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## **Antitrust and Democracy**

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# ANTITRUST AND DEMOCRACY

SPENCER WEBER WALLER\*

*Our solution of the anti-monopoly problems must be in terms of our ideals—the ideals of political and economic democracy. We want no economic or political dictatorship imposed upon us either by the government or by big business. We want no system of detailed regulation of prices by the government nor price fixing by private interests. We do not want bureaucracy or regimentation of any kind, but we will prefer governmental to private bureaucracy and regimentation, if we have to make such a choice. We cannot permit private corporations to be private governments. We must keep our economic system under the control of the people who live by and under it.*<sup>1</sup>

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## I. INTRODUCTION

This article analyzes two critical and related questions regarding the eternal quest for better understanding the purposes and tools of competition law and policy. It first looks at the role of democracy as a policy goal of competition policy. It also looks at the role of democracy in the enforcement of competition law, regardless of the normative goals of any given competition law system.

This is a timely and important topic as antitrust law has become more politicized and is under attack in these times of populism both in the United States and in other countries. One recent example is the

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\* John Paul Stevens Chair in Competition Law and Director, Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law. Thanks to Peter Carstensen, Christine Chabot, Harry First, Philip Marsden, John Newman, and Thomas Horton for their helpful comments and Frances Butler for her excellent research assistance and participants at workshops and presentations at Class Crits X; Centre for Competition Law & Policy, Oxford University; Marquette University Law School; New York University School of Law; University of California-Irvine School of Law; and the Global Competition Forum of the Organization for Economic Cooperation and Development.

1. Robert H. Jackson, *Should the Antitrust Laws be Revised?*, 71 U.S. L. REV. 575, 582 (1937).

current concern in the United States that the Trump Administration sought to block the AT&T-Time Warner merger because of the President's dislike for the political coverage of his campaign and presidency by CNN (part of Time Warner) and/or investigate Amazon because of a similar animus to the political coverage of the Washington Post, owned by Jeff Bezos, the owner of Amazon. It is also an exciting time for antitrust with new cries from both the left and right to reinvigorate antitrust as a control on the abuse of corporate power and its corrosive effect on democratic values.

Part I examines the promotion of democracy as one of the historical and contemporary values for competition law. Part II explores how to promote democracy in the enforcement of competition law, regardless of the values adopted in the formulation of that system's competition law. Part II also examines in detail the meaning of democracy in legislative action, agency enforcement, executive branch actions, judicial review, private rights of actions (including collective actions), and in civil society. Part III provides a taxonomy and hypothetical example for democracy in antitrust, outlining how the roles of the different actors combine to form a virtuous feedback loop. In this feedback loop, explicit values are debated and enacted by the democratic branches of government and society. These democratically formulated values are then implemented by the more technocratic branches of government. All the while, each of the parts of the system provide feedback to the democratic branches to allow continued debate and revisions over time. Part IV concludes.

## II. ANTITRUST AND DEMOCRACY

From the earliest days of antitrust laws in the United States, the promotion and preservation of democracy was one of the goals of the drafters and supporters of state and federal antitrust law. While the political content of antitrust law in the United States has waxed and waned over the ensuing decades, competition law and policy has always recognized the need for a pluralism of economic actors and interests. This pluralism of economic actors and interests is similar to the United States constitutional principles ensuring a pluralism of governmental actors and interests through separation of powers and the individual liberties set forth in the bill of rights.

Drafters of the United States Constitution debated, but rejected an anti-monopoly clause.<sup>2</sup> The drafters of state antitrust laws in the United States, a decade before the Sherman Act, enacted detailed

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2. Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J. L. & PUB. POL'Y 983, 1009-23 (2013).

provisions attacking monopoly.<sup>3</sup> As state law proved ineffective in addressing the rise of national corporations, the impetus for federal antitrust law increased. Gubernatorial, Senatorial, and Presidential candidates in the late 19th century often focused on the need for stronger competition legislation and enforcement.<sup>4</sup> Perhaps the zenith of this political movement was the Anti-Monopoly Party that fielded candidates for President and other federal and statewide offices in 1888.<sup>5</sup> In support of the legislation that would bear his name, Senator John Sherman argued on the floor of the United States Congress:

If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessities of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.<sup>6</sup>

Although the final text that emerged was highly general, vague, and grounded in the common law, the country understood that a sea change had occurred.<sup>7</sup> Congress made three important changes to the weak existing state common law. First, the law of competition was federalized, although the state retained the power to maintain and enforce their local antitrust laws.<sup>8</sup> Second, violations of sections one and two of the Sherman Act became a federal criminal offense, eventually made a felony.<sup>9</sup> Finally, the Sherman Act, and later the Clayton Act, created a federal private right of action for treble damages, attorney's fees, and costs for persons injured in their business and property as a result of an antitrust violation.<sup>10</sup>

While the courts debated the meaning of the specific text adopted by Congress in the Sherman Act, politicians and the public continued to debate the meaning and the purpose of U.S. antitrust laws. The Progressive Movement's concern with large business organizations

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3. James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495, 499 (1987).

4. Joshua Fink & Spencer Weber Waller, *A Flash in the Pan: The Brief Existence of the Anti-Monopoly Party*, LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW INSTITUTE FOR CONSUMER ANTITRUST STUDIES (2001) (on file with author).

5. *Id.*

6. 21 CONG. REC. 2457 (1889).

7. WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ACT 95-99 (1965).

8. 15 U.S.C. § 1 (2012).

9. Over time, criminal enforcement was limited to hard core cartel violations with violations elevated to a felony currently punishable by up to ten years imprisonment for individual and fines up to \$1 million for an individual and \$100,000,000 for undertakings. 15 U.S.C. § 1 (2012).

10. 15 U.S.C. § 15 (2012).

included a fear of such wealth and power that would put an end to traditional American democracy.<sup>11</sup> In the *Standard Oil* decision, Justice Harlan's concurrence expressed these concerns in terms of the replacement of human slavery with a new form of economic slavery to the trusts and monopolies.<sup>12</sup> Following the *Standard Oil* decision, the presidential election of 1912 largely was fought over the future of antitrust law and enforcement.<sup>13</sup>

A generation later, U.S. antitrust enforcement was revived in the depths of the Great Depression as a political instrument to revive the economy, to prepare for the eventual entry of the United States into World War II, and, in part, to distinguish the U.S. political and economic system from the rising powers of Germany and the Soviet Union.<sup>14</sup> The revival of antitrust continued with the appointment of Robert Jackson to head the Antitrust Division.<sup>15</sup> The revival expanded in 1938 with President Roosevelt's famous Anti-Monopoly Message and his appointment of Thurman Arnold to continue the expansion of antitrust enforcement.<sup>16</sup>

Following the war, the United States embarked on an aggressive campaign of international cartel enforcement focused on the decartelization and de-monopolization of the defeated powers as part of a post-war world international order.<sup>17</sup> It is not surprising that during the Cold War, there was a bipartisan political consensus to strengthen enforcement of the antitrust laws, and that competition law was an express provision of both Republican and Democratic Party platforms until 1980.<sup>18</sup>

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11. RICHARD HOFSTADTER, *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 200, 206, 214, 221 (1964); *see also* Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMP. L. 131, 131-32 (2018).

12. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 83 (1910) (Harlan, J., concurring).

13. *See* JAMES CHACE, 1912: WILSON, ROOSEVELT, TAFT & DEBS—THE ELECTION THAT CHANGED THE COUNTRY (2004).

14. *See* SPENCER WEBER WALLER, *THURMAN ARNOLD: A BIOGRAPHY* 78-110 (2005).

15. *Id.*

16. Spencer Weber Waller, *The Antitrust Legacy of Thurman Arnold*, 78 ST. JOHN'S L. REV. 569, 569 (2004). Roosevelt presented a message to Congress on the concentration of economic power on April 29, 1938 in which he urged Congress to curb monopolies. *Message to Congress from Franklin D. Roosevelt to Curb Monopolies and the Concentration of Economic Power (Apr. 29, 1938)*, in *THE PUBLIC PAPERS AND ADDRESS OF FRANKLIN D. ROOSEVELT 1938*, at 305-23 (Samuel I. Rosenman ed., 1941).

17. *See* GEORGE W. STOCKING & MYRON W. WATKINS, *CARTELS IN ACTION: CASE STUDIES IN INTERNATIONAL BUSINESS DIPLOMACY* (1946) (case studies analyzing cartels from World War I to 1940).

18. *National Political Party Platforms: Parties Receiving Electoral Votes 1840-2016*, by *The American Presidency Project*, U.C. SANTA BARBARA, <https://www.presidency.ucsb.edu/documents/presidential-documents-archive-guidebook/national-political-party-platforms> [<https://perma.cc/XW5U-FWE8>] (last visited Aug 13,

Against this background, Robert Pitofsky (who later became chairman of the Federal Trade Commission) wrote in 1979, “It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws.”<sup>19</sup> The link between market competition and democracy is expressed in a surprising array of more conservative voices as well. As former Secretary of State and National Security Advisor Condoleezza Rice stated to the 2012 Republican Convention in more general terms: “Where does America stand? . . . The U.S. has since the end of World War II had an answer—we stand for free peoples and free markets . . . we will sustain a balance of power that favors freedom.”<sup>20</sup> Milton Friedman in *Capitalism and Freedom* argued that political freedom depended on economic freedom.<sup>21</sup> Robert Bork in *The Antitrust Paradox* recognized that “antitrust is a subcategory of ideology” necessarily connected to “the central political and social concerns of our time.”<sup>22</sup> Most recently, Senator Orrin Hatch spoke on the floor of the Senate:

Little surprise, then, that in America’s free enterprise tradition, no less than in its larger political tradition, we deeply distrust concentrated power. We distrust the intervention of the state, to be sure. Our system is largely defined by limited government. But so too do we cast a wary eye upon powerful private entities. We have little tolerance for the monopolist which secures its market position anti-competitively, and we offer no quarter to the naked cartel. In other words, we no sooner trust concentrated private power than concentrated public power to dictate the direction of our economy.<sup>23</sup>

Outside the United States, issues of competition law also have been intertwined with debates about political freedom and democracy. Competition law in Europe represents a combination of distinctly

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2019) (compiled list of the political platforms of each party in each U.S. Presidential election from 1840 until 2016 with hyperlinks to descriptions of each party’s platform); *see also* N. Pac. Ry. v. United States, 356 U.S. 1, 4 (1958) (“The Sherman Act was designed to . . . [provide] an environment conducive to the preservation of our democratic political and social institutions”).

19. Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979).

20. Condoleezza Rice, Former Secretary of State, Speech at the Republican National Convention, WASH. POST (Aug. 29, 2012), [https://www.washingtonpost.com/politics/rnc-2012-condoleezza-rice-delivers-speech-to-republican-national-convention-in-tampa-full-text/2012/08/29/334d8122-f224-11e1-892d-bc92fee603a7\\_story.html?noredirect=on&utm\\_term=.304bcc5f385c](https://www.washingtonpost.com/politics/rnc-2012-condoleezza-rice-delivers-speech-to-republican-national-convention-in-tampa-full-text/2012/08/29/334d8122-f224-11e1-892d-bc92fee603a7_story.html?noredirect=on&utm_term=.304bcc5f385c) [<https://perma.cc/872Q-48WE>].

21. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 8 (1962).

22. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 408 (2d ed. 1993).

23. Press Release, *Hatch Speaks Again on ‘Hipster Antitrust,’ Delrahim Confirmation*, PUBLIC (Sept. 25 2017), <http://www.publicnow.com/view/95AC914914FE72F2690C1E2A6FC18CF421D27453> [<https://perma.cc/NV9H-4264>].

national impulses in the early years of the twentieth century reflecting different visions of political economy.<sup>24</sup> The ordoliberal project both before and after World War II embodies a desire to embed controls of both political and economic power in a constitutional legal structure. Two recent scholars have noted the direct link between competition and democracy as the normative underpinnings for European Union (EU) competition law.<sup>25</sup>

The EU includes a variety of economic and political goals of its treaty provisions and its case law, such as the single market imperative and the special responsibility of dominant firms.<sup>26</sup> The wholesale adoption of competition law around the world following the collapse of the Soviet Union represents a ringing declaration of the importance of the economic freedoms embodied in competition law, as countries went through both political and economic transformation.<sup>27</sup> Similarly, the adoption of meaningful competition law in South Africa was part of the democratization of the country in the post-apartheid era.<sup>28</sup>

The debate over the goals of competition law has continued and strengthened in contemporary times. Scholars both old and new argue for more than a thin diet of efficiency, defined as wealth maximization, as the animating principle of competition law.<sup>29</sup> Economists from the

24. See DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* (1998).

25. Elias Deutscher & Stavros Makris, *Exploring the ordoliberal paradigm: The competition-democracy nexus*, EUI Working Papers, LAW 2017/03, [http://cadmus.eui.eu/bitstream/handle/1814/45291/LAW\\_2017\\_03.pdf?sequence=2](http://cadmus.eui.eu/bitstream/handle/1814/45291/LAW_2017_03.pdf?sequence=2) [<https://perma.cc/VP7D-UEVY>].

26. See Treaty on the Functioning of the European Union 2012 O.J. (C 326) 47, *superseding* Treaty Establishing the European Economic Community, 25 Mar. 1957, 298 U.N.T.S. 3; see Commission Decision 1/2003 of June 27, 2017 relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area (AT.39740 - Google Search (Shopping)) at ¶ 331, [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39740/39740\\_14996\\_3.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf) [<https://perma.cc/M327-ZCME>] (discussing special responsibility of dominant firms).

27. Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 U. KAN. L. REV. 558, 582-90 (1994).

28. Trudi Hartzenberg, *Competition Policy and Practice in South Africa: Promoting Competition for Development*, 26 NW. J. INT'L L. & BUS. 667, 667 (2006) (explaining that new competition policy was drafted in the post-apartheid regime as part of South Africa's new democratic regulatory reforms).

29. For a representative cross section of such scholars, see Jonathan Baker, *Competition Policy as Political Bargain*, 73 ANTITRUST L.J. 483, 484 (2006); Thomas Horton, *Rediscovering Antitrust's Lost Values*, 16 U.N.H. L. REV. 179 (2018); Marina Lao, *Ideology Matters in the Antitrust Debate*, 79 ANTITRUST L.J. 649, 653 (2014); Allen P. Grunes & Maurice E. Stucke, *Plurality of Political Opinion and the Concentration of the Media*, in GENERAL REPORTS OF THE XVII CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE (Karen B. Brown & David V. Snyder eds., 2012); Eleanor M. Fox, *The Efficiency Paradox*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 77 (Robert Pitofsky ed., 2008);

University of Chicago have begun an annual conference to examine the negative effects of increased concentration in the economy.<sup>30</sup> The media has increased coverage of issues of economic inequality and the abuse of power.<sup>31</sup> Both presidential candidates in the 2016 election and other political leaders recently have addressed themes of excessive economic concentration and power.<sup>32</sup> Most recently, the Democratic Party has called for increased merger enforcement and enforcement against dominant firms as a centerpiece of its current political agenda.<sup>33</sup> Scholars have sought to deploy new and existing theories in

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Harry First, *Antitrust's Goals: Theories of Antitrust in the United States and Japan*, in COMPETITION POLICY IN THE GLOBAL TRADING SYSTEM 175 (Clifford A. Jones & Mitsuo Matsushita eds., 2002); Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713 (1997); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L. J. 65, 68-69 (1982).

30. *The University of Chicago Worries About a Lack of Competition*, THE ECONOMIST: THE SCHUMPETER BLOG (Apr. 12, 2017), <https://www.economist.com/business/2017/04/12/the-university-of-chicago-worries-about-a-lack-of-competition> [https://perma.cc/N8KQ-LHLG]; Conference Agenda, *Stigler Center for the Study of the Economy and the State: Is There a Competition Problem in America?*, THE UNIVERSITY OF CHICAGO BOOTH SCHOOL OF BUSINESS (Mar. 27-29, 2017), <https://research.chicagobooth.edu/stigler/events/single-events/march-27-2017> [https://perma.cc/4JTL-ZF9Z].

31. *Data is Giving Rise to a New Economy*, THE ECONOMIST (May 6, 2017), <https://www.economist.com/briefing/2017/05/06/data-is-giving-rise-to-a-new-economy> [https://perma.cc/JU8R-YB66]; *The World's most Valuable Resource is no Longer oil but data*, THE ECONOMIST, (May 6, 2017), <https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data> [https://perma.cc/MWM8-QZ8Q]; Linda Kahn & Sandeep Vaheesan, *How America Became Uncompetitive and Unequal*, THE WASHINGTON POST (June 13, 2014), [https://www.washingtonpost.com/opinions/how-america-became-uncompetitive-and-unequal/2014/06/13/a690ad94-ec00-11e3-b98c-72cef4a00499\\_story.html?utm\\_term=.381ea4b02dfe](https://www.washingtonpost.com/opinions/how-america-became-uncompetitive-and-unequal/2014/06/13/a690ad94-ec00-11e3-b98c-72cef4a00499_story.html?utm_term=.381ea4b02dfe) [https://perma.cc/HM63-P7G4]; Stacy Mitchell, *The Rise and Fall of the Word "Monopoly" in American Life*, THE ATLANTIC (June 20, 2017), <https://www.theatlantic.com/business/archive/2017/06/word-monopoly-antitrust/530169/> [https://perma.cc/42KS-A4BA]; Gillian B. White, *Escaping Poverty Requires Almost 20 Years With Nearly Nothing Going Wrong*, THE ATLANTIC (April 27, 2017), <https://www.theatlantic.com/business/archive/2017/04/economic-inequality/524610/> [https://perma.cc/6DXQ-6FK3].

32. Elizabeth Warren, Senator, Keynote Remarks at New America's Open Market Program Event: Reigniting Competition in the American Economy (June 29, 2016), [https://www.warren.senate.gov/files/documents/2016-6-29\\_Warren\\_Antitrust\\_Speech.pdf](https://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf) [https://perma.cc/2TV5-EZEY]; Barry C. Lynn, *America's Monopolies are Holding Back the Economy*, THE ATLANTIC (Feb. 22, 2017), <https://www.theatlantic.com/business/archive/2017/02/antimonopoly-big-business/514358/> [https://perma.cc/PE77-LCGW]; Brian Naylor, *Presidential Campaigns Blast AT&T-Time Warner Merger*, NPR (Oct. 24, 2016, 11:25 AM), <http://www.npr.org/2016/10/24/499152454/presidential-campaigns-blast-at-t-time-warner-merger> [https://perma.cc/2B5W-26ZG]; *Hillary Clinton's Vision for An Economy Where Our Businesses, Our Workers, and Our Consumers Grow and Prosper Together*, ENEWS PARK FOREST (Oct. 3, 2016), <https://www.enewsp.com/national-news/latest-national-news/hillary-clintons-vision-economy-businesses-workers-consumers-grow-prosper-together/> [https://perma.cc/G63U-34KW].

33. Chuck Schumer, *Chuck Schumer: A Better Deal for American Workers*, THE NEW YORK TIMES (July 24, 2017), <https://www.nytimes.com/2017/07/24/opinion/chuck-schumer-employment-democrats.html?mcubz=1&r=0> [https://perma.cc/A8QV-PVHK].



order to deal with new issues of monopolization and abuse of a dominant position in the information and social media age.<sup>34</sup>

Professor Harry First and I examined the democratic underpinnings of antitrust law in our 2013 article *Antitrust's Democracy Deficit*.<sup>35</sup> In that article, we explained how the dramatic decrease in “antitrust’s political salience,” until very recently, affected the “antitrust enterprise,” and “connect[ed] this shift to our concern for the political values that we believe underlie” all forms of competition law.<sup>36</sup> “We connect[ed] free markets with free people, favoring open markets, . . . the opportunity to compete, . . . [and] . . . the connection between free markets and democratic values and institutions.”<sup>37</sup> We also argued that “a balance of institutional power is necessary to advance the goals that free markets embody.”<sup>38</sup>

We characterize[d] the result of this shift toward technocracy as antitrust’s democracy deficit . . . draw[ing] upon the concept of a democracy deficit from the literature analyzing and critiquing the European Union (EU) and the World Trade Organization (WTO). The term has generally been used to refer to policymaking by unaccountable and nontransparent technocratic institutions far removed from democratic (or national) control. . . . The concern for democratic decision-making has also been reflected in a new interest in global administrative law and the importance of basic principles of transparency and due process as a way to control the administrative state. This interest in administrative law principles has likewise led to a closer examination of how well antitrust conforms to due process and institutional norms.

Our concern over antitrust’s move away from more democratically controlled institutions toward greater reliance on [unaccountable] technical experts [was] not just animated by a theoretical preference for democracy. . . . A preference for democratic institutions implicitly assumes that more democratically arranged institutions will, in general, produce preferable antitrust policies and outcomes. We think this is particularly true today, when the imbalance between democratic control and technocratic control has put antitrust on a thin diet of

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34. See, e.g., MAURICE E. STUCKE & ALLEN P. GRUNES, *BIG DATA AND COMPETITION POLICY* (2016); ARIEL EZRACHI & MAURICE E. STUCKE, *VIRTUAL COMPETITION: THE PROMISE AND PERILS OF THE ALGORITHM-DRIVEN ECONOMY* (2016).

35. Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 *FORDHAM L. REV.* 2543 (2013).

36. *Id.* at 2543-44.

37. *Id.* at 2544.

38. *Id.*

efficiency, one that has weakened antitrust's ability to control corporate power.<sup>39</sup>

"[C]oncern about a democracy deficit does not lead to a full-throated embrace of . . . populism" in either its historical or more contemporary form.<sup>40</sup> One scholar has recently characterized antitrust populism as emphasizing social divides by using exaggerated claims.<sup>41</sup> He goes on to describe both a historical liberal strain of antitrust populism that is pro small business, and a more recent dominant conservative populist strain that questions the efficacy of antitrust itself.<sup>42</sup>

In *Antitrust's Democracy Deficit*, Harry First and I express our favoring of antitrust enforcement conducted by knowledgeable and committed public servants deciding cases in accordance with the law and due process, rather than directly by public opinion or the ballot box.<sup>43</sup> "Rather, we think that by redressing the democracy deficit we can move the needle back toward policies that reflect more general political understandings and views of antitrust policy."<sup>44</sup> These policies would improve the institutions and outcomes for antitrust law in the process.<sup>45</sup>

First and I began our Article, *Antitrust's Democracy Deficit*, by charting the democracy deficit as shown through the conduct of the major antitrust system institutions, such as the courts, Congress, and public enforcers and by comparing the state of antitrust enforcement in the United States with the evolving enforcement regime found in Europe.<sup>46</sup> Second, we examined the link between technocracy and ideology, in particular, how a technocratic approach supports a radical laissez-faire ideology for antitrust enforcement.<sup>47</sup> First and I concluded our article with our thoughts on why antitrust would benefit from increased democracy.<sup>48</sup>

This article expands on that work in an important way. The question of whether and how the promotion of democracy is an instrumental goal of antitrust law is an important one. There is an equally important issue of how antitrust can be enforced in a democratic manner (reflecting the values of a democratic market based

39. First & Waller, *Antitrust's Democracy Deficit*, *supra* note 34, at 2544-45.

40. See, e.g., Eleanor M. Fox & Harry First, *America-First Antitrust*, 2 CPI ANTITRUST CHRONICLE 17 (Feb. 2017), [https://www.competitionpolicyinternational.com/wp-content/uploads/2017/02/AC\\_feb-2.pdf](https://www.competitionpolicyinternational.com/wp-content/uploads/2017/02/AC_feb-2.pdf) [<https://perma.cc/99TC-9SEH>].

41. Barak Orbach, *Antitrust Populism*, 14 N.Y.U. J. L. & BUS. 2, 7-11 (2017).

42. *Id.* at 16-17.

43. First & Waller, *Antitrust's Democracy Deficit*, *supra* note 34, at 2545.

44. *Id.* at 2546.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

society, as is the case in the countries belonging to the Organization for Economic Co-operation and Development) regardless of which values any particular individual or society believes are paramount in the antitrust laws themselves. That is the issue discussed below.

### III. DEMOCRACY IN ANTITRUST

As Professor First and I stated in *Antitrust's Democracy Deficit*:

The institutional aspects of today's antitrust enterprise . . . are increasingly out of balance, threatening the democratic, economic, and political goals of the antitrust laws. The shift that [Richard] Hofstadter first described has led to an antitrust system captured by lawyers and economists advancing their own self-referential goals, free of political control and economic accountability. Some of this professional control is inevitable, of course, because antitrust is a system of legal ordering of economic relationships. But antitrust is also public law designed to serve public ends. Today's unbalanced system puts too much control in the hands of technical experts, moving antitrust enforcement too far away from its democratic roots.<sup>49</sup>

In that article, we began the conversation of what an expert, but democratic, form of competition would mean for the main institutional players in our field, namely:

- 1) the legislatures that enact and oversee the law;
- 2) the public agencies that investigate and enforce the law;
- 3) the executive branches that execute the competition laws as part of a broader array of responsibilities;
- 4) private litigants and sub-federal enforcement agencies;
- 5) the judiciary, which decides trials and appeals of both public and private antitrust litigation; and
- 6) civil society.<sup>50</sup>

This article expands that framework with a more in depth analysis of the institutions of competition law from the perspective of how these different institutions support or push back against democratic values.

Two caveats before proceeding further. First, while most of the specific examples are drawn from the experience of the United States, and to a lesser extent the EU and its member states, the overarching principles remain applicable to analyzing whether any given jurisdiction's competition law system exhibits a greater or lesser democracy deficit. Second, while my co-author and I both believe that the promotion of democracy should be an express value of competition law, this portion of the article is agnostic to that debate. Whether one

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49. First & Waller, *Antitrust's Democracy Deficit*, *supra* note 34, at 2544.

50. *Id.* at 2546-67.

believes that democracy, wealth transfer, consumer choice, efficiency, or something else should be the sole goal, the primary goal, one goal among many, or a minor aspect of competition policy, there is a still a pressing need that the resulting law and policy are enforced in a democratic manner that ensures due process, non-discrimination, and transparency.

### *A. Agencies and Administrative Law*

The role of administrative agencies in a democracy has been an issue in the United States since the creation of the Interstate Commerce Commission in 1887. Both in the United States and abroad, the control of governmental agency power is traditionally within the domain of administrative law. In U.S. competition law, this is complicated by the fact that the Federal Trade Commission (FTC) is an independent administrative agency, while the Justice Department Antitrust Division is a part of the Executive Branch.<sup>51</sup> Nonetheless, the principles of administrative law in the United States and abroad are helpful for creating a vocabulary for analyzing the nature and degree that competition law and policy within an enforcement agency comports with democratic principles.

This section first reviews traditional U.S. scholarship on how to ensure the democratic nature of administrative agencies. Part Two looks at the growing field of global administrative law and includes a checklist of values that any competition agency must consider in enforcing the law. Part Three examines the growing movement toward global administrative law and its relations to competition enforcement. Part Four concludes with a discussion of bias, discrimination, due process, transparency, and public participation in the work of competition agencies.

#### *1. Democracy and Administrative Law in the United States*

In his 1946 article, *The Responsibility of Administrative Officials in a Democratic Society*, David M. Levitan notes that the quest for discovering techniques to keep administrative bodies responsive to the public has “disturbed students of democratic government.”<sup>52</sup> Levitan notes that external controls over administrative bodies—such as dismissal authority, judicial review, senate confirmation authority,

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51. Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383, 1391, 1394-95 (1998).

52. David M. Levitan, *The Responsibility of Administrative Officials in a Democratic Society*, 61 POL. SCI. Q. 562, 581 (1946). See generally KEITH WERHAN, PRINCIPLES OF ADMINISTRATIVE LAW §2.3 (2008).

and Congressional investigations—are alone not the solution to problems of unhindered administrative control.<sup>53</sup>

According to Levitan, external controls are important, but achieving a responsible bureaucracy also includes the development of internal controls.<sup>54</sup> Internal controls ensure that administrative professionals are aware of their role in a democratic system and are dedicated to the achievement of a democratic agency.<sup>55</sup> Levitan states that the bureaucracy can be made more responsible to the public where: the base of recruitment for positions is widened, training of such officials includes training in social and economic ideas, civil liberties granted to citizens are guaranteed for officials and government employees, and agencies consist of non-career professional public servants who are dedicated to the policies of the administration.<sup>56</sup>

Robert S. Lorch in his 1980 book, *Democratic Process and Administrative Law*, also addresses whether and how administrative rule-making can be made democratic.<sup>57</sup> Lorch lists techniques for making administrative rule-making democratic including: notice of proposed rules, the opportunity to present views, the legislative veto, deferred effectiveness and publication, and judicial review.<sup>58</sup> According to Lorch, notice is central to democratic administration, because if the public is to participate in rule-making, they must have notice that such rule-making is taking place.<sup>59</sup> Lorch goes on to list the right to petition, consultation and conference with interested persons, and hearings as devices that allow for the presentment of public views in administrative agencies.<sup>60</sup> He also discusses three additional techniques for democratic administration: 1) agencies should be encouraged to keep a public docket, 2) agencies should be encouraged to utilize rule-making for policy formulation rather than adjudication,

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53. Levitan, *supra* note 51, at 581.

54. *Id.* at 581-82.

55. *Id.* at 582.

56. *Id.* at 582-83.

57. ROBERT S. LORCH, *DEMOCRATIC PROCESSES AND ADMINISTRATIVE LAW* 101-14 (Wayne State University Press ed., rev. ed. 1980).

58. *Id.* Lorch's book was written before the United States Supreme Court's decision in *I.N.S. v. Chadha*, 462 U.S. 919 (1983), which found the legislative veto unconstitutional.

59. Lorch, *supra* note 56, at 101; *see also* Donald J. Kochan, *The Commenting Power: Agency Accountability Through Public Participation*, 70 OKLA. L. REV. 601 (2018) (describing commenting power as critical to our Republic). For a broader view of a more democratic administrative process *see* K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2017).

60. LORCH, *supra* note 56, at 105-07.

and 3) where adjudication is relied on for policy formation, there should be periodic codification of policy.<sup>61</sup>

In his 1990 article, *The American Administrative State: The New Leviathan*, A.M. Gulas discusses how each of the three branches of the United States government respectively check the power of administrative agencies.<sup>62</sup> Beyond the now unconstitutional legislative veto, Gulas suggests that Congress can still ensure accountability of administrative agencies by writing the statutes granting agency power with greater specificity.<sup>63</sup> Greater specificity in drafting statutes would provide the agencies with less discretion in carrying out their mandates, which helps to eliminate arbitrariness and inequality in agency decisions.<sup>64</sup> As Gulas states, the legislature has methods, such as statutory override, joint resolutions, limitation or removal of agency jurisdiction, as well as indirect devices, such as “committee vetoes, critical oversight hearings, and limitation on appropriations” that allow the legislature to monitor agency action.<sup>65</sup> Additionally, the judiciary has the important power of judicial review over administrative decisions, which serves as a further check on agency action.<sup>66</sup>

Gulas cites the executive branch’s power over administrative agencies as “politics in action.”<sup>67</sup> The executive checks administrative agencies through “powers of appointment and removal from office of top administrators, direction of policy within statutory boundaries, and organization or reorganization of agency power.”<sup>68</sup> Gulas also cites the executive’s power of the purse as the “single most effective control . . . over the administrative state.”<sup>69</sup>

Giandomenico Majone discusses many of these same issues in analyzing Europe’s democracy deficit in *Europe’s ‘Democracy Deficit’: The Question of Standards*.<sup>70</sup> In particular, Majone discusses how the United States ensures that administrative agencies remain

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61. *Id.* at 114.

62. A.M. Gulas, *The American Administrative State: The New Leviathan*, 28 DUQ. L. REV. 489, 504 (1990).

63. *Id.* at 505. Gulas notes, however, the practical inefficiencies in narrowly tailoring agency discretion in statutes. *Id.* In particular, this could result in a “screetching halt” in lawmaking due to the level of specificity that would go into each piece of legislation. *Id.*

64. *Id.*

65. *Id.*

66. *See* Gulas, *supra* note 61, at 506-07.

67. *Id.* at 506-07, 509.

68. *Id.* at 509-10.

69. *Id.* at 510.

70. Giandomenico Majone, *Europe’s ‘Democracy Deficit’: The Question of Standards*, 4 EUR. L.J. 5 (1998).

accountable despite their independence.<sup>71</sup> Agencies are created by congressional statutes; which are created and maintained by elected officials, who appoint the agency employees.<sup>72</sup> Agency discretion is also limited by procedural requirements, such as those imposed by the Administrative Procedures Act (APA).<sup>73</sup> The APA provides for control over agency rule-making by requiring agencies to provide notice of rules and opportunity for comment.<sup>74</sup> Lastly, the United States controls administrative agencies by allowing judicial review of administrative rule-making and adjudication.<sup>75</sup>

Kenneth Warren in his 2010 book, *Administrative Law in the Political System*, focuses on legislative attempts to keep administrative agencies democratically accountable.<sup>76</sup> Warren cites three traditional powers of Congress that provide oversight on administrative agencies.<sup>77</sup> These powers are to create and organize agencies, to control agency budget, and to investigate agency activities.<sup>78</sup> The power to create provides Congress, a democratic body, with the ability to create controllable administrative agencies.<sup>79</sup> Congress exercises control by: limiting agency jurisdiction, attaching appropriation ceilings to prevent expansion, establishing specific procedural steps for policy implementation, limiting agency discretion, and by clearly laying out policy goals and expectations.<sup>80</sup>

Congress further controls administrative agencies through authorization committees that establish the agencies and engage in further statutory review of the programs.<sup>81</sup> These committees have five specific watchdog powers over agencies: authorization; reauthorization; amending the agencies' structure, powers, and programs; confirming appointments; and conducting investigatory research.<sup>82</sup>

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71. *Id.* at 18-28.

72. *Id.* at 18-20.

73. *Id.* at 19.

74. *Id.*

75. *Id.*

76. KENNETH F. WARREN, *ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM* 105-56 (Westview Press ed., 5th ed. 2011).

77. *Id.* at 109.

78. *Id.*

79. *Id.* at 111.

80. *Id.*

81. *Id.*

82. WARREN, *supra* note 75. Warren also names the legislative veto as a watchdog power of Congress, but notes that in the U.S. this power was ruled unconstitutional by the *Chadha* decision. *Id.* at 112, 115 (quoting *I.N.S. v. Chadha*, 462 U.S. 919, 959 (1983)).

Warren also notes that Congress exercises control over administrative agencies through general guidance legislation.<sup>83</sup> The main guidance legislation passed by Congress that promotes democracy in administrative agencies is the APA.<sup>84</sup> There are many features of the APA that are aimed at making the administrative process more democratic, such as: publicity of proposed procedures and activities of agencies, demanding that agencies keep adequate records in case of appeal, providing for appellate review, creating independent administrative law judges (ALJs) to better ensure impartial hearings, allowing for judicial review, limiting unnecessary discretion, and others.<sup>85</sup> Warren also cites the Freedom of Information Act (FOIA) as an important Congressional control over administrative agencies, because disclosure of information to interested parties is consistent with democratic theory.<sup>86</sup>

Lastly, Warren cites Sunshine and Sunset legislation as allowing Congress to exercise control over administrative agencies.<sup>87</sup> Sunshine laws “allow the sun to shine” on meetings where important public policy decisions are being made.<sup>88</sup> Preventing these meetings from happening behind closed doors can make administrative decision making more democratically accountable.<sup>89</sup> Sunset laws require agency evaluation at set intervals in order to ascertain whether their financial support should be continued.<sup>90</sup> This review allows legislators to scrutinize agencies at regular intervals to determine whether the agencies are performing satisfactorily, need to implement changes, or be terminated.<sup>91</sup>

## 2. *Administrative Agencies on a Global Scale*

One of the most interesting recent scholarly developments has been the emergence of the global administrative law (GAL) field.<sup>92</sup> The

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83. *Id.* at 109.

84. *Id.* at 129.

85. *Id.* at 129-30.

86. *Id.* at 131.

87. WARREN, *supra* note 75, at 138-42.

88. *Id.* at 138.

89. *Id.*

90. *Id.* at 141.

91. *Id.*

92. Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 15 (Summer/Autumn 2005); *see also* Benedict Kingsbury, *Global Administrative Law and Deliberative Democracy*, in OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 526 (Florian Hoffmann and Anne Oxford eds., 2016); Benedict Kingsbury, *Introduction: Global Administrative Law in the Institutional Practice of Global Regulatory Governance*, 3 WORLD BANK LEGAL REV. 3 (2012); Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of*



purpose of the Global Administrative Law Research Project at New York University School of Law is to systematize studies in diverse national, transnational, and international settings to work toward an embryonic field of global administrative law.<sup>93</sup> The introduction to a leading symposium defines this nascent field as: “[T]he mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make.”<sup>94</sup> In addition to familiar issues of procedural participation and transparency, Benedict Kingsbury, Nico Krisch, and Richard B. Stewart discuss substantive standards of proportionality, means-end rationality, avoiding unnecessarily restrictive means, protecting legitimate expectations, and the existence of immunities with special regimes for special issues and actors.<sup>95</sup>

Kingsbury, Krisch, and Stewart also examine the normative bases of global administrative law.<sup>96</sup> The authors note that while systems vary in their means of ensuring democracy in administrative law, all jurisdictions are concerned about democracy.<sup>97</sup> Some jurisdictions implement democracy in administrative agencies by ensuring adherence to statutes and providing transparency and public participation in rule-making.<sup>98</sup> For example, in the U.S. there are judicially enforced obligations for agencies to consider affected interests and to provide justifications for their policy decisions that

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*International Organizations Law*, 6 INT'L ORG. L. REV. 319 (2009); Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1 (2006); Benedict Kingsbury, et al., *Foreword: Global Governance as Administration—National and Transnational Approaches to Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 1 (Summer/Autumn 2005); Benedict Kingsbury, *Omnilateralism and Partial International Communities: Contributions of the Emerging Global Administrative Law*, 104 J. INT'L L. & DIPL. 98 (2005); Richard Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. (2005); Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. OF INT'L L. 247 (2006); Nico Krisch, *Global Administrative Law and the Constitutional Ambition* (LSE Legal Studies Working Papers 10/2009, 2009), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1491608](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1491608) [<https://perma.cc/L7VJ-5ASK>]; Richard Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 63 (Summer/Autumn 2005).

93. Kingsbury et al., *The Emergence of Global Administrative Law*, *supra* note 91, at 5.

94. *Id.* at 17.

95. *Id.* at 37-42.

96. *Id.* at 42.

97. *Id.* at 48.

98. Kingsbury et al., *The Emergence of Global Administrative Law*, *supra* note 91, at 48.

include responses to public comments.<sup>99</sup> Other jurisdictions rely on executive controls, administrative law procedures, and/or judicial review to ensure democratic control by administrative bodies.<sup>100</sup>

### 3. *Global Administrative Law and Competition Enforcement*

The GAL Project uses the following questions as a way of testing national and transnational administrative regimes:

“Were these international systems of governance accountable and legitimate?

Were the procedures and outputs fair? transparent? Predictable?  
[sic]

Were the decision-makers sufficiently expert?

Were the systems efficient?

How should they be assessed?

Are there benchmarks by which the new institutions of governance can be evaluated?”<sup>101</sup>

The main application of the global administrative law project in the competition field has been the volume *The Design of Competition Law Institutions: Global Norms, Local Choices*.<sup>102</sup> It consists of nine descriptive chapters of the various national and regional competition agencies, evaluating those powers and procedures according to the criteria of the GAL project.<sup>103</sup> For example, Professors Fox and First and practitioner Daniel E. Hemli authored the descriptive chapter on the United States, laying out the criteria of U.S. practice according to the common template applied in the book.<sup>104</sup>

Some of the best work directly examining democracy in competition law design outside of the GAL project came from two distinguished Canadian professors at the University of Toronto law school, one an

99. *Id.*

100. *Id.*

101. Eleanor M. Fox & Michael J. Trebilcock, *The Design of Competition Law Institutions and the Global Convergence of Process Norms: The GAL Competition Project 1* (N.Y.U. Law & Econ. Research Paper Series Paper No. 304, 2012), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2128913](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2128913) [<https://perma.cc/GSD8-88Y2>].

102. THE DESIGN OF COMPETITION LAW INSTITUTIONS: GLOBAL NORMS, LOCAL CHOICES (Michael J. Trebilcock and Eleanor M. Fox eds., 2013).

103. *Id.*

104. Harry First, Eleanor M. Fox, & Daniel F. Hamli, *The United States: The Competition Law System and Country's Norms*, in THE DESIGN OF COMPETITION LAW INSTITUTIONS: GLOBAL NORMS, LOCAL CHOICES 329 (Eleanor M. Fox & Michael J. Trebilcock eds., 2013).

economist and one a lawyer. In two different articles, Edward M. Iacobucci and Michael J. Trebilcock specifically address the design of competition law institutions in a way that provides a vocabulary for agency officials and commentators to assess the values and structures of competition agencies.<sup>105</sup>

In both articles, the authors outline five questions that any competition policy regime must address:

- 1) “who investigates and initiates proceedings;”
- 2) if investigation and enforcement are “undertaken by the government, which branch of the government is responsible;”
- 3) “what body adjudicates contested competition proceedings;”
- 4) “to what extent is there judicial review of competition [policy] decisions;” and lastly,
- 5) “what role, if any, is there for political review by elected officials of competition agency decisions.”<sup>106</sup>

The authors subsequently lay out normative criteria for evaluating competition law agencies<sup>107</sup> that involves the balancing of ten values.<sup>108</sup> The first is a balancing between agency independence and agency accountability.<sup>109</sup> Next, competition law agencies must balance expertise with detachment from the industry.<sup>110</sup> Competition law agencies must also balance transparency and confidentiality in handling highly sensitive commercial information.<sup>111</sup> Balancing between administrative efficiency and due process is also necessary, as many matters are time sensitive, but all interested parties must still be afforded a right to be heard, to introduce evidence, and to

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105. Michael J. Trebilcock & Edward M. Iacobucci, *Designing Competition Law Institutions: Values, Structure, and Mandate*, 41 LOY. U. CHI. L. J. 455, 457 (2010) [hereinafter “*Values, Structure, and Mandate*”]; Michael J. Trebilcock & Edward M. Iacobucci, *Designing Competition Law Institutions*, 25 WORLD COMP. 25(3) 361, 361 (2002) [hereinafter “*Designing Competition Law Institutions*”].

106. *Values, Structure, and Mandate*, *supra* note 104, at 457; *Designing Competition Law Institutions*, *supra* note 104, at 361.

107. *Values, Structure, and Mandate*, *supra* note 104, at 457; *Designing Competition Law Institutions*, *supra* note 104, at 363.

108. *Values, Structure, and Mandate*, *supra* note 104, at 459; *Designing Competition Law Institutions*, *supra* note 104, at 368.

109. *Values, Structure, and Mandate*, *supra* note 104, at 457; *Designing Competition Law Institutions*, *supra* note 104, at 364.

110. *Values, Structure, and Mandate*, *supra* note 104, at 458; *Designing Competition Law Institutions*, *supra* note 104, at 365.

111. *Values, Structure, and Mandate*, *supra* note 104, at 458; *Designing Competition Law Institutions*, *supra* note 104, at 366-67.

contest the adverse party's position.<sup>112</sup> Lastly, the need for predictability in the application of the law must be balanced with flexibility as economic theory and the nature of industries evolve.<sup>113</sup>

Taken together, these sources demonstrate that there are three general categories of techniques for implementing democracy in administrative law. The first can be labeled checks and balances, as it involves the checks that the other branches of government can place on administrative agencies to ensure they comply with democratic principles. This idea is exemplified in almost all the U.S. sources by discussion of legislative, executive, and judicial controls over administrative agencies, including the necessity of judicial review. The next category can be labeled as public participation in the administrative process, which includes techniques which many of the sources discuss such as notice and comment. The last category is a miscellaneous category that consists of some of the additional approaches and suggestions, such as the internal controls that Levitan suggests, the miscellaneous techniques suggested by Lorch, and the discussion of the questions and values competition agencies consider from Lacobucci and Trebilcock.

#### *4. Bias, Discrimination, Due Process, Openness, and Public Participation*

Due process of law and procedural fairness are fundamental aspects of democratic government. These two concepts may take on different meanings depending on the specifics of the jurisdiction in question. Nonetheless, several aspects of due process can be identified as relevant to competition law by national competition agencies.

One important aspect is the absence of bias or discrimination in the handling of a claim or defense. Similar cases should be treated the same while different cases should be treated differently. The national identity or political affiliation of the respondent should not determine the investigation, bringing, or resolution of a competition claim.

Nondiscrimination has several meanings in this context. Borrowing from the vocabulary of the WTO, unlawful discrimination can take two different forms. WTO law bars one form of discrimination in its Most Favored Nation (MFN) provisions.<sup>114</sup> MFN status means that a nation

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112. *Values, Structure, and Mandate*, *supra* note 104, at 458; *Designing Competition Law Institutions*, *supra* note 104, at 367.

113. *Values, Structure, and Mandate*, *supra* note 104, at 458; *Designing Competition Law Institutions*, *supra* note 104, at 367.

114. General Agreement on Tariffs and Trade art. 1, Oct. 30, 1947, 61 Stat. A5 (Supp. A), 55 U.N.T.S. 188.

(or its nationals) will not receive less favorable treatment than any other nation or national in the WTO.<sup>115</sup>

In competition terms, MFN provisions would bar discrimination in the application of competition law based on nationality. For example, a British company or individual should not be treated less favorably than an Argentinian company or individual under the competition law of another nation, or vice versa.

WTO law also bars a different form of discrimination referred to as national treatment. Here, a country will not treat a foreign product or producer less favorably than a domestic product or producer.<sup>116</sup> In the antitrust context, foreign producers cannot be the subject of competition proceedings where domestic producers are not subject to the legal treatment under equivalent circumstances.<sup>117</sup> National treatment violations can include situations where the law or enforcement decisions explicitly discriminate against foreign producers.<sup>118</sup> More often, seemingly facially neutral statutes, regulations, and guidelines can be applied in subtle ways that effectively only apply to the disadvantage of foreign parties.<sup>119</sup>

Democratic decision making also involves an open and transparent system where the parties and the public can determine what is occurring and participate as appropriate. In the United States, a complaint to either of the federal competition agencies has no legal significance. The agencies have complete discretion on how to proceed with the information and when, or if, to take any further action.<sup>120</sup> No agency response is required, and the complaining parties have no legal standing to participate in any resulting investigation or any right to challenge a decision not to proceed.

Similarly, the U.S. agencies have discretion on how to proceed if they choose to conduct an investigation. They must initially decide whether to open a preliminary investigation and whether to treat the matter as a potential civil or criminal offense.<sup>121</sup> They eventually may choose to bring a case in court or to close the investigation without

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115. *Id.*

116. General Agreement on Tariffs and Trade art. 3, Oct. 30, 1947, 61 Stat. A5 (Supp. A), 55 U.N.T.S. 188.

117. JOHN JACKSON, WORLD TRADE AND THE LAW OF GATT 273-303 (1969).

118. *Id.*

119. For discussion of WTO proceedings involving such claims related to competition law, see SPENCER WALLER & ANDRE FIEBIG, ANTITRUST AND AMERICAN BUSINESS ABROAD § 19.12 (4th ed. 2015).

120. See DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL, III-6 (5th ed. Apr. 2018); I STEPHANIE KANWIT, FEDERAL TRADE COMMISSION § 24 (2019).

121. ANTITRUST DIVISION MANUAL, *supra* note 119, at III-7 to III-12.

taking any action.<sup>122</sup> There is no requirement that the agency explain its decision to close a matter, although the agencies do so from time to time in varying degrees of detail.<sup>123</sup> Outside parties cannot challenge a decision not to proceed regardless of whether they were the complaining party, provided information to the agency, or were otherwise affected by the decision.

In contrast, a complaint to the European Commission is an act with legal consequences. It triggers a legal duty to inquire into the matter to a sufficient degree to determine whether a formal investigation is warranted.<sup>124</sup> While the Commission has substantial discretion as to how it allocates its budget and personnel, that discretion is not unlimited.<sup>125</sup> It must explain its decision and a complainant or other affected third party may participate and challenge the decision not to proceed.<sup>126</sup> Here too, the Commission is accorded substantial deference by the European Court of Justice, but must explain and defend its action to decline to proceed further.<sup>127</sup>

### *B. The Role of the Executive Branch*

As discussed above, all constitutional systems do, or should, embody some forms of checks and balances. These checks and balances are embedded in the United States Constitution with separate and distinct executive, legislative, and judicial branches.<sup>128</sup> In parliamentary democracies, the majority party, or coalition of parties, in the legislature form the government and ministries under the leadership of a prime minister with an independent judicial branch.<sup>129</sup> This government serves until removed by election or a vote of no confidence.<sup>130</sup> Other systems of government mix and match aspects of these two models with both strong and weak presidents and judicial branches with varying degrees of independence.<sup>131</sup>

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122. *Id.* at III-21.

123. *See, e.g.*, U.S. DEPT OF JUSTICE, STATEMENT OF THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION ON ITS DECISION TO CLOSE ITS INVESTIGATION OF XM SATELLITE RADIO HOLDINGS INC.'S MERGER WITH SIRIUS SATELLITE RADIO INC. (2008), [https://www.justice.gov/archive/opa/pr/2008/March/08\\_at\\_226.html](https://www.justice.gov/archive/opa/pr/2008/March/08_at_226.html) [<https://perma.cc/5JU4-GY44>].

124. COMPETITION LAW OF THE EUROPEAN COMMUNITY 993-96 (Van Bael & Bellis eds., 5th ed. 2010).

125. *Id.* at 993.

126. *Id.* at 996-97.

127. Case C-413/06P, Bertelsmann AG v. Indep. Music Publishers & Labels Ass'n, 2008 E.C.R. I-4951, ¶ 69.

128. U.S. CONST. art. II-IV.

129. GARY SLAPPER & DAVID KELLY, THE ENGLISH LEGAL SYSTEM ¶1.4 (6th ed. 2003).

130. *Id.*

131. Mathew Soberg Shugart, *Semi-Presidential Systems: Dual Executive and Mixed*

In the U.S. system, the President is the chief executive and nominates cabinet secretaries and other top officials of the Executive Branch, who must be confirmed by the Senate but serve at the pleasure of the President.<sup>132</sup> This includes the Attorney General, the head of the Justice Department, which includes the Antitrust Division.<sup>133</sup> The Assistant Attorney General of the Antitrust Division must also be confirmed by the Senate.<sup>134</sup>

The President also nominates the heads of the various independent agencies who also must be confirmed by the Senate.<sup>135</sup> They serve fixed terms set by Congress and may not be removed without good cause.<sup>136</sup> In the case of the FTC, which enforces both competition and consumer protection law, there are five Commissioners, but no more than three can be members of the President's political party.<sup>137</sup>

There is a tradition of substantial independence of the Justice Department and its operating divisions, such as the Antitrust Division.<sup>138</sup> While the President has the power to command the Attorney General or the Antitrust Division to either bring or not pursue an antitrust case, for sound reasons, it is rarely exercised.<sup>139</sup>

*Authority Patterns*, 3 FRENCH POL. 323, 323-24 (2005).

132. U.S. CONST. art. II, § 2.

133. DEPT OF JUSTICE, ASSISTANT ATTORNEY GENERAL, <https://www.justice.gov/atr/assistant-attorney-general> [<https://perma.cc/WX78-AX8X>].

134. *Id.*; Sara Forden & Billy House, *Trump Antitrust Chief Pick is Said to be Blocked by Warren*, BLOOMBERG (Aug. 7, 2017, 9:17 AM), <https://www.bloomberg.com/news/articles/2017-08-07/trump-s-pick-for-antitrust-chief-is-said-to-be-blocked-by-warren> [<https://perma.cc/6CMW-5D7U>]. This opposition was withdrawn in late September 2017 and the nominee was confirmed to head the Antitrust Division. Brent Kendall, *Senate Confirmed Makan Delrahim as Antitrust Chief at Justice Department; The 73-21 Senate Vote Followed a Delay that was Due in Part to Objections Raised by Sen. Elizabeth Warren*, WALL ST. J. (Sept. 27, 2017), <https://www.wsj.com/articles/senate-confirms-makandelrahim-as-antitrust-chief-at-justice-department-1506552099> [<https://perma.cc/YN5R-U5A7>].

135. *See, e.g.*, 15 U.S.C. § 41 (2012) (Presidential appointment and Senate confirmation for FTC Commissioners).

136. *Humphrey v. United States*, 295 U.S. 602, 624-26 (1935).

137. 15 U.S.C. § 41 (2012).

138. *See* Ryan J. Reilly, *Trump Does Not Acknowledge or Respect DOJ's Independence. That Can't End Well.*, HUFFPOST (updated July 26, 2017), [https://www.huffpost.com/entry/donald-trump-justice-department\\_n\\_5970cdfce4b0aa14ea783baf](https://www.huffpost.com/entry/donald-trump-justice-department_n_5970cdfce4b0aa14ea783baf) [<https://perma.cc/M2MA-BF8N>].

139. *See* WALLER & FIEBIG, *supra* note 118, § 2.16; GERARD HELFERICH, AN UNLIKELY TRUST: THEODORE ROOSEVELT, J.P. MORGAN, AND THE IMPROBABLE PARTNERSHIP THAT REMADE AMERICAN BUSINESS (2018); Carl W. Hittinger & Tyson Y. Herrold, *Presidential Power and Antitrust Politics: Part Two*, BAKERHOSTETLER (Aug. 25, 2017), <https://www.bakerlaw.com/webfiles/Litigation/2017/Articles/08-25-2017-The-Legal-Intelligencer-Hittinger-Herrold.pdf> [<https://perma.cc/3LY9-YG55>]; MICHAEL R. BESCHLOSS, TAKING CHARGE: THE JOHNSON WHITE HOUSE TAPES, 1963-1964, at 139-43, 151-53 (1997); George Lardner, Jr., *On Tape Nixon Outlines 1971 'Deal' to Settle Antitrust Case Against ITT*, THE WASHINGTON POST (Jan. 4, 1997),

The Justice Department and its constituent divisions are the legal experts in complicated areas of the law in which the White House lacks expertise. In addition, the Justice Department is a repeat litigant in numerous areas of criminal and civil law before the federal courts and must cultivate and preserve a reputation for careful case selection and litigation, lest all of its litigation efforts be affected.

At the same time, the President and the Executive Branch have a broader perspective and vision for the overall interests of the United States. For example, it would be foolish to either proceed, or refrain, from a particular antitrust enforcement if that decision were to inevitably lead to an armed conflict or the destruction of diplomatic relations with either a friendly or hostile nation. While the promotion of competition and economic markets is a fundamental policy of the United States and most other jurisdictions, it is normally only one of many policy issues that must be balanced by nations in their day-to-day diplomacy interactions.

As a result, there have been times when the Executive Branch has decided that antitrust enforcement must yield to a broader vision of the national interest. For example, the Truman Administration in the late 1940s directed that the antitrust investigation of the international petroleum industry be limited in scope and proceed on a civil, rather than a criminal, basis.<sup>140</sup> This decision was based on the political and diplomatic repercussions of the case on broader United States interests in the Middle East.<sup>141</sup>

The massive antitrust litigation against AT&T resulting in the divestiture of the Bell System spanned two different administrations and involved high level policy decisions regarding the case from both Presidents Ford and Reagan. President Ford supported the decision to initiate the case in 1974 and President Reagan supported the continuation of the case against “furious” lobbying from members of his administration that the case would harm national defense interests.<sup>142</sup>

The Reagan Administration also quashed a criminal grand jury investigation of the international aviation industry following the demise of Laker Airlines.<sup>143</sup> The investigation affected United States’ relations with Great Britain, who was proceeding with the

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[https://www.washingtonpost.com/archive/politics/1997/01/04/on-tape-nixon-outlines-1971-deal-to-settle-antitrust-case-against-itt/246628a9-8abf-47f3-80ec-379569e0f350/?utm\\_term=.1009df95f5b7](https://www.washingtonpost.com/archive/politics/1997/01/04/on-tape-nixon-outlines-1971-deal-to-settle-antitrust-case-against-itt/246628a9-8abf-47f3-80ec-379569e0f350/?utm_term=.1009df95f5b7) [https://perma.cc/EXP7-LJGJ]; 15 U.S.C. § 16 (2012).

140. WALLER & FIEBIG, *supra* note 118, at § 2.16.

141. *Id.*

142. Hittinger & Herrold, *supra* note 138, at 1.

143. WALLER & FIEBIG, *supra* note 118, at § 5.11.



privatization of British Airways.<sup>144</sup> Absent allegations of corruption or other improper influences, it is hard to argue that such rare interventions in the name of overall national interest violate democratic norms.

A statute which gives the executive branch, or a ministry, the explicit power to sacrifice competition for national security or some other significant national interest is equally defensible in terms of democratic values, regardless of the wisdom of any particular decision under those powers. For example, numerous jurisdictions have public interest standards in their merger laws allowing the approval or rejection of transactions on grounds other than their competitive effects.<sup>145</sup>

While the United States does not have public interest standards in its merger regime, it does have three statutes allowing non-competition factors to supersede competitive analysis in order to achieve national security objectives. First, mergers may be blocked on national security grounds, even if cleared by the competition agencies.<sup>146</sup> Second, the United States enacted Section 232 of the Trade Act of 1962, which allows the Secretary of Commerce to conduct investigations to determine the effect of imports on any article of the national security of the United States.<sup>147</sup> Finally, the Defense Production Act of 1950 (DPA) allows the President to exempt agreements between private parties from the application of the antitrust laws where such action was taken for the national defense.<sup>148</sup>

Fortunately, these statutes are rarely used. Section 232 was invoked by the Trump Administration for the first time in years and the DPA has not been used for decades.<sup>149</sup> To rely on the frequent use of these tools involves an explicit sacrifice of competition for the promotion of other national values. However, a reasoned decision to do so on the grounds that the overall gain to national security or defense exceed the costs to economic competition may be unwise, but it is not undemocratic.

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144. *Id.*

145. *E.g., Guidelines on the Assessment of Public Interest Provisions in the Merger Regulation Under the Competition Act No. 89 of 1998*, COMPETITION COMMISSION OF SOUTH AFRICA 8 (May 31, 2016), <http://www.compcom.co.za/wp-content/uploads/2016/01/Gov-Gazette-Public-Interest-Guidelines.pdf> [<https://perma.cc/H7XY-DWUT>].

146. 50 U.S.C. § 4565 (2012).

147. 19 U.S.C. § 1862(b) (2012).

148. 50 U.S.C. § 4558(j) (2012).

149. 2 JERRY COHEN, CHRISTOPHER A. DUNN, & MATTHEW McCULLOUGH, INTERNATIONAL TRADE PRACTICE §42:1-2 (2018-19 ed.); JEFFREY L. KESSLER & SPENCER WEBER WALLER, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW § 12:15 (2d ed. 2018).

There have also been examples where the executive branch has sought to intervene or influence individual enforcement actions for less noble reasons. A new book analyzes the extent to which President Theodore Roosevelt's friendship with J.P. Morgan may have influenced the scope of his administration's antitrust actions against the railroad industry dominated by Morgan's banking interests.<sup>150</sup> President Kennedy initiated a criminal price fixing probe of the steel industry to pressure U.S. Steel to renounce a planned price increase.<sup>151</sup> Taped conversations from the Johnson Administration reveal an instance where the President overtly threatened a bank with denial of its planned merger unless bank executives could persuade a local newspaper to endorse President Johnson for reelection.<sup>152</sup> A lesser-known aspect of the Watergate crisis involved the use of illegal campaign donations to influence a pending merger decision.<sup>153</sup> This led, in part, to the eventual passage of the Tunney Act requiring open court hearings before the entry of a consent decree in government antitrust cases.<sup>154</sup> It would be equally troubling if the antitrust laws were to be used going forward at any level to punish political enemies or silence dissent and criticism.

### C. *The Legislature*

While legislatures are the natural repository of lawmaking authority in most democracies, the full role of a legislature in a democracy is beyond the scope of this article. In general, a legislature plays the same role in the competition law area that it plays in any other area of the law. It enacts and amends laws relating to the substance, procedure, institutions, remedies, exemptions, and immunities of competition law.<sup>155</sup> Depending on the system, the legislature also confirms political appointments to the agencies and the judiciary, appropriates the budget for each agency, oversees agency conduct, conducts investigations, holds hearings on legislation and issues, enacts resolutions, and debates in committee and in the full assembly.<sup>156</sup> This work is done by the elected members and their staff in plenary sessions as well as in committees.<sup>157</sup> Often the personal staff of the elected representatives or the committee staff have

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150. HELFERICH, *supra* note 138.

151. Hittinger & Herrold, *supra* note 138, at 2.

152. BESCHLOSS, *supra* note 138, at 139-43, 151-53.

153. Lardner, *supra* note 138.

154. 15 U.S.C. § 16 (2012).

155. *See* U.S. CONST. art. I.

156. *Id.*

157. *Enactment of a Law*, U.S. SENATE, [https://www.senate.gov/legislative/common/briefing/Enactment\\_Law.htm](https://www.senate.gov/legislative/common/briefing/Enactment_Law.htm) [<https://perma.cc/N9KF-GA98>].

substantial area expertise. Occasionally, legislatures “outsource” competition law matters to blue ribbon commissions or panels to formulate policy recommendations.<sup>158</sup>

The interest of the legislature in competition law matters will, of necessity, wax and wane. While competition law is of importance in the economic sphere, it is only one of a multitude of competing areas of interest and importance to a jurisdiction’s legislature, along with the press of regularly scheduled business and unexpected emergencies.

A legislature can give as much or as little time to competition law and policy as it wishes. In the U.S. Congress, the Senate must devote time to enacting legislation, confirming Presidential nominees, budget appropriations, and conducting oversight hearings.<sup>159</sup> These activities are important in their own right and in ensuring that the agencies fulfill their role as expert, but democratic, institutions. The rest is more or less optional and dependent on any individual Congress’s level of interest and the press of other business.

It is disappointing that the U.S. Congress has more often focused on the minutiae of competition law and policy or conducted hearings on high profile mergers that, by design, cannot affect the eventual enforcement actions of the agencies.<sup>160</sup> There have been no major amendments of the antitrust laws since the 1970s.<sup>161</sup> Criminal penalties have been increased, but the private treble damage remedies as a whole have been largely left unchanged.<sup>162</sup> Exemptions and immunities have been expanded and contracted at the margins.<sup>163</sup> Budgets have been increased and lowered depending on the era and the overall political zeitgeist.

Unfortunately, much of Congressional attention to competition law has involved minor issues and outright petty matters. For example, Congress effectively killed a proposal that would have rationalized cooperation between the Antitrust Division and the FTC because it

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158. See e.g., ANTITRUST MODERNIZATION COMMISSION: REPORT AND RECOMMENDATIONS 1 (April 2007), [http://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf) [<https://perma.cc/G78W-MN5K>].

159. U.S. CONST. art. I & II.

160. First & Waller, *Antitrust’s Democracy Deficit*, *supra* note 34, at 2555-59.

161. Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435, tit. II, 90 Stat. 1383 (codified as amendmennt to 15 U.S.C. § 18(a)) (requiring pre-merger notification of certain large transactions); Tunney Act, 15 U.S.C. § 16(a) (2012) (requiring judicial approval of consent decrees in government antitrust cases).

162. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. 108-237, 118 Stat. 665 (codified as 15 U.S.C. § 1) (allowing only single damages in private suits against successful leniency applicants).

163. ABA SECTION OF ANTITRUST LAW, MONOGRAPH NO. 24, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW 291 (2007).

affected which Congressional committee had “jurisdiction” over the work of these agencies.<sup>164</sup> Even more petty was the unsuccessful effort of one Congressman to force the FTC to vacate its headquarters for an expansion of the national art museum.<sup>165</sup>

The opportunity costs for each hearing on such marginal issues, for example, whether professional baseball should continue to enjoy a partial exemption from the antitrust laws or grandstanding for constituents over the fate of a particular merger with a pronounced local effect, is high. Congress sacrifices time, money, and attention better used to study more important, broader issues of competition law and policy. Stated enforcement policy over unilateral conduct and merger policy have changed substantially between administrations and over time. Important guidelines and stated enforcement priorities have changed as well with little substantive Congressional involvement.<sup>166</sup> Critical decisions by the United States Supreme Court have changed the law in dramatic and subtle ways without significant Congressional input either before or after the decisions.<sup>167</sup>

Perhaps Congress simply does not care about, or actually approves of, the continued evolution of United States antitrust law and policy in all its complexity. However, this silence or indifference has important consequences. It shifts power from the most democratic elected institutions to the more distant, less democratic institutions of agencies and courts to craft fundamental economic policy free from all but the most macro-level interventions or corrections.

No legislature can spend all of its time on competition policy. But when it does, one should ask:

Is the legislature addressing fundamental issues or minor matters at the fringe?

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164. U.S. DEP'T OF JUSTICE, DOJ AND FTC ANNOUNCE NEW CLEARANCE PROCEDURES FOR ANTITRUST MATTERS (Mar. 5, 2002), [https://www.justice.gov/archive/atr/public/press\\_releases/2002/10171.pdf](https://www.justice.gov/archive/atr/public/press_releases/2002/10171.pdf) [<https://perma.cc/9SXC-7CMK>].

165. Charles S. Clark, *Mica Steps Up Bid to Evict FTC from Headquarters*, NAT'L J. (April 20, 2012), <https://www.yahoo.com/news/mica-steps-bid-evict-ftc-headquarters-212733209.html> [<https://perma.cc/8GSL-F2MJ>].

166. See, e.g., *Horizontal Merger Guidelines*, U.S. DEP'T OF JUSTICE (2010), <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010> [<https://perma.cc/M44P-FEX3>] (most recent in a string of such guidelines dating back to 1968); U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), <https://www.justice.gov/sites/default/files/atr/legacy/2009/05/11/236681.pdf> [<https://perma.cc/5MB3-88MJ>] (report produced by the Bush Justice Department, which was withdrawn by Obama Administration); *Justice Department Withdraws Report on Antitrust Monopoly Law*, U.S. DEP'T OF JUSTICE (May 11, 2009), <https://www.justice.gov/opa/pr/justice-department-withdraws-report-antitrust-monopoly-law> [<https://perma.cc/4BNN-C94F>] (official press release announcing the withdrawal of the Obama Administration from the “Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act”).

167. First & Waller, *Antitrust's Democracy Deficit*, *supra* note 34, at 2559.

Is the legislature addressing matters of national importance or local concern of a small group of members?

Has the legislature proposed or explored actual improvements or is it primarily airing issues for which no action is likely to ensue?

How is the legislature ensuring that power is delegated subject to democratic controls and that the other institutional actors are acting in accordance with democratic norms?

If major changes have occurred elsewhere in the system, had Congress actually approved or merely not paid attention?

What non-mandatory hearings occur, how were they selected, and why do they matter?

Without such inquiries, power naturally migrates from the more democratic institutions to the less democratic portions of the system. If legislatures approve of the course of current competition law and policy, they should say so. If they do not approve, then their silence should not be used to justify self-interested actors shifting power in their favor, while the legislature chooses to turn its attention to other pressing issues and only nibble at the edges of competition policy.

#### D. *The Judiciary*

The role of the judiciary in democratic theory is a complicated one. The federal judicial branch in the United States is designed to enjoy substantial independence and not be politically accountable. Yet, it must also declare what the law is, enforce that law in a fair and nondiscriminatory manner, hold the government accountable to the law, and resolve disputes between private parties.<sup>168</sup>

How the judiciary accomplishes all those tasks in the competition law field begins with questions of institutional design. United States federal judges are generalists handling a large docket of criminal cases, civil matters involving constitutional, treaty, and statutory matters, as well as disputes between citizens of different states involving more than \$75,000.<sup>169</sup> Antitrust disputes are rare but normally large in scope, difficult legally and factually, and time consuming.<sup>170</sup> United States federal trial judges must supervise pretrial proceedings and any resulting trials for up to several hundred

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168. *Court Role and Structure*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/court-role-and-structure> [<https://perma.cc/F5PF-SR6M>] (last visited Aug. 13, 2019). This article does not discuss the role of the jury in ensuring the democratic application of competition law since this is almost exclusively a U.S. issue outside the criminal context. For more on this additional aspect of democracy in antitrust see First & Waller, *Antitrust's Democracy Deficit*, *supra* note 35, at 2552-55.

169. 28 U.S.C. §§ 1331-32 (2012).

170. FEDERAL JUDICIAL CENTER, *MANUAL FOR COMPLEX LITIGATION* 519 (4th ed. 2004).

cases with a staff of two law clerks, an administrative assistant, and the assistance of a single magistrate judge.<sup>171</sup> Appeals of any dispositive orders are handled by a three judge panel from the United States Courts of Appeal with similar generalist backgrounds, docket constraints, and resource limitations.<sup>172</sup>

The Antitrust Division of the Justice Department brings all of its cases in federal court before the United States District Court that has jurisdiction over the defendants charged with a civil or criminal antitrust violation.<sup>173</sup> The U.S. FTC brings most of its merger cases directly in federal district court in the same manner.<sup>174</sup> The FTC also brings certain cases through an internal administrative procedure, and the losing party can appeal to the appropriate appellate court.<sup>175</sup>

In a second type of judicial system, similar to Chile's system, competition law disputes are handled by specialist tribunals and courts which can include both competition law experts and economists. For example, in Chile the government brings its cases before a five-person expert tribunal that includes both expert competition lawyers and economists.<sup>176</sup> The Tribunal also hears certain private claims for damages.<sup>177</sup> Decisions of the Tribunal are appealed to the Chilean Supreme Court.<sup>178</sup>

Regardless of the institutional design chosen, every judicial system requires some form of due process and fundamental fairness at each level of decision making. Court and tribunals are expected to provide both sides of the dispute with impartial justice in accordance with the substantive and procedural requirements of the legal provisions governing the dispute. These requirements are clearer when a court must litigate a claim from start to finish. In the United States, criminal matters must be proven by the government beyond a reasonable doubt and civil matters must be proven by a preponderance of the evidence by the plaintiff (whether public or private).<sup>179</sup> The

171. *Who Works in a United States Federal Court*, FED. JUD. CTR. (Apr. 4, 2016), <https://www.fjc.gov/sites/default/files/2016/Who%20Works%20in%20a%20U.S.%20Court.pdf> [https://perma.cc/K4MN-HA2D] (last visited Aug. 13, 2019).

172. *About the U.S. Courts of Appeals*, UNITED STATES COURTS, <https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals> [https://perma.cc/UNR3-C49J] (last visited Aug. 13, 2019).

173. ANTITRUST DIVISION MANUAL, *supra* note 119, at IV-5 to IV-87.

174. 15 U.S.C. § 53(a) (2012).

175. 16 C.F.R. § 3.52 (2018).

176. *Chile—Accession Report on Competition Law and Policy*, OECD 30-31 (2010), <https://www.oecd.org/daf/47950954.pdf> [https://perma.cc/GD5P-JF7W] (last visited Oct. 3, 2017).

177. *Id.* at 28, 32-33.

178. *Id.* at 30.

179. *Jackson v. Virginia*, 443 U.S. 307, 309 (1979); *In re Winship*, 397 U.S. 358, 371-72

Federal Rules of Civil Procedure govern all civil cases regardless of who is the plaintiff or what type of matter is litigated.<sup>180</sup> Whether a party has received correct legal rulings, due process, and fundamental fairness can be vigorously litigated before the trial judge, and resolved on appeal through review of the record generated in the trial court.

The situation is trickier when an expert regulatory agency decides a matter administratively and then that matter is appealed to the courts. Virtually every legal system grapples with the issue of the degree of deference that should be given to the decisions of expert agencies that have been given the power by the legislature to issue rules and adjudicate complicated questions of law and fact in deciding whether the law has been broken.<sup>181</sup> The question of appellate deference to regulatory decisions is all the more important in the competition law arena where the consequences are severe and in many systems involve large fines deemed to be quasi-criminal in nature.<sup>182</sup>

The United States Supreme Court has developed two different theories of deference to administrative decision making. The *Chevron* doctrine deals with situations where Congress has enacted an ambiguous statute and explicitly or implicitly intended the agency to fill in the gaps through authoritative interpretation.<sup>183</sup> Authoritative interpretations most often take the form of notice and comment, rulemaking, or formal adjudication.<sup>184</sup> Under such circumstances, courts must defer to the agency's interpretation of the law, unless the agency action was procedurally defective, arbitrary or capricious, or manifestly contrary to the statute.<sup>185</sup>

Rationales for the *Chevron* doctrine include both separation of powers and democratic accountability.<sup>186</sup> Judicial deference is warranted in part because "policy judgments are not for the courts but

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(1970) (Harlan, J., concurring).

180. FED. R. CIV. P. 1.

181. See, e.g., *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

182. Maciej Bernatt, *Transatlantic Perspectives on Judicial Deference in Administrative Law*, 22 COLUM. J. EUR. L. 275 (2016) [hereinafter Bernatt, *Transatlantic Perspectives*].

183. *Chevron*, 467 U.S. at 843. See generally WERHAN, *supra* note 51, at 331-36.

184. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

185. *Id.*; William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1086 (2008); see generally Dan Farber, *Everything You Always Wanted to Know About the Chevron Doctrine*, YALE J. L. & REG. NOTICE & COMMENT (Oct. 23, 2017), <http://yalejreg.com/nc/everything-you-always-wanted-to-know-about-the-chevron-doctrine-by-dan-farber/> [<https://perma.cc/6XJQ-AZ9B>]; Peter M. Shane & Christopher J. Walker, *Symposium, Chevron at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475 (2014).

186. *Chevron*, 467 U.S. at 865-66.

for the political branches; Congress having left the policy question open, it must be answered by the Executive.”<sup>187</sup> Deference is also warranted because administrative action via delegation by the legislature enjoys a democratic mandate, unlike the courts.<sup>188</sup>

The United States Supreme Court also has recognized a less compelling form of deference, referred to as *Skidmore* deference.<sup>189</sup> Under *Skidmore* deference, an agency’s determination may merit some deference, whatever its form, given the specialized experience, expertise, broader investigative authority, and broader information available to the agency, the value of uniformity of what a national law requires, and the persuasiveness of the agency determination, even if informal in nature.<sup>190</sup> *Skidmore* deference is usually accorded to some degree to agency soft law, actions, and statements like policy guidance, operating manuals, and enforcement guidelines.<sup>191</sup>

Neither *Chevron* nor *Skidmore* deference formally apply to the enforcement actions of the Antitrust Division of the Justice Department.<sup>192</sup> The Antitrust Division does not utilize rulemaking procedures, nor does it hold administrative hearings.<sup>193</sup> Instead, it goes to court when it charges individuals or enterprises with criminal or civil antitrust violations.<sup>194</sup> Once in court, the Antitrust Division must prove a criminal defendant guilty beyond a reasonable doubt, and has the normal burden of proof of any civil litigant in proving the defendant liable by a preponderance of the evidence.<sup>195</sup>

At the same time, the Antitrust Division (and the rest of the Justice Department) is not just any litigant. Its many enforcement guidelines (most jointly issued with the FTC, but others alone) are treated with respect, if not precisely judicial deference in the sense of the *Chevron* and *Skidmore* doctrines.<sup>196</sup> The guidelines are frequently cited as indicative of the state of antitrust doctrine and the courts have ruled against the Division if it does not produce evidence supporting the positions set forth in its enforcement guidelines.<sup>197</sup> In addition, the

187. Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511, 515 (1989).

188. Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 551 (1985).

189. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

190. *Id.*

191. Bernatt, *Transatlantic Perspectives*, *supra* note 181, at 286.

192. *In the Matter of UAL Corp.*, 468 F.3d 444, 450-51 (7th Cir. 2006).

193. 15 U.S.C. §§ 1, 2, 4, 5 (2012).

194. ANTITRUST DIVISION MANUAL, *supra* note 119, at IV-5 to IV-87.

195. *Jackson*, 443 U.S. at 309; *In re Winship*, 397 U.S. at 371-72 (Harlan, J., concurring).

196. Waller, *Prosecution by Regulation*, *supra* note 50, at 1384.

197. *United States v. AT&T, Inc.*, 916 F.3d 1029, 1032, 1037 (D.C. Cir. 2019); *United*



Justice Department is frequently asked by the Supreme Court (and occasionally lower courts) about whether to hear an antitrust claim and how to decide antitrust claims in private antitrust litigation.<sup>198</sup> The Justice Department's submissions to the Supreme Court are frequently persuasive regardless of whether they technically receive "deference" in the *Chevron* or *Skidmore* sense.<sup>199</sup>

The question of judicial deference to a FTC decision is a more complicated matter. The FTC is an independent regulatory agency established by Congress with powers over both consumer protection and competition matters.<sup>200</sup> The FTC Act prohibits both unfair methods of competition, and unfair and deceptive acts and practices.<sup>201</sup> The FTC also enforces a wide variety of other statutes that relate to consumer protection and privacy.<sup>202</sup> The FTC engages in notice and comment rulemaking in consumer protection, but not in competition matters.<sup>203</sup>

Unfair methods of competition include violations of the Sherman and Clayton Act and a poorly defined penumbra of incipient violations of these statutes and matters that violate the spirit, if not the letter, of the antitrust laws.<sup>204</sup> When the FTC brings an enforcement action directly in federal court, it is a litigant like any other public or private plaintiff in civil litigation. The FTC wins its case when it correctly interprets the law and proves the allegations in the complaint by a preponderance of the evidence.

When the FTC brings an administrative action for a cease and desist order, it follows a series of strict procedural requirements set forth in the FTC Act.<sup>205</sup> At the completion of the staff investigation, agency staff must seek an affirmative majority vote of the full Commission to issue an administrative complaint.<sup>206</sup> Any subsequent

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States v. Baker Hughes 908 F.2d 981, 983 (D.C. Cir. 1990).

198. See, e.g., *Animal Sci. Prods., Inc. v. Heibei Welcome Pharm. Co. Ltd.*, 137 S.Ct. 2320, 2320 (2017) (inviting Solicitor General to file a brief expressing the views of the United States).

199. *Animal Sci. Prods., Inc. v. Heibei Welcome Pharm. Co. Ltd.*, 138 S.Ct. 1865, 1865 n.6 (2018).

200. 15 U.S.C. §§ 41, 45 (2012).

201. 15 U.S.C. § 45 (2012).

202. See generally I STEPHANIE KANWIT, FEDERAL TRADE COMMISSION § 6, 19-20 (2019).

203. 15 U.S.C. § 57(b) (2012).

204. *Fed. Trade Comm'n. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 235 (1972); *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act*, U.S. FEDERAL TRADE COMMISSION (Aug. 13, 2015), [https://www.ftc.gov/system/files/documents/public\\_statements/735201/150813section5enforcement.pdf](https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf) [<https://perma.cc/A963-Y9UF>].

205. 15 U.S.C. § 45(b) (2012).

206. ABA SECTION OF ANTITRUST LAW, FTC PRACTICE AND PROCEDURE MANUAL 160-61

proceeding takes the form of a trial in front of an independent Administrative Law Judge (ALJ) with the defendant represented by counsel.<sup>207</sup> The Commissioners do not participate in the trial before the ALJ.<sup>208</sup> The Commissioners hear any appeal from the decision of the ALJ and conduct briefing and hearing before voting and issuing the official decision of the FTC.<sup>209</sup> A losing respondent (but not the FTC staff) may then appeal the matter to the relevant federal appellate court.<sup>210</sup>

An unfortunate dichotomy exists when the FTC brings an administrative action for a cease and desist order and the losing respondent appeals to the federal appellate courts. In consumer protection matters the FTC receives the normal judicial deference under the *Chevron* doctrine as do most other federal agencies in formal adjudication matters.<sup>211</sup> This means that the FTC's construction of its own statute is upheld unless the court finds that the statute is unambiguous or find that the agency interpretation is unreasonable.<sup>212</sup>

This is not the case in competition matters. The courts do not accord *Chevron* deference to the FTC's interpretation of the meaning of unfair methods of competition in antitrust cases, stating that the meaning of the antitrust laws is a matter for the courts to decide de novo.<sup>213</sup>

At the same time, the courts often have upheld the factual findings of the FTC when supported by "substantial evidence."<sup>214</sup> A recent appellate court decision defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>215</sup> This includes complicated matters that touch on questions of fact, economics, and the application of law to facts such as market definition, market power, and harm to competition.<sup>216</sup> The substantial evidence test does not require excluding all other possible explanations for the conduct in question, and an FTC decision may be

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(2007).

207. *Id.* at 161.

208. *Id.*

209. *Id.*

210. *Id.*

211. I STEPHANIE KANWIT, FEDERAL TRADE COMMISSION § 9.6 (2015).

212. *Id.*

213. Bernatt, *Transatlantic Perspectives*, *supra* note 181, at 315-18 (surveying cases). See generally Royce Zeisler, *Chevron Deference and the FTC: How and Why the FTC Should Use Chevron to Improve Antitrust Enforcement*, 2014 COLUM. BUS. L. REV. 266 (2014); Justin (Gus) Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 212 (2014).

214. Bernatt, *Transatlantic Perspectives*, *supra* note 181, at 318-20.

215. *McWane, Inc. v. Fed. Trade Comm'n*, 783 F.3d 814, 824 (11th Cir. 2015) (quoting *Schering-Plough v. Fed. Trade Comm'n*, 402 F.3d 1056, 1062 (11th Cir. 2005)).

216. *Id.* at 824-25.

upheld as supported by substantial evidence even if there was evidence in the record that could support some other conclusion.<sup>217</sup>

In the European Union, the question of judicial deference is controversial for a different reason. The European Commission is a unitary agency handling investigations, adjudications, exemptions, settlements, fines, and remedies.<sup>218</sup> It lacks the strict separation of powers and functions of the FTC.<sup>219</sup> As a result, many critics have argued that judicial deference to the legal, factual, and complex economic findings of the Commission are inappropriate under the EU Treaties, due process, and human rights concerns.<sup>220</sup>

Critics argue that full judicial review is required in competition matters imposing a fine by Article Six of the European Convention on Human Rights (ECHR).<sup>221</sup> Such fines are deemed criminal in nature even when imposed by an administrative body such as the European Commission.<sup>222</sup> Article Six of the ECHR states that, in the determination of civil rights, and obligations or in any criminal matters, “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal.”<sup>223</sup>

The European General Court and the European Court of Justice have not yet accepted these arguments. To the contrary, the EU courts accord a degree of de facto deference to the complex economic findings of the European Commission, its factual findings, its calculation of fines, and its interpretation of its own soft law.<sup>224</sup> One EU scholar

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217. *Id.*; *Chi. Bridge & Iron Co. N.V. v. Fed. Trade Comm’n*, 534 F.3d 410, 437 (5th Cir. 2008); *Toys “R” Us, Inc. v. Fed. Trade Comm’n*, 221 F.3d 928, 935 (7th Cir. 2000); *Hosp. Corp. of Am. v. Fed. Trade Comm’n*, 807 F.2d 1381, 1385 (7th Cir. 1986). *See generally* Maciej Bernatt, *McWane and Judicial Review of Federal Trade Commission Decisions—Any Inspirations for EU Competition Law?*, 38 EUR. COMP. L. REV. 288 (2017).

218. Council Regulation 1/2003 of Dec. 16, 2002, Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty (referring to 2003 O.J. (L 1) 1).

219. Bernatt, *Transatlantic Perspectives*, *supra* note 181, at 315.

220. *See generally* Maciej Bernatt, *The Compatibility of Deferential Standard of Judicial Review in the EU Competition Proceedings with Article 6 of the European Convention on Human Rights* 12 (Loyola University Chicago School of Law Institute for Antitrust and Consumer Studies Working Paper, 2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2447884](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2447884) [https://perma.cc/49VE-EYNS] (discussing the counterarguments against the deferential standard of review).

221. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 221.

222. Case T-1/89, *Rhone-Poulenc v. Comm’n*, 1991 E.C.R. II-867, 884-85.

223. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 221.

224. *See* Bernatt, *McWane and Judicial Review of Federal Trade Commission Decisions*, *supra* note 216, at 6, 8.

recently has argued that this degree of deference roughly corresponds with the substantial evidence test used in the United States.<sup>225</sup>

The bottom line is the degree of judicial deference in most systems appears to be inversely related to the degree of due process and separation of functions at the administrative level. Arguably, both the United States and European Union systems err in giving too little and too much deference, respectively, to the administrative competition decisions of its expert agencies.

#### *E. State Attorneys General and Sub-Federal Competition Agencies*

Many competition systems have more than one level of enforcement. In such systems, this raises issues of allocation of responsibilities and jurisdiction between the federal and sub-federal enforcers. The most thorough devolution of power appears to the Russian Federation which has both a Federal Anti-Monopoly Service and numerous regional offices across the Federation.<sup>226</sup> These regional offices are largely autonomous from the national competition authority, and have the autonomy to investigate, adjudicate, and appeal matters separately from the national authority.<sup>227</sup> At the opposite end of the spectrum lie national competition authorities that may establish regional offices purely for administrative convenience, and those employees take their direction from the national headquarters. In the United States, both the Antitrust Division and the FTC have such regional offices.<sup>228</sup>

The EU is an example of a competition law system where the allocation of authority and jurisdiction is both more nuanced and subject to a sophisticated network of responsibilities. After the modernization of EU competition law, national competition authorities and the national courts enforce both EU and national competition law.<sup>229</sup> Relationships between national competition authorities (NCAs) within the EU, and between NCAs and the

225. Bernatt, *Transatlantic Perspectives*, *supra* note 181, at 292-93.

226. *About the FAS Russia*, FED. ANTIMONOPOLY SERV. OF THE RUSSIAN FED'N, <http://en.fas.gov.ru/about/what-we-do/general-information.html> [<https://perma.cc/QBF6-6DH6>] (last visited Aug. 13, 2019).

227. *Id.*

228. ANTITRUST DIVISION MANUAL, *supra* note 119, at I-8. For example, the FTC has a regional office in Chicago which currently handles only consumer protection matters, although in the past the office handled both competition and consumer protection. *Id.*; FED. TRADE COMM'N, REGIONAL OFFICES, <https://www.ftc.gov/about-ftc/bureaus-offices/regional-offices> [<https://perma.cc/9GYS-7XBN>] (last visited May 13, 2019). The Chicago field office decisions are subject to review and approval by the FTC in Washington, D.C., except to the extent that the FTC chooses to delegate discretion to the regional director of the office. ANTITRUST DIVISION MANUAL, *supra* note 119, at I-8.

229. Council Regulation, 1/2003, *supra* note 217, at Art. 3, 5-6.

European Commission, are governed by the provisions of the European Competition Network (ECN).<sup>230</sup> The ECN allocates responsibilities between and among the EU and the NCAs and has additional provisions governing cooperation and information sharing.<sup>231</sup> Similarly, the EU Merger Regulation has provisions allocating jurisdiction of certain mergers between and among the European Commission and the NCAs.<sup>232</sup>

The United States also faces this issue. Each of the fifty states, the District of Columbia, and the U.S. territories have authority to enforce their own state or local level competition provisions.<sup>233</sup> Since the 1970s, state attorneys general<sup>234</sup> have had the authority to enforce the federal antitrust laws in federal court on behalf of their natural citizens.<sup>235</sup> The U.S. Supreme Court has made clear that state enforcers can proceed in addition to, or instead of, the federal competition agencies.<sup>236</sup>

There are no hard or soft law instruments that determine jurisdiction, responsibilities, or cooperation in proceeding with cases that attract the interest of more than one level of enforcement. The states themselves cooperate through the National Association of Attorneys General and often bring cases as a coalition of states that share costs and responsibilities on a case-by-case basis.<sup>237</sup> There are also circumstances when the states and one of the federal agencies act together in litigating significant competition matters.<sup>238</sup>

Despite the long-standing statutory authority of state attorneys general to enforce both federal and state antitrust law, there has been

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230. Overview, EUROPEAN COMPETITION NETWORK, [http://ec.europa.eu/competition/ecn/index\\_en.html](http://ec.europa.eu/competition/ecn/index_en.html) [<https://perma.cc/X738-R9J6>] (last visited Feb. 17, 2019).

231. *Id.*

232. Council Regulation (EC) No. 139/2004 of Jan. 20, 2004 on the control of concentrations between undertakings (the EC Merger Regulation), 2004 O.J. (L24) 1, Arts. 1, 9, 19, 22.

233. See, e.g., N.Y. STATE OFF. OF THE ATT'Y GEN., *Antitrust Enforcement*, <https://ag.ny.gov/antitrust/antitrust-enforcement> [<https://perma.cc/B6SH-5PZK>] (last visited Aug. 13, 2019).

234. The District of Columbia and the U.S. overseas territories also have local competition authorities. See, e.g., *PL Price-Fixing, Bid-Rigging and Other Antitrust Issues*, OFF. OF THE ATT'Y GEN. FOR THE DIST. OF COLUMBIA, <https://oag.dc.gov/pl-price-fixing-bid-rigging-and-other-antitrust> [<https://perma.cc/P345-A24G>].

235. 15 U.S.C. § 15(c) (2012).

236. *California v. Am. Stores Co.*, 495 U.S. 271, 280 (1990).

237. NAT'L ASS'N OF ATT'YS GEN., *Multistate Task Force*, [http://www.naag.org/naag/committees/naag\\_standing\\_committees/antitrust-committee/multistate\\_task\\_force.php](http://www.naag.org/naag/committees/naag_standing_committees/antitrust-committee/multistate_task_force.php) [<https://perma.cc/NTL9-JJGL>] (last visited Aug. 13, 2019).

238. E.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 45 (D.C. Cir. 2001). See generally ANDREW I. GAVIL & HARRY FIRST, *THE MICROSOFT CASES: COMPETITION POLICY FOR THE TWENTY-FIRST CENTURY* (2014); WILLIAM H. PAGE & JOHN E. LOPATKA, *THE MICROSOFT CASE: ANTITRUST, HIGH TECHNOLOGY, AND CONSUMER WELFARE* (2007).

significant criticism of state antitrust enforcement and calls to strip states of this authority.<sup>239</sup> Much of this criticism focuses on the fact that virtually all of the state attorneys general are elected officials.<sup>240</sup> Despite the obvious democratic accountability of such an arrangement, the critics argue that elected state attorneys general have inappropriate incentives to bring cases that should be left to the federal level enforcers, and that they are subject to capture by local political interests that influence case selection toward more overtly political criteria or even anticompetitive outcomes.<sup>241</sup> Some have gone as far to question the professional competence of state enforcers.<sup>242</sup> There is little empirical evidence to support either the capture or competence critique.<sup>243</sup>

The fact that state attorneys general are popularly elected also creates virtuous incentives to bring enforcement actions which directly benefit state residents and which the general electorate might approve.<sup>244</sup> The record shows that state attorneys general have often used their powers under the antitrust laws to obtain monetary compensation on behalf of state consumers and state governmental entities injured by antitrust violations.<sup>245</sup> This is a role not normally played by the Justice Department or the FTC in competition cases.<sup>246</sup>

The states also continue to take a firmer stance against vertical resale price fixing out of a concern for consumers who believe they will benefit from price competition among independent sellers of the same goods and services. For example, much of the limited case law interpreting the rule of reason standard for retail price maintenance

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239. See e.g., Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, in COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 252 (Richard A. Epstein & Michael S. Greve, eds., 2004); ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 185 (2007).

240. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, *supra* note 238, at 256-57.

241. Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940-41 (2001).

242. *Id.*

243. Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004, 1029-31 (2001).

244. First & Waller, *Antitrust's Democracy Deficit*, *supra* note 34, at 2563.

245. *Id.* at 1018 tbl. 5; see also Harry First, *Modernizing State Antitrust Enforcement: Making the Best of a Good Situation*, 54 ANTITRUST BULL. 281, 300-01 (2009) (summarizing cases).

246. The Antitrust Division and the FTC have only occasionally sought restitution in antitrust cases. Waller & Fiebig, *supra* note 118, at § 6.9.

(RPM) under the *Leegin* decision<sup>247</sup> has come from the states.<sup>248</sup> In contrast, none has come from the federal agencies.<sup>249</sup>

While all enforcers have to be on their guard that enforcement efforts do not end up protecting competitors from competition, the states have shown that direct political accountability can also produce incentives counterbalancing these protectionist forces and aligning enforcement more directly with the will of the people. States thus have produced a democratic and professional system that benefits the needs of actual consumers and not merely theoretical consumer welfare.

#### F. *Private Rights of Action and Collective Actions*

Private rights of action are an additional avenue to maintain democracy in competition law. Private rights of action allow private parties to bring claims to a court or tribunal when they have been wronged, regardless of whether the government chooses to take up their claim in a public enforcement proceeding. It also permits private parties to obtain compensation even if the government has pursued its case in the name of punishment and/or deterrence. Private rights of action allow private parties to persuade courts and tribunals of the validity of causes of action, theories of liability, defenses, and immunities that the government may not favor at any particular moment. This brings about a certain stability to the system with multiple parties seeking to pursue their self-interest free from political coercion before a judiciary or tribunal charged with impartially applying the law. Finally, creating private rights of action pushes the power to pursue claims down to the level of those most directly affected by the alleged unlawful conduct, a notion consistent with both principles of justice, democracy, and subsidiarity.<sup>250</sup>

The trend is toward the increase of private rights of action outside the United States where, for a variety of reasons, private litigation has always far outweighed the number of public enforcement actions.<sup>251</sup> The European Union has enacted its private damages directive,<sup>252</sup> and

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247. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007).

248. See Michael A. Lindsay, *Overview of State RPM*, THE ANTITRUST SOURCE (April 2017), [https://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/lindsay\\_chart.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/lindsay_chart.authcheckdam.pdf) [<https://perma.cc/ZWW4-LS57>].

249. First & Waller, *Antitrust's Democracy Deficit*, *supra* note 34, at 2563.

250. *Id.* at 2554-55.

251. See generally Waller & Fiebig, *supra* note 118, at §§ 20.1-20.13.

252. Directive 2014/104, of the European Parliament and of the Council of Nov. 26, 2014 on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union, 2014 O.J. (L 349) 1, 19 (EU).

the member states have now completed the process of enacting the directive into national legislation.<sup>253</sup>

These changes have promoted democracy, principles of subsidiarity, and helped address the allegations of democracy deficit in the operation of the EU.<sup>254</sup> Enforcement powers have been pushed from Brussels to the member states, and down to the citizens and enterprises themselves.<sup>255</sup> There is no longer a need for private persons and enterprises to wait for the government to accept and act on a complaint. European Court of Justice (ECJ) decisions about the direct applicability of EU competition law have been made more concrete.<sup>256</sup>

There are, however, limitations as to the bringing of private claims. Absent pro bono type public interest litigation and purely personal grudges, plaintiffs rarely bring claims in antitrust (or most other fields) unless the expected value of the litigation is positive.<sup>257</sup> The probability of winning and scope of anticipated damages (or monetary value of the injunction) must exceed the costs of litigation and the prospect of an award of fees and costs against an unsuccessful plaintiff in most systems.<sup>258</sup> Without a positive value claim, most plaintiffs will be unwilling or unable to proceed with their case or able to find counsel willing to handle the matter on a contingent fee or a third party willing to finance the litigation.<sup>259</sup> Jurisdictions seeking to permit or encourage private damage claims must carefully analyze the mix of incentives and disincentives to ensure that valid claims are brought and frivolous claims deterred. In a world that largely rejects multiple damages and insists on a loser pays principle, much can still be done through the construction of rules, procedures, institutions, and remedies to ensure that meritorious claims can be pursued by those most affected by the conduct.

If either direct purchasers (or indirect purchasers where allowed) have small claims, private damage claims will almost never happen for the reasons set forth above.<sup>260</sup> There are numerous cartels and

253. *Directive on Antitrust Damages Actions: Transposition of the Directive in Member States*, EUROPEAN COMMISSION, [http://ec.europa.eu/competition/antitrust/actionsdamages/directive\\_en.html](http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html) [<https://perma.cc/9DR8-C5XA>] (last visited Aug. 13, 2019).

254. First & Waller, *Antitrust's Democracy Deficit*, *supra* note 34, at 2566-67.

255. *Id.*

256. *See* Case C-453/99, *Courage Ltd. v. Crehan* 2001 E.C.R. I-6297, I-6322-23.

257. J. Douglas Richards, Michael B. Eisenkraft, & Abigail E. Shafroth, *Class Action*, in *Private Enforcement of Antitrust Law in the United States*, in *PRIVATE ENFORCEMENT OF ANTITRUST LAW IN THE UNITED STATES* 108, 109 (Albert A. Foer & Randy M. Stutz, eds., 2012).

258. *Id.*

259. K. Craig Wildfang & Stacy P. Slaughter, *Funding Litigation*, in *THE INTERNATIONAL HANDBOOK ON PRIVATE ENFORCEMENT OF COMPETITION LAW* 257 (Albert A. Foer & Jonathan W. Cuneo eds., 2010).

260. Richards et al., *supra* note 256, at 109.



other serious antitrust violations that involve a small overcharges or other injury to a wide number of victims. For example, a cartel raising the price of gel pens by ten or twenty percent will only involve a harm of well less than a euro per pen. A successful cartel involving intermediate chemicals used to soften rubber products used in consumer goods such as rubber soled shoes, garden hoses, and tires may only involve a penny or two per item. Only a zealot would pursue such a negative value claim, even if they or their undertaking purchased hundreds of the items.

To provide a viable claim for any or all of the victims of such illegal conduct, some mechanism must be created to aggregate the numerous negative value claims into a single positive value claim. Otherwise, the formal availability of private rights of action will never be utilized by a large and critical mass of plaintiffs with meritorious, but individually low value claims. An increasing number of jurisdictions have implemented class actions or collective actions to address these problems.<sup>261</sup> For example, the EU instead offered a recommendation to the member states regarding collective action, with some member states creating their own collective actions even prior to the recommendation.<sup>262</sup>

Like private damage actions, there are numerous ways to structure a collective action system for competition claims. In addition to general issues about the substance and procedure of competition law itself, any jurisdiction pursuing this path must answer such questions as:

- 1) Standing: Whether only public officials, certain organizations, and/or ad hoc groups of individuals will be permitted to bring collective actions[?]
- 2) Scope: Will collective actions be available for all causes of action or only selected types of litigation, such as consumer or competition matters?
- 3) Remedies: Will successful collective actions result in damages, injunctions, declaratory relief, or some combination?
- 4) Procedure: Can collective actions be used for settlement purposes only or for litigation of contested claims?
- 5) Binding Effect: Will collective actions be opt-in or opt-out?

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261. Waller & Fiebig, *supra* note 118, at §§ 20.6-20.13.

262. Commission Recommendation 2013/396 of June 11, 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 2013 O.J. (L 201) 60, 60-62, [http://ec.europa.eu/justice/civil/files/c\\_2013\\_3539\\_en.pdf](http://ec.europa.eu/justice/civil/files/c_2013_3539_en.pdf) [<https://perma.cc/YK8R-UP7M>].

- 6) Financing: Will contingency fees, success bonuses, and/or third party financing be allowed? Will one way or two-way loser pay principles apply?<sup>263</sup>

Reasonable people can differ on these questions. Each system will have to work out whether the certification of the collective/class action will involve the deep scrutiny and mini-trials of the merits that has evolved in the United States in recent years, or the more relaxed approach of resolving the issues at trial on a class wide basis that Canada and other countries have favored.<sup>264</sup> As in any private damage action, issues of contingency fees, indirect purchaser standing, damage calculations, litigation finance, discovery, effect of prior government verdicts, access to the government file, admissibility of leniency applications, all have to be resolved.<sup>265</sup>

Both common law and civil law jurisdictions have experimented with different permutations of the class action and the collective action.<sup>266</sup> Most have sought to distance themselves from the system that has developed in the United States.<sup>267</sup> Ironically, class actions in the United States are increasingly restricted through judicial and statutory means at the very same time that the rest of the world is seeking to increase mechanisms for collective actions in order to address perceived gaps in deterrence and compensation.<sup>268</sup>

One issue looms above all others. No collective action system for competition claims has thrived without an opt-out mechanism.<sup>269</sup> Opt-in class actions for competition (and most other claims) do not work in theory or in practice.<sup>270</sup> At a conceptual level, opt-ins are not true collective actions, they are merely a form of joinder.<sup>271</sup> The need for a conscious decision of a large group of plaintiffs affirmatively to opt into a costly and risky proceeding are doomed to fail because of risk aversion and the natural bias toward the status quo.<sup>272</sup> While there are partial substitute mechanisms for large direct purchaser antitrust

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263. Spencer Weber Waller & Olivia Popal, *The Fall and Rise of the Antitrust Class Action*, 39 WORLD COMP. L. & ECON. REV. 29, 37 (2016); RACHEL MULHERON, *THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE* 23 (2006); Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 307 tbl. 2 (2011).

264. Waller & Popal, *supra* note 262, at 47-49.

265. *Id.* at 37.

266. *Id.*

267. *Id.*

268. *Id.*

269. Waller & Popal, *supra* note 262, at 49-50.

270. *Id.* at 50-51.

271. *Id.*

272. *Id.*

claims, entities with small monetary claims simply have no rational reason to bring valid claims or join the litigation brought by others.<sup>273</sup> As I have written with a co-author elsewhere: “Without some sort of opt-out mechanism with as many procedural or judicial safeguards [for the rights of defendant] as desired, proceeding with collective actions is a cruel hoax and an expensive but ultimately fruitless enterprise.”<sup>274</sup>

Opt-out provisions may not be possible in every jurisdiction. Such provisions may be inconsistent with a jurisdiction’s history or legal system. So be it. However, under such systems the choice in most situations is not between collective actions and individual private damage actions. It is between finding a way to create an effective collective litigation system or a system with little or no private damage claims.<sup>275</sup>

### G. Civil Society

The role of an engaged civil society is critical for a competition policy that is democratic. Awareness of competition policy through the press, academia, along with a transparent agency and court system helps make competition policy (and government more generally) more accountable and directly engaged with the public at large. It allows occasional competition issues to enter the realm of politics, but more likely it helps create a culture of competition by making competition policy more a reality for the everyday lives of consumers.

One aspect of an engaged civil society is the presence of public policy institutions that regularly engage on competition policy matters. In the United States there are a number of institutions that take on this role from different ideological perspectives. Probably the largest entity specializing in competition law and policy is the Antitrust Section of the American Bar Association (ABA).<sup>276</sup> The ABA Antitrust Section covers both U.S. and comparative antitrust law as well as consumer protection matters.<sup>277</sup> Its annual spring meeting attracts in excess of

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273. For an example of an unsuccessful opt-in proceeding involving price-fixed UK soccer jerseys see Waller & Popal, *supra* note 262, at 42. Even opt-out class actions face many hurdles. For an example of recent unsuccessful requests for opt-out collective actions under UK law see *Gibson v. Pride Mobility Prods. Ltd.* [2017] CAT 9 (Eng.); *Merricks CBE v. MasterCard, Inc.* [2017] CAT 16 (Eng.).

274. Waller & Popal, *supra* note 262, at 51.

275. Spencer Weber Waller, *The United States Experience With Competition Class Action Certification: A Comment*, in *LITIGATING CONSPIRACY: AN ANALYSIS OF COMPETITION CLASS ACTIONS* 209, 216 (Stephen G.A. Pitel ed., 2006).

276. *Section of Antitrust Law*, AMERICAN BAR ASSOCIATION, [https://www.americanbar.org/groups/antitrust\\_law.html](https://www.americanbar.org/groups/antitrust_law.html) [<https://perma.cc/KJ67-PM7M>].

277. *Id.*

three thousand attorneys and other professionals for three days of continuous programming and related events.<sup>278</sup>

The spring meeting is a part of a full year of programming around the United States and the globe, covering a variety of professional and academic topics in the field.<sup>279</sup> In addition, the ABA Antitrust Section is probably the largest publisher of antitrust law materials in the world.<sup>280</sup> Its portfolio includes treatises, monographs, handbooks, guides for the business community, the well-respected Antitrust Law Journal, and other periodicals and newsletters.<sup>281</sup> The Section also comments on pending legislation and guidelines in the United States and abroad.<sup>282</sup> The ABA Antitrust Division is also just one of numerous national, state, and local bar associations which have active committees or sections in the antitrust field.<sup>283</sup>

Think tanks and research institutions also address competition law and policy matters from a variety of perspectives. Over the years, virtually every Washington D.C. and national research institution, regardless of its political leanings, has weighed in on one or more significant matters in the antitrust field. This includes more conservative and libertarian groups such as the Heritage Foundation,<sup>284</sup> the Hoover Institute,<sup>285</sup> the Cato Institute,<sup>286</sup> and the

278. *ABA Antitrust Spring Meeting to feature top officials from DOJ, FTC, Europe, Australia, Mexico*, AMERICAN BAR ASSOCIATION, <https://www.americanbar.org/news/abanews/aba-news-archives/2019/03/aba-antitrust-spring-meeting-to-feature-top-officials-from-doj-/> [<https://perma.cc/7XD4-DQLB>].

279. *Section of Antitrust Law Section Events & CLE*, THE AMERICAN BAR ASSOCIATION, <https://www.americanbar.org/news/abanews/aba-news-archives/2019/03/aba-antitrust-spring-meeting-to-feature-top-officials-from-doj-/> [<https://perma.cc/X7UG-QWHD>].

280. *See Section of Antitrust Law: Section Publications*, AMERICAN BAR ASSOCIATION, [https://www.americanbar.org/groups/antitrust\\_law/publications.html](https://www.americanbar.org/groups/antitrust_law/publications.html) [<https://perma.cc/W4QB-8P76>].

281. AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, SECTION PUBLICATIONS, [https://www.americanbar.org/groups/antitrust\\_law/publications/](https://www.americanbar.org/groups/antitrust_law/publications/) [<https://perma.cc/89MH-UB6C>].

282. AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, COMMENTS, REPORTS & AMICUS BRIEFS, [https://www.americanbar.org/groups/antitrust\\_law/resources/comments\\_reports\\_amicus\\_briefs/](https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/) [<https://perma.cc/RG6V-6HFH>].

283. *E.g., Antitrust Law Section*, STATE BAR OF GEORGIA, <https://www.gabar.org/committeesprogramssections/sections/antitrust/index.cfm> [<https://perma.cc/JZ9T-LHPT>].

284. Alden Abbot, *Heritage Antitrust Conference Highlights Domestic and International Policy Challenges for the next Administration*, HERITAGE FOUNDATION (Feb. 3, 2016), <http://www.heritage.org/economic-and-property-rights/commentary/heritage-antitrust-conference-highlights-domestic-and> [<https://perma.cc/WWL8-ZFBV>].

285. *Hoover IP<sup>2</sup> partners with GCR to present conference on IP and Antitrust*, HOOVER INSTITUTE (May 19, 2017), <http://hooverip2.org/news/hoover-ip%C2%B2-partners-with-gcr-to-present-conference-on-ip-and-antitrust/> [<https://perma.cc/DT2W-ADWU>].

286. Alan Reynolds, *Antitrust for Fun and Profit: The Democrats' Better Deal (Part 1)*, THE CATO INSTITUTE (August 17, 2017), <https://www.cato.org/blog/antitrust-fun-profit->

American Enterprise Institute,<sup>287</sup> more centrist groups such as the Brookings Institute,<sup>288</sup> and more enforcement oriented groups such as the Center for American Progress<sup>289</sup> and the New American Foundation.<sup>290</sup>

There are also a number of research and advocacy organizations that focus on competition matters. For example, the American Antitrust Institute has for more than twenty years engaged in lobbying, amicus briefs, research, conferences, and publication to promote the vigorous enforcement of the antitrust laws and a broader vision of the role of antitrust law in U.S. society.<sup>291</sup> The Open Markets Institute is a more recent group whose mission statement states that the group utilizes “journalism to promote greater awareness of the political and economic dangers of monopolization.”<sup>292</sup> The Institute for Consumer Antitrust Studies at Loyola University Chicago School of Law promotes a more consumer friendly competitive economy through education, training, conferences, round table discussions, and the presentation of its views to federal and state legislatures, enforcement agencies, and international bodies concerned with competition law.<sup>293</sup>

On the more libertarian perspective, organizations such as the Searle Center on Law, Regulation, and Economic Growth at Northwestern University Law School has presented numerous conferences and workshops on the application of law and economics to various aspects of competition law and regulation.<sup>294</sup> The Law & Economics Center at George Mason University School has devoted significant resources to law and economic trainings for law professors, judges, and enforcement officials in the United States and abroad, and

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democrats-better-deal-part-1 [https://perma.cc/6TCD-28DA].

287. Jeffrey Eisenbach, *Antitrust Policy for a New Administration*, AMERICAN ENTERPRISE (January 26, 2016), <http://www.aei.org/publication/antitrust-policy-for-a-new-administration/> [https://perma.cc/SSY4-V3U4].

288. Tim Boersma, *Can the EU turn Gazprom into Google?*, BROOKINGS INSTITUTE (April 23, 2015), <https://www.brookings.edu/blog/order-from-chaos/2015/04/23/can-the-eu-turn-gazprom-into-google/> [https://perma.cc/Q8NU-YRQM].

289. *Showing Results 1-10 out of 150 for “antitrust,”* CENTER FOR AMERICAN PROGRESS, <https://www.americanprogress.org/search/?query=antitrust> [https://perma.cc/UHZ3-TJYV].

290. *Search: Antitrust*, NEW AMERICAN FOUNDATION, <https://www.newamerica.org/search/?query=antitrust> [https://perma.cc/2BUV-59RY].

291. *Mission and History*, AMERICAN ANTITRUST INSTITUTE, <https://www.antitrustinstitute.org/about-us/> [https://perma.cc/U2RE-JFFX].

292. *Press Releases*, OPEN MARKETS INSTITUTE, <https://openmarketsinstitute.org/> [https://perma.cc/H7GU-8EDQ].

293. *Institute for Consumer Antitrust Studies*, LOYOLA UNIVERSITY SCHOOL OF LAW, <http://www.luc.edu/antitrust> [https://perma.cc/56LC-7P79].

294. *Center on Law, Business, and Economics*, NORTHWESTERN PRITZKER SCHOOL OF LAW CENTER ON LAW, <http://www.law.northwestern.edu/research-faculty/searlecenter/> [https://perma.cc/BN54-B7BP].

advocates for a more libertarian approach to competition law.<sup>295</sup> Harder to pin down ideologically is the Stigler Center at the University of Chicago Booth School of Business that has undertaken a fascinating series of conferences on the perils of concentration and similar concerns over power in the digital economy, all seemingly at odds with the traditions of the “Chicago School” developed at that institution in prior decades.<sup>296</sup>

Trade associations and related professional groups also are actively involved in the formulation and evaluation of competition matters. It is a rare (or very small) trade association that does not have at least one competition law attorney or other specialist on its staff or on retainer. Among the larger trade organizations, the U.S. Chamber of Commerce devotes significant resources to competition law matters and engages in lobbying, litigation, the filing of amicus briefs, conferences, research, and publication on its views on competition law.<sup>297</sup>

Another important aspect of an engaged civil society is the presence of a robust academic sector that teaches and studies competition law, economics, and policy. In the United States, the directory of the Association of American Law Schools lists approximately 200 accredited law schools with more than 260 professors who teach, or have taught in the past, antitrust law as full-time faculty members.<sup>298</sup> This is in addition to numerous part-time adjunct members who teach antitrust courses in addition to their full-time jobs as practicing attorneys, judges, economists, or enforcers. U.S. law schools also offer masters level programs in antitrust and trade regulation both on

295. *Law & Economics Center*, GEORGE MASON UNIVERSITY ANTONIN SCALIA SCHOOL OF LAW, <http://masonlec.org/> [<https://perma.cc/L32M-B8LQ>].

296. *Academic Conferences*, STIGLER CENTER FOR THE STUDY OF THE ECONOMY AND THE STATE, CHICAGO BOOTH, <https://research.chicagobooth.edu/stigler/events/academic-conferences> [<https://perma.cc/MH9K-4AUN>]. This conference was widely covered in the business press. See, e.g., *The University of Chicago worries about a lack of competition*, THE ECONOMIST: THE SCHUMPETER BLOG (Apr. 12 2017), <https://www.economist.com/news/business/21720657-its-economists-used-champion-big-firms-mood-has-shifted-university-chicago> [<https://perma.cc/MS3S-EE5D>]. Despite its reputation as a bastion of conservatism, the University of Chicago has included a number of scholars concerned with the democratic and political values embedded in economic competition. See, e.g., James W. Brock, *Economic Power, Henry Simons, and a Lost Antitrust Vision of Economic Conservatism*, 58 S.D. L. REV. 443, 461 (2013) (discussing University of Chicago scholar Henry Simon’s view that private economic power was a threat to a democratic society).

297. *Antitrust Council*, UNITED STATES CHAMBER OF COMMERCE, <https://www.uschamber.com/antitrust-council-0> [<https://perma.cc/93SF-2SBQ>]. See, e.g., U.S. Chamber Litigation Center, <https://www.chamberlitigation.com/> [<https://perma.cc/R35S-V6LY>].

298. ASSOCIATION OF AMERICAN LAW SCHOOLS, THE AALS DIRECTORY OF LAW TEACHERS 2016-17, at 1390-92.

campus, and on line, for students who are currently working in field, hope to work in the field, and who plan to seek academic careers in this area.<sup>299</sup> These subjects also are taught in varying degrees in business schools, economics departments, and public policy schools at both the graduate and undergraduate levels. There are numerous antitrust conferences held throughout the year exploring practice, policy, and theory issues. The result is a robust debate about the values, techniques, and results of competition law and policy that continues no matter which party is in office or who runs the enforcement agencies.

The government agencies also play a role in creating an engaged civil society in addition to operating in a transparent manner as discussed above. The agencies post a tremendous amount of material on their respective web sites, frequently speak to legal and business groups, publish guidelines for both professional and lay audiences, hold press conferences on high visibility cases, and other enforcement actions. The agencies also testify in front of Congress, hold workshops, post on social media, respond to freedom of information act requests, and maintain libraries and databases for the public.<sup>300</sup>

Equally important, the agencies receive input from the public as well as send information out to the public. The Agencies receive complaints and white papers from interested parties and the public.<sup>301</sup> They obtain testimony and comments from the public in workshops, review responses to draft guidelines, and communicate on an informal basis with members of the competition community on a daily basis.<sup>302</sup>

The ways an agency receives input from the public are limited only by its imagination. The Competition and Consumer Commission of Singapore used to hold a contest for the best animated short submission on the evils of cartels.<sup>303</sup> Other agencies have come up equally creative ways to receive feedback and input from the public, in addition to the material they make available to the public.<sup>304</sup>

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299. *E.g.*, *Institute for Consumer Antitrust Studies*, LOYOLA UNIVERSITY SCHOOL OF LAW <https://www.luc.edu/law/academics/centersinstitutesandprograms/instituteforconsumerantitruststudies/> [<https://perma.cc/PG7P-AWL3>].

300. DEPT OF JUSTICE ANTITRUST DIV., *Public Documents* (Sept. 28, 2018), <https://www.justice.gov/atr/public-documents> [<https://perma.cc/3FKA-MZ3Y>].

301. ANTITRUST DIVISION MANUAL, *supra* note 119, at III-6.

302. *E.g.*, DEPT OF JUSTICE ANTITRUST DIV., *Public Documents*, *supra* note 299.

303. *Competition Commission of Singapore (CCS) Animation Competition 2013*, TEMASEK POLYTECHNIC: SCH. OF ENG'G (June 11, 2013), <https://www.tp.edu.sg/schools/eng/showcase/achievements/animationcompetition2013> [<https://perma.cc/WEG7-F4JA>].

304. *Competition Law and How it Affects Businesses*, UK COMPETITION & MARKETS AUTHORITY (Nov. 18, 2015), <https://www.gov.uk/government/publications/video-guides-on-illegal-anti-competitive-activities> [<https://perma.cc/FDF9-HWD9>] (short animated videos).

The general and business press plays an equally important role in reporting on competition matters. Major publications such as the Wall Street Journal, New York Times, Washington Post, The Economist, and many business magazines regularly feature stories about criminal cartel cases and investigations, issues involving allegedly dominant firms, the flood of mergers and acquisitions in the United States and abroad, and major private damage cases.<sup>305</sup> More analytical stories appear on such topics as the role of big data in antitrust, algorithmic competition, and the pros and cons of the EU's enforcement actions against Google and pending investigations of other high-tech firms.<sup>306</sup>

Social media increasingly is both supplementing and partially substituting for traditional press coverage of competition law and policy matters. There is a plethora of forums for competition law topics and well as numerous individuals who post on Twitter and/or link to news stories published elsewhere as well as on other social media platforms.<sup>307</sup> There is even a substantial number of twitter posts about the merits of so-called “#hipster” antitrust.<sup>308</sup>

The result is a vigorous debate about most issues of importance in the competition law world and very few issues of any kind that escape notice and comment in the antitrust profession. The more important and salient of these issues also receive at least some general public attention and comment suggesting that antitrust policy operates in the spotlight, at least among lawyers and business people most directly affected by the decisions and policies at issue. While competition policy is an area of specialization, and competes with many other issues of more life and death importance for the time and attention of the public, it is heartening to see the number and resources of the actors in civil society who devote time and resources to the promotion of what they consider sound competition law and policy.<sup>309</sup>

305. *E.g.*, Jonah Engel Bromwich, *The Raisin Situation*, N.Y. TIMES (Apr. 27, 2019), <https://www.nytimes.com/2019/04/27/style/sun-maid-raisin-industry.html> [<https://perma.cc/JU7W-V5BJ>].

306. *The world's most valuable resource is no longer oil, but data*, THE ECONOMIST (May 6, 2017), <https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data> [<https://perma.cc/R23Q-Q8CA>].

307. *E.g.*, Spencer Weber Waller (@SWeberWaller), TWITTER, <https://twitter.com/sweberwaller?lang=en> [<https://perma.cc/E8AX-JVGG>]; Spencer Weber Waller, LINKEDIN, <https://www.linkedin.com/in/spencerwaller/> [<https://perma.cc/Q7JW-C9JX>]; Facebook Group for the Institute for Consumer Antitrust Studies at Loyola University Chicago School of Law, FACEBOOK, <https://www.facebook.com/groups/104637465017/> [<https://perma.cc/D95B-KEZ6>].

308. Search Results for “#HipsterAntitrust,” TWITTER, <https://twitter.com/hashtag/hipsterantitrust?lang=en> [<https://perma.cc/5MAP-SP5T>].

309. Elizabeth Warren, *Here's how we can break up Big Tech*, MEDIUM BUSINESS (Mar. 8, 2019), <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c?source=GS-66368038294-warren%20for%20president-p->



It is difficult to ascertain how much of this flurry of activity makes its way into the general public consciousness. It is also difficult to ascertain what is the optimum level of civil society engagement in order to make antitrust policy more truly democratic. This section, like most of the rest of this essay, provides more of a checklist of issues and indicators for each jurisdiction to consider how to better involve the public in understanding the value of competition and how it is enforced at home and abroad. The increasing global scope of the on-line discussion of these issues and the availability of materials and training outside of national borders at a minimum suggests that the national, regional, and international conversation and engagement is on the rise.<sup>310</sup>

#### IV. A TAXONOMY FOR DEMOCRACY AND ANTITRUST

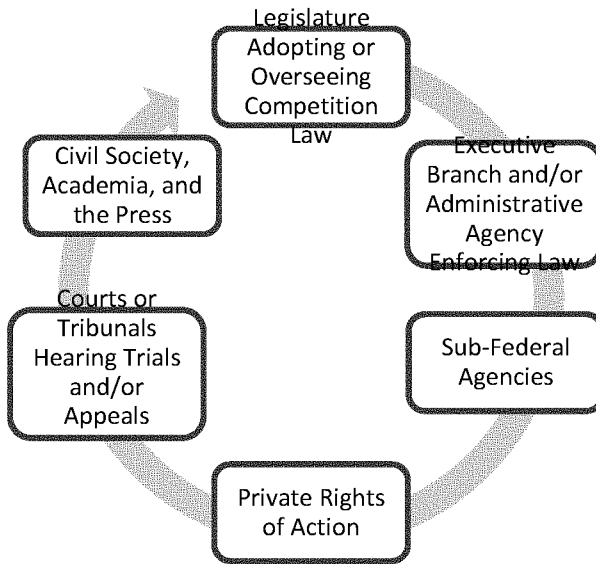
One way to view democracy and antitrust in a holistic manner is to think about how values are created and how values are then enforced. It is for the political branches to articulate those values in constitutions, treaties, and legislation through accepted national and international democratic processes. It is for the administrative branches and the judiciary to implement these policy preferences consistent with whatever discretion the political branches have delegated to them in applying their technical expertise. The public participates both as complainant, litigant, critic, and catalyst for political change. Competition law and policy then returns to the political branches to exercise periodic oversight to ensure that the democratically enacted policy choices and values are respected, implemented, and amended as needed.

This type of iterative feedback loop can be outlined as follows. This system of competition law and policy creates a stable, but not rigid, political economy equilibrium if each institution plays its assigned roles. An oversimplified diagram of this interaction is set forth below.

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344821541734&gclid=EAIaIQobChMIoaT9hvv44QIVeP\_jBx3E\_QqyEAAYASAAEgLDcFD\_BwE&refcode=WFP2019-LB-GS-IL&refcode2=GS-66368038294-warren%20for%20president-p-344821541734 [https://perma.cc/L5UN-3BBT].

310. *E.g.*, INTERNATIONAL COMPETITION NETWORK, *Training on Demand*, <https://www.internationalcompetitionnetwork.org/training/> [https://perma.cc/M8D7-J35Z].



While such a diagram is both over-stylized and oversimplified, it helps focus on the respective roles of the multi-player system in most legal regimes. In such a system, the players toward the top of the diagram are the most overtly political actors and play the most direct role in formulating the values for the competition law system. Value creation evolves into value implementation. As the process continues, the feedback loop is formed with civil society and related private actors providing input and criticism requiring the more overtly political branches of government to react creating a new cycle of value creation and implementation. Thus, democracy and antitrust produces democracy in antitrust and a virtuous feedback loop that is flexible enough to evolve over time, yet stable enough to produce justice and stability for the players in the system at any given moment.

Consider how this virtuous feedback loop plays out in the hypothetical country of Westeros.<sup>311</sup> While I created the antitrust specific details and outcome of this hypothetical, it is based on events in the series *A Song of Ice and Fire*, by George R.R. Martin, and recent events that occurred in Chile and Argentina. Westeros is a large prosperous country with substantial manufacturing, precious minerals, and agricultural production. There is substantial inter-provincial commerce and growing international trade and financial transactions with nearby island nations. Until recently, Westeros was a military dictatorship and the country was wracked with internal conflicts and a war with a northern neighbor. While Westeros has been

311. See generally *Westeros*, A WIKI OF ICE AND FIRE <http://awoiaf.westeros.org/index.php/Westeros> [https://perma.cc/BW4A-ND4A].

restored to stable civilian democratic rule, seven families continue to dominate the economy.

Westeros has no tradition of competition law, but wishes to consider the adoption of a modern system of competition law and enforcement. The government embarks on a multi-year study of competition systems. It established a blue ribbon commission of ministers, private sector representatives, domestic experts, and international advisors to make recommendations for a competition law statute for adoption by the legislature. The commission holds hearings and receives comments and testimony from individuals, businesses, trade associations, lawyers, economists, and professors that it posts on its web site. Its draft report and recommendations are circulated among key ministers and staff and is eventually posted again for public comment. Additional revisions are made in response to these comments and the package of bills as recommended is introduced in the legislature for adoption.

The proposal establishes a series of absolute offenses that include traditional hard-core cartel offenses, as well as resale price maintenance. The law also provides for a series of relative offenses that include other vertical agreements, abuse of dominance, price discrimination, and mergers and acquisitions. There is no mandatory pre-merger notification for mergers and acquisitions, but the Competition Authority is given the power to challenge transactions if there is a "substantial lessening of competition." Much of the language and structure of the Competition Authority draws upon the competition laws of the European Union and its Member States because of the historical ties the EU enjoys with Westeros and the blue ribbon commission's conclusion that EU style competition best fits Westeros's needs.

The competition bill does not contain any single purpose or value to be applied in the interpretation and enforcement of the new Act. The preamble to the new Competition Act does contain broad language that the purpose of the bill is to "protect consumers and consumer choice, promote efficiency, prevent the abuse of dominance, and prevent the exercise of undue economic power."

The proposal establishes a new Westeros Competition Authority (WCA) that does not handle consumer protection matters. The WCA has authority to bring civil proceedings before a newly created Competition Tribunal against individuals and undertakings violating the new competition law. The head of the WCA is appointed jointly by the President and the Central Bank and confirmed by the Parliament for a five-year term that can be renewed once. The head of authority can be removed only for "cause" or "malfeasance in office."

The WCA's budget is substantial and allows it to hire approximately thirty-five lawyers, economists, and investigators in addition to support staff to begin its work. The penalties are administrative fines for undertakings up to 10% of annual turnover, and individuals fines up to 100,000 Westeros silver stags. The WCA may also seek injunctive relief to halt the alleged illegal conduct.

The WCA brings all proceedings before the new Competition Tribunal composed of three lawyers and two economists appointed by the President, Parliament, and the Central Bank. Appeals from the Competition Tribunal are made to the Westeros Supreme Court. Private parties may bring cases for single damages (with a loser pays principle) before the Competition Tribunal. There are no provisions for class actions or collective actions.

While the original blue ribbon commission's work attracted little general public attention, the competition bill becomes more of a cause célèbre. Competition policy becomes an issue in both local and national parliamentary elections. Trade associations, labor unions, corporations, consumer groups, and other ad hoc coalitions testify, lobby, publish white papers, debate in the media, and publish scholarly analyses of the proposed Competition Act. There are minor amendments to the Competition Act that eventually passes more than four years after the government first began to study the issue.

The WCA begins its work once the head of agency is selected and confirmed six months later.<sup>312</sup> She hires her staff over the course of the next six months and begins to hold workshops around the country to explain the new law to bar association groups, labor unions, University law departments, trade associations, and other business and civic groups. The WCA builds a dual language website and publishes a variety of plain language guides for citizens and businesses to better understand the Competition Act. The WCA also begins work on horizontal merger guidelines. The WCA further establishes small regional offices in Oldtown and Lannisport, the two largest cities outside the capital, to assist with competition advocacy and case investigations.

It takes almost eighteen months for the WCA to bring its first enforcement proceedings. The WCA's first case is a straightforward resale price maintenance case involving retail pharmaceutical products. The case receives extensive publicity in the business and general press because of the wide range of products and medicines involved. The Competition Tribunal finds liability based on the written

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312. The Westeros Competition Authority more or so less follows the game plan set forth in William Kovacic & Marianela Lopez-Galdos, *Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes*, 79 L. & CONTEMP. PROB. 85, 122 (2016).

contracts between the pharmaceutical companies and the drugstores which pre-date the adoption of the Competition Act, but continued in effect up to the filing of the case. Over the objection of the WCA, the Tribunal imposed a relatively small administrative fine of 50,000 silver stags on each of the pharmaceutical companies despite their extensive turn over in Westeros. Neither party appealed to the Supreme Court.

The second case involved a merger challenge to the combination of two regional supermarket chains in the southern most province of Dorne that would have established a firm with over 75% of the market for retail groceries and even higher market share for the retail sale of certain spices, fruits, and wines from the Dornish region. This unconsummated transaction was abandoned by the parties once the WCA challenged the acquisition. The WCA published a statement outlining the publicly available evidence it would have used to show a substantial lessening of competition.

The third of the initial wave of enforcement actions involved a dominant energy provider who refused to interconnect with competitors. Both the WCA and the respondent extensively cited cases from the United States and the European Union as precedent for the Competition Tribunal to apply in this case of first instance in Westeros. Ultimately, the Competition Tribunal held that it lacked jurisdiction and that the matter must be resolved by the sectoral energy regulator. As a result, the Tribunal also dismissed private damage claims by competitors that were also pending before the Tribunal.

The WCA also began activities in competition advocacy matters. It submitted comments and testimony on two bills before Parliament that would have negative consequences on competition in the retail and manufacturing sectors. It also submitted comments to the transportation sectoral regulator regarding the entry of Uber, Lyft, and local ride sharing services and their procompetitive potential if properly regulated to protect consumers. The WCA also began participating in international organizations such as the International Competition Network, the United Nations Conference on Trade and Development, and the Organization for Economic Cooperation and Development and contacted Bravos, a key regional trading partner, about the possibility of negotiating an antitrust cooperation agreement.

Throughout the year, the head of the WCA and senior staff held press conferences, issued press releases, spoke at industry and academic events, and published articles about the enforcement and other actions of the WCA in various business magazines and general circulation newspapers. The WCA's performance in its initial years was debated extensively in legal journals, newsletters, and at

conferences organized by the bar associations and new competition law centers established at the University of the Vale and Highgarden Tech. These and other Universities began to increase courses in the competition law area and the University at Winterfell has begun to explore creating a master's program in competition and consumer protection.

Changes in Westeros politics eventually produced a new free market liberal President and Parliamentary majority. Oversight and budget committees reviewed the WCA's first two years and pressed the head of the WCA for her priorities for the coming years. While refusing to discuss pending matters, the head of authority indicated that she favored focusing on hard-core cartel cases and more closely monitoring mergers and acquisitions, particularly between companies affiliated with the major families of Westeros who continued to consolidate their holdings and increase the interconnections between their business empires.

A new round of competition amendments are prepared by the President and the various Ministries with the input of the WCA. As a result, maximum resale price maintenance was removed from the list of absolute offenses, a new leniency procedure is instituted to assist in the anti-cartel campaign, and a new provision is added barring interlocking directorates under certain circumstances. Provisions to add criminal penalties and class actions were discussed, but not included in the package of amendment ultimately passed by the Parliament. Thus, the feedback cycle begins anew with consideration and adoption of external values undertaken by the more democratic institutions and the faithful implementation of those values by the more technocratic institutions in a fair and transparent manner.

## V. CONCLUSION

Democracy is fundamentally a set of norms and institutions. Competition fits into the fabric of democracy by promoting a plurality of actors and voices in the market and enforcing rules enacted by democratic institutions in an expert, fair, and nondiscriminatory way. The political branches create competition rules, remedies, procedures, and institutions through open debate in accordance with the values and procedures of each society. Public competition agencies enforce these laws bound by norms and rules of administrative law and judicial review. Courts review agency actions to ensure fidelity to the established statutes and procedures and provide avenues for participation by those affected most by the decisions. At the same time, courts defer to the expertise of agencies if the agencies have acted reasonably and provided due process of law. Private rights of action allow the people most affected by the alleged harms to take matters into their own hands to obtain compensation, both after the

government has challenged wrongdoing and when the public bodies choose not to act. Class or collective actions allow for compensation of private rights when damages are small or inertia otherwise prevents individual plaintiffs from bringing individual cases. These developments are then analyzed, debated, and advocated in civil society to influence the law and the enforcement priorities going forward. In so doing, the law ensures that both private and public power is not abused, recognizing the promise and the limits of competition law and democratic market economies.