2002

International Antitrust at the Crossroads: The End of Antitrust History or the Clash of Competition Policy Civilizations

Antonio F. Perez
The Catholic University of America, Columbus School of Law

Follow this and additional works at: http://scholarship.law.edu/scholar

Part of the Antitrust and Trade Regulation Commons, International Law Commons, and the International Trade Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at CUA Law Scholarship Repository. It has been accepted for inclusion in Scholarly Articles and Other Contributions by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
INTERNATIONAL ANTITRUST AT THE CROSSROADS: THE END OF ANTITRUST HISTORY OR THE CLASH OF COMPETITION POLICY CIVILIZATIONS?

ANTONIO F. PÉREZ*

I. INTRODUCTION

The great question facing U.S. antitrust law in the next few years is how to respond to the European Union's (EU) increasing pressure for the inclusion of antitrust standards in the managed regime for world trade. In this context, one must note the increasing aggressiveness of European competition policy enforcement with respect to primarily American transactions, such as the MCI-World Com/Sprint, Boeing/McDonnell Douglas, and GE/Honeywell mergers. Such cases either reflect mere policy differences between U.S. and EU antitrust specialists or a self-conscious EU strategy designed to advance EU trade interests and provoke international conflicts that will compel the United States to come to the table and negotiate global standards for antitrust enforcement. Less menacingly, one could see EU efforts to force the inclusion of competition policy in the next round of global trade talks as simply an effort to complicate those negotiations and thereby reduce the pressure on the European Union for major concessions on agricultural subsidies, and, by parity of reasoning, see U.S. resistance as merely an effort to avoid a vehicle for imposing new limits on U.S. anti-dumping laws. In any event, the recent Doha Declaration

* Professor of Law, Columbus School of Law, The Catholic University of America. A.B. (1982), Harvard University; J.D. (1985), Columbia Law School. I want to thank George Garvey for helpful comments on an earlier version of this essay. Needless to say, the remaining errors are mine alone.


3. See id. The basic argument for substituting a competition policy-based approach for anti-dumping law is that anti-dumping law's effect as a check on international predatory pricing can be achieved through domestic competition law. For the United States, this would entail relying on Sherman Act predatory pricing claims and the Robinson-Patman Act's anti-price discrimination provisions because exceptions available under the latter Act, such as the competition and cost-justifications defenses, also ensure that primarily only anti-competitive price
of the World Trade Organization (WTO) now seems to suggest that the door to including antitrust issues in the current WTO negotiating round has been opened, although the question whether the member states will walk through that door has not yet been answered.\(^4\)


4. Paragraph 23 of the Doha Declaration provides, as follows:

Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.

Ministerial Declaration, Fourth WTO Ministerial Conference, Doha, Qatar, WT/MIN(01)/DEC/1, 1 23 (Nov. 14, 2001). While the Declaration leaves open the possibility that the WTO will not be able to reach a decision by “consensus” on the “modalities of negotiations,” it does seem clear that a decision in principle has been taken that the upcoming negotiating round must include competition policy. *See John H. Jackson et al., Legal Problems of International Economic Relations: Cases, Materials and Text 1223-24 (4th ed. 2002)* (noting the Ministerial Conference Chairman’s statement, albeit expressing his personal view, that the language of paragraph 23 would permit any member to take a position on “modalities” that would block the commencement of the negotiations contemplated by the Declaration).

5. **MARK R. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER: A GUIDE TO THE OPERATION OF UNITED STATES, EUROPEAN UNION AND OTHER KEY COMPETITION LAWS IN THE GLOBAL ECONOMY** (2d ed. 2001). I should disclose that I have for several years served with Mr. Joelson on the Advisory Committee to *International Legal Materials*, a publication of the American Society of International Law, where I have come to appreciate his expertise and good judgment. I should also note that I think so highly of Mr. Joelson’s new book that I had provisionally decided to use it as the basic materials in an Advanced Course in Antitrust Law scheduled for the spring semester of 2002, until filling other teaching needs for my law school made my teaching this course impossible.
practices concerning the extraterritorial application of U.S. antitrust, intellectual property and fair trade law is leavened with a detailed account of the key judicial decisions and administrative policy changes that have shaped the current structure of international antitrust law, as seen from the perspective of an insider. Mr. Joelson discloses, for example, his own role as counsel for the Government of the United Kingdom (p. 43), which filed an amicus brief in perhaps the most important international antitrust case of the last generation, Hartford Fire Insurance Co. v. California. The book's tone as an insider account is set, moreover, by a helpful foreword by Judge Diane P. Wood of the United States Court of Appeals for the Seventh Circuit, a former Deputy Assistant Attorney General at the Antitrust Division of the Department of Justice. In short, it is the view from a high priest of the American antitrust temple.

In my view, as a teacher of antitrust law and a former State Department lawyer, Mr. Joelson's book is an exemplar of the kind of close and perceptive analysis of the legal and policy dimensions of competition law regimes and how they interact at the international level that only a seasoned practitioner can provide. As a marker for the evolution of international antitrust cooperation over the last generation, this book will frame the issues for anyone genuinely interested in a realistic understanding of the debate that has already commenced at the WTO concerning the role of competition law harmonization and the mechanism for its extraterritorial enforcement through global trade law.

But it would be unfair to describe this comprehensive review of the issues as lacking a prescriptive argument. Indeed, the implicit message of this book is made explicit in Judge Wood's foreword, where she argues that antitrust cooperation can be separated from other policy agendas driving national policymaking, including the temptation to employ national antitrust policy for trade advantages (p. xiv), thus implicitly arguing against seeking to discipline domestic antitrust law's application to transactions affecting international trade. In a more elliptical style, Mr. Joelson's largely hornbook-style analysis of the state of the field contains an implicit argument, which the author makes explicit only in the final chapter, "The Search for a Global Competition Policy" (pp. 388-404). To his credit, Mr. Joelson reports the full range of views represented in the February 28, 2000 Report of the International Competition Policy Advisory Committee (ICPAC), including the dissenting views of Professor Eleanor M. Fox of New York University.

---

the foremost academic advocate for the accommodation of U.S. anti-trust policy to the changing global environment through negotiations at the WTO (p. 402). Nonetheless, Mr. Joelson downplays the possibilities for global institutional management of antitrust policy conflicts, relying on the basic conclusions of the ICPAC’s majority report (pp. 400-02), and even on the EU Competition Commissioner Mario Monti’s own recognition that “first and foremost” the European Union itself would seek to develop bilateral solutions to antitrust policy conflicts (p. 403). Implicitly, if not explicitly, Mr. Joelson buttresses the case for continued American exceptionalism in antitrust law and for reticence in committing the United States to anything more than management of the rough edges of international antitrust policy in the years to come. This skepticism towards multilateral institutional solutions clearly reflects the viewpoint of an antitrust practitioner with vast experience and expertise that U.S. antitrust law and procedures can, without abandoning core U.S. values, incrementally adapt themselves to facilitate increased international cooperation. From this perspective, therefore, the United States need not sacrifice its competition ideals at the altar of free trade. Because this is the viewpoint from the inside of the temple of U.S. antitrust law, those who would risk compromising this faith should be asked to understand better what they would abandon.

This Review Essay has two parts. First, it describes the structure, content, and most important insights found in Mr. Joelson’s volume. Second, it evaluates the case for remaining faithful to the U.S. antitrust faith in the context of the larger debate raging today about the

7. Cf. Tarullo, supra note 2, at 479 (arguing that “forcing the square peg of competition policy into the round hole of trade policy will change the shape of the peg”). The major premise of Professor Tarullo’s argument is that the governance approach of the WTO would ultimately distort the formulation and interpretation of competition policy norms. Id. at 487-94. This conclusion seems to be challenged by the WTO Appellate Body’s recent increased deference towards environmental values. Compare WTO Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, ¶ 153 (Nov. 6, 1998) (holding that failure of the United States to engage in adequate efforts to achieve a multilateral solution precluded its imposition of measures to encourage certain conservation efforts extraterritorially), with WTO Panel Report, United States—Restriction on Imports of Tuna (EC), WT/DS29/R, ¶ 5.42 (May 20, 1994) (not adopted by the Contracting Parties) (suggesting that U.S. conservation-related measures impermissibly sought to encourage conservation efforts extraterritorially). The WTO’s obsession with welfare-maximizing trade values may well be attenuated by the need to balance those values against other welfare-maximizing policies. Cf. Antonio F. Perez, The International Recognition of Judgments: The Debate Between Private and Public Law Solutions, 19 BERKELEY J. INT’L L. 44, 47 (2001) (proposing a WTO solution for the problem of non-recognition and enforcement of trade and investment-related judgments).
continued feasibility of American exceptionalism. This debate has recently been framed in terms of whether American values reflect the "final" form of political and economic development compatible with human freedom or merely one of a number of cultural forms in global competition that will continue to clash for the foreseeable future, the so-called Fukuyama-Huntington debate. Although Mr. Joelson has very little to say about this explicitly, I will argue he implicitly makes a case through the weight of overwhelming detail. His essentially pragmatic argument is that the exposition of U.S., EU and other foreign laws reveals that the United States has little to gain from internationalizing antitrust policy that cannot be gained through incremental convergence as EU competition policy evolves and matures to resemble more closely U.S. policy and procedures. At the same time, the potential cost of attempting to proselytize the globe may well provoke a backlash against further globalization of antitrust values (p. 388).

This Review will suggest a theoretical explanation for the essentially pragmatic conclusion that the United States should continue to oppose negotiations at the WTO. This explanation has the virtue of drawing on the special quasi-constitutional role of antitrust policy in U.S. history, one that is in fact deeply connected to the political economy of U.S. federalism and which, therefore, leaves less room for U.S. acquiescence in the institutionalization of competition policy at the WTO than does even the pragmatic argument for continued U.S. opposition to multilateral and institutional approaches. This argument draws on the continuing centrality of federalism as a regulatory device for U.S. political economy, rather than on federalism's role in maintaining the self-governance prerogatives, including antitrust immunity, of the Ameri-

8. See infra text accompanying notes 38, 39, 41 and 42.
9. For an explicit version of this argument, see Tarullo, supra note 2, at 495-99 (describing the potential for "regulatory convergence" and the absence of a genuine threat to world economic welfare).
10. For this point, Mark Joelson cites to THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE (1999), and thus frames the issue as a conflict between technological change and traditional culture. As this review will argue, infra text accompanying notes 38-46, it may be more productive to assess the place of competition policy in terms of competing theories of political economy and culture rather than levels of technological development and culture.
It is worth noting that a federal antitrust policy became central to U.S. political economy a hundred years ago as a perceived necessity to circumvent the apparent inability of the states, due to a narrow reading of state authority to regulate the national economy, to regulate private power at a national level. The so-called populist conception of U.S. antitrust law focuses on the preservation of a counterweight to the concentration of private political power flowing from the rise of the transcontinental corporation. This Review will argue that it is federalism's role in reinforcing the political accountability of national and state governments, and its correlative force in furthering individual citizen responsibility in both our federal and state political communities, that marries federalist political theory to the role of U.S. antitrust laws in reinforcing individual responsibility for economic liberty. Thus, together, U.S. federalism and U.S. competition law tap into a classical tradition of republican government, shaping our democracy and economy in mutually-reinforcing ways, so that the selfish and embittering aspects of extreme individualism are softened.


13. Swaine, supra note 11, at 779 & n.592 (quoting from legislative history of the Sherman Act). The Court later made clear that it understood the need for federal regulation of interstate commerce to be deeply connected to the capacity of the states to do that job themselves. See H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 538 (1949). Justice Jackson, writing for the majority, noted:

This Court has not only recognized this disability of the state to isolate its own economy as a basis for striking down parochial legislative policies designed to do so, but it has recognized the incapacity of the state to protect its own inhabitants from competition as a reason for sustaining particular exercises of the commerce power of Congress to reach matters in which states were so disabled.

Id. (citations omitted).

by the character-forming effects of participation in a competitive market economy\textsuperscript{15} and by democratic federalism's role in buttressing responsible individualism.\textsuperscript{16} It is thus the continuing relevance of federalism's structuring of U.S. political economy that shapes U.S. antitrust law and, accordingly, should limit U.S. participation in international antitrust lawmaking, for separating antitrust's political dimension from its substantive economic component in a WTO negotiation might then risk undermining this carefully-constructed and uniquely American contribution to global diversity.

Understood in this way, the evolution of U.S. antitrust law cannot be countenanced, much less can a U.S. negotiating position at the WTO be considered, without a more fundamental judgment about where the United States stands on the possibility for cultural accommodation with other political systems in the world less favorable to the preservation of individualism as a legal, political, and economic ethic. In short, if U.S. antitrust laws are part of the body of beliefs and institutions Fukuyama would have us treat as the model for civilizational development, then we dare not risk that special contribution to the potential for human flourishing. If, on the other hand, U.S. antitrust law's path of development is merely the language or rhetoric for solving tensions in political economy between consumers and producers or an oscillating discourse for protecting liberty—conceived either as equality of opportunity and/or as equality of result, as the need for each becomes more pressing\textsuperscript{17}—then there should be less resistance to accommodating


\textsuperscript{16} See generally Martin Diamond, \textit{As Far As Republican Principles Will Admit} (William A. Schambra ed., 1992). As Alan Gibson, reviewing Diamond, the Framers believed that "[p] rov onlying decentralized federalism was important because it allowed citizens to conduct many of their own local affairs. This ... would help to mitigate the effects of individualism and to foster an enlarged understanding of self-interest among citizens who were enticed into politics only on the premise of economic gain." See Alan Gibson, \textit{The Legacy and Authority of the Founders}, 56 REV. POL. 555, 572-73 (1994). Claes Ryn, drawing on Madison's claim that a geographically extended republic would "refine and enlarge" the public's views, argues that the fragmentation of power in the American Constitution requires consensus for significant actions and compels a deliberative process. The end effect of this, he argues, is the encouragement of moral reasoning in public conduct. See Claes G. Ryn, \textit{Democracy and the Ethical Life: A Philosophy of Politics and Community} 158 (2d ed. 1990) (citing \textit{The Federalist} No. 10, at 82 (Clinton Rossiter ed., 1961)); \textit{infra} text accompanying notes 70-71.

\textsuperscript{17} See generally Rudolph J. R. Peritz, \textit{Competition Policy in America: History, Rhetoric, Law} 284 (rev. ed. 2000) [hereinafter \textit{Competition Policy in America}] (deploying Michel Fou-
other cultures' clashing methods for mediating the tension between individual liberty and equalitarian agendas through a global competition agreement enforceable through the WTO.

II. THE ARGUMENT OF THE PRIMER

Unlike other volumes in the field—which specialize either in comparative antitrust, international law affecting antitrust issues, or offer solely the perspective of one national regime situated in an international context—An International Antitrust Primer brings all of these features together in one manageable volume. It will prove of value to students, beginning practitioners in international antitrust, and journalists or others policy experts whose need to understand international antitrust issues requires a precise understanding of the operation of various international and domestic legal regimes. Indeed, even seasoned practitioners will find many nuggets of value through careful use of this volume; however, because it is unburdened by extensive footnotes, it clearly was not prepared to serve as a resource for scholars.18

The substantive focus, however, is on U.S. and EU competition law. The latter, in contrast to U.S. law, is described as a category of supranational law, rather than the law of an emerging supranational entity representing a distinct polity.19 That said, EU competition law not only "illustrates how supranational antitrust law can function effectively," but also "has served as a model for some nations who are still developing their approaches to the issue of restraint of trade" (p. 192). Detailed expositions of both U.S. (pp. 11-187) and EU (pp. 18-212) legal regimes are provided.

---

18. For those purposes, one should turn to other works. See generally JAMES R. ATWOOD & KINGMAN BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD (3d ed. 1997); SPENCER WEBBER WALLER, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW (West Group 2001).

19. Indeed, the European Union has aptly been described as a "legal order established by international treaties giving birth to an international organization that behaves as if its founding instrument were not a treaty governed by international law, but a constitutional charter governed by a form of constitutional law." Eric Stein, International Integration and Democracy: No Love at First Sight, 95 Am. J. Int'l L. 489, 495 (July 2001) (citing J.H.H. Weiler, THE CONSTITUTION OF EUROPE—"DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION 221 (1999)); see also J.H.H. Weiler, THE TRANSFORMATION OF EUROPE, 100 Yale L.J. 2403, 2413-19 (1991) (describing the process through which the European Court of Justice forged a new constitutional reality in Europe that transcended the individual Member States).
191-306) competition law are usefully situated in the context of the overall constitutional and legal systems in which they reside, including, in particular, the U.S. (pp. 36-100) and EU (pp. 191-204) approaches to the exercise of legislative, adjudicative, and enforcement jurisdiction.

It is impossible in a brief review to do justice to the detail and nuance of An International Antitrust Primer. However, certain critical points bearing on the possibilities for antitrust convergence emerge. On the one hand, as Mr. Joelson effectively demonstrates, U.S. antitrust law in key areas is also moving toward administrative control of what were once judicially-monopolized policy decisions (pp. 168-76). In the critical area of mergers, a whole family of precedents satisfying the “incipiency” standard for harm to competition under the Clayton Act’s merger provisions seem to have been overturned by the Guidelines for Horizontal and Vertical Merger Analysis, issued by the Department of Justice and the Federal Trade Commission in the last two decades.\(^2\)

The tilting of the antitrust interpretation playing field in the United States towards administrative decision-making has also been exacerbated by a more restrictive judicially-made standing doctrine, which now drastically reduces the risk of private attorneys general intervening in merger cases to invoke the standards established by previous case law.\(^2\) In addition, the Hart-Scott-Rodino Act of 1976 requires pre-merger notification to the U.S. antitrust enforcement agencies,\(^2\) thereby allowing administrative decision-makers an opportunity to shape potential transactions to cure the most serious threats to competition and thus ensuring that courts second-guessing consent agreements settling DOJ enforcement actions under the Tunney Act usually review only relatively unproblematic transactions.\(^2\) Equally important, critical administrative guidance is now available to parties engaging in interna-


21. See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 US. 477, 489 (1977) (denying competitor standing under Section 4 of the Clayton Act in a challenge to an acquisition arguably in violation of Section 7 of the Clayton Act, because competitor's injury, if any, would not have been an antitrust injury, that is, injury of the kind the competition laws were designed to prevent).


tional transactions through the U.S. Antitrust Enforcement Guidelines for International Operations ("International Guidelines"). In short, the increasing application of deference to the expertise of regulatory agencies mandated by the Chevron principle as a matter of U.S. administrative law suggests an increasing role for the FTC and DOJ Antitrust Division experts in the evolution of substantive antitrust doctrine.

The tendency towards convergence in this area is not unambiguous, however, for Hartford Insurance—like the European Community's Wood Pulp case, and perhaps implicitly in response to that case—takes the position that courts need not even consider whether to exercise restraint in applying domestic competition law to foreign parties on international comity grounds unless there is a true policy conflict, defined now in terms of whether the foreign party is compelled by its own sovereign to engage in conduct that violates the national competition law. The International Guidelines, by contrast, appear to continue the more restrained approach of earlier courts and commentators in the extraterritorial exercise of U.S. antitrust jurisdiction.

It may well be that the Supreme Court's refusal itself to engage in the kind of policy balancing required under the so-called jurisdictional rule of reason is distinguishable from the Executive Branch and FTC's willingness to exercise their delegated legislative discretion in determining the international reach of the U.S. competition laws (or, for that in some cases, judicial review in order to avoid settlements that are "blatantly inequitable and improper").


25. See Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984) (requiring, when Congress's intent on a question is not clear, deference to the settled interpretation of the agency responsible for implementing the statute); see also Waller, supra note 11, at 127 n.71 (noting that, if anything, the courts have deferred more to DOJ, which is not a pure "regulatory agency" delegated rulemaking authority by Congress, than to the FTC, which more closely approximates the agency model contemplated in Chevron deference).


27. See Hartford Fire Ins. Co. v. California, 509 U.S. 764, 797-98 & n.24 (1993) (appearing to rule out comity analysis and employment of the so-called jurisdictional rule of reason unless there is a true conflict, defined as the inability to comply with both sets of laws simultaneously).

matter, from the International Guidelines function as simply advance notice of the enforcement agencies' exercise of their "prosecutorial" discretion) through invocation of a jurisdictional rule of reason. The jury is still out, however, as to whether the Supreme Court will in later decisions defer to the jurisdictional judgments of the DOJ and FTC reflected in the International Guidelines. Thus, the discrepancy between judicially-created approaches and administrative enforcement policy in the exercise of jurisdiction in international antitrust cases now joins merger analysis as an important uncertainty in U.S. antitrust law, even as it becomes a possible area of U.S.-EU convergence.

On the other hand, Mr. Joelson makes clear that there are elements of stark divergence between U.S. and EU competition law and policy. The absence of private remedies and litigation, and correlatively treble damages encouraging so-called private attorneys general to enforce competition law, as is the case in the United States, centralizes antitrust policymaking in the EU bureaucracy (pp. 200-04). The concentration of authority in the European Commission ("Commission") arguably serves the basic policy agenda of EU competition law, which—as part of the constitutive instruments of the European Union—explicitly also serves the quasi-constitutional function of ensuring that private (and public) economic activity does not undercut the creation of a European common market (p. 200). This constitutional function is performed instead in the U.S. by the Dormant Commerce Clause, which has not been understood to contain any competition-related policy values.30 Moreover, the emphasis on top-down control of market activity translates into a legal background prohibiting any activities

29. See Joelson, supra note 5, app. III.B (Consolidated Version of the Treaty on European Union). The original competition provisions of the European Economic Community, articles 85, 86, and 90, have been renumbered as articles 81, 82, and 86 in the new version of the EEC Treaty adopted as part of the Treaty of Amsterdam. The Appendix helpfully includes both set of numbers.

30. See, e.g., C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383 (1994) (a majority of the Court holding that a local ordinance creating a local waste station monopoly violated the Dormant Commerce Clause because it operated as either protectionist legislation or unduly burdened interstate commerce, although a strong dissent would have described the ordinance as merely anticompetitive and, therefore, not unconstitutional); see also H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949) (adopting a common market rationale for the Dormant Commerce Clause, Justice Jackson believed it advanced national prosperity through protecting consumers only in the sense that "every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any"); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935) (Justice Cardozo echoing Justice Jackson in arguing that "the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division").
formally inconsistent with EU law prohibitions against concerted practices "distorting competition within the common market" and "abuse of a dominant position"—which largely parallel the Sherman Act's prohibition against concerted practices in "restraint of trade" and "monopolization"—coupled with authority for the Commission to grant so-called "block" exemptions for certain categories of practices, which the Commission through experience has been able to determine are pro-competitive and non-trade distorting (pp. 212-15). The contrast with U.S. doctrine could not be starker; for, under the jurisprudence of the Supreme Court elaborated over the course of a century, rather than through administrative rulemaking, only extensive judicial experience showing that a practice is uniformly anti-competitive merits the determination that it is considered per se invalid, that is, without a showing of its anti-competitive effects in a particular case. Otherwise, a rule of reason analysis requires an explicit showing of anti-competitive effect in a defined market, in which case the plaintiff (governmental or private) carries the burden of persuasion. Indeed, even then the defendant can subsequently rebut this prima facie case by establishing a pro-competitive justification for the challenged practice.\(^3\)

Similarly, the migration of antitrust policymaking towards administrative control has facilitated the triumph of more relaxed antitrust enforcement in the United States, such as the utilization of the Herfindahl-Hirschman Index (HHI) for measuring the effect on market concentration of a proposed merger, which often—depending on the relative size of the leading firms—yields lower risk assessments than traditional 4-firm concentration ratios, thus arguably raising the threshold for finding risk to market performance from changes in market structure.\(^4\) Meanwhile, the Commission utilizes HHIs to evaluate whether to exempt horizontal cooperation agreements from Article 81 of the Consolidated Version of the Treaty Establishing the European Community ("EC Treaty") (p. 234), as well as for vertical merger analysis (p. 247). The Commission does not appear to use HHIs for horizontal merger or abuse of a dominant position analysis. Instead, it appears to have adopted rules of thumb for market share analysis for mergers drawn from its enforcement under the abuse of dominant position prohibition under Article 82 of the EC Treaty, with post-

---

31. See, e.g., Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 690-91, 695 (1978) (articulating a rule of reason analysis that would allow a defendant to rebut a prima facie case of anti-competitive effect).

merger firm market shares as low at 50% shifting the burden of proof to the applicant (pp. 292 and 296-97). This combined standard for mergers and dominance seems to be roughly equivalent to U.S. policy and practice for horizontal mergers, although it is closer to older U.S. jurisprudence for mergers than to the traditional U.S. market share standards for finding monopoly power (pp. 17 and 272). The real difference is that given the Community's general prohibition against certain kinds of vertical arrangements, subject to block exemptions, such arrangements even when effected through vertical mergers are still viewed with more suspicion in the European Union—where there are "few indications to date that merger specific efficiencies will become a significant criterion" (p. 296)—than in the United States, where the post-Sylvania revolution on vertical restraints has led to greater administrative receptivity to the pro-competitive effects of vertical mergers. In short, and without too much exaggeration: in the United States, whatever is not expressly prohibited is permitted; whereas in the European Union, whatever is not expressly permitted is prohibited.

Yet, although virtually all of what An International Antitrust Primer addresses, it addresses well, this reader would have preferred the same level of attention to the constitutional context of the other national competition systems addressed (i.e., Canada, Mexico, the United Kingdom, and Japan), which unfortunately are covered in only one-fourth of the volume's roughly four hundred pages of analytical text. The selection could also have been expanded to include potential NAFTA parties, such as Chile, or countries that of necessity will be involved in any eventual Free Trade Agreement for Americas, such as Argentina, Brazil, and Venezuela. Alternatively, the volume might have been leavened for comparative purposes by including other countries outside of NAFTA, the European Union, and Japan, even perhaps some countries having little or no trade with the United States. In those cases, where U.S. business groups might have less interest in the need for legal certainty to facilitate trade and investment, the divergence between U.S. antitrust values and foreign regimes may well be greater and perhaps, therefore, more revealing about the non-economic assumptions embedded in different kinds of competition policy.

Nonetheless, the scope of discussion and analysis is worthy, and the volume contains a useful collection of appendices: a selected bibliography, consisting of the most important books, websites, and decisions of national and supranational competition agencies and courts (Appendix I, pp. 405-13); titles of national competition laws, agencies, and special courts (Appendix II, pp. 414-16); the texts of the various U.S. and EU competition-related laws (Appendix III, pp. 417-41); the full text of the U.S. Antitrust Enforcement Guidelines for International Operations (Appendix IV, pp. 442-67); and a Proposal for a Council Regulation which would move toward decentralizing competition law enforcement and placing more authority in the hands of the Member States of the European Union (Appendix V, pp. 468-85). Importantly, for a volume of this kind, the index is also well organized and quite useful in quickly identifying the differences in doctrine and practice among the jurisdictions covered with respect to specific theories of antitrust invalidity.

The comparative significance of the last appendix, however, arguing as it does a sea change in EU law in the direction of decentralization—in EU “constitutional” terms, subsidiarity—warrants more attention than *An International Antitrust Primer* gives it (pp. 215-16). It may be that different conceptions of federalism and subsidiarity will have implications for competition policy convergence and management. To take one example, the interface between trade law, competition law, and intellectual property law (which may well emerge as the most difficult challenge in the negotiation of a consolidated regime at the WTO), needs to be understood in these terms. While the United States by statute protects certain U.S. intellectual property rights from parallel importation of products licensed for sale outside the United States (pp. 144-45),34 the European Union, by contrast, extends the first sale exhaustion concept for patents, trademarks, and copyrights to apply to sales not only in the rights holder’s Member State, but also in any other Member State (pp. 245 and 258-61). As Mr. Joelson notes, “under Article 36 (now Article 30), once the goods had been placed on a Community market by the rights holder or by a third party with the rights holder’s consent, their parallel importation into another Member State could not be blocked” (p. 259). Properly understood, however, U.S. and EU law are in accord on this point. It is the Dormant

INTERNATIONAL ANTITRUST AT THE CROSSROADS

Commerce Clause under U.S. constitutional law, not the Sherman Act, which creates a U.S. common market. It is not surprising that the Dormant Commerce Clause commands the same result as the synthesis of the trade-related and competition-related provisions of EU law, taking into account, as noted above, that the European Union has consistently assumed that its competition law and policy are intended to reinforce the creation of a common market. Thus, competition law in the European Union performs only centralizing functions, so that competition policy and the EU quasi-constitutional policy of subsidiarity are not in conflict, especially given the relative weakness of subsidiarity in decentralizing EU governance.35 The same question for the United States, however, requires a more sustained analysis.

The next part of this Review Essay will seek to remedy An International Antitrust Primer's lack of attention to the convergence and global regulatory implications of the tension between U.S. federalism and traditional EU centralism by locating the decentralization issue in terms of a larger debate about the relationship between, on the one hand, the distinctive mode of democratic capitalism represented by U.S. federalism and antitrust law and, on the other hand, the multiple potential competing systems around the globe. In short, the unique American synthesis is either a "final" product of evolution in political economy or merely one of many possible forms, each with their virtues and vices, that can each be improved through accommodation, compromise, or legal borrowing. These larger questions need to be addressed before we move toward global antitrust policy convergence or acquiesce in global institutional antitrust policy coordination at the WTO level.

III. THE "ENDURING FREEDOM" OF U.S. ANTITRUST LAW

The recent U.S. military operation in Afghanistan to suppress the Taliban and the Al Qaeda terrorist organization, which was code named "Enduring Freedom," is in part at least a response to a violent manifestation of the anti-globalization backlash so aptly described in Thomas Friedman's The Lexus and the Olive Tree.36 In citing this work,

35. See infra text accompanying notes 57-58.
36. See FRIEDMAN, supra note 10, at 267-83. The phenomenon suggested by Friedman's concern about a "backlash" against globalization is also a central theme of much of the popular literature in the wake of the September 11, 2001 attacks against the Pentagon and World Trade Centers. It seems, in short, to express the zeitgeist.
Mr. Joelson's *An International Antitrust Primer* (p. 388) invokes the received image of globalization as the dominant phenomenon of the new century. Implicitly then, the technocratic vision Mr. Joelson articulates in the book takes no position on the relationship between competing conceptions of antitrust law and the larger value conflicts antitrust law has historically mediated.  

### A. **Globalization's Challenge**

However, translated to a context of globalization, the great debate of this era may well be whether the organizing vision of the United States' engagement with the world is best captured by Francis Fukuyama's *The End of History* or, instead, by Samuel Huntington's *The Clash of Civilizations*. Under the former vision, the core principles of democratic capitalism, which have largely reached their clearest expression in the socio-political order of the United States, have triumphed over all other competing models. Fukuyama's explanation of the meaning of the fall of the Soviet Union barely ten years ago gained currency in the years immediately following the fall of the Berlin Wall. Fukuyama seemed the early apparent winner in the race for the overarching concept that would define U.S. grand strategy in the post-Communist period, much as George Kennan's famous Mr. X article in the respected journal *Foreign Affairs* defined the character of the Stalinist state and drew the necessary implications for a Western grand strategy of containment. As post-Communist brushfires erupted over the globe and a new competition emerged between the United States and rising forces in East Asia and the Middle East, Huntington advanced a vision that saw no final victory for Western democratic capitalism, but rather, imagined an emerging, yet unavoidable, conflict between the great civilizations of the world, each

---

37. *See generally* Peritz, *supra* note 17 (describing American antitrust policy's evolving relationship in the United States to public perceptions of the danger of economic and/or political domination).


40. *See* X, *The Sources of Soviet Conduct*, 25 *Foreign Aff.* 566 (1947) (authored by George Kennan while he served as Director of the State Department's Policy Planning Staff and widely believed, therefore, to represent official policy of containment of Soviet power and international communism).
defined in terms of fundamental views of man, society, and the state. Huntington distinguished Europe and North America from other civilizations, including Orthodox Russia and Latin America, but he treated Western civilization as a whole. However, a plausible case can be made that the Americans and the Europeans, as children of different, and incompatible, revolutionary experiences, are no more alike than the Orthodox Russians and the Latin Americans.

Drawing on the intuition that the American way and the European way may well be different in reality, the macro-level debate between Fukuyama and Huntington might be played out in smaller, more manageable sets of issues posing the same basic value conflicts. One fruitful place to explore a more focused inquiry into the relevance of the Fukuyama and Huntington theses may be the case of negotiating international competition policy coordination in the next decade. Understood in those terms, the tensions between those civilizations—tensions that are generally agreed to have been exacerbated by the globalization phenomenon Friedman describes so lucidly—reflect competing and as yet unresolved views about the relative weights that should be attached to individualist and communitarian visions of social and economic organization. The former places consumer sovereignty and technological progress through creative destruction at the apex; the latter seeks to regulate and direct the evolution of the economy to achieve a plurality of values, including the protection of certain kinds of market participants from ruinous competition, the reduction of costs of social dislocation, and the preservation of traditionally-valued ways of life—values which in an earlier era may also have been part of


42. See Huntington, supra note 39, at 45-48 (distinguishing between Latin American, Orthodox Russian, and Western Civilizations, but not between American and European).

43. See generally Hanna Arendt, On Revolution (1965) (arguing that the American revolution, unlike the French revolution, sought to restore liberty through a particular conception of order); see also Stanley Elkins & Eric McKitrick, The Age of Federalism 8 (1993) (describing the influence in the American Revolution of the Renaissance intellectuals, who reconstructed classical thinking on the "mixed and balanced constitution as that kind least unstable, as well as of such a commonwealth's providing the most ample setting for men's [sic] own self-realization").

44. See generally Joseph A. Schumpeter, Capitalism, Socialism, and Democracy (3d ed. 1950) (advancing the "creative destruction" thesis as the key to dynamic efficiency); Robert Bork, The Antitrust Paradox: A Policy at War with Itself 81-88, 107-32 (1978) (arguing for consumer welfare maximization policy, including attention to the promotion of productive efficiency, as the only policy goal of the Sherman Act).
the U.S. competition matrix. Some commentators see this increasingly clear value conflict in competition policy as symptomatic of more fundamental differences between the trajectories of U.S. and European society that are not amenable to harmonization or convergence, but rather, can at best merely be managed.

At issue then may be the nature and purpose of U.S. antitrust law: either as the continuing expression of core economic and socio-political ideals of American democratic capitalism, or, alternatively, as a dispensable portion of our national heritage, one that can be adapted to meet the needs of cooperation between "civilizations" in the ongoing task of avoiding too violent a clash of civilizations. For many, U.S. antitrust law is more than merely one of a number of policy instruments designed to regulate effectively the U.S. market. It is, rather, central to American beliefs, not only concerning the ideal economy but also about the ideal political structure and, perhaps, even the ideal citizen; at least this is what generations of American law students trained in the rhetoric deployed by Judge Learned Hand in the Alcoa case have been indoctrinated to believe about the Sherman Act. For Hand believed:

it is no excuse for "monopolizing" a market that the monopoly has not been used to extract from the consumer more than a "fair" profit. The Act has wider purposes. Indeed, even though we disregarded all but economic considerations, it would by no means follow that such concentration of producing power is to be desired, when it has not been used extortionately. Many believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. Such people believe that competitors, versed in the craft as no consumer can be, will be quick to detect

45. See Robert Pitofsky, The Political Content of Antitrust, 127 U. Pa. L. Rev. 1051, 1053-54, 1060-65 (1979) (rejecting the Borkian view and, drawing on legislation enacted after the Sherman Act, arguing that—whether or not consumer welfare maximization was ever the only policy goal of U.S. competition law—current law mandates a more multi-factorial analysis in certain contexts).

46. See Evans, supra note 1, at 17-18 (contrasting the fundamentally different approaches taken by the United States and the European Union to competition policy and law). Mr. Evans' intuition about civilizational differences between the United States and the EU may also reflect a difference between Anglo-American and continental philosophy. See Competing Visions, Economist, Sept. 21, 2002, at 61-62 (reporting the United Kingdom's adoption of a merger review standard probably equivalent to the U.S. standard).
opportunities for saving and new shifts in production, and be eager to profit by them. . . . It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. These considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes.47

Hand implicitly recognized that the Sherman Act initially could well have been a charade, an attempt to refer to the courts for inaction the problem of increasing concentration of power in American society in the hands of the few.48 Yet, the “decisions,” which Hand found to give the Act a broader meaning, may well have included not only those of the Supreme Court in interpreting the Sherman Act, but also the judgments of the Executive Branch in seeking to enforce it more vigorously. It was Theodore Roosevelt’s grand, albeit not unambiguous, response to the political sea change brought about by populism’s anti-authoritarian attempt to realize the Founders’ vision of American liberty, in a new technological and industrial context, that made the Sherman Act the “law” Hand also felt bound to interpret.49

For others, based on their reading of the Sherman Act’s legislative history, the Act is merely a policy instrument designed to maximize consumer welfare, the core intuition of the Chicago School-approach popularized by Judge Bork and arguably dominant in the recent jurisprudence of the U.S. Supreme Court:

The legislative histories of the antitrust statutes, therefore, do not support any claim that Congress intended the courts to sacrifice consumer welfare to any other goal. The Sherman Act was clearly presented and debated as a consumer welfare prescription. The same clarity may not be present in the history of the later statutes, but consumer welfare is a major component in the debates, and there is no indication of any congressional decision to sacrifice consumer welfare in any case to any other value.50

---

47. See United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945).
50. See Bork, supra note 44, at 63-66 (reading the legislative history of the Sherman Act, and related antitrust statutes, to further the single policy of consumer welfare maximization, in large part to avoid a background constitutional concern that to do otherwise would vest excessive law-making authority in the judiciary).
Thus, two views of the relation between the modern American commitment to antitrust law and the alternative conception that may be emerging throughout the globe seem to be permissible.

For followers of Fukuyama, then, a global reform agenda based on a broader vision of the purposes of American antitrust law would operate at two levels of institution-building: the domestic and the international. At the domestic level, the goal of exporting American-style democracy after the Second World War was inextricably connected to exporting American style antitrust to the defeated Axis powers. Similarly, the U.S. agenda for policy reform in the new democracies of Central and Eastern Europe after the fall of the Berlin Wall included antitrust reform. In promoting competition as a crucial reform policy, the United States sought not only to spur economic development and innovation, but also, drawing on the faith that competition law would further democracy by breaking down the economic walls of cartels and exclusive dealing, to change the very nature of post-Communist cultures, thus supporting the emergence of a culture of transparency and an ethic of individualism.

At the international level, the post-Second World War generation of American leaders thought it important to include competition principles in the proposed but aborted Havana Charter and International Trade Organization, in order to transform the international trading system and thus provide the context for strengthening national democracies. By contrast, the post-Cold War generation has recoiled at the idea of including antitrust principles as part of the legal fabric for democratic capitalism in the new World Trade Organization. Ironically, it is now the European Union which seeks to bring competition policy to the table at the World Trade Organization, while the United States under both the Clinton and Bush administrations argues for their continued exclusion. Some American neo-isolationists might now argue that U.S. antitrust values would be impoverished through inclusion in the new WTO. Also, those holding that core values of antitrust law are central to American democracy would not be prepared to accept the weakening of U.S. antitrust principles in order to enhance predictability for the global economy, even if the United States, as the largest participant in that global economy, would have the most to gain. Rather, they might argue that the natural evolution of economy and society in the direction of the democratic capitalism epitomized by the values of U.S. antitrust law over time will characterize the central tendency of antitrust law’s evolution under the law of U.S. trading partners. Under this view, the progressive victory of U.S. values might be better achieved through continued antitrust cooperation at a bilat-
eral and technical level, thereby avoiding a premature consensus on global antitrust values that would delay the imperative for evolution in the direction of a powerful U.S. national commitment to competition as national economic policy and as socio-political ideal.\textsuperscript{51}

For followers of Huntington, the efforts to internationalize antitrust were attempts at legal transplantation in infertile soil doomed to failure. At the same time, the needs of U.S. business to accommodate itself to the likelihood of continued divergence from American values in national competition policy argue for the use of some level of international policymaking to reinforce positive developments in foreign law, even at the price of accepting lower international standards and trading off some American trade interests in the process of bargaining during the Millennium Round of WTO negotiations. A persistent clash of civilizational values would make, for the United States, the best international antitrust policy agenda the enemy of a good international antitrust policy agenda. Accordingly, the business and political elites favoring a level playing field for U.S. business in the new world created by decreasing tariff and non-tariff barriers to trade in goods and services must adopt a more realistic stance about what can be achieved through continued unilateral and technical approaches to international antitrust issues in the foreseeable future before they reject out of hand deals that are now achievable at the WTO.

B. Federalism's Response

The uniqueness of the U.S. model of capitalism and democracy is highlighted by its relationship to the peculiarly American fascination with federalism. If Fukuyama and Huntington agree that there is something distinctive about the American contribution to democratic capitalism, then surely for constitutional lawyers that uniqueness can be located in federalism; the implications of federalism include not only creating a national common market, but also assuring that management of that market will remain, to some degree at least, accountable to local constituencies and interests and thereby free from political domination from the center. The "constitutional character" of the Sherman Act was recognized by the U.S. Supreme Court early in American antitrust history, in the sense that, as "a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable

\textsuperscript{51} See generally Tarullo, supra note 2.
in constitutional provisions." But in the establishment of freedom, federalism's chief goal is the vertical and horizontal division of power, largely to ensure political competition between different centers of power for the support of the people. Indeed, the neo-federalist revival in the jurisprudence of the U.S. Supreme Court is largely grounded on the notion that the Framers "split the atom of sovereignty," so that "our citizens would have two political capacities, one state and the other federal, each protected from incursion by the other." In short, the ethic of political competition is built into the very fabric of American life and the need to maintain that political competition from the distorting effects of concentration of private, as well as public, power are never far from American political thought. This ethic of competition in the political sphere, much as in the economic sphere, arguably promotes public deliberation in the pursuit of the common good. At least that was the original conception; whether it survives is an open question.

The structural integrity of states as independent political actors also plays a role in antitrust federalism. In the context of U.S. antitrust law, this concern manifests itself in the form of the Parker v. Brown doctrine of state action immunity. By contrast, European law directly applies competition policy to the public sector. European extension of competition policy to state enterprises may reflect, as some commentators suggest, the larger role of the state in European economy, thereby necessitating the

52. See Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933). Justice Hughes added that the Act did "not seek to establish a mere delusive liberty" but rather sought to establish a "standard of reasonableness." Id. at 360.

53. See The Federalist No. 51, at 290 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he constant aim is to divide and arrange several offices in such a manner as that each may be a check on the other . . . ").

54. See U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (stating that the U.S. Constitution created two sets of rights and obligations—state and federal—for the people governed respectively by each). Justice Kennedy's formulation draws on the need for the people to retain the right and the duty to hold their representatives in each sphere of government accountable for the benefits and burdens of policymaking at each level of government. See also New York v. United States, 505 U.S. 144, 180 (1992) (articulating the rule against legislative commandeering by the federal government on precisely these grounds).

55. See The Federalist No. 10, at 50-51 (James Madison) (Clinton Rossiter ed., 1961) (describing the effects of the republican form of government and noting that the public view will be enlarged and refined when passed through the medium of a body of representatives and that factions are to be less feared in part because "communication is always checked by distrust in proportion to the number whose concurrence is necessary").


application of competition policy in this area to ensure not only the protection of competition values, but also the even more important community trade protecting functions of EU competition law. Yet the extension of competition law to member state activity may also reflect the relative weakness of the European Union's commitment to subsidiarity, as compared to the U.S. commitment to federalism. It should be remembered that the efficiency of the level of policy determination is the key criterion under the principle of subsidiarity, and it would seem obvious that the efficiency of a common set of policies would appear to be manifest in the competition area. 58

Policy convergence on this issue of democratic structure, at least as viewed from the U.S. perspective, is problematic at best. Whether U.S. antitrust state action immunity is grounded solely in statutory interpretation or really is commanded by the Constitution would surely be put to the test if the United States were to follow the international trend on this issue. Alternatively, the United States would have to pay the price in trade concessions in order to maintain its own accommodation between the sovereignty of sub-state entities and national economic policymaking. The United States is currently constrained by federalism principles in the government procurement area, where it cannot make binding commitments on behalf of states without testing the limits of political feasibility and perhaps constitutional authority. 59 In the Dormant Commerce Clause context, the Supreme Court has recognized a so-called market participant exception, under which states may exercise their rights to condition sales and purchases in the marketplace so as to further their narrow self-interests, even at the risk of abridging the operation of the federal common market, 60 although one precedent

58. See generally Koen Lenaerts, Constitutionalism and the Many Faces of Federalism, 38 Am. J. Comp. L. 205, 224-25 (1990); Koen Lenaerts, The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism, 17 Fordham Int'l L.J. 846, 875-79 (describing the principle of subsidiarity as relating only to locating governance at the level capable of maximizing the welfare gains achieved by the governmental policy in question). A minority of the U.S. Supreme Court, in rejecting the majority's view of federalism as ensuring political liberty through maintaining a political market structure ensuring competition between state and federal sovereigns for the support of the people, instead has fashioned a theory of cooperative federalism and, accordingly, looks to European constitutional thinking for analogies. See, e.g., Printz v. United States, 521 U.S. 898, 976-78 (1997) (Breyer, J., dissenting).

59. See Waller, supra note 11, at 124 n.61 (asserting, without argument, that Congress could bind the states in this area under the Commerce Clause, although such a measure would be politically unthinkable).

does suggest that this exception operates more narrowly in the context of foreign commerce. In a recent case raising foreign relations federalism questions, for example, the Supreme Court held that where Congress has specially delegated authority to the president to regulate U.S. economic relations with a particular country in order to achieve a foreign policy goal, state action in that same area is preempted and, if taken, unconstitutional. The Court did not, however, address whether state sovereignty over core domestic regulatory concerns could be trumped under the Commerce Clause.

Moreover, despite the reversal through Garcia v. San Antonio Metropolitan Transit Authority of the National League of Cities v. Usery zone of Tenth Amendment protection from federal authority under the Commerce Clause, the Supreme Court's subsequent jurisprudence under the Commerce Clause and the Eleventh Amendment suggests renewed receptivity to the idea that a hard core of state sovereignty over local policymaking requires some level of constitutional protection. If this is so, the case for Parker v. Brown immunity may stand on stronger constitutional foundations than we have previously believed, even if courts have not generally reached the question. The relationship between the two, the Eleventh Amendment and the Parker doctrine, depends of course on whether the state itself or a private person, pursuant to clearly articulated and actively supervised state policy, is the defendant. But there seems to be no good reason to separate the two analyses when the fundamental question is whether a state should be free from federal competition policy, either directly or through agents or independent contractors, to prefer other values to those embodied

64. See Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) (decided the same day as Hughes v. Alexandria Scrap).
65. See United States v. Lopez, 514 U.S. 549, 564-67 (1995) (concluding that although Congress's authority under the Commerce Clause is broad, "it does not include the authority to regulate each and every aspect of local schools").
67. See Waller, supra note 11, at 120 n.37 (citing authorities).
in the Sherman Act. As a side note, it is important to recognize that the tension between U.S. constitutional or quasi-constitutional values and international decision-making is not limited to antitrust issues. Even outside the WTO, the United States is facing a similar choice in the context of recognition and enforcement of judgments. Because the Fourteenth Amendment's constitutionalization of "minimum contacts" jurisprudence, which serves as a limit on the exercise of state sovereignty in its adjudicative jurisdiction so as to preserve individual liberty, includes the so-called "doing business" ground for exercise of jurisdiction, international sensibilities are offended and may well prevent the United States from securing foreign recognition and enforcement of U.S. judgments by treaty. Arguably, however, these constitutional limits

68. Recently, in the Bivens context, the Supreme Court has implied a remedy to vindicate the interests of victims of tortious conduct by federal agents acting in violation of Fourth Amendment and Fourteenth Amendment constitutional guarantees. The Court also drew a distinction between actions against the state's individual agents and actions against independent contractors. See Corr. Serv. Corp. v. Malesko, 122 S. Ct. 515, 517-523 (2001). In the latter case, because adequate state law remedies remained available against the independent contractor, who unlike a federal official would not ordinarily be able to assert qualified immunity, there was no need to imply a constitutional remedy. Id. at 521 (noting likelihood that only the government would be sued under the Federal Tort Claims Act, since government officers would be able to assert qualified immunity, with the result that constitutional violations by government officers might go undeterred in certain contexts). Malesko also noted the potential caveat of the government contractor defense available under Boyle v. Technology Corp., 487 U.S. 500 (1988). Id. at 523 n.6.

By parity of reasoning, in the Parker v. Brown context, unless an agency or instrumentality of the state was the defendant and benefited from state sovereign immunity, there would seem to be no need to imply a constitutional entitlement to a remedy in order to vindicate those rights. See Waller, supra note 11, at 118 n.24. But that begs a larger question: Are there constitutional rights to be free from state interventions in the economy that favor one class of producers or consumers over others? This issue has sometimes been framed as a regulatory takings argument.

Regardless of whether under U.S. law there is a constitutional right to free trade, it is worth noting that some international law scholars trained in the so-called "Austrian" school have suggested that there is an international individual right to free trade. This right is protected by the trend toward increasing international law limits on the freedom of states to distort international free trade through tariffs and non-tariff interventionist policies, such as antidumping and countervailing duty law. See, e.g., Ernst Ulrich Petersmann, The WTO Constitution and the Millennium Round, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOR OF JOHN H. JACKSON 111, 130 (Marco Brondkers & Reinhard Quick, eds., 2000) (arguing that the "basic objectives of human rights law and WTO law are complementary and similar"). Even conventional U.S. antitrust law commentators have suggested—largely for reasons of furthering transparency, legitimacy, and fairness—that the first targets for policy reform in the promotion of international trade should be antidumping and countervailing duty policies, which could simply be replaced by antitrust doctrine addressing real predatory pricing strategies. See Waller, supra note 11, at 130-33.

69. See Perez, supra note 7, at 62-63.
are more sensitive to federal interests when foreign commerce is implicated.\textsuperscript{70} Can antitrust federalism then adapt to global governance any better than the component of federalism that limits the personal jurisdiction of state courts?

IV. CONCLUSION

The question really is not all that new. U.S. antitrust law has always adapted to the changing needs of the moment. The genius of the common law system of antitrust precedents and the continued flexibility of antitrust enforcement policy permit U.S. antitrust law to evolve to serve the values Learned Hand so elegantly articulated in the \textit{Alcoa} case. Improved economic learning and better understanding of the social context for antitrust policy decisions matter. But deeper reflection on the relation between the economic and cultural values of U.S. antitrust law and their relation to the continuing vibrancy of our democracy may be even more important. The political economy of antitrust law in the United States is central to fostering civic virtue so as to fulfill, at least in part, the vision of the American experiment.\textsuperscript{71} We should be aware that the precise relationship between market society and civic virtue has remained a subject of intense debate, about which Americans and Europeans will no doubt intensely disagree.\textsuperscript{72} But debate about the moral value of capitalism and its premises, including the role of a clear and protected right to property balanced by recognition of the social implications of its establishment and exercise, is healthy. Indeed, if a theologically driven institution such as the Papacy is capable of modulating its views on the moral status of capitalism in light of changing circumstances,\textsuperscript{73} then perhaps so also

\textsuperscript{70} Compare World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-94 (1980) (justifying the so-called "minimum contacts" test for personal jurisdiction on federalism grounds), \textit{with} Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987) (plurality opinion) (rejecting mere placement by a foreign manufacturer of a product into the "stream of commerce" as a basis for finding "purposeful availment" of forum's benefits and meeting the minimum contacts test for personal jurisdiction).

\textsuperscript{71} See Elkins & McKitrick, supra note 43, at 20-21 (explaining the moderate, non-mercantilist political economy of the Framers in part as a rebellion against British court-centered mercantilist corruption).

\textsuperscript{72} See Hirshman, supra note 15, at 109-17.

may be the high priests of the American and European temples of competition law.

Thus, it would be surprising to expect that antitrust values, any more than other elements of the U.S. experience, would remain static in the face of either a changing international economy or a changing international political system. U.S. antitrust law must adapt to new threats to economic freedom, as evidenced in the struggle of judges and Executive Branch policymakers to come to grips with the implications of the technological revolution of the last decade. This is no less true for U.S. antitrust thinking than for American grand strategy's need to adapt to new external threats to American freedom, as evidenced in the new kind of war the United States is fighting against global terrorism. In short, Mr. Joelson's detailed account makes a strong case for not abandoning U.S. antitrust law in the context of WTO negotiations. However, it does not make the case for what kind of antitrust law U.S. negotiators should strive to protect in those negotiations because we still do not have a considered vision of U.S. competition policy in the new world of increasing returns to scale and innovation markets that promises an eventual paradigm shift in U.S. antitrust law.

In many respects the path of U.S. antitrust law has reflected the oscillation of antitrust between competing tendencies over the control of private and public power.74 Surely, then, as international regulation becomes a more important force in governing the everyday lives of U.S. citizens, antitrust values will need to be translated to that context as well. Preserving the freedom of Americans to participate in the political process and achieve their goals through the level of government most

the Roman Catholic Church's position—rejecting not capitalism but rather rejecting treating capitalism as an all-encompassing ideology—is found in the Papal encyclical on the concept of development for the post-colonial era. Pope Paul VI, after noting the rise of industrial society, observed that "it is unfortunate that on these new conditions of society a system has been constructed which considers profit as the key motive for economic progress, competition as the supreme law of economics, and private ownership of the means of production as an absolute right that has no limits and carries no corresponding social obligation." Pope Paul VI, *Populorum Progressio: On the Development of Peoples* (1967) ¶ 26, reprinted in *Catholic Social Thought: The Documentary Heritage*, supra, at 240, 246. In short, it was not capitalism that the Papacy rejected, but rather the perversion of capitalism into a "stifling materialism." *Id.* at 244. Properly understood, then, the Church's teaching is fully consistent with treating competition law as an evolving set of precepts because the social good to be achieved through competition law varies with the changing requirements of the common good.

74. See *Wallner*, supra note 11, at 117-18 & n.23 (noting that the reaction to the Microsoft litigation has largely followed from a prior view of whether government power or private power is a greater danger to individual liberty and American democracy).
closely connected to them—in many cases their states and localities—will require that international antitrust policy take into account the relation between, on one hand, international market structure, conduct, and performance and, on the other, international democratic structure, conduct, and performance. Accordingly, the next book to be written on international antitrust, now that Mr. Joelson has provided a roadmap through the legal thicket, should address the comparative political economy of antitrust law. This project will require a collaborative effort of antitrust, constitutional, and international lawyers, economists, and students of comparative and international politics. Fortunately, a third edition may be available by then, remedying the few defects of the second.

In sum, the debate concerning the U.S. negotiating position with respect to antitrust’s inclusion in the next Millennium Round of WTO negotiations begs a further set of questions about the actual operation of antitrust law in national economies and the precise interaction between competition, trade, and democracy. This most definitely requires top-down thinking, as suggested by the Fukuyama-Huntington debate. More important, however, it requires bottom-up thinking. We need an accurate assessment of the true role and trajectory of antitrust law in the United States today, as well as an assessment of the real possibilities for convergence towards the American ideal in foreign antitrust systems. In short, we need some comparative public law that will provide the raw material for those who want to generate policy options. Mr. Joelson’s contribution, therefore, is not only addressed to the present; it is a challenge for the future and an invitation to question where we are and where we are going. Can one say anything better about a new book?