CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Journal

December 2010 (2)

Antitrust 2025

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Antitrust 2025

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I. INTRODUCTION

Antitrust policy in the United States has roughly twenty to thirty year cycles: (i) after initial dormancy,[2] 1900—1920, the promise of antitrust; (ii) 1920s—mid-1930s, antitrust dormancy in the boom and bust years; (iii) mid-1940s—1970s, antitrust representing "the Magna Carta of free enterprise"[3] in preserving economic and political freedom; and (iv) late-1970s—2010, antitrust's contraction under the Chicago and post-Chicago Schools' neoclassical economic theories. So if past cycles are reliable indicators of future ones, we are at (or approaching) a new antitrust policy cycle, with 2025 being the approximate midpoint.

Any new policy cycle will be defined by three fundamental questions:

a. What is competition?

b. What are the goals of competition law?

c. What should be the legal standards to promote these goals?

One reason the Chicago School was effective in displacing the existing paradigm was its answering these three questions. For example, in *The Antitrust Paradox*, Robert Bork first looked at several different definitions of competition. Rejecting competition as rivalry, perfect competition ("utterly useless as a goal of law"), and protection of fragmented markets, Bork settled on his definition of competition, namely as a shorthand expression of consumer welfare, which comported with his goal of competition law.[4] Bork then outlined the legal standards to promote his conception of consumer welfare. Consequently, the first and second questions are fundamental, as "[e]verything else follows from the answer we give."[5]

Rather than predict the state of antitrust policy in 2025 (such as more or less cartel enforcement), this Essay will map two scenarios based on these three fundamental questions. At a 2010 American Antitrust Institute conference, a distinction was made between prediction and futures planning.[6] Prediction is something fairly precise and usually anticipated within a short time period. Futures planning is less precise. It is an open creative exercise in developing multiple

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[2] U.S. Dep't of Justice, Antitrust Div., Timeline of Antitrust Enforcement Highlights at the Department of Justice, http://www.justice.gov/atr/timeline.htm#cases (noting that on "average, less than 2 cases filed per year; antitrust enforcement not specifically funded").

[3] United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972).

[4] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 57-61 (1993).

[5] *Id.* at 50.

[6] Prediction and Antitrust Invitational Symposium (June 23, 2010), http://www.antitrustinstitute.org/content/prediction-and-antitrust-invitational-symposium.

scenarios and trying to understand the assumptions embedded in these scenarios. Accordingly, this Essay will examine some of the prevailing assumptions underlying the current answers to these three questions. By altering these assumptions, one can map alternative scenarios and their policy implications.

II. WHAT IS COMPETITION?

Although the Sherman Act is over a hundred years old, there is no well-accepted unifying definition of competition. Instead, there remain multiple conceptions of competition. The 2010 revisions to the U.S. Horizontal Merger Guidelines exposed the divide between static price competition and competition as a dynamic process. The 2010 Guidelines are an improvement over the 1992 Guidelines in terms of recognizing other dimensions of competition besides price.[7] But the criticism remains that the 2010 Guidelines primarily focus on static competition in narrowly defined antitrust markets.[8]

One reason why multiple conceptions of competition remain is that any theory of competition depends on its premises, the validity of which may not hold true across industries, countries, and time. Among the assumptions in any theory of competition are: (i) the rationality of market participants; (ii) the amount of information they have; (iii) the costs and speed of transactions; (iv) the degree to which market participants act independently of one another and care about the interests of third parties; and (v) the role of legal institutions and informal social, ethical, or moral norms in affecting the market participants' behavior.

The rise in behavioral economics has eroded the first assumption regarding the market participants' rationality. As I explore elsewhere,[9] in altering the assumption of the relative rationality of consumers and firms, our conception of competition (and the forms of market failure) can vary under the following four scenarios:

	Consumers, Rational	**Consumers, Bounded Rational**
Firms, Rational	I.	II.
Firms, Bounded Rational	III.	IV.

Relaxing the assumption of the relative rationality of the government raises additional concerns about the proper antitrust policies.

For example, under Scenario IV, both firms and consumers are bounded rational. Competition can be viewed as an evolutionary trial-and-error discovery process. Bounded rational firms have limited, imperfect knowledge about current and future preferences of

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[7] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010). Non-price competition in the 1992 Merger Guidelines was relegated to a footnote: "Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation."

[8] *See, e.g.*, J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, *The Next Challenges for Antitrust Economists* (July 8, 2010), http://www.ftc.gov/speeches/rosch/100708neraspeech.pdf.

[9] Maurice E. Stucke, *Reconsidering Competition*, University of Tennessee Legal Studies Research Paper No. 123, *available at* http://ssrn.com/abstract=1646151.

bounded rational consumers. While starting out as bounded rational, market participants, based on situational factors, can become more (or less) rational. Thus firms compete in offering products and services to continually satisfy consumers' changing preferences. Firms try different solutions and can learn from the customers' feedback (or their competitors' experience) which products and technological solutions are superior.

In the United States today, the Chicago, post-Chicago, and to the extent distinguishable Harvard Schools of competition policy confine their analysis to Scenario I where firms and consumers are rational, as defined under neoclassical economic theory. Consequently, one possibility is that antitrust policymakers by 2025 will be analyzing competition under the frontiers of Scenarios II, III, and IV. In doing so, the conception of competition will broaden beyond the current Guidelines' focus on static competition in narrowly defined markets. Issues of systemic risk, behavioral exploitation, herding behavior, and overconfidence bias will increase in importance. Antitrust analysis will shift from narrowly defined markets to vertical and horizontal competition among larger units, systems, platforms, and alliances in which potential competition plays an important analytical role.

As policymakers analyze competition under the frontiers of Scenarios II, III, and IV, neoclassical microeconomic analysis will continue to play a role, albeit a smaller one. If a better default conception of competition does not emerge, antitrust enforcers will continue using Scenario I's neoclassical economic theories as the starting point for their analysis. In a world of rational profit-maximizers with perfect willpower, what would one expect? Thus, Scenario I competition could represent the anchor from which enforcers deviate as far as the evidence and law permit.

Alternatively, by 2025, the prevailing theories of competition could shift to a new default. For example, based on the empirical findings or legislative command, Scenario II (rational firms/bounded rational consumers/rational or bounded rational government) or Scenario IV (bounded rational firms, consumers, and government) could become the new default conception of competition. Under Scenario II, behavioral exploitation and consumer protection will play a greater role in competition policy. Under Scenario IV, competition officials will focus more on such factors as systemic risk, path dependency, the importance of maintaining trial-and-error feedback loops, consumer choice, and competitive diversity.

So how far will policymakers depart from Scenario I's conception of competition premised on rational firms and consumers? This depends on the developments of the inter-disciplinary antitrust scholarship and policymakers' incentives. We are already seeing this push in the antitrust scholarship. Professor Spencer Weber Waller, for example, in his recent work is incorporating insights from corporate governance, strategic management, and marketing to shape antitrust analysis.[10] Professor Thomas Horton's recent article further expands an evolutionary economic theory of competition law.[11] And the behavioral antitrust scholarship over

[10] Spencer Weber Waller, *Corporate Governance and Competition Policy* (Sept. 23, 2010), http://ssrn.com/abstract=1681673; Deven R. Desai & Spencer Weber Waller, *Brands, Competition and the Law* (Feb. 1, 2010), http://ssrn.com/abstract=1545893.

[11] Thomas J. Horton, *The Coming Extinction of Homo Economicus and the Eclipse of the Chicago School of Antitrust: Applying Evolutionary Biology and Ethics to Structural and Behavioral Antitrust Analyses*, LOY. U. CHI. L.J. (forthcoming 2011), *available at* http://works.bepress.com/thomas_horton/1.

the past few years reexamines these fundamental questions, with interest in behavioral antitrust, both here and in Europe, growing.[12]

Thus it remains unlikely that by 2025 any unifying definition of competition will emerge. Instead, by 2025 policymakers may relax the current prevailing assumptions underlying their conceptions of competition. In doing so, they will encounter greater complexity. Competition by its nature will be increasingly viewed as an often unpredictable, dynamic process, not easily subject to mathematical modeling. Competition will be incompressible. It will be "impossible to account for the system in a manner that is less complex than the system itself."[13]

III. WHAT ARE THE GOALS OF COMPETITION LAW?

Between the mid-1940s and 1970s, antitrust policy recognized multiple political, social, and economic goals. The political and social goals were salient given the cartels in Nazi Germany and their collusion with U.S. firms.[14] In the 1970s—2010 policy cycle, some antitrust scholars pursued a quest for a single unifying goal. Some began evangelizing the purity of competition law, free from non-economic objectives. The debate devolved to whether the antitrust goal should be increasing total economic- or consumer welfare.[15]

So what will be the goals of competition policy in the next antitrust cycle? One scenario is that antitrust scholars and policymakers continue to debate over the proper economic welfare standard. But the debate over antitrust's goals has narrowed to such a degree that further contraction is unlikely.

Instead, any movement is likely to go in the opposite direction. Thus the second scenario is that over the next thirty years the goals of competition law will broaden to include political, social, and ethical concerns. Going forward, antitrust scholarship will increasingly emphasize the normative foundations of competition law.[16] Competition will be increasingly viewed as a means to secure political, economic, and individual freedoms, which in turn can promote innovation and dynamic competition, as well as the good life. Several additional forces can shape these goals.

First are the changes in the conception of competition by 2025. How one defines competition (say static price competition) will affect the resulting goals of competition

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[12] *See, e.g.*, Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 INDIANA L.J. (forthcoming 2011) (discussing increasing interest in behavioral economics and its applications to competition law), *available at* http://ssrn.com/abstract=1582720.

[13] Organisation for Economic Co-operation and Development, *A Framework to Measure the Progress of Societies: Statistics Directorate*, Working Paper No 34, at 10 (July 12, 2010), *available at* http://www.politiquessociales.net/IMG/pdf/framework.pdf.

[14] WENDELL BERGE, CARTELS: CHALLENGE TO A FREE WORLD (1944); Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497 (2009).

[15] Rudolph J.R. Peritz, *Foreward: Antitrust As Public Interest Law*, 35 N.Y.L. SCH. L. REV. 767, 771-72 (1990) (observing how the traditional array of goals such as "the abatement of unfair competition, a strong preference for individual entrepreneurs, the disfavor of monopoly profits, a distrust of firms with great economic power, and a recognition of competition as a process with social, economic, and political returns" were "shoved into the archives of antitrust history").

[16] For some recent examples of this scholarship, *see, e.g.*, Darren Bush, *Too Big to Bail: The Role of Antitrust in Distressed Industries*, 77 ANTITRUST L.J. (forthcoming 2010); Frank Maier-Rigaud, *On the Normative Foundations of Competition Law* (forthcoming 2011 in the ASCOLA Competition Law series by Edward Elgar).

(maximizing allocative and productive efficiencies). Thus, to the extent to which the prevailing conceptions of competition change so too may the antitrust objectives.

Second is the public's prevailing mood. Antitrust policy, as a political issue, has diminished over the past antitrust cycle.[17] But several factors may ignite the policy debate. The public is angry over the recent record taxpayer bailouts and increasing wealth inequality. Many question how financial institutions became too-big-to-fail. Although much is said of the globalization of competition policy, antitrust, to justify its existence to taxpayers, must also resonate on a local level. In combating international cartels, antitrust can combine globalism and localism. But antitrust must also respond to the citizens' concerns about preserving (or securing) the desired social and economic life, including the benefits of smaller firms and their locale's distinct character.

One weakness of antitrust in the last policy cycle was that its purist, theoretical approach made it easier to marginalize. Consequently, the public's and antitrust technocrats' view over antitrust policy can increasingly diverge. Take, for example, protecting small competitors, which, under the current antitrust conventional wisdom, is heresy. In a recent survey, about 8 in 10 European Union citizens thought that small companies needed to be protected from large companies' competition (51 percent "totally agreed" and 30 percent "somewhat agreed").[18] More E.U. citizens "totally agreed" with that statement than other statements considered antitrust gospel, such as competition between companies allows for more choice[19] and better prices[20] for consumers. Even if one assumes that Americans would disagree with the Europeans on protecting small companies, in today's global economy, the E.U.'s merger policies can impact U.S. commerce and merger policy.

A third potential force is the extent to which policymakers respond to the public's dissatisfaction. Behavioral antitrust, unlike the Chicago and post-Chicago Schools, is not captured by any political party. The Conservatives in Britain's recent election, for example, claimed aspects of behavioral economics for their modernization projects.[21] An interesting development is if Republicans do the same on antitrust. The Sherman Act, after all, was enacted under a Republican administration, led by a Republican senator. Some of the leading antitrust enforcers were Republicans. And among the dynamic voices today are the Republican FTC Commissioners. So a significant force is the extent to which Republicans seek to reclaim antitrust policy, albeit in a different form from today's rule-of-reason standard.

A fourth potential force is the competition among different competition policies around the world. For decades, the United States had a monopoly on antitrust law. In the last antitrust cycle we saw an oligopoly, with the European Union and, to lesser degrees, Canada, Japan, and South Korea. The last cycle also witnessed many new entrants and the formation of the International Competition Network. In the next antitrust cycle, some of the BRICs (Brazil, Russia, India, and China) may play a greater role in the competition policy arena.

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[17] Maurice E. Stucke, *Lessons from the Financial Crisis*, 77 ANTITRUST L.J. 1101 (2010).

[18] Flash Eurobarometer EU citizens' Perceptions About Competition Policy (No 264), requested by the European Commission's DG Competition, at 7 (2010). About 7 in 10 believed that mergers between large companies distorted competition (37 percent "totally agreed" and 32 percent"somewhat agreed"). *Id*.

[19] *Id*. (49 percent totally agree).

[20] *Id*. (50 percent totally agree).

[21] Matthew Taylor, *Left Brain, Right Brain*, PROSPECT, Sept. 23, 2009.

To the extent the Beijing Consensus continues in its present form (a far from certain conclusion[22]) the next antitrust cycle might mark a competition between a "Democracy Consensus" and "Authoritarian Consensus," where antitrust policy plays a key role. If the prevailing antitrust goal is to maximize productive and allocative efficiency, then China can claim the advantage. If the primary antitrust goals are lower prices and greater output, then China's authoritarian government can claim that the rule of law, democracy, and individual freedoms are unnecessary to secure such aims. Instead, the United States and E.U., to differentiate their competition policies from an Authoritarian Consensus, would have to promote their comparative advantage.

The primary aim of competition law, under the Democracy Consensus, is not to secure lower prices, but to prevent the formation of powerful firms and state-controlled enterprises that threaten a dynamic economy and democracy. The United States and E.U., consistent with a broader conception of competition, can emphasize the significance of economic, personal, and political freedoms, as important in themselves, as well as important in promoting dynamic efficiencies and the good life (as further developed under the happiness economic literature).

So under the second scenario, these forces can converge into a powerful socio-political-economic movement. The primary value of competition and competition policy will be to secure political, economic, and individual freedoms and prevent the concentration of political and economic power.

IV. WHAT SHOULD BE THE LEGAL STANDARDS TO PROMOTE THESE GOALS?

An inherent trade-off exists between antitrust goals and legal standards. One can use a fact-specific weighing standard, such as the rule of reason, if one has a narrow, clear antitrust objective. Alternatively, one can have multiple and conflicting policy objectives, if they are synthesized into clear rules that market participants can internalize and follow. One cannot have, consistent with the rule of law, a fact-specific weighing standard and multiple policy objectives. That is a recipe for disaster.

Up until the late 1970s, antitrust policy promoted multiple economic, social, and political goals. Accordingly, between the mid-1940s—1970s, the U.S. Supreme Court generally (but not always) sought four things. First, it sought a legal standard that was administrable for generalist judges.[23] With some exceptions, the Court turned to the legislative history or common law precedent as a basis for its standards.[24] Second, the Court sought legal standards to enhance predictability. For example, in devising the thirty percent presumption for mergers, the Court sought to foster business autonomy: Unless business executives "can assess the legal consequences of a merger with some confidence, sound business planning is retarded."[25] The Court's role was to provide clearer rules on what was civilly (and criminally) illegal under the Sherman Act. Third, the Court sought to prevent the lower courts from being bogged down in difficult economic

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[22] Yang Yao, *The End of the Beijing Consensus*, FOREIGN AFFAIRS, Feb. 2, 2010, *available at* http://www.foreignaffairs.com/articles/65947/the-end-of-the-beijing-consensus.

[23] *See, e.g.*, United States v. Phila. Nat'l Bank, 374 U.S. 321, 362 (1963) ("in any case in which it is possible, without doing violence to the congressional objective embodied in . . . [the statute], to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration").

[24] Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1402-03 (2009).

[25] *Phila. Nat'l Bank*, 374 U.S, *supra* note 23, at 362.

problems, such as trade-offs between inter- and intra-brand competition.[26] Neither the courts nor litigants could weigh the reduction of competition in one area (such as intra-brand competition for Topco private-label products among Topco member supermarkets) versus greater competition in another area (such as inter-brand competition between Topco members' and the major supermarkets' private-label goods).[27] Fourth, not only was this weighing beyond its institutional competence, the Court recognized that the legislature, while subject to rent-seeking, was more politically accountable than the judiciary; so Congress must make these normative trade-offs.[28]

Between 1977 and 2010, the Court went the opposite direction. It increasingly emphasized one type of competition (static price competition) and certain economic objectives of the competition law (consumer welfare and promotion of inter-brand competition) and deemphasized antitrust's political and social objectives (and intra-brand competition). In narrowing its conception of competition and the goals of competition law, the Court dismantled several of its *per se* illegal standards, increasingly relied on its rule-of-reason standard, and expanded antitrust immunity.[29]

In the 2010—2030 antitrust cycle, several forces suggest that another trade-off is likely. First, the extent to which the conception of competition broadens and policymakers promote antitrust's political and social goals, this will, accordingly, increase the pressure to change the rule of reason as antitrust's default legal standard. Accompanying the shift in antitrust goals and to a more complex conception of competition will be pressure for more predictable, objective, and transparent antitrust standards so that private actors can reasonably anticipate what actions would be prosecuted and channel their behavior in welfare-enhancing directions.

This does not mean a return to *per se* illegal standards. Instead, the demand for, and supply of, more administrable standards, such as presumptions of illegality, with well-defined exceptions or defenses, will increase. For example, if the conception of competition shifts from Scenario I's assumption of rational market participants, then competitive outcomes become less predictable. Antitrust policymakers would be more skeptical about enforcers' and courts' abilities to predict competitive outcomes or to maximize efficiency in those markets. Thus, as the conception of competition evolves over the next 30 years, policymakers will be more skeptical about the rule of reason. The goal instead will be in maintaining competitive structures, which in turn might lead to more structural prohibitions and presumptions that lessen the number of mergers, domestic or foreign, that American antitrust agencies will permit.

Second, faith in behavioral regulations (and *ex post* assessments of conduct) will diminish with the ascendency of more complex conceptions of competition and concerns over economic, political, and individual freedom. One belief is that with better independent regulators at the helm, the financial crisis could have been averted.[30] This, of course, is the cult of the personality. Rather than fall sway to the genius and later failures of the next "maestro" like Alan Greenspan,

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[26] Stucke, *Rule of Reason*, *supra* note 24, at 1404-05.

[27] United States v. Topco Assoc., Inc., 405 U.S. 596 (1972).

[28] Stucke, *Rule of Reason*, *supra* note 24, at 1405-6.

[29] *Id*. at 1407-15.

[30] SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 206-07 (2010) (criticizing the belief that regulatory refinements will solve the too-big-to-fail problem and prevent the financial crisis as "excessive faith in technocracy").

the public may demand greater structural mechanisms. Rather than closely regulate financial institutions deemed too-big-to-fail, policymakers would strive for structural mechanisms, such as limiting the financial institutions' ability to grow beyond a certain threshold[31] or separating "utility" banking from riskier investment banking and trading activities.[32] The structural mechanisms would be designed to protect the public from the most ineffectual bureaucrats, while leveling the playing field for smaller financial institutions that do not have the political clout to receive an implicit government guarantee.

Third, the public in the next antitrust cycle may demand greater accountability of the antitrust enforcers. With a greater focus on dynamic competition, it would become more difficult for competition officials to allow mega-mergers with light consent decrees (requiring, as in the bank merger wave of the 1990s, large integrated financial institutions to divest relatively few local bank branches in the overlapping narrowly-defined markets). Citizens may demand more predictable, objective, and transparent antitrust enforcement by the agencies. Citizens may also seek to lower the barriers to bring their own private actions. Due to the current high litigation costs and the inherent complexity of competition cases, consumers may demand standards that make it easier to recover for their antitrust injuries. This too would require better legal standards than the current rule of reason.

Fourth, as private and public antitrust enforcement grows around the world, the costs from uncertain and inconsistent legal outcomes will likely increase. Multinational firms' concern over such uncertainty will likewise increase. As the Court's rule-of-reason standard is an unattractive export, especially to countries with less developed judiciaries, firms will increasingly demand clearer legal standards. Even if the standard imperfectly weighs the costs of false positives and negatives, it will be accepted over an inconsistently applied rule of reason.

Thus, in the next antitrust cycle, the legal standards may shift in two ways. First, as recently signaled in *linkLine*, the Court may shift from a "case-by-case" approach, which focuses on the "particular facts disclosed by the record"[33] to simpler antitrust rules "clear enough for lawyers to explain them to clients."[34] Second, the standards may shift, whenever feasible, from directly regulating market participants' behavior to maintaining a competitive structure and preserving freedom therein.

V. CONCLUSION

This Essay maps two possible scenarios in the next U.S. antitrust policy cycle.

The first scenario is the status quo. Antitrust's conception of competition remains confined to the neoclassical world of rational profit-maximizers with willpower. The goal of competition law will be promoting total or consumer economic welfare. With a narrow construction of competition and narrow economic goal, antitrust law will continue to diminish in importance in the United States. With its narrow conception of competition, antitrust policy will

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[31] *Id.* at 214 (proposing a cap on financial institutions' control or ownership interest in assets worth more than a fixed percentage of U.S. GDP).

[32] Mervyn King, Governor of the Bank of England, Speech to the Scottish Business Organizations (Oct. 20, 2009), http://www.bankofengland.co.uk/publications/speeches/2009/speech406.pdf

[33] Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 467 (1992).

[34] Pacific Bell Telephone Co. v. linkLine Communications, Inc., 129 S. Ct. 1109, 1121 (2009) (quoting Town of Concord, Mass. v. Boston Edison Co., 915 F.2d 17, 22 (1st Cir. 1990)).

offer few tools to address issues of increasing importance in a global interconnected economy, such as systemic risk. If competition policy assumes rational consumers, it cannot offer meaningful insights on systemic behavioral exploitation. If competition policy assumes that firms are rational (or assumes that market forces swiftly punish irrationality), it cannot explain why many mergers destroy shareholder value, and it will continue to dwell on the fear of false positives, rather than weigh the false negatives. If competition policy seeks to promote mainly static price competition, it will continue to have little to say about innovation and dynamic efficiencies. If competition policy promotes only short-term economic welfare, it will not necessarily promote political or social goals, be less relevant to the public, and be easier to marginalize during times of economic crisis.

So if antitrust remains constant, many facets of competition policy will be addressed by sector-specific regulation or other laws (e.g., business torts). Some signposts of this trend emerged in the last cycle. One signpost was enforcers' attitudes towards hard-core cartels. Cartels were once considered one, among many, evils. During the last cycle, cartels became the "supreme evil."[35] If antitrust's conception of competition and the goals of competition law further contract, cartels will become the only evil. Another signpost is greater faith in sector-specific behavioral regulation than in the antitrust laws, as evident in *Trinko*,[36] *Billing*,[37] *linkLine*,[38] and the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act.[39]

Under the second scenario, policymakers in the next antitrust cycle will reexamine the three questions. In evaluating the assumptions underlying the prevailing conceptions of competition, they will look beyond neoclassical economic theory. Policymakers will consider the developments in such inter-disciplinary areas as behavioral, neuro-, identity, new institutional, and evolutionary economics, and embrace other disciplines. Some of the key assumptions underlying the current conceptions of competition will be relaxed or displaced. What will emerge will be more complex, but more realistic, conceptions of competition; these too will draw into question the enforcers' ability to predict behavior in these markets. Over the next thirty years, the goals of competition law, driven by several forces, will broaden to include political, social, and ethical concerns. As a result, there will be greater demand for clearer legal standards.

Which scenario is more likely? First this depends on the types of cases the antitrust agencies and private plaintiffs bring, the courts' response, and Congress' reaction.

Second, it depends on the Supreme Court's and lower courts' humility in the next antitrust policy cycle. Faced with the complexity of competition and the Sherman Act's political and social goals, some courts may acknowledge the judiciary's inherent limitations and lack of authority in making these normative policy judgments (such as trading off antitrust's social, political, and economic goals). In emphasizing its institutional limitations in setting industrial policy,[40] the judiciary instead may opt for simpler presumptions of legality or illegality. One

[35] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

[36] *Id*. at 414-15.

[37] Credit Suisse Securities (USA) LLC v. Billing, 551 U.S. 264 (2007).

[38] 129 S. Ct. at 1124 (Breyer, J., concurring) (when a "regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits").

[39] Pub. L. 111-203, 124 Stat 1376 (July 21, 2010).

[40] Unlike Congress, the Court is limited to the factual record and amicus briefs. It does not subpoena and question witnesses, independently gather evidence, or revisit the industry after its decision to assess the impact of its decision.

promising indicator of this trend is *California v. Safeway, Inc.*[41] Thus, much depends over the next antitrust cycle on the degree to which the judiciary leaves trade-offs and complexities to the politically accountable legislature, and accepts simpler, albeit imperfect, standards.

Finally, it depends on the public's demand for change and the incentives of policymakers to undertake this analysis. Sound antitrust policy requires steady Congressional oversight and leadership, which diminished during the past antitrust cycle. So if you are unhappy with the status quo, demand for change. Demand that the policymakers do more than reorganize antitrust agencies. Demand that policymakers take into account the new economic findings in assessing first what is competition, second what can competition achieve for us, and finally how can competition promote the good life.

[41] 615 F.3d 1171, 1192-93 (9th Cir. 2010).