ANTITRUST ECONOMICS—MAKING PROGRESS, AVOIDING REGRESSION

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INTRODUCTION

In the Supreme Court's 1972 decision in *United States v. Topco Associates, Inc.*,[1] the Court struggled to justify the per se condemnation of a joint venture with obvious procompetitive benefits. The district court had dismissed the complaint, sizing up the venture as a legitimate effort by a group of smaller, independent grocery retailers to compete with larger rivals by arranging for the provision of a common line of private-label products—thereby allowing the members of the group to emulate a successful strategy common to the larger chains.[2] The Supreme Court was most concerned by territorial restrictions placed on the venture participants, which attracted characterization as a horizontal division of territories[3]—a classic per se offense.[4] Despite defendants' proffered rationales, the Supreme Court held firm to the per se approach, fearing that any willingness to consider case-specific justifications in assessing the venture and its territorial restraints would launch antitrust litigation into "the wilds of economic theory."[5]

Less than ten years after the Supreme Court's admonition about expeditions into "the wilds," however, William F. Baxter took over as Assistant Attorney General for Antitrust, promising to follow one policy above all: "if it doesn't make economic sense, it doesn't happen."[6] Baxter's policy was implemented at the break-through point (1981, just after the first inauguration of President Reagan) of the revolution in the application of concepts and methods of microeconomics to antitrust issues. Antitrust was being rapidly and permanently transformed in ways that created numerous

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1 405 U.S. 596 (1972).

2 *Id.* at 599-600.

3 *See id.* at 608.

4 *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

5 *Topco Assocs.*, 405 U.S. at 609-10.

> Without the *per se* rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act. Should Congress ultimately determine that predictability is unimportant in this area of the law, it can, of course, make *per se* rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach.

Id. at 609 n.10 (italics in original).

6 Edward Meadows, *Bold Departures in Antitrust*, FORTUNE, Oct. 5, 1981, at 180, 182.

opportunities for economists to apply their skills to formulate and analyze policy and to influence cases as expert witnesses, expert advisers to antitrust attorneys and as senior government antitrust enforcement officials.[7]

With twenty years' hindsight it seems apparent that this economics revolution has been both transforming and beneficial to antitrust, but we can also see that it is not yet complete. Controversy continues to dog the use of economics both in policy formulation and application to specific cases. Which industries and practices represent the most attractive targets of opportunity for antitrust enforcement? Which mergers are likely to lessen competition substantially? Which price discounts constitute acts of monopolization? Which competitor collaborations threaten to reduce welfare in the long run? Each of these questions resolves itself into an issue or series of issues in microeconomic analysis. Many cases give rise to sharp disagreements regarding these economic issues. These disagreements are not resolved by resolution of the specific legal controversy in which they arise, but continue long afterwards in the literature of antitrust law and economics.

Why does it remain so difficult in some cases to reach consensus on the correct antitrust approaches and outcomes, despite near-universal agreement that U.S. antitrust is now essentially a set of issues in microeconomics? Why do economists trained in the same patterns of thought and empirical techniques continue to disagree on some of the most important antitrust cases and controversies of the day? Put another way: why is there still so much antitrust litigation? This paper briefly explores some of these issues and asks how the economics revolution of antitrust can be advanced to the next stage. Of course there will never be complete unanimity (or even near-universal consensus) on all the significant issues, but if and to the extent that economic analysis can be refined to the point where the likelihood of ambiguity in its antitrust prescriptions is reduced, it will make for less litigation, more efficient enforcement and—the basic objective of the law—a more productive economy.

This paper does not reach conclusions on the best way to accomplish this, but only suggests some alternatives that might assist in pushing antitrust economics toward a greater coherence. The main alternatives have

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7 Baxter was the first to give the title of Deputy Assistant Attorney General to the Antitrust Division's senior economist, thereby placing that position at "optically" equal rank with the Division's other senior lawyer-appointees. He also organized the first systematic program of instruction in microeconomics for Division personnel. Although Baxter—a Stanford Law School professor for all but a few years of his career—did not have an economics degree, he had studied microeconomics intensively in various formats over an extended period. Nobel-Prize laureate A. Michael Spence—who first encountered Baxter while teaching in the Stanford University Economics Department during the 1970's (Spence later became Dean of the Stanford Graduate School of Business)—once said of Baxter that he ranked among the most talented microeconomists of his generation.

been at least mentioned previously by others. They include (1) a specific program of independent long-run monitoring and evaluation of case results (that is, a focused effort at *ex post* analysis), and (2) the creation of new sources of independent economic expertise for use at critical points during the antitrust enforcement process, including the use of independent experts or expert panels during the actual process of case evaluation and prosecution, and the more systematic use of court-appointed economic experts in litigation.[8] Each such mechanism has precedents in current practice, but neither has been used more than sporadically, nor have they been designed on a broad canvass of all the institutional alternatives, nor have they been implemented with the careful attention to institutional detail that is necessary to maximize their effectiveness. A dialogue on the merits of these approaches will either clarify the way forward or convince us that the economic controversies of antitrust are at an irreducible minimum within the constraints of existing techniques and enforcement alternatives.

I. ECONOMICS TAKES OVER ANTITRUST

The story of how economics took over the main concepts of antitrust has been told effectively by many others.[9] Accordingly, this discussion can take as a point of departure that the rapid assimilation of microeconomics into antitrust thinking makes almost every antitrust controversy an exercise in microeconomic analysis. While economic rationality is consistent with certain uses of the per se rule—notably in the case of "naked" horizontal restraints such as market allocation or minimum price-fixing—the upsurge of antitrust economics has gone hand-in-hand with the abandonment of most per se rules.[10] The per se rule against non-price vertical restraints announced in *United States v. Arnold, Schwinn & Co.*,[11] was abandoned in *Continental T.V., Inc. v. GTE Sylvania Inc.*[12] The per se rule against vertical agreements on maximum prices announced in *Albrecht v. Herald Co.*,[13] was

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8 *See, e.g.,* Timothy J. Muris, How History Informs Practice—Understanding the Development of Modern U.S. Competition Policy, Speech Before the American Bar Association Section of Antitrust Law Fall Forum (Nov. 19, 2003), *available at* http://www.ftc.gov/speeches/muris/murisfallaba.pdf; William E. Kovacic, *Evaluating Antitrust Experiments: Using* Ex Post *Assessments of Government Enforcement Decisions to Inform Competition Policy*, 9 GEO. MASON L. REV. 843 (2001).

9 *See, e.g.,* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43, 52-53 (2000).

10 *See id.* at 55.

11 388 U.S. 365 (1967).

12 433 U.S. 36 (1977).

13 390 U.S. 145 (1968).

overruled in *State Oil Co. v. Kahn*,[14] and even the per se rule against vertical agreements on minimum prices of *Dr. Miles Medical Co. v. John D. Park & Sons*,[15] was confined to agreements specifically directed to the setting of "price or price levels" in *Business Electronics Corp. v. Sharp Electronics Corp*.[16]

The list continues: a consistent Justice Department enforcement policy of attacking a wide variety of patent licensing restrictions using per se rules (the infamous "Nine No-No's") was explicitly abandoned in 1981.[17] The per se rule against tie-ins announced in *United States v. Northern Pacific Ry. Co.*,[18] was questioned and implicitly weakened by *Jefferson Parish Hospital District v. Hyde*.[19] And the use of per se rules against horizontal agreements and their associated restraints—the precise issue in *Topco*—was steadily refined by a series of Supreme Court cases showing an increasing willingness to consider economic rationales for horizontal collaboration.[20] Although horizontal restraints are still a risky and uncertain area, competitor collaborations can be justified by a demonstrated likelihood that they are wealth-creating.[21]

Finally, the quasi-per se rule against horizontal mergers attributed to *United States v. Von's Grocery Co.*,[22] was abandoned in *United States v. General Dynamics Corp.*,[23] making every merger case an exercise in microeconomic analysis at almost every step of the way. As listed in the Department of Justice/Federal Trade Commission's 1992 *Horizontal Merger Guidelines* ("*Guidelines*"),[24] each issue—Market Definition, Measurement and Concentration; Potential Adverse Competitive Effects, Entry Analysis,

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14 522 U.S. 3 (1997).

15 220 U.S. 373 (1911).

16 485 U.S. 717, 735-36 (1988).

17 *See* Abbott B. Lipsky, Jr., *Current Antitrust Division Views on Patent Licensing Practices*, 51 ANTITRUST L.J. 515 (1981).

18 356 U.S. 1 (1958).

19 466 U.S. 2 (1984); *see also* United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (declining to apply per se rule against tie-ins in context of software "bundling").

20 *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999) (holding that the assessment of procompetitive justifications for horizontal collaboration must analyze economic logic of justifications to the extent "meet for the case"); Bd. of Regents v. NCAA, 468 U.S. 85 (1984) (holding that rule of reason applied where horizontal collaboration was essential to offer product); Broad. Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1 (1979) (holding that restraints literally meeting the definition of price-fixing assessed under rule of reason as essential to create new product offering).

21 *See* cases cited *supra* note 20.

22 384 U.S. 270 (1966) (striking down retail grocery merger creating firm with trivial market share).

23 415 U.S. 486 (1974) (labeling an inference of probable competitive harm improper unless concentration data are shown to reflect competitive realities).

24 U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines, *available at* http://www.usdoj.gov/atr/public/guidelines/horiz_book/toc.html.

Efficiencies, Failure and Exiting Assets—and their respective analytical subroutines invoke a distinct complex of microeconomic concepts and approaches. Structural transaction analysis, at least from the perspective of the *Guidelines*, is almost a pure economics exercise.

So far this brief discussion has mentioned the legal rules applicable to horizontal and vertical agreements and structural transactions (mergers, acquisitions, joint ventures and the like). It goes without saying that rules applicable to monopolizing conduct have generally required some substantial microeconomic component, which the microeconomics revolution in antitrust has deepened, clarified and to some extent improved. Learned Hand's opinion in *United States v. Aluminum Co. of America*,[25] for example, has been cited as exhibiting an intuitive grasp of the then-emerging field of control theory, even though it predates even the earliest academic writings[26] that are generally regarded as the point of origin for the microeconomics movement in antitrust law.

It would understate the impact of the microeconomic takeover of antitrust to describe it simply in terms of its effect on specific legal rules. It must also be recognized that the primacy of microeconomics is a "root-and-branch" phenomenon: there is no longer any serious debate in U.S. antitrust that policies and rules must be formulated in terms of their ultimate effect on long-run economic performance—whether that performance is measured precisely by total surplus, long-run productivity growth or some other objective quantity. This has greatly simplified both the policy debate and the technique of antitrust. To return to Baxter's maxim, whatever the rule or policy under scrutiny, in modern antitrust, "if it doesn't make economic sense, it doesn't happen."[27] This has been a powerful clarifying aid to debate at all levels of antitrust.

II. THE MICROECONOMIC DEBATES: LOOKING IN THE RIGHT PLACE

Having said that the great majority of antitrust questions resolve themselves into issues of microeconomics, it hardly need be added that there are still difficult and hard-fought antitrust cases—meaning that it's still fairly easy to find advocates on different sides of the relevant microeconomic issues. Consider the issues surrounding Microsoft Corporation,[28] such as

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25 148 F.2d 416 (2d Cir. 1945).

26 *See, e.g.*, W. S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957).

27 Meadows, *supra* note 6, at 182.

28 The background and history of the federal government litigation is briefly recounted in the most recent Court of Appeals decision. *See* United States v. Microsoft Corp., 253 F.3d 34, 47-51 (D.C. Cir. 2001).

market definition and the proper definition of monopolizing conduct (among many other issues), or the *Cruise Line* mergers,[29] which led ultimately to an unprecedented public discussion of regression analysis and what it showed about market definition, the character of industry competition and the likely effect of a proposed merger between the first- and third-largest industry players. These were hotly contested matters, and although they are resolved (or, in *Microsoft*, all-but-resolved) as specific legal controversies, lively debate continues regarding the accuracy of the judgments made.

Many antitrust cases—indeed, perhaps the vast majority—are resolved by consent because both parties foresee that the same particular result is likely.[30] But there are always a few key cases that are litigated to the bitter end (or close to it) because the contending parties assess differently the range of potential outcomes. These are the interesting cases, signaling the frontiers of accepted theory and analysis, often determining the future scope for certain species of commercial conduct for a leading firm, for an entire industry or indeed across all industries. In addition to the cases already mentioned, *United States v. AMR Corp.*[31] and *In re Schering-Plough Corp.*[32] stand out as members of this category.

Many of the salient microeconomic issues underlying the leading antitrust cases of our day could be cited as examples of serious disagreements among contending schools of contemporary antitrust economists and among specific individuals and the modes of analysis they sponsor.[33] To pick a single example: many assert that *Image Technical Services, Inc. v. Eastman Kodak Co.*[34] stands for a new "post-Chicago" antitrust economics, giving somewhat greater weight to the possibility that vertical restraints or "raising rivals' costs" strategies may be regarded as exclusionary and therefore subject to antitrust condemnation.[35] But the "post-Chicago" theory

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29 *See* Statement of the Federal Trade Commission Concerning Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc, FTC File No. 021 0041 (Oct. 4, 2002), *at* http://www.ftc.gov/os/2002/10/cruisestatement.htm.

30 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 757 (5th ed. 2002).

31 140 F. Supp. 2d 1141 (D. Kan. 2001), *aff'd*, 335 F.3d 1109 (10th Cir. 2003) (involving proper application of the below-cost pricing standard in a predatory pricing case).

32 FTC Docket No. 9297, 2002 WL 1488085 (F.T.C. June 27, 2002) (involving the legality of a patent settlement).

33 One example is the debate regarding the existence, nature and antitrust significance of "network effects." *Compare* Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 GEO. MASON L. REV. 617 (1999), *with* Ronald A. Cass & Keith N. Hylton, *Preserving Competition: Economic Analysis, Legal Standards and Microsoft*, 8 GEO. MASON L. REV. 1 (1999).

34 504 U.S. 451 (1992).

35 *See*, *e.g.*, Jonathan B. Baker, *Promoting Innovation Competition Through the* Aspen/Kodak *Rule*, 7 GEO. MASON L. REV. 495 (1999).

found in *Image Technical* was abandoned on remand, possibly because its factual predicates couldn't be established.[36] More conventional applications of "raising rivals' costs" have since been advanced.[37] Itemizing all of the issues subject to serious disagreement would be far beyond the scope of any single paper.

To illustrate a broader point about the current status of microeconomic analysis within the antitrust enforcement process, however, this paper focuses on structural transaction analysis. In this area there remains a fundamental mismatch between the leading exponents of theory and the salient legal approaches to analysis. The economic content of structural transaction analysis has undergone a broad evolution since passage of the fundamental governing statute, the 1950 Cellar-Kefauver Amendments to the Clayton Act. This story has also been recounted many times in much greater depth than time permits here: the first plenary Supreme Court decision under the law, *United States v. Brown Shoe Co.*,[38] set forth a somewhat amorphous and multifaceted analysis under the "substantial lessening of competition" standard.[39] A few years later this multifactor analysis was superseded by *United States v. Philadelphia National Bank*,[40] which focused on "structural" factors: that is, illegality was to be presumed for transactions that created a substantial increase in market concentration leading to a highly concentrated market.[41] This was followed by a series of cases in which the government was granted judgment in merger cases involving smaller and smaller market shares and lower post-merger concentration, leading to *Von's Grocery*.[42]

Although *United States v. General Dynamics Corp.*,[43] undermined the strict "structuralist" approach by suggesting that the competitive significance of concentration statistics could not simply be presumed, the absence of a plenary substantive Supreme Court merger decision in the last generation has severely limited the capacity of enforcement agencies and counselors to discern the current fundamental disposition of merger doctrine. The result is that some structural transaction decisions are litigated in the lower courts as if the structuralist presumption was no longer valid or at least sub-

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36 Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998) (mem.).

37 Elizabeth Granitz & Benjamin Klein, *Monopolization by "Raising Rivals' Costs": The Standard Oil Case*, 39 J.L. & ECON. 1 (1996) (interpreting the conduct of Rockefeller's interests as cartel-stabilization, in part, on behalf of the railroads).

38 370 U.S. 294 (1962).

39 *Id.* at 312-13.

40 374 U.S. 321 (1963).

41 *See id.* at 363.

42 United States v. Von's Grocery, Co., 384 U.S. 270 (1966).

43 415 U.S. 486 (1974).

stantially weaker than appears to have been intended by *Philadelphia National Bank* as shown in *United States v. Baker Hughes, Inc.*,[44] while other cases seem to revert to the *Philadelphia National Bank* approach as shown in *Federal Trade Commission v. H. J. Heinz Co*.[45] How would the Supreme Court resolve such a case? Clues are scarce. As outlined below, this conflict is in need of resolution.

III. *MATSUSHITA, BROOKE GROUP*, AND THE *DAUBERT* QUARTET

While the economic content of antitrust has conquered the "known world" of cases and issues, the Supreme Court has promoted another revolution in the assessment of "scientific" evidence—a trend that originated in two antitrust cases, spread to other common forms of civil litigation and thus to all forms of scientific evidence, and then circled back to antitrust with profound effects on the treatment of economic testimony. The six cases in this cycle extend from 1986 to 2000.

The Supreme Court itself has never explicitly drawn any connection between the initial two antitrust cases and the subsequent four non-antitrust disputes. But arrayed in order, they appear to form an unmistakable pattern, pointing to a desire by the Supreme Court to develop better means of policing the formulation and assessment of expert evidence for purposes of civil litigation. These cases have each had a profound impact on the role of the lower courts in assessing economic evidence and have changed the way that antitrust cases are brought, argued and litigated.

The first case in this line is *Matsushita Electric Industrial Corp. v. Zenith Radio Corp.*[46] The case involved allegations that Japanese consumer electronic products manufacturers had engaged in a twenty-year predatory pricing conspiracy intended to cripple U.S. competitors.[47] The precise question presented to the Supreme Court was whether an economic expert's report that claimed to have found evidence establishing the conspiracy was sufficient to create a fact issue and get the case past summary judgment on this specific theory.[48] The Court held 5-4 that it did not, because on balance the persisting doubts about the expert's conclusion rendered any ultimate

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44 908 F.2d 981 (D.C. Cir. 1990) (holding that the burden of persuasion rests with government in merger case while allowing the presumption based on market concentration to be overcome by a variety of evidence).

45 116 F. Supp. 2d. 190 (D.D.C. 2000).

46 475 U.S. 574 (1986).

47 *Id.* at 580-81.

48 *See id.* at 595-598. Other liability theories were rejected essentially on standing or "antitrust injury" grounds.

inference of the conspiracy "implausible."[49] Justice White led the dissent in questioning how an expert report submitted on a question of fact could have been rejected in a civil jury trial.[50] Justice White's dissent might be summarized by the semi-facetious question, "what part of 'trial by jury' don't you understand"?

The majority opinion in *Matsushita* established clearly for the first time that courts assessing a complex antitrust dispute are not bound by the parties' characterization of the inferences that the record may contain. This implies that courts must play some role in selecting among the competing characterizations that may be in play before the finder of fact. By saying that the range of permissible inferences (specifically, the key inferences about the competitive effects of business conduct) is limited by antitrust law, the Supreme Court was acknowledging that the law includes some notion of what constitutes an acceptable economic interpretation of a given case. The fact that a well-credentialed expert will espouse a theory in litigation does not certify compliance with that standard.

The Supreme Court's skepticism on questions of expert microeconomic testimony was found to have increased by the time of the second case in the series, *Brooke Group v. Brown & Williamson Tobacco Corp.*[51] There the plaintiff, a self-proclaimed "maverick price-cutter," alleged that the number three firm, holding 11% of the cigarette market, had engaged in a bout of "oligopolistic disciplinary pricing," charging discriminatory and below-cost prices in a manner calculated to restore oligopolistic price-stickiness to an industry driven by price cutting in response to the entry and expansion of low-price generic-product competition, championed by plaintiff.[52] The other members of the alleged oligopoly included the substantially larger Philip Morris and R.J. Reynolds.[53] Against these long odds the late, legendary Phil Areeda succeeded in nailing two "hail Mary" passes, first obtaining certiorari (contrary to all expectations, as the trial court's j.n.o.v. and the Fourth Circuit's unanimous affirmance satisfied the "two-court rule" indicating presumptive unsuitability for Supreme Court review), and then persuading the Supreme Court on the merits that "oligopolistic disciplinary pricing" was indeed a legally acceptable theory under the Robinson-Patman Act.[54]

But the ultimate judgment was against plaintiff Brooke Group despite expert testimony supporting the "oligopolistic disciplinary pricing" theory.

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49 *See id.* at 593-98.

50 *Id.* at 598-607 (White, J., dissenting).

51 509 U.S. 209 (1993). The author served as counsel to Brown & Williamson in this case.

52 *Id.* at 216-17.

53 *Id.* at 241.

54 *Id.* at 228-30.

The Supreme Court found both the market facts and certain statements by plaintiff's senior executives inconsistent with the construction placed on events and the description of the economic dynamics of the industry provided by plaintiff's expert.[55] The result was not a conflict in testimony, requiring respect for a jury resolution, but a finding that the expert's testimony was legally deficient.[56] The Supreme Court ruled in language even more explicit than *Matsushita* that such testimony will not stand where it "is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable."[57] The Supreme Court thereby confirmed that it would not act as a potted plant by certifying jury verdicts based on microeconomic testimony falling outside the bounds of rationality.

The Supreme Court has returned to the question of microeconomic theory in antitrust cases only once since *Brooke Group*, albeit in a somewhat different context.[58] But its actions in four subsequent cases (all unanimous in result and only the first showing hesitation by some Justices regarding the rationale)—the *Daubert* Quartet—have established beyond doubt that the Supreme Court expects lower courts to assess the legal objectivity of expert testimony in all cases involving scientific testimony.[59]

These cases have totally reworked and imposed a much more demanding standard on the lower courts in assessing expert testimony. The *Daubert* rule has frequently been used to challenge expert testimony in antitrust cases, leading in many cases to the exclusion of expert testimony, and in several instances to the loss of substantial jury verdicts, even where the testifying expert was a Nobel laureate.[60]

55 *Id.* at 232-43.

56 *Id.* at 242-43.

57 *Id.* at 242.

58 In California Dental Ass'n v. FTC, 526 U.S. 756 (1999), the Court disapproved the Commission's use of a "quick look" approach to the assessment of competitive effect, finding the FTC had not sufficiently assessed the potential procompetitive rationales for the impugned conduct.

59 *See* Weisgram v. Marley Co., 528 U.S. 440 (2000); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (holding that *Daubert* applies to all expert testimony); General Elec. Co. v. Joiner, 522 U.S. 136 (1997) (holding that the standard for review of admission of scientific evidence is abuse of discretion); Daubert v. Merrell Pharm., Inc., 509 U.S. 579 (1993) (holding that the Federal Rules of Evidence, not common-law "general acceptance" test, govern admissibility of expert scientific testimony in federal trials).

60 *See, e.g.*, Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000) (reversing \$142 million jury verdict due to failure of *Daubert* test by economic expert).

IV. COMPENSATING FOR INSTITUTIONAL DISTORTIONS?

A. *Illustrating the Problem of Conflicting Economic Testimony*

Matsushita, *Brooke Group* and the *Daubert* Quartet seem to express the Supreme Court's profound discomfort with the manner in which scientific evidence—including microeconomic evidence—is considered and used by the lower courts. Is the Supreme Court reacting to an institutional bias in the manner in which such testimony is formulated and presented? To what can that bias be attributed, and how can it be corrected?

As mentioned above, structural transaction analysis probably provides the single best illustration of how microeconomic analysis may have drifted "off track." *Philadelphia National Bank* enshrined a "structural" presumption based on high concentration.[61] This presumption corresponds to the intuitively plausible notion that the more concentrated a market becomes, the more likely it is to express suboptimal competitive performance characteristics: supracompetitive prices and profits, suboptimal output and reduced investment in innovation, etc. As it turns out, however, very extensive empirical and theoretical research since *Philadelphia National Bank* seems to have confirmed that this plausible suspicion is not borne out in practice:

> As long ago as 1971 Professor McGee's survey of the literature concluded that "there is no clear relationship between concentration and "competitiveness . . ." Professors Scherer and Ross stated in 1990: "[R]ecent work has demonstrated that most, if not all, of the correlation between profitability and concentration found by [Harvard Economics Professor Joe] Bain and his descendants (at least for the United States) was almost surely spurious . . . ." In 1984, Judges Posner and Easterbrook stated in the Supplement to their antitrust textbook: "These new studies call into question the position—which underlies much of antitrust law . . . that increasing concentration creates a significant risk of cartels (or cartel-like oligopolistic interdependence)." In 1999 economists Barry Harris and David Smith concluded: "Overall, the economics literature does not provide the basis for a merger enforcement policy based principally on concentration levels. Nobel Laureate George Stigler once commented: "the typical antitrust case is an almost impudent exercise in economic gerrymandering."[62]

Despite these well-appreciated weaknesses in the structural approach, litigants and courts continue to base arguments and rulings on the *Philadelphia National Bank* presumption. This is convenient, in a sense, for the enforcement agencies and other litigants, but it can obscure a variety of fundamental economic issues implicit in many transactions, and it may lead to incorrect results in certain types of cases. Two specific cases illustrate

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61 United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963).

62 Am. Bar Ass'n, Section of Antitrust Law, Perspectives on Fundamental Antitrust Theory 2 (2001).

the tensions between economic approaches as perceived by the participants in the legal system *versus* economic analysis as a means for arriving at a persuasive basis for interpreting and characterizing real-world phenomena.

In *New York v. Kraft General Foods, Inc.*, the eminent antitrust and microeconomics expert Alfred E. Kahn was appointed as an expert under Rule 706 of the Federal Rules of Evidence by a federal district court evaluating a challenge to an acquisition involving several breakfast-cereal brands; after considering extensive submissions from both parties, Dr. Kahn ultimately concluded that the transaction did not warrant prohibition.[63] Both the reasoning and the conclusion ultimately were accepted by the court. The most interesting element of the case from the perspective of the role of economics, however, is found in Dr. Kahn's observations about the differences between economic analysis for a litigant and economic analysis as an aid to the court. In the former role it is essential (or at least highly advisable) to be certain about each issue; in the latter, it becomes evident that certainty isn't possible, and that distinct issues (market definition, supply elasticity, etc.) tend to meld.

A specific conflict between structuralist and more refined theories of competitive effect is well-illustrated in *Federal Trade Commission v. H.J. Heinz*.[64] In that case the second- and third-largest baby-food suppliers proposed to merge, basing their justification on the possibility of substantial efficiencies and the capacity to provide more effective competition to the clear industry leader, Gerber.[65] The district court rejected a preliminary injunction request filed by the FTC, accepting these efficiency arguments as presented by the parties' economic expert, a former Director of the FTC's Bureau of Economics.[66] But the appellate court, placing a somewhat different light on much of the evidence before the district court, and finding what it characterized as errors in the district court's reasoning, reverted to an approach with a distinctly more structuralist feel:

> The FTC demonstrated that the merger to duopoly will increase the concentration in an already highly concentrated market; that entry barriers in the market make it unlikely that any anticompetitive effects will be avoided; that pre-merger competition is vigorous at the wholesale level nationwide and present at the retail level in some metropolitan areas; and

63 New York v. Kraft Gen. Foods, 926 F. Supp. 321, 351-52, 363-66 (S.D.N.Y. 1995).

64 116 F. Supp. 2d. 190 (D.D.C. 2000).

65 *Id.* at 198.

66 *Id.* at 198 n.7 (holding that "The Commission's argument that further concentration in the baby food industry will increase the likelihood of collusion was effectively rebutted by Dr. [Jonathan] Baker's testimony regarding the structural market barriers to collusion in the market.").

> that post-merger competition may be lessened substantially. These substantial questions have not been sufficiently answered by the appellees.[67]

B. *Alternative Formats for the Resolution of Conflicting Economic Testimony*

How can courts discriminate between two different versions of antitrust economics, presented by opposing sides in litigation? Neither the court nor the jury (if present) can be relied upon to have the expertise and background to sort out the different versions of reality. A variety of alternatives might be suggested.

1. Increasing Use Of Court-Appointed Experts.

As illustrated by *Kraft General Foods, supra*, one alternative is to regularize or mandate the increasing use of court-appointed experts. This is a solution that was urged on the district court in *In re: High Fructose Corn Syrup*.[68] Experience with court-appointed experts has not, however, been a panacea for the resolution of complex economic questions. Judge Wyzanski famously employed Carl Kaysen as his clerk during the path-breaking Section 2 case, *United States v. United Shoe Machinery Corp*.[69] Following years of post-judgment wrangling, the company went out of business and the shoe machinery industry left the U.S. Although no one contends the handling of the litigation is entirely to blame, contemporary antitrust economics does not attribute particular value to the judge's reliance on an economic expert. Reviews seem to be similarly mixed regarding the decision of the judge originally overseeing trial of *United States v. Microsoft Corp.* to use a computer expert to advise on the resolution of that case.[70]

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67 FTC v. H. J. Heinz Co., 246 F.3d 708, 725 (D.C. Cir. 2001).

68 *In re* High Fructose Corn Syrup, 295 F.3d 651, 665-66 (2002) (Posner, J., suggesting in a price-fixing conspiracy case of extraordinary complexity that the court-appointed expert be nominated by the parties' experts).

69 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

70 The European Court of Justice appears to have employed independent economic experts nominated with input from the parties to resolve conspiracy and damages questions arising in the *Wood Pulp* litigation, the first major price-fixing case to arise under the competition rules of the European Union. It is not clear, however, how the European experience translates as a lesson for U.S. courts.

2. Reliance On Neutral Economic Experts At Other Phases Of Case Development And Litigation.

Another possibility to consider is the use of one or more neutral economic experts during case development or at certain stages in the course of antitrust litigation. Although the federal agencies have sometimes employed outside economists in the process of case assessment, these economists tend to work as consultants to the agencies. That being so, one would expect such experts to perceive that their own professional interests may be affected by their inclination to support the government's objectives. To be sure, the agencies are probably conscious of the need to ensure that consultants maintain the strictest objectivity, and there are undoubtedly many antitrust economists who are fully capable of giving neutral and objective views of a case even if the result would bring the consulting assignment to a close. But it might be an interesting exercise to permit economic experts to participate in case development from a completely independent perspective—that is, hired neither by the agencies nor by a reviewing court.

Perhaps the National Science Foundation, which funds a considerable amount of economic research, could be tasked to select and assign economists to "shadow" antitrust case development in order to obtain a strictly neutral view. Such an effort might have utility in identifying institutional tendencies in the use of microeconomic experts that would allow some adjustments to assist objective case development. Perhaps the mere presence of a totally neutral and independent source of economic expertise would itself tend to produce a more objective and dispassionate case assessment.

Finally, a variation on the idea of independent expertise would be to create a source of independent economic assessment at later stages of case development and litigation. Thus, for example, neutral experts could be brought in to review the process of second-request formulation and compliance, the design of discovery and formulation of complaints in litigation, or to advise district courts in a manner similar to the Rule 706 approach but not dependent on the district court's initiative to seek the involvement of independent experts. The key difference would be that the presence of an economic expert would not be at the discretion of or subject to selection by the district court, but would be controlled by an independent agency or outside body specifically constituted with the unique institutional demands of antitrust litigation in mind.

CONCLUSION

The microeconomic takeover of antitrust has simplified antitrust policy and litigation in important ways. It has identified a single economic objective as the policy of the law and has allowed enforcement agencies, parties and courts to employ a common array of theories and empirical methods specifically designed to reach economically optimal results. But antitrust litigation is still bitterly contested and schools of opposing economic thought continue to struggle for the hearts and minds of enforcers, policy makers, judges and juries in many of the most critical areas that govern the most important antitrust disputes.

The simultaneous revolution in the manner in which the courts interact with economists and economic evidence—arising from *Matsushita*, *Brooke Group* and the *Daubert* Quartet—may indicate a need for new institutional formats to improve the quality of economic evidence and streamline the manner in which economic testimony is channeled into the various stages of dispute resolution. This article has identified several basic means to improve the objectivity of antitrust litigation through participation by economic experts isolated from the litigants. Some of these methods envision increased reliance on court-appointed experts, and others envision sources of economic expertise supplied entirely independent of both the judiciary and the agencies.

Whether these mechanisms would improve matters—costs and other aspects all considered—is subject to debate. But it is at least beneficial to raise the issue, in order to assure that good institutional alternatives are not ignored. Antitrust law—as the DNA of a gigantic and complex economy—can have profound affects on the economic well-being of society through seemingly modest changes in doctrine or procedure. If we can improve the mileage that our system of law and our economic system derive from the use of microeconomic expertise, we should try to do so.