²⁶⁵

been a 35 percent decline in the number of radio station owners, and that 70 percent of advertising revenue in markets that were examined was controlled by two firms. The Senate, during its confirmation hearings, questioned the incoming FCC Chairman about this self-censorship, and the FCC thereafter posted drafts of the local news study and a copy of the radio study. Overseas, a study of television coverage of the Ukrainian presidential elections among the incumbent and six other candidates found that the percentage of coverage devoted to the incumbent and the percentage of positive coverage that the incumbent received were directly and positively related to the degree of state involvement in the station ownership. Despite the legal requirement for the state-owned media to provide balanced and neutral coverage, the state-owned station gave the most coverage (51 percent) and the most biased coverage (75 percent of the coverage was positive for the incumbent). Close on the heels was the private family-owned station with links to the government (48.5 percent coverage for the incumbent, 73 percent of which was positive). The more independent privately-owned station devoted 23 percent of its coverage to the incumbent, 40 percent of which was positive. WORLD BANK, *supra* note 32, at 185.

²⁶³ See, e.g., BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* (6th ed. 2000); C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* (2006); ROBERT W. MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES* 243 (1999). Journalists and media watchdogs have also expressed concern about the rise of self-censorship and the loss of journalistic independence following the increasing media concentration. See, e.g., Trudy Lieberman, *You Can't Report What You Don't Pursue*, COLUM. JOURNALISM REV., May/June 2000, at 44, 44–49; Mark Crispin Miller, *Can Viacom's Reporters Cover Viacom's Interests?*, COLUM. JOURNALISM REV., Nov./Dec. 1999, at 50, 50. In enacting the 1992 Cable Act, Congress noted its “special concerns” about concentration of the media in the hands of a few who may control the dissemination of information. One concern was that “the media gatekeepers will (1) slant information according to their own biases, or (2) provide no outlet for unorthodox or unpopular speech because it does not sell well, or both.” Congress's second concern about “horizontal concentration is that it can be the basis of anticompetitive acts. For example, a market that is dominated by one buyer of a product, a monopsonist, does not give the seller any of the benefits of competition.” S. REP. NO. 102–92, at 32–33 (1991), as reprinted in 1992 U.S.C.C.A.N. 1165–66. Congress sought to remedy these concerns in the 1992 Cable Act, with several provisions including the “must-carry,” “subscriber limits,” and “channel occupancy” provisions.

²⁶⁴ See WORLD BANK, *supra* note 32, at 188.

²⁶⁵ In a survey of journalists, editors, and news executives in the United States, “more than one-third responded that news is not reported if it might hurt

To foster a competitive media, the government should first remove onerous regulations that reduce the media's independence or distort the provision of information. Globally, some government licensing requirements extend beyond technical feasibility and impose restrictions on content.²⁶⁶ After the Korean government, for example, replaced the newspaper licensing requirements in 1987 with more liberal ones, "the number of newspapers grew from 6 to 17 in Seoul alone, and dozens more were launched" in other parts of Korea, providing more diverse coverage.²⁶⁷

The government should also affirmatively promote the free flow of information. Under an evolutionary economic perspective, not only is experimentation critical, but also the dissemination of information of that experimentation and feedback thereto.²⁶⁸ Given the dispersion of information in society and the attendant search costs, the government can play a key role in facilitating "the greatest possible centralization of information, and diffusion of it from the centre."²⁶⁹ This does not mean having the government evaluate or filter the information's content. Instead, the government should promote the information's transparency.²⁷⁰ These steps include creating

advertising revenues and thus harm the financial position of media firms." *Id.*

²⁶⁶ One notable example is the Chinese government's attempt to restrict access to or chill certain information over the Internet. Residents of the city Xiamen recently employed the Internet to organize a mass protest against a planned chemical feedstock plant. Seeking to mitigate the anonymity of Internet users, city officials drafted regulations banning such anonymous postings. See Mure Dickie, *Chinese City To Tighten Grip over Internet*, FIN. TIMES (London), July 9, 2007. Internet censorship, according to one report, is practiced in about twenty-four countries, with ten countries "regularly preventing their citizens from seeing a range of material" online. Also disturbing is that other countries reportedly are copying the more experienced countries' censorship techniques. See Richard Waters, *Web Censorship Spreading Around the World, Report Finds*, FIN. TIMES (London), Mar. 15, 2007, at 1. These censorship techniques include (1) the "brute force" bombarding of the offending server with requests, so as to make the website unobtainable, (2) blocking entire services, such as Google's blogging service, and (3) keyword filtering which identifies particular undesirable terms. See *id.* The World Bank cites two additional techniques: (1) "restrict[ing] access to the Internet under criminal law," or (2) "establish[ing] government Internet service monopolies" to restrict citizens' access to certain sites and to "monitor[] information from abroad." WORLD BANK, *supra* note 32, at 187.

²⁶⁷ WORLD BANK, *supra* note 32, at 186.

²⁶⁸ NELSON & WINTER, *supra* note 109, at 402; see also Moreau, *supra* note 49, at 869.

²⁶⁹ MILL, *supra* note 245, at 123.

²⁷⁰ For example, the government can promote benchmarks so that consumers

antitrust safe harbors for private individuals to (1) publicly disseminate price, wage, and other information,²⁷¹ or (2) promote novel forms of information dissemination, such as prediction markets, whereby individuals bet on future outcomes.²⁷² To foster accountability—and lower the media’s search costs—the government can promote its own transparency and remove restraints in accessing such information.²⁷³

Finally, in the media industry, the competition agencies should examine not only the merger’s—or anticompetitive restraint’s—impact on advertising rates, but its impact on editorial competition.²⁷⁴ Although some argue that editorial competition involves non-economic concerns better left to other agencies, such editorial competition, as courts have repeatedly found, is economic competition cognizable under the competition laws.²⁷⁵

can readily compare prices of goods, such as mattresses and cell phone services. In markets with many sellers, buyers may have high search costs to identify the lowest-priced seller. Increased price transparency may make it easier for buyers to compare prices and bargain shop, reducing their search costs.

²⁷¹ Making historical price, supply, or cost data may also enable each competitor to benchmark its performance to an industry standard. For such exchanges, the federal antitrust agencies have outlined some steps to mitigate litigation risks by (1) having a third party, such as a purchaser, government agency, consultant, academic institution, or trade association, collect the data, (2) basing the information provided by the participants on data more than three months old, (3) having at least five providers report data upon which each disseminated statistic is based, with no individual provider’s data representing more than 25 percent on a weighted basis of that statistic, and (4) aggregating any information disseminated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider. See U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE 63 (1996), <http://www.usdoj.gov/atr/public/guidelines/0000.pdf>; see also Letter from R. Hewitt Pate, Assistant Att’y Gen., U.S. Dep’t of Justice, Antitrust Div., to Diana West, Internationally Bd.-Certified Lactation Consultant (May 25, 2004), <http://www.usdoj.gov/atr/public/busreview/203831.pdf> (explaining that the Division would not challenge the collection of fee information for a survey among competitors, which would be collected following the principles outlined in the *Health Care Guidelines*). For a further discussion of the antitrust risks of the dissemination of price information, see generally Maurice E. Stucke, *Evaluating the Risks of Increased Price Transparency*, 19 ANTITRUST 81 (2005).

²⁷² See KENNETH J. ARROW ET AL., AEI-BROOKINGS JOINT CTR., STATEMENT ON PREDICTION MARKETS 2 (2007) (on file with author).

²⁷³ The Freedom of Information Act, 5 U.S.C.A. § 552 (West 2008), for example, was enacted to foster this transparency. For a critique of its success and shortcomings in recent years, see generally ALASDAIR ROBERTS, *BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE* (2006).

²⁷⁴ See Stucke & Grunes, *supra* note 173, at 270–73.

²⁷⁵ The most recent decision was *Reilly v. MediaNews Group, Inc.*, No. C 06-

4. How Ethical, Social, and Moral Norms Can Promote and Hinder Competition

Competitive markets are not supported solely by government institutions. Individuals act or refrain from acting based on individual, familial, social, religious, and ethical norms. Competition advocates must do more than establish the basic rules of the game to “ensure that each firm’s competitive energy is directed towards socially-productive ends rather than socially-destructive or welfare-reducing ends.”²⁷⁶ They must also synthesize these rules with the prevailing informal cultural, moral, and ethical norms.²⁷⁷ These norms can act as sticks—such as guilt, shame, social stigma, or economic or penal sanctions—or as carrots—such as praise or increased social stature.²⁷⁸ The key for competition policymakers is determining how these informal institutions aid or hinder competition, such as by facilitating market transactions or collusion.²⁷⁹

Moral norms and competition policy, rather than being antithetical, can work in tandem toward shared goals by removing entry barriers against outsiders or targets of discrimination, fostering non-zero-sum cooperation and strong

04322 SI, 2007 WL 1068202, at *3 (N.D. Ca. Apr. 10, 2007), where Judge Illston held that the alleged loss of editorial competition was sufficient for antitrust injury. *See also* Hawaii v. Gannett Pac. Corp., 99 F. Supp. 2d 1241, 1249–50 (D. Haw.), *aff’d*, 203 F.3d 832 (9th Cir. 1999); Cmty. Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146, 1166 (W.D. Ark. 1995), *aff’d*, 139 F.3d 1180 (8th Cir. 1998); United States v. Citizen Publ’g Co., 280 F. Supp. 978, 985 (D. Ariz. 1968), *aff’d*, 394 U.S. 131 (1969); United States v. Times Mirror Co., 274 F. Supp. 606, 612 (C.D. Cal. 1967), *aff’d*, 390 U.S. 712 (1968).

²⁷⁶ OECD, REGULATED SECTORS, *supra* note 133, at 3.

²⁷⁷ As a FTC Commissioner observed on his trip to Mongolia, even if a former centrally-planned economy relaxes controls on firm behavior, “some business entities may show a propensity to attempt to recreate privately the types of planning mechanisms that the state formerly supplied.” William E. Kovacic, *Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe*, 44 DEPAUL L. REV. 1197, 1205 (1995). Likewise, two French economists attributed—before the election of President Nicolas Sarkozy—their country’s anti-capitalist instincts and resistance to change to attribution bias. When France was interventionist in the 1950s and 60s, growth was high, so people thereafter attribute growth to interventionism. *See* AUGUSTIN LANDIER & DAVID THESMAR, LE GRAND MÉCHANT MARCHÉ (2007).

²⁷⁸ For a discussion of the use of shaming and praise to deter antitrust crime, see generally Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443, 515–23 (2006) [hereinafter Stucke, *Morality and Antitrust*].

²⁷⁹ *See* WORLD BANK, *supra* note 32, at 173.

reciprocity, and increasing opportunities for technological change by opening access to the market. Absent promoting these ethical and moral foundations for competition, competition policies can stumble. As the chief rabbi of Britain said,

[w]hen everything that matters can be bought and sold, when commitments can be broken because they are no longer to our advantage, when shopping becomes salvation and advertising slogans become our litany, when our worth is measured by how much we earn and spend, then the market is destroying the very virtues on which in the long run it depends.²⁸⁰

For example, until the Sentencing Guidelines were promulgated, the federal district courts treated price-fixing and other hard-core cartels lightly, infrequently sentencing offenders to jail.²⁸¹ Even today in most countries, the existing legal, social, and ethical norms do not condemn such price-fixing.²⁸² A country can introduce criminal sanctions for such hard-core cartels, but absent social condemnation, the risk of jury or judge nullification increases. To deter such price-fixing, competition authorities must reorient these informal norms by educating the public to the harms of the criminalized conduct. Once citizens synthesize the legal norm with the prevailing social, ethical, and moral norms—and internalize that norm—the costs to police and punish deviations thereto are reduced. Absent reconciliation with prevailing social, ethical, and moral norms, legal prohibitions are costly to enforce and face jury and judge nullification. Enforcement authorities can supplement the criminal sanctions of incarceration and fines with shaming and praise.²⁸³ Moreover, internalizing the norms not only helps deter price-fixing—without the need to escalate the levels of incarceration—but also helps foster a culture of competition.

Social, ethical, and moral norms can complement, but not supplant, legal institutions to foster competition. Social, ethical, and moral norms may work well in insular communities where trade is based upon shared conventions and personal relationships. Deviations are subject to social penalties. For example, at a local yard sale, I may accept a check from my

²⁸⁰ JONATHAN SACKS, *TO HEAL A FRACTURED WORLD: THE ETHICS OF RESPONSIBILITY* (2005).

²⁸¹ Stucke, *Morality and Antitrust*, *supra* note 278, at 460–70.

²⁸² *Id.* at 540–44.

²⁸³ *See id.* at 515–23.

neighbor. But this informal norm of trust—and the social stigma if the neighbor's check bounces—weakens when I trade over eBay with someone outside my community. Moreover, outsiders may be uninformed of—or do not share—the local norms of exchanges, which may serve as a trade barrier. Here, formal legal institutions can supplement the informal norms to encourage trade with more socio-culturally diverse traders. One key legal mechanism to lower the risk of transactions is to promote information sharing.²⁸⁴ As division of labor increases, we become more dependent upon others to provide our goods and services. As the complexity of our relationships increases—getting vegetables from South America, shoes and eyeglasses from Italy, and much else from China—legal institutions must supplement these informal institutions. Otherwise, absent these legal institutions, transaction costs and allocative inefficiency increase.²⁸⁵

On the other hand, informal norms can hinder the attainment of competition goals. Social norms, for example, can insulate certain groups from competition through discriminatory practices. Legal institutions can break down these entry barriers and improve competitiveness by enabling the discriminated groups to compete in the marketplace.²⁸⁶ Social norms, especially

²⁸⁴ Rather than taking the most risk-averse position—such as demanding cash up front, extracting higher service fees, or requiring a performance bond, surety, or guarantor—a more formal mechanism to collect information can assist traders in gaining information about the riskiness, reputation, and ethics of their potential partners, and adjust accordingly. One simple example is the reputation feedback of traders over eBay. As these more formal norms are manipulated, as some have found over eBay, alternative or supplemental legal institutions might be required.

²⁸⁵ In countries without developed legal institutions, for example, the contracting parties must negotiate all the contingencies, remedies, and procedural due process components. As the community legal institutions develop, the parties need not replicate this entire legal framework in every contract. Indeed, the contract can focus on the material, unique issues; the remainder can be left to default or implied provisions.

²⁸⁶ For example, anti-discrimination laws can spur competition by enabling individuals of different race, gender, origin, sexual orientation, religion, or age to compete in the labor market and for goods and services. Thus, an important component of competition policy is breaking down these entry barriers, promoting greater access to these markets—such as for housing, schooling, government, employment, etc.—as well as educating society to the anticompetitive harms of such discriminatory practices. The persistence of racial discrimination also undercuts the neoclassical economist's assumption that market forces will somehow discipline discriminatory employers and eliminate discrimination from the marketplace.

Needless to say that if the market is the solution to discrimination, it

during times of economic stagnation, may lead to hostility toward immigrants. The orthodoxy is that global trade flourishes by reducing tariffs and other trade barriers, encouraging convergence on competition policies, and otherwise promoting the free flow of goods and services across borders. It is puzzling that, in recent years, the United States seeks to liberalize trade while erecting barriers for professionals, students, and potential employees from entering the United States.²⁸⁷ It is also puzzling that attorneys (myself included) at the Antitrust Division of the DOJ spent time and resources on unrelated immigration appeals—namely, defending the deportation of immigrants who sought amnesty in the United States. How can a competition agency promoting open information exchanges and trade seek to erect such entry barriers, and what sort of signal does a competition agency send when its attorneys are clamping down on workers seeking amnesty to remain in the United States? This is not to say that immigration should be unregulated. But, any intelligent competition policy must assess the degree to which immigration norms—as well as resources devoted to enforcing such norms—promote or hinder the objectives of our competition policies, including the presumption that our nation’s openness to immigrants has spurred its competitiveness.²⁸⁸

seems to take a distressingly long time to solve the problem since the market has had well over one hundred years to work since the passage of the Thirteenth Amendment and discrimination is still with us today.

Kenneth G. Dau-Schmidt, *Economics and Sociology: The Prospects for an Interdisciplinary Discourse on Law*, 1997 WIS. L. REV. 389, 409–10 (1997).

²⁸⁷ About eighty percent of MBA programs launched over the past ten years were outside the United States. Although this may reflect a mature domestic market for MBAs, the “application problem has been exacerbated by visa time lags and the unfriendliness of American authorities to non-U.S. entrants after the events of September 11, 2001.” James M. Danko, *The Global MBA Race: Facing Challenges Through Collaboration*, BUS. LEADERSHIP REV., July 2005, <http://schools.mbaworld.com/printblarticle/29/index.htm>.

²⁸⁸ John Stuart Mill commented about internal trade fostering the exchange of ideas, stating that:

[T]he economical advantages of commerce are surpassed in importance by those of its effects which are intellectual and moral. It is hardly possible to overrate the value, for the improvement of human beings, of things which bring them into contact with persons dissimilar to themselves, and with modes of thought and action unlike those with which they are familiar. Commerce is now, what war once was, the principal source of this contact. Commercial adventurers from more advanced countries have generally been the first civilizers of barbarians. And commerce is the purpose of the far greater part of the communication which takes place between civilized

Similarly, great leaders temper rather than excite their citizens' fears about foreigners during times of uncertainty. Although Athens was at war, for example, Pericles in his funeral oration noted Athens' strength in throwing open its city to the world: "[N]ever by alien acts" does Athens "exclude foreigners from any opportunity of learning or observing, although the eyes of an enemy may occasionally profit by our liberality."²⁸⁹ As this last point reinforces, policy makers must examine how their moral and ethical norms affect the goals of competition. How effective are authorities in promoting a culture of competition, if, for example, they violate the rule of law? Ultimately, policy makers must provide moral leadership.

5. How Informed Antitrust Enforcement Can Promote Competition

Finally, for effective competition advocacy, authorities must identify not only the objectives of their competition policy, but the risks when market power is left unchecked. Competition advocacy rings hollow without antitrust enforcement. Instead of viewing competition enforcement and advocacy as independent activities, the ICN noted how they reinforce each other: "Enforcement is strengthened by an active advocacy, and advocacy is less effective in the absence of enforcement powers or when enforcement lacks credibility."²⁹⁰ This does not mean more

nations. Such communication has always been, and is peculiarly in the present age, one of the primary sources of progress. To a being like man, who, as hitherto educated, can scarcely cultivate even a good quality without running it into a fault, it is indispensable to be perpetually comparing his own notions and customs with the experience and example of persons in different circumstances from himself: and there is no nation which does not need to borrow from others, not merely particular arts or practices, but essential points of character in which its own type is inferior. . . . And it may be said without exaggeration that the great extent and rapid increase of international trade, in being the principal guarantee of the peace of the world, is the great permanent security for the uninterrupted progress of the ideas, the institutions, and the character of the human race.

JOHN STUART MILL, 1 PRINCIPLES OF POLITICAL ECONOMY 119–20 (West Strand 1848).

²⁸⁹ THE LANDMARK THUCYDIDES, *supra* note 231, at 113. Sparta, in contrast, regularly and summarily expelled unwelcomed visitors. *Id.* app. C.

²⁹⁰ ICN ADVOCACY REPORT, *supra* note 1, at iv; *see also* Porter, *supra* note 93, at 156 (noting his conviction that "open competition, stimulated by strict antitrust enforcement, is essential not only to national prosperity, but to the health of companies themselves"). *See generally* HARVARD UNIV. & WORLD ECON. FORUM, THE

of the same mishmash of neoclassical economic theory, vignettes of zero-sum competition, and normative weighing of the anticompetitive ethereal—deadweight welfare loss—against the conjectures of procompetitive efficiencies. This recipe benefits antitrust lawyers acting as soothsayers, but is a disservice to industry participants, competition authorities entrusted with enforcing the law, and consumers. Instead, competition enforcement must become more empirically based, objective, and predictable.²⁹¹

IV. HOW DO WE KNOW WE ARE PROGRESSING IN THE RIGHT DIRECTION

If competition is a process to achieve certain objectives, how do we know if we are progressing toward that end? If competition is not a self-initiating, self-correcting process that ultimately guides us to the right result, then there is no assurance that the invisible hand is bringing about concomitant moral progress. Nor is it clear that competition, even if self-initiating, independently promotes moral, ethical, and societal objectives.

Competition policymakers must periodically assess the economy's progression toward the competition policy's objectives. Concepts like consumer welfare or allocative or productive efficiency are not readily measurable, and therein the potential for abuse exists: An ethereal objective can justify any practice. Instead, competition authorities must justify their policies by more tangible signposts.²⁹²

The AMC recently cited two familiar, but unmeasurable, objectives of a competitive market: (1) spurring “businesses to develop and sell as efficiently as possible the kinds and quality of goods and services that consumers desire,”²⁹³ and (2) driving an “economy's resources toward their fullest and most efficient uses,

GLOBAL COMPETITIVENESS REPORT 2000 (2000).

²⁹¹ For a discussion of several measures to improve merger enforcement, see generally Stucke, *Behavioral Economists*, *supra* note 69, at 579–82. I plan to further develop this subject in a forthcoming article, *Does the Rule of Reason Violate the Rule of Law?*

²⁹² Plutarch similarly employed certain signposts to objectify one's moral development. PLUTARCH, *On Being Aware of Moral Progress*, in *ESSAYS* 130 (Ian Kidd ed., Robin H. Waterfield trans., Penguin 1992).

²⁹³ AMC REPORT, *supra* note 18, at 333.

thereby providing a basis for economic development.”²⁹⁴ Only the third signpost has some measurability: leading to the “creation of wealth, making possible improved living standards and greater prosperity.”²⁹⁵

What happens, however, if one signpost reflects a stagnant or declining living standard and a growing wealth disparity? In perfectly competitive markets, producers are price takers and charge less than what many consumers are willing to pay. Many factors contribute to the inequality of wealth, but any competition policy must assess its impact on wealth distribution. Market power reduces consumer surplus, as wealth is transferred from buyers to sellers.²⁹⁶ A historical criticism of utilitarian welfare economics is its indifference to such distributional issues, and “its concentration only on utility sum-totals in a distribution-blind way.”²⁹⁷ Although neoclassical economic theory may be indifferent to such distributional effects, one concern underlying the Sherman Act’s passage in 1890 was the growing disparity in wealth. With business executives “madly striving in the race for riches,” a widening income

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ For example, assume loyal Coca-Cola (“Coke”) drinkers are willing to pay one dollar for a twelve-ounce can; but other cola buyers are willing to drink either Coke or Pepsi depending on which is cheaper. Because the vending machine cannot ascertain the loyalty of prospective purchasers, and charge the loyal Coke drinkers more than the fickle drinkers, Coke charges a lower price to capture the sales of the marginal Coke beverage drinkers. In a perfectly competitive market, the price for the can of Coke would equal its marginal cost. But given Coke’s investment in branding and promotion, the price will be somewhat higher, say sixty cents. Thus, the loyal Coke drinkers enjoy a consumer surplus of forty cents, which represents the savings of what they were willing to pay—one dollar—versus what they actually paid—sixty cents. If the Coca-Cola Company acquired PepsiCo, then it could extract more consumer surplus through its increased market power. For example, Coca-Cola post-merger could charge a higher price for its Coke products—one dollar—but keep Pepsi at a lower price—sixty cents. Now the loyal Coke drinker has zero consumer surplus. On one level, wealth is being transferred from the loyal consumers to Coke. On a second level, not all Coke employees, shareholders or other stakeholders will equally share in these monopoly rents. Depending on the clout of Coke’s workers, shareholders, or other stakeholders, these monopoly rents may ultimately be dissipated on a subset of Coke stakeholders, such as their senior executives. Indeed, the average CEO compensation in the United States has increased much faster than the average wage, which cannot be attributed solely to tax episodes in the 1980s. *See infra* note 302.

²⁹⁷ Amartya Sen, *The Possibility of Social Choice*, 89 AM. ECON. REV. 349, 352 (1999). When receiving his Nobel prize, Sen noted this informational limitation of the distributional effects has “considerable ethical and political importance.” *Id.*

disparity emerged: “[o]ne comprising the very rich and powerful, while in another are found the toiling poor.”²⁹⁸ Likewise, Senator Sherman identified this inequality of condition, of wealth, and opportunity as the greatest threat to disturbing social order: This inequality “has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition.”²⁹⁹

The disparity in income, based on the index of income concentration or Gini coefficient, decreased between 1947 and 1968, but increased thereafter, accelerating notably during the Reagan Administration, which, outside of localized bid-rigging schemes, had severely cut back its antitrust enforcement.³⁰⁰ According to another measure, the disparity in wealth in recent years is higher than when the Sherman Act was promulgated.³⁰¹ Other measures show the ever-widening salary gap between the average CEO and the average worker,³⁰² and between the richest one percent and the average worker.³⁰³ The

²⁹⁸ President Grover Cleveland, Fourth Annual Message (Dec. 3, 1888), in 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 57, 58 (Earl W. Kintner ed., 1978).

²⁹⁹ 21 CONG. REC. 2455, 2460 (1890) (statement of Sen. Sherman), reprinted in 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 113, 122 (Earl W. Kintner ed., 1978).

³⁰⁰ See U.S. CENSUS BUREAU, THE CHANGING SHAPE OF THE NATION'S INCOME DISTRIBUTION 1947–1998 (2000). The census data may understate the income disparity. See Peter H. Lindert, *When Did Inequality Rise in Britain and America?*, 9 J. INCOME DISTRIBUTION 11, 13 (2000). Other studies reflect the growing income disparity. Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States: 1913–1998*, 118 Q.J. ECON. 1, 1 (2003).

³⁰¹ See Lindert, *supra* note 300, at 18.

³⁰² In 2005, according to an Economic Policy Institute study, the average CEO in the United States earned 262 times the pay of the average worker, the second-highest level of this ratio in the forty years for which data exist. In 1965, U.S. CEOs in major companies earned twenty-four times more than an average worker; this ratio grew to thirty-five in 1978 and to seventy-one in 1989. The ratio hit 300 at the end of the recovery in 2000. The fall in the stock market reduced CEO stock-related pay, such as options, and the ratio declined to 143 times that of an average worker in 2002. “Since then, however, CEO pay has exploded and by 2005 the average CEO was paid \$10,982,000 a year, or 262 times that of an average worker (\$41,861),” and a CEO earned more in one workday than an average worker earned in fifty-two weeks. Lawrence Mishel, *CEO-to-Worker Pay Imbalance Grows*, ECON. SNAPSHOTS (Econ. Policy Inst., Wash., D.C.), June 21, 2006, http://www.epi.org/content.cfm/webfeatures_snapshots_20060621. In examining the widening income disparity in the United States, Piketty and Saez found that since 1970, the increasing CEO compensation could not be attributed solely to tax episodes in the 1980s or of technical change in the United States. Piketty & Saez, *supra* note 300, at 32, 34.

³⁰³ The Economic Policy Institute measured the ratio of the wealth of the richest

traditional response is to invest in educating skilled workers. But how does one reconcile another signpost that the earnings of the average United States worker with an undergraduate degree have not kept up with the gains in productivity in recent years?³⁰⁴

Besides wealth disparity, crime is another signpost of whether competition is progressing toward its intended goals. Thomas More, for example, noted how a sheep cartel fueled by the “wicked greed of a few men” caused great evil. As wool prices escalated, poorer people who ordinarily made cloth out of the wool could not afford to buy it and, therefore, were unemployed and reduced to idleness and crime.³⁰⁵ Unless the evils of monopolies and oligopolies were remedied, warned More’s traveler in *Utopia*, “It is pointless for you to boast of the justice administered in the punishment of thieves, a justice which is specious rather than either just or expedient.”³⁰⁶ Crime may be a function of the comparable unattractiveness of lawful employment. What does one make of the United States’ prison population being the highest per capita in the world, and of the large number of homicides for a developed country?³⁰⁷

one percent to that of a household with typical wealth in the middle, and found that the wealth inequality has not only persisted, but widened over time. “The richest 1% of wealth holders had 125 times the wealth of the typical household in 1962; by 2004 they had 190 times as much or \$14.8 million in wealth for the upper 1% compared to just \$82,000 for the household in the middle fifth of wealth.” Sylvia Allegretto, *Wealth Inequality Is Vast and Growing*, ECON. SNAPSHOTS (Econ. Policy Inst., Wash., D.C.), Aug. 23, 2006, http://www.epi.org/content.cfm/webfeatures_snapshots_20060823.

³⁰⁴ See Frank S. Levy & Peter Temin, *Inequality and Institutions in 20th Century America* (MIT Dep’t of Econ., Working Paper No. 07-17, 2007), <http://ssrn.com/abstract=984330> (presenting a comprehensive view of the income distribution by contrasting conditions in postwar years); see also Krishna Guha & Alex Barker, *US Graduates Are Not Immune to Income Inequality*, FIN. TIMES (London), June 5, 2007 (discussing Mr. Levy’s and Mr. Temin’s research).

³⁰⁵ THOMAS MORE, *UTOPIA* 24–25 (Clarence H. Miller trans., Yale Univ. Press 2001) (1516).

³⁰⁶ *Id.* at 25.

³⁰⁷ See Stephen Fidler, *US and Russia Make a Poor Showing in Peace Rankings*, FIN. TIMES (London), May 31, 2007 (discussing the United States’ poor peace rank). There was some concern about England’s and Wales’ prison population, which in 1993 increased from 45,000 to 80,000, more than at any time in Britain’s history. But, while Britain has 148 prisoners per 100,000 inhabitants, the United States is approximately five times higher: 748 per 100,000 inhabitants. Richard Tomkins, *The Case for the Prosecution*, FIN. TIMES (London), May 18, 2007.

Other signposts may call into question whether America's competition policies are trending in the right direction, including:

- The comparative weakness in the area of health and primary education, where the United States ranked 40th overall in the competitive index, below most countries at similar per capita income levels.
- Weak health indicators compared with other wealthy nations, such as lower life expectancy, higher infant mortality rates than in countries such as Japan, Finland, Slovenia, the Czech Republic, and Korea, and high prevalence rate for HIV/AIDS—placing the United States 79th in the world—despite the fact that at almost 15 percent of GDP, the United States spends more on health care than any other nation in the world—including France and Germany (10 and 11 percent of GDP, respectively) where health coverage, unlike that in the United States, is universal.
- International concern over the macroeconomic imbalances in the United States, particularly public finances.³⁰⁸

CONCLUSION

Advocating competition must be more than attacking anticompetitive government restraints that protect German economists, Italian hairstylists, and Kentucky real estate agents. In advocating competition, policy makers cannot surmise that: (1) free market forces are generally self-correcting and self-initiating, (2) absent governmental restraints, the free market will allocate resources efficiently, (3) the government is an exogenous force to be used sparingly for sustained market failure, (4) the government can do more harm than good, so the risk of false positives is greater than of false negatives,

³⁰⁸ WORLD ECON. FORUM, THE GLOBAL COMPETITIVENESS REPORT 2006–2007, at 30 (2006).

These indicators suggest that Americans receive worse health care than do the citizens of many countries that spend less, eroding the country's overall competitiveness. Implementation of the long-discussed health care reforms in the country should therefore be seen as a priority for improving the country's competitiveness in the future.

Id.

(5) government bureaucrats are so susceptible to regulatory capture that the goals of competition policy, once inoculated from politics, will be value-free efficiency and consumer welfare, and (6) competition advocacy should focus on hard-core restraints done under the state action doctrine and other implied or express antitrust immunities.

Competition policy makers must step back and clearly articulate: (1) what they mean by competition, (2) its specific objectives, (3) how their policies will achieve those objectives, (4) what institution-building is necessary to promote such competition, besides governmental restraints that inhibit the attainment of such competitive state/process, (5) whether governmental inaction—such as inadequate institutions or lax antitrust enforcement policy in particular areas—inhibits the attainment of such competitive state/process, and (6) how they will keep us apprised with measurable signposts to ensure that we are indeed heading in the right direction. Rather than being an idealized state, competition instead is a process with which to achieve certain objectives. Inquiring about the objectives of competition policy, the means to attain that end, the role of legal and informal institutions to assist toward that end, and our progression should be the critical exercises that lead to more informed advocacy.