SYMPOSIUM:

100 YEARS OF *STANDARD OIL*

ANTITRUST ENERGY

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I. INTRODUCTION

Antitrust law has been declared a failure, moribund, or possibly just a ghost from the trustbusting era. A quarter of a century ago, Thomas Hazlett declared: "Any responsible historian of American antitrust policy must conclude that, if one takes at face value the assertions that antitrust laws exist to advance competition and protect the consumer, that policy is a failure. The notorious *Berkey Photo* case may be the flagship of that failed policy."[1] Hazlett went as far as suggesting it would be "most effective . . . to consider federal enforcement of the antitrust laws to be a per se restraint of trade."[2] Robert Crandall and Clifford Winston examined the question: "Should the United States pursue a vigorous antitrust

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1. Thomas W. Hazlett, *Is Antitrust Anticompetitive?*, 9 HARV. J.L. & PUB. POL'Y 277, 334 (1986) (footnote omitted) (citing Berkey Photo, Inc. v. Eastman Kodak Co., 457 F. Supp. 404 (S.D.N.Y. 1978), *aff'd in part, rev'd in part*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980)).
2. *Id.* at 336.

policy?"[3] They found "little empirical evidence that past interventions have provided much direct benefit to consumers or significantly deterred anticompetitive behavior."[4] Other scholars examined whether antitrust was still alive.[5] Yet, recently some stressed that antitrust is not dead, but while "at one time [it] was skewed toward over-enforcement, . . . today if there is any bias it is in the opposite direction."[6] Statistical figures indicate that, since the 1970s, the volume of civil antitrust litigation is low compared to prior decades.[7] For these reasons and others, Jonathan Baker tried to provide "evidence of the necessity and success of antitrust enforcement."[8] The Supreme Court, however, voiced skepticism about antitrust litigation.[9] In the fall of 2007, *Antitrust* therefore posed the question for a special issue: *The End of Antitrust As We Know It?*[10]

Marking the centennial anniversary of *Standard Oil Co. v. United States*,[11] we argue that much of the critique of antitrust enforcement and the skepticism about its social significance suffer from "Nirvana fallacy"—comparing existing and feasible policies to ideal normative policies, and concluding that the existing and feasible ones are inherently inefficient because of their imperfections.[12] Antitrust law and policy have always been

3. Robert W. Crandall & Clifford Winston, *Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence*, 17 J. ECON. PERSP. 3, 3 (2003).

4. *Id*. at 4.

5. *See*, *e.g.*, THE CONFERENCE BD., RESEARCH REPORT NO. 928, IS ANTITRUST DEAD? (1989).

6. Stacey L. Dogan & Mark A. Lemley, *Antitrust Law and Regulatory Gaming*, 87 TEX. L. REV. 685, 701 (2009). *See also* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 3 (Robert Pitofsky ed., 2008) [hereinafter HOW THE CHICAGO SCHOOL OVERSHOT THE MARK].

7. During this period, the volume of criminal antitrust cases has been much higher than in any other era. *See* RICHARD A. POSNER, ANTITRUST LAW 36 (2d. ed. 2001); Vivek Ghosal, *Regime Shift in Antitrust Laws, Economics and Enforcement*, 7 J. COMPETITION L. & ECON. 733, 733, 746–47 (2011). For the role of treble damages in this trend, see D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. CAL. L. REV. 689 (2012).

8. Jonathan B. Baker, *The Case for Antitrust Enforcement*, 17 J. ECON. PERSP. 27, 27 (2003).

9. *See*, *e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558–59 (2007); William H. Page, Twombly *and Communication: The Emerging Definition of Concerted Action Under the New Pleading Standards*, 5 J. COMPETITION L. & ECON. 439 (2009); D. Daniel Sokol, *Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement*, 78 ANTITRUST L.J. 201, 235 (forthcoming 2012) ("[B]oth plaintiff- and defense-side respondents noted a change in the ability to bring private actions in recent years. Some argued that *Twombly* caused the elimination of the most unreasonable cartel claims. For a number of practitioners, the impact of *Twombly* has been significant in terms of reducing weak cases. However, other respondents asserted that *Twombly's* impact was minimal because most of the cases filed would have survived *Twombly*."); Mark D. Whitener, *Editor's Note: The End of Antitrust?*, ANTITRUST, Fall 2007, at 5, 5.

10. ANTITRUST, Fall 2007, at cover page. *See also* Whitener, *supra* note 9, at 5–6.

11. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

12. *See generally* Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1–4 (1969).

and will always be imperfect. However, they are alive and kicking. The antitrust discipline is vibrant, evolving, and global.[13] This Essay introduces a number of important innovations in scholarship related to *Standard Oil* and its modern applications and identifies shifts in antitrust that will keep the field energized for some time to come.

Writing for the Court in *Standard Oil*, Chief Justice White expressed the view that Congress passed the Sherman Act because of "the dread of enhancement of prices."[14] *Berkey Photo*, the alleged flagship of the failed antitrust policy, stands among other things for the proposition that "[s]etting a high price may be a use of monopoly power, but it is not in itself anticompetitive."[15] The transition between these statements was meaningful. The *Berkey Photo* court unequivocally stated a well-established economic understanding—high prices are not necessarily uncompetitive.[16] Like economic thinking, although perhaps at a slower pace, antitrust evolves.

William Howard Taft, who was President of the United States at the time the Supreme Court handed down the *Standard Oil* decision, described Standard Oil as "the greatest monopoly and combination in restraint of trade in the world[,] . . . an octopus that held the trade in its tentacles, and the few actual independent concerns that kept alive were allowed to exist by sufferance merely to maintain an appearance of competition."[17] Standard Oil invented the "corporate trust" and played a central role in the trust movement that motivated Congress to enact the Sherman Act in 1890.[18] More than 130 years after Standard Oil took over almost the entire market for refining of crude oil in the United States, scholars still debate how the company acquired its monopolistic position.[19]

Standard Oil's pricing schemes symbolize traditional and

13. Sokol, *supra* note 7; D. Daniel Sokol, *Explaining the Importance of Public Choice for Law*, 109 MICH. L. REV. 1029, 1041–48 (2011); D. Daniel Sokol, *The Future of International Antitrust and Improving Antitrust Agency Capacity*, 103 NW. U. L. REV. 1081 (2009).

14. *Standard Oil*, 221 U.S. at 58.

15. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 294 (2d Cir. 1979).

16. *See supra* note 15 and accompanying text.

17. WILLIAM HOWARD TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 85–86 (1914).

18. *See generally* Barak Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605 (2012).

19. *See, e.g.*, Daniel Crane, *Were Standard Oil's Rebates and Drawbacks Cost Justified?*, 85 S. CAL. L. REV. 559 (2012); Elizabeth Granitz & Benjamin Klein, *Monopolization by "Raising Rivals' Costs": The Standard Oil Case*, 39 J.L. & ECON. 1 (1996); Benjamin Klein, *The "Hub-and-Spoke" Conspiracy that Created the Standard Oil Monopoly*, 85 S. CAL. L. REV. 459 (2012); George L. Priest, *Rethinking the Economic Basis of the Standard Oil Refining Monopoly: Dominance Against Competing Cartels*, 85 S. CAL. L. REV. 499 (2012).

contemporary controversies over potential anticompetitive effects of discounts.[20] *Standard Oil* is iconic because it was the first time antitrust was used to break up a company, and at the time Standard Oil was the largest company in the United States. Structural remedies and choice of remedies have remained controversial ever since.[21]

Standard Oil was involved in numerous legal battles before its dissolution. The lawsuits against Standard Oil illustrate the roles of private and public plaintiffs in Section 2 claims, as well as strategic conduct of such plaintiffs.[22] Contemporary plaintiffs in actions against Microsoft, Intel, Google, and other giants utilize similar strategies and leverage the globalization of competition laws.[23]

Standard Oil is the case in which the Supreme Court embraced reading a reasonableness qualification into the interpretation of Section 1 of the Sherman Act: the rule of reason.[24] For that alone, *Standard Oil* is one of the most significant cases in antitrust jurisprudence. The Supreme Court probably would have endorsed the rule of reason even without *Standard Oil*,[25] and today's rule of reason is rather different from *Standard Oil*'s rule of reason.[26] However, it was still *Standard Oil* that formally contributed the rule of reason to antitrust jurisprudence. By today's standards, the factual and economic analyses of the *Standard Oil* Court were crude and imprecise in several ways.[27] Yet, the decision should be judged by the standards of 1911. In retrospect, popular market theories that had been used to criticize antitrust policy were simplistic and socially costly.[28] Today's petroleum markets are very different from the markets Standard dominated, but

20. *See, e.g.*, Christopher R. Leslie, *Revisiting the Revisionist History of* Standard Oil, 85 S. CAL. L. REV. 573 (2012); John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137 (1958).

21. *See* Peter C. Carstensen, *Remedies for Monopolization From* Standard Oil *to* Microsoft *and* Intel*: The Changing Nature of Monopoly Law From Elimination of Market Power to Regulation of Its Use*, 85 S. CAL. L. REV. 815 (2012).

22. *See* Sokol, *supra* note 7.

23. *Id*.

24. *See* Alan J. Meese, Standard Oil *as* Lochner*'s Trojan Horse*, 85 S. CAL. L. REV. 783, 783–84 (2012); Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 733 (2012).

25. *See infra* Section II.B; Meese, *supra* note 24, at 787–93.

26. *See* Gavil, *supra* note 24.

27. *See, e.g.*, Crane, *supra* note 19; Leslie, *supra* note 23; William H. Page, Standard Oil *and* U.S. Steel*: Predation and Collusion in the Law of Monopolization and Mergers*, 85 S. CAL. L. REV. 657 (2012).

28. *See, e.g.*, FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES (2011).

antitrust remains essential in those markets.[29] Business history shows that antitrust is and has always been needed.[30]

The rise of Standard Oil contributed to the birth of antitrust. The breakup of Standard Oil released enough energy to fuel discussions and disagreements a century later.[31] Despite a somewhat popular (at least outside of the field of antitrust) narrative of the death of antitrust, this Essay introduces several areas of "energy" in antitrust through works authored for the centennial anniversary of *Standard Oil*.

II. ANTITRUST JURISPRUDENCE

A. UNCERTAINTY ABOUT THE GOALS

Writing for the Court in *Standard Oil*, Chief Justice White argued that "it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions . . . led . . . to the prohibition [of] all contracts or acts which were unreasonably restrictive of competitive conditions."[32] That is, Chief Justice White believed that the goals of antitrust could be defined precisely. One hundred years later, the goals of antitrust law are still defined with clarity: protection of consumer welfare. Both definitions are vague and undesirable from the economic perspective.

Chief Justice White's focus on the "dread of enhancement of prices" supposedly suggests that a successful firm could violate antitrust laws only for the capacity to increase prices. In essence, this principle means no-fault liability for monopolists.[33]

The modern stated goal of antitrust laws supposedly reflects the

29. Timothy J. Muris & Bilal K. Sayyed, *The Long Shadow of* Standard Oil*: Policy, Petroleum, and Politics at the Federal Trade Commission*, 85 S. CAL. L. REV. 843 (2012).

30. Margaret C. Levenstein, *Antitrust and Business History*, 85 S. CAL. L. REV. 451 (2012).

31. *See, e.g.*, William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43, 45 (2000) ("In *Standard Oil Co. v. United States*, the Supreme Court directly tackled the question of dominant firm conduct and left four enduring marks. First, the Court treated Standard's 90 percent share of refinery output as proof of monopoly. Future cases commonly would use high market shares as proxies for monopoly power. Second, the Court established the "rule of reason" as the basic method of antitrust analysis. . . . Third, the Court began classifying some behavior as unreasonably exclusionary. . . . Finally, despite Standard's dire (and unfulfilled) predictions of industrial apocalypse, the Court broke the firm into 34 parts." (citation omitted)).

32. Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).

33. *See* Orbach & Campbell Rebling, *supra* note 18.

legislative intent of the Sherman Act.[34] In *Reiter v. Sonotone Corp.*, the Supreme Court quoted Robert Bork's argument that Congress passed the Sherman Act as a "consumer welfare prescription."[35] Perhaps the only thing that "may be said with accuracy" is that, since then, courts have been treating the protection of consumer welfare as the goal of antitrust law. Nevertheless, lawyers and economists do not know or agree about the meaning of the term "consumer welfare" in antitrust, although it has a defined meaning in economics.[36]

In *The Antitrust Curse of Bigness*, Barak Orbach and Grace Campbell Rebling point out that Robert Bork introduced his definition in response to antitrust policies that were size oriented and protected small businesses. They note that Bork reconstructed antitrust history to argue that Congress passed the Sherman Act as a "consumer welfare prescription."

In *Standard Oil as Lochner's Trojan Horse*, Alan Meese addresses one aspect of the present controversy over the meaning of the term "consumer welfare."[37] Meese points out that courts are inconsistent with the application of the term. For the purpose of Section 2, courts tend to embrace interpretations that appear to be related to the "total surplus" standard. Under Section 1, because of the rule of reason that Chief Justice White introduced in *Standard Oil*, courts endorse interpretations that focus on consumer interests. Meese goes further and argues that "courts have apparently structured the Rule of Reason analysis in a manner that equates 'consumer welfare' with the welfare of purchasers in the relevant market."[38] Meese argues that the modern "consumer welfare" goal should be interpreted in the spirit of Chief Justice White's *Lochnerian* idea of the rule of reason.[39] Such interpretation may be closer to the total surplus standard. One concern that comes to mind is that if we defer to the view of Chief Justice White in *Standard Oil* in searching for the goals of antitrust

34. *See, e.g.*, Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 11 (1966) ("[T]he legislative intent underlying the Sherman Act was that courts should be guided exclusively by consumer welfare . . . ."). *But see* Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 134 (2011) (critiquing Bork's misuse of the term "consumer welfare").

35. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting ROBERT BORK, THE ANTITRUST PARADOX 66 (1978)). *See generally* Douglas H. Ginsburg, *Judge Bork, Consumer Welfare, and Antitrust Law*, 31 HARV. J.L. & PUB. POL'Y 449 (2008).

36. *E.g.*, Orbach, *supra* note 34, at 133–34.

37. Meese, *supra* note 24, at 119–30.

38. *Id*. at 121. In *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007), the Supreme Court rejected the distinction between buyers and sellers in contexts where the buyers hold the market power.

39. Meese, *supra* note 24, at 130–31.

laws, we may end up with the focus on "dread of enhancement of prices and of other wrongs."

Since *Standard Oil* considerable energy has been spent on the discussion of the goals of antitrust laws. And commentators still find energy to debate the topic.[40] Considering the frequent use of the term "consumer welfare" in antitrust, this topic may be one of the most important unsettled areas.

B. THE RULE OF REASON

In *Standard Oil*, Chief Justice White declared that courts should use the rule of reason to construe the Sherman Act: The "standard of reason which had been applied at the common law" should guide interpretation of the phrase "restraint of trade" in Section 1 of the Sherman Act.[41] In adding a reasonableness qualification to the ban on "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce,"[42] Chief Justice White closed a circle. In 1897, fourteen years earlier, the Supreme Court rejected his approach in a five-to-four decision in *Trans-Missouri Freight Ass'n*.[43] Justice Peckham wrote the decision for the Court, declaring that the inquiry into whether a restraint of trade was reasonable or unreasonable was unimportant because the Sherman Act denounced all restraints.[44] Justice White wrote the dissent and argued that "a brief consideration of the history and development of the law on the subject will . . . demonstrate that the words 'restraint of trade' embrace only contracts which unreasonably restrain trade, and, therefore, that reasonable contracts, although they, in some measure, 'restrain trade,' are

40. *See, e.g.*, Joseph Farrell & Michael L. Katz, *The Economics of Welfare Standards in Antitrust*, 2 COMPETITION POL'Y INT'L 3 (2006); Ken Heyer, *Welfare Standards and Merger Analysis: Why Not the Best?*, 2 COMPETITION POL'Y INT'L 29 (2006); Herbert Hovenkamp, *Distributive Justice and Consumer Welfare in Antitrust* (forthcoming); John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191 (2008); Orbach, *supra* note 37; Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The* True *Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336 (2010); Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551 (2012).

41. Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).

42. *Id.* at 49.

43. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

44. *Id.* at 327–28 ("Contracts in restraint of trade have been known and spoken of for hundreds of years . . . . When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce . . . , the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress.").

not within the meaning of the words."[45]

Two weeks after delivering the *Standard Oil* decision, Chief Justice White delivered another important antitrust decision. In *United States v. American Tobacco Co.*,[46] Chief Justice White clarified his view of the reasonableness qualification:

> [I]n the *Standard Oil* Case [it was held] that, giving to the [Sherman Act] a reasonable construction, the words :restraint of trade" did not embrace all those normal and usual contracts essential to individual freedom and the right to make which were necessary in order that the course of trade might be free.[47]

Justice Peckham, who rejected the reasonableness qualification in *Trans-Missouri Freight Ass'n*, was inconsistent in applying his own strict interpretation of Section 1. Already in *Trans-Missouri* he identified a category of contracts that should be excluded from the coverage of Section 1.[48] Similarly, in *Joint-Traffic Ass'n*, Justice Peckham reiterated the rejection of the reasonableness qualification, but exempted from the Sherman Act restraints of trade he described as "incidental" or "indirect."[49]

In *Standard Oil as Lochner's Trojan Horse*, Alan Meese argues that "*Standard Oil* was simply an application of *Lochner* to antitrust policy."[50] He reasons that "[a]n unduly broad reading of the statute, then, would infringe the liberty of contract that *Lochner* and its progeny so jealously protected."[51] Meese points out that today's rule of reason serves as a device to narrow, or "define," the Sherman Act's coverage "so as not to ban contracts and other conduct protected by the due process clause, but instead to reach only those contracts and conduct susceptible to regulation under *Lochner*'s regulatory paradigm."[52] He, thus, concludes that "one of constitutional law's most maligned decisions [*Lochner*] and its progeny live on, at least nominally [through the rule of reason], with no sign of mortality."[53]

45. *Id.* at 346.

46. United States v. Am. Tobacco Co., 221 U.S. 106 (1911).

47. *Id*. at 180–81.

48. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 329 (1897) ("A contract which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which in effect is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included within the letter or spirit of the statute in question.")

49. United States v. Joint-Traffic Ass'n, 171 U.S. 505, 568 (1898).

50. Meese, *supra* note 24, at 784 (referring to *Lochner v. New York*, 198 U.S. 45 (1905)).

51. *Id*.

52. *Id*.

53. *Id*.

Justice Peckham, who rejected the application of the rule of reason in *Trans-Missouri Freight Ass'n,* authored *Lochner*. Meese stresses Justice Peckham's approach to the liberty of contract, as reflected in *Lochner* and other decisions, including his antitrust decisions. The endorsement of the rule of reason in *Standard Oil* reflects the general sentiments of the Court as expressed in *Lochner*.[54]

Lochner and *Standard Oil* are landmark cases in which the Supreme Court created rules that narrowed the power of the state to interfere with the liberty of contract. However, there is at least one significant distinction between the *Lochner* jurisprudence and the antitrust restraint of trade jurisprudence. *Lochner* is about Section 1 of the New York Bakeshop Act that intervened in employment agreements for paternalistic concerns to one of the parties to the agreement. The antitrust restraint of trade jurisprudence is mostly about harm to others that restraint of trade (the agreement) may cause. As such, the antitrust restraint of trade jurisprudence seems more like an ordinary application of the police powers at turns of the century.[55]

The incorporation of the reasonableness qualification in *Standard Oil* ended one debate over the proper application of antitrust laws,[56] but marked only the beginning of many other debates and controversies. More than a century later, courts, lawyers, and scholars still have energy to criticize the antitrust rule of reason and debate its scope and meaning of its application. In his article, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, Andrew Gavil evaluates the level of uncertainty under the modern rule of reason one hundred years after the Supreme Court delivered its *Standard Oil* decision.[57] He chronicles the historical journey of the rule of reason from an undefined reasonableness qualification to the ban on restraints of trade to a structured approach that relies on economic analysis.[58] Gavil further illustrates how judicial misunderstanding of the evolution of the rule of reason impedes its progression and adds uncertainty to the application of antitrust laws.

Gavil's analysis of the evolution of the rule of reason also stresses the methodological transition in antitrust analysis. Chief Justice White's view

54. *Id*. at 792–96.

55. *See, e.g.*, Munn v. Illinois, 94 U.S. 113, 124–25 (1876); ERNST FREUND, THE POLICE POWER (1904); W.P. PRENTICE, POLICE POWERS ARISING UNDER THE LAW OF OVERRULING NECESSITY (1894).

56. *See, e.g.*, N. Sec. Co. v. United States, 193 U.S. 197, 360–64 (1904) (Brewer J., concurring).

57. Gavil, *supra* note 24.

58. *Id.* at 740–83.

that antitrust laws had something to do with "the dread of enhancement of prices"[59] was an intuitive approach that was grounded in economic analysis. Today, economics guides antitrust policy.[60]

A few weeks after the Supreme Court handed down its *Standard Oil* decision, it delivered another landmark antitrust decision: *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[61] In *Dr. Miles*, adopting a certain liberty of contract theory,[62] the Supreme Court announced that resale price maintenance (RPM) was illegal per se. It took the Court ninety-six years to overrule *Dr. Miles*. In 2007, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, the Supreme Court delivered a five-to-four landmark decision holding that RPM agreements should be assessed under the rule of reason.[63] Three years later, in *American Needle, Inc. v. National Football League*, the Supreme Court took a look into the contractual arrangements of sports leagues and pointed out that when the NFL's contractual activities for its teams with third parties may violate Section 1 of the Sherman Act they should be judged under the rule of reason.[64] The Court rejected the contractual theory that the NFL and its teams are a "single economic enterprise."[65] Both decisions left industries and antitrust practitioners with some uncertainty about how courts would apply the rule of reason.

In some respects, *Dr. Miles* may be antitrust's *Lochner*: A controversial decision that was adopted on some theory of liberty of contract, which the Supreme Court did not apply coherently,[66] ultimately abandoned, and that probably will remain controversial. The rule of reason was a concept present in antitrust before *Standard Oil*, but it was officially embraced by Chief Justice White in *Standard Oil*. As such, *Standard Oil* contributed to the jurisprudence of reasoning in antitrust but left the field with unsolved uncertainties, and energized debates over many doctrinal and economic theories.

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59. *See supra* note 32.

60. *See* Kovacic & Shapiro, *supra* note 31, at 43, 58–59.

61. Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

62. *Dr. Miles*, 220 U.S. at 383, 408–09 ("But, because there is monopoly of production, it certainly cannot be said that there is no public interest in maintaining freedom of trade with respect to future sales after the article has been placed on the market and the producer has parted with his title. Moreover, every manufacturer, before sale, controls the articles he makes."). *See generally* Barak Y. Orbach, *Antitrust Vertical Myopia: The Allure of High Prices*, 50 ARIZ. L. REV. 261 (2008); Barak Y. Orbach, *The Image Theory: RPM and the Allure of High Prices*, 55 ANTITRUST BULL. 277 (2010).

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

64. Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201 (2010).

65. *Id.* at 2213–16.

66. Under the Colgate doctrine, manufacturers could for the most part circumvent the ban on RPM at the federal level. United States v. Colgate & Co., 250 U.S. 300 (1919).

C. OUTSIZED CONCERNS ABOUT SIZE

In *The Antitrust Curse of Bigness*, Orbach and Campbell Rebling argue that, as sophisticated as modern antitrust may be, fears of size still influence and burden applications of the law.[67] The inertia of fears of size seems to be embedded in antitrust. Some antitrust scholars and practitioners still believe that absolute size should be a legal concern. At the very least, such views generate costs to large firms and confuse public opinions. Relative size—market share—is a basic analytical instrument in antitrust. It supposedly suggests that when a firm's relative size grows, its market power correspondingly increases. This proposition may hold in very limited circumstances.[68] At present, although most understand the limitations of the reliance on market share analysis and the Merger Guidelines reflect such understanding, the use of market shares in antitrust law is still rigid. Size perceptions influence the operation of antitrust law—concerns regarding absolute size play a role in antirust jurisprudence and relative size is still dominant in antitrust analysis. The American antitrust discipline might owe its birth to the fear of size, but thus far it has not acquired enough energy to recover from this fear.[69]

D. IDEOLOGICAL DISTORTIONS AND OTHER BIASES

Antitrust has greatly evolved since *Standard Oil*. The evolution of antitrust has been shaped by changing lines of economic thinking and ideologies.[70] Robert Bork identified the influence of "[a]nti free-market forces"[71] and a "socialist drive."[72] Others identified conservative ideology in Bork's influential antitrust writing. Many also attribute a conservative political ideology to the influential Chicago School of Antitrust.[73] Richard

67. Orbach & Campbell Rebling, *supra* note 18.

68. *Id.*; Barak Y. Orbach, *The Durapolist Puzzle: Monopoly Power in Durable-Goods Markets*, 21 YALE J. ON REG. 67 (2004).

69. Orbach & Campbell Rebling, *supra* note 18.

70. *See, e.g.*, RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA: 1888–1992 (1996); Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985); Herbert Hovenkamp, *The Antitrust Movement and the Rise of Industrial Organization*, 68 TEX. L. REV. 105 (1989); Herbert Hovenkamp, *United States Competition Policy in Crisis: 1890–1955* (Jan. 2009), http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=herbert_hovenkamp.

71. Robert H. Bork & Ward S. Bowman Jr., *The Crisis in Antitrust*, FORTUNE, Dec. 1963, at 138, 138.

72. ROBERT H. BORK, THE ANTITRUST PARADOX xiii (rev. ed. 1993).

73. *See, e.g.*, HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, *supra* note 6; Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219 (1995); William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 FORDHAM L. REV. 49 (1991).

Posner, however, suggested that the differences between the Chicago School and other economic perspectives to antitrust are "totally nonideological."[74] It may be fair to state that ideological distortions are particularly noticeable when a person disagrees with the ideology.[75] Members of the Chicago School exemplified this maxim in a festive symposium: *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932–1970*.[76]

Standard Oil also symbolizes concerns regarding ideological distortions and other biases in antitrust. In *Revisiting the Revisionist History of Standard Oil*, Christopher Leslie illustrates this point.[77]

The *Standard Oil* Court held that the company engaged in predatory pricing. The iconic status of the decision drew significant attention to this element as well: for several decades courts used *Standard Oil* as an authoritative reference on predatory pricing.[78] In the late 1950s, John McGee, a first-generation economist of the Chicago School, examined the trial record of *Standard Oil* to determine whether the company engaged in predatory pricing. In 1958, he published his findings in an article that became a very influential work on predatory pricing.[79] McGee concluded that "Standard [Oil] did not systematically, if ever, use local price cutting . . . to reduce competition. To do so would have been foolish."[80] He therefore argued that "if the popular interpretation of the *Standard Oil* case is at all responsible for the emphasis that anti-trust policy places on 'unfair' and 'monopolizing' business practices, that emphasis is misplaced."[81] McGee's critique of *Standard Oil* influenced the case law and scholarly approach to predatory pricing. Many have used his article as a reference to suggest that predatory pricing does not exist or is rare.[82]

In *Revisiting the Revisionist History of* Standard Oil, Christopher Leslie debunks McGee. Leslie examines John McGee's study of *Standard Oil* and argues that it does not support McGee's factual claims, theoretical

74. Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 925 (1979).

75. See Barak Orbach, *On Hubris, Civility, and Incivility*, 54 ARIZ. L. REV. 443 (2012).

76. Symposium, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932–1970*, 26 J.L. & ECON. 163 (Edmund W. Kitch ed., 1983).

77. Leslie, *supra* note 20.

78. *Id.* at 573.

79. John S. McGee, *Predatory Price Cutting: The Standard Oil (N. J.) Case*, 1 J.L. & ECON. 137 (1958).

80. *Id.* at 168.

81. *Id.* at 169.

82. *See, e.g.*, Leslie, *supra* note 20.

arguments, and conclusions.[83] Specifically, Leslie concludes that "even if the facts of Standard Oil do not prove that the oil company engaged in predatory pricing, the record in that case cannot stand as proof that predatory pricing does not occur or that it fails when attempted."[84] Leslie's critique of McGee's study of predatory pricing is in essence a critique of the ideologies and beliefs in antitrust.

In many ways, Leslie's critique of McGee is conceptually parallel to McGee's critique of *Standard Oil*. McGee argues that all conclusions related to Standard Oil's alleged predatory pricing, including antitrust policies that relied on the *Standard Oil* precedent, were "logically deficient."[85] Leslie argues that McGee's analysis is "logically flawed,"[86] builds on a "logical fallacy,"[87] and "risks distorting antitrust jurisprudence."[88] As such, McGee and Leslie share the belief that extrapolation of normative arguments from unfounded factual frameworks should not influence antitrust policy. Leslie adds that McGee failed with the same logical deficiency he attributed to others: overclaiming.[89]

In 1981, Frank Easterbrook argued that "there is no sufficient reason for antitrust law or the courts to take [predatory pricing] seriously."[90] It may well be that many still subscribe to this view.[91] The debate, however, shifted toward the legal definition of predatory pricing and the standard of proof for predation.[92] Predatory pricing is yet another unsettled antitrust topic that *Standard Oil* fueled.

Some of the unsettled controversies in antitrust, as the parallel lines of arguments of McGee and Leslie illustrate, stem from biases, overclaiming, and the habit of relying on certain references. No matter how much energy one has, the fire of truth does not exist.[93]

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83. *Id. See also* James A. Dalton & Louis Esposito, *Predatory Price Cutting and Standard Oil: A Re-Examination of the Trial Record*, 22 RES. LAW & ECON. 155 (2007).

84. Leslie, *supra* note 20, at 602.

85. McGee, *supra* note 79, at 138.

86. Leslie, *supra* note 20, at 579.

87. *Id*. at 589.

88. *Id*. at 603.

89. *Id.* at 579.

90. Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 264 (1981).

91. *See, e.g.*, JOHN R. LOTT, JR., ARE PREDATORY COMMITMENTS CREDIBLE? (1999); Kenneth G. Elzinga & David E. Mills, *Predatory Pricing and Strategic Theory*, 89 GEO. L.J. 2475 (2001).

92. *See*, *e.g.*, Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 CORNELL L. REV. 1 (2005).

93. For the social costs of uncompromising positions see Barak Y. Orbach & Frances R. Sjoberg, *Excessive Speech, Civility Norms, and the Clucking Theorem*, 44 CONN. L. REV. 1 (2011).

III. MARKET STRUCTURE AND REMEDIES

A. MARKET DEFINITION

John D. Rockefeller took control over almost the entire market for refining of crude oil in the United States. Controversies still exist as to how he did that.[94] The *Standard Oil* Court, however, did not use the word "market" even once, but the concept of "market" has guided antitrust thinking thus far. "Market definition" has been a core element in structural antitrust analysis.[95] The significance of the antitrust utilization of the term "market" cannot be overstated. Antitrust drove many, if not most, of the methodological developments in definition and understanding of the term. Antitrust critics, who believe that free markets function well without antitrust enforcement, could not have conceptualized the "markets" in which they believe without methodological contributions driven by antitrust enforcement.[96] To a large extent, the modern understanding of markets relies on traditional tools developed for antitrust analysis.

Market definition is also one of the areas that stresses the myopia of the requiem for antitrust. The use of these concepts in antitrust analysis has defined their use and perception in all other areas. The concept of "market" in antitrust analysis is at the verge of methodological transformation. For quite some time, economists have been developing and experimenting with alternative methodologies that would relax the reliance on market analysis and could be used in legal institutions. Once established in antitrust, the applications of these methodologies to other legal fields and thinking of markets in general may be vast.

Traditional market definition methodologies are not helpful in many instances. Simulation models introduced several challenges, but generally they could not withstand scrutiny in court. The 2010 Merger Guidelines relax the reliance on market definition by adopting the upward pricing pressure ("UPP") test for analyzing unilateral competitive effects of horizontal mergers on differentiated products.[97]

94. *See* Granitz & Klein, *supra* note 19; Klein *supra* note 19; Priest, *supra* note 19.

95. *See generally* Dennis W. Carlton, *Market Definition: Use and Abuse*, 3 COMPETITION POL'Y INT'L 1 (2007); Gregory J. Werden, *The History of Antitrust Market Delineation*, 76 MARQ. L. REV. 123 (1992).

96. *See*, *e.g.*, Donald F. Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281 (1956).

97. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N HORIZONTAL MERGER GUIDELINES §§ 2.1.3, 6.1. (2010) [hereinafter 2010 MERGER GUIDELINES].

Merger analysis is the first area of attack against market definition. Reliance on market definition has been under fire from a number of different directions. One is the increased use of simulation models in differentiated product markets that has not advanced sufficiently. Two additional and relatively new methodologies are now in use: Compensating Marginal-Cost Reductions (CMCRs), which look at prices, quantities and demand elasticities,[98] and Upward Pricing Pressure (UPP), which measures the "strength of the merged firm's incentive to increase price above pre-merger levels."[99]

Other attacks on market definition have come from professors[100] while yet a further set of attacks are based on changes within recent Horizontal Merger Guidelines that seem to embrace UPP.[101] In the merger context, the lessening importance of market definition will play out in the courts in interesting ways, as the courts seem to hold with some level of suspicion the abandonment of the market definition.[102] Yet, if courts over time embrace the current 2010 Horizontal Merger Guidelines as they did the 1992 Merger Guidelines,[103] this may have profound effects across antitrust. The changes in the understanding of market definition with regard to merger law will ultimately impact how courts view issues of market definition in monopolization cases.

B. MONOPOLIZATION

Enforcement regimes in antitrust law change, but the role of dominant firms in antitrust continues to be hotly debated. In this sense, *Standard Oil* has been a preview to the present and future, not merely a blip in antitrust's past.[104] D. Daniel Sokol shows that the strategic use of private and public litigation against Standard Oil share the general characteristics of

98. Greg Werden, Luke M. Froeb & Steven Tschantz, *The Effects of Merger Efficiencies on Consumers of Differentiated Products*, 1 EUR. COMPETITION J. 245, 255 (2005).

99. Elizabeth M. Bailey et al, *Merger Screens: Market Share-Based Approaches Versus "Upward Pricing Pressure,"* ANTITRUST SOURCE, Feb. 2010, at 1, 1. *See also* Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, 10 B.E. J. THEORETICAL ECON. Article 9 (2010); Robert Willig, *Unilateral Competitive Effects of Mergers: Upward Pricing Pressure, Product Quality, and Other Extensions*, 39 REV. INDUS. ORG. 19 (2011).

100. *See e.g.*, Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437 (2010).

101. *See* 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 97, § 6.1.

102. United States v. H&R Block, Inc., 789 F. Supp. 2d 74 (D.D.C. 2011).

103. D. Daniel Sokol & James A. Fishkin, *Antitrust Merger Efficiencies in the Shadow of the Law*, 64 VAND. L. REV. EN BANC 45, 51 (2011); Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 781, 798–802 (2006).

104. Carstensen, *supra* note 21; Sokol, *supra* note 7.

contemporary strategic use of litigation.[105]

A number of hearings in recent years have addressed various costs of antitrust and their impact on dominant firms. For example, the Department of Justice's Antitrust Division and the Federal Trade Commission held hearings on Single Firm Conduct in 2006.[106] A congressionally created Antitrust Modernization Commission released a report on the future of antitrust in 2007.[107] In February 2008, the Federal Trade Commission organized a workshop to evaluate the welfare effects of unilateral effects analysis,[108] while the Department of Justice authored a report on Section 2 of the Sherman Act (since withdrawn).[109] Across the Atlantic, the European Commission released a White Paper in 2008[110] on the feasibility of private rights of action for antitrust in the European Union and a 2010 paper on Collective Redress.[111]

The *Standard Oil* case stands for the greatest victory of the U.S. government in a monopolization case. Legal battles, whether via public or private enforcement, are costly. The alternative may be costly as well. In *Antitrust and Business History*, Margaret Levenstein reviewed the recent concentration trend in the United States and summarized: "Large businesses require a large state, a state capacity that we are not willing to create. But there is an alternative, and that is effective antitrust policy which is empowered to promote competitive markets."[112]

C. MERGERS

Before the Sherman Act was enacted, Standard Oil acquired its

105. Sokol, *supra* note 7.

106. Notice of Public Hearings and Opportunity for Comment: Consumer Benefits and Harms: How Best to Distinguish Aggressive, Pro-Consumer Competition from Business Conduct to Attain or Maintain a Monopoly, 71 Fed. Reg. 17,872 (Apr. 7, 2006).

107. ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 189–90 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

108. Press Release, Fed. Trade Comm'n, FTC Releases Agenda for Public Workshop on Unilateral Effects Analysis and Litigation (Feb. 5, 2008), *available at* http://www.ftc.gov/opa/2008/02/uea.shtm.

109. U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), *available at* http://www.justice.gov/atr/public/reports/236681.pdf.

110. Comm'n of the Eur. Cmtys., *Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules*, at 3, 10, COM (2008) 165 final (Apr. 2, 2008), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0165:FIN:EN:PDF.

111. Eur. Comm'n, Commission Staff Working Document, *Public Consultation: Towards a Coherent European Approach to Collective Redress*, SEC (2011) 173 final (Feb. 4, 2011), *available at* http://ec.europa.eu/justice/news/consulting_public/0054/sec_2011_173_en.pdf.

112. Levenstein, *supra* note 30, at 457.

competitors, threatening to drive them out of business. In *Standard Oil and U.S. Steel*, Bill Page examines how the Supreme Court addressed the rise of the next giant that supposedly employed similar strategies: U.S. Steel.[113]

Merger control in the United States owes its existence in part to *Standard Oil*. While the Sherman Act was enacted in 1890, the Clayton Act, which governs mergers, was not enacted until 1914 (and initially for only stock acquisitions),[114] and a systematic premerger notification regime was not adopted until 1976.[115] The origins of the Clayton Act were a function of debate in the 1912 presidential race and the sense that the antitrust laws needed to be strengthened in light of the conduct of Standard Oil and other firms. Had a merger regime been in place when Standard Oil was making its acquisitions, Standard Oil would most likely not have been able to achieve the monopolization it did.

Merger control remains a very important part of antitrust. Today, by volume, most antitrust resources are dedicated to merger control. Competition-directed merger control under antitrust law is generally intended to prevent the formation of combined entities that could use their market power—unilaterally or jointly with other firms—to charge prices above the competitive level. The use of merger control is a more regulatory form of antitrust than conduct cases, but offers certain advantages. Particularly, merger control tools can be refined to the specifics of mergers better than other antitrust tools such as collusion or dominance provisions. It is often easier, for example, to address the issue of dominant firms ex ante with merger law than ex post with monopolization law.[116] Antitrust history provides some examples of the problems of anticompetitive mergers and their economic impact. As Page documents, the mergers that created U.S. Steel and Standard Oil are often viewed as having had a significant negative effect on U.S. consumers.[117] Indeed, emerging empirical scholarship on the merger wave of the 1890s suggests a revisionist interpretation to its welfare impact—these mergers hurt economic development.[118] The current economics of merger control are

113. Page, *supra* note 27.

114. Herbert Hovenkamp, *The Law of Vertical Integration and the Business Firm: 1880–1960*, 95 IOWA L. REV. 863, 879–80 (2010).

115. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified as amended at 15 U.S.C. § 18a).

116. Levenstein, *supra* note 30.

117. Page, *supra* note 27; Granitz & Klein, *supra* note 19; Klein, *supra* note 19; Donald O. Parsons & Edward John Ray, *The United States Steel Consolidation: The Creation of Market Control*, 18 J.L. & ECON. 181 (1975).

118. *See, e.g.*, Levenstein, *supra* note 30.

mixed with regard to the impact of concentration on social welfare.[119]

A merger control statute is often not sufficient for effective merger control. One of the core developments in merger control in many jurisdictions has been the development of merger guidelines. Transparent guidelines present core concepts and explain how both legal and economic analytics are applied to these concepts. When successful, guidelines also provide merging parties with some predictability as to how an agency may respond to their proposed merger.[120]

Over time, antitrust authorities have moved to a more economic based approach in their merger analysis. The Horizontal Merger Guidelines have evolved along with economic thinking, having been created in 1968, and revised in 1982, 1984, 1992, 1997, and again in 2010.[121] European merger law also has gone through increased economic rigor as a result of its 2004 reform, case law developments, and the creation of the chief economist position at the Directorate General for Competition.[122] Developments in the application of the economics embodied in the 2010 Horizontal Merger Guidelines will provide quite a bit of "antitrust energy" for scholarship.[123]

The changes in merger control in the United States and Europe impact merger control globally. After a period of divergence as to economic analysis of important cases across the Atlantic,[124] there has been convergence of the major antitrust merger regimes in recent years.[125] Given the importance of the European and U.S. merger control regimes, anecdotal

119. Jonathan B. Baker, *Responding to Developments in Economics and the Courts: Entry in the Merger Guidelines*, 71 ANTITRUST L.J. 189, 191–93 (2003).

120. William Blumenthal, *Clear Agency Guidelines: Lessons from 1982*, 68 ANTITRUST L.J. 5 (2000).

121. D. Daniel Sokol, Antitrust, Institutions, and Merger Control, 17 GEO. MASON L. REV. 1055, 1105–09 (2010).

122. ULRICH SCHWALBE & DANIEL ZIMMER, LAW AND ECONOMICS IN EUROPEAN MERGER CONTROL (2009); Tomaso Duso, Klaus Guglery, & Florian Szücs, *An Empirical Assessment of the 2004 EU Merger Policy Reform* (Governance and the Efficiency of Econ. Sys., Discussion Paper No. 337, 2010).

123. See e.g., Roger Blair & Jessica Haynes**,** *The Efficiencies Defense in the 2010 Horizontal Merger Guidelines*, 39 REV. INDUS. ORG. 57 (2011); Michael A. Salinger, *The 2010 Revised Merger Guidelines and Modern Industrial Economics*, 39 REV. INDUS. ORG. 159 (2011).

124. William E. Kovacic, *Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy*, 68 ANTITRUST L.J. 805 (2001); Jeremy Grant & Damien J. Neven, *The Attempted Merger Between General Electric and Honeywell: A Case Study of Transatlantic Conflict*, 1 J. COMPETITION L. & ECON. 595 (2005).

125. Florian Szücs, *Investigating Transatlantic Merger Policy Convergence* (Vienna Univ. of Econ. and Bus. Admin., Working Paper, 2012), *available at* http://ssrn.com/abstract=1773774; Mats A. Bergman et al., *Merger Control in the European Union and the United States: Just the Facts* (Working Paper, 2010), *available at* http://ssrn.com/abstract=1565026.

evidence (though not tested empirically) suggests a similar convergence of both developed and developing world merger control regimes as to substance ("best practices") over time. The convergence is reinforced by numerous factors—capacity building and technical assistance by the United States and European Commission, other agencies, and other technical assistance providers; imitation by younger antitrust regimes; advanced degrees from Europe and the United States in both competition law and economics; secondment in agencies and law firms in major jurisdictions; and recommendations of soft law antitrust organizations.[126] Also relevant have been advances in antitrust merger economics such as the increased use of models for unilateral effects,[127] coordinated effects,[128] merger simulation,[129] efficiencies,[130] and upward pricing pressure.[131]

Supranational solutions to merger control (other than at the European-wide level) have not been adopted to any measurable effect. Their absence largely reflects the lack of any effective international merger review institution. An obvious contender for such an institution, the World Trade Organization, lacks the substantive knowledge of antitrust as well as the legitimacy to undertake such review.[132] In no region other than Europe have regional merger institutions been effectively implemented, although the potential for effective regional merger control includes a reduction in resource and capability constraints.[133] Thus, for the majority of the world, merger review remains a national rather than regional or global endeavor.

126. See e.g., D. Daniel Sokol, *The Development of Human Capital in Latin American Competition Policy*, *in* LATIN AMERICAN COMPETITION LAW AND POLICY (Eleanor M. Fox & D. Daniel Sokol eds., 2009).

127. Gregory J. Werden & Luke M. Froeb, *Unilateral Competitive Effects of Horizontal Mergers*, *in* HANDBOOK OF ANTITRUST ECONOMICS 43 (Paolo Buccirossi ed., 2008); Jonathan B. Baker & David Reitman, *Research Topics in Unilateral Effects Analysis* (Am. Univ., WCL Research Paper No. 09-37, 2009), *available at* http://papers.ssrn.com/.

128. Janusz A. Ordover, *Coordinated Effects*, *in* 1 ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY 1359 (Wayne Dale Collins ed., 2008).

129. Roy J. Epstein & Daniel L. Rubinfeld, *Merger Simulation: A Simplified Approach with New Applications*, 69 ANTITRUST L.J. 883 (2001); Gregory J. Werden & Luke M. Froeb, *Simulation as an Alternative to Structural Merger Policy in Differentiated Products Industries*, *in* THE ECONOMICS OF THE ANTITRUST PROCESS 65 (Malcolm B. Coate & Andrew N. Kleit eds., 1996).

130. William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 ANTITRUST L.J. 207 (2003); Johan N.M. Lagerlöf & Paul Heidhues, *On the Desirability of an Efficiency Defense in Merger Control*, 23 INT'L J. INDUS. ORG . 803 (2005).

131. Farrell & Shapiro, *supra* note 99, at 1, 18.

132. D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37, 91–92 (2007).

133. Michal Gal & Inbal Faibish Wassmer, *Regional Agreements of Developing Jurisdictions: Unleashing the Potential*, *in* COMPETITION POLICY AND REGIONAL INTEGRATION IN DEVELOPING COUNTRIES (Mor Bakhoum et al. eds., forthcoming, Edward Elgar, 2012).

Given the lack of supranational protections, merger control may be necessary even for developing economies when other jurisdictions cannot remedy the conduct that will have country-specific effects, when there is sufficient nexus to the transaction, and when economic analysis is sufficiently sound to avert most false positives. Antitrust matters more now because countries regularly use competition and the market where the market did not exist before. The legal framework has also impacted the study of mergers as well as the practice of mergers.[134]

Yet, at what point in the development of a nation's competition regime should the law be expanded to include merger control? The preconditions seem to include (1) that there are enough resources within an agency, (2) that the agency has enough experience with the easier issues of competition law, such as hard core cartel enforcement, and (3) that there has been consolidation via merger with unilateral or coordinated conduct infractions that ex post competition enforcement has been unable to remedy.

D. REMEDIES

Standard Oil stands for the most dramatic remedy in antitrust: dissolution. Remedies vary in antitrust. Peter Carstensen examines the available remedies for monopolization and changing approaches toward such remedies.[135] The goal of structural remedies is to restore the competition that would have existed but for the monopolization. This was the remedy that was put into place in the *Standard Oil* context. Such remedies may create a new source of competition through divestiture or strengthen an existing competitor who purchases the divested asset(s).[136] Overall, most jurisdictions around the world prefer the use of structural remedies, at least for horizontal mergers.[137] In the conduct context, structural remedies, as Carstensen notes, are rare.[138]

134. Liran Einav & Jonathan D. Levin, *Empirical Industrial Organization: A Progress Report*, 24 J. ECON. PERSP. 145, 152 (2010). ("Thirty years ago, it was common for antitrust arguments to rest on simple summary measures of industry structure such as concentration ratios and Herfindahl–Hirschman indices. Nowadays, the Department of Justice and the Federal Trade Commission, which are tasked with reviewing proposed mergers, commonly undertake sophisticated econometric studies to define industry boundaries and to assess the likelihood of price increases or collusive behavior following a merger. These exercises often draw on academic research, and in turn have motivated the development of new empirical models.").

135. Carstensen, *supra* note 21.

136. U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (2011).

137. INT'L COMPETITION NETWORK, MERGER REMEDIES REVIEW PROJECT (2005), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc323.pdf.

138. Carstensen, *supra* note 21.

IV. CONCLUSION

One hundred years after the Supreme Court delivered its decision in *Standard Oil*, the case still introduces nuances to the discipline and fuels debates. Antitrust history and the present are rich with many other significant and important judicial decisions and developments. Contrary to some rumors, the field has never lacked energy.

Standard Oil is today's ExxonMobil—the second largest corporation in the United States these days. On the one hundredth anniversary of *Standard Oil*, ExxonMobil was the largest corporation and lost its position to Apple only a few months later. One may argue that *Standard Oil* made no difference, since the octopus regrouped; Standard Oil is still with us. Studying the history of antitrust in the petroleum industry, Timothy Muris and Bilal Sayyed explain the rationale for the competition policy in the industry and show that, unlike Standard, ExxonMobil faces competition.[139]

Some debates regarding Standard Oil will probably never be settled. The economics of the rebates and drawbacks Standard Oil received from railroads is an example of one of these debates. Dan Crane explores whether they were cost justified and concludes that "there is little or no evidence that the rebates were proportional to the magnitude of the savings."[140] The riddle of how John D. Rockefeller acquired power and made Standard Oil a formidable monopoly is still debated. In 1996, Benjamin Klein and Elizabeth Granitz introduced the most comprehensive explanation thus far: Standard Oil stabilized the cartel among the railroads and used this position to raise its rivals' costs.[141] For this tribute to the centennial anniversary of *Standard Oil*, Klein further elaborates his classic explanation.[142] As *Standard Oil* demands, Klein's classic explanation is contested. George Priest argues that the facts do not support the raising rivals' theory; Rockefeller, he argues bought up his competitors in a merger to monopoly that years later became illegal under antitrust law.[143]

Overall, the opportunity to reflect upon one hundred years of *Standard Oil* provides a window into the past, present and future of antitrust law scholarship. This scholarship has had a significant impact upon the analysis

139. Muris & Sayyed, *supra* note 32.
140. Crane, *supra* note 19, at 560.
141. Granitz & Klein, *supra* note 19.
142. Klein, *supra* note 19.
143. Priest, supra note 19.

of law overall, as a vanguard of the law and economics movement. Antitrust legal scholarship will continue to provide insights not merely within antitrust but more generally within law, such as the analysis of contractual relations, the interplay of standards versus rules, private versus public enforcement, common law versus administrative law, and globalization of law, mergers, and remedies.