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Managerial and Decision Economics, Vol. 17, No. 2, Special Issue: The Role of Economists in Modern Antitrust. (Mar. - Apr., 1996), pp. 217-230.

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MANAGERIAL AND DECISION ECONOMICS, VOL. 17, 217–230 (1996)

Monopoly and the Problem of the Economists

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By any measure economists have played increasingly prominent roles in antitrust policy making, at least since the early 1970s. Indeed, the approach to the analysis of public policy toward business pioneered by Chicago school economists dominates the academic literature nowadays. According to the Chicago school's adherents, their insistence that antitrust be examined through the lens of price theory should have produced discernably 'better' (read pro-consumer) laws and 'better' law enforcement. This paper contends that economists have in fact not had a positive influence on antitrust policy, but have instead actively contributed to its use as a way of subverting competitive market forces.

Economists have their glories, but I do not believe that the body of American antitrust law is one of them (Stigler, 1982, p. 7).

INTRODUCTION

At the start of his presidential address to the American Economic Association in 1981, the late George Stigler (1982) jokingly observed that, had he instead been. invited to speak before the American Monopolists' Association, the title of his lecture would have been 'Monopoly and the Problem of the Economists'. He then went on to survey the available evidence concerning the impact economists have had on the course of antitrust policy in the United States. Stigler's conclusion is summarized nicely by this article's epigram: he found little reason to commend the profession for its contributions to the theory and practice of antitrust.

Stigler's tale of the economists and the problem of monopoly echoes Winston Churchill's colorful description of Russia as a 'riddle wrapped in a mystery inside an enigma'. The riddle is the profession's inexplicable change of heart toward antitrust, a nearly unanimous reversal of opinion that occurred some time during the early part of this century. As Stigler (1982, p. 3) put it so aptly, 'a careful student of the history of economics would have searched long and hard, on the unseasonably cool day of July 2 of 1890, the day the Sherman Act was signed by President Harrison, for any economist who had ever recommended the policy of actively combatting collusion or monopolization in the economy at large'.

Lurid accounts of the evils wrought by bloated 'robber barons' aside, the majority of the economists of the late nineteenth century were in fact opposed to the Sherman Act (Gordon, 1963; DiLorenzo and High, 1988). Their opposition was based on the widely held belief that the trust movement was a natural and mostly unobjectionable response to the rising forces of competition triggered by America's industrial revolution. The trusts assembled by John D. Rockefeller, Andrew Carnegie, and their fellow capitalists facilitated the exploitation of the new economies of scale and scope that made large-scale enterprises profitable. Any harm consumers may have suffered from price-fixing agreements or other abuses, which surely did occur, was more than offset by the benefits of increased price stability and the cost advantages of large-scale production. Although no economists were called upon to testify before Congress during the hearings held on Senator John Sherman's bill, the published opinions of economists overwhelmingly 'seemed to reject the idea that competition was declining, or showed no fear of decline' (Gordon, 1963, p. 166).

Contrary viewpoints were certainly expressed. The socialist Richard T. Ely, a founder of the American Economic Association, for instance, thought that the trust movement had brought great distress to the working class. Ely endorsed proposals limiting the use of child labor and re-

CCC 0143–6570/96/020217–14
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stricting the number of hours adults could be required to work each day. He even went so far as to call for government ownership of industry to cure these perceived social ills. But Ely, too, opposed the Sherman Act, stating that 'the so-called trusts are not a bad thing, unless business on a large scale is a bad thing. On the contrary, when they come about as the result of free development, they are a good thing, and it is a bad thing to attempt to break them up' (Ely, 1887, p. 265; 1900, p. 162).

At least two well-known economists, Henry Carter Adams and Allyn Young, came out strongly in favor of an antitrust policy that would dismantle the great 'monopolies'. By and large, though, the economists of the 1880s saw no need for antitrust legislation (DiLorenzo and High, 1988, p. 429); they were in fact downright hostile to it (Stigler, 1982, p. 3).

The economics profession's opposition to an antitrust policy had reversed almost completely by the middle of this century's second decade. By the late 1970s, 85% of the economists surveyed by Kearl *et al.* (1979) agreed or agreed provisionally with the statement that the 'antitrust laws should be enforced vigorously to reduce monopoly power from its current level'.[1] Shortly before his death, even George Stigler was firmly in the camp of antitrust's supporters. Antitrust, he said, 'is a public interest law in the same sense in which ... having private property, enforcement of contracts, and suppression of crime are public interest phenomena ... I like the Sherman Act' (Hazlett, 1984, p. 46).

The mystery is that the reversal of opinion was grounded not in the principles of positive economics, but apparently sprang full grown like Athena from the head of Zeus: 'It would be gratifying to me if I could report that our profession's changing view was based upon the systematic study by economists of the effects of the policy, in short, that hard evidence carried the day. Unfortunately, there have been no persuasive studies of the effects of the Sherman and Clayton Acts throughout this century' (Stigler, 1982, p. 5).

The continuing enigma is why the profession's majority, especially those members of it identified with the 'Chicago school', steadfastly cling to the belief that antitrust's failures, which became evident almost immediately and have persisted for more than a century, can be explained chiefly on the basis of ignorance of economics among the lawyers, judges, and bureaucrats charged with the responsibility of enforcing the law. If only they were better equipped with the economist's toolkit and way of thinking, so the conventional Chicago school wisdom goes, public policy makers would do a much better job distinguishing competition from monopoly, thereby finally fulfilling the Sherman Act's promise as the bulwark of freely functioning markets.

Antitrust economists are prescribers (e.g. Dick, this issue). They develop elegant mathematical models with the avowed purpose of helping the Justice Department's Antitrust Division and the Federal Trade Commission identify and attack sources of allocative inefficiency in the economy so as to enhance consumer welfare. Yet many of these same economists would not be caught dead making similar recommendations to the Interstate Commerce Commission or to the now-defunct Civil Aeronautics Board. More than 30 years of research in the economic theory of regulation pioneered by George Stigler (1971) has produced evidence that, almost without exception, public regulation of price and entry has harmed consumers by reducing competition and raising prices.[2]

Economists also found that regulation has frequently been acquired by the regulated industry and has been designed and operated primarily for its benefit (Stigler, 1971, p. 3): 'Consumers never asked for an Interstate Commerce Commission to prevent new truckers from entering the business. Nor had consumers been heard from when the federal government set up milk marketing boards to restrict the supply of milk and drive up the price. The main players were truckers and milk producers, who wanted to limit competition' (Henderson, 1995, p. 62).

In short, interest-group politics, not economics, is now widely seen to be the driving force behind more traditional forms of public regulation of industry. The majority of economists would therefore not waste their time building and fine tuning models of optimal pricing mired in a regulatory nirvana where regulators maximize a non-existent social-welfare function. Why is it that the ghost of Pigou uniquely haunts the literature of antitrust (McCormick, 1984, p. 26)? Are antitrust economists simply naive?

The burden of this paper is to suggest that far from contributing to improved antitrust enforcement, economists have for reasons of self-interest actively aided and abetted the public law enforcement bureaus and private plaintiffs in using the Sherman, Clayton, and FTC Acts to subvert competitive market forces. It does so, first, by summarizing the literature attempting to explain antitrust law enforcement decisions available to George Stigler on the occasion of his presidential address. This is followed by a review of the subsequent contributions to this same literature which, being grounded in public-choice principles, has produced fairly strong evidence that politics shapes antitrust processes in much the same way it does more traditional forms of regulation. The paper then presents some data suggesting that economists' puzzling support for antitrust is at least in part explained by self-interest: Employment opportunities for economists in the private sector seem to be positively correlated with 'exotic' antitrust theories.

WHAT DID GEORGE STIGLER KNOW AND WHEN DID HE KNOW IT?

At the time George Stigler gave his presidential address, few attempts had been made to measure the impact of economists or economic theory on antitrust policy making. One relevant study was his own early effort to gauge the overall effects of the antitrust laws on the basis of broad-brush comparisons of concentration ratios, merger activity, and price-fixing conspiracies in selected US and UK industries (Stigler, 1966). He reported evidence that the Sherman Act had had modestly salutary effects, but characterized the findings as 'meager'.

Stigler also have available to him, but failed to cite, a series of important contributions to the literature that explored the antitrust law enforcement process more systematically. In the first of these studies, Long, Schramm and Tollison (1973) compared the actual distribution of antitrust cases across industries with the pattern that would be consistent with a public-spirited law enforcement agency selecting cases to prosecute on the basis of their potential net social benefit. Their approach was to regress the number of cases instituted against firms in particular industries on various industry-specific welfare-loss measures.

The Long–Schramm–Tollison model performed best in explaining case-bringing activities when industry size, measured by sales, was used as a proxy for welfare loss. Overall, though, the empirical evidence failed to support the hypothesis that the Antitrust Division's behavior was grounded in a benefit–cost model. Specifically, the results suggested that 'the composite measures of the potential benefits from antitrust action — the welfare-loss triangle or [the triangle] together with excess profits — appear to play a minor role in explaining antitrust activity' (Long, Schramm and Tollison, 1973, p. 361).

Subsequent comments on the Long–Schramm–Tollison study reported additional evidence that the law enforcement activities of the antitrust bureaucracy do not follow a public-interest 'model'.[3] Peter Asch (1975) estimated similar regression specifications for the Antitrust Division and the Federal Trade Commission separately. He concluded from the coefficient estimates that 'case-bringing activity cannot be characterized as predominantly "rational" or predominantly "random"' (Asch, 1975, pp. 580–81).

Exploiting a data set significantly less aggregated than that used by the other researchers, John Siegfried (1975) produced evidence that more antitrust cases were brought in industries exhibiting *greater* excess profits and *lower* welfare losses. These findings suggested that the antitrust agencies target successful firms whose profits are based on efficient resource use, not market power. But when Siegfried refined his model to include improved measures of industry profitability, its explanatory power plummeted, coefficient estimates switched signs, and their standard errors ballooned. Siegfried (1975, p. 573) ended by saying that 'economic variables have little influence on the Antitrust Division'.

By the late 1970s, then, economists had stumbled upon their own Holmesian mystery of the dog in the night: no support for the public-interest 'model' of antitrust policy making has been found. No one at the time had an explanation for the dog's failure to bark. There were, however, some hints that the modern architect of the economic theory of regulation (Stigler, 1971) could have put to better use. One of these was Suzanne Weaver's (1977) study of the Justice Department's

Antitrust Division. Based on personal interviews conducted during 1971 with staff members, private attorneys, and other observers of the antitrust law enforcement process, she sought to answer the question, 'Why does the division choose to bring any particular case?' (Weaver, 1977, p. 66).

According to her, events during the early 1950s, including the passage of the Celler–Kefauver Act and the indictment of the leading electrical equipment manufacturers for price fixing, 'made antitrust expertise a more valuable commodity to the business community and to the law firms serving it'. Due to the increased demand for such expertise, 'experience in the Antitrust Division became newly valuable to a young lawyer who wanted eventually to work in private practice'. And the specific experience wanted was trial experience in the federal courts (Weaver, 1977, pp. 38–40).

Weaver's study thus suggested that, at the margin, the goal of getting to trial may dominate the economic merits of a particular case in the Antitrust Division's decision to prosecute. A companion study of the incentive structure faced by the Federal Trade Commission's attorneys published three years later reached similar conclusions. Robert Katzmann (1980) also observed that the ultimate career goal of most members of the FTC's legal staff is a job with a prestigous private law firm. Such ambitions mean that the commission's senior managers will tend to avoid complex 'structural matters and industry wide cases [that] threaten the morale of the staff because they often involve years of tedious research before they reach the trial stage'. Instead, bureau directors will 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' (Katzmann, 1980, p. 83).[4]

Katzmann's main point is that one cannot explain the FTC's case selection process on the basis of market characteristics economists customarily associate with allocative inefficiency. The decision to prosecute is instead dominated by factors internal to the FTC bureaucracy — staff career objectives, the availability of law enforcement resources, the need to produce 'output' visible to congressional oversight committees, and so on.

A subsequent study of the FTC likewise identified internal organizational conflicts, staff incentives, and external constraints as important determinants of antitrust case selection decisions (Clarkson and Muris, 1981). For instance, a bureaucratic explanation is given for the commission's change of strategy in the early 1970s that devoted more resources to wide-ranging investigations of highly concentrated industries. It was apparently hoped that this reallocation of the commission's law enforcement resources would yield a number of highly visible monopolization cases which would both help reduce frictions between FTC lawyers and economists, who were at loggerheads over enforcing a law (the Robinson–Patman Act amendment to Clayton Act Section 2) 'that requires business decision makers to consult their attorneys before making price moves' (Scherer, 1980, p. 81), and provide staff members with the human-capital-building experience of a more legally complex and intellectually challenging caseload. Clarkson and Muris (1981, pp. 303–4) also attribute the FTC's reluctance to institute price-fixing cases to the desire on the part of the commission's attorneys to differentiate themselves in the post-government job market from their Antitrust Division counterparts.

Taken as a group, the three studies of organizational behavior summarized above point to the conclusion that the antitrust cases instituted by the public law enforcement agencies are not selected on the basis of their potential net benefits to society. The bureau managers and employees of the Antitrust Division and the Federal Trade Commission instead use the discretion available to them to launch investigations and pursue cases that help advance their own interests (by raising their expected lifetime earnings) rather than those of consumers.

In sum, the evidence available to George Stigler at the time of his presidential address to the American Economic Association provided little reason for thinking that the antitrust law enforcement agencies choose cases to prosecute on the basis of their potential net social benefit.[5] And to the extent that this evidence suggested that the antitrust laws were not being used to attack sources of allocative inefficiency in the economy, there were substantial doubts that antitrust policy was guided by a public-interest model or that economists had had much influence on it.

But what was the cause of these failures? To members of the Chicago school, who insist that the organization of industry be studied 'through the lens of price theory' (Posner, 1979, p. 127), the answer is simple ignorance. Given proper instruction in economic principles, policy makers, the private antitrust bar, and the judiciary will all apply the laws to better effect. Are there grounds for such optimism?

WHAT DO ANTITRUST ECONOMISTS DO?

Antitrust's partisans, at least those residing intellectually in Hyde Park, maintain that 'better' antitrust policy will automatically follow an expanded role for economists in the law enforcement process and a greater appreciation for economics by the lawyers and judges who try antitrust cases. As the prior discussion shows, however, this superficially appealing proposition seems to be inconsistent with the facts.

Economists can, perhaps, claim a few minor victories: Very few Robinson–Patman price discrimination complaints are issued nowadays and the Supreme Court has said several times recently that it believes predatory pricing to be a rare event.[6] But the era of job growth for antitrust economists coincided with the launching of a number of clumsy, old-fashioned structural antitrust investigations based on novel, untested theories of 'shared monopoly' and predatory 'brand proliferation'.[7] The Justice Department began its quixotic pursuit of IBM and AT&T at about the same time.[8] *Exxon* dragged on for ten years, employing the energies of over 200 FTC lawyers and economists, and ended up producing little more than tens of thousands of pages of microfilmed oil company documents and reams of internal commission memoranda. Except for AT&T, which was settled by an agreement that created an oligopoly in long-distance telephone service and arguably impeded the development of competition in local telephone markets, the other cases met similar fates.

Economists working for the antitrust bureaus invented the idea of 'raising rivals' costs', which contends that firms can take actions unilaterally in input markets to provide themselves with competitive advantages in output markets, expressly to undermine the Chicago school's effective critique of predatory pricing.[9] As discussed in the next section, antitrust economists have also been accessories both before and after the fact in tilting merger policy further in the direction of protecting competitors rather than consumers. More recently, they have used the theory of games almost exclusively to build exotic models of anticompetitive behavior with little empirical content (Peltzman, 1991).[10] It is, in short, far from clear that 'better' economics makes 'better' antitrust policy.

It might be better to ask why it was ever expected to. In a geographically based representative democracy, politicians and policy makers receive almost no payoff from taking vague positions on behalf of the 'public interest' (Buchanan and Tullock, 1962; McCormick and Tollison, 1981). Instead, the logic of collective action (Olson, 1965) suggests that well-organized pressure groups will tend to dominate the political process, obtaining benefits for themselves at the expense of unorganized taxpayers and consumers.

Like all government agencies, the antitrust bureaus must produce visible output to satisfy their congressional sponsors (Lindsay, 1976). Investigations, complaints, consent orders, and litigation are the meat and bread of the Antitrust Division and the Federal Trade Commission. The careers of the economists employed by these agencies accordingly progress not on soundness and impartiality of their analyses of the theories and facts on which antitrust matters are based, but rather on their proficiency in 'working with' the lawyers to whom they are assigned. Economists who consistently oppose moving forward with antitrust actions do not prosper in this environment.

Antitrust provides numerous employment opportunities for economists in the private sector as well. They serve as expert witnesses for defendants in antitrust cases, they obtain post-government positions in academia, and they have recently found new sources of remuneration from spreading the antitrust gospel to the newly independent republics of Eastern Europe, to Taiwan, which adopted its first antitrust law just a few years ago, and even to Mongolia, which sought advice on writing its own Robinson–Patman Act.

Both more than economists' personal self-interest in an active antitrust policy, the bottom line is that antitrust is no different than other forms of government intervention into the private economy. Insofar as they provide the means of short-circuiting competitive market forces, the

Sherman, Clayton, and FTC Acts are the domestic equivalents of tariffs, quotas, and 'voluntary' export restraints in international trade. In the realm of antitrust, as in all other public policies toward business, it is the interplay between the demanders of protectionism — the firms who seek shelter from the Schumpeterian 'perennial gale' of 'creative destruction' — and the legislative suppliers of such protection that determine policy outcomes.

The dominance of politics in antitrust processes has never been more conspicuous than in the Justice Department's unprecedented decision to open its own investigation of Microsoft Corporation after the FTC had, on tied votes, twice failed to issue a complaint against America's leading producer of computer software. The Justice Department's intervention occurred only after several telephone calls from Capitol Hill to Anne Bingaman, the Assistant Attorney General for Antitrust. As the *Wall Street Journal* reported,

> because Ms. Bingaman's request for FTC documents followed prodding by two senators, her action 'does appear to have taken on a bit of the political aspect,' [former Assistant Attorney General for Antitrust] Mr. [Charles] Rule said.
>
> But if it's political, it's also bipartisan. Sen. Howard Metzenbaun (D., Ohio), chairman of the Senate Judiciary Committee's antitrust subcommittee, and Sen. Orrin Hatch, the ranking Republican on the full committee, both have urged Ms. Bingaman to examine the Microsoft case (Davidson, 1993, p. B8).

The *Journal* did not report, though other publications did, that the headquarters of two of Mircosoft's major competitors, Novell and Wordperfect, Inc., which at the time were independent but subsequently merged, are both located in Utah, whose voters sent Orrin Hatch to the US Senate (McChesney and Shughart, 1995, p. 344).

Just as Stacy Koon and his fellow Los Angeles police officers were going to be found guilty of using excessive force in the beating of Rodney King, no matter how many trials were required for that verdict to be reached, so Microsoft will be pursued until its competitors are satisfied. Economists and economic theory will only play supporting roles in this drama.

DO ECONOMISTS MATTER?

Whether or not economists' influence on antitrust policy making has grown over time, there are certainly more of them. The data series collected by George Stigler (1982, p. 10) and updated by me in Table 1 show the number of economists employed by the Justice Department's Antitrust Division and the FTC essentially doubling by the late 1980s. Although there has been some modest retrenchment since then, especially so at the commission, if numbers count economists certainly play much more prominent roles in the public antitrust agencies nowadays.

Notable periods of job growth for economists in the public antitrust bureaus followed passage of the Celler–Kefauver Act in 1950, which closed section 7's 'asset loophole', thereby strengthening the government's hand in merger law enforcement,[11] and the Hart–Scott–Rodino Antitrust Improvement Act of 1976, which established a pre-merger notification process requiring prospective merger partners to obtain the approval of either the Antitrust Division or the FTC before consummating their transaction.[12] Although information on the number of antitrust economists working in the private sector is harder to come by,[13] the data shown in Table 2 suggest that employment opportunities there are considerably more volatile. They also lend credibility to Stigler's (1982, p. 7) conjecture that the number of economists engaged in private antitrust consulting may 'possibly [be] twenty times as large' as the number employed in the public sector. While employment data were supplied by only one private consultancy, there are dozens of these firms, including Capital Economics, Charles River Associates, Economists, Inc., MiCRA, and NERA (National Economic Research Associates).

Perhaps one of the most interesting conclusions that can be drawn from the data in Table 2 is that economists' job opportunities in the private sector seem to be positively correlated with 'exotic' antitrust theories. If the information supplied by one firm is at all representative of general trends, the number of economists and support staff employed by private consultancies dropped precipitously during the Reagan era. This is noteworthy because the number of investigations and cases underway at the two public antitrust agencies

Table 1. Economists in the Antitrust Agencies, 1913–93

Year	Justice Department	FTC
1913	N/A	N/A
1923	N/A	30
1930	N/A	44
1951	N/A	18
1955	N/A	26
1971	N/A	47
1972	21	53
1973	26	56
1974	24	66
1975	36	67
1976	43	73
1977	40	73
1978	44	81
1979	45	78
1980	45	80
1981	38	92
1982	41	84
1983	43	84
1984	43	77
1985	46	80
1986	44	78
1987	39	74[a]
1988	39	72
1989	36	67
1990	44	66
1991	45	70
1992	47	70
1993	44	70

Sources: 1913–81: Stigler (1982, p. 10). 1982–93: The Justice Department data were supplied by Thomas D. King of the Antitrust Division; the FTC data were supplied by Malcolm B. Coate of the Bureau of Economics.

[a] Beginning in 1987, the FTC data are based on an internal employment series that includes economists working in the Office of the Director of the Bureau of Economics. The Office of the Director currently comprises the director, three area directors, and one assistant. In the past, up to six economists have been employed there.

remained fairly constant throughout the 1980s (Shughart, 1989). But the focus of the FTC's and the Antitrust Division's law enforcement activities shifted away from 'shared monopoly' and other imaginative legal theories having little economic foundation toward 'bread-and-butter' antitrust (Tollison, 1983) — horizontal mergers, price-fixing conspiracies, and similarly traditional antitrust matters. The activist antitrust agenda of the 1990s, with its renewed emphasis on resale price maintenance and other vertical restraints of trade have been good to antitrust economists.[14]

What impact have these additional law enforcement powers and additional numbers of economists had on the course of merger policy? There is evidence, at least for the horizontal mergers and acquisitions proposed between 1963 and 1978, that the transactions challenged by the Antitrust Division and the FTC under Clayton Act Section 7 would not, on average, have lessened competition or tended to create monopolies in the relevant lines of business or sections of the country (Eckbo, 1983; Stillman, 1983). It is conceivable, however, that the failures of government antimerger policy during this period can be explained by the fact that the information necessary for assessing the competitive effects of proposed mergers was not available to the antitrust authorities prior to implementation of the pre-merger notification process in 1978 and, moreover, that

Table 2. Economists and Support Staff in One Private Consultancy, 1980–94

Year	Economists	Support and Clerical
1980	109	61
1981	59[a]	32[a]
1982	48	40
1983	37	33
1984	40	33
1985	40	33
1986	42	35
1987	33	34
1988	52	36
1989	52	41
1990	70	49
1991	80	52
1992	83	58
1993	77	47
1994	94	41

Source: Private correspondence.
[a] 1980–81 change due to an unusually large number of case settlements.

the inability of the law enforcement agencies to block mergers prior to their consummation made it more difficult to achieve effective relief against transactions subsequently determined to be unlawful.[15]

The hypothesis that the Hart–Scott–Rodino Act has improved merger case selection has been tested. Using capital market data from 82 horizontal mergers challenged by the Antitrust Division or the FTC between January 1963 and December 1981 (17 of which challenges occurred after the pre-merger notification rules went into effect), Eckbo and Wier (1985) asked whether the public law enforcement agencies' newfound authority had enhanced their ability to identify and challenge transactions likely to substantially lessen competition. The evidence suggested no such improvement. Indeed, the competitors of the prospective merger partners seemed to have benefitted most from pre-merger notification:

> While it is possible that the government's merger policy has deterred some anticompetitive mergers, the results indicate that it has also protected rival producers from facing increased competition due to efficient mergers. The additional enforcement powers granted under the HSR Act apparently have not led the agencies to pick cases better (Eckbo and Wier, 1985, p. 121).

More law enforcement authority and more economists have failed to produce outcomes consistent with antitrust's avowed public-interest goals. If economics does not seem to have much influence on antitrust, politics is an obvious alternative. Writing in 1969, Richard Posner advanced a pork-barrel hypothesis with respect to the FTC. Posner (1969) charged that the commission was significantly impaired in carrying out its mission of promoting competitive markets by its dependence on Congress. He emphasized the obvious fact that in a geographically based representative democracy each member of the legislature is obligated to protect and further the provincial interests of the citizens of the jurisdiction who have elected him. More specifically, 'the welfare of his constituents may depend disproportionately on a few key industries. The promotion of the industries becomes one of his important duties as a representative of the district'.

In addition, because oversight responsibilities regarding the commission's budget and its political appointees are vested in the hands of the members of certain key committees and subcommittees of the Congress, a legislator holding such a position will have a 'a great deal of power to advance the interests of businesses located in his district however unimportant the interests may be from a national perspective'. Posner contended that a major reason FTC investigations seldom seem to be in the public's interest is that many of them are initiated 'at the behest of corporations, trade associations, and trade unions whose motivation is at best to shift the costs of private litigation to the taxpayer and at worst to harass competitors'.[16]

Posner's pork-barrel hypothesis was tested in an important study of the FTC's case-bringing activities from 1961 through 1979. After identifying the committees and subcommittees of the House and Senate having proximate jurisdiction over the FTC, Roger Faith, Donald Leavens, and Robert Tollison (1982) tallied the number of antitrust actions instituted against firms headquartered in the districts and states of sitting committee members that were *dismissed* relative to the total number of actions brought against these firms. They then tested whether this ratio was significantly different from the ratio of dismissals to total complaints issued against firms not so represented.

Comparisons were made for each of two subperiods, 1961–9 and 1970–9, to see whether congressional influences on antitrust actions were affected by major reform measures implemented at the FTC following the release in 1969 of two reports highly critical of the commission's case selection policies and administrative procedures (ABA, 1969; Cox *et al.*, 1969). The empirical results suggested that FTC complaints issued against firms headquartered in the jurisdictions represented by the relevant committee members — particularly so in the case of companies headquartered in the districts of key House subcommittee members — were more likely to be dismissed than complaints involving firms headquartered elsewhere. Moreover, there was no evidence of any lessening of the role played by politics in FTC decision making between the two subperiods studied: 'If anything, the pork-barrel relationship between Congress and the commission became statistically stronger during the reform period of the 1970s' (Faith, Leavens and Tollison, 1982, p. 342).

More recent evidence suggests that economists' opinions are taken into account in decisions to prosecute, but that their recommendations are of lesser importance than either legal or political considerations. Coate, Higgins and McChesney (1990) examined the information gathered by the FTC in response to all 'second requests' issued under the authority of the Hart–Scott–Rodino Act between 14 June 1982 and 1 January 1987. The resulting sample consisted of 70 commission decisions. In 27 of the cases, the FTC issued a complaint alleging that the transaction violated Clayton Act Section 7; the proposed merger was allowed to proceed in the other 43 cases.

A regression model designed to explain the commission's decision whether to challenge a merger or not included variables measuring the extent of agreement between the staff attorneys and economists working on the case as to the transaction's likely competitive effects — its impact on market concentration and the probability of collusion, based on their independent judgments concerning the existence of barriers to entry into the relevant market. The model also included measures of the intensity of the political pressure, if any, exerted on the commission regarding the proposed merger. Possible congressional influence was proxied by two explanatory variables — the number of *Wall Street Journal* articles devoted to the merger published prior to the FTC's decision and the number of times commission officials were called to testify before congressional committees during the 12-month time interval centered on the date the FTC issued its second request.

All these variables had statistically significant effects on the commission's decision to prosecute. In particular, mergers were more likely to be challenged the more highly concentrated the industry was prior to the merger (i.e., the more narrowly the relevant market boundaries were drawn), the higher the barriers to entry were thought to be, and the more the merger was perceived to raise the benefits or lower the costs of collusion among the remaining firms. Although these results are consistent with an economic approach to merger law enforcement, *when the FTC's lawyers and economists disagreed on the competitive issues, the commission typically sided with its legal staff*. Moreover, greater political pressure — more news coverage and more summonses to appear before congressional committees — increased the probability that the FTC would vote to oppose the merger.

Based on this evidence, it appears that

> there is a constellation of identifiable interests who benefit from the FTC's stopping mergers.

> Politicians, their organized constituents opposed to mergers, and agency attorneys apparently are among the principal beneficiaries... [T]his combination of personal interests creates an upward bias in the way the Merger Guidelines are applied, resulting in a greater propensity to challenge mergers in the marginal case (Coate, Higgins and McChesney, 1990, p. 23–24).[17]

The minimal influence of economists on antitrust processes is further exposed by evidence from the United Kingdom. Weir (1992) investigated how the British Monopolies and Mergers Commission dealt with transactions referred to it between 1974 and 1990. To his apparent surprise, various economic indicators associated with a proposed merger's likely competitive impact (e.g., its estimated effects on prices and costs) carried little, if any, weight in the commission's decision to challenge it. The only variable that consistently seemed to increase the probability of a merger challenge was whether or not the merger bid was contested by the target firm. Politics trumps economics.

There is no shortage of anecdotes to bolster the econometric evidence of significant political influences on antitrust enforcement. According to an anonymous source, one reason that Australia's Trade Practices Commission (TPC) launches so many investigations that ultimately go nowhere is that such actions raise the profile of the TPC and, in particular, that of its current chairman, Alan Fels. The basis of this explanation is contained in remarks by Australia's Prime Minister who, in a recent cabinet meeting, dismissed the TPC's chairman as a 'nymphomaniac for publicity' (Ramsey, 1995).[18]

CONCLUSIONS

By the close of the Sherman Act's first century, *no* evidence had been produced by antitrust's partisans that the law enforcement activities of the Department of Justice's Antitrust Division or the Federal Trade Commission had systematically provided benefits to consumers by promoting open market conditions. Indeed, scholars taking a positive approach to the study of the subject have uniformly found that antitrust follows the same interest-group principles that have been shown to be robust in explaining more traditional forms of public regulation (Shughart and Tollison, 1985; McChesney and Shughart, 1995). This research suggests that economists have failed to produce 'better' antitrust policies because the public's interest carries little weight in the objective function being maximized by antitrust's law enforcers.

Economists have important roles to play in developing and testing positive models that expose the political forces that shape antitrust. But there is a dark side to antitrust economics as well. It is that economists

> do have some control over legislative agenda. That is, they can generate public policy alternatives of which legislators are previously unaware. Then, legislators combine these alternatives with all other alternatives before them and rank these alternatives with respect to their political productivity and the probability of passage. Legislators then turn to academics for a second contribution: argument and evidence in support of their preferred alternatives and against those they do not prefer (Aranson, 1990, p. 285–6).

One can charitably conclude that 'this interpretation of the role of academics — and their information — in the political regulatory process at best casts that role as transitory, and sometimes even epiphenomenal' (Aranson, 1990, p. 286). On the other hand, the 'essential facilities doctrine' and the doctrine of 'unilateral action' may just be the most recent examples of the shopworn ideas antitrust economists periodically reinvent in order to support plaintiffs' pleas for protection from the forces of unfettered market competition.

Acknowledgements

I thank Willie Shughart for help with mythological metaphors and Fred McChesney for inviting me to contribute to this special issue. Any remaining errors are my own.

NOTES

1. Frey *et al.* (1984) find comparable percentages of European economists responding positively to this

statement. In the most recent such study, however, Alston *et al.* (1992) report that only 62% of the economists they surveyed agreed or agreed provisionally with the need for more vigorous antitrust law enforcement.

2. Representative contributions to this literature are collected in Stigler (1988).
3. Aranson (1990, p. 259) argues that proponents of government intervention to correct so-called market failures do not in fact have a model that conforms with conventional scientific standards: 'The essential problem with the public interest theory of regulation is that its form is conditionally normative, and not necessarily positive (explanatory and predictive).'
4. As Posner (1969, p. 86) had put it earlier, 'the principal attraction of Commission service to lawyers who wish to use it as a steppingstone to private practice lies in the opportunities it affords to gain trial experience ... It is the experience of trying cases, *the more the better*, not the social payoff from the litigation, that improves the professional skills and earning prospects of FTC lawyers' (emphasis added).
5. Stigler also had available to him an extensive literature employing a case-study approach to assess the effects of antitrust law enforcement. The verdict of this literature, it is fair to say, is that many more 'bad' than 'good' cases have been brought. In evaluating one of the merger law's leading precedents, for example, John Peterman (1975a, p. 143) concludes that 'neither the government nor the Courts seemed able to distinguished between competition and monopolizing'. Even when the law has conceivably struck at anticompetitive acts and practices, the relief granted to the plaintiff is frequently ineffective (Elzinga, 1969). In summing up his detailed study of the FTC's lengthy prosecution of the Brown Shoe Company, Peterman (1975b, p. 393) ends up by saying that, at best, 'nothing was accomplished by bringing this case'. A representative sample of these case studies is summarized in Rubin (1995).
6. See, for instance, *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 US 574 (1986); *Cargill, Inc. v. Montfort of Colorado, Inc.*, 479 US 104 (1986); and *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993).
7. *In re Kellogg Co. et al.*, FTC dkt. no. 8833; and *In re Exxon Corp. et al.*, FTC dkt. no. 8934.
8. *U.S. v. International Business Machines* Corp., 69 Civ. 100 (1969); and *U.S. v. American Telephone & Telegraph Co.*, 74 Civ. 2974 (1968).
9. Steven Salop and David Scheffman, both of whom held high positions in the Federal Trade Commission's Bureau of Economics, first advanced the theory of raising rivals' cost at the 1982 meetings of the American Economic Association (Salop and Scheffman, 1983). A critical summary of the ensuing literature, with applications of the theory of three well-known cases, is contained in Coate and Kleit (1994). McGee (1958) still represents the most cogent statement of the Chicago school's position on predatory pricing.
10. 'Consider one small example: the earlier literature of predatory competition had the predator cut prices in the vicinity of the prey and raise prices elsewhere to recoup the loss. Today it would be embarrassing to encounter this argument in professional discourse' (Stigler, 1982, p. 9). However, dressed up appropriately in game theory clothing, antitrust economists routinely and unabashedly make this same argument nowadays in proving the existence of Nash subgame perfect noncooperative equilibria in models with asymmetric information and N players (no entry allowed).
11. As enacted in 1914, the original language of Clayton Act Section 7 condemned only those anticompetitive mergers effectuated by the purchase of 'the whole or any part of the stock or other share capital of another corporation engaged also in commerce'. Mergers effectuated by the purchase of physical assets where held by the courts to be beyond Section 7's reach. The Celler–Kefauver Act of 1950 added language explicitly prohibiting the acquisition of another firm's assets if the effect of the acquisition was to 'substantially lessen competition or tend to create a monopoly'. See Ekelund, McDonald and Tollison (1995) for theory and evidence suggesting that the original asset 'loophole', which remained open for nearly 40 years, was not a simple legislative error.
12. Although the merger partners must notify both the Antitrust Division and the FTC simultaneously of their intention to merge, one agency grants jurisdiction over the proposed transaction to the other through a clearance process worked out in the wake of the Supreme Court's decision in *Federal Trade Commission v. Cement Institute et al.*, 333 US 683 (1948). This decision allowed the commission to attack under Section 5 of the FTC Act business practices that would also be unlawful under the Sherman Act. The impact of this so-called liaison agreement on antitrust budgets and law enforcement activity is explored in Higgins, Shughart and Tollison (1987).
13. Even though promised anonymity, only one of the major private consulting firms heavily engaged in antitrust litigation responded to my request for information on the number of economists and support staff in their employ. Such are the weaknesses of survey data.
14. For instance, one of the first acts of Anne Bingaman, President Clinton's Assistant Attorney General for Antitrust, was to rescind the 1985 Vertical Restraints Guidelines. See Bingaman (1994).
15. Additional empirical support for Elzinga's (1969) conclusion that the remedies imposed in Section 7 cases have not placed significant constraints on the behavior of the parties involved is contained in

Ellert (1976) and Rogowsky (1986, 1987). The evidence that the antitrust penalties are often ineffective has an important implication for the efficacy of antitrust policy (Shughart and Tollison, 1987). One of the key prongs of the case for an activist antitrust law enforcement policy is that charges brought successfully against one firm can deter many other firms from committing similar law violations — that, in George Stigler's (1950, p. 32) felicitous phrase, 'the ghost of Senator Sherman is an *ex officio* member of the board of directors of every large company'. Research pointing to the ineffectiveness of the relief granted in antitrust proceedings weakens the support for bringing antitrust cases in the first place.

'Ineffectiveness' in this context should not, of course, be taken to mean that firms accused of merger law violations do not bear any costs. Indeed, McWilliams, Turk and Zardkoohi (1993) provide evidence that the reduction in stockholder wealth that follows in the wake of a government merger challenge goes far beyond that borne by the owners of the firms targeted by the antitrust complaint. The values of *all* mergers — including uncontested mergers — ongoing at the time an unfavorable Supreme Court ruling is announced appear to be affected adversely.

16. The political influences on antitrust policy making are explored more fully in Shughart and Tollison (1985), Shughart (1990), and McChesney and Shughart (1995). Also see Baumol and Ordover (1985), who provide numerous examples of firms using the antitrust laws to gain competitive advantages over their rivals.
17. Also see Coate and McChesney (1992, p. 291–2), who conclude that while 'rumors that economists were actually taking part in antitrust enforcement decisions' during the 1980s seem to have some basis in fact — 'both economist and attorney evaluations of [merger] guidelines factors appear to have an impact' on decisions to prosecute — nevertheless 'at the margin, attorneys seem to have more influence at the Commission if one accepts the econometric' results. Moreover, models that include political variables explain a greater proportion of FTC decisions to challenge mergers than models that contain only economic variables.
18. According to my source, the TPC's current chairman is the odds-on favorite to be named the first head of the Australian Competition and Consumer Commission, a new agency to be created by merging the TPC with the Prices Surveillance Authority. Additional anecdotes are contained in McChesney and Shughart (1995, p. 341–4).

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