ANTITRUST AND PUBLIC CHOICE

Maxwell Stearns and Todd Zywicki[1]

Antitrust law, as embodied in the Sherman antitrust law and the Federal Trade Commission Act, is conventionally considered to be an area where the public interest theory of legislation and regulation is thought to hold sway. Examining the legislative history of the Sherman Act, for example, Robert Bork concluded that the purpose of the Sherman Act was the maximization of consumer welfare, while also noting that in practice antitrust policy often failed to accomplish that goal.[2] Today the Sherman Act is often touted as a paradigmatic example of a public interest law aimed at breaking up large corporations for the benefit of consumers.

Subsequent scholars, however, challenged Bork's interpretation of the historical record. This chapter reviews several of those contributions. First, the chapter considers several studies of economic and legal history in the period preceding the passage of the Sherman Act. The first by Boudreaux, DiLorenzo, and Parker, looks at the state law antitrust laws that preceded and provided the model for the Sherman Act. Contrary to accepted wisdom that antitrust laws were passed to protect consumers from anticompetitive price-gouging by large corporations, Boudreaux, et al., find that in the period preceding the enactment of these laws agriculture prices were falling, not rising, and conclude that the motivation of these laws was to protect local farmers from competition from more efficient producers. Gary Libecap similarly shows that the origins of the meat packing act, historically credited to the impact of famous book *The Jungle*, was actually found in similar protectionist motivations and that meat safety and antitrust law were tied together legislatively. Libecap shows that the allegations about unsafe meat production were highly overstated, lending further support to the private interest hypothesis. Thomas DiLorenzo also reviews the historical roots of the Sherman Act together with its legislative

[2] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

history and finds further support for the private interest hypothesis. Finally, Thomas Hazlett reviews the legislative history of the Sherman Act and comes to conclusions contrary to Bork's interpretation—Hazlett finds little evidence that Senator Sherman or any other member of Congress was concerned about consumer welfare, as evidenced by their enthusiasm for high tariffs on imported goods during this period. He concludes that, like tariff policy, they were concerned primarily with protecting politically-influential businesses, not consumers.

The second part of this chapter turns to public choice analysis of antitrust enforcement. It opens with a classic article by economists William Baumol and Janusz Ordover, which notes that although antitrust law can be used as a vehicle to improve economic efficiency and promote competition, the same factors that provide that potential also give rise to a potential for rent-seeking by those out-competed in the marketplace to stifle competition by claiming that their market losses were the result of unfair competition. The next article, by Coate, Higgins, and McChesney, examines the bureaucratic and political factors that condition antitrust enforcement policies. They find that political factors are significant in the decision of the Federal Trade Commission to challenge a proposed merger. In particular, they find that the FTC is more likely to challenge a high-profile merger that receives a lot of media coverage and is also more likely to challenge a merger when the company being acquired (and thus likely to suffer job losses) is in the home district of a politician with oversight responsibility over the FTC. In "Antitrust Pork Barrel," Faith, Leavens, and Tollison conclude that cases against companies located in committee members' jurisdictions are more likely to be dismissed than matters involving firms located in other jurisdictions. Shughart and Tollison's article summarizes this and other research.

The final section of this chapter turns to antitrust exemptions and immunities, focusing specifically on the "state action" exception to the antitrust laws associated with the Supreme Court's decision in *Parker v. Brown*. Under this theory, in certain circumstances a state government can enact a regulation with an anti-competitive effect that will be protected from scrutiny under the antitrust laws. As the readings in this section indicate, however, this theory of state action is premised in the public interest model of government that prevailed during the New Deal era. As our understanding of the dynamics by which regulation is produced has changed the public interest regulatory theory that underlies the state action doctrine have come to be seen as untenable. The contributions in this section review the public choice theory challenges to state action and the possible implications for reform of the doctrine.

<u>The Origin of the Sherman Act</u>
George J. Stigler[3]

The Sherman Act was potentially applicable to all interstate commerce, which had not yet swallowed all commerce, as the Knight decision was to show. Who were its beneficiaries and its victims?

Economic theory tells us, as it told Adam Smith, that output is at a maximum under competition, so it would appear that most people would be beneficiaries of a rule commanding competition. It would be difficult to conjure up any redistributions of income consequent on the effective enforcement of a competitive rule that would systematically run against any important part of the economy in 1890.

The obvious losers from an antitrust policy would be the present (1890) and prospective possessors of monopoly power. This is a select group: for example, it surely does not include the business community or manufacturing at large. The average business is not capable of achieving effective cartelization or monopoly, simply because the small relative size of an efficient enterprise and the absence of entry barriers make such goals unattainable. Hence, the average business is not among the prospective losers of an antitrust policy.

In order to identify the most likely losers, we have gone to the list of industries that were highly concentrated in 1899. There is a measure of paradox in identifying as victims of antitrust policy those industries which often became highly concentrated after the passage of the act, but at least those industries were capable of (possibly temporarily) high concentration, and with foresight could fear a vigorously enforced Sherman Act. That list of industries is provided by G.W. Nutter's well-known dissertation, *The Extent of Enterprise Monopoly in the United States.*

The actual and potential monopolists would be the opposition on self-interest grounds to the passage of the Sherman Act. The small business sector would be the set of possible

[3] George J. Stigler, *The Origin of the Sherman Act*, 14 J. LEGAL STUD. 1, 4 (1985)

beneficiaries of the Act: an anti-big business statute would possibly hamper the growth of large enterprises whose greater efficiency threatened the small business sector in many industries. This small business support clearly led to the passage of the Robinson-Patman Act in 1936, and there is evidence of the political effectiveness of this group in earlier times. The Capper-Volstead Act of 1922 exempted agricultural cooperatives from the antitrust laws. The Clayton Act displayed a concern with predatory competition which probably reflects the same opposition to big business. It is easy to believe that the concerns of small business were already present in 1890, although actual inroads of large enterprises on small business were still in an early stage.

I have sought to identify this small business constituency by elimination. The agricultural sector could not have seen any threat to the small farm enterprise from big business, nor could the large handicraft occupations (carpenters, plumbers, and so forth). In addition I exclude other areas with large-scale enterprises: railroads, public utilities, and employees in mining and manufacturing industries whose establishments had more than one hundred employees in 1890, on the grounds that these areas were already big business.

If one compares these two groups with a possible self-interest in the defeat or passage of the Sherman Act – would-be monopolists and small business, respectively – they prove to be highly and inversely related. The correlation across states in the two groups, each measured as a function of the state's nonagricultural labor force, is - .86. Accordingly I am unable to distinguish between the two interpretations. . .

I possess two bodies of evidence on the support for the Sherman Act. Neither source is powerful, and they do not even have the decency to agree strongly with each other.

The first is the attitudes of the individual states toward antitrust policy. Well before 1890 some states had passed antitrust laws, and in some cases also had constitutional prohibitions on monopolies. . . Five states, all southern, passed laws before 1880. A full dozen (chiefly in the North) passed laws in 1889, and three more in both 1890 and 1891. Thereafter the intense movement subsided.

The second evidence is the vote in Congress. The house vote was 242 for, none against, the passage of the Act; the Senate vote was 52 for and one against. These votes are hardly eloquent on the distribution of support for the law, but I have sought to deduce some information from the following ground.

I interpret an abstention as an expression of less support for, or even opposition to, a legislative act. This approach. . . provides a second measure of the variation across states in the support for the Sherman Act.

Consider the pattern of state antitrust laws passed before 1890. . . Here the evidence suggests that potential monopolists' opposition to the Act, or small business support for the Act, was operative in the manner predicted by the self-interest theory.

My second source, the analysis of the pattern of abstentions from votes. . . I find that the percentage of a state's congressional delegation who vote (affirmatively) for the act is higher, the lower the fraction of the state's nonagricultural labor force in "monopolizable" industries but that the relationship has no statistical significance. This second, and more conjectural, test neither supports nor contradicts the evidence of the state antitrust laws.

Antitrust Before the Sherman Act

Donald J. Boudreaux, Thomas J. DiLorenzo, and Steven Parker.[4]

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[4] Boudreaux, Donald J., et. al. *Antitrust Before the Sherman Act, in* THE CAUSES AND CONSEQUENCES OF ANTITRUST, 255 (Fred S. McChesney and William F. Shughart II eds., 1995).

Economists and legal scholars have studied the effects of antitrust policy for decades, but only recently have the origins of antitrust received much scholarly attention. In an early analysis, Robert Bork claimed to have found evidence in the *Congressional Record* that the "legislative intent" of Congress in passing the Sherman Act was consumer protection. Hazlett, however, disputes Bork's interpretation, as do others.

Stigler was among the first economists to reexamine "the problem of why the United States introduced an affirmative competition policy." He tested an agrarian-interest hypothesis-that "the Republicans passed the Sherman Act to head off the agrarian ... movements" for price controls and other interventions-against a self-interest hypothesis that small businesses wanted a law to protect them from their larger, more efficient rivals. Stigler found little, if any, empirical support for either hypothesis…

The public interest interpretation of the origins of antitrust- that the law was passed as a benevolent response by Congress to a form of market failure-is still by far the predominant view among economists and legal scholars. There are, however, reasons to be skeptical of this view. This essay reexamines the genuine roots of antitrust, the state· level antitrust laws that were enacted several years before the Sherman Act. In the mid·1880s, strong political movements emerged at the stale level of government in favor of "anti-monopoly" legislation that eventually took the form of antitrust statutes.

The Sherman Act was not enacted in a Washington, D.C., political vacuum. It emerged from the same economic and political forces that gave rise to state antitrust legislation. It is particularly relevant that in 1890 state legislatures still directly elected U.S. Senators and that the Sherman Act was introduced in the Senate rather than the House.

The second section of this essay compares the public-interest and special-interest hypotheses, and then examines these hypotheses in light of the economic and political forces at work during the emergence of state antitrust legislation in the late nineteenth century, particularly in 1889. We focus on one primarily agricultural state, Missouri, which we believe to be representative of the states that enacted antitrust legislation during this period. Most states that enacted antitrust statutes in 1889 were located in or near the Mississippi valley. Agrarian interests were particularly active in pressing for antitrust legislation in Missouri. Our third section further develops the special-interest hypothesis; our fourth tests the hypothesis with cross-sectional data. Our final section contains a summary and conclusions.

Missouri Agriculture in the Late Nineteenth Century: Monopoly or Competition?

If the standard consumer-welfare-enhancing interpretation of antitrust legislation explains Missouri's experience with such laws, then the following trends should be evident in the economic data on Missouri's agricultural sector for the 1870s and '80s: (1) the real price of farm outputs should have risen (or not fallen); (2) the volume of farm outputs should have fallen (or not increased); and/or (3) the real price of farm inputs should have risen.

However, if the real prices of farm outputs and inputs fell-and if the volume of outputs rose-the protests against supposed monopolization are inconsistent with what actually happened in Missouri's agricultural economy. Indeed, if real prices fell and outputs rose, the cries against monopolization are more plausibly interpreted as rent-seeking attempts of less efficient producers to protect their markets from the increasing competition of more efficient producers.

Agricultural Price Data: Inputs and Outputs

During the 1880s, cattle was Missouri's single largest agricultural output, in 1889 accounting for nearly one quarter of all agricultural output in the state. Hog production and wheat production followed, accounting for more than 20 and 13 percent, respectively, of Missouri's gross agricultural product. Cattle, hogs, and wheat together accounted for almost 60 percent of Missouri's total agricultural production in 1889…

CATTLE

Although a simple comparison of, say, the 1879 per-head value of Missouri cattle with the 1889 value shows a slight increase, a different and more significant picture emerges from the trend of cattle values from the mid-1880s to the end of the decade. Compared to its peak in 1884, the per-head value of cattle in Missouri in 1889 was 28.8 percent lower (and was to fall even further by 1890). Looked at another way, the average value of cattle per head for the years 1887- 1889 was 18.8 percent lower than the average value per head for the years 1882- 1884. This decline in cattle values-which affected all the major cattle-producing states-was accomplished by a steady increase during me 1880s of the quantity of cattle entering into gross national product. Measured in pounds of live weight, cattle supply during the 1880s increased by about 50 percent for the United States as a whole, while the price per hundred weight received by American cattlemen fell from an average of $5.59 in 1880 to $3.86 in 1890-a 31 percent decrease.

Not surprisingly, this increased supply and reduced price of cattle resulted in lower prices of beef (and beef by-products) for final consumers. According to American economic historian Mary Yeager, the average price of beef tenderloins in the United States fell by nearly 38 percent between 1883 and 1889.

HOGS

As with cattle, the market value of hogs in Missouri peaked in the mid-1880s. The 1889 value of a Missouri-raised hog was approximately 19 percent lower than it had been six years earlier. The average value of hogs in the state for the 1887-1889 period was more than 15 percent lower than it was in 1882-1884. The nationwide output of hogs and hog products increased during the 1880s, while the price per hundred weight of hogs fell precipitously-from $6.07 in 1880 to $3.60 in 1890-a decrease of more than 40 percent…

Political Motivations

Close study of late nineteenth-century politics in Missouri suggests that agrarians were the major special interest behind state antitrust legislation. What, then, did the agrarians in Missouri have to gain from the passage of an antitrust statute? Agrarians and local merchants in Missouri (and elsewhere) correctly perceived that larger producers were responsible for the downward pressures on the prices of their outputs. tBecause economies of scale caused a decrease in the optimal number of producers of any particular commodity, the economy *looked* as if it were becoming more "monopolized," if "monopoly" is defined purely in terms of market structure and not in terms of the intensity of rivalry. As such, in their attempts to protect their local markets from the lower-priced and/or higher-quality goods being shipped to towns and country-sides on the railroads from the increasingly centralized production locations, politically organized agrarians complained of the evils of "monopoly." But the term monopoly, as used by the agrarians, referred only to the larger and more efficient firms which were driving small farmers and merchants out of their traditional lines of work and business. They equated "monopoly" with bigness, even if "bigger" firms meant greater economic efficiency and lower prices for consumers.

There is evidence that farmers did indeed view large-scale enterprise as a competitive threat and sought antitrust laws to protect them from competition. The Farmers Alliance was the most powerful political coalition in Missouri in the years preceding the enactment of the 1889 antitrust law. Farmers carried so much political clout that nearly all members of the state legislature identified themselves as "farmer-lawyers," "farmer-bankers," "farmer-teachers," “farmer-druggists," and so on, to signify their identification with the farm lobby, even if they had never set foot on a farm ….

One reason Missouri's farmers wanted an antitrust law was that many of them were being underpriced by larger, more efficient farms. Farmers repeatedly sought legislation "to obtain higher prices for all that the farmer produces," For example. at an 1889 meeting of the National Farmers Alliance in St. Louis. a declaration was issued that urged "care for the widows and orphans"; and called for legislation to "suppress ... all unhealthy rivalry.”

Farmers were bitter about low and falling agricultural prices, and blamed the trusts for the decline in their economic position. They complained of "our depressed condition," because of the fact that "the price of the farmers' grain is below the cost of production." As historian David March wrote: Just as the low price of raw cotton spurred the expansion of the Southern Alliance, so low grain prices in the late 1880s caused thousands of farmers in the wheat belt to join the National Farmers Alliance.

To the extent that agricultural prices were falling, the notion that the Missouri antitrust law enhanced consumer welfare is suspect. Missouri farmers were an appropriate special-interest group to launch an antitrust policy on grounds of self interest, if it could be expected that an "antitrust" statute would be enforced and interpreted as an *anti-bigness* statute to protect some producers from the competition of larger and more-efficient rivals….

A Test of the Self-Interest Hypothesis

[T]wenty-four states passed some form of antitrust legislation between 1867 and 1893. Twelve of these states passed laws in 1889 and six more enacted legislation in 1890-1891. Given the speed of this process, it is reasonable to assume that these laws were passed within the same political climate, as described earlier. It was also the same political climate in which the 1890 Sherman Act was passed.

The Model

Because the vote on the Sherman Act was nearly unanimous, it is difficult if not impossible, to test the self- interest hypothesis at the congressional level in a way that could capture the interest-group dynamics. State antitrust laws, by contrast, provide fertile ground for such testing. Following Stigler's (198.5) method, we assume that states' antitrust acts are similar. We seek to predict whether a state will have an antitrust statute or not…on the basis of the political-interest variables identified above. The tests were also run with a dependent variable…that excluded Texas, Georgia, Tennessee, and Arkansas, which passed antitrust laws prior to 1877. These states are omitted to account for the possibility that a different political climate existed before the 1880s.

A series of logit multiple regression models was estimated. These regressions model the dependent variable (whether the state passed an antitrust statute) as a function of the (1) concentration of agricultural interests within a state, (2) concentration of businesses, and (3) rate of business failures. U.S. Census data were used.

Statistical Results

...[A] positive and statistically significant relationship exists between the dependent variable…and the number of farms per capita, the number of cows, and the variables measuring business failures. These variables are significant at conventional levels. The per capita number of businesses and of butchers are not significant. The model was also estimated with the regressors entered logarithmically, with results (not presented here) qualitatively the same…In the logarithmic regression, however, it is the number of farms and number of butchers (but not cows per acre) that are statistically significant.

…[A]ltering the model by excluding slates which passed antitrust laws prior to 1877, provides further support for the special-interest hypothesis. Qualitatively, the results are similar to those for all states, but the size and significance of the coefficients are greater. (The variable measuring the number of businesses per capita also becomes significant, although its sign is the opposite of that predicted) Apparently, the basic model works better to explain political behavior circa 1890. Most important, the relative abundance in the economy of farms, and of cattle in particular, is an important predictor of which states passed antitrust laws after 1877.

Conclusion

The political and economic roots of antitrust lie at the state level of government. Numerous states passed antitrust laws before the 1890 Sherman Act, which was initiated in the U.S. Senate (whose members, at that time, were directly elected by state legislatures).

The political impetus for some kind of antitrust law came primarily from the farm lobbies of midwestern agricultural states such as Missouri. Rural cattlemen and butchers were especially eager for statutes that would thwart competition from the newly centralized meat-processing facilities in Chicago. The evidence on price and output in these industries, moreover, does not support any claim that these industries suffered from a monopoly problem in the late nineteenth century, if "monopoly" is understood conventionally as an organization of industry that restricts output and raises prices. As discussed in this chapter's second section, these industries were highly competitive because of relatively free entry and rapid technological advances such as refrigeration .

It is an interesting fact that, unlike economists, historians studying the period discussed here have had little difficulty perceiving the politics behind state antitrust laws. Perhaps economists have remained unpersuaded because empirical evidence of antitrust's special-interest nature has been meager. But the statistical tests reported in the previous section provide cross-sectional evidence supporting the special-interest interpretation of the origins of antitrust. The passage of state antitrust laws is found to be influenced by the presence of agricultural interests, consistent with the analysis discussed in our third section. Cattlemen who were disadvantaged by the more efficient, centralized butchering processes, developed in Chicago in the 1870s and thereafter were significant political forces agitating for protectionist antitrust laws.

The Rise of the Chicago Packers and the Origins of Meat Inspection and Antitrust
Gary D. Libecap[5]

The Meat Inspection Act of 1891 and the Sherman Act of 1890 are closely tied. This link makes clearer Congress' intent in enacting the legislation. Both laws were products of economic conditions after 1880 and reflected, in part, widespread concern about the market power of Chicago meat packers. The concerns of local slaughterhouses, which were being displaced by new, low-cost refrigerated beef, and of farmers, who sold livestock to the large Chicago packers, were echoed elsewhere by other small businesses and farmers, who feared for their livelihood during a time of structural change in the economy.

I. INTRODUCTION

In the few years between 1887 and 1891,the legislative basis was established for major intervention by the federal government into the American economy: The Interstate Commerce Act of 1887, the Sherman Act of 1890, and the Meat Inspection Act of 1891. With these laws the federal government became directly involved in the regulation of railroad rates, antitrust enforcement, and the inspection and certification of food quality for consumers. Representing a significant break from what had previously been considered an appropriate role for the federal government, this legislation provided a new and permanent mandate for government regulation in the market economy.

Despite the importance of these laws, the link between the economic and political environment in the United States in the late nineteenth century on the one hand, and the legislative histories of the laws onthe other, has not been thoroughly explored. As a result, the motives of Congress for enacting these laws remain both unclear and controversial. Consider meat inspection and antitrust. Although most attention in the literature is focused on the 1906 Meat Inspection Act, made popular by the publication of Upton Sinclair's The Jungle, the initial legislation, the Meat Inspection Act of 1891, came fifteen years earlier, and it addressed the production and consumption of fresh beef. But as reported in this paper, there is no evidence of a major health crisis regarding the consumption of beef at the time. Something else appears to have been on the mind of Congress when it passed the legislation in 1891. The objectives of Congress in enacting the Sherman Act are even more controversial because of the prominence of the law. Debate revolves around whether the Sherman Act was designed to promote competition and consumer welfare or to limit competition and protect special interests.

This paper argues that to gain a better understanding of the origins of this important legislation and its early economic effects, the laws must be placed into the context of the extraordinary changes taking place in the American economy in the late nineteenth century. The linkages among the laws help to identify the underlying political and economic forces behind the legislation.

Three broad characteristics of the economy must be kept in mind in analyzing this period: First, the post-Civil War period was a time of general deflation. Between 1864 and 1900 the

[5] 30 ECONOMIC INQUIRY 242 (1992).

consumer price index fell by 47 percent (U.S. Department of Commerce [1975, 211]). In general, prices for farm products followed the overall pattern, but prices for cattle fell in real terms after the mid-1880s. Fluctuations in farm prices also appear to have coincided with periods of agrarian unrest. Second, as described by Higgs [1971] and Chandler [1977], the period after 1880 was a time of major structural change in the economy. The economy was becoming more industrial, and biased technological change, economics of scale in production, distribution, and marketing, as well as the lowering of transportation costs were fundamentally altering production methods and products. This affected the competitive positions of many firms, creating winners and losers. Emerging large firms expanded from local to national and international markets, and existing small firms found their local markets threatened by new competitors. Concentration levels in many industries rose, although as indicated by Nutter and Einhorn [1969], timeseries data on concentration for documenting this are limited. Those firms adversely affected by technological change had incentives to appeal to the federal and state governments to mold and control the effects of new technology in ways similar to that described in a broad context by Mokyr. Large firms became very visible and were obvious targets for those who were disadvantaged and sought redress through the federal government.

Third, by the late nineteenth century, the federal government had begun to displace state and local governments as the focus of interest group lobbying. The rapid integration of the national economy, as well as the growth of the federal government in the post-Civil War period, meant that only the federal government had the requisite jurisdiction and size to broadly influence economic events.

This paper examines the origins of the first federal food quality guarantees in the Meat Inspection Act of 1891 and of the first federal antitrust provisions in the Sherman Act of 1890. Both laws were products of the changing economic and political environment in the country, which brought new demands on Congress for intervention into the economy. The origins of the laws were closely linked by a common concern about the Chicago packers, the Beef trust. The Chicago packers and their new product, refrigerated (dressed) beef, were an integral part of the demand for government inspection of meat. Additionally, although certainly other trusts or combinations were targeted in congressional debate over antitrust, the Beef trust played a more prominent role in the events leading to the enactment of the Sherman Act than has been recognized in the literature.

In brief, my arguments are as follows: The rise of the Chicago packers, following the introduction of refrigeration around 1880, fundamentally altered both demand and supply conditions in the meat-packing industry. Small, local slaughterhouses, which previously had characterized the industry, were displaced rapidly in most markets because they could not compete with the new, low-cost substitute from Chicago. To counter, local slaughterhouses charged that the Chicago packers used diseased cattle and that dressed beef was unwholesome. This disease issue damaged export markets for cattle and beef products and may also have threatened the growth of domestic demand for dressed beef. One remedy, urged especially by midwestern cattle raisers, was federal meat inspection to promote demand. But meat inspection alone was not enough in the view of midwestern farmers, who not only raised grains but were the country's major producers of cattle.

Even though the popularity of refrigerated dressed beef supported an increase in the derived demand for cattle, cattle raisers were wary of the feared market power of the Chicago packers. They believed that the Chicago packers were responsible for the severe fall in cattle prices after 1885. Promoting demand through meat inspection would be of little benefit if the

Chicago packers colluded to hold down cattle prices. Accordingly, state and federal antitrust legislation was demanded as a solution to this problem. This relationship between meat inspection and antitrust legislation provides new insight into the economy of the late nineteenth century and the intent of Congress in enacting the laws.

III. THE UNEVEN ECONOMIC BENEFITS OF THE INTRODUCTION OF NEW TECHNOLOGY

Impact on Small Slaughterhouses

According to census data from the U.S. Department of the Interior [1904, 318] and the U.S. Department of Commerce and Labor [1913, 442] slaughtering and meat packing was either the first or second most valuable U.S. industry from 1880 through 1910. Prior to the introduction of refrigeration, the industry was characterized by small wholesale slaughterhouses and packing plants, located near or in urban areas. They slaughtered both local livestock and those shipped from the Midwest. As shown by the U.S. Department of the Interior [1904, 318] in the census, the number of slaughter and packing firms in the industry was large, with 872 in 1880 for example. Local slaughterhouses often had retail outlets, but there were also numerous specialized small retail butchers. Both local wholesale and retail markets were competitive with ease of entry and relatively large numbers of firms in each community. For example, according to the leading industry trade journal, National Provisioner, [13 February 1892, 11; 10 June 1893, 13] in 1892 there were 1,950 wholesale and retail butchers in Chicago alone and some 80,000 nationwide.

Refrigeration allowed for the centralized, large-scale slaughtering of cattle in Chicago or other leading western packing centers and the shipment of carcasses to eastern markets and export. Centralized slaughtering offered economies that the older, live cattle trade could not match. As noted by the Bureau of Animal Industry [1885, 233] and Skaggs [1986, 94], carcasses could be shipped from Chicago at one third the cost of transporting live cattle. In addition Clemen [1923, 195] reported that there were weight losses of 10 to 15 percent and injuries from crowding in shipping live cattle that could be avoided with dressed beef. Besides lower transportation costs, there were economies of scale in slaughtering, packing, and canning, and in the use of by-products

The Chicago packers. Swift, Armour, Morris, and Hammond, who were not involved in the live cattle trade, pioneered the use of refrigeration and centralized slaughter. To distribute the dressed-beef product, they invested in refrigerator railroad cars and wholesale branch units. By 1917, according to the Federal Trade Commission [1919a, 153, 260], the major packers had 1,165 branch houses for the storage and distribution of dressed beef and 15,454 refrigerator cars, 93 percent of the U.S. total. As early as 1884, 84 percent of the cattle slaughtered in Chicago were by the 'big four packers. Additionally, the Chicago packers established slaughter and packing plants in other midwestern cities, such as Omaha, East St. Louis, Kansas City, South St. Paul, and Ft. Worth.

Table I illustrates the change in production size that followed the introduction of refrigeration. The table shows the average capital of the slaughter and packing plants in the western packing states of Illinois (Chicago), Kansas (Kansas City), and Nebraska (Omaha) and those in the eastern consuming areas which had been supplied by local slaughterhouses. As late as 1880, the average capital of slaughterhouses in the western states was not dramatically larger than in the east. By 1890, however, the firm size differences in the two regions are clear. According to census data from the U.S. Department of the Interior [1883, 474; 1904, 389], in 1880, Illinois, Kansas, and Nebraska accounted for 35 percent of the total value of U.S. meat production of $303/562/413; by 1900, those states accounted for 55 percent of total production valued at $790,252,586.

TABLE I

Average Capital in Slaughter and Packing Plants

State	1880	1890	1900	1910
Illinois	$84,056	$503,792	$1,112,957	$1,202,000
Kansas	119,243	615,892	1,177,584	1,081,971
Nebraska	27,558	724,214	1.377,075	1,078,556
Maryland	96,111	58,417	18,884	70,519
Massachusetts	37,720	299,489	514,276	165,394
New Jersey	57,256	36,513	38,741	97,405
New York	35,597	69,643	139,610	145,109
Rhode Island	66,444	75,310	108,550	28,238

Source: Calculated from the U.S. Department of the Interior [1883, 474; 1904, 389] and VS. Department of Commerce and Labor [1913, 350-351].

With these production, distribution, and transportation advantages, refrigerated dressed beef could be provided to retail markets at lower cost than could be supplied by local slaughterhouses. Moreover, as the technology was improved by the late 1880s, dressed and local beef were perfect substitutes. Retail prices for beef for consumers fell. For example as reported by Yeager [1981, 70], between 1883 and 1889 the average price of beef tenderloins fell by 39 percent from $.275 per pound to $.1675. In addition with refrigerated storage, beef could be held for consumption year-round. Beef consumption rose. Clemen [1923, 255] noted that per capita consumption of beef, which was 77.8 pounds during the period 1870-1879, rose by 12 percent to 87.2 pounds during he period 1880-1889. Although consumers clearly benefitted from the new technology, many high-cost, local slaughterhouses could not compete with the centralized Chicago packers. Given this, Chicago dressed beef began to displace the shipment and local slaughter of live cattle. Table II documents the relevant patterns.

TABLE II

The Growth of the Dressed Beef Trade

(in tons from Chicago)

	1880	1881	1882	1883	1884	ii5i
Live Cattle Shipments:	416/204	433,600	383,660	372,214	310,410	281,022

Dressed Beef Shipments:	30,705	43/774	65,775	149/640	184,993	231/634
Ratio of Dressed Beef to Live Cattle:	.07	.10	.17	,40	.60	.82

Source: Bureau of Animal Industry [1886, 278]

Impact on Cattle Raisers

As suppliers of the prime input for dressed beef, cattle raisers were also affected by the new technology. The lowering of production and distribution costs for beef and increases in demand for beef due to refrigeration raised the derived demand for cattle. Nominal cattle prices, which had declined from 1871 through 1879, rose to an average of $25.26 in 1884, their highest level since 1867, when data are first available through the U.S. Department of Agriculture [1937, 27]. This rise in value encouraged investment in cattle in what has been called the 1880-1885 'cattle boom' by historians of the livestock industry, such as Osgood [1929/ 85-89, 106-14] and Dale [1930, 93-97, 105-159]. With increased profit expectations from these investments, the total stock of cattle grew. Based on data from the U.S. Department of Agriculture [1937, 27], in 1875 there were 35,361,000 cattle in the U.S.; in 1885, 52,563,000, an increase of 49 percent; and by 1890, 60,014,000, 70 percent greater than in 1875 and 14 percent more than in 1885.

There were three major cattle-producing regions: the corn belt, which accounted for 36 percent of the total stock of cattle in 1889; Texas and the southwest; and the western range states. Most mid-western farmers marketed at least some cattle, which were fed corn before slaughter in Chicago or shipped to eastern urban intense concern in the Midwest as cattle. Arizona, which accounted for 19 percent of the stock of cattle in1889, produced grass-fed cattle, often considered inferior in size and quality to mid-western cattle.

The Chicago packers demanded large numbers of Texas cattle for the production of dressed and canned beef, and they were shipped north and often fed corn in the Midwest prior to slaughter.

With the increase in the stock, the number of cattle marketed rose rapidly. In 1880 the total number of cattle received in Chicago was 1,382,477. By 1884, the number received was up by 31 percent to 1,817,697, and by 1890, 3,484,280 were marketed in Chicago, 152 percent more than in 1880 and 92 percent more than in 1884. Cattle prices, however, began to fall in 1885, ending the cattle boom. Nominal U.S. cattle prices declined gradually from their 884 peak of $25.26 per head to $16.49 in 1891, a decline of 35 percent, and real prices fell by 24 percent between 1885 and 1890 from $28.71 to $20.67. This was the longest and most severe fall in cattle prices since the end of the Civil War. Although prices for other agricultural commodities, such as hogs and grains, also fell in the late nineteenth century, they had temporary recoveries during the 1884-1891 period. The cattle price decline and ways to counter it became central issues in the efforts by cattle raisers to obtain inspection legislation and antitrust laws.

Midwestern farmers argued that the consolidation of cattle markets in Chicago with the rise of centralized slaughter and the market power of the big four packers were responsible for the decline in cattle prices. Although Chicago had been an important shipping center since the end of the Civil War, handling 29 percent of all cattle marketed in the U.S. in 1865, most cattle were shipped elsewhere for slaughter by small slaughterhouses. This changed with refrigeration, so that in 1883 Chicago received 40 percent of the cattle marketed in the U.S./ and approximately half of those were slaughtered there. Additionally, most of the cattle received in the Kansas City stockyards, the second argest in the U.S. in 1883, were shipped on to Chicago for slaughter. In these markets the packers were the major purchasers. By 1888, the Chicago packers purchased over 50 percent of the cattle in Chicago and Kansas City. They also gradually obtained shares in thirty of the country's major stockyards where cattle were sold. The size and concentration of the packers in these markets made collusion a credible explanation for the fall in cattle prices to many cattle raisers.

By available measures of concentration, the Chicago packers had large market shares, contributing to the notion that there existed a combine or Beef trust. In 1890, Armour, Swift, Morris, and Hammond slaughtered 89 percent of the cattle slaughtered in Chicago. Nutter and Einhom [1969, 131-137, 140-142] provide a list of highly concentrated industries from 1895-1904 and the market shares of the leading firms. For meat packing, the four largest firms had over 50 percent of the market. Moreover, the ratios constructed by Nutter and Einhorn of value-added in highly concentrated sectors of the industry to the industry total value-added show that meat packing was one of the more concentrated industries at that time. Further, the Chicago packers attempted

Various pooling arrangements from 1886 Allerton and Veeder Pools) to divide input and output markets and to set prices for dressed beef and other products. The pools had formal structures and the number of bargaining parties was relatively small, but any impact on cattle became magnified after 1880 by rivalry prices appears to have been short term, among the cattle-producing regions, their The pooling agreements were instabilities to the Chicago packers, and the impact with new entry, first by Cudahy and later of disease on livestock and meat export by Schwarzschild and Sulzberger, and un-authorized expanded production by the member parties. Nevertheless, the political reaction to declining cattle prices after1884 took two directions. One was to limit the alleged market power of the packers through antitrust laws, and the other was to promote the demand for cattle and meat in domestic and export markets through inspection legislation.

IV. THE DISEASE ISSUE, MEAT INSPECTION, AND THE SHERMAN ACT

The association between the Chicago packers and diseased cattle was made by local slaughterhouses, who through the -Butchers' National Protective Association, organized in 1886, charged that the Chicago packers slaughtered cattle with Texas fever, pleuropneumonia, and other diseases. They asserted that the use of these low-cost, diseased cattle allowed the Chicago packers to underprice local slaughterhouses, which used only healthy animals. The earlier opposition of the Chicago packers to restrictions on northern shipment of Texas cattle was given as additional evidence of the desire of the Chicago packers to have access to low-cost drugs, and low-quality supplies. Moreover, the Butchers' National Protective Association argued that consumers could not distinguish between wholesome and unwholesome beef and, hence, were at risk.

The use of derogatory claims about the quality of a competitor’s products was a common competitive strategy in many industries in the late nineteenth and early twentieth centuries. As production processes became more complex with new products and new technology and as consumers increasingly were separated from the production of the goods they consumed, a potential information problem rose that was exploited, generally be established producers against new, less well-understood products. For instance, discriminatory taxes or outright bans were placed on oleomargarine and compound lard, as well as certain kinds of baking powdered, milk, whiskey, coffee, candy, and drugs, which were claimed by competitors to be adulterated. In most cases, no health hazard was ever identified.

State Meat Inspection and State Antitrust

The political battle over the call for government inspection of cattle began at the state level, where the laws were designed to serve three purposes – to provide for inspection of livestock prior to slaughter, to limit the shipment of dressed beef, and to reduce the market power of the packers through state antitrust laws. In February 1889, Kansas Governor Lyman Humphrey sent a resolution to the governors of cattle-producing states, mostly from the Midwest, calling for joint legislation and a convention of legislators. The convention was to address meat inspection and the effects of the Beef trust on cattle prices in Chicago and Kansas City. In response, delegates from state legislatures were sent to St. Louis in March 1889 from Indiana, Illinois, Minnesota, Iowa, Missouri, Kansas, Nebraska, Colorado, and Texas.

The convention called on Congress to construct a deep-water port in Texas to compete with Chicago for livestock shipments and to enact an antitrust bill to prohibit contracts among the Chicago packers that "have united and combined for the purpose of controlling the market price of the cattle, pork, grain and other products of the country...." In addition, the convention presented to each state sample antitrust legislation and a local meat inspection bill for adoption. Local inspection of livestock was to occur just prior to slaughter, and its goal was "...to render it impossible for Chicago dressed meat to be sold anywhere except in Chicago. The resultant effect of such measure would be...that butchers all over the country would resume business, and, competition being restored, the value of cattle would naturally rise."

Twenty states subsequently considered the local inspection legislation in 1889, and four adopted the law. Local inspection as a solution to the disease issue, however, was short-lived as efforts quickly turned to the federal government. An examination of the journals of state legislatures in Colorado, Delaware, Illinois, Indiana, Minnesota, Missouri, Nebraska, New York, and Ohio from 1885 to 1892 shows that local inspection bills appeared only in the 1889 legislative sessions. The U.S. Supreme Court ruled against such legislation in *Minnesota v. Barber* (136 U.S. 313) in May 1890 because of the impact on interstate commerce.

While the states were considering local meat inspection legislation, they also were adopting antitrust prohibitions. In the 1889 St. Louis convention, agricultural interests, organized through groups like the Grange and Farmers' Alliance, were major proponents of state antitrust legislation. In 1889. twelve states (*nine from the Midwest*) passed antitrust laws for the first time. Seager and Gulick [1929] report that by 1890 twenty-seven states had antitrust restrictions, either through statute or constitutional provisions.

In their analysis of the Missouri state antitrust law, passed in 1889, Boudreaux and DiLorenzo [1990] find that farmers were the major special interest behind the legislation. According to Boudreaux and DiLorenzo, Missouri farmers blamed the Chicago packers for the fall in cattle prices. Cattle accounted for one-quarter of Missouri's agricultural output, and cattle raising was the largest single contributor to agricultural gross product in the state. The Chicago packers naturally opposed the local inspection laws. The packers, through the Chicago Board of Trade, were quick to respond. As reported in the *Cincinnati Price Current* on January 31, 1889, a Resolution was passed by the Board of Trade claiming that local inspection legislation would “irretrievably embarrass and ruin the dressed beef industry…” In testimony before the Vest Committee of the Senate, George Beck, a Detroit butcher, claimed that a major packer, Hammond, offered: "If you men will take down those cards [No Chicago Dressed Meat Sold Here] and if you will withdraw the petition you are now circulating through the state to go to the legislature for local cattle inspection, I will agree to keep out of committee on Detroit myself with my dressed beef and to keep Mr. Armour and Mr. Swift out.” The Chicago Board of Trade charged that state inspection was a sham, designed primarily to prohibit the interstate shipment of dressed beef, and that it had the potential to discredit American meat products in foreign markets.

The protests of the Chicago packers were supported by the Bureau of Animal Industry. Between 1884, when the agency was established, and 1891, the bureau joined in refuting claims that dressed beef was unwholesome. For example, in 1885 it disputed articles in the press that diseased animals were slaughtered for food:

The facts seem to warrant the assertion made that the meat supply of Chicago is practically entirely wholesome. Self-interest leads the packers and the canners to use every available means for preventing even the shadow of suspicion resting upon the goods they have to sell; hence they become most efficient aids to the health department.” While local inspection and antitrust legislation was being considered at the state level, more comprehensive efforts for meat inspection and antitrust were occurring at the federal level.

Federal Government Meat Inspection

The position of Midwestern farmers and politicians on the issues of cattle diseases, the role of the packers in the decline in cattle prices, and federal inspection and antitrust legislation are reflected in the testimony and reports of the Senate Select Committee on the Transportation and Sale of Meat Products (the Vest Committee). The committee was approved by the Senate on May 14, 1888, following a resolution by Senator George Vest of Missouri, calling for an investigation as to “whether there exists or has existed any combination of any kind by reason of which the price of beef and beef cattle have been so controlled or affected as to diminish prices paid the prouder…” Five senators from cattle states four of them from the Midwest, made up the Vest Committee, including Vest of Missouri, Preston Plumb of Kansas, Shelby Cullom and, later, Charles Farwell of Illinois, Charles Manderson of Nebraska, and Richard Coke of Texas.

Beginning in November 1888, and for the next thirteen months, the Vest Committee held hearing sin St. Louis, Washing D.C., Chicago, Des Moines, Kansas City, and New York City. The committee elected to begin the hearings in St. Louis to coincide with the meetings of the International Cattle Range Association and the Butchers’’ National Protective Association. During the hearings, the committee listened to 111 individuals, including 57 cattle raisers and sales commission agents, 19 slaughterhouse owners and butchers, and S.B. Armour of Kansas City and P.D. Armour of Chicago.

As reported in the published testimony from the U.S. Senate [1889,13, 81, 95,137, 177, 180, 185, 189, 268], it was repeatedly charged that the packers colluded in purchasing cattle, which accounted for the fall in cattle prices, and that dressed and canned beef shipped from Chicago was from diseased animals and therefore was less healthy than locally slaughtered beef.

The report of the Vest Committee to the Senate on May 1, 1890 addressed the same two issues that had been raised earlier in the states: meat inspection and antitrust. In U.S. Senate

[1890a], the committee recommended five pieces of legislation—two dealt with federal meat inspection and three dealt with various monopoly issues:

SR78, which asked the President to obtain repeal of quarantine regulations against American cattle in Great Britain; S3717, which amended the Interstate Commerce Act to prevent discrimination by railroads in shipping rates for live cattle and dressed beef; S3718, which prohibited monopoly in transporting cattle to foreign countries; S3719, which provided for inspection of live cattle and beef products for export; and Sl, which was the Sherman Antitrust bill, as passed by the Senate on April 8, 1890. Senate Resolution 78 was agreed to by the Senate on June 11,1890. The bills S3717, S3718, and S3719 also passed the Senate the same day, and were sent to the House.

During Senate debate on his committee's report. Vest argued that British cattle raisers wanted to block the importation of American cattle and that the cattle and beef inspection bill, S3719, should be passed to remove the pretense that diseased U.S. cattle were exported. In the House, S3719 was incorporated into S4155, another bill for the inspection of Livestock and meat products, and was passed by both houses of Congress on March 2, 1891.

The Meat Inspection Act of 1891 required that the Secretary of Agriculture inspect and certify all cattle to be exported or to be slaughtered for either interstate or export trade. Section 3 of the law also authorized inspection of hogs and sheep prior to slaughter and interstate shipment and discretionary examination of carcasses and meat products. The Bureau of Animal Industry was given the mandate for inspection, and all slaughterhouses that desired to produce for interstate trade had to apply for government inspection.

With this law, the federal government, for the first time, was authorized to inspect and certify food quality for American consumers.

The Sherman Act

In its report to the Senate, the Vest Committee repeated the claim made in March 1889 at the convention of cattle-raising states in St. Louis that inspection of cattle and meat products alone was insufficient to address the problems faced by farmers. If the demand for cattle were to rise with greater exports and domestic demand for beef, the gains could be captured by the Beef trust unless federal antitrust legislation also was enacted. Accordingly, the Vest committee included the Sherman bill, Sl, in its report. Indeed, the Beef trust played an especially prominent role in congressional debate over federal antitrust between 1888 and 1890.

The Chicago packers, along with the Standard Oil, sugar, whiskey, tobacco, cotton bagging, and oil trusts, were the frequently cited examples of the evils presented by the great enterprises of the day. It is no coincidence that studies by Atack [1985] and Bums [1983] show that meat packing, whiskey, and tobacco were among the industries evidencing the greatest structural changes due to scale economies, biased technological change and lower transportation costs by 1900. The Beef trust in particular, appears to have attracted the attention of those lobbying Congress for antitrust legislation. Although there was reference in Congress to "a great clamor" about trusts, in fact most of the lobbying came from farm groups, especially from the Midwest, where grains and cattle were the major products. For example, of the fifty-nine petitions regarding trusts sent to the 51st Congress prior to the enactment of the Sherman Act, all but two came from Illinois, Indiana, Iowa, Kansas, Kentucky, and Tennessee, and were presented by groups, such as the Farmers Union, Farmers Alliance, Farmers Mutual Benefit Association, and Patrons of Animal Husbandry.

This lobbying appears to have had the desired impact on members of Congress from the Midwest. At least thirteen of the sixteen antitrust bills introduced in the House, 50th Congress, 1st session, and all eighteen of the bills introduced in the House, 51st Congress, 1st session, were sponsored by Midwestern or southern representatives. In the Senate, three antitrust bills were introduced in the 50th and 51st Congresses, also by Midwestern or southern Senators—Cullom of Illinois (50th Congress), Sherman of Ohio, Reagan of Texas, and George of Mississippi (51st Congress).

The Beef trust also played a prominent role in congressional hearings on the impact of trusts in the economy. Between 1888 and 1890, there were three major congressional hearings on trusts: two were conducted by the House Committee on Manufacturing during 1888 on the sugar, whiskey and cotton bagging trusts and reported in U.S. House of Representatives [1888; 1889], and one was by the Senate Vest Committee on the Beef trust, reported in U.S. Senate [1890a].35 In the House Committee on Manufacturing hearings, testimony was taken regarding combinations among sugar refiners, efforts of oil producers to reduce oil production in Pennsylvania and New York fields, and alleged agreements among distillers and cotton bag producers. These investigations were reported early in congressional deliberations on antitrust (30 July1888 and 2 March 1889), and provided no recommended legislation. The Vest Committee report, however, was introduced two months prior to the Sherman Act and, hence, was timely enough to have had some influence on the debate. Further, as noted above, unlike the other two committee reports, the Vest Committee provided a draft of the Sherman Act as a remedy for the problems it uncovered in the meat-packing industry. In general, the members of the Vest committee were influential proponents of antitrust legislation, especially Senator Cullom, who introduced his own antitrust bill, S3510 in 1888, and Senators Vest and Coke, who were on the Judiciary Committee, which drafted the final version of the Sherman Act.

Finally, on May 1, 1890 Representative Richard Bland of Missouri directly targeted the Beef trust in an amendment to the Sherman Act that became a point of contention between the House and Senate.

The amendment at least delayed congressional approval from April 8, 1890, when it passed the Senate, to June 20, 1890, when the same bill finally passed the House. Disputes over the amendment had the potential to prevent final adoption of the law. Letwin [1965, 90] noted that other antitrust bills, including earlier versions of the Sherman Act, were introduced into Congress after 1888 only to languish in various committees.

Antitrust was a new and vague area for Congress, and in the May 1, 1890 House debate on the Senate-passed bill there was especial concern as to just what contracts, trusts, or combinations would be prohibited as restraints of trade under the general wording of the proposed law. Since congressional antitrust authority was based upon the commerce clause of the constitution, there was the question of when commercial activity fell under the jurisdiction of the federal government. Moreover, there were related issues of how federal and state antitrust statutes would blend. Indeed, Representative David Culbertson of Texas argued that answers to these questions would not be known until the courts had interpreted the provisions of the proposed act. He speculated, however, that resale price maintenance contracts to drive out competitors and purchase contracts to fix prices at some specified (low) level in interstate commerce would be illegal under the new law. Contracts by the Beef trust with retail butchers and with agents purchasing cattle to fix prices across state lines, along with similar actions taken by Standard Oil, were presented as specific examples of likely violations of the law. But the concerns about the coverage of the law, and particularly about how the Chicago packers would be affected, continued to be raised. Representative David Henderson of Iowa pointed to the Vest committee report and asked if the bill would prohibit the actions of the Beef trust "to reduce the price of Western cattle from one-third to one-half...."

Finally, after some discussion of various antitrust issues concerning the roles of state laws, congressional jurisdiction over corporations, and the contribution of the tariff to trusts. Representative Bland introduced his amendment: "Every contract or agreement entered into for the purpose of preventing competition in the sale or purchase of any commodity transported from one State or Territory to be sold in another, or so contracted to be sold, or for the transportation of persons or property from one State or Territory into another, shall be deemed unlawful within the meaning of this act...." The Bland amendment went beyond the Sherman bill in a number of ways. It prohibited the ‘intent’ to restrict competition, a provision which was not explicit in the Sherman bill. Further, it targeted contracts to prevent competition in the sale or purchase of goods that had been or would be transported across state lines, as well as contracts directly affecting interstate commerce. Accordingly, contracts to restrict trade within a state, but involving goods that would be or had been shipped in interstate commerce would fall under the provisions of the new federal law. Bland wanted to make clear Congress’s intent to limit the market power of the Chicago packers in both the purchase of cattle and in the sale of meat and not to leave the issue to the discretion of the courts: "We know the contract with the Big Four, so called, covers every State in this Union. They compel butchers in every town of any population. East or West, to purchase of them or else they establish by the side of those butchers other shops for the sale of beef and, by underselling for a short time, they compel the home seller to submit to their dictation...! want my friends to join with me to make this definite and certain, for there is no trust in this country that today is robbing the farmers of the great West and Northwest of more millions of their hard-earned money than this so-called Big Four beef trust of Chicago."

After discussion, the House passed the amended Sherman Act and sent it back to the Senate. The Senate Judiciary Committee, however, believed that the Bland amendment went too far—beyond the "constitutional power of Congress. The mere fact that an article has once been the subject of transportation from one state to another does not authorize the Congress to treat forever after the dealing in that article as interstate commerce," and it re- wrote the amendment to focus solely on contracts directly affecting competition in interstate transport. A House-Senate conference committee meeting was held to resolve the dispute, and it forwarded the Senate version to the House. Senator Vest and Representative Bland, who were members of the conference committee, supported the original amendment and did not sign the committee report.

The House overwhelmingly rejected the Senate amendment, with Bland arguing that his original wording was necessary so that the question of which con- tracts were in restraint of trade “is no longer a judicial question at all. It is simply a question of fact." Again Bland wanted to insure Congress's ability to police the actions of the Chicago packers "in relation to the purchase of beef, cattle, and hogs that are shipped from the Northwest and Western States to Chicago." He did not want the matter referred to the courts: "We do not know what the court will hold in regard to contracts to prevent fair com- petition in interstate commerce or in restraint of trade/'41 As debate continued, prospects for enacting any antitrust legislation appeared to dim, and the House voted on June 12,1890,106 to 98, with 123 abstaining, to remove the Bland amendment. Thorelli [1955, 209] argues that the close vote reflected strong support in the House for the Bland amendment. A final House-Senate conference committee struck all amendments from the bill, and the House approved the original Sherman Act on June 20, 1890, 242 to 0 with 85 abstentions. The bill was signed by President Harrison on July 2, 1890.

V. CONCLUDING REMARKS

Coinciding with congressional enactment of the country's first law for federal inspection and guarantees of food quality, the Meat Inspection Act of 1891, was the passage of the first federal antitrust law, the Sherman Act of 1890. The timing of this legislation was no coincidence. Both laws were the product of fundamental changes taking place in the American economy in the late nineteenth century. The rise of the Chicago packers, or Beef trust, exemplified the irreversible effects of new technology; economies of scale in production, marketing, and shipment; and falling transportation costs, which were bringing about the rise of the modem industrial economy. The concerns of local Slaughterhouses, which were being displaced by low-cost dressed beef, and of cattle raisers, who sold their products to the large Chicago packers were echoed across the economy by small businesses, farmers, and other sellers of primary and intermediate products, who feared for their competitive positions during a time of structural change in the economy.

Indeed, congressional debate and hearings over the Sherman Act emphasized the protection of small businesses and farmers, who were being 'crushed' by the new industrial combines. Senator James George of Mississippi, a leading proponent of antitrust, although a critic of the original Sherman Act, commented on the changes in the economy during the Senate debate: "It is a sad thought of the philanthropist that the present system of production and of exchange is having that tendency which is sure at some not very distant day to crush out all small men, all small capitalists, all small enterprises"

Meat inspection legislation was a consequence of these changing competitive conditions, and there is no evidence that a documented consumer information problem or a domestic health threat were the principal factors behind adopting of the 1891 law. Instead, the disease issue was stressed by local slaughterhouses in an effort to limit or redirect the economic effects of the introduction of refrigeration. Similarly, Midwestern farmers, who blamed the Beef trust for low cattle prices and who had other concerns about trusts and low agricultural prices, were the most active lobbyists for state and federal anti-trust legislation.

The paper argues that the meat-packing industry played a more prominent role in the enactment of the Sherman Act than has been previously recognized. At the state level, concerns regarding falling cattle prices and the perceived role of the Chicago packers in their decline led to the 1889 St. Louis convention, attended largely by delegates from Midwestern states, to consider local inspection and state antitrust laws. Twenty states considered local inspection laws, and four adopted them in 1889, but these laws were dismissed by the U.S. Supreme Court in *Minnesota v. Barber* in 1890. In 1889, twelve states adopted antitrust legislation, the greatest outpouring of such legislation for any year. At the federal level, nineteen antitrust bills were introduced into the 50th Congress and twenty-one into the 51st Congress. Midwestern and southern members of Congress were the major proponents, sponsoring sixteen bills in the 50th Congress and all twenty-one in the 51st Congress. The principal lobbyists for federal antitrust legislation came from Midwest farm groups. Of the three major congressional investigations into trusts between 1888 and 1890, only the Vest Committee report on the Beef trust in May 1890 suggested a specific legislative remedy. Finally, the Bland amendment, added in the House in May 1890 to strengthen the provisions of the Sherman Act, focused on the Beef trust, and it raised difficult jurisdiction and definition issues that were to persist in judicial interpretation of the Sherman Act.

The outcome of this judicial review, of course, was the concern of Representative Bland, Senator Vest, and others in their efforts to amend the Sherman Act. Indeed, the Supreme Court in *United States v. E.C. Knight Co.* 156 U.S. 1 (1895) took a narrow view of the commerce clause, separating contracts affecting the 'flow of commerce' from those involving the manufacture of goods within a state. This was exactly the interpretation feared by Bland. Nevertheless, the intensity of concern about the market power of the Chicago packers abated temporarily after 1890. Cattle prices rose after 1891, peaking in 1900, and charges of anti-competitive behavior in cattle markets disappeared. When prices began to decline in 1901, however, monopsony charges again were raised. As outlined by Letwin [1965, 240-44], Therein [1955, 585], and Yeager [1981,181-95, 219-32], antitrust investigations into the actions of the Chicago packers by the Justice Department and the Bureau of Corporations began in 1902. They led to the 1912 dissolution of the National Packing Company by Armour, Swift, and Morris, as well as the FTC investigation and 1920 judicial consent decree which required divestiture of ownership in stockyards, terminal railways, and cold storage facilities.

The analysis of antitrust and meat inspection legislation indicates how closely tied were major legislative efforts in the late nineteenth century to expand the federal government's role in the economy.

This record reaffirms the argument made by North [1978, 970-78] that a more thorough understanding of government regulations requires identification of the winners and losers in economic events, such as the introduction of new technology, and their efforts to construct institutions to mold those events to their benefit.

The Origins of Antitrust: An Interest-Group Perspective

Thomas J. DiLorenzo

[6]Major political agitation for 'antimonopoly' laws such as the Sherman Act was first led by farmers' organizations such as the Grangers and the Farmers' Alliance, who were among the most powerful political interests of the day. . . In seeking government regulation to hinder the development of large-scale farming, farm organizations were apparently seeking protection from pressures of competition, despite the rhetoric about 'land monopolies'. That farmers simultaneously complained about *falling* farm prices belied the notion that the farm industry was becoming monopolized. . .

Farmers also hoped to secure wealth transfers through the regulation of railroad rates, having accused the railroads of monopolistic pricing. But the view that the railroad industry prior to 1887 (when the ICC was created) was becoming monopolized is inaccurate, for the fall in railroad rates during that time is striking. The decline in railroad rates nationwide was even greater than the fall in the general price level from 1865 to 1900, so that farmers received substantial benefits from the competitiveness of that industry. In seeking governmental price regulation they were apparently trying to secure additional benefits beyond what a competitive railroad market would give them. For instance, the railroads gave rebates to their large-volume customers, as most competitive businesses must do. It is likely that smaller-scale farmers who did not receive rebates sought regulation to prohibit their competitors from receiving them.

In lobbying for antitrust legislation the farmers' organizations claimed that trusts and combinations were monopolies so that the things they bought (from the trusts) were becoming increasingly expensive relative to the prices of farm products. Thus the trusts were allegedly

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[6] Thomas J. DiLorenzo, *The Origins of Antitrust: An Interest-Group Perspective*, 5 INTERNATIONAL REVIEW OF LAW AND ECONOMICS, 73, 75 (1985)

'exploiting' the farm population. But the facts do not support this interpretation. From 1865 to 1900 agricultural terms of trade improved from the farmers' perspective. While there was a declining general price level during much of this period, farm prices fell less than all other prices, producing real gains for farmers. Farm prices were, however, quite volatile which may explain why farmers became so politically active. A strong case can be made that such volatility explains why farm lobbyists have been among the most active (and effective) throughout history. Also, the quality of many manufactured goods was improving because of technological changes in the manufacturing sector so that the agricultural terms of trade were even better for farmers. Thus, it is difficult to fathom that the farm lobby was attempting to avoid rather than create monopoly rents by lobbying for 'antimonopoly' or antitrust legislation.

Many other groups soon became part of the antitrust coalition--small business organizations, academics (although not economists), and especially 'progressive' journalists'. The *Congressional Record* of the 51st Congress is replete with examples of congressmen voicing complaints of small businesses (especially agricultural businesses) in their districts who were allegedly being subjected to 'unfair' competition by the trusts. These groups all claimed that the 'giant monopolies' were creating a 'dangerous concentration of wealth' among the capitalists of the day. Even though the conspicuous wealth of entrepreneurs such as Rockefeller, Mellon and Morgan added fuel to this charge, it does not appear that this was generally true. . . Although there was no general redistribution of wealth from labor to capital owners, dynamic, competitive markets always alter the distribution of income in ways that some do not like. There was no 'dangerous concentration of wealth' taking place, but many supporters of antitrust probably found their own incomes lower than they liked and sought to use the powers of the state to alter that situation.

Despite the facts regarding income distribution, it is relevant that perceptions are often more important than reality in politics. The news media and popular press of the 1880s successfully nurtured the notion that the wealth of a small handful of successful entrepreneurs (the 'robber barons') was coming at the expense of farmers, laborers and consumers, and was therefore the 'legitimate' domain of governmentally-imposed redistribution. In short, they denied that business activity and freemarket exchange involving the 'trusts' was mutually advantageous, but was rather a zero-sum game, at best. As one historian concluded:

> Trusts, it was said, threatened liberty, because they corrupted civil servants and bribed legislators; they enjoyed privileges such as protection by tariffs; they drove out competitors by lowering prices, victimized consumers by raising prices, defrauded investors by watering stocks, and somehow or other abused everyone. The kind of remedy that the public desired was also clear enough: it wanted a law to destroy the power of the trusts.

This statement of the standard account of the 'trust problem' is quite revealing. If trusts bribed legislators and were protected by tariffs, then the source of the problem is government itself and the solution is less government regulation and the enforcement of laws against bribery and fraud, not bans on industrial combinations. Further, lowering prices and closing unprofitable plants is perfectly consistent with competitive behavior and any laws prohibiting these actions must hinder, not help competition. Moreover, the statement that trusts simultaneously lowered prices and raised prices, victimizing both competitors and consumers, is nonsensical. In sum, one may object to lower prices and plant closings on arbitrary distributional grounds: They may temporarily hurt less efficient businesses and necessitate the movement of capital and labor--changes individuals may not wish to undertake. But to criticize these phenomena on the grounds that they are 'monopolistic' is misleading. Hayek noticed that the benefits of competitive markets

> . . . are the results of such changes, and will be maintained only if the changes are allowed to continue. But every change of this kind will hurt some organized interests; and the preservation of the market order will therefore depend on those interests not being able to prevent what they dislike. All the time it is thus the interest of most that some be placed under the necessity of doing something they dislike (such as changing their jobs or accepting a lower income), and this general interest will be satisfied only if the principle is recognized that each has to submit to changes when circumstances. . . determine that he is the one who is placed under such a necessity.

Hayek pointed out another inherent difficulty in maintaining competitive markets in democratic societies: 'In a society in which . . . the majority has power to prohibit whatever it dislikes, it is most unlikely that it will allow competition to arise'.

There is no doubt that economic conditions were changing very rapidly in the latter part of the nineteenth century. Rapid expansion of the railroad and inland shipping industries greatly reduced the cost, both pecuniary and non-pecuniary, of transportation. Technological developments in the latter part of the century led to large-scale (and lower cost) production of steel, cement, and many other goods; communications technology rapidly expanded, especially with the use of the telegraph; and the capital markets became much more sophisticated. In addition, the nation underwent a rapid transition from a predominantly agrarian to an industrial society. In 1810 the ratio of farm to non-farm labor was approximately 4.0. This ratio fell to 1.6 by 1840 and by 1880 the labor force was about equally divided. It is also apparent that individuals and groups uncomfortable in an atmosphere of rapid change were becoming increasingly adept at using the regulatory powers of the stare to their own advantage, to slow or eliminate such change. It is in this atmosphere that the Sherman Antitrust Act was passed in 1890.

The Sherman Act was passed after 13 states had already instituted their own antitrust laws. The essential claim made by Senator John Sherman and his colleagues was that combinations or trusts tended to restrict output which drove up prices. . . If this is true, then one would expect to have observed restrictions of output in those industries that were allegedly being monopolized by the trusts and combinations. By contrast, if the trust movement was part of the evolutionary process of competitive markets responding to technological change, one would expect an expansion of trade or output. The data offer no support for the contention that in the 1880s trusts were restricting output and thereby increasing prices. From the *Congressional Record* of the 51st Congress a list of industries that were accused of being monopolized by the trusts was compiled. Those industries for which data were available . . . shows output growth from 1880 to 1900. The available data are incomplete, but one striking feature. . . is that of the 17 industries listed, there were increases in output not only from 1880 to 1890, but also to the turn of the century in all but two industries, matches and castor oil. These are hardly items that would cause a national furor, even if they were monopolized.

In addition, output in these industries generally expanded more rapidly than output in all other industries during the ten years preceding the Sherman Act. Data are available for some industries only in terms of nominal output, while measures of real output are available in others. In the nine industries for which nominal output data were available, output increased on average by 62 per cent compared to an increase in nominal GNP of 16 per cent during that time period--almost four times greater. Several of the industries expanded output by more than ten times the overall increase in nominal GNP. Some of the more rapidly expanding industries were cotton seed oil (151 per cent), leather goods (133 per cent), cordage and twine (166 per cent), and jute (57 per cent).

Real GNP increased by approximately 24 per cent from 1880 to 1890, while those allegedly monopolized industries for which some measure of real output is available grew on average by 175 per cent - seven times the rate of growth of the economy as a whole. Again, some of the industries grew more than ten times faster than real GNP. These included steel (258 per cent), zinc (156 per cent), coal (153 per cent), steel rails (142 per cent), petroleum (79 per cent) and sugar (75 per cent).

These trends continued to the turn of the century. Output expanded in each industry except castor oil, and, on average, output in these industries grew at a faster rate than the rest of the economy. Those industries for which nominal output data were available expanded by 99 per cent compared to a 43 per cent increase in nominal GNP, while the other industries increased real output by 76 per cent compared to a 46 per cent rise in real GNP from 1890 to 1900.

In sum, the data call into question the notion that those industries singled out by Senator Sherman and his colleagues were creating a 'rising tide of monopoly power', if one judges by Senator Sherman's own measuring rod of monopoly power, output restriction. These industries were expanding much faster than the economy as a whole, a phenomenon that has been overlooked by those who adhere to the standard account of the origins of antitrust. To my knowledge this fact has not been revealed previously: It is usually *assumed*, without evidence, that the trusts were restricting output.

It is possible that even though the trusts were actually expanding output, they were doing so less rapidly than if such combinations did not exist, thereby increasing prices and profits. The data, however, do not support this interpretation. Prices in these industries were generally falling, not rising, even when compared to the declining general price level. Price data on these items are very scattered and some are simply unavailable. But the data that are available indicate that falling prices accompanied the rapid output growth in these industries. For example, the average price of steel rails fell from $68 to $32 between 1880 and 1890, or by 53 per cent. The price of refined sugar fell by 22 per cent, from 9 cents per pound in 1880 to 7 cents in 1890. It fell further to 4.5 cents by 1900. The price of lead dropped by 12 per cent, from $5.04 per pound in 1880 to $4.41 in 1890. The price of zinc declined by 20 per cent, from $5.51 to $4.40 per pound from 1880 to 1890, and the price of bituminous coal remained steady at about $3.10 per pound, although it fell by 29 per cent, to $2.20 from 1890 to 1900. Although the consumer price index fell by 7 per cent from 1880 to 1890 this was proportionately less than all of these items except coal.

Perhaps the most widely-attacked trusts were those that existed in the sugar and petroleum industries. But there is evidence that the effect of these combinations or mergers was to reduce the prices of sugar and petroleum. Moreover, Congress clearly recognized this. . .

Thus the Congress acknowledged that combinations were actually responsible for improving the lot of the consumer by dropping prices 'immensely'. They objected, however, to the fact that less efficient (smaller) businessmen ('honest men') were driven out of business. The fact that these and other businessmen voted and contributed in other ways to political campaigns surely helps to explain this stance taken by the Republican-controlled Congress. At the time nearly every Congressional district had large numbers of small businesses (and farmers) so that one would have expected them to carry considerable political clout compared to the trusts which were far fewer in number and whose ownership was more dispersed. . . It was generally recognized that, despite the facts, the strong emotional opposition to the trusts fostered by journalists, politicians, and others meant that speaking in favor of them could mean political suicide.

In summary, the Sherman Act may possibly be viewed as special-interest legislation, the purpose of which was at least two-fold. First, to isolate certain groups, especially small businesses, from the rigors of competition. If the trusts were restricting output (or slowing its expansion) and raising prices, small businesses would not have objected, for they would have benefited from the (higher) price umbrella. This point is of considerable importance. It is widely acknowledged that small businesses have always initiated antitrust cases against their larger (and often more efficient) competitors . . . these actions typically protect small businesses from competition and inevitably lead to higher prices. If the larger businesses in these cases were colluding and raising industry prices, it stands to reason that smaller businesses would also benefit and would not have brought antitrust suits against them. The point is, just as small businesses have often benefited from the enforcement of the antitrust laws over the years (at the expense of larger businesses and consumers) they are likely to have been a major force behind the creation of the laws in the first place. By this interpretation their interest was not to prohibit monopoly from occurring but to protect themselves from competition. In short, they wanted an 'antimonopoly' law to reduce competitive pressures in their industries.

A second purpose of the Sherman Act was to satisfy voters who had become increasingly envious of the economic success earned by nineteenth-century entrepreneurs and who were upset over rapidly-changing relative prices and wages. As mentioned in the above quotation of Hayek, changing relative prices are often characteristic of a dynamic, competitive market economy. But groups whose relative wages and incomes fall (at least temporarily) often protest to the government by lobbying for protectionist measures of various sorts, including antitrust laws. It is not unusual for economic instability (i.e., deflation) caused largely by the government's monetary policies to be blamed on a small handful of private corporations.

One objection to this interpretation may be that even though the trusts were dropping prices, couldn't they have been engaging in predatory pricing? This is possible, but not probable. Studies of predatory pricing over the past several decades have found that it is not likely to be a profitable practice and that there is no evidence that Standard Oil, which was sued for predatory pricing in the famous 1911 decision, was actually engaged in any such practice . . . Moreover, with respect to the trusts of the late nineteenth century, it is inconceivable that they would have allowed prices to fall for more than an entire decade, as they did, to 'temporarily' undercut the competition. That would have been irrational.

These statements are not meant to imply that there was no monopoly power in American industry during the late nineteenth century. It appears that one function of the Sherman Act was to divert public attention away from a more certain source of monopoly power, the state. It is well known that the Interstate Commerce Commission, established three years before the Sherman Act in 1887, served as the mechanism for the legal cartelization of the railroad industry. Here, and in many other instances, it was government regulation itself that was the source of monopoly power. Tariffs imposed by Congress were probably the major source of restraints of trade in the late nineteenth century, but the Sherman Act made no provision for them or for any other form of government-sanctioned monopoly. Nor should one expect vote-maximizing politicians to have done so, for they are major beneficiaries of such legislative privileges. In bestowing them, they win votes and campaign contributions from the beneficiaries. The political costs, on the other hand, are rather hidden, for the average voter has little or no financial incentive to discover the true costs of protectionism. Moreover, even though the aggregate costs of protectionism may be large, they are relatively small to each individual voter.

In a particularly revealing statement Senator Sherman attacked the trusts during the Senate debates over his bill on the grounds that they

> . . . subverted the tariff system; they undermined the policy of government to protect. . . American industries by levying duties on imported goods.

This is certainly an odd statement by the man who has been called the champion of free enterprise. However, the evidence cited above is consistent, with the Senator's political fears. Increased output and reduced prices in these industries apparently dissipated the monopoly rents previously procured by protective tariffs. This worked against the objectives of some in the protected industries and of their legislative allies such as Senator Sherman. Further, just three months after the Sherman Act was passed Senator Sherman, as Chairman of the Senate Finance Committee, sponsored a bill popularly known as the 'Campaign Contributors' Tariff Bill'. As reported in the *New York Times* on 1 October 1890:

> The Campaign Contributors' Tariff Bill now goes to the president for his signature, which will speedily be affixed to it, and the favored manufacturers, many of whom.., proposed and made the [tariff] rates which affect their products, will begin to enjoy the profits of this legislation.

The *New York Times* further reported that 'the speech of Mr. Sherman on Monday [29 September 1890] should not be overlooked, for it was one of confession'. Apparently, Senator Sherman withdrew his speech from the *Congressional Record* for 'revision', but a *New York Times* reporter obtained an unabridged copy of the original. As reported in the *New York Times*:

> . . . we direct attention to those passages [of Sherman's speech] relating to combinations of protected manufacturers designed to take full advantage of high tariff duties by exacting from consumers prices fixed by agreement after competition has been surpressed . . . Mr. Sherman closed his speech with some words of warning and advice to the beneficiaries of the new tariff. He was earnest enough in his manner to indicate that he is not at all confident as to the outcome of the law. The great thing that stood in the way of the success of the bill, he said, was whether or not the manufacturers of this country would permit free competition in the American market. The danger was that the beneficiaries of the bill would combine and cheat the people out of the benefits of the law. They were now given reasonable and ample protection, and if they would resist the

> temptation attaching to great aggregations of capital to combine and advance prices, they might hope for a season of great prosperity . . . . He did hope, the Senator concluded, that the manufacturers would open the doors to fair competition and give its benefits to the people . . . . He hoped the manufacturers would agree to compete one with another and would refuse to take the high prices that are so easily obtained.

For Senator Sherman to say that a protective tariff would not harm consumers or would actually help them if only manufacturers could be trusted to refrain from raising prices is contradictory, to put it mildly. It led to a complete reversal of the views of the *New York Times* which had for years been one of the foremost proponents of antitrust legislation. After observing the behavior of Senator Sherman and his colleagues during the months following the passage of the Sherman Act the *New York Times* concluded:

> That so-called Anti-Trust law was passed to deceive the people and to clear the way for the enactment of this . . . law relating to the tariff. It was projected in order that the party organs might say to the opponents of tariff extortion and protected combinations, 'Behold! We have attacked the Trusts. The Republican party is the enemy of all such rings.' And now the author of it can only 'hope' that the rings will dissolve of their own accord.

These suspicions are certainly justified. Monopoly has long been associated with governmental entry restrictions such as tariffs, quotas, licenses, monopoly franchises, and grandfather clauses, hut this type of activity has been immune from antitrust law. It is not unlikely that the Sherman Act was passed to help draw public attention away from the actual process of monopolization in the economy, among the major beneficiaries of which have always been the legislators themselves. The Sherman Act won votes and campaign contributions from small businesses, while the tariff bill was supported by all manufacturers, large and small. Tollison and McCormick argue that the essential role of legislators is precisely this: to act as 'brokers' of legislation. By interfering with the competitive process the Congress became perhaps the chief interest group benefiting from the Sherman Act. Similar views were also voiced by many economists during that time, although they were almost completely ignored by the legislature.

The Legislative History of the Sherman Act Re-Examined

Thomas W. Hazlett

[7]. . . If Senator Sherman possessed any long lived commitment to the alleged efficiency goals of his Act, he kept them to himself. In a 382-page volume of his letters (sent between 1837 and 1891) to his renowned brother, General William Tecumseh Sherman, the subject of monopoly (or antitrust, cartels, pools, price-fixing, collusion, or industrial combinations) is raised not once. In *John Sherman* [1906], his biographer, Theodore E. Burton, spends just 12 of 429 pages on the trust question, all of it in reference to the Sherman Act. Most of this discussion concerns Sherman's legal and political views on the matter; what economic analysis there is

[7] Thomas W. Hazlett, *The Legislative History of the Sherman Act Re-Examined*, ECONOMIC INQUIRY, 263, 264 (April 1992)

involves Sherman's Senate speech on March 21, 1890 and one other item of interest: Sherman, writes Burton, "attacked the theory that such combinations reduced prices to the consumer by better methods of production. All experience showed, he said, that this saving of cost went to the pockets of the producer" (p. 360). Of course, the analysis is false: cost reductions lower output prices *and* (excepting the special case of perfectly elastic input supplies) raise profits.

This reveals that Sherman's statement that the law "will distinguish between lawful combinations in aid of production and unlawful combinations to prevent competition and in restraint of trade" (21 Cong. Rec. 2456), clarifies the issue a good deal less than Bork supposes: "Sherman could hardly have said more clearly that the law was to delegate to the courts the task of distinguishing between those agreements and combinations which increase efficiency and those that restrict output". An equally convincing interpretation would hold that Sherman was attacking even output-expanding combinations which, he claimed (erroneously) would not benefit consumers. To Senator Sherman, "combinations in aid of production" may have meant aid to small, beleaguered firms forming cartels as a defense against the gales of competition. Sherman's class of inoffensive combinations may have simply been limited to localized corporations or some other ad hoc categorization unrelated to criteria of economic efficiency.

The latter view is also supported by comments on the trusts in Sherman's autobiography to which are devoted but five pages of 1216, mostly consumed again by his March 21 speech, a printing of the final bill, and a scant legislative history. . .   Sherman's sentiments regarding the control of "one man" and the profits accumulated by trusts, concomitant with his rejection of cost-efficiencies being realized in the form of lower prices, belies a nonefficiency concern for the combination issue. This concern was ably articulated in his March 21 Senate speech, his major public address on the issue:

> If the concentrated powers of this combination are intrusted to a single man, it is a kingly prerogative inconsistent with our form of government, and should be subject to the strong resistance of the state and national authorities. If anything is wrong, this is wrong. 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 necessaries 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.

One interpretation of this passage is that Sherman is concerned with "noneconomic" (or nonefficiency) issues, such as the distribution of wealth and power. This is precisely the position Judge Learned Hand took, in fact, in Alcoa. Hand's interpretation is disputed by Bork, who focuses on Sherman's allusion to the state-like power of combinations and the "power to fix the price of any commodity." This, deduces Bork, is synonymous with "the power, in short, to injure consumers" (ibid.). Yet it is not clear. In that the senator was not of the "Chicago School," his attack on price-fixing may have been motivated by distributional, and not efficiency, issues. Moreover, as an eloquent politician, Sherman's reference to prices may involve little more than aplomb. While Bork sees the price-fixing concern as key and the "noneconomic" rhetoric as gratuitous, an alternative perspective could easily reverse the shadings-as Learned Hand plainly did.

It is at just this point that we should seek out some evidence to separate these competing interpretations of Sherman. Fortuitously, Sherman and the 51st Congress provide just such an issue to serve as a test: “The most important measure adopted during this Congress,” wrote Sherman in his autobiography, “was what was popularly known as the McKinley Tariff Law.” Passed on October 1, 1890, the tariff was “a matter of constant debate in both houses” between 1883 and 1890, as opposed to the monopoly law, which came and went with little discussion. Whatever cross-currents were evidenced in the analysis of the trust question, the tariff was then well understood as a restriction of output resulting in dead-weight losses. Most conveniently, the tariff appears on a neat continuum in our consumer welfare analysis. Compared to a free-market cartel which restricts output and still manages to sustain itself against potential competitors, a tariff, which enjoys state-enforcement of output restrictions, is bound to create a clearly more objectionable interference with “free and full competition.” Certainly, this was the prevailing, “orthodox” view; according to mainstream economists of the day, monopoly problems "would arise only if such groups or classes were permitted to appropriate the political powers of the state ... and create ... 'artificial' monopolies by tariff and other class legislation."

Contrary to the public interest hypothesis, not only was Senator John Sherman a Republican (high tariff) vote on Senate tax questions, he was one of the protectionist system's most vocal proponents. Sherman went to some lengths, in fact, to differentiate his views from the "least burden" (pro-efficiency) approach in public finance:

> On the one hand, the Democratic party believes in a tariff for revenue only, sometimes they say, with incidental protection, but what they mean is a tariff intended solely to raise money to carry on the operations of the government. On the other hand, the Republican party believes that we should so levy the duties on imported goods that they not only yield us an ample revenue but that they do more; that they would protect, foster, and diversify American industry. We think that this tax ought to be put at such a rate as will give to our people here a chance to produce the articles and pay a fair return for the investment made and for the labor expended at prices higher in this country than in any country in the world. That is the first rule, and I believe that the rule has been carried out, and I think liberally, and so as to secure increased production at home and a larger market.

Surely, any attempt to set this statement in a pro-consumer lexicon based upon Sherman's parting assurance that a tariff creates "increased production and a larger market" would be highly tenuous. In fact, Bork excuses Representative Taylor's (R-Ohio) anticonsumer position on such reasoning: "Even when defending the protective tariff ... Taylor did so on the ground that it created lower prices beneficial to consumers. Despite the fallacy of his argument, this demonstrates that Taylor, like most other legislators, was not willing to argue for a policy of preferring producers to consumers." Exactly correct: he was unwilling to argue for it; he was only willing to vote, lobby, and politic for it.

The senior senator from Ohio was, by all accounts, a polished political figure with staying power. As such, he was in the forefront of devising GOP strategy, often having to fight off zealous factions of the party who endangered long-term Republican success by seeking excessive industry protection. As big business became an issue of popular concern, "Senator Sherman thought and said frequently before 1889 that the trusts could only be reached through the revenue laws." Yet, radical Republican protectionists and particularly the formidable Senator

Nelson Aldridge (R-R.I.) would have nothing to do with a lowering of tariffs in "trust-dominated" industries.

The Democratic president, Grover Cleveland, had effectively welded the tariff and trust questions together in a famous 1887 speech, and during the Sherman Act debate populists had charged that "Tariffs are the mother of trusts." Hence, Senator Sherman's instant concern about conspiracies in restraint of trade *other* than those nurtured by the protective tariff was viewed as cynical. "At all events," wrote Tarbell of the Sherman Act, "the measure was passed ahead of the tariff bill. Thus, an answer was ready for the critics. As Senator Morgan said, 'The bill was a good preface to an argument upon the protective tariff."

> . . . Tariff rates had been raised substantially during the Civil War, but had not been pared postbellum. . .

. . . The goal of the 1890 tariff reform was to lower revenues - the U.S. federal budget in 1888-89 had run a $53 million, or 13.4 percent, surplus - and this, the Congressional leadership candidly proposed to accomplish via a perverse Laffer Curve effect. William McKinley, Sherman's Ohio colleague and Republican Speaker of the House, "accepted the principle. . . that the way to reduce revenue from customs is to make foreign goods which might compete with domestic products too dear to buy."

. . . Knowledge of the tariff's anticonsumer consequences was entirely common. The *New York Times*, for instance, made a near crusade out of highlighting the pro-monopoly impact of protectionism, and in tying the trust question to the tariff. "In January of 1888, one month after Cleveland's tariff message, the *Times* ran 20 editorials denouncing combinations. The majority of these articles showed how specific combinations were fostered by the high protective system.". This was a point incessantly made by Democrats both in the Congress and out. Gordon even cites an arresting passage from the Congressional Record (12 September, 1888, p. 8521), wherein Senator Hoar took issue with a Democratic senator (George from Mississippi) for limiting his political attacks only to trusts protected from competition by tariffs:

> Does it not occur to the Senator from Mississippi that it might be well to include some of these trusts. . . which, notably the Whisky, the Cotton-Seed and Cotton-Oil Trusts, the Anthracite Coal Trust, and the Standard Oil Trust are not protected by tariffs? Why does the Senator steer so carefully in his proposed legislation not to hit these great trusts ... ?

. . . Indeed, Senator Gray was again quick to offer an amendment to the tariff, one which presumably promoted consumer welfare. It read, in part:

> That the President may suspend the rate of duty on any imported article when, in his judgment, the production, manufacture, or sale of such articles is monopolized. . . by any trust or combination. (21 Cong. Rec. App. 291)

Gray was clearly at loggerheads with the GOP leadership; his tariff amendment received healthy Democratic support, but only two Republican votes in the House (21 Cong. Rec. App. 291).

Critics of the tariff were only too eager to relate the problem of protectionism to the redistribution away from consumers and the deadweight losses from reduced trade. One Democratic senator noted that, "For the want of cheaper raw material, in the years 1888 and 1889 one hundred and twenty manufacturers of woolen goods and dealers in goods went into bankruptcy and the establishments which did not fail are to be kept going by duties on woolen goods which for the most part are prohibitory of foreign importations and are an unspeakable grievance to the consumers" (21 Cong. Rec. 7701). Representative Charles Tracey of New York complained that tariffs limited domestic markets. . . by noting that "in my district, it is the manufacturers that are loudest in complaints of injury done by this too high tariff" (21 Cong. Rec. App. 292). . .

Robert Bork believes that evidence of the Sherman Act's single-minded concern for consumer welfare is to be gleaned from the public statements of the Senate Judiciary Committee which framed the Act. A more subtle reading of the disposition of these legislators vis-a-vis consumer welfare maximization would be to scrutinize their votes on the McKinley Tariff of 1890. We have seen that Senator Sherman was himself an outspoken backer of the measure. It is also interesting to note that every Republican member of the Judiciary Committee voted for the tariff (21 Cong. Rec. 9113*)*. The fact that each of the bill's important Senate backers registered an up-front anticonsumer vote brings the efficiency explanation of the Sherman Act into question.

A further gauge of protectionist sentiment can be constructed from the House of Representatives tariff vote. The state congressional delegation proportion which votes pro-McKinley Tariff is a proxy for that state's protectionist (anticonsumer) leanings. . .

The vote in the House of Representatives, where a substantial anti-Sherman sentiment was recorded, supports the view that the Sherman Act and the McKinley Tariff were seen by the legislators as fundamentally related. Of the 62 House Democrats to vote "No" on the Sherman Antitrust Act, none voted "Yes" on the McKinley Tariff. Conversely, of the 117 Republican congressmen to vote "Yes" on the Sherman Act, none voted "No" on the McKinley Tariff. . .

. . .among those congressmen who voted "Yes" or "No" on both bills (i.e., excluding those who abstained on either), 142 members voted identically on the bills, while only 17 crossed over (i.e., voted "Yes" on one and "No" on the other). The hypothesis that the votes on these laws were independent of each other can be dismissed at the 99.9 percent confidence level. Adding abstentions into the "No" column for both votes waters down the results (as would be anticipated from inclusion of data which can be interpreted as half-yes, half-no), but independence can still be rejected at the 99.9 percent confidence level. A similar pattern does not evidence itself in the Senate, where there was only one "NO" vote on Sherman, and a close party line vote on the tariff. (This distribution is without proconsumer implications. The proconsumer thesis would be suggested by a high correlation between "Yes" votes on Sherman and "No" votes on the tariff.) Still, the clear pattern exhibited by Republican members of the Senate and by both parties in the House suggests that those who voted for the Sherman Act were likely to abandon the consumer welfare cause on the tariff, while those who promoted consumer welfare by opposing the tariff were highly likely to oppose the Sherman Antitrust Act. This is direct electoral evidence against the proconsumer hypothesis.

<u>Use of Antitrust to Subvert Competition</u>
William J. Baumol and Janusz A. Ordover[8]

[8] 28(2) *J. L. & Econ.* 247 (1985).

There is a specter that haunts our antitrust institutions. Its threat is that, far from serving as the bulwark of competition, these institutions will become the most powerful instrument in the hands of those who wish to subvert it. More than that, it threatens to draw great quantities of re-sources into the struggle to prevent effective competition, thereby more than offsetting the contributions to economic efficiency promised by anti- trust activities. This is a specter that may well dwarf any other source of concern about the antitrust processes. We ignore it at our peril and would do well to take steps to exorcise it.

The problem is not an easy one. In a sense it is inherent in the very nature of the antitrust process. There is no doubt, for example, that mergers can sometimes inhibit or undermine competition and that predatory pricing can sometimes serve as an instrument of monopolization. But then, because of that, a merger that promises to introduce efficiencies that make it necessary for other firms in the industry to try harder is vulnerable to challenge by those rivals, who will claim that it is anticompetitive. Similarly, a firm that by virtue of superior efficiency or economies of scale or scope is able to offer prices low enough to make its competitors uncomfortable is all too likely to find itself accused of predation. Such attempts to use the law as an instrument for the subversion of competition do not confine themselves to private lawsuits. All too often the enterprise seeking to erect a protective umbrella about itself will be tempted to try to subvert the antitrust authorities, Congress, and even the president's office as partners in its purpose. One suspects that the costs in terms of the efficiency of the firm and the economy that is subject to this sort of attack are high. One knows that the costs in terms of the time of management, lawyers, economists, and others absorbed in the litigation process itself are enormous. And it is almost all economic waste.[9]

…

We repeat that the antitrust and regulatory institutions have shown themselves to be sources of substantial incentives and opportunities for such rent-seeking activity. Whenever a competitor becomes too successful or too efficient, whenever his competition threatens to become sufficiently effective to disturb the quiet and easy life his rival is leading, the latter will be tempted to sue on the grounds that the competition is "unfair." Every successful enterprise comes to expect almost as a routine phenomenon that it will sooner or later find itself the defendant in a multiplicity of cases. It is an enchanted topsy-turvy world in which vigorous competition is made to seem anticompetitive and in which "fair competition" comes to mean no competition at all.

The runners-up, the firms that despair of succeeding through superior efficiency or more attractive products, use different instruments in seeking protection from rivals. The antitrust laws are not always useful as means to handicap competition from abroad, but they are apparently a prime instrument for the creation of impediments to effective competition by American rivals. The reason the antitrust laws can be used in this way is clear. The borderline between measures that are legitimate competitive moves and those that are destructive instruments of monopolization is often difficult to define even in principle (witness, for example, the intricacies of the concept of predatory innovation). Moreover,

[9] *Id.* at 247-48.

whatever the criteria adopted, in practice they rarely lend themselves to clear-cut evidence and unambiguous conclusions. The runner-up firm then finds itself with the opportunity to claim that almost any successful program by a rival is "anticompetitive" and that it constitutes monopolization. Antitrust, whose objective is the preservation of competition, by its very nature lends itself to use as a means to undermine effective competition. This is not merely ironic. It is very dangerous for the workings of our economy.[10]

…

III. CASE EXAMPLES OF STRATEGIC USES OF ANTITRUST

The purpose of this section is to illustrate by means of a few actual cases the protectionist uses of antitrust and associated forms of government intervention such as regulation. Our examples involve mergers and joint ventures, as well as monopolization cases.

A. The GM-Toyota Joint Venture

The GM-Toyota joint venture illustrates clearly the strategic role of antitrust litigation. Here, it is Chrysler and Ford, the horizontal competitors of the joint venturers, that have pressed the Federal Trade Commission to reject the joint venture on the ground that it will restrain competition in the automobile market in general and in the subcompact segment of the market in particular. Recently the FTC approved the joint venture. Undeterred, Chrysler has been pressing a private antitrust action in an attempt to accomplish what it failed to do at the FTC.

This sort of opposition is predictable, and in a manner that is rather ironic it can signal clearly the likely effects of the joint venture. If the enterprise were in fact likely to acquire monopoly power and charge excessive prices, other U.S. auto firms undoubtedly would benefit from the resulting protective umbrella, which would enable them to raise their prices as well. If this is the probable outcome, then those rivals can be expected to view the joint venture with equanimity and silent acquiescence. But if the joint venture really is likely to introduce economies or improve product quality, it is sure to make life harder for the domestic rivals of the participants who will then have to run correspondingly faster in order to stand still. Paradoxically, then and only then, when the joint venture is really beneficial, can those rivals be relied on to denounce the undertaking as "anticompetitive." That is exactly the response of Chrysler and Ford, who have presented themselves here as defenders of consumers' interests even though before other forums they have not hesitated to argue for blatantly protectionist measures such as higher trade barriers. Once again, consistency has given way to expediency.

B. MCI v. AT & T: The Economics of Price Inflexibility

MCI was perhaps the first firm to challenge AT & T's monopoly in the long-distance telecommunications market. Beginning in 1963, MCI embarked on an extensive investment program in microwave transmission facilities. Because of its (and the FCC's) policy of

[10] *Id.* at 251-52.

"universal service" or "nationwide averaging," AT & T's relative rates along different routes did not correspond closely to relative costs, with service along sparsely used routes comparatively underpriced. This was a clear invitation for "cream skimming" entry. Understandably, MCI at least initially attempted to specialize in serving the high-density routes in which AT & T earned more substantial profit margins.

MCI's moves to enter these routes predictably led to an attempt by AT & T to adjust its relative rates to correspond more closely to costs. MCI alleged that these responses were anticompetitive. Litigation ensued. l Of course, MCI's initial entry primarily into AT & T's more profitable routes is unobjectionable. The benefits of competition depend on the willingness of entrants to seek out profitable opportunities. What is far more questionable is MCI's attempt to use antitrust litigation as a means to restrain AT & T's ability to respond to competitive incursions. It was charged that by adjusting its prices on different routes to correspond more closely to costs, even on routes where competition had not yet appeared, AT & T was launching "preemptive strikes." One can imagine what would have been said if instead AT & T had reduced prices only on the routes where MCI had opened for business. MCI insisted during the trial and in its appellate brief that a "full-cost" approach should be used to calculate AT & T's costs and to perform the tests of predatoriness. Indeed, according to MCI, citing Dr. William Melody's testimony, many "economists advocate the use of fully distributed costs as the proper test for below-cost predatory pricing in the telecommunications industry."

There is no need to dwell here on the inefficiencies that result from the use of fully allocated costs as constraints on the price responses of regulated and unregulated firms. It suffices to note that insistence that such costs are the appropriate price floors invites socially inefficient entry that is elicited not by genuine cost advantages and productive efficiencies but by false profitability signals. There is no doubt that potential and actual entrants (such as MCI) have a strong incentive to rigidify the price responses open to an incumbent who is confronted with newly emerging competition. It seems clear that the staunchest advocates of full-cost pricing have been firms anxious to hobble their disquietingly effective rivals.

C. Strategic Uses of Antitrust in Takeover Cases

The targets of tender offers frequently initiate antitrust suits against their unwanted suitors. The critical issues are whether the targets should be allowed to institute injunction proceedings or whether instead the enforcement of merger statutes should be left to the government and to customers who are likely to be injured if the merger brings competition to an end, elevates prices, and causes resource misallocation. The issue is not straightforward. While the incentive for management to bring an antitrust case need not coincide with the interests of the consumers, it is nevertheless true that the management of the target is probably better informed than any other group about the likely consequences of the acquisition for future competition.

There is no question that a target's management, bent on derailing the tender offer, has a potent weapon in the antitrust laws. The two most recent instances in which highly lucrative offers were defeated with the aid of the antitrust laws were Grumman Corp. v. LTV Corp.[15] and Marathon Oil Co. v. Mobil Corp.[16] The latter case illustrates the problem clearly. Marathon's management possessed extensive, firsthand information about the scope of its geographic operations and about the marketing of gasoline to independents, which was at issue in the antitrust proceedings. On the other hand, Marathon's management hardly shared the interests of the automobile owners in cheap and plentiful gasoline. Indeed, if the target's management were truly guided by shareholders' interests, it ought to sell the company to the bidder likely to obtain the highest profit from the transaction. But when such enhanced profits result from the elevation of market power in the postmerger market, the interests of the consumers and of the target's stockholders clash directly.[11]

…

V. WHAT IS TO BE DONE?

There are no easy and costless remedies for the abuse of antitrust by those who use it for protection from competition. The difficulty is inherent in the problem, for anything that is done to make it harder for plaintiffs to use our antitrust institutions anticompetitively automatically also makes it easier for others to get away with acts of monopolization. This trade-off is apparently unavoidable, because anything that makes conviction of the defendant more likely necessarily makes suits more attractive to plaintiffs in pursuit of protection from effective competition. The Japanese … have largely solved the problem of protectionism, but only by virtual prohibition of initiatives by the victims of monopolistic behavior. In dealing with the shortcomings of our antitrust institutions that are the subject of this paper, we must be careful not to undermine the antitrust laws themselves.

The most obvious remedial change is a restriction of the sort of circumstances to which treble damages apply. One should consider both the use of a multiple smaller than three, at least in those types of cases, such as predatory pricing, in which rent-seeking protectionist activity seems to abound, and in some types of cases one might even consider restriction of the amount of the award to the magnitude of the damage actually shown to have been sustained.

Such proposals are not new, but we do have a new wrinkle to suggest. The choice of multiplicand in damages payments faces at least two conflicting goals. Given the possibly low probability of discovery of an antitrust violation and of conviction on the charge, optimal deterrence clearly calls for a multiplicand greater than unity, and on that score trebling of damages may perhaps not be too bad an approximation to the optimum. On the other hand, if this encourages rent seeking we may want, on this score, a much smaller damages award.

…

In private antitrust suits a similar solution is at least worth considering. That is, the defendant who is found guilty might continue to pay three times (or some other multiple of) the estimated damages. But the plaintiff can be made eligible to a smaller multiple (and perhaps even a multiple less than unity) of that damages figure. The difference would then go into the public treasury as a tax on violators of the antitrust laws. Once again, this provides two distinct parameters (the defendant's multiple and the plaintiff's multiple) to the designers of public policy who can select their values separately so as to provide the proper

[11] *Id.* at 256-58.

incentive for deterrence of violations while at the same time offering an appropriate disincentive for rent-seeking protectionism.

One may want to take a further step in this direction. Mere accusation and trial subjects the defendant firm to enormous expenses and even greater ex ante risks of an expensive adverse decision, even if it transpires ex post on the basis of convincing evidence that it is completely innocent. The possibility of required compensation to the defendant for these damages caused by the plaintiff might well discourage frivolous and mischievous suits, including those undertaken in the hope that an out-of-court settlement will prevent the latter from having to reveal the weakness of his case. Thus, the third remedy we propose for consideration is liability of the plaintiff for costs incurred by the defendant in the event of acquittal.

A fourth line of defense against protectionism is the adoption of clearer criteria of unacceptable behavior, such as the predation tests proposed by Areeda and Turner or those we have suggested. For reasons already discussed, vagueness in the standards of unacceptable behavior plays into the hands of those who would use the antitrust laws as anticompetitive weapons.

Fifth, one may well consider it desirable, for similar reasons, to inhibit, if not necessarily prohibit, the ability of the management of a company that is a takeover target to bring an antitrust suit against the unwanted acquirer.

Here it should be emphasized that we do not want to immunize mergers or acquisitions from the antitrust laws. Rather, we suggest the possibility that (only) those most likely to misuse the process for protectionist purposes be limited in their ability to bring private suits against the transaction on antitrust grounds. Others, including the pertinent government agencies, should clearly remain free to do so.

All of these suggestions are offered very tentatively and with great hesitation. They are mostly untried, and our lack of competence in the law surely raises questions about their workability, their consistency with other legal rules, and perhaps even (in some cases) their constitutionality. We end by repeating an earlier caveat. It is not by accident that every one of our very tentative proposals incurs some social cost in that it reduces to some degree the available deterrents to monopolistic behavior. This is unavoidable, because any measure that offers some promise of dealing effectively with the problem discussed in this paper must necessarily involve some reduction in the incentive to bring litigation and hence must weaken to a degree the position of the potential plaintiff. It seems clear to us that some move in this direction is urgent if antitrust and regulation are to be prevented from becoming major impediments to competitiveness, efficiency, and productivity growth in the U.S. economy. The question is not whether some such moves are justified. The issue, rather, is how substantial those moves should be-how great a modification constitutes a social optimum in the trade-off between the two competing perils to true competition-excessive weakening of the deterrents to monopolization and excessive facilitation of attempts to subvert effective competition through protectionist misuse of our antitrust institutions.[12]

<u>Bureaucracy and Politics in FTC Merger Challenges</u>

[12] *Id.* at 263-65.

Malcolm B. Coate, Richard S. Higgins, and Fred S. McChesney[13]

I. Introduction

Since Stigler's article on the economic theory of regulation, public interest views of regulation increasingly have yielded to self-interest explanations. That is, well-organized private groups purchase regulatory favors in the political marketplace, benefiting both themselves and politician-sellers at the expense of less well-organized groups. However, one form of government regulation, antitrust, has largely escaped characterization as a political, interest-group bargain. "Antitrust is one of the few remaining areas in which it is commonly assumed that government operates in the public interest." Stigler himself believes antitrust a rare instance of benevolent regulation. Some have tested this claim by examining the cases brought by antitrust authorities but found little evidence that public interest (social welfare) considerations drive antitrust enforcement. However, the alternative hypothesis, that antitrust is a politically driven, private-interest sort of regulation, has also been tested and found to be largely unsupported.

This article joins the debate by examining decisions of the Federal Trade Commission (FTC) to challenge horizontal mergers, using nonpublic data from that agency's files. The FTC does not purport to base its enforcement of merger law on the public interest variables identified by previous authors; rather, the commission's merger enforcement policy focuses on variables specified in the Department of Justice's merger guidelines. All other things equal, the guidelines predictably would play a role in agency determinations to challenge a merger, a hypothesis tested here using the internal FTC data.

Our data also elucidate the separate roles played by FTC lawyers and economists in influencing FTC decisions to challenge mergers. Several studies of the FTC have advanced-but never tested-hypotheses about these two groups within the agency. Lawyers supposedly have greater incentives to initiate cases than do economists, but both lawyers and economists are said to affect agency decisions whether to file a complaint. Those and related hypotheses are also tested here.

Finally, we model antitrust enforcement by the FTC as also influenced, ceteris paribus, by pressure from Congress. This pressure reflects demands from management and labor of companies at risk from reorganization through mergers and takeovers. Although mergers and takeovers are socially beneficial overall, the configuration of winners and losers confronts a politician with asymmetric benefits and costs. Individual share-holders who gain are weakly

[13] 33 J. L. & ECON. 463 (1990). A footnote to the article reads: "We have reluctantly agreed to recite the following, written by the FTC's Office of General Counsel: This paper was prepared using nonpublic information from Federal Trade Commission internal files. Access to this information was available to Messrs. Higgins and Coate because they were employees of the Commission, and it was made available to Mr. McChesney because he was a consultant to the FTC Bureau of Economics. The Commission's Bureau of Economics has major disagreements with the methodology, analysis, inferences, and conclusions contained in this paper, and neither the Commission nor any of its members has authorized or endorsed its creation or publication. The FTC General Counsel determined that precluding publication would not be in the public interest and authorized its publication under secs. 5.12 and 5.21 of the FTC Rules of Practice, 16 C.F.R. sees. 5.12 and 5.21."

organized and scattered throughout the country; institutional shareholders are too numerous and well diversified to have strong incentives to organize. Management and labor that may lose their jobs or be transferred are better organized and more concentrated in a particular politician's district. An antitrust regime can be useful to a politician in the same way that antitakeover legislation is, avoiding the risk that resources and votes will exit a politician's jurisdiction following completion of a merger.[14]

B. A Bureaucratic-Political Model of Antitrust Enforcement

I. Bureaucratic Factors

There are several likely reasons for the prior models' inability to explain antitrust enforcement. First, prior inquiries have ignored the criteria that the antitrust agencies themselves specify as determining their case selection. With mergers, for example, the Department of Justice and the FTC have officially adhered to written merger guidelines for the past twenty years. The more recent guidelines (issued on June 14, 1982, and revised in 1984) define various factors that will increase the likelihood of an antitrust challenge to a merger, including the degree of and change in market concentration (measured by the Herfindahl-Hirschman Index [HHI]), the existence of significant barriers to entry, the likelihood of successful collusion for reasons other than barriers to entry, and the possibility that one firm may be failing. Prior models have not included the merger guidelines criteria as determining antitrust enforcement, perhaps because antitrust enforcers' measures of these variables have not generally been available. Our access to internal FTC case files permits us, however, to determine whether these factors increase the chances of FTC enforcement action.

A second reason for the weak explanatory power of previous models, especially the private-interest models, has been their failure to model the agency decision in terms of the incentives of particular agency personnel. Lawyers and economists face different incentives to bring cases. Attorneys are said to favor more litigation than do economists because court challenges increase lawyers' human capital as litigators and thus raise their subsequent returns in private practice. Even in the shorter run, heading a major investigation is required for FTC lawyers to advance to higher government employment grades (which also increase salaries); no such requirement applies to economists. The influence of economists at the FTC has grown considerably, particularly as economists have been named as commissioners and (once) even as chairman of the commission. Economists tend to stay longer at the agency instead of using federal experience to build capital for subsequent private employment.

Conflicting incentives will lead to disagreement between lawyers and economists about whether to bring cases, and disagreements will reduce the likelihood of merger challenges. One would hypothesize that the FTC brings more cases when both lawyers and economists agree that the magnitudes of the various factors set out in the merger guidelines have reached worrisome levels. Disagreement among agency personnel as to the desirability of a particular merger challenge, in contrast, probably will reduce the likelihood that a case will be brought.

2. Political Factors

[14] *Id.* at 463-65.

There is another reason for the largely unsuccessful attempts at explaining antitrust enforcement from an interest-group perspective. Those efforts have generally considered only private industries possibly served by antitrust. The likely private beneficiaries from antitrust may, however, cut across particular industries. Examination of the private winners and losers from mergers, plus the interests of politicians themselves, suggests that merger enforcement would be politically driven by the same groups favoring restriction on corporate takeovers generally.

In a merger, the wealth of shareholders in both firms increases. Even the threat of a merger will benefit shareholders of potential target firms if management seeks to operate more efficiently to avoid a takeover. Small shareholders who gain ordinarily are not organized and are geographically dispersed; their small individual holdings give them little incentive to be active politically. Likewise, larger institutional shareholders are too numerous, dispersed, and well diversified to have strong incentives to organize. But with gains to shareholders often come losses to two more concentrated groups, firms' current management and labor. Jobs may be eliminated and offices may be closed or moved, as a result either of the merger or of reorganization to fend off takeover threats. This means that the merger (or threat of merger) of a firm in politicians' home districts or states confronts them (and their management and labor constituents) with concentrated expected costs, while the expected benefits are spread among shareholders nationwide. Imperiled home-district management and labor will value political help to stop the merger; failure to stop it not only will mean the district loses wealth, but politicians may lose votes as jobs are transferred.

Of course, the districts where jobs and offices ultimately are located will benefit, so other politicians may have an incentive to favor a merger. But the particular districts that benefit are more difficult to perceive (more uncertain) ex ante, so potential labor and management beneficiaries have less incentive to press for the merger. Thus, the value of the probable loss to the current district is typically greater than the value of the possible gain to another. The expected costs to losing politicians outweigh the gains to winning politicians, ceteris paribus. To politicians who stand to lose, an antitrust challenge can be beneficial in defeating the attempted merger altogether; at a minimum it will slow down completion of the merger, increasing the likelihood that the parties themselves will call off the proposed arrangement.

In effect, the antitrust system works like private and public anti-takeover devices, although the similarities have not been fully appreciated. Privately, target managements can file antitrust actions to repel hostile bidders; they can acquire assets preemptively to increase concentration levels and so elicit a governmental antitrust challenge to the proposed takeover. Under either strategy, antitrust is a close substitute for other private devices (for example, poison pills) to fend off bids....

Political considerations alone will not determine agency decisions. Antitrust enforcers purport to follow the government's merger guidelines in deciding what mergers to challenge, and these also should affect bureaucratic choices. At the margin, however, political demands for enforcement will increase the bureaucratic supply of mergers challenged. There is considerable anecdotal evidence that the FIC commissioners do at times bring pressure for more cases. The principal implication of the model presented here is that in bringing such pressure, the FTC commissioners respond to politicians' demand for more antitrust cases. This model of antitrust has implications for a more general debate. Many social scientists, including some economists, view administrative agencies as operating with few effective constraints imposed by legislators: this view characterizes many prior studies of the Federal Trade Commission. Others argue along the lines of the present hypothesis: that the benefits to politicians of controlling bureaucratic agencies are worth the costs. In the end, the issue is an empirical one.

III. EMPIRICAL EVIDENCE

To test the bureaucratic-political model of merger enforcement, we reviewed the internal records associated with all H-S-R [Hart Scott Rodino Act] "second requests" concerning horizontal mergers issued by the Federal Trade Commission between June 14, 1982 (the date of the new merger guidelines) and January 1, 1987. Second requests obtain the data necessary to evaluate potentially anticompetitive transactions. The sample includes seventy commission decisions. In forty-three cases, the merger was allowed to proceed without interference; in the other twenty-seven cases (including those in which the merger was allowed to proceed only following some agreement with the FTC, such as a negotiated divestiture) the commission issued a complaint. Of the twenty-seven complaints issued, the FTC has not lost a case.[15]

[Empirical Results]

1. Political Influences

The coefficient estimates for the two variables measuring political pressure ... lead us to conclude that the commission does respond to political considerations, ceteris paribus.

The marginal *Wall Street Journal* story [a measure of the economic importance of the merger] raises the probability of a challenge 4.7 percentage points, and one additional congressional hearing raised the probability of a merger challenge by 4.2 percentage points.   Thus the commission decisions are significantly influenced by political concerns.[16]

2. Bureaucratic Influence

Merger Guidelines Variables. The evidence on bureaucratically interpreted guidelines factors also supports our hypotheses. A claim by BC [the lawyers of the Bureau of Competition] that the HHI, difficulty of entry, or ease of collusion is worrisome would increase the likelihood of commission action, ceteris paribus. Likewise, BE [Bureau of Economics] claims that the HHI, ease of entry, or difficulty of collusion do not justify challenging a merger would reduce the likelihood that the commission would vote to challenge. A chi-square test indicates that the three economic variables as interpreted by BC are jointly significant at the 1 percent level, as are the same variables as interpreted by BE.[17]

Lawyers versus Economists. While lawyers and economists both are influential in the decision

[15] *Id.* at 467-472.
[16] *Id.* at 476.
[17] *Id.* at 478-79.

whether to challenge a merger, lawyers' influence appears to dominate. [T]he absolute size of the BC coefficients for the HHI, entry barriers, and ease of collusion is greater than the BE coefficients for those variables. The reestimated model above shows that the composite BC variable is greater in absolute value than the composite BE variable. Based on the coefficients form the reestimated model, Table 3 shows more precisely the different effects of BE and BC evaluations of factors indentified in the merger guidelines as anticompetitive. The table shows the probabilities that a merger will be challenged, under alternative BC and BE evaluations of the number of troublesome guideline factors. For example, if the two bureaus agree that only one factor is a problem, the probability of a challenge is only .002; if they agree that two of the three factors are problematic, the likelihood of a challenge rises to .295; if both bureaus agree that all three factors represent potential problems, the probability of a challenge is .969.

When the two groups disagree, BC apparently has a greater effect on a particular decision than BE. If BC alleges that three guidelines factors are problematic when BE claims only two are worrisome, the likelihood of a challenge is .847; in the reverse situation, however, when BE claims that three factors are problematic while BC alleges that only two factors are worrisome, the likelihood of suit is only .623. If BC claims that all factors are at worrisome levels when BE says that none are, the probability of a challenge is .249. If BE claims that all factors are problematic when BC says that none are, the probability of a challenge is only .003. In short, lawyers' evaluation of the variables identified in the merger guidelines had a greater effect than does the evaluation by economists.[18]

In the end, therefore, a constellation of identifiable interests benefits from the FTC's stopping mergers. Politicians, their organized constituents opposed to mergers, and agency attorneys are apparently among the principal beneficiaries. Overall, the merger guidelines are applied with an upward bias, resulting in a greater propensity to challenge mergers in the marginal case. Greater appreciation of the ways that antitrust works and, in particular, of the role of politics in the process should begin to dispel the notion that antitrust can be viewed as driven solely by congressional and bureaucratic concerns for competition.[19]

<u>Antitrust Pork Barrel</u>

Roger L. Faith, Donald Leavens, and Robert D. Tollison[20]

Empirical Results: 1961-69

. . . Institutional sources stress that the Senate committees are relatively passive overseers of the FTC. This conjecture tends to hold for the Committee on Interior and Insular Affairs. However, membership on the Commerce Committee would appear to be related to unfavorable FTC rulings in Table 2, while membership on the Subcommittee on Antitrust and Monopoly is significantly related to favorable rulings in both Tables 1 and 2. This latter result is meaningful since this subcommittee had a membership in the 1960s that, on average, encompassed only eight states, and we find a highly significant pattern of decisions over this period favoring firms in these states.

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[18] *Id.* at 480.
[19] *Id.* at 482.
[20] Roger L. Faith, Donald Leavens, & Robert D. Tollison, *Antitrust Pork Barrel*, 25 J.L. & ECON. 329 (1982).

For purposes of testing the pork barrel hypothesis on House data, we present results for individual subcommittees and for all five subcommittees taken together. The pattern of results on individual subcommittees suggests that the Independent Offices Subcommittee wielded substantial power with respect to FTC decision making in the 1960s, both in the broad and narrow definitions of influence. The results also suggest that the Subcommittee on Agriculture and Related Agencies and the Subcommittee on Monopolies and Commercial Law were influential in FTC decision making over this period with respect to favorable rulings for within-district cases. The Subcommittee on State, Justice, Commerce, and the Judiciary and Related Agencies and the Subcommittee on Oversight and Investigations appear to bear no relation to FTC behavior.

. . .When the broad definition of FTC activity is used, we can reject the null hypothesis at approximately the 10 percent level of confidence. On the more narrowly based definition, where a complaint has been issued, the pork barrel hypothesis can be accepted at better than the 1 percent level of confidence. The House subcommittees, taken as an observational unit, appear to have been a ripe arena for antitrust pork barrels in the 1960s.

The idea that congressional committee members who have important oversight and budgetary powers with respect to the FTC can deflect commission decisions in favor of firms in their jurisdictions would appear to have useful explanatory power in the 1960s, supporting the suspicions of Posner and other observers. The question remains for our inquiry of whether the much touted reforms of the commission in the 1970s did anything to mitigate congressional influence in antitrust matters.

Empirical Results: 1970-79

. . . Katzmann argues that the efforts to reform the FTC to operate more consistently in the public interest have by and large been successful. By this, Katzmann does not mean that there are not biases in commission activities, only that these biases derive from such factors as personnel selection and turnover, not from such forces as congressional influence or FTC aspirations to have a larger budget by currying congressional favor. Our results for commission activity in the 1970s, the period of reform, do not bode well for Katzmann's assessment. . .

The institutional observation that the Senate committees are passive overseers of FTC activities tends to be borne out in the results for the 1970s. We can observe no statistically reliable relationship over this period between membership on the relevant Senate committees and FTC decision making. This contrasts with the results for the 1960s where the Subcommittee on Antitrust and Monopoly in particular appeared to have a significant impact on commission decisions. On the other hand, the Commerce Committee, which exhibited a dismissal pattern in the 1960s opposed to the pork barrel hypothesis, reversed itself in the 1970s, particularly with respect to complaints. Still, in the case of the Senate, Katzmann's public-interest argument can perhaps be said to hold. An alternative explanation is that a given firm is an insignificant member of a senator's constituency (the entire state), and the net return from FTC pork barrel is negligible in the Senate.

The House, however, is another matter. The results for all five subcommittees taken as a unit tend to bear out the pork barrel hypothesis for both definitions of FTC activity. This is probably the strongest counterevidence to the claim that the reforms of the FTC altered the basic underlying relationship of the agency with Congress. If anything, the pork barrel process became more pronounced and apparent in the data.

Among the individual House subcommittees, the Subcommittee on Independent Offices and the Subcommittee on Monopolies and Commercial Law continued to have an important impact on FTC actions in the 1970s, with the latter subcommittee now showing a significantly favorable impact on both cases brought and complaints. Unlike the results for the 1960s, the Subcommittee on the Judiciary and Related Agencies had a strong impact on formal FTC actions, particularly with respect to complaints. . . In an apparent jurisdictional shift, the Subcommittee on Agriculture essentially drops out of the data in the 1970s. Finally, the Subcommittee on Oversight and Investigations continues to be unimportant in explaining FTC decisions with respect to complaints.

Overall, the individual subcommittee results suggest that most of the basic results from the 1960s carried over to the 1970s. There were some jurisdictional shifts, to be sure, but most of the important underlying patterns in the data persisted and were strengthened in a statistical sense. The hypothesis of reform in the 1970s simply does not hold up for the House.

One general comparative aspect of the data should be noted. Total cases brought fell from 2,475 in the 1960s to 1,840 in the 1970s. More important, the number of formal actions by the FTC fell from 579 in the 1960s to 196 in the 1970s. It would appear that consents became more important in the 1970s, and, moreover, the leverage of four of the House subcommittees over the diminished number of formal commission actions became quite pronounced in the 1970s. Perhaps the reduction in formal actions is the true result of the FTC reforms.

<u>The Positive Economics of Antitrust Policy: A Survey Article</u>

William F. Shughart II and Robert D. Tollison

[21]The conventional wisdom on antitrust is based on a benign view of government. Most discussions of policy are clothed in the garb of the public interest, and those enforcing the law are pictured as individuals somehow able to transcend the self-interested motivations normally attributed to behavior in the market-place. . . The conventional wisdom leaves the discussion of antitrust on a normative plane. Both supporters and critics have recourse only to assertions about 'good' and 'bad' law, or 'good' and 'bad' enforcement. Such an approach is not very helpful in understanding how antitrust works. . .

The standard history argues that the political pressure for passage of the Sherman Act arose among small businessmen and farmers who complained of the 'rough methods of the trust builders'. The latter group was particularly vocal, believing itself to have been squeezed between rising monopoly prices for machinery and other finished goods on the one hand, and falling agricultural prices on the other. Similarly, the Clayton and FTC Acts are supposed to have grown out of dissatisfaction with enforcement efforts under, and judicial interpretations of, the Sherman Act. The Clayton Act therefore prohibited certain specific practices through which it was thought monopoly could be attained (i.e., mergers, price discrimination), and the FTC Act established an agency that combined broad investigative, prosecutorial, and adjudicative functions.

In evaluating the purposes of these statutes, the traditional approach has been to treat them as innocent of economic motivation. The intent of Congress in enacting the laws was a public-spirited concern with consumer welfare, and the role of the antitrust officials charged

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[21] William F. Shughart II and Robert D. Tollison, *The Positive Economics of Antitrust Policy: A Survey Article,* 5 INTERNATIONAL REVIEW OF LAW AND ECONOMICS, 39, 40 (1985).

with enforcement is explicitly or implicitly assumed to be the maintenance of competition 'by prohibiting private restrictions of it, and by preventing the development of monopoly'. . .

Given that the purposes of antitrust lie outside economic analysis in the conventional view, policy failures are ascribed to a variety of correctable errors. The most prominent of these is the 'neglect of economic principles [by] the judges, lawyers, and enforcement personnel who are responsible for giving meaning to the vague language of the antitrust statutes. . . Accordingly, a literature has grown up which attempts to instruct the antitrust bar in economic theory by offering critiques of specific cases. These case studies examine the evidence before the court, evaluate the economic merits of the charges, and then confer approval or disapproval on the ultimate decision. . .

When errors in the case law are uncovered, the common recommendation is for closer adherence to economic principles in the future. Some commentators, however, go so far as to call for wholesale changes in the antitrust statutes. . .

While in no way attempting to diminish the importance of these contributions, it is clear that the conventional wisdom on antitrust is based on a benign view of government. One cannot support antitrust intervention to correct markets which have failed to provide some standard of competition, without admitting that comparable failures can exist in the proposed corrective measures. It is disingenuous to explain policy failures, the granting of exemptions to antitrust law, and the existence of 'a body of substantive doctrine and a system of sanctions and procedures that are poorly suited to carrying out the fundamental objectives of antitrust policy. . . within a model where the behavior of individuals shifts from that of self-interested maximizers when making private choices to that of public benefactors when confronted with policy choices.

In few other places in economics does this benign view of government exist any longer. Modern scholarship in the areas of public finance and regulation has moved the discussion of policy away from normative issues by suggesting that the individuals who enact legislation and enforce the law are the same people who behave in their own interest when making market decisions. Out basic point is that antitrust can be fruitfully analyzed from the same perspective. . .

Another early step toward positive analysis was taken by Weaver in her study of decision-making within the Antitrust Division. Based on the results of interviews during 1971 with about 100 staff members, private attorneys, and other observers of the Division, she sought to answer the question, 'Why does the division choose to bring any particular case'? Weaver's main contribution was to elicit information on the private incentives motivating public prosecutors. According to Weaver, events during the early 1950s, such as passage of the Celler-Kefauver Act and the indictment of electrical equipment manufacturers for price-fixing, made 'antitrust expertise a more valuable commodity to the business community and to law firms serving it'. Because of this increased demand, 'experience in the Antitrust Division became newly valuable to a young lawyer who wanted eventually to work in private practice . . . And, the experience wanted was trial experience in the federal courts.

Weaver's work thus suggests that, at the margin, getting to trial may win over the merits of a particular case in the decision to prosecute. Unfortunately, her study suffers from the faults common to interview evidence, i.e., that what people say often diverges from what they do, and from her inability to examine internal Antitrust Division documents. Weaver nevertheless helps to pierce the veil of the public-interest assumption.

The incentive structure faced by Federal Trade Commission attorneys has been examined by Katzman, who also notes that the ultimate career goal of most legal stall members is a job with a prestigious law firm.[22] Such goals mean that managers will find that 'structural matters and industrywide cases threaten the morale of the staff because they often involve years of tedious investigation before they reach the trial stage'. In consequence, upper-level Commission executives may support 'the opening of a number of easily prosecuted matters, which may have little value to the consumer . . . in an effort to satisfy the staff's perceived needs'.

Katzman's main point is that one cannot explain the Commission's case selection process on the basis of industry economic characteristics. Rather, the decision to prosecute is dominated by factors internal to the FTC--staff career objectives, the availability of enforcement resources, Congressional influence, and so on. Katzman's study thus reaches conclusions similar to those of Weaver, and is also subject to the same methodological criticism of reliance on interviews for evidence.

The attack assembled by Clarkson and Muris on the FTC focuses on internal organizational conflicts, staff incentives, and external constraints.[23] For example, they suggest that the Commission substituted cases employing the market concentration doctrine for Robinson-Patman matters to resolve internal conflicts between lawyers and economists, and because the increased complexity of the caseload provided human capital benefits to the attorney staff. In addition, Clarkson and Muris attribute the FTC's failure to bring many price-fixing cases to the desire of Commission attorneys to differentiate themselves in the private job market from their Justice Department counterparts. The value of their study lies in the insights into the functioning of the Commission offered by Clarkson and Muris and the other contributors to their book. . . Several attempts have been made to compare the actual distribution of antitrust cases across industries with the pattern that would emerge if the agencies chose cases so as to maximize consumer welfare. In a sense these studies represent a positive effort to ascertain whether the economic model of the public interest has actually been followed or has any chance of being followed by antitrust bureaucrats. . .

The interest-group model was formalized in the work of Stigler and Peltzman.[24] Although the theory is usually put in terms of producer interests versus consumer interests, it is in reality much more general. Once it is realized that certain groups within the polity can use the political apparatus of the state to their own benefit, the theory generates a rich set of predictions about regulatory outcomes in which, generally, groups having concentrated interests in the regulatory process gain at the expense of groups having more diffuse interests. As examples, large firms may gain at the expense of small firms, coalitions of high-income consumers and some producers may gain at the expense of low-income consumers, residents of certain states may gain at the expense of other states' residents, and so forth. . .

[T]he broad language of the laws suggests that there is no single redistribution at work, for example, from business as a whole to consumers, hut that there may be a whole range of political margins to be cleared by the antitrust bureaucracy. To illustrate, Baxter considered several hypotheses in his 'attempt to identify the political constituency for the passage and enforcement of the antitrust laws in the United States'. These included the conventional wisdom, i.e., that 'public-spirited legislators pass these laws and the public-spirited judiciary enforces them because they profit all consumers . . . the hypothesis that the private antitrust bar is the

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[22] R. A. Katzman, *Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Policy*, MIT Press (1980)
[23] K. W. Clarkson and T. J. Muris (eds.), *The Federal Trade Commission Since 1970: Economic Regulation and Bureaucratic Behavior*, Cambridge University Press (1981).
[24] G. J. Stigler, 'The Theory of Economic Regulation,' (1971) 3 Bell J. Econ. 7, and S. Peltzman, 'Toward a More General Theory of Regulation,' (1976) 19 J. Law and Econ. 211.

most direct beneficiary of antitrust activity, the idea that the laws give public officials 'a relatively low cost vehicle for the expansion of their own power and their own budgets', and the hypothesis that antitrust enforcement benefits small firms at the expense of their larger rivals. Although Baxter is only able to bring sketchy evidence to bear on each of these hypotheses, he asks the question that the positive approach seeks to answer: which public and whose interest does antitrust serve?

Faith, Leavens and Tollison suggest that the interests served by antitrust are those of the congressmen sitting on committees having budgetary or oversight mandates with respect to the enforcement agencies.[25] Specifically, they consider whether there is a geographic bias in the case-bringing activities of the FTC such that enforcement favors firms operating in the jurisdictions of the relevant committee members. Using data on Commission case-bringing activity for the period 1961-79, Faith, Leavens and Tollison find that matters brought against companies located in the jurisdictions of important committee members--especially cases involving firms in the districts represented by the members of key House subcommittees--are more likely to be dismissed than matters involving firms located in other jurisdictions. Overall, their results 'lend support to a private-interest theory of FTC behavior . . .' in which 'representation on certain committees is apparently valuable in antitrust proceedings'.

Similarly, using a median-voter model, Weingast and Moran explained the significant policy reversals by the FTC during the late 1970s as a function of membership turnover on the congressional committees overseeing the Commission.[26] Their purpose was to test 'two opposing approaches about regulatory agency behavior. The first assumes agencies operate independently of the legislature and hence exercise discretion; the second assumes that Congress controls agency decisions'. Weingast and Moran presented evidence favoring the latter hypothesis. That is, the FTC drew back from its activist posture in 1979 because key committee members in Congress were replaced by individuals opposed to such activism. The authors concluded that their 'results show that FTC activity is remarkably sensitive to changes in the subcommittee composition'.

Another important segment of the positivist literature seeks to identify winners and losers from ongoing enforcement efforts. In a study of 772 mergers using data from the capital market, Ellert found that firms against which complaints were brought generated larger abnormal returns for stockholders prior to the challenged acquisitions than acquiring firms not indicted.[27] In both cases, however, most of the abnormal returns had been earned far enough in advance of the mergers that Ellert doubted them to have been due to capitalizations of anticipated monopoly rents. Ellert also found that firms ordered to divest acquired assets had provided larger abnormal returns to stockholders than acquirers permitted to retain assets, and that the issuance of a complaint reduced stockholder wealth by about 2 per cent regardless of the eventual outcome of the case. Ellert's study thus provides evidence that enforcement of the antimerger law penalizes efficient management.

Burns examined the effects on stockholder wealth of the dissolutions in 1911 of Standard Oil, American Tobacco, and American Snuff.[28] His data indicated that 'the performance of the snuff, tobacco, and petroleum industries was not significantly altered by the replacement of each

[25] R. Faith, D. Leavens, and R. D. Tollison, 'Antitrust Pork Barrel,' (1982) 25 J. Law and Econ. 329.
[26] B. R. Weingast and M. J. Moran, 'Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission,' (1983) 91 J. Pol. Econ. 765.
[27] J. Ellert, 'Mergers, Antitrust Law Enforcement and Stockholder Returns,' (1976) 31 J. Fin. 715.
[28] M. R. Burns, 'The Competitive Effects of Trust-Busting: A Portfolio Analysis,' (1977) 85 J. Pol. Econ. 717.

trust with independent rivals', i.e., that investors evaluated the dissolutions 'as "better than expected" and ultimately "benign" in their competitive effects'. Burns was unable to resolve whether his results implied 'no successor competition' or 'no monopoly in the first place', but the inference in either case appears to be that trust-busting is ineffective.

In studying the origins of the Robinson-Patman Act, Tom Ross found evidence that grocery chains suffered wealth reductions, that food brokers benefitted, and that there were no significant effects on the market values of grocery manufacturers or other chains. Moreover, the wealth effects of Robinson-Patman enforcement were found to be substantial and largely associated with issuance of a complaint, not the ultimate outcome of the case. The Ross results suggest a transfer of wealth from large to small firms.

A wealth transfer in the opposite direction has been found by Altrogge and Shughart with respect to enforcement of consumer protection laws by the FTC.[29] They test an implication of Peltzman's model that in maximizing their political majority, regulators may choose to 'exploit differences within the group that, taken as a whole, either wins or loses'.[30] Using data derived from 57 civil penalty cases before the Commission between 1979 and 1981, Altrogge and Shughart discover that the majority of the variation in fines is explained by variations in firm size, where size is measured by sales. Moreover, an increase in firm size results in a less than proportional increase in penalty, *ceteris paribus*, suggesting that the fines assessed by the Commission operate as a regressive tax on law violators, transferring wealth from small firms to large.

In a recent paper, Stigler examined the conventional view that the main support for passage of the Sherman Act can be traced to the Granger Movement.[31] He found no empirical evidence favoring the proposition that agricultural interests had reason to be distressed by railroad market power or by monopoly in general. To the contrary,' for the farmers to combat the railroads--who were major benefactors of western agriculture--was in fact perverse behavior'. In a separate test, Stigler analyzed the congressional vote on the Capper-Volstead Act (1922), which exempted agricultural cooperatives from the antitrust laws' reach. He regressed the per cent of each state's House delegation voting yes on Capper-Volstead on two variables measuring the importance of agriculture to the stare economy. Representatives from states having larger percentages of their populations on farms tended to support the exemption.

In another test of the interest-group model, Amacher, Higgins, Shughart and Tollison examined FTC enforcement activities under the Clayton Act.[32] They found a countercyclical and statistically significant relationship between cases alleging price discrimination violations and several alternative measures of general business conditions, lending support to the proposition that 'regulation will tend to be more heavily weighted towards "producer protection" in depressions and toward "consumer protection" in expansions'. The authors conclude that their result ' can be rationalized under the view that the FTC is in the business of transferring wealth from consumers either to protect small business or to shore up cartels'.

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[29] P. Altrogge and W. F. Shughart II, 'The Regressive Nature of Civil Penalties,' (1984) 4 Int. Rev. Law and Econ. 55.
[30] Peltzman, at note 62, p. 219.
[31] G. J. Stigler, 'The Origin of the Sherman Act,' (1985) 14 J. Legal Stud. I.
[32] R. C. Amacher, R. S. Higgins, W. F. Shughart II, and R. D. Tollison, 'The Behavior of Regulatory Activity Over the Business Cycle,' Econ. Inquiry, forthcoming.

Distributional gains and losses from the FTC's advertising substantiation program have been noted by Higgins and McChesney.[33] Although advertising substantiation is a consumer protection rather than a traditional antitrust issue, the workings of the program shed light on the effects of government intervention by an antitrust enforcement bureau. Higgins and McChesney showed that FTC case selection under advertising substantiation, which requires advertisers to possess a 'reasonable basis' for their claims prior to making them, does not follow a 'public interest' model. In particular, the Commission appeared to focus its enforcement activities under this program on industries having the greatest wealth redistribution potential, i.e., industries populated by firms with disparate market shares and reputations. Moreover, Higgins and McChesney found that the introduction of the advertising substantiation program had positive and significant effects on the market values of large advertising agencies. Their results 'are consistent with the observed resistance by advertisers and ad agencies to any relaxation of substantiation requirements'.[34]

These few largely unconnected studies which take a positive approach to the analysis of antitrust suggest that enforcement activities benefit some groups at the expense of others, and that what the conventional wisdom attributes to policy 'failure' is in reality the understandable behavior of self-interested enforcers operating under given constraints. In any case, this small body of literature suggests that antitrust bureaucracy operates much like regulatory bureaucracy in general.

A Capture Theory of Antitrust Federalism

John Shepard Wiley Jr.

[35]LAST century Congress passed a short law called the Sherman Act. Its brevity is charming and significant. Without lingering over definitions, the statute outlawed ‘restraint of trade’ and made it illegal to ‘monopolize.’ That sweeping language set the country's fundamental economic policy: reliance on the process of market competition.

Though fundamental, federal antitrust policy has frequently come into conflict with other federal, state, or local policies that have sought to regulate-and thereby restrain-particular markets. When federal regulatory policy conflicts with federal antitrust policy, the courts seek to reconcile the conflict by inferring whether Congress intended to create an exemption from its basic antitrust policy. But when state or local regulatory policy conflicts with federal antitrust policy, the conflict poses an issue of federalism, specifically an issue of ‘antitrust federalism.’ For the last forty years, issues of antitrust federalism have been governed by antitrust's ‘state action’ doctrine.

The state action doctrine was slow to form. For the first half-century of the Sherman Act, litigants and courts virtually ignored problems of antitrust federalism. Since 1943, however, when the Supreme Court first declared the state action doctrine in the landmark case of *Parker v. Brown*, issues of antitrust federalism have been frequently litigated, and the state action doctrine has been formed and reformed. On its face the state action doctrine is straightforward. The Court

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[33] R. S. Higgins and F. McChesney, 'Truth and Consequences: The Federal Trade Commission's Ad Substantiation Program,' (1983) unpublished manuscript.
[34] *Id*. at 44.
[35] Wiley Jr., John Shepard. *A Capture Theory of Antitrust Federalism,* 99 HARV. L. REV. 713-715 (1986).

in *Parker* simply held that the Sherman Act did not preempt any state action. But divining what constituted 'state action' proved not to be so simple. Whereas the *Parker* Court emphasized the importance of deferring to state sovereignty in creating the state action doctrine, opinions of the last decade, without abandoning either the state action doctrine or the rhetoric of deference to states, have demonstrated an unpredictable but unmistakable willingness to subject state regulatory policies to supervening federal antitrust policy.

… [T]his doctrinal shift has paralleled a theoretical shift in conceptions of the nature of regulation itself. *Parker* reflected a New Deal confidence in market regulation. With regulation viewed both as economically beneficial to the public and as politically legitimated by the public will, whatever conflict existed between national economic policy and state sovereignty must have seemed inconsequential at best. But erosion of this New Deal confidence in regulation has complicated *Parker*'s causal disposition of the antitrust federalism issue. A growing suspicion that producers have 'captured' the political bodies regulating them has inclined people to view regulation as the product and protector of producer interests. With regulation no longer presumptively viewed as both economically and politically justified, the conflict between national economic policy and state and local sovereignty has become increasingly difficult to sweep under *Parker*'s state action rug. Thus, it is hardly surprising that courts have, under the guise of the very state action doctrine that was meant to protect state sovereignty, intruded more and more on state and local regulatory policy.

Unfortunately, the Court has labored to respond to changing regulatory conceptions without abandoning the fundamentally conflicting premise of *Parker*. As a result, it has recast the state action doctrine as a clear-statement rule: an anticompetitive state regulation is immune from federal antitrust attack so long as it is 'clearly articulated' and 'actively supervised' by the state. The clear-statement rule is a miserable procedural compromise to the substantive problem of antitrust federalism: as applied, it not only insults the value of state and local sovereignty but also fails to advance federal economic policy. The Court should either abandon the clear-statement rule altogether and revive the genuine deference to state sovereignty that *Parker* exhibited or else adopt a review of state and local regulation that focuses more selectively on the problem of regulatory capture. …

The Supreme Court displayed extraordinary confidence and willingness to make law in *Parker*. The Court ignored its own standard prudential limitations and set down simple reasoning with a sweeping effect. The Court acted as though it faced a simple problem, and indeed for a New Deal Court the solution was obvious: judges ought not tinker with regulation that the public wanted and that was necessary to a functioning economy.

Porter Brown distributed raisins. He challenged a 1940 California raisin proration scheme that raised prices and restricted the supply of California raisins. A three-judge district court agreed with his judicial challenge on commerce clause grounds without reaching his additional antitrust claim. The Sherman Act did not actively enter the case until the Supreme Court set the case for reargument and invited the parties (as well as the Solicitor General) to discuss the topic-actions that violated its ordinary rule against considering issues neither raised in the certiorari petition nor addressed by lower courts. The *Parker* Court then compounded this irregularity. After *beginning* its analysis by considering the 'Validity of the Prorate Program under the Sherman Act,' the Court turned to a *second* new issue: the 'Validity of the Program under the Federal Agricultural Marketing Agreement Act' (AMAA). In essence, the Court concluded that California's conduct fell within the AMAA's federal antitrust exemption, thus mooting the preceding (and already conventionally unwarranted) discussion of the Sherman Act's preemptive relevance.

The plainness of the Court's logic further testifies to its clarity of vision about the irrelevance of the Sherman Act to California's raisin regulations. Regarding the Sherman Act, *Parker* syllogized simply: ‘In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.’ After examining the Sherman Act's statutory text and legislative history, the Court found that neither contained any ‘hint’ or ‘suggestion’ of an intention ‘to restrain state action or official action directed by a state.’ It followed directly that California's policy of cartelizing raisin prices must be beyond federal antitrust scrutiny.

… I do not mean to deny that the Court was also influenced by other factors-including the inherent value of state sovereignty itself. My point is not that the *Parker* Court created the state action doctrine *solely* because of its regulatory conceptions, but that the Court could not have reached its antitrust holding so easily if its regulatory conceptions had been seriously at odds with its regard for state autonomy. Because regulation was commonly regarded as necessary to the public interest, the *Parker* Court's regulatory conceptions dovetailed with its respect for state sovereignty. In this intellectual climate, *Parker*'s states' rights premise that federal courts should keep their preemptive hands off state legislated regulation must have seemed blindingly self-evident.

Parker's sweeping protection of state sovereignty has not endured. Eight subsequent cases have subjected to federal antitrust review local practices that represented ‘state policy’ in the sense that one concerned with local autonomy and control would use the term. These cases fundamentally contradict the basic premise of *Parker*-deference to state regulatory policy.

In the mid-1970's, the Court began consciously to use the Sherman Act to invade state sovereignty. These opinions openly recognized and sought to reconcile their conflict with *Parker*'s premise. In *Goldfarb v. Virginia State Bar*, the Court unanimously invalidated, under the Sherman Act, a minimum fee schedule for lawyers, even though state law provided that the state bar and supreme court-both official agencies of the state-were to enforce the schedule. *Cantor v. Detroit Edison Co.* exposed to antitrust review a regulated utility's practice of exchanging new light bulbs for used ones despite the fact that the utility ‘could not maintain the lamp-exchange program without the approval of the state Commission, and now may not abandon it without such approval.’

…The post-*Parker* debate has been about how far to diverge from *Parker*'s premise, not whether to apply it. This doctrinal shift from ‘no preemption’ to ‘how much preemption’ manifests a larger change in intellectual perspective: the intrusion of doubts about *Parker*'s public-interest view of regulation. …

These cases suggest that something has been challenging *Parker*'s premise of deference to state regulatory policy, though their language gives little clue about what that thing is. Rather than discussing the policies that compete with state sovereignty, these cases have tended to explicate the requirements of ‘state’ action as if the matter were a definitional question free of policy overtones. Nevertheless, the shift in doctrine toward wider application of federal antitrust policy fits well with the evolution of broader social attitudes during the same period. Regulation, formerly conceived of as a method of advancing public interest over private advantage, in many instances came to be conceived of as a method of subsidizing private interests at the expense of public good. My thesis is that this change in intellectual climate caused the Court to perceive state regulatory policy from a different perspective than that of the *Parker* Court.

… Mancur Olson provided the fundamental theoretical groundwork for a general capture theory of regulation. Olson criticized the work of earlier students of group politics for failing to explain the paradox of group action by self-interested individuals. His devastatingly simple insight was that a large group with a common interest would encounter a greater obstacle to effective joint action-the free rider problem-than would a small group. In many political situations, each member of a group benefits from successful joint action irrespective of that member's own participation. Thus, if the group is large, individual members have little incentive to participate because participation is personally costly and contributes little to the group's chances for successful joint action. Small groups encounter fewer of such problems. If group members behave in this rational self-interested manner, then 'there is a systematic tendency for exploitation of the great by the small'; less numerous, more intensely concerned special interests can predictably outmatch more numerous, more mildly concerned consumer or 'public' interests in legislative or regulatory fora-even though the actions of special interests impose a net loss on society.

In the 1970s, attacks on regulation became commonplace. As the decade opened, public interest advocates joined the fray, while a leading economist advanced the 'very general conclusion' that the prototypical form of regulation-that of public utilities-had proved misbegotten. In a manner bespeaking intellectual confidence, other economic scholars began to treat as naive and faintly amusing any approach to regulation that did not incorporate notions of producer capture. By the 1980s, these and other scholars had developed an integrated synthesis that, although falling short of a comprehensive theory of regulation, nevertheless sketched a highly elaborated and influential conception of the mechanics and resulting evils of regulatory capture.

This conception explained socially detrimental regulation in roughly the following manner. Government at virtually every level offers enormously lucrative potential benefits (such as price supports and entry-barrier protection against competition) to competing producers. Typically these government benefits are temptingly available. A relatively small number of incumbent competitors support such measures with intensity, while consumer opposition is diluted and widely distributed. Producers are thus able to act as an effective group far more frequently than their opposition. Government market intervention is therefore very often an anticonsumer effort to enlarge producers' share of social wealth. Compounding its anticonsumer redistributive character is the dead weight loss such market regulation usually creates; the high prices that follow from restricted output reduce both the absolute size of the economic pie and the relative size of the consumers' slice. In static terms, in short, such regulation tends to impose a cost on society as a whole in order to shift wealth from consumers to producers. And perhaps of the greatest long-run significance, such producer restraints reduce the rate of economic growth by slowing the speed with which the economy both adopts new technologies and reallocates resources in response to changing conditions…

'The climate of intellectual opinion regarding regulation has essentially reversed itself since the days of the New Deal.' And in an importantly similar respect, so has the Court. As market regulation has become the target of increasing criticism for being an instrument by which industry can exploit the public, judicial attitudes toward states' rights and regulation-once so neatly congruent-have collided. On eight occasions since *Parker*, the Court has shown a willingness to disregard the deference to states' rights that was the bedrock of *Parker*'s reasoning.

My argument is that the Court has done so in a largely unarticulated but historically understandable response to growing fears of regulatory capture.

The doctrinal result of the shift away from *Parker*'s public interest vision of regulation toward a capture model gave victory to neither vision of regulation. Instead, the state action decisions of the last decade struck—and then in the last two Terms shrank from—a compromise. Unfortunately it was a bad compromise. The Court created a clear-statement rule that satisfies neither concerns about state sovereignty nor concerns about capture.

As formulated by *Midcal*, state action doctrine now requires most state regulation to satisfy a two-prong standard if it is to escape federal antitrust review. 'First, the challenged [regulatory] restraint must be 'clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself.' Policies that flunk either tine of this two-prong test must withstand Sherman Act review of an as-yet-unspecified nature. This doctrinal reaction is a broad procedural compromise. It is broad because it applies to all state agency regulation, whether or not the regulation is the product of producer capture. It is a compromise because it seeks to retain *Parker*'s states-rights deference for 'articulated' and 'supervised' regulation at the same time that it indulges capture theory's skepticism about regulation lacking such a pedigree of state involvement. It is procedural because it does not consider the substantive question of whether state or local regulation imposes restraints that are in character inconsistent with federal competitive policy. Rather it effectively announces a clear-statement rule: federal policy will not disturb regulatory restraints on competition when a "state has demonstrated its commitment to a program through its exercise of regulatory oversight."

This post-*Parker* procedural compromise is unjustified in theory and misbegotten in practice. The rationale that the Court has stated for this compromise is a literal one. Regulatory policy lacking clear and authoritative articulation and supervision, the argument runs, is not really 'state' action, and *Parker* offers no protection to such 'private' action. This logic founders, however, upon the cases. Since *Parker*, eight Supreme Court opinions have lumped into the unprotected 'private' category what would ordinarily be considered to be government policies. Thus, although professing respect for state sovereignty, in application this rationale permits attacks on sovereign policies. Reference to the supposed plain meaning of 'state' and 'private' cannot justify this peculiarly restricted definition of the 'state.

Any clear-statement approach to preemption is ineffective because it does little to combat the real problem with state and local regulation-capture. If state legislatures are no less prone to producer capture than are administrative agencies, the prevailing rule simply prompts captors to obtain the requisite degree of 'sovereign' endorsement for their captured program. Current doctrine thus spurs captors to enshrine restrictions on entry and competition in more powerful and durable state legislation (or state supreme court practice) rather than in informal and malleable agency custom, just as antitrust's act-of-state doctrine encourages foreign cartels to obtain official backing-and enforcement-from foreign governments. The doctrine, moreover, could well *justify* such a legislative request, if industry or agency members explain a legislative proposal as a formality required by federal law. A procedural approach to the state action problem therefore may have the wonderfully perverse net effect of strengthening state cartels.

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Current doctrine is thus a dismal compromise between *Parker*'s public interest conception of regulation and the suspicions aroused by the capture model. At the same time that it fails to respect the sovereign power of state and local governments to regulate their markets, this doctrine also fails to advance the federal interest in subjecting markets to the procompetitive regulation of the antitrust laws…

Capture theory has problems. But as a compelling logical insight about group action it does accurately explain a tendency documented by a plethora of empirical observations. To ignore such a tendency is unsettling. One nonetheless might choose to do so. One might acknowledge (unlike the *Parker* Court) that state market regulation poses an anticompetitive threat but simultaneously conclude that federal intrusion into state autonomy is even less appealing.

…

A meaningful capture theory must thus recognize that regulations are not always caused by capture and that regulations that are caused by capture are not always bad. This recognition of the limits of capture theory suggests that antitrust preemption doctrine must employ the selective branch of preemption theory, which generally tolerates state regulations unless they conflict with a particularly defined federal interest. It also suggests that in defining that preemptive interest it will be important to determine two things: whether the regulation undermines federal antitrust policy and whether the regulation resulted from capture.

…

4. Attacking Capture.-The fourth and final criterion of this antitrust preemption test requires plaintiffs to prove that the regulation they attack is the product of producer capture. This criterion is necessary if the proposed preemption test is to accommodate both sides of the conflict between state and local regulatory policy and federal antitrust policy. On the one hand, the intrusive review of state regulatory policy undertaken in the name of the state action doctrine shows that the Court is unwilling to defer totally to state and local regulatory policy. On the other hand, problems of ‘antitrust imperialism’ suggest that adopting just the first three criteria of this test, and deferring to federal antitrust policy in any true conflict, would be a mistake. Instead, the capture criterion accommodates both sides; it focuses on those state or local regulations most likely to undermine market competition seriously, and it limits preemption to instances of state political decision making that deserve less deference. Plaintiffs should be allowed to meet this requirement of capture by one of two methods: through direct evidence of decisive producer political activity or through indirect inferences showing that the regulation's facial characteristics clearly suggest that it arose by virtue of decisive capture influence.

Why Capture?-If defining efficiency as the federal antitrust interest itself suggests the distinction between socially beneficial and socially undesirable regulation, one might wonder why the proposed test requires the separate element of capture. Cannot the possibility of inefficiency-for whatever reason-justify federal oversight of state and local regulation and obviate any capture requirement? The answer is no, and the reason is the problem of ‘antitrust imperialism’-the potentially enormous intrusion of federal review into state and local policies in the overreaching name of efficiency.

The breadth of an unqualified mandate to preempt inefficient unexempted regulation, taken in its most general form, would logically lead courts to use the Sherman Act's proscription of ‘restraints of trade’ to question any state or local policy that affects resource allocation by altering the rewards to economic activities. That directive jeopardizes a breathtaking array of state and local policies. Every tax (besides the famous and nonexistent 'lump sum transfer') and subsidy becomes suspect. A wide variety of other traditional state and local laws could also become actionable, including market prohibitions on prostitution, marijuana, and baby-selling; restrictions on gun, firework, and drug sales; and limitations such as rent, usury, and condominium conversion controls. Each of these policies denies or impedes the satiation of particular human demands that exchange would allow. Under a broad efficiency preemption standard, each would be prima facie suspect…

…

The rationale for the capture requirement is thus legitimacy. Preemptive rules should face the burden of justifying deviations from the normal respect that a federal system lends to state and local decisionmaking. Absent fear of capture, federal lawmakers generally lack an excuse for reviewing the wisdom of state and local political conclusions about regulatory governance. If market competition yields desirable results, state and local policymakers would normally be expected to strive for those results, and this expectation should moot the need for further review.

Fear of producer capture is the cause of federal suspicion about-and the warrant for federal review of-the ability of states to craft beneficial regulation. A capture test should not preempt all regulations infringing on the federal interest in economic efficiency, nor can it avoid some preemption that infringes on the state and local interest in self-governance. But by selecting those cases in which the federal interest in economic efficiency is at its maximum and the state and local interest in self-governance is at its minimum, a capture test signals when-if at all-preemption is appropriate…

Ways of Proving Capture.-Courts could allow plaintiffs to show capture either directly or indirectly. The most direct way to build into a preemption test a filter sensitive to the problem of regulatory capture would be to examine the facts surrounding a regulation's origin. Judges could demand that plaintiffs, on pain of dismissal, identify producers who profit from the regulation's competitive restraint and who played a *decisive* political role in its adoption. Such an inquiry has the virtue of asking directly the relevant question: was the market restraint enacted by means of decisive Olsonian capture? Specifying 'decisiveness' as the relevant standard solves the problem of mixed political support-what Bruce Yandle has called the issue of 'bootleggers and Baptists' - by screening from preemptive review regulations that lack a crucial element of capture.

The test operates on the basis of the direct evidence that such political capture would leave in its wake. Courts are capable of conducting the necessary evidentiary investigation. The test does require some counterfactual analysis: whether the state government market restraint would have arisen but for the political support of the putatively benefiting producers. But the determination of whether producer political participation was 'decisive' is simple and straightforward in many situations in which the *only* political support for a market restraint came from a narrow interest group. The 'decisiveness' question grows more difficult and speculative when political support is mixed. Even so, the inquiry remains theoretically coherent, analytically tractable (particularly when combined with a suitably demanding burden of proof that plaintiffs must satisfy), and analogous to other questions that courts routinely settle.

Requiring direct evidence of capture can present problems regarding both the availability of proof and its interpretation. Plaintiffs may be hard pressed to offer direct evidence of producer support for a regulation, especially if the regulation is old or if producers launder their lobbying in anticipation of capture preemption litigation. Moreover, it may seem particularly pointless to demand that plaintiffs gather direct proof of capture when the legislature has expressly said that it is enacting a statute to transfer wealth to a particular producer group, as in *Orrin Fox*, or when the challenged regulation's terms evince a pattern of effects that make its heritage of capture obvious…

Plaintiffs should face a burden sufficiently heavy to limit federal preemptive review to genuine instances of producer capture. Courts should use a facial analysis to establish capture only when a regulation's pattern of effects clearly points to producer capture as the single most likely explanation of its origin. Defendants should have the opportunity to rebut this inference of capture with evidence supporting other explanations of political origin. Rebuttal evidence, however, should be of actual legislative influence or consideration, rather than simply creative speculation by the state attorney general at the time of suit, if it is to rebut a highly suggestive facial pattern of capture effects. Cases of doubt should be decided against the plaintiff's preemptive challenge. An effects test of this limited scope, for instance, could not consider market prohibitions such as state bans on narcotics sales, prostitution, and other like transactions to be examples of capture; such regulations are more typically the product of widely shared notions of public morality than they are the product of political actions by producers of economic substitutes for the banned goods. An antitrust plaintiff seeking to attack such laws would have to offer actual evidence of their decisive captor origin.

An origin test, whether substantiated by direct evidence of capture or by the facial effects of the regulation, would tend to deter lobbying by potential captors. They would realize (if well counseled) that their political activism could make any resulting anticompetitive state or local regulation more vulnerable to federal preemption. Any reduction in captor lobbying and hence in inefficient captured regulation (slight though it is likely to be) would advance the Sherman Act's efficiency interest and thus improve upon current state action doctrine…

The FTC and State Action: Evolving Views on the Proper Role of Government

John T. Delacourt & Todd J. Zywicki.

[36]The state action doctrine was born in an era of exceptional confidence in government, with governmental entities widely regarded as unbiased and conscientious defenders of the public interest. Over time, however, more cautious and skeptical theories of government began to gain sway. In particular, the school of thought known as "public choice"—which holds that governmental entities, like private firms, will act in their economic self-interest—began to influence both legal theory and competition policy. Indeed, a close examination of recent state action case law suggests that public choice thinking has driven a slow, but consistent, evolution of the doctrine toward *less* deference to state regulators and more careful assessment of the actual incentives that drive their decision making. This evolution in thinking, however, has not been accompanied by the development of a systematic, analytical framework to guide the application of the state action doctrine in particular cases. Developing such a framework should therefore remain a top priority of leading antitrust policymakers, including those at the Federal Trade Commission.

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[36] Delacourt, John T. & Zywicki, Todd J. *The FTC and State Action: Evolving Views on the Proper Role of Government*, 72 ANTITRUST LAW JOURNAL 1075, 1075-77 (2005).

The state action doctrine was first articulated by the Supreme Court in the 1943 case of *Parker v. Brown*. The *Parker* case arose out of a lone raisin producer's efforts to enjoin enforcement of a mandatory state program controlling the marketing, sale, and, therefore, the price of certain agricultural products. Among other allegations, plaintiff Brown asserted that the State of California had violated the Sherman Act by passing and enforcing the Agricultural Prorate Act. Although the Court acknowledged that the objective and mechanics of the Act's scheme had the potential to be anticompetitive, Chief Justice Stone characterized the scheme as benevolent, apolitical industrial planning designed to protect raisin producers from the pernicious forces of the market process.

Brown claimed that, prior to adoption of the Act, he had entered into contracts for the sale of his 1940 raisin crop. Consequently, unless the Act's compulsory marketing scheme was enjoined, it would be enforced against him, possibly through criminal prosecution. Although the Court acknowledged that the scheme likely would have constituted a Sherman Act violation if it had been implemented though a contract, combination, or conspiracy among private parties,5 it refused to adopt the same reasoning in the context of action by a state. As the Court explained, the California agricultural marketing program at issue "derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command."

Accordingly, the program was exempted from federal antitrust enforcement, as "[t]he Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state."

While the *Parker* Court's apparent willingness to accept any and all government involvement in the marketplace as an unqualified good may seem quite surprising to the 21st century reader, it is substantially less so when one accounts for historical context. The *Parker* case was adjudicated and decided in the early 1940s, in the midst of World War II, when the economic privations of the Great Depression were still a fresh memory. Thus, California's Agricultural Prorate Act would have been viewed not as a protectionist anachronism, but as cutting edge industrial policy…

The public interest theory underlying the *Parker* decision manifests itself in a number of ways, most notably in the Court's label- oriented and deferential approach to state action analysis. The Court's approach is "label- oriented" in the sense that it focuses unduly on titles—such as "official," "public," or "governmental"—as a kind of shortcut analysis, rather than evaluating each defendant's incentives to purse its own agenda at the expense of the state's. Likewise, the Court's approach is "deferential" in the sense that it is willing to give governmental actors the benefit of the doubt without first putting them to their proof. Both tendencies are illustrated by important aspects of the Court's decision.

First, the *Parker* opinion places fairly weak emphasis on the federalism rationale for the decision. Although the Court notes that the state action exemption is rooted in federalism, and that it will not lightly impute to Congress "an unexpressed purpose to nullify a state's control over its officers and agents," the Court's language is less precise in other portions of the opinion. Although it is clear, when the opinion is taken as a whole, that the Court intended to limit the *Parker* exemption to one specific category of governmental actors—states—at various points the Court uses looser language, such as references to "official action," "act[s] of government," and "the state *or its municipalities*," which suggests that the exemption may be broader. Though seemingly insignificant, the Court's use of these imprecise labels as shorthand has led to confusion in a least some lower courts, where efforts to extend the state action exemption to all "public" or "governmental" entities occasionally have gained traction.

Second, the opinion reflects complete indifference to the issue of electoral accountability. The Court openly acknowledges that the California marketing scheme at issue encompasses "almost all of the raisins consumed in the United States, and nearly one-half of the world crop," yet it continues to analyze the matter as purely one of *state* policy. Despite the fact that the vast majority of the affected raisins—90–95 percent—would be consumed outside the State of California, by consumers with no access to the California ballot box, the Court makes no mention of a potential externalities problem. Faith in "good government," it seems, easily overcame the concerns that typically arise where a small, tightly concentrated group of producers is positioned to impose substantial price increases on a diffuse, unorganized group of consumers.

Third, the opinion reflects substantial deference to state oversight efforts. For example, the Court states, without further elaboration, that consumers are protected by a portion of the legislation authorizing the Agricultural Prorate Advisory Commission to reject a petition for establishment of a collective marketing plan if it would "permit unreasonable profits to producers . . . ." The Court does not address how "unreasonable profits" would be defined or how the Commission would go about auditing producer profits in the first place. Furthermore, the Court does not address the more critical issue of the composition of the Commission, beyond a brief description of the number of members. Presumably, as in many other professional contexts, these sectoral regulators would be drawn largely from the ranks of the industry itself.

Finally, the *Parker* opinion reflects substantial deference to purported state objectives. As in the case of the Court's deference to state oversight efforts, its deference to purported state objectives is revealed less by what the decision said than what it did not say. Although the objective of the Prorate Act was, quite plainly, to raise agricultural prices through the cartelization of California producers, the sponsors of the legislation, understandably, elected to describe its goals more diplomatically. Thus, the *Parker* Court notes, without further elaboration, that "[t]he declared purpose of the Act is to 'conserve the agricultural wealth of the State' and to 'prevent economic waste in the marketing of agricultural crops' of the state." While the Court's failure to address squarely the likely consumer impact of the legislation, as well as the outright deceptiveness of the "economic waste" language, can perhaps be chalked up to genuine New Deal enthusiasm, it also reflects the *Parker* opinion's deep roots in public interest theory, including that theory's general enthusiasm for government solutions.

Although public interest theory survives in a variety of forms, and continues to claim adherents, much has changed since the time of *Parker*. For better or worse, skepticism regarding the role of government has grown increasingly common and now plays a more dominant role in economic and political theory. While initial challenges to public interest theory emerged much earlier, a consensus counterpoint began to take hold during the 1960s. Leading adherents of this alternative viewpoint included Milton Friedman who, in his 1962 work *Capitalism & Freedom*, argued that "[t]he pressure [for the imposition of occupational licensing standards] invariably comes from members of the occupation itself" and not necessarily from an aggrieved public. Other notable adherents included James Buchanan and Gordon Tullock, who, in the same year, published *The Calculus of Consent*, in which they analyzed political decision making using the economic principles of rational self-interest and exchange. The result was "a substantive criticism of the then-dominant elevation of majority voting to sacrosanct status in political science" …

The work begun in the 1960s continued, with a renewed focus on the ever expanding regulatory state. In his 1971 article *The Theory of Economic Regulation*, for example, George Stigler described how small, well organized interest groups often use the political process to "capture" regulatory schemes and turn them to their own advantage. Building on this insight, Richard Posner's 1974 article *Theories of Economic Regulation* argued that the public interest theory of regulation was outmoded, and called for more empirical research into "interest group" or "capture" theories…

The emergence of public choice theory, and its increasing acceptance by judges, also has been reflected in the Supreme Court's thinking on antitrust exemptions. Beginning in the 1970s, the Court's reliance on public interest theory began to give way to a more incentive-oriented and skeptical approach to state action analysis. The approach is "incentiveoriented" in the sense that it presumes that even governmental entities will tend to act in an economically self-interested manner and tries to determine whether that parochial self-interest coincides or conflicts with the interests of the state. Likewise, the approach is "skeptical" in the sense that it grants no greater deference to a governmental entity than to a profit-seeking private firm. Both tendencies, which reflect a decidedly more cynical view of government, are illustrated by a series of state action decisions that mark a steady rejection of the key aspects of the *Parker* decision that root it so firmly in the public interest tradition.

One seemingly simple way to address the disconnect between the philosophical underpinnings of the state action doctrine, which are increasingly rooted in public choice theory, and the current analytical framework, which remains mired in public interest theory, would be to update the outdated analytical framework. One promising alternative would be to adopt a "tiered" approach to state action. This approach, which was briefly described in the FTC's *State Action Report,* recognizes that both the "clear articulation" and "active supervision" requirements have been weakened though uniform application to vastly different factual circumstances. In order to escape this one-size-fits-all paradigm, a tiered approach would vary the level of clear articulation and active supervision required based on two key factors: (1) the nature of the anticompetitive conduct and (2) the nature of the entity engaging in the conduct. Such an approach would be far more consistent with the state action doctrine's current roots in public choice theory, as it would place the focus on the analysis squarely on the defendant's political and economic incentives.

Pursuant to such a tiered approach, the level of clear articulation required would increase or decrease, depending on the nature of the anticompetitive conduct at issue. This approach reflects that fact that, the more serious the nature of the anticompetitive conduct, the more likely it is to restrain trade. Thus, it is logical to assume that the alleged beneficiary of a restraint will be more likely to engage in more serious anticompetitive conduct as such conduct is also more likely to be successful. Increasing the level of clear articulation required to match the seriousness of the alleged anticompetitive conduct should therefore create at least a rough link between the defendant's incentives and a grant of state action protection, with the result that the "clear articulation" requirement will be most rigorous where the defendant is most likely to engage in anticompetitive conduct.

Similarly, the level of active supervision required would increase or decrease depending on the nature of the entity engaging in the conduct. The goal of this aspect of the tiered approach is, once again, to tailor the rigor of the *Midcal* analysis to the incentives of the defendant. Thus, where the defendant has strong incentives to pursue its own objectives, as opposed to those of the state, one would expect the required level of active supervision to increase. In contrast, where the incentives of the defendant are closely aligned with those of the state, one would expect a corresponding lower level of required supervision.

Theory and Practice of Competition Advocacy at the FTC
James C. Cooper, Todd J. Zywicki, and Paul A. Pautler

[37]This past fall marked the 30th anniversary of a pivotal moment in the establishment of the modern competition advocacy program at the FTC, Chairman Lewis Engman's speech on the economic burden that inefficient transportation regulation policies were imposing on the U.S. economy. Competition advocacy, broadly, is the use of FTC expertise in competition, economics, and consumer protection to persuade governmental actors at all levels of the political system and in all branches of government to design policies that further competition and consumer choice. Competition advocacy often takes the form of letters from the FTC staff or the full Commission to an interested regulator, but also consists of formal comments and amicus curiae briefs. Although the FTC has been involved in competition advocacy activities since its founding, Engman's speech symbolized a new aggressiveness on the part of the FTC.

The economic theory of regulation (ETR) posits that because of relatively high organizational and transaction costs, consumers will be disadvantaged relative to businesses in securing favorable regulation.4 This situation tends to result in regulations—such as unauthorized practice of law rules or per se prohibitions on sales below-cost—that protect certain industries from competition at the expense of consumers. Competition advocacy helps solve consumers' collective action problem by acting within the political system to advocate for regulations that do not restrict competition unless there is a compelling consumer protection rationale for imposing such costs on citizens. Furthermore, advocacy can be the most efficient means to pursue the FTC's mission, and when antitrust immunities are likely to render the FTC impotent to wage ex post challenges to anticompetitive conduct, advocacy may be the only tool to carry out the FTC's mission.

Notwithstanding its potential as a low-cost—and in some cases, the only—vehicle to carry out the FTC's core mission of promoting consumer welfare, the importance of the advocacy program relative to other components of the FTC markedly declined during the 1990s following its zenith in the mid-1980s. Only since Timothy Muris's Chairmanship has the advocacy program begun to enjoy a resurgence. In part, these mixed fortunes may reflect a lack of advocacy's fundamental grounding within the core mission of the FTC. The advocacy program, moreover, often has been politically controversial, exposing the Commission to criticism from special interests, Congress, and other governmental actors…

One can argue that the advocacy program (known internally as the "intervention" program in the 1970s and 1980s) dates back to the earliest days of the Commission, when the FTC submitted comments to the Fuel Administration (on coal pricing) and the War Industries Board (on steel). If we do not want to ascribe the origins of a program to distant and idiosyncratic events, a more representative date for the beginning of the program, and certainly for the program's "modern era," would be October 7, 1974, when Chairman Louis Engman spoke about the broader use of antitrust policy as an alternative to the regulation of markets. In referring to the nation's macroeconomic problems—in 1974 the U.S. economy was suffering

[37] Cooper, James C., et. al. *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST LAW JOURNAL 1091 (2005).

from stagflation—he argued that burdensome federal transportation regulations contributed to the problem of slow economic growth and that aggressive antitrust enforcement could be a substitute for regulation of certain industries. Because it presented competition policy as a novel alternative to deal with pressing economic problems, the speech received substantial coverage in the press—including a front-page story in *The New York Times.*

Regardless of the precise starting point for the program, a competition based advocacy program was in full swing by June 1980 when Alfred Dougherty, Bureau of Competition Director under Chairman Pertschuk, wrote that "the intervention program played an important role in advancing the Commission's competition goals." Under Pertschuk, the Commission and its staff presented comments to numerous federal level agencies on a wide range of issues, including international trade, health professions, and transportation…

…[A]t least in numbers of filings, the program grew significantly from 1982 through 1987, when the program reached its apex with ninety comments. The number of filings increased during this period for a least three reasons: (1) there was a greater emphasis on the program generally, and thus more opportunities were pursued; (2) there was an increase in the already broad range of the issues covered (e.g., postal practices and taxicab regulation); and (3) there were certain policy issues that were playing out in many states simultaneously, resulting in a large number of advocacy opportunities on a single issue (e.g., attorney ethics codes, professional advertising, gasoline marketing, retail dealer protections, optometry retailing, etc.) …

By early 2000, the FTC's program of regulatory comment was small and mostly unidimensional, focusing very heavily on the restructuring of the electricity generation and distribution industry. The program produced scattered comments on other substantive issues (e.g., comments to FDA on food advertising or drug regulation issues, comments to various states on entry restraints), but they were few compared to the heyday of advocacy activity and virtually none were supported by empirical work because by that time the agency did little research on regulatory issues.21

With Timothy Muris as Chairman (June 2001–August 2004) came a renewed emphasis on the FTC's advocacy program. There were twenty-one filings in 2002, a level that has risen slightly since then. Further, the program sought to expand beyond electricity into areas that were familiar ground in the 1980s—restraints on entry in local markets and governmental restrictions on competition. Although the general regulatory research that had been used to support the program in the 1980s was no longer an ongoing project, the comment topics became more diverse, including, for example, comments on the retail marketing of gasoline, wine distribution, licensure, and the unauthorized practice of law…

The advocacy program was controversial from its inception because it could not avoid offending someone on each issue it pursued. Some of the animosity toward the program was likely based on disputes over specific policy suggestions, while more general objections may have arisen regarding the proper role (if any) of a federal agency in providing suggestions regarding competition or regulatory policies to a state legislature or regulatory body. Additionally, certain Congressional critics also argued that the advocacy program's use of resources kept the Commission from aggressively pursuing predation and other nonmerger antitrust activities. As discussed above, in an effort to reduce tensions between the FTC and other state and federal regulators, Chairman Janet Steiger began to de-emphasize the advocacy program in 1989, as Figure 1 clearly shows…

Although regulation sometimes is needed to correct a market failure, it also can be used to restrict competition in order to transfer wealth from consumers to a favored industry. It has long been recognized that because of industry's superior efficiency in political organization relative to consumers, consumer interests often are subservient to industry interests in the regulatory process.31 Beginning with the seminal work of Stigler (and later more formally developed by Sam Peltzman and Gary Becker), however, the notion that regulation is produced in a black box to maximize social welfare has given way to what has become known as the economic theory of regulation (ETR). The foundation of ETR is that politicians and constituents are rational economic actors. As such, constituents demand favorable regulation and politicians use the state's coercive power to supply it in return for political support. When adopting a policy, regulators33 weigh the political support from those who stand to gain against political opposition from those who stand to lose. The interest group most able to translate its demand for a policy preference into political pressure is the one most likely to achieve its desired outcome.

Building on the work of scholars like Anthony Downs and Mancur Olson, ETR explains why information and organization costs will limit the size of effective interest groups. As a threshold matter, individuals must expend resources to gain enough information to recognize their interests. As Stigler notes, "[t]he costs of comprehensive information are higher in the political arena [than the marketplace] because information must be sought on so many issues of little or no direct concern to the individual, and accordingly he will know little about most matters before the legislature." Holding constant the size of a wealth transfer, the larger the interest group size, the smaller the per capita benefit; as per capita benefits diminish, the less likely it is that informing oneself on the impact of a regulation makes economic sense.

Second, once individuals recognize their interest in the outcome of the regulatory process, they must organize to translate their demand for policy into political pressure. Because the benefits from acquiring a desired regulatory outcome is a public good for members of an interest group, however, each member has an incentive to shirk his obligation to the group and free ride on the contributions of others.

The important implication of this insight is that policies that reduce the welfare of a majority for the benefit of a minority are within the set of feasible outcomes. Indeed, one readily can see how consumer interests give way to the interests of a small industry in the regulatory process. Beyond a certain point, per capita benefits from a preferred regulatory outcome are diluted such that it becomes irrational to take part in the political process. A practical consequence of this is that small groups with similar interests—like members of a particular industry—can organize political support more effectively than large diffuse groups—like consumers generally. Thus, the equilibrium outcome of the political process is likely to be regulation that harms consumers by protecting a favored industry from competition…

ETR suggests that because consumers will be relatively ineffective at representing their interests in the political system, political outcomes may tend to restrict competition more than they otherwise would. Tasking a public entity with the responsibility of representing dispersed consumers by promoting the principle of competition in the political process is a way to correct this political market failure. Indeed, because anticompetitive regulation that results from a political market failure can have just as pernicious effects on consumer welfare as private conduct that harms competition, there does not appear to be a reasoned justification for the FTC to police the former but not attempt to ameliorate consumer harm from the latter.

By representing consumer interests in the political process, the FTC is able to affect political outcomes through three, nonmutually exclusive channels. First, to the extent that a comment informs consumers of the way a proposed regulation is likely to affect them, it can spur political action and thus increase the political costs associated with supporting anticompetitive regulation. In this manner, competition advocacy can move the political equilibrium towards one that is more favorable to competition. Similarly, an FTC comment can provide "political cover" for politicians to take a position against favored industry; regardless of whether an FTC comment increases the political cost to supporting anticompetitive regulations, a politician can claim that he or she has an excuse for not supporting a favored industry. Finally, a comment simply may persuade a politician to oppose regulation by presenting a compelling case that a certain regulation restricts competition more than is necessary to promote some consumer protection goal and therefore is not in the public interest.

ETR also can help to explain why it is uniquely appropriate to have a federal agency charged with carrying out the advocacy function. As noted by James Madison in *Federalist 10,* state and local governments are often the most prone to the sort of factions and interest-group activity that generates anticompetitive regulation. Thus, a particular interest group may be especially concentrated or strong in a particular state, and that group may have undue influence in the political process of that state. In addition, the anticompetitive regulations of one state may have major spillovers, or other externalities, that impose burdens on national markets.42 As a result, it is appropriate for the advocacy function to rest with a national actor that will be less prone to capture by parochial interest groups, but instead will be attenuated from some local political pressures and will be able to look out for the national goals of preserving robust economic market competition. In addition, the FTC's status as a bipartisan independent agency may also increase its effectiveness on advocacy issues. Because critics often will characterize FTC interventions as "taking sides," the Commission's status as a bipartisan expert agency may insulate it from some of the attacks that might otherwise be leveled at its advocacy activities.

Despite these justifications for an advocacy program, there are some inherent limits on the benefits that advocacy can provide. For example, although advocacy provides regulators with information concerning the likely economic consequences of a policy choice, the FTC is not a constituent. FTC opposition to a protectionist piece of legislation, therefore, is not the same as constituent opposition because the FTC cannot provide political support in the form of votes or campaign contributions. In addition, FTC advocacy only can inform the debate and suggest appropriate action; it cannot compel that action.

Another important consideration is that the FTC is itself a regulatory body and may be subject to political pressure from interest groups in much the same manner as federal or state agencies or legislatures. As Timothy Muris, who has served as Chairman and Bureau Director, has observed, "Congress can, and often does, exert considerable influence over an agency such as the FTC." Indeed, some studies have found a relationship between the preferences of congressional oversight members' constituencies and FTC policy. And due to constituent complaints, in the late 1980s, moreover, Congress attempted to cripple, if not totally eliminate, the advocacy program.

That the FTC is an independent and bipartisan agency, however, is likely to limit the ability of an industry to capture it. Almost uniformly, the Commission gives unanimous approval for comments. Because one industry would be unlikely to effectively capture all Commissioners, the views put forth in advocacy comments are highly unlikely to have resulted from interest-group pressure. Further, the FTC deals with a wide range of industries, making it less likely than agencies that serve only one or a few industries to be subject to capture by any single interest group…

The value of competition advocacy should be measured by (1) the degree to which comments altered regulatory outcomes and (2) the value to consumers of those improved outcomes. For all practical purposes, however, elements (1) and (2) are impossible to determine with any degree of certainty. Although certain advocacy comments almost surely had some effect on final outcomes, and others clearly did not, there is no reliable way to determine the impact of a particular comment. For example, when regulators act in a manner advocated by the FTC, in most cases there is no means to measure a comment's marginal impact in the decision-making process. Moreover, even if decision makers later indicate that they relied on particular evidence or arguments, one can never be sure that such statements are not just after-the-fact justifications.

One study that attempted to assess the advocacy program's impact on regulatory outcomes between 1985–1987 found that 40 percent of comment recipients reported that the comments were at least "moderately effective," meaning that "the governmental entity's actions were totally or in large part consistent with all of the FTC's recommendations, and that any action taken was largely or partly because of those recommendations." The author concedes, however, that this "does not establish that the FTC effect on those decisions improved them; that is what cannot be measured" …

Although it is difficult to measure with any precision the impact of advocacy comments on regulatory outcomes, it is almost certainly the case that competition advocacy is a more cost-effective means than enforcement to attack state-imposed barriers to competition. The *Noerr-Pennington* doctrine immunizes certain attempts to lobby government for even anticompetitive regulation from antitrust challenge, and the state action doctrine shields certain anticompetitive conduct from federal antitrust scrutiny when the conduct is (1) in furtherance of a clearly articulated state policy, and (2) actively supervised by the state. Thus, FTC enforcement may be unable to reach some anticompetitive regulations, leaving advocacy as the only tool available to prevent consumer harm.

Even for cases where a court finds immunities not to apply, the high costs and inherent uncertainty of litigation and the extremely small amount of resources needed for advocacy suggest that advocacy is a more efficient vehicle than enforcement to attack state restrictions on competition. Further, by preventing or ameliorating anticompetitive restraints *before* they are imposed, advocacy can avoid, or at lease attenuate, consumer harm. Finally, to a greater extent than litigation—which often can involve idiosyncratic issues—the FTC often can amortize the cost of advocacy activities over subsequent comments on similar issues; once the fixed costs of analyzing a restraint have been incurred, the marginal cost of each subsequent filing on the same or similar topics is often minimal.

Discussion Questions

1. Other studies have reached conclusions similar to the public choice findings here. For example, Ekelund, McDonald, and Tollison argued that interest group influences also underlay the enactment of the Clayton Act in 1914, which expanded the Sherman Act.[38] They found that the enactment of the law transferred wealth to two groups of firms: relatively large national firms already engaged in interstate commerce and small firms

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[38] Robert B. Ekelund, Michael J. McDonald, and Robert D. Tollison, *Business Restraints and the Clayton Act of 1914: Public- or Private-Interest Legislation, in* THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC CHOICE PERSPECTIVE (Fred S. McChesney and William F. Shughart eds., 1994).

operating exclusively intrastate. According to Ekelund, et al., this occurred at the expense of medium-sized growing firms by denying them many of the benefits of economies of scale such as holding companies, mergers, exclusive dealing and other vertical restraints that would enable them to grow to larger size effectively. Thus, the impact of the Clayton Act was to protect small, inefficient firms from competition while also protecting large firms from new rivals.

2. Cohen examined the behavior of judges in the context of antitrust cases by studying the sentencing of decisions in criminal antitrust cases.[39] He found that jail sentences tended to be longer, fines tended to be higher, and *nolo contendere* pleas were less likely to be accepted over the government's objection when the judge hearing the case perceived an opportunity for promotion to a higher federal court. Cohen also found that judges with heavier dockets tended to impose heavier sentences than other, which he interprets as being a vehicle for judges to encourage plea bargains for defendants.
3. Several of the theories described in the chapter point to the importance of the incentives of bureaucrats with respect to enforcement of the antitrust laws. Coate, et al., and Higgins, et al., point to influences that resemble the congressional control model described by Weingast and Moran in Chapter 6 of the main volume. Weaver and Katzmann, as well as Coate, et al., point to the role of autonomous bureaucrats acting to further their own interests rather than overall public policy goals of the bureau. What do these studies say about the theories of bureaucratic behavior discussed earlier in the semester?

[39] Mark A. Cohen, *The Role of Criminal Sanctions in Antitrust Enforcement*, 7 CONTEMPORARY POLICY STUDIES 36 (1989); Mark A. Cohen, *The Motives of Judges: Empirical Evidence from Antitrust Sentencing*, 12 INT'L REV. LAW & ECON. 13 (1992).