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What I know about antitrust law and economics has been learned largely from reading the papers of this conference and listening to their presentation. I am an antitrust ignoramus or at least an antitrust innocent. My participation in the conference was induced by one of its organizers, Spencer Waller, who has ably used my comparative institutional approach to analyze antitrust law and felt that I might lend a "fresh perspective." As I note later in this paper, ignorance can make a fresh perspective expensive. Still, after some reflection on the many interesting observations on antitrust offered at the conference, I am offering a brief comparative institutional perspective on the role of courts in antitrust.

It seems that the landscape of antitrust decision-making described at the conference is particularly ill-suited for a significant role for the courts—the adjudicative process—either in the form of judicial review or private damage actions. Since the former is the basis for legal scholarship on antitrust and the latter represents much of the practice of antitrust law in the United States, I am unlikely to make many friends with this position. But I suppose that is an advantage of being an outsider.

Let me start with the insight that antitrust administrative agencies are highly imperfect decision-makers that make many mistakes. I can say this without much knowledge of the actual workings of antitrust because, at high numbers and complexity, all decision-making alternatives are highly imperfect and all decision-makers make many mistakes.[1] And in the antitrust context, there are large numbers of

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1. I have expanded on this point in NEIL KOMESAR, LAW'S LIMITS: THE ROLE OF COURTS, THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS (2001) [hereinafter LAW'S LIMITS], and Spencer Waller has introduced this insight to antitrust. *See* Spencer Weber Waller, *The Future of Monopoly and Monopolization Symposium: Areeda, Epithets, and Essential Facilities*, 2008 WIS. L. REV. 359 (2008); Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1 (2008).

people and business entities impacted by highly complex business arrangements with highly complex implications. But these insights do not make the case for augmenting the decision-making of these imperfect administrative agencies with court-based judicial review or private damage actions. The most obvious point here is that the adjudicative process almost always has less expertise than administrative agencies. Generalist appellate court judges, trial court judges, and especially juries, lack training and experience when compared to agency employed specialists. There are, of course, federal judges like Richard Posner with expertise in the law and economics of antitrust. But few are as well versed in antitrust law as Judge Posner.[2] And even someone as able as Judge Posner may not have the information or insights of antitrust agency specialists, who are augmented by the economic experts at their disposal.

The case for judicial review or private litigation hardly ever lies in better expertise. Instead, it lies in lessening bias. This tradeoff between expertise and bias is an essential piece of the analysis of the role of the judicial or adjudicative process in general. Doubts about the competence of judges and juries as decision-makers have been with us probably as long as judges and juries.[3] There is little doubt that juries have limited technical expertise and sophistication. Jurors are randomly chosen from the general population, and individual jurors are often chosen in the voir dire explicitly to avoid expertise in the specific technical issue of the case. These inexpert juries are then asked to listen to the technical and complex testimony of conflicting expert witnesses and decide difficult substantive issues. Similarly, trial and appellate judges formally trained only as lawyers and coming from a wide variety of practice backgrounds are regularly asked to judge the facts in and fashion the rules for complex litigation, like antitrust. Most judges, both trial and appellate, do not specialize in one type of controversy and, therefore, do not obtain the expertise that such frequent exposure would bring.

Juries and judges can easily be unfavorably contrasted with the technically more expert bureaucrats of administrative agencies who, like juries and judges, serve as fact-finders and implement rules and standards. From a comparative institutional standpoint, this lack of expertise may be discomforting, but the criticism is, as it stands, only a

2. *See* RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976); Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975).

3. For a summary of some of this literature, see NEIL KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 138–39 (1994) [hereinafter IMPERFECT ALTERNATIVES].

parade of horribles. It is single institutional. Comparative institutional analysis requires the parallel consideration of the institutional alternatives—in this case, more expert administrative agencies.

From the perspective of technical expertise, these agencies with their narrower scope and more specialized staffing are superior to generalist trial court judges and randomly chosen juries. But, these same factors, in some settings, provide advantages to juries and judges. The very characteristics that make juries less expert make them less subject to systematic influence and bias. Systematic bias is associated with the skewed distribution of stakes where, in highly complex contexts, concentrated interests with small number of members and high per capita stakes are over-represented relative to highly dispersed interests whose many members have low per capita stakes. This is a common enough vision of the political process captured in terms like special interest legislation and captured agency. I have come to call it "minoritarian bias" to contrast it with the more rare, but in many ways more dangerous, political malfunction "majoritarian bias."[4]

The transient jury is not a good target for one-sided efforts at influence associated with minoritarian bias and the skewed distribution of stakes. The constantly changing jury is difficult to influence through continuous long-term contact and propaganda. Judges, barricaded by procedures as well as the rotation among types of cases, are also difficult targets for influence. The parties are forced to sway the jury or judge by advocacy in the more formally confined adversarial process, where opposing parties have more equal opportunities to present their viewpoints. In addition, the random jury selection process makes any attempt to staff the jury with cronies extremely difficult, if not impossible. Although inducement, for example, in the form of bribes, is not unknown, it is unlikely both because juries and judges are, to a considerable degree, removed from informal contact with the relevant interests during deliberation. In addition, the costs of bribery, including possible criminal sanctions, are seldom worth incurring when the bribery, especially in the case of juries, will cover only one case rather than a large set of cases.

Administrative agencies, in contrast, are fixed targets hearing many cases of a particular type and are easier and more worthwhile to influence via activities like propaganda, lobbying, bribery, or restaffing. In their random choice from the general population and their greater

4. The story of minoritarian bias, majoritarian bias, and the two-force model of politics is developed extensively in IMPERFECT ALTERNATIVES, *supra* note 3, and LAW'S LIMITS, *supra* note 1.

resistance to minoritarian bias, juries provide a form of majoritarian influence within the adjudicative process; therefore, their use must be considered in terms of the character of the social issue to be decided. As a general matter, where the conditions for strong minoritarian bias are present, the jury's advantages are significant and may outweigh lack of expertise even in a complex setting.

As a general matter, the choice between the political process and the adjudicative process involves a tradeoff between the amount of information and the possibility of one-sided or biased information. The insulation that makes judges and juries more independent also separates them from a great deal of information about the desires and needs of the public. In politics, public officials must understand the wants and needs of the general public or at least powerful parts of the general public to remain in office or obtain higher office. These interests link political officials to the populace and provide them with more robust information on desires and needs. This information provides the weights to be given the various opposing public policy positions or options. The problem with all this informality and interdependence is that under the wrong conditions—particularly the skewed distribution of stakes—these informal channels can carry a severely distorted view of public needs.

By contrast, judges and juries stand aloof. They depend on others to convince them by evidence and reason, but they do not depend on these others for their jobs and livelihood. The adversarial process attempts to equalize the representation of positions and the delivery of information by assuring that both positions are at least formally represented and that information reaching judge and jury is confined to what opposing advocates present to them.

The tradeoff is between a political process that integrates far more information but with a more significant risk of bias and an adjudicative process that suppresses information but decreases distortions in its presentation. This tradeoff between information and evenhandedness—and more generally between expertise and bias—is among the most difficult issues in institutional choice.

We can now examine this issue in the context of antitrust. Where expert administrative agencies hear only one side of the issue or are bent by incentives from political sources that are one-sided, expertise can be of limited advantage. There are many areas of political process decision-making, including many areas of administrative agency decision-making, that are subject to one-sided representation or participation and, therefore, may be in need of the less biased judicial process. But antitrust does not stand out as one of them.

There is certainly a very large group that is unlikely to take an active role in the antitrust regulatory process: consumers. When an observed market practice is subjected to the scrutiny of antitrust administrative agencies, consumers are unlikely to be directly represented. This is the classic problem of the dormancy of large dispersed interests whose members have low per capita stakes. But from the description I heard at the conference, the consumer position is likely to be represented vociferously by either the perpetrators of the market practice or their competitors who oppose the market practice.

This of course, begs the crucial question: who is really on the side of the consumers—the perpetrators or the complainants? One only knows this by making the essential and difficult determination whether the practice in question—merger or other contractual or marketing arrangement—is "pro-competitive or anti-competitive" or "pro-consumer or anti-consumer"? This pro-competitive versus anti-competitive decision is a tough choice, and antitrust administrative agencies sometimes, possibly often, get it wrong, but not because they are hearing only one side of the story.

At the conference, many presenters made the argument that judicial review of antitrust decisions would be highly beneficial. None was more forceful than David Evans, an economist who asserted that the experts at the agencies may become too parochial or inbred—what he described colorfully as "breathing their own fumes." I am not in a position to validate or challenge this description. But even if I assume its validity, it does not make a strong case for substituting the cumbersome and inexpert process of judicial review. That would be an especially costly "fresh perspective." Would the adjudicative process reverse bad decisions? Of course, but not any more frequently than it would reverse good ones. As several commentators pointed out, inexpert judicial reviewers have a tendency to substitute procedure for substance, calling for further hearings or findings of fact. Increased procedural due process or findings can be a valuable antidote to minoritarian bias by providing more information to the public and thereby decreasing the dormancy of the dispersed majority. They can also provide information to reviewers in either the adjudicative process or the political process where that review is justified. But all this supposes a one-sided antitrust decision-making and there is very little evidence for that.

Breathing one's fumes may fairly describe decision-making at high numbers and complexity. The same experts may continuously make the same points at the same conferences and perhaps fashion or habit distorts the judgment of these experts and lessens the quality of their

expertise. But substituting reviewers who know much less is a dubious antidote.

Antitrust administrative agencies appear to be hearing both sides of the story and presumably both sides are capable of the political process activities necessary to more directly influence administrative agencies. The resulting decision-making process is an expensive and highly imperfect process with a great deal of rent seeking potential and, therefore, a significant potential for wasting resources. Competitors may attempt to use the agency to gain advantage. In turn, the agency may be fooled into finding the productive anti-competitive or the anti-competitive productive. But if it does so, it is not because the decision-making process is systematically biased or one-sided. There may be a case here for doing away with or narrowing the scope of antitrust regulation. But there is no case for using the tool of judicial review whose bias-correcting role is not needed and whose lack of expertise will add unnecessary mistakes and expense.

With the possible exception of price fixing noted below, the case against private damage actions in the antitrust context seems even stronger than the case against judicial review. Private damage actions seem to represent a large part of antitrust practice in the United States. Perhaps it is too late to reverse this trend. But developing nations looking to establish antitrust regimes or nations looking to reform their processes should think twice—and maybe a few times more—before they introduce this device. Courts and litigation are expensive, and the dynamics of litigation has its own source of minoritarian bias captured most simply in the absence of small claims, and more broadly in the skewed investment in litigation by high stakes players relative to interests that are more dispersed. More importantly, the process involves highly inexpert decision-makers—in particular, juries. This inexpertness will increase both the costs of litigation and the potential for mistakes and can only bring out the worst gamesmanship of litigation.

Despite these problems, I have argued for private damage actions in other contexts. In some settings, a skewed distribution of stakes in the market and political processes provide the error prone and expensive adjudicative process with comparative institutional advantages. The most straightforward examples of this advantage involve the social goal of safety or prevention of accidents, where the adjudicative process, operating through private actions for damages, sometimes faces a different and more socially favorable distribution of stakes than does either the market or the political process. The adjudicative process faces this more favorable distribution because of the retrospective focus

of private damage actions as opposed to the prospective focus of the market and political processes.

This favorable difference occurs where a potential injury has a very low probability of occurring but carries with it significant loss if the event occurs. Many products injuries have this configuration. Before the injury, potential victims have low per capita stakes because the probability of the bad outcome is so low. However, after an injury occurs, the class of victims is now a much smaller group of actual victims with large per capita stakes.

The crucial distinction here is between ex ante and ex post distributions of per capita stakes. In the market and political processes, the relevant actors are potential victims and injurers. In the market, they are the parties that buy and sell safety. In the political process, they are the parties who seek or oppose safety regulation. Where we have potential victims with low per capita stakes, we have a significant chance of dormancy or mistaken decisions by this group. Combined with high per capita stakes potential injurers, we get minoritarian bias in the political process and manipulation of information and under-production of safety devices in the market.

In the adjudicative process, however, it is actual victims and injurers who are the litigants. Although these damage actions may have significant prospective (deterrent) effects as their threat affects *potential* injurers and, thereby, increase the safety of *potential* victims, it is *actual*, not potential, victims and injurers whose litigation produces the signal to potential injurers. Where we have high stakes actual victims, we have an increased possibility of triggering the adjudicative process because the large individual stakes justify individual private actions (often as joint ventures with contingent-fee lawyers). This provides an antidote to the one-sided activity associated with the ex ante skewed distribution of stakes.

This comparative advantage exists, however, only where there is a "shifted distribution"—where the victims' low distribution ex ante becomes a high uniform distribution ex post. I have argued elsewhere that the configuration of stakes in the shifted distribution creates both a significant comparative advantage for private damage actions over regulation and market transactions in settings like product and service safety and, in turn, a potential need for judicial protection of that advantage against the political process—protection that might even produce serious constitutional judicial review of tort reform legislation.[5]

5. IMPERFECT ALTERNATIVES, *supra* note 3, at 153–95. Another failure to shift the distribution occurs when a low distribution ex ante remains a low distribution ex post. The actual

But the situation in private antitrust actions presents quite a different picture. Here, we have large per capita stakes actors both ex ante and ex post. As we have seen, antitrust administrative agencies do not face one-sided representation of the positions for or against a given market practice. There is no skewed distribution ex ante. There are active participants on both sides. The same remains true in the litigation process, but now without the need for the augmentation of the signal necessary with a skewed distribution ex ante. Put simply, this sort of private action has all the costs of litigation, including the use of highly inexpert decision-makers, without the benefit of the shifted distribution. Because we have high per capita stakes both ex ante and ex post, the result is significant litigation without a compensating correction of bias. To me, it looks like the worst of rent seeking: wasted resources without any net advantages even for the litigating competitors who may find themselves as plaintiffs in some cases and defendants in others, thus trapped in a negative-sum enterprise. This is a world in which only lawyers clearly gain.

There is another dimension of the case against a significant role for the courts in antitrust. Several presenters at the conference noted that administrative agencies are, or can be, severely underfunded. This appears worst in developing or poorer nations, but the complaint was sounded even about the Federal Trade Commission. The implications of increasing or decreasing the physical capacity (the scale) of any institution are important in determining the ability of that institution. But if the alternative to these supposedly underfunded administrative agencies is the courts, we are substituting the institution most constrained by scale. The constraints on the size of the adjudicative process and the implications of these constraints on judicial choices are more obvious and dramatic than any comparable constraints on the size of the market and political processes. In fact, it is the relative ease with which the market and political processes expand that creates demands which strain the physical capacity of the adjudicative process.

As a general matter, the demand or potential demand for judicial action far exceeds the capacity of the courts and the problem only worsens with time. Embedded in the expansion of these other institutions are several factors that drive the demand for judicial resources. General demographic changes, such as increased population

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damage done, as well as the potential damage, may affect many victims but at a relatively low per capita level. Many examples of air or water pollution have this configuration of damage. Here, all the problems of adjudication in the face of dispersed stakes remain for private damages actions. Here, the problem, in contrast to private damages actions in most areas of antitrust, is too little, not too much, litigation.

and increased commercial and industrial activity, often operating through the market and the political process, increase the demand on the judiciary in contracts, torts, and general commercial litigation. With increased governmental activity, the demand for courts as implementers of legislation and for judicial review under the aegis of administrative or constitutional law increases as well.

One obvious means for dealing with the increased demand for adjudication is to increase the size or capacity of the adjudicative process. In the United States, the federal and state judiciaries have increased in size. The judiciary, however, has been unable to expand to keep up with the increases elsewhere and, more importantly, it is unlikely to do so in the future. The main bottleneck here is the appellate court structure. This central component of the adjudicative process, meant to articulate the rules under which adjudication takes place and to define the rights that trigger litigation, is difficult to expand. Each judicial system, at least in the United States, has at its apex a supreme court. These courts are staffed by a small set of judges, often nine like the Supreme Court of the United States. The most obvious reform, increasing the number of judges on these high courts, does not easily or even necessarily increase their output. While an increase in judges would decrease the per judge load of opinion writing, it would not decrease the time and effort necessary to reach a collective decision by this body. In fact, increasing the numbers would probably make such collective decisions more difficult and time consuming.[6]

The failure to adequately expand the size of the adjudicative process produces the prospect of demand for adjudicative services greater than the existing capacity can meet. Such excess demand hardly supposes queues outside courthouse doors. The judicial process has a number of methods to deal with any excess demand on its capacity. Each of these methods, however, involves difficult trade-offs between competence, independence, and bias, and each involves the exclusion of important areas of societal decision-making from the courts. I have explored these issues at length elsewhere.[7] For present purposes, it is enough to make the point that the supply of judicial resources is severely constrained and that the weak claims for antitrust judicial review and private damages actions must be considered in terms of this larger picture.

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6. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 14–15 (1985).

7. The subject of the supply of and demand for the courts is the general focus of LAW'S LIMITS, *supra* note 1, and the specific issue of scale and judicial strategies to deal with increasing demand are taken up in IMPERFECT ALTERNATIVES, *supra* note 3, at 142–49.

I began by admitting my ignorance and must end by doing so. Almost certainly, I am insensitive to variations in circumstances that might change the outcome of my analysis. There may be antitrust settings where skewed distributions produce biased results and, therefore, where the adjudicative process—either in the form of judicial review or private damage actions—makes sense. Spencer Waller, in his comments to me about this paper, pointed out an important example of private antitrust litigation—consumer price fixing—which may be characterized as a skewed distribution of stakes with low stakes per capita for consumers both ex ante and ex post. In these price fixing cases, a large number of people have paid a relatively small overcharge because of the illegal conspiracy.

Here, the interests of this dispersed and, therefore, likely politically dormant group may be severely underrepresented in administrative agencies because there are no high stakes players to provide this representation. The competitors of the price fixers have little incentive to attack the price fixing in the political process. They would instead attack it in the market where supra-competitive prices attract their attention and competition. This is, of course, the classic market mechanism to end price fixing. This competitive activity may vary with the costs and stakes for entry. But the important point is that, in the price fixing context, competitors would participate, if at all, in the market not in the political process.

The only way that small per capita stakes consumers can receive compensation and, thereby, have their interests directly represented is through private damage actions.[8] Since this group has low per capita injuries (low per capita stakes ex ante), however, litigating their claims will require an augmented private litigation form—either a "bounty" in the form of treble or punitive damages or a class action. These mechanisms, especially class actions, have their own set of imperfections which would have to be factored into any decision on the utility of private damage actions as a response to price fixing.[9]

It is worth noting that, while in the price fixing setting there may be a good case for the judicial process in the form of private damage actions, the case for judicial review remains questionable. The minoritarian bias

8. To the extent that there are large purchasers, there may be some active representation against the price-fixing conspiracy in the political process and, in such a context, there would again be a weak case for judicial activity including private damage actions. Presumably, the existence of large scale purchasers would vary across price fixing arrangements.

9. I have examined the trade-off between class actions and individual actions in LAW'S LIMITS, *supra* note 1, at 45–51, and the role of punitive damages in IMPERFECT ALTERNATIVES, *supra* note 3, at 186–91.

in the political process in the price fixing setting would bias decisions against prosecution and, therefore, the case for judicial review would be in review of administrative agency decisions that refuse prosecution. It is procedurally difficult to challenge such a decision in the courts. Even if it were technically possible, so long as the losers are a large group of consumers with low per capita stakes, it is doubtful that there is sufficient incentive for them even to be aware of the loss, let alone to challenge it by judicial review.

Price fixing conspiracies appear to be an exception to my assumption that high per capita stakes actors would be present on both sides of antitrust issues in the political process and this situation might justify private damage actions. The situation in private antitrust actions outside of consumer and small business price fixing overcharge cases, however, still seems to fit the more conventional picture I have painted. But there may be more exceptions of which I am unaware. I must leave it to those more knowledgeable about antitrust to qualify or dispute my case further.

But if I am unsure of the full picture of the antitrust landscape, I am far more confident of the analytical framework that must be employed in exploring it. Any analysis of institutional design in antitrust or anywhere in the analysis of law and public policy must be made in terms of a comparative institutional analysis that takes account of the dynamics of participation of the various interests in all the available and always imperfect institutional alternatives. I believe that if such an approach is consistently applied, the resulting institutional designs will improve. In frustration with the perceived shortfalls of an existing arrangement, it is common to suppose that something else such as judicial review or private actions must be an improvement. But in today's world—a world of high numbers and complexity and, therefore, a world of highly imperfect institutional alternatives—no such conclusion can be drawn. It is the comparison of highly imperfect alternatives, not the listings of the imperfections of any one system, that makes a case for or against antitrust regulation in general, or antitrust regulation with a substantial judicial role, or antitrust regulation disciplined only by the political process in particular. One of these strategies may be the best, but none of them will be anywhere near perfect.