

2000

## Bringing Globalism Home: Lessons from Antitrust and Beyond

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### Recommended Citation

Spencer W. Waller, *Bringing Globalism Home: Lessons from Antitrust and Beyond*, 32 Loy. U. Chi. L. J. 113 (2000).  
Available at: <https://lawcommons.luc.edu/lucj/vol32/iss1/4>

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# Bringing Globalism Home: Lessons from Antitrust and Beyond

The 2000 Wing Tat Lee Lecture\*

*Spencer Weber Waller\*\**

## I. INTRODUCTION

I am honored to be chosen to deliver the first Wing Tat Lee Lecture of the new century. I will continue the themes of harmonization and globalization that were the subject of the recent lectures in this series and focus on the necessary and desirable changes that globalism can bring to the United States in the antitrust area.<sup>1</sup>

There is vast literature on both harmonization and globalization. Much of the extensive commentary, at least in the United States, is outward looking. It focuses on how other countries have changed, or should change, their laws and legal culture to more fully participate in the global economy and the information age that is upon us. Other commentators take a more cautionary view and examine the price being paid by these same countries as a result of the changes they are implementing.

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\* As a result of a gift to the Loyola University Chicago School of Law by Wing Tat Lee, a Hong Kong businessman and philanthropist, the School of Law established a lecture series in the area of international and comparative law. The Wing Tat Lee lectureship has enabled the School of Law to participate in ventures such as the Central and Eastern European Law Initiative (CEELI) of the American Bar Association and to invite other speakers to the campus.

\*\* Professor and Director of the Institute of Consumer Antitrust Studies, Loyola University Chicago School of Law; Professor, Brooklyn Law School, 1990-2000; 2000 Wing Tat Lee Distinguished Lecturer, Loyola University Chicago School of Law. B.A., University of Michigan, 1979; J.D., Northwestern University Law School, 1982. Many thanks to my gracious hosts at Loyola University Chicago School of Law for the opportunity to meet with faculty, alumni, and students over the course of my week-long visit to the Law School in March, 2000. Thanks also to Lan Cao, Peter Carstensen, Larry Solan, and Mark Warner for their helpful comments on drafts of this manuscript and to Wose Tura Ebba for her research assistance.

1. See Eleanor M. Fox, *Globalization and Its Challenges for Law and Society*, 29 LOY. U. CHI. L.J. 891 (1998) (explaining the effects of liberalization of trade policies in the United States, Russia and Central and Eastern Europe); Tahiri V. Lee, *Mixing River Water and Well Water: The Harmonization of Hong Kong and PRC Law*, 30 LOY. U. CHI. L.J. 627 (1999) (describing the growing similarities between law in Hong Kong and law in the People's Republic of China).

I want to take a different point of view and examine the lessons to be learned by the United States as a result of globalism. In particular, I want to focus on the area of antitrust or competition law, where the United States is a leader and one of the senior statesmen in the field.<sup>2</sup> From this vantage point, we in the United States are often quick to teach, lecture, and criticize other legal systems that frequently do nothing worse than enact and enforce competition law in a manner that is different from the way we approach the same type of problems. The extreme version of this syndrome is, of course, both arrogant and offensive to sophisticated legal systems seeking to achieve varying objectives in a culture and history different from our own.

To change, we must do two things. First, we must acquire the ability to analyze other legal systems from the point of view of whether legal rules and institutions serve their needs, not ours. Second, we must begin to study and analyze the developments of the more than eighty foreign systems of competition law for the lessons we can use to reform our own system of competition law to better play the role of antitrust senior statesman in a global economy.

This essay is a plea for change in the United States based on the lessons learned abroad both in antitrust law and in the broader issues of economic regulation and national sovereignty. It is not intended as an answer to these vexing issues but rather as the beginning of a different type of dialogue<sup>3</sup> and a richer role for the United States in the global marketplace and world community.

## II. GLOBALISM IS A TWO-WAY STREET

While the United States has never been particularly good at comparative law matters in any field, its absence has been painfully obvious and particularly detrimental in the antitrust field. One simple

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2. As a formal matter, the United States was not the first nation to have an antitrust law. That honor goes to Canada, which passed its anticommon law in 1889, a year prior to the enactment of the Sherman Act. See Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade, S.C. 1889, c. 41 (Can.).

3. One of the few similar types of analysis of this topic can be found in an earlier article by then professor, now Judge, Diane P. Wood's provocative essay in 1994, addressing how "the existence of a global market is affecting the theory and application of these laws within the United States." See Diane P. Wood, *United States Antitrust Law in the Global Market*, 1 IND. J. GLOBAL LEGAL STUD. 409, 409 (1994). I share Judge Wood's concern that state action immunity is an inappropriate distortion of United States antitrust policy and that foreign experience has shown a better way. See *infra* notes 24-59 and accompanying text (discussing state action immunity and its detrimental effect on competition). Otherwise, Judge Wood and I discuss different issues where an examination of foreign developments would point to a better way for the United States.

contrast is the way the European Community and the United States approach competition law. In the European Community, private parties,<sup>4</sup> the European Commission,<sup>5</sup> the Court of First Instance,<sup>6</sup> and the European Court of Justice<sup>7</sup> are conversant with, and frequently discuss United States' antitrust precedent, academic commentary, and government enforcement policy in formulating their own initiatives and decisions. While U.S. cases and policy are not slavishly followed, they frequently comprise part of the debate about proper action and, if not followed, are analyzed and rejected on the merits. The same is true in Canada,<sup>8</sup> Australia,<sup>9</sup> New Zealand,<sup>10</sup> and many other nations that are serious about the enforcement of competition law. These countries routinely take the time and effort to be aware of developments in sister jurisdictions and respond to those developments when drafting and revising competition statutes, formulating enforcement policy and guidelines, and bringing enforcement actions. In contrast, no United States' court has ever cited to a foreign competition law decision for anything other than the background or procedural history of the case.<sup>11</sup>

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4. See MARK FURSE, *COMPETITION LAW OF THE UK AND EC* (1999) (offering numerous comparisons with and discussions of the United States' antitrust principles); VALENTINE KORAH, *CASES AND MATERIALS ON EC COMPETITION LAW* (1997) (offering teaching materials which contain numerous references to United States antitrust case law and statutes).

5. See Vertical Restraints in EC Competition Policy: Green Paper from the Commission of the European Communities, COM(96)721 final at 12-17. The final version of the reforms proposed by the Commission are set forth in the "Commission Regulation on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices," adopted by the Commission on Dec. 22, 1999. See The European Commission, *Europa* (visited May 31, 2000) <<http://europa.eu.int/comm/competition/antitrust/others.htm>>.

6. See, e.g., Case C-333/94, *Tetra Pak Int'l SA v. Commission*, 1997 E.C.R. I-755, [1997] 4 C.M.L.R. 726 (Ct. First Instance 1997).

7. For a discussion of the general use of United States Supreme Court cases in the European Court of Justice, see Peter Herzog, *United States Supreme Court Cases in the Court of Justice of the European Communities*, 21 HASTINGS INT'L & COMP. L. REV. 903 (1998).

8. See *Regina v. Nova Scotia Pharm. Soc'y* [1992] 2 S.C.R. 606 (Can.); *Attorney-General v. Law Soc'y of British Columbia* [1982] 2 S.C.R. 307 (Can.).

9. See *Australian Competition and Consumer Comm'n v. Boral Ltd.* (1999) 166 A.L.R. 409 (Austl.); *Robert Hicks Party Ltd. v. Melway Publ'g Party Ltd.* (1998) 42 I.P.R. 627 (Austl.); *News Ltd. v. Australian Rugby Football League Ltd.* (1996) 135 A.L.R. 33 (Austl.); *Trade Practices Comm'n v. Gillette Co.* (1993) 118 A.L.R. 280 (Austl.).

10. See *Fisher & Paykel Ltd. v. Commerce Comm'n* [1990] 2 N.Z.L.R. 731; *Union Shipping NZ Ltd. v. Port Nelson Ltd.* [1990] 2 N.Z.L.R. 662.

11. A recent United States case is a partial exception in discussing European Union competition rules in order to hold that a plaintiff had an adequate remedy abroad in dismissing a United States antitrust case under the doctrine of *forum non conveniens*. See *Capital Currency Exch. v. National Westminster Bank*, 155 F.3d 603, 610 (2d Cir. 1998), *cert. denied*, 526 U.S. 1067 (1999).

This is a uniquely opportune time for the United States to do better in regards to comparative competition law. The transnational business community is exposed to numerous different sets of competition laws around the world. This community can transmit that information home through its United States and foreign counsel as to good, bad, and indifferent experiences which can be compared to treatment under competition rules in the United States. Government officials are increasingly in contact with each other through both formal<sup>12</sup> and informal<sup>13</sup> cooperation arrangements that require a tremendous amount of information sharing about different aspects of competition law. Moreover, an increasing body of information on comparative competition law is finally available throughout the world via the internet<sup>14</sup> and various published English language material.<sup>15</sup>

Even if the United States is affirmatively uninterested in what it can learn from the rest of the world, the tremendous effort the United States has made to sell the Sherman Act abroad<sup>16</sup> has exposed it to the way competition law is enforced elsewhere. This exposure has produced changes in the way in which the United States addresses these issues as an unconscious, and largely unforeseen, side effect of trying to convince the rest of the world to do things our way.<sup>17</sup>

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12. See JAMES R. ATWOOD ET AL., *ANTITRUST AND AMERICAN BUSINESS ABROAD* §§ 14.3-14.7 (3d ed. 1997) (describing the increasing set of antitrust cooperation agreements governing relationships between United States and foreign enforcement agencies).

13. Over the past decade, government competition enforcers frequently interact at a network of regularly scheduled and ad hoc professional and scholarly conferences and other gatherings, including those sponsored by the American Bar Association, the International Bar Association, the Fordham Corporate Law Institute, which runs an annual two day conference devoted to international antitrust law and policy, and, most recently, a series of hearings conducted by the United States Department of Justice International Competition Policy Advisory Committee.

14. See, e.g., American Bar Association, *Section of Antitrust Law* (visited May 31, 2000) <<http://www.abanet.org/antitrust/links.html>>. This website, maintained by the American Bar Association, contains links to the vast majority of websites of foreign competition authorities. See *id.*

15. See, e.g., Spencer Weber Waller, *Comparative Competition Law as a Form of Empiricism*, 23 BROOK. J. INT'L L. 455 (1997) (comparing approaches to antitrust law in the United States and Europe).

16. See Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 U. KAN. L. REV. 557, 569-72 (1994) (describing attempts by the United States government to influence antitrust law in Eastern Europe and other parts of the world).

17. As prominent anthropologists and other social scientists have noted in other contexts, often the act of observing and seeking to observe a supposedly less advanced nation produces significant changes in the observer. See TOM NAIRN, *THE BREAK-UP OF BRITAIN: CRISIS AND NEO-NATIONALISM* (2d ed. 1981); *THE STUDY OF CULTURE AT A DISTANCE* (Margaret Mead & Rhoda Metraux eds., 1953). One current example of this phenomenon can be seen in the recent report of the International Competition Policy Advisory Committee of the Justice Department

## III. LESSONS FOR AMERICA

In short, it is the best of times to reexamine many of the fundamental principles of United States competition policy in light of the experience of the rest of the world. What follows is a discussion of three issues: 1) the application of competition rules to the public sector;<sup>18</sup> 2) the relationship between antitrust and regulation;<sup>19</sup> and 3) the relationship between antitrust and antidumping law.<sup>20</sup> Foreign competition law represents an attractive alternative to the orthodox way these issues are analyzed under United States competition policy. In each case, United States policy has been blinded by perceiving antitrust as a separate sphere limited in its application. Conversely, foreign systems have both a more nuanced and more holistic view of the benefits of competition, allowing the application of antitrust rules with sensible limitations to areas which the United States regards as completely off-limits to competition policy.

To the extent United States policy makers have confronted these issues, they have either ignored or rejected foreign experience as a useful guide.<sup>21</sup> I suggest that a closer look reveals that examining the foreign approaches in each of these areas is sound, not because it would be good for other nations or the global community, but because it would better serve the traditional conceptions of antitrust law as it has evolved in the United States.

*A. The Need to Control Public as Well as Economic Power*

Antitrust law has been a long struggle over fear of power.<sup>22</sup> Since the passage of the Sherman Act, however, there has been an equally contentious struggle over what kinds of accumulations of power are

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(ICPAC). See U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION, INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE TO THE ATTORNEY GENERAL AND THE ASSISTANT ATTORNEY GENERAL FOR ANTITRUST, FINAL REPORT (2000). In the course of recommending the best practices for the global antitrust committee, the report ends up recommending numerous changes in U.S. practices as well. See *id.*

18. See *infra* notes 24-69.

19. See *infra* notes 70-82.

20. See *infra* notes 83-98.

21. For example, none of the leading antitrust casebooks used as the basic antitrust teaching tools in American law schools systematically analyze or discuss foreign or comparative antitrust issues. This structural weakness is being remedied in the forthcoming new edition of the casebook by Professor Eleanor Fox and Lawrence Sullivan, now being joined by Professor Rudolph Peritz.

22. See generally RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA, 1888-1992: HISTORY, RHETORIC, LAW (1996) (analyzing how the history of competition policy in the United States has been shaped by the fear of political and economic domination).

feared most, namely the public sector or the private sector. One's views on which is the greater of the two evils normally determines where one stands on the great antitrust questions of the day.<sup>23</sup>

### 1. American Antitrust Law and the Public Sector

American antitrust law has taken an unusually narrow view of the type of power regulated under our competition statutes. United States antitrust law has chosen to regulate private, but not public, anticompetitive conduct.<sup>24</sup> Beginning with the Supreme Court's decision in *Parker v. Brown*,<sup>25</sup> there has been a consistent line of cases holding that the antitrust laws apply only to private economic actors and not state governmental entities.<sup>26</sup> The antitrust laws apply with somewhat greater vigor to municipal entities. Broad immunity, however, applies to municipal entities that are acting pursuant to state delegated power and have an articulated policy of replacing competition with regulation.<sup>27</sup> Even private actors enjoy substantial immunity if

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23. The widely divergent reactions to the Microsoft litigation reveal the contemporary version of this dichotomy. Compare William Safire, *The Curse of Bigness*, N.Y. TIMES, Dec. 13, 1999, at A22 (arguing that concentrated power in American big business is the greatest danger to capitalism), with John McCain, *High-Tech America at High Noon; Heavy Hand of Government Threatening U.S. Ingenuity*, HOUST. CHRON., Aug. 9, 1998, Outlook, at 1 (arguing that the "heavy hand of government" is "more likely to stifle and smother new initiatives [by oppressive regulation or excessive taxation] than any other force"). For the historical twists and turns as to how these dual fears have affected United States competition policy see PERITZ, *supra* note 22.

24. From time to time, the United States has flirted with other doctrines to control public sector anticompetitive conduct outside of the antitrust context. For much of the late 19th century and early 20th century, the courts used the doctrine of substantive economic due process in this fashion. See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). More recently, the Supreme Court has used the doctrine of commercial free speech in a similar fashion. See *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173 (1999).

25. *Parker v. Brown*, 317 U.S. 341 (1942) (holding that a marketing plan adopted by the state for regulating the handling, disposition, and prices of raisins produced in California was not within the intended scope of, and therefore not a violation of, the Sherman Act).

26. See, e.g., *Hoover v. Ronwin*, 466 U.S. 558 (1984) (holding actions of the Committee on Examinations and Admissions to the Bar are actions of the State Supreme Court and therefore exempt from antitrust laws under the state action doctrine).

27. See, e.g., *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991) (holding that the City of Columbia's restriction of billboard construction was immune from federal antitrust liability because it was an authorized implementation of state policy, the city possessed clear delegated authority to suppress competition, and the suppression of competition was at the very least a foreseeable result of zoning regulations); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) (holding that the city of Eau Claire's acquisition of a monopoly over the provision of sewage treatment services was protected by the state action exemption because the city was acting pursuant to a clearly articulated state policy contemplating anticompetitive conduct by the city and evidencing the state policy of displacing competition with regulation in the area of municipal provision of sewage services); *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40 (1982) (holding that an ordinance enacted by the city of Boulder prohibiting petitioner from expanding its cable television business was not exempt because it was enacted in

they can establish that they are acting pursuant to a clearly articulated state regulatory policy, and the state actively supervises the private conduct.<sup>28</sup> Moreover, private conduct intended to obtain anticompetitive government action is immune from antitrust laws, unless merely a sham to directly interfere with a competitor.<sup>29</sup>

These broad immunities were almost entirely created by the judiciary and run counter to the general trend within United States antitrust jurisprudence to narrowly construe statutory immunities and avoid implying antitrust immunities except where necessary to implement some other statutory scheme. The only equivalent judicially created immunity unrelated to the state action doctrine and the closely related *Noerr-Pennington* doctrine consisted of the Supreme Court's lightly regarded decision in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.<sup>30</sup> In this case, the Court held that professional baseball was not subject to the antitrust laws because it did not constitute interstate commerce.<sup>31</sup> This unprecedented judicial immunity for professional baseball has been heavily criticized and recently has been repealed by statute.<sup>32</sup>

The Supreme Court has justified the state action doctrine and the related immunities discussed above on two grounds. First, the Supreme Court relied on legislative history to suggest that Congress only

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the absence of any regulation by the state and was not implementing any clearly articulated state policy).

28. See *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (holding that California's wine pricing system was not immune from federal antitrust liability, even though it was pursuant to a clearly articulated and affirmatively expressed state policy, because it did not meet the requirement that the policy be actively supervised by the state itself).

29. See *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993) (holding that deprivation of immunity as a sham requires a two-part analysis: first, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits, and second, only if the litigation is objectively meritless can a court examine a litigant's subjective motivation, focusing on whether the suit conceals an attempt to interfere directly with a competitor's business relationship); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (pattern of baseless administrative litigation to deter entry by competitor constituted sham litigation not immune under antitrust laws); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (lobbying of executive branch to obtain government action detrimental to competition immune from antitrust laws); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (holding that solicitation by railroads of governmental action destructive to the trucking business was not violative of the Sherman Act by any anticompetitive purposes it may have had).

30. *Federal Baseball Club of Baltimore, Inc. v. National League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922).

31. See *id.* at 209.

32. See 15 U.S.C.A. § 27(a) (West Supp. 1998). See generally *BASEBALL AND THE AMERICAN LEGAL MIND* 75-160 (Spencer Weber Waller et al. eds., 1995).



intended to regulate private market behavior and not political conduct.<sup>33</sup> Second, the Supreme Court raised the specter that applying the antitrust laws to state action or lobbying activity would raise important federalism and First Amendment questions.<sup>34</sup>

In recent years, the trend in the United States toward immunity for state governments both in general and in antitrust law has, if anything, broadened.<sup>35</sup> The Supreme Court has broadened the scope of Eleventh Amendment and extra-constitutional sovereign immunity for states to limit their exposure to suits for damages of all kinds, even for those federal statutes once thought the preeminent law of the land.<sup>36</sup> Even though lower courts are not yet using the Eleventh Amendment to dismiss antitrust claims against state governments and agencies, they typically use the narrower state action doctrine to accomplish the same result without reaching the broader constitutional questions.<sup>37</sup>

## 2. Public Sector Antitrust Law Abroad

Outside of the United States, there has been a broad trend in the opposite direction toward applying competition rules to both the private and the public sector, while making some adjustments for public sector activity that is indispensable to the functioning of the government.<sup>38</sup>

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33. See *Parker v. Brown*, 317 U.S. 341, 350-51 (1942).

34. See *id.* at 352; *Noerr*, 365 U.S. at 137-38.

35. See generally Jean Wegman Burns, *Embracing Both Faces of Antitrust Federalism: Parker and Arc America Corp.*, 68 ANTITRUST L.J. 29 (2000).

36. See *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000) (holding that the Age Discrimination in Employment Act did not validly abrogate states' Eleventh Amendment immunity from suit by private individuals); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (holding that the Trademark Remedy Clarification Act did not abrogate Florida's sovereign immunity, nor was it voluntarily waived); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999) (holding that the Patent and Plant Variety Protection Remedy Clarification Act did not validly abrogate states' sovereign immunity); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1997) (holding that the Eleventh Amendment prevents Congress from authorizing suits by Indian tribes against states to enforce legislation enacted pursuant to the Indian Commerce Clause).

37. See, e.g., *Neo Gen Screening, Inc. v. New England Newborn Screening Program*, 187 F.3d 24, 28 (1st Cir. 1999) ("This doctrine is [so] well settled that its rationale and underpinnings are scarcely worth discussing."), *cert. denied*, 120 S. Ct. 615 (1999). But see *Earles v. State Bd. of Certified Pub. Accountants*, 139 F.3d 1033, 1036-44 (5th Cir. 1998) (using the Eleventh Amendment to immunize the state defendant and using the state action doctrine to protect the individual defendants), *reh'g en banc denied*, 146 F.3d 869 (5th Cir. 1998), and *cert. denied*, 525 U.S. 982 (1998). As to the application of the Eleventh Amendment to antitrust claims, see generally Susan Beth Farmer, *Altering the Balance Between State Sovereignty and Competition: The Impact of Seminole Tribe on Antitrust State Action Immunity Doctrine*, 23 OHIO N.U. L. REV. 1403 (1997).

38. And quite rightly so, for why have democratic government decision making if the results must slavishly follow the fashions of markets?

One need not go as far as Robert Bork<sup>39</sup> or the libertarian critics of antitrust that claim government power is virtually the only source of lasting market power<sup>40</sup> to acknowledge that governmental action can be a powerful source of anticompetitive power and outcomes. Indeed, one of the critical insights of public choice theory<sup>41</sup> is that well-organized, narrowly focused private interests will frequently use government processes to seek monopoly rents and otherwise insulate themselves from competitive processes.<sup>42</sup>

The foreign experience on this issue suggests there is a better way. The European Union ("EU"), which is composed of sovereign governments, not merely states in a federal system, has recognized the importance of controlling the anticompetitive acts of Member-States, public enterprise, and the private firms given special privileges by those states. Such actions threatened the creation and maintenance of the common market just as the equivalent actions of private undertakings. In addition to the now common rules prohibiting anticompetitive agreements between undertakings,<sup>43</sup> abuses of a dominant position,<sup>44</sup> and legislation prohibiting anticompetitive mergers and acquisitions,<sup>45</sup>

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39. See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978).

40. See DOMINICK T. ARMENTANO, *ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE* (2d ed. 1990); DOMINICK T. ARMENTANO, *ANTITRUST POLICY: THE CASE FOR REPEAL* (1986).

41. Public choice theory relies on the fundamental proposition that people behave in political arenas in much the same manner as they behave in economic markets. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991). As one prominent public choice scholar has stated:

The model of public choice insists that the same rational, self-interest-seeking motives that animates human action in ordinary markets be applied to decision making in the public sector as well. The assumption that *all* individuals, in or out of government, pursue their own self-interests is the fundamental tenet of public choice. Just as consumers want to maximize their utility and firms want to maximize their profits, public policy makers want to maximize their welfare.

William F. Shugart II, *Public-Choice Theory and Antitrust Policy*, in *CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC CHOICE PERSPECTIVE* 7, 9 (Fred S. McChesney & William F. Shugart II eds., 1995).

42. See FARBER & FRICKEY, *supra* note 41, for the application of public choice theory to antitrust issues; Shugart, *supra* note 41, at 7; *PUBLIC CHOICE AND REGULATION: A VIEW FROM THE INSIDE OF THE FEDERAL TRADE COMMISSION* (Robert J. McKay et. al. eds., 1987).

43. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, art. 85 available in OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITY, *TREATIES ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY* 85 (1957) [hereinafter EEC TREATY].

44. See EEC TREATY, *supra* note 43, art. 86.

45. Commission Regulation 4064/89, 1989 O.J. (L 395/1) (discussing merger control, as amended).

the EU included provisions in Article 90 of the Treaty of Rome<sup>46</sup> applying these same rules to the actions of Member-States, public enterprise, and private firms enjoying special privileges.

Article 90 has a three-part structure and states in Article 90(1):

In the case of public undertakings and undertakings to which Member-States grant special or exclusive rights, Member-States shall not enact or maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94.<sup>47</sup>

An important, but limited, exception is contained in Article 90(2), which reads:

Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the community.<sup>48</sup>

Finally, the European Commission is given the power in Article 90(3) to enforce Article 90 and to issue directives to the Member-States regarding its implementation.<sup>49</sup>

The European Commission has taken its duties seriously under Article 90 and brought numerous cases in recent years.<sup>50</sup> The European

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46. The Treaty of Amsterdam both amended and renumbered the articles of the Treaty of Rome, including the competition provisions. See TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Oct. 2, 1997, O.J. (C 340) 1, 37 I.L.M. 56. Thus, the former Articles 85, 86, and 90 are now Articles 81, 82, and 86 respectively. This article uses the old numbering system for convenience only.

47. EEC TREATY art. 90(1). Article 7 prohibits discrimination on the grounds of nationality, and Articles 85-94 cover competition policy. These rules are reinforced by Articles 2-3 of the European Union Treaty which establish competition policy as one of the fundamental foundations of the European Union and Article 5 which obligates Member-States to refrain from action which would jeopardize achievement of European Union's goals and treaty provisions. See TREATY ON EUROPEAN UNION, Feb. 7, 1992, art. 2-3, 5, 31 I.L.M. 247 (ratified Nov. 1, 1993).

48. EEC TREATY art. 90(2).

49. A directive is a form of secondary legislation whereby the European Commission, the Council of Ministers, and the European Parliament enact through prescribed procedures measures which require the Member-States of the EU to take the necessary steps within their national legal systems to implement the purpose and specific actions called for by the directive. See EEC TREATY, *supra* note 43, art. 189, at 351. See *generally* CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 74-75 (George A. Berman ed., 1993).

50. See ATWOOD ET AL., *supra* note 12, § 16.5 at 16-24 (discussing application of Art. 90); FRANCOISE BLUM & ANNE LOGUE, STATE MONOPOLIES UNDER EC LAW (1998) (explaining the fundamental changes that have taken place in the application of EU Treaty rules to state monopolies).

Court of Justice has interpreted the basic prohibition of Article 90(1) broadly and the exemption in Article 90(2) narrowly to create a system that safeguards truly vital Member-States' interests, but otherwise subjects both the public and private sectors within the EU to reasonably uniform competition rules.<sup>51</sup> The European Commission has also used its powers to issue directives sparingly, but effectively, to hasten the application of competition principles to the telecommunications sector.<sup>52</sup>

Even without the extensive use of directives, both the European Commission and private parties applying EU competition rules in Member-State courts through the principle of direct effect have used Article 90 effectively to restore competition to a variety of sectors previously dominated by state-owned or state-sponsored monopolies. Critical cases have brought competition, where there was once none, to such industries as the media, banking, transportation, and music publishing.<sup>53</sup>

The EU is hardly alone in seeing the value of applying competition rules to both the public and private sector. Pursuant to a variety of treaty arrangements, the basic structure of Article 90 applies to the countries of the European Economic Area,<sup>54</sup> the former socialist countries of Central and Eastern Europe seeking future membership in the EU,<sup>55</sup> and a whole host of other transition economies who look to the EU as a source of inspiration for their new competition laws.<sup>56</sup>

51. See ATWOOD ET AL., *supra* note 12, § 16.5 at 16-24 (discussing how Member-States may not grant specific privileges which would avoid the constraints of competition); Wood, *supra* note 3, at 422-25 (contrasting EU law with state action doctrine which fails to create uniform boundary between federal and state competition policy).

52. See, e.g., Commission Directive 96/2, 1996 O.J. (C 20) (discussing mobile and personal communications); Commission Directive 96/13, 1996 O.J. (L 74 0) (discussing full competition in telecommunications); Commission Directive 95/51, 1995 O.J. (L 256/49) (expanding competition in telecommunications services).

53. See generally Commission Annual Report on European Community Competition Policy, at II (detailing enforcement of Article 90); LENNART RITTER ET AL., *EEC COMPETITION LAW: A PRACTITIONER'S GUIDE* 43-51 (1991). See, e.g., Case C-179/90, *Mercati Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA*, [1991] 4 C.M.L.R. 422 (1991); Case C-41/90, *Hofner and Elser v. Macroton GmbH*, 1991 E.C.R. I-1979, [1993] 4 C.M.L.R. 306 (1991); Case 155/73, *Italy v. Sacchi*, 1974 E.C.R. 409, [1974] 2 C.M.L.R. 177 (1974); Case 127/73, *Belgische Radio en Televisie v. S.A.B.A.M.*, 1974 E.C.R. 313, [1974] 2 C.M.L.R. 238 (1973).

54. See generally *THE EUROPEAN ECONOMIC AREA EC-EFTA: INSTITUTIONAL ASPECTS AND FINANCIAL SERVICES* (Julien Stuyk & A. Looijestijn-Clearie eds., 1994).

55. See Eleanor M. Fox, *The Central European Nations and the EU Waiting Room - Why Must the Central European Nations Adopt the Competition Law of the European Union?*, 23 BROOK. J. INT'L L. 351 (1997).

56. For example, such diverse nations as the Philippines, Turkey, Croatia, Slovenia, Kazakhstan, Kyrgyz Republic, Lithuania, and Brazil apply their competition laws to both public

Even Mexico, which adopted its antitrust law in the shadow of the United States antitrust laws as an informal prerequisite for the negotiation of NAFTA, has provisions applying competition principles to its public sector.<sup>57</sup> Indeed, some of its principal successes have come in stopping the anticompetitive activities of state and local governments and public enterprises.<sup>58</sup> Australia and New Zealand are additional notable examples of countries applying their competition rules to both public and private enterprise in an even-handed manner.<sup>59</sup>

### 3. The Weakness of Federalism

In addition to being inconsistent with state practice around the world, the state action doctrine in the United States also illustrates the general weakness of federal states and systems in the international trading system. Under the rules of the World Trade Organization ("WTO"), federal states have the worst of both worlds. On the one hand, such nations bear broad responsibility for the actions of their sub-federal governmental units and can be responsible for violations of trading rules even where they lack the pragmatic ability to control sub-federal governments.<sup>60</sup> On the other hand, when it comes time to negotiate reductions to trade barriers with other nations, they cannot offer as complete a package of concessions as unitary nations because many trade barriers of sub-federal units are beyond their constitutional or pragmatic ability to control.<sup>61</sup> Accordingly, their ability to obtain as great a package of concessions from other nations is restricted as well.

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and private sector activity.

57. See "Ley Federal de Competencia Economica," L.C.E, 30 de junio de 1997 (Mex.); see also ATWOOD ET AL., *supra* note 12, § 17.6 at 17-18 (describing the principal provisions of Mexico's Economic Competition Law); Allan Van Fleet, *Mexico's Federal Economic Competition Law: The Dawn of a New Antitrust Era*, 64 ANTITRUST L.J. 183 (1995).

58. ATWOOD ET AL., *supra* note 12, § 17.8 at 17-26 (discussing the Federal Competition Commission and its role in enforcing the Economic Competition Law).

59. Trade Practice Act, 1974, ch. 2(B)(1) (Austl.); Commerce Act, 1986, § 36 (N.Z.). *But see* Attorney General v. Law Soc'y of British Columbia [1982] 2 S.C.R. 307 (Can.) (approving antitrust exemption for conduct pursuant to provincial regulatory scheme citing *Parker v. Brown*, 317 U.S. 341 (1942) approvingly).

60. General Agreement on Tariffs and Trade, June 7, 1948, A 24(12), 62 U.N.T.S. 56 [hereinafter GATT].

61. One telling example is the continuing negotiations and controversy over the reduction of trade barriers in government procurement policies. Under the auspices of the GATT and now the WTO, a number of governments have negotiated voluntary codes that require non-discriminatory treatment of foreign vendors in government procurement policies. In these negotiations, the United States can only offer binding assurances as to the purchasing decisions of *federal* agencies. Even if Congress technically could bind the states to such international agreements through its power under the Commerce Clause of the Constitution, such a statute is politically unthinkable. The best that the United States could do was obtain the voluntary cooperation of a

This general weakness may soon come to haunt the United States in the competition area as well. Many nations are pressing for the WTO to include competition issues as a topic for future negotiations.<sup>62</sup> While the United States vigorously opposes any formal negotiations at this time,<sup>63</sup> it will be hampered by the existence of the state action exemption, other exemptions, and decentralized features of United States antitrust enforcement if and when such negotiations do occur.<sup>64</sup>

Even if such negotiations do not occur within the WTO, the United States is already facing the pressures and handicaps of the state action doctrine in other international fora. The United States is currently negotiating competition policy issues in such disparate contexts as the NAFTA, the Free Trade of the America negotiations, the Asia Pacific Economic Progress Forum, and the Organization for Economic Cooperation and Development ("OECD"). The United States will increasingly feel the sting of not maximizing its bargaining leverage both within the competition area and in negotiations linked between competition and other sectors. This is a result of numerous anticompetitive restrictions at the state and local level which are simply off limits for United States' negotiators to trade for concessions.

The state action doctrine and similar exemptions have also been criticized as inconsistent with the kind of regulatory reform that the United States normally promotes in international fora. For example, the OECD, in its review of United States competition law and policy, has noted that state regulation and exemption from the federal antitrust laws may delay reform in a wide variety of sectors of the United States economy.<sup>65</sup>

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large number of states in order to sweeten its offer to its trading partners. Even this solution has proven unsatisfactory since many of these same states have passed trade sanctions aimed at foreign governments which have undercut the value of these voluntary concessions. See *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288 (2000) (striking down Massachusetts' sanctions statute limiting state procurement from companies dealing with the current regime in Burma).

62. See ATWOOD ET AL., *supra* note 12, § 18.11 at 18-22 (discussing the role of GATT and the World Trade Organization (WTO) in competition law).

63. See, e.g., A. Douglas Melamed, *Antitrust Enforcement in a Global Economy*, 1998 FORDHAM CORP. L. INST. 1; *U.S. Welcomes WTO Decision to Continue Antitrust Talks but Rules Out Negotiations*, 15 INT'L TRADE REP. 2087 (1998); *Klein Reviews and Projects Trends in International Antitrust Enforcement*, 73 ANTITRUST & TRADE REG. REP. 400 (1997).

64. See Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1541 (1998); cf. Wood, *supra* note 3, at 425 (arguing that the United States is subject to pressures at an international level that tends to diminish the role of local government units in competition matters).

65. See Michael Wise, *Review of United States Competition Law and Policy*, 1 OECD J. COMP. L. & POL. 9, 62 (1999) (stating that anti-competitive state laws and the state action

The point is not that the United States necessarily can or should trade away the state action doctrine in the course of international negotiations,<sup>66</sup> but that the elimination, or limitation, of this judicially created and ill-defined exemption has the potential to provide great benefits to the United States both domestically and in promoting its national interest at the international level.

One need not debate whether the state action doctrine can, or should, be eliminated to suggest a more advantageous way to apply United States antitrust principles in light of foreign experiences in the regulation of public sector abuses. Respect for federalism, in both a constitutional and a political sense, suggests that certain state actions must remain off-limits to competition rules. Unless, and until, Congress affirmatively and constitutionally preempts the states from imposing anticompetitive regulation in certain sectors,<sup>67</sup> such decisions should be respected at some level.

I join with a number of other commentators, however, in seeking fundamental restrictions to the state action doctrine as a matter of fundamental competition policy.<sup>68</sup> If one cares about a competitive economy, one cares about restrictions to competition regardless of the source. The EU and others show that immunity at the sub-federal level can be restricted in a nuanced and respectful way, leaving room for fundamental state policy to deviate from competition in the provision of key services of a general nature. They also limit, however, anticompetitive restrictions in the type of markets when national policy dictates faith in the process of competition.

If Congress did not consider whether competition law should be applied to the public sector in 1890, it should do so now. If the normal competition rules need to be modified or limited in their application to the public sector either for sound policy reasons or for prudential

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exemption may delay reform in areas such as professional services, telecommunications, and electric power).

66. *But see* *Missouri v. Holland*, 252 U.S. 416 (1920) (upholding validity of treaty imposing regulations which were potentially beyond the power of Congress to enact as legislation under the prevailing view of the Commerce Clause at the time).

67. The question of what state laws and functions are preempted by the federal antitrust laws is closely related to the state action doctrine but subject to considerable confusion. *See* HERBERT H. HOVENKAMP, *FEDERAL ANTITRUST POLICY* § 20.1 (1994).

68. *See, e.g.*, Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667 (1991); Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CAL. L. REV. 227 (1987); William H. Page & John E. Lopatka, *State Regulation in the Shadow of Antitrust: FTC v. Ticor Title Insurance Co.*, 3 SUP. CT. ECON. REV. 189 (1993); John Shephard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713 (1986).

political reasons, so be it.<sup>69</sup> If Congress prefers a broad system of immunity, I would oppose such action, but welcome the open debate about the benefits and costs of the present system and the preferable alternatives that foreign experience has shown. 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.

### *B. Antitrust as Regulation*

There is a peculiar view in the United States that antitrust represents the antithesis of regulation. These dual methods of public policy toward business inappropriately tend to be viewed as separate spheres, just as private and public sectors have been improperly separated for antitrust enforcement purposes. Regardless of whether this was ever an accurate way of depicting these bodies of law, it has little applicability to the legal environment today. We live in a regulatory era of antitrust enforcement where most antitrust law is made by the Antitrust Division of the United States Department of Justice and the Federal Trade Commission through the promulgation of guidelines, the issuance of advisory opinions, the review by the enforcement agencies of most mergers before they are consummated, and the negotiation of consent decrees that bear only a partial resemblance to the governing, but increasingly obsolete, case law.<sup>70</sup> The courts both have abdicated their traditional common law function in this area and have tended to defer to the pronouncements of the Antitrust Division and the FTC, as courts do with the interpretations of other expert regulatory bodies.<sup>71</sup>

Despite all evidence to the contrary, including the routine way in which antitrust is described as regulatory in the popular media, the antitrust agencies insist on referring to their mission as “law

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69. For example, a spate of treble damage lawsuits in the 1980s against municipalities led Congress to eliminate damage actions in such circumstances but retain injunctive actions. See 15 U.S.C.A. §§ 35-36 (West 1997 and Supp. 2000).

70. See also Thomas Kauper, *The Justice Department and the Antitrust Laws: Law Enforcer or Regulator?*, in 1 *THE ANTITRUST IMPULSE: AN ECONOMIC, LEGAL AND HISTORICAL ANALYSIS* 435 (Theodore P. Kovaleff ed., 1994); E. Thomas Sullivan, *The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition*, 64 *WASH. U. L. Q.* 997 (1986) (focusing more on the regulatory nature of merger enforcement). See generally Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 *OR. L. REV.* 1383 (1998).

71. See Waller, *supra* note 70, at 1407-08 (analogizing to *Chevron* deference in administrative law). The irony is that, if anything, the courts grant more deference to the DOJ, as opposed to the FTC, which is the only true administrative agency with a mandate from Congress to regulate competition.



enforcement” rather than “regulation.”<sup>72</sup> The supposed law enforcement nature of the United States system normally is compared favorably with foreign systems like the EU which are described as regulatory in nature.<sup>73</sup>

Other countries have avoided this unproductive fight over the nature of antitrust law and more properly conceive competition policy as a continuum of governmental responses to particular types of markets, forms of ownership, and business conduct. Competition policy is viewed in a positive way as a form of light regulation to replace the heavy hand of the state or administrative agencies previously in charge of entry and pricing decisions. Perhaps the most advanced nation in this regard is New Zealand. At the forefront of privatization and deregulation in such industries as telecommunications, banking, and energy, New Zealand has expressly adopted competition policy as virtually the sole form of light-handed regulation for its economy.<sup>74</sup> As a prominent group of New Zealand economists recently noted:

[C]ompetition policy has, from the enactment of the Commerce Act in 1986, sought to minimize government and regulatory intervention and to place reliance on actual and potential competition for the regulation of prices and monopoly behavior. The Commerce Act is not specific about the “public benefit” criterion on which firms and individuals’ actions are evaluated but its central component is economic efficiency. The legal framework was molded by competition policy that rested on much less regulation in general, and minimal industry-specific regulation in particular. The absence of any industry-specific regulatory body and the possibility of price control characterize most of New Zealand’s commerce. It has become known as “light handed” regulation.<sup>75</sup>

In New Zealand, most disputes over interconnection and other aspects of the type of network industries involved in light regulation have been resolved through a combination of negotiation and private litigation, as well as public enforcement actions of the New Zealand

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72. *Id.* at 1384 (noting that officials of the Antitrust Division and the FTC describe their role as “law enforcement,” not as regulators).

73. See 76 ANTITRUST & TRADE REG. REP. 271 (1999).

74. See Alan Bollard & Michael Pickford, *Utility Regulation in New Zealand*, in REGULATING UTILITIES: BROADENING THE DEBATE 75 (M.E. Beesley ed. 1997) [hereinafter *Utility Regulation*]; MINISTRY OF COMMERCE, LIGHT-HANDED REGULATION OF THE NEW ZEALAND ELECTRICITY AND GAS INDUSTRIES (1995); Alan E. Bollard & Michael Pickford, *New Zealand’s ‘Light-Handed’ Approach to Utility Regulation*, 2 AGENDA 411, 412 (1995) [hereinafter *Light-Handed Approach*]; Lewis Evans et al., *Economic Reform in New Zealand 1984-95: The Pursuit of Efficiency*, 34 J. ECON. LIT. 1856 (1996); Gordon R. Walker & Mark A. Fox, *Globalization: An Analytic Framework*, 3 IND. J. GLOBAL LEG. STUD. 375 (1996).

75. Evans et al., *supra* note 74, at 1885.

Commerce Act, rather than traditional agency dictates and administrative proceedings.<sup>76</sup> While the policy of light-handed regulation is not without critics,<sup>77</sup> most commentators appear to be cautiously optimistic that it has served its role of safeguarding both consumers and the economy during a period of massive and rapid privatization and deregulation.<sup>78</sup>

I offer these examples not to specifically endorse the substance of New Zealand's policy, which continues to be debated in that country,<sup>79</sup> but to illustrate a more helpful discourse about the nature of competition policy. New Zealand has proved the political and economic viability of recognizing the regulatory nature of competition policy while preserving, if not enhancing, the role of antitrust rules within a national economy.

The irony is that the foreign competition systems perceived in the United States as "regulatory" are taking steps to become more judicialized<sup>80</sup> and more oriented toward dispute resolution through private litigation and public enforcement actions. In particular, the EU has taken steps to eliminate many of the routine advance filings for

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76. *Id.* at 1888-90. For the substance of the New Zealand Commerce Act, see generally COMPETITION LAW AND POLICY IN NEW ZEALAND (Rex J. Ahdar ed., 1991).

77. See *Utility Regulation*, *supra* note 74, at 122-24 (discussing high litigation and enforcement costs, incumbency advantages, under assessment of complexity of regulating of vertically integrated natural monopolies, and insufficient attention to demands on courts); Ross Patterson, *Light-Handed Regulation in New Zealand Ten Years On*, 6 COMP. & CONS. L.J. 134, 149-51 (1998) (arguing that the policy of light-handed regulation was flawed from the beginning and is still generally deficient regarding dealings with industries); see also Rex Ahdar, *The Privy Council and "Light-Handed Regulation"*, 111 L.Q. REV. 217 (1995) (critiquing the principal application of the Commerce Act provision that governs access by new telecommunication entrants to a dominant firm's network).

78. See *Light-Handed Approach*, *supra* note 74, at 421 ("[T]he policy has made inroads into areas of monopoly power in a relatively short time, and from a former status quo of government ownership and heavy regulation."); Chris Pleatsikas & Bruce Turner, *Electric Competition in New Zealand: Putting Last Things First*, 134 PUB. UTIL. FORT. 26, 30 (1996).

79. The recent election in New Zealand resulted in the replacement of the National government by a coalition government led by the Labour Party. Competition policy was an important issue with the policy of light-handed regulation often equated with a lack of regulation and proposals to both strengthen the Commerce Act and the possible reintroduction of certain forms of industry specific regulation to prevent abuses in sectors such as telecommunications and electrical power. See LABOUR NEW ZEALAND 2000, IMPROVING COMPETITION (1999); Brian Fallow, *Major Players Both Seeking Tougher Line on Competition*, NZ HERALD (Nov. 18, 1999); Kevin Norquay, *Anderton Moves to Placate Business*, DAILY NEWS (New Plymouth), Nov. 29, 1999 (detailing Alliance party leader's views in favor of regulating telecommunications industry); *Power Probe Detail Soon*, THE EVENING POST, Dec. 18, 1999, at 3.

80. For a discussion of the historical evolution of the European national competition systems in this direction see generally DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS (1998).

most vertical distribution agreements<sup>81</sup> and to radically decentralize the enforcement of EU competition law by stripping the European Commission of its exclusive control of EU competition provisions.<sup>82</sup> The European Commission proposed this radical power stripping in the hope of relieving itself of the more routine review functions in order to preserve the discretion and resources to pursue the biggest and most significant violations. At the same time, the power of Member-State courts to handle all aspects of EU competition law would be increased, further judicializing the system. It is hoped that the result will produce more Member-State enforcement actions and more private law suits, a multiplicity of actors and actions reminiscent of the United States!

The result is a meeting in the middle. The United States can no longer be characterized as the pure law enforcement system that its chief competition officials would like to suggest, nor can the EU and most serious foreign competition systems be viewed as creatures of regulation as once may have been the case. With a common lexicon, the chances for harmonization, or at least cross-influence and a constructive dialogue, are further enhanced with the United States freeing itself from a mind-set that further complicates the delicate process of learning from abroad in the competition field.

### *C. The Anathema of Antidumping Law*

Another area dominated by the separate sphere type of thinking is the tortured relationship between antitrust and antidumping law. The growth of antitrust and foreign experience suggests the fundamental weakness with the United States' love affair with antidumping law. In a nutshell, antidumping law applies when imported goods are sold in the United States for less than they are sold for in their country of origin.<sup>83</sup> Once dumping is proven and measured, an antidumping duty equal to

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81. See *supra* note 5 and accompanying text (discussing reforms proposed by the European Commission).

82. Commission Programme 99/027 of 28 April 1999 White Paper on the Modernization of the Rules Implementing Articles 85 and 86 of the E.C. Treaty, *available at* European Union, *Europa* (visited Sept. 22, 2000) <<http://www.europa.eu.int/comm/competition/antitrust/others.html>>.

83. See 19 U.S.C. § 1673 (1994) (imposing antidumping duties if an American industry is materially injured or threatened with material injury by reason of imports that are being sold for less than fair value); 19 U.S.C.A. § 1677 (West 1999 & Supp. 2000) (providing definitions); see also Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, *reprinted in* JOHN H. JACKSON ET AL., 1995 DOCUMENTS SUPPLEMENT TO LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 435 (1995). For a sense of the complexities and vagaries of antidumping investigations under United States law, see JOSEPH E. PATTISON, *ANTIDUMPING AND COUNTERVAILING DUTY LAWS* (1984).

the difference between the United States' price and the home market price is applied.<sup>84</sup>

The relationship between antidumping and antitrust law is complex, but primarily antagonistic. One would be hard pressed to find a scholar steeped in competition law and policy who supports current antidumping rules. Most would prefer their outright replacement with a competition-based regime that could address any serious instance of dumping that actually harms consumers and the process of competition.<sup>85</sup> At best, antidumping law can be used to attack true international predatory pricing,<sup>86</sup> but the vast majority of the time it is used to penalize simple price differences that would not even be actionable domestically under the Robinson-Patman Act.<sup>87</sup> Many of these price differences are either pro-competitive or benign from a competitive standpoint. In addition to penalizing the kind of behavior that competition law normally wishes to promote, the misuse of the antidumping and other import relief laws can become an outright antitrust violation.<sup>88</sup>

More typically, these laws represent a seemingly neutral set of rules that permit a highly damaging disguised form of protectionism. Many nations now follow the example of the United States and enforce their own set of antidumping laws. In this world, the United States suffers doubly. America imposes dramatic costs on both its own economy and consumers to provide partial, indirect relief to a limited number of domestic industries. At the same time, it hinders its export performance through encouraging the creation of foreign antidumping laws that penalize the more aggressive pricing strategies of our most successful exporters.

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84. See 19 U.S.C. § 1673 (1994).

85. See SPENCER WEBER WALLER, *INTERNATIONAL TRADE & U.S. ANTITRUST LAW* § 12 (1999); Raj Bhala, *Rethinking Antidumping Law*, 29 GEO. WASH. J. INT'L L. & ECON. 1 (1996); Ronald A. Cass, *Price Discrimination and Predation Analysis in Antitrust and International Trade: A Comment*, 61 U. CIN. L. REV. 877 (1993); Eleanor M. Fox, *Antitrust, Trade and the Twenty-first Century-Rounding the Circle*, 48 REC. ASS'N B. CITY N.Y. 535 (1993); Robert W. McGee, *The Case to Repeal the Antidumping Laws*, 13 N.W. J. INTEL L. & BUS. 491 (1993); Thomas J. Schoenbaum, *The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust*, 19 N.C. J. INT'L L. & COM. REG. 393 (1994); Diane P. Wood, *"Unfair" Trade Injury: A Competition-Based Approach*, 41 STAN. L. REV. 1153 (1989).

86. This, of course, depends on the extent such an animal exists at all. See Robert W. McGee, *An Economic Analysis of Protectionism in the United States with Implications for International Trade in Europe*, 26 GEO. WASH. J. INT'L L. & ECON. 539, 560 (1993).

87. 15 U.S.C.A. § 13 (West 1999 & Supp. 2000) (prohibiting price discrimination where effect may be to substantially lessen competition or create a monopoly).

88. See WALLER, *supra* note 85, § 13 (discussing circumstances where bringing or settling antidumping cases violates antitrust laws).

Our commitment to the preservation and expansion of this type of regime can only be explained in terms of classic public choice theory, whereby the narrow, well-focused efforts of industries and workers benefiting from the antidumping laws have greater political power than the broader but more diffuse lobbying efforts of consumers and exporters.

There are also collateral costs. The United States vehemently opposes the introduction of a dialogue on competition principles in the WTO,<sup>89</sup> in part because of the fear that such conversations will be the springboard for the replacement of antidumping rules with competition rules. Domestically, the mandate of the Justice Department's International Competition Policy Advisory Committee was similarly circumscribed, leaving the section of its report on trade and competition policy a shadow of what it could have been.<sup>90</sup>

While it is unfortunate that antidumping laws are a fact of life, there are partial and realistic solutions if we again look abroad to see how other countries and trading blocks have addressed the inherent tension between antidumping and competition law. Instead of focusing on the unlikely abolition of the antidumping statutes, one should focus on the experience of countries where antidumping law has been eliminated or modified in the context of the creation of a free trade area or customs union.

If a nation integrates its economy with one or more of its trading partners, antidumping law should be one of the first non-tariff barriers to be eliminated. At a legal level, this may in fact be a requirement of the WTO, which permits free trade areas and customs unions to be formed and to allow trade concessions among members, which are not extended to other WTO members, only upon the condition that "duties and other restrictive regulations of commerce . . . are eliminated with respect to substantially all the trade between the constituent territories."<sup>91</sup>

The elimination of antidumping rules for free trade partners also makes sense from both a competition and trade policy perspective. Historically, a free trade relationship has involved the elimination of

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89. See *supra* note 63 (citing sources that indicate the United States' opposition to negotiating issues of competition in the WTO).

90. See U.S. DEP'T OF JUSTICE, INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE TO THE ATTORNEY GENERAL AND THE ASSISTANT ATTORNEY GENERAL FOR ANTITRUST, FINAL REPORT Ch. 5 (2000).

91. GATT, *supra* note 60, art. xxiv, § 8(a)(I), (b); see also GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 736-808 (6th ed. 1994).

antidumping rules because the partners are creating a new single market in place of the dual or multiple markets of the past in which antidumping rules functioned as a penalty for "unfair" tactics and as a safety valve regulating trade between different economic structures.<sup>92</sup>

Two great historical examples illustrate this principle. The first is the experience of the United States. Once the separate colonies created a nation, and not merely a confederation, the newly created states of the Union were constitutionally barred from imposing any form of import or export duties on trade between the American states.<sup>93</sup> Similarly, when the European Economic Community was created in the late 1950s, it learned the American lesson well. In the Treaty of Rome, the Member-States were barred after a brief transition period from imposing antidumping or any other form of duties on trade between the Member-States.<sup>94</sup> Price differences between Member-States are dealt with as an abuse of a dominant position under the competition rules rather than as a trade issue.<sup>95</sup>

Most recent and limited forms of free trade relationships have continued the trend of eliminating antidumping rules. New Zealand and Australia concluded a free trade agreement in 1983, which included the elimination of antidumping rules for trans-Tasman trade and the replacement of the dumping rules with true competition provisions.<sup>96</sup> Canada and Chile also eliminated antidumping rules in their free trade agreement even though their economies are structurally quite different and separated by thousands of miles.<sup>97</sup> Mercosur, the principal South American free trade area, has pursued a similar path in eliminating antidumping duties for trade within the bloc.<sup>98</sup>

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92. See JACKSON ET AL., *supra* note 83, at 668-71.

93. See U.S. CONST. art. I, § 10 ("No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress"); see also Jim Chen & Daniel J. Gifford, *Law as Industrial Policy: Economic Analysis of the Law in a New Key*, 25 U. MEM. L. REV. 1315, 1324 (1995) (arguing that the Constitution imposed a free trade zone on the United States).

94. See EEC TREATY, *supra* note 43, arts. 12-17.

95. See, e.g., Case 85/76, *Hoffman-La Roche & Co. v. Commission*, 1979 E.C.R. 461, 3 C.M.L.R. 211 (1979); Case 27/76, *United Brands v. Commission*, 1978 E.C.R. 207, 1 C.M.L.R. 429 (1978).

96. See Closer Economic Relations Trade Agreement, Mar. 28, 1983, Austl.-N.Z., art. IV, 22 I.L.M. 945, 950. New Zealand and Australia simultaneously harmonized their competition laws, and created a mechanism for transborder enforcement.

97. See *Canada-Chile Free Trade Agreement* (last modified June 22, 1999) <<http://www.dfait-maeci.gc.ca/english/geo/lac/cda-chile/chap-m26.htm>>.

98. See *Southern Common Market (Mercosur) Agreement* (last modified Jan. 4, 1999)

## IV. SOMETIMES HIGHEST COMMON DENOMINATOR RULES

The divergence of United States competition policy from that of other prominent jurisdictions around the world leads to the larger issue of the costs and benefits of the current diverse state of global competition policy. The proliferation of antitrust regimes around the world currently presents the private and public sectors with the opposite of the old race to the bottom problem. If anything, the current world of international antitrust is best characterized by a form of "highest common denominator rules." As a practical matter, if any significant jurisdiction prohibits a horizontal or vertical type of agreement or imposes a particular type of merger control, then all transnational businesses must follow the most restrictive rules no matter what their home jurisdiction is prepared to tolerate.<sup>99</sup> For example, an export cartel tolerated or even encouraged by its home market must adhere to the basic anti-cartel prohibitions of any market where the cartel does business, implements its pricing agreements, or produces significant effects.<sup>100</sup> Similarly, a standard worldwide method of selective distribution cannot be implemented if more than a couple of the relevant markets object on competition grounds. Any merger of truly global enterprises is subject to the most restrictive version of pre-merger notification and substantive merger control in any important jurisdiction it does business in or plans to do business in for the future.

One can only assume that this type of three-dimensional chess game of counseling businesses and individuals in light of the welter of different and occasionally inconsistent obligations will continue for the foreseeable future. If nothing else, the growth of electronic commerce, where the customer base is global in scope but unknowable in advance, means that more and more firms will have to decide their business practices taking into account the most stringent rule they can identify in any significant jurisdiction. Firms then can either conform their behavior accordingly or risk investigation and challenge if detected and found to be subject to the jurisdiction of the offended competition system.<sup>101</sup> My unorthodox take on this collection of different rules on a

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<<http://www.mac.doc.gov/ola/mercosur/mgi/mercosus.htm>> (providing annex IV, art. V which was effective as of Dec. 31, 1994).

99. This may also be an illustration of the phenomena that to ascribe nationality to transnational business is impossible. See generally ROBERT REICH, *THE WORK OF NATIONS* (1991); Lan Cao, *Toward a New Sensibility for International Economic Development*, 32 TEX. INT'L L.J. 209 (1997).

100. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 770 (1993); Case 89/85, *Ahlstrom Osakeyhtiö v. Commission*, 1988 E.C.R. 5193, 4 C.M.L.R. 901 (1988).

101. Antitrust is hardly the only body of law to be affected in such a fashion. In particular,

global scale is that it is basically a positive development with a handful of exceptions. There are, to be sure, minor jurisdictions which have imposed pre-merger filing requirements for transactions with little connection to their market as a way of funding nascent competition enforcement agencies. In the scheme of global competition enforcement and any particular transnational transaction, these are minor irritants, not major policy matters.

What has emerged is not unlike the system in the United States with multiple enforcers that act as a system of checks and balances. In the United States, the competition laws are enforced by two different federal agencies, the fifty states, and any private party that has been injured in its business or property by reason of a violation of the antitrust laws. If one jurisdiction loses interest in some aspect of antitrust enforcement, there is now an antitrust safety net in the myriad of other jurisdictions which are unlikely to adopt the same policy shift at precisely the same moment. It also prevents any single jurisdiction from pulling a fast one in a particular case. Even if one jurisdiction wishes to permit an anticompetitive cartel, merger or abusive monopolist, because the negative effects are felt elsewhere but not at home, there are eager enforcers seeking to step into the breach to stop this kind of beggar-thy-neighbor strategy.<sup>102</sup> Even when most nations are in agreement about the illegality of a particular type of conduct, multiple enforcers create a higher probability of detection, successful

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lawyers must make a similar calculus in the emerging area of privacy law where standards in the EU and elsewhere are more systematic and more restrictive of what data can be used and the lawful manner of use than the scattering of privacy provisions found in United States law. See generally PAUL M. SCHWARTZ & JOEL R. REIDENBERG, *DATA PRIVACY LAW: A STUDY OF UNITED STATES DATA PROTECTION* (1996).

102. The Boeing-McDonnell merger, at least from the EU perspective, may be a partial example of this phenomenon. The suspicion in the EU was that the Federal Trade Commission chose not to challenge this merger because of the political and economic advantages of strengthening Boeing as a national champion for the United States in global civil aviation markets at the expense of Airbus the European consortium. Under this scenario, the EU was the only jurisdiction that could effectively step in to challenge aspects of the transaction which affected its market. However, the EU's insistence on conditions for approving the transaction that had little to do with the acquisition itself created an equal suspicion that the EU was only acting as a result of factors other than strictly competition concerns. See Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 *ANTITRUST L.J.* 159 (1999); Crystal Jones-Starr, *Community-Wide v. Worldwide Competition: Why European Enforcement Agencies are Able to Force American Companies to Modify Their Merger Proposals and Limit Their Innovations*, 17 *WISC. INT'L L. J.* 145 (1999); Jeffrey A. Miller, *The Boeing/McDonnell Douglas Merger: The European Commission's Costly Failure to Properly Enforce the Merger Regulation*, 22 *MD. J. INT'L L. & TRADE* 359 (1998). See generally Guzman, *supra* note 64, at 1532, 1533-35 (dealing incentives for nations to underenforce competition rules where externalities are felt elsewhere).



investigation,<sup>103</sup> and a complete package of punishment that reflects the global effects of the unlawful conduct.

The multiplicity of jurisdictions and enforcers interested in antitrust law and competition policy holds the potential for the United States to relearn the best lesson it has taught the rest of the world, namely, that competition matters, not just as a narrow matter of promoting various forms of economic efficiency, but as a broad economic and political commitment to a society without durable dominant economic interests that exploit consumers, injure competitors, subvert the process of competition, and eventually threaten political freedom as well. One does not often hear this kind of talk in the United States anymore.<sup>104</sup> By contrast, the spirit of this broad form of antitrust and competition policy is alive and well throughout the world. If we can re-import this fundamental notion that began in the nineteenth century industrial revolution in the United States and has come to fruition around the world at the beginning of the twenty-first century, then we have (re)learned the greatest lesson that antitrust law has to teach us.

## V. CONCLUSION

The United States often claims that the fifty states represent a unique laboratory of experimentation for federal policy. If that is true, or at least an honorable myth that we observe in practice, why not use the more than eighty nations around the world with active competition laws the same way? The comparative perspective is particularly helpful even for sacred cows that our history tells us cannot be improved upon. Far too frequently, there is compelling evidence that something works well in practice that we have trouble accepting even in theory.

Globalization has created opportunities for both harmonization and diversity. The United States needs both the wisdom and the humility to look both abroad and at home at its own policies and determine where change is needed and which direction that change should take.

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103. This is particularly true when there is cooperation between enforcement agencies. See generally Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 360-74 (1997).

104. See, e.g., RICHARD HOFSTADTER, *What Happened to the Antitrust Movement?*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 188 (1965); Gary Minda, *Antitrust at Century's End*, 48 SMU L. REV. 1749 (1995); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979).