

THE SOCIAL COSTS OF POPULIST ANTITRUST: A PUBLIC CHOICE PERSPECTIVE

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I. INTRODUCTION

Microeconomic analysis has become increasingly important to the development of antitrust law.¹ Over the past decade, a number of antitrust decisionmakers—including enforcement bureaucrats and judges—have adopted an economic approach and moved toward a “minimalist” view of the proper scope of antitrust:² “[O]nly explicit [horizontal] price fixing and very large horizontal mergers”³ are worthy of serious concern. Ac-

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1. This development is widely attributed to the work of “Chicago School” economists and lawyers. Useful discussions of the Chicago School approach include Posner, *The Chicago School of Antitrust Analysis*; 127 U. PA. L. REV. 925 (1979); Reder, *Chicago Economics: Permanence and Change*, 20 J. ECON. LITERATURE 1 (1982); *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 J.L. & ECON. 163 (1983); and G. STIGLER, *MEMOIRS OF AN UNREGULATED ECONOMIST* 148-69 (1988).

2. Minimalist ideas were clearly reflected in the federal antitrust enforcement agenda under Ronald Reagan. See Pitofsky, *Antitrust in the Next 100 Years*, 75 CALIF. L. REV. 817, 818 (1987) (“The only matters that regularly attract the attention of the enforcement authorities are cartels, horizontal mergers tending to create a monopoly, and various forms of predation.” Even in these areas, the federal “enforcement agencies have introduced various exceptions and qualifications into prior law and today tend to resolve most doubts in favor of nonintervention.”). Minimalism has also had a significant impact on the Supreme Court and the lower federal courts, as evidenced by two statements by Robert Bork, separated by little more than a decade. In 1978, he described the “modern condition” of antitrust as one of “internal contradiction and intellectual decadence.” R. BORK, *THE ANTITRUST PARADOX* 408 (1978). In 1989, he voiced the opinion that:

The courts are deciding antitrust cases better. There are some doctrines I would like to see changed, but I don't know if that is practical. . . . There is always going to be room for improvement in any field of law, but antitrust has seen a remarkable regeneration after a period of being in a very decayed state.

Paradox Revisited: Interview with Judge Robert H. Bork, *ANTITRUST*, Summer 1989, at 16, 16-17.

3. Posner, *supra* note 1, at 933 (explaining the “orthodox Chicago position,” which “had crystallized” by 1969). Similar formulations include R. BORK, *supra* note 2, at 405-06 (stating that antitrust should “strike[] at three classes of behavior,” including non-ancillary horizontal agreements to restrain competition, horizontal mergers that leave fewer than three significant competitors in a relevant market, and deliberate predatory behavior, economically defined); and Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1701 (1986) (Chicago School “seems to favor little other than prosecuting plain vanilla cartels and mergers to monopoly”).

cordingly, antitrust oversight of a number of areas has decreased under the theory that most incidents involving alleged monopolization, vertical restraints, or questionable mergers (particularly of the vertical or conglomerate variety) do not pose a serious threat to consumer welfare.

Some observers have criticized these developments, arguing that the law should be used to advance such populist goals as the "fair" distribution of business opportunities and income and the dispersal of political and economic "power."⁴ This Article questions the strengths of these populist criticisms. More specifically, the Article describes the substantial danger that populist antitrust doctrines would encourage "rent-seeking" behavior on the part of firms and other parties.⁵ The Article shows that a populist antitrust regime would induce increases in rent-seeking behavior, including increases in antitrust litigation. It further demonstrates that the costs of rent seeking are social costs that should be included in the total cost of a populist antitrust regime. In so doing, the Article corrects the remarkable failure of contemporary populist critics to recognize, much less account for, these costs. To address this shortcoming in the literature, the Article applies a public choice perspective to the current debate over the proper scope of antitrust.

The Article is divided into four parts. Part II describes several populist writers' proposals for incorporating their ideological views into antitrust law. Part III outlines the theory of rent seeking and argues that populist antitrust doctrines would cause a significant increase in socially wasteful rent-seeking activity. Part IV offers the more general point that the potential for an increase in rent-seeking costs should be a factor considered in determining whether any proposed government intervention in the economy will yield, on balance, positive results.

II. CURRENT POPULIST BLUEPRINTS FOR ANTITRUST

Populist commentators have argued recently that antitrust

4. Populist ideas are certainly not new to antitrust. Indeed, solicitude for "small dealers and worthy men" appeared early in antitrust jurisprudence. *United States v. Trans Missouri Freight Ass'n*, 166 U.S. 290, 323 (1897). This approach to antitrust reached something of a zenith during the Warren Court. See Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism and Cynicism*, 67 MICH. L. REV. 325 (1968).

5. "Rent-seeking" behavior is the effort by persons or groups to obtain government action that would confer on them legal or other rights, and associated benefits. See *infra* note 40 and accompanying text.

law should account for social and political factors in cases that deal, *inter alia*, with mergers,⁶ vertical restraints,⁷ and "exclusionary" behavior.⁸ The scope and ambition of these proposals are striking, and deserve some discussion as a prelude to addressing the costs of implementing a populist antitrust regime.

First, it is interesting to note that some contemporary populists couch their arguments in economic jargon. Professor Herbert Hovenkamp, for example, frames one of his arguments for populism in terms of "market failure." His justification for populist antitrust is that markets in which competitive rigor is not blunted by populist doctrines will fall prey to a heretofore unnoticed "free rider" problem. He argues as follows:

It seems clear from the literature and mystique surrounding the small business in America that many people and the legislatures they elect place a high value on the so-called "mom and pop" store. Likewise, many people appear to be quite uncomfortable about the large amount of political and economic power wielded by large firms. Many members of society value a regime in which businesses do not have so much influence. However, such a regime can be paid for only if each consumer individually agrees to do business with smaller stores, stores with lower productive efficiency (and higher prices) and no such power. If each consumer prefers to save money now, trusting others or the government to support the small firm, a substantial free rider problem exists.⁹

Apparently, Professor Hovenkamp's antitrust regime would consider social and political factors in reaching decisions that would correct for consumers' unwillingness to express their interest in "small dealers and worthy men" at some cost to themselves.

Professor Eleanor Fox also offers a nominally economic argument for her populist blueprint. She argues that protection of "the process of competition among a significant number of

6. See Barnes, *Nonefficiency Goals in the Antitrust Law of Mergers*, 30 WM. & MARY L. REV. 787 (1989); Cann, *Section 7 of the Clayton Act and the Pursuit of Economic "Objectivity": Is There Any Role for Social and Political Values in Merger Policy?*, 60 NOTRE DAME L. REV. 273 (1985).

7. See Cann, *Vertical Restraints and the "Efficiency" Influence—Does Any Room Remain for More Traditional Antitrust Values and More Innovative Antitrust Policies?*, 24 AM. BUS. L.J. 483 (1987).

8. See Fox, *Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness*, 61 NOTRE DAME L. REV. 981 (1986); Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985).

9. Hovenkamp, *supra* note 8, at 243.

rivals in free and open markets, with special regard for *long-run* consumer interests, is the most appropriate focus for antitrust economics."¹⁰ This position implicitly assumes that consumers' short-run preferences will overpower their more important long-run interests, and that government action can correct these mistaken consumer decisions. Professor Fox's brand of antitrust, presented as "a proper regard for *long-run* consumer interests and a proper respect for producer autonomy,"¹¹ is thus packaged in "market failure" terms similar to those invoked by Professor Hovenkamp.

Professor Fox's regard for producer autonomy and the producer's concomitant "freedom and opportunity to compete on the merits"¹² may be read as suggesting that small businesses should be protected because they are small. She contends, however, that this is not the point. Rather, long-run consumer interests should trump the smallness protection goal. She does not explain, however, what constitute "long-run" consumer interests, other than the promotion of such populist goals as a larger number of competing firms, more locally-owned businesses, or smaller firms in general. Furthermore, it is difficult to envision an antitrust law that would adequately balance what she claims is the long-run consumer interest in advancing populist goals against the short-run consumer interest in unfettered market competition. In fact, it is difficult not to conclude that Professor Fox's protection of the competitive "process" would aim primarily at preventing the elimination of some of the smaller competitors from the process.

In a similar vein, Professor David Barnes has argued that antitrust evaluation of mergers should include a consideration of "the nonefficiency concerns [that] represent the texture, color, and taste of our society—the cultural ambiance."¹³ He then contends that these concerns should be given some weight in the assessment of costs and benefits of proposed mergers by invoking the economic concept of market failure due to externalities:

Political and social as well as allocative and productive efficiency effects of mergers are all identifiable as results of pri-

10. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1174-75 (1981) (emphasis added).

11. *Id.* at 1176 (emphasis added).

12. *Id.* at 1182.

13. Barnes, *supra* note 6, at 863.

vate behavior, the benefits or costs from which are not all internalized by the private economic actor, the acquiring firm. When considerations other than size of the economic pie are relevant to policy formation, efficiency concerns have no greater inherent claim for priority.¹⁴

A comprehensive analysis of the substance of these three authors' arguments is beyond the scope of this paper. I include them here only to illustrate the extraordinary increase in the scope of antitrust regulation that these scholars desire. In view of this ambition, the question is raised: What are the substantive ends these scholars wish to achieve?¹⁵

Consider again Professor Fox's vision of populist antitrust. She has characterized antitrust as "high on the list [of] laws enacted to improve the quality of life for the less advantaged and . . . to give the less well-established person a greater opportunity to try."¹⁶ She sees antitrust as an area in which "government regulation [has been produced] in the name of the alienated and the powerless,"¹⁷ and views government intervention as a means "to tilt the economic system in favor of opportunity for 'the little man' and against exploitation by the powerful."¹⁸ (Conversely, Professor Fox describes practitioners of "law and economics" as exhibiting an "ungenerosity toward those outside of the circle of advantage and power."¹⁹) Reaching its fullest potential, antitrust, according to Professor Fox, would be a vehicle for helping the "underclass"²⁰ and for enhancing the development of Third World countries.²¹ In a

14. *Id.* at 864-65.

15. I will focus here on what the populists offer as the "positive" aspects of their proposals—the good they wish to achieve. Perhaps as important to them, however, is the avoidance of the bad outcomes they associate with an economically-grounded minimalist approach to antitrust. For example, Professors Fox and Sullivan have described the current state of affairs in antitrust as "an Orwellian 1984." Fox & Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 944 (1987). See also Barnes, *Revolutionary Antitrust: Efficiency, Ideology and Democracy*, 58 U. CIN. L. REV. 59, 62 (1989) (contending that antitrust analysis based on economic efficiency concerns "leads to a decline in the democratic process and a diminution in the provision of tangible and intangible goods that can only be produced effectively in the political market"); Curran, *Beyond Economic Concepts and Categories: A Democratic Refiguration of Antitrust Law*, 31 ST. LOUIS U.L.J. 349, 361 (1987) (stating that economics-based analyses "destroy democratic values and subvert justice").

16. Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window*, 61 N.Y.U. L. REV. 554, 587-88 (1986).

17. *Id.* at 588.

18. *Id.* at 574.

19. *Id.* at 588.

20. *Id.* at 559.

21. See Fox, *Harnessing the Multinational Corporation to Enhance Third World Develop-*

similar vein, Professor Barnes asserts that "the characteristics of a good society come from political and entrepreneurial freedom, from community, and from individual control over our economic destinies."²² According to Professor Barnes, anti-trust rules can be used in a way that will foster the appropriate mix of these characteristics.

The populists' varied (and rather ambiguous) list of objectives is bound together by their preference for public over private-sector decisionmaking. In this sense, the populists appear generally to subscribe to what Professor David Vogel calls the "new conventional wisdom" in political science, that is, that "the large corporation's concentration of resources and wealth [is] an anomaly that upsets the balance between democracy and capitalism."²³ An important element of this "conventional" view is a strong distrust of the private exercise of discretion. This is most explicit in the writings of Professor Lawrence Sullivan. As he puts it:

The existence of firms of great size and high levels of concentration make [sic] the presence of discretionary power inevitable. On countless questions involving product design, investment in research and development, plant location, levels and styles of advertising, and choice of legal and lobbying strategies, the profit maximizing solution will hardly ever be clear in an oligopolistic industry. The individual firm will have discretion about these and related matters.²⁴

For Professor Sullivan, government intervention via antitrust is apparently preferable to the private exercise of discretion:

[A]dherents to the liberal tradition are as suspicious of discretionary economic power as they are of discretionary political power. They are skeptical that markets adequately control economic power. Liberals do not accept as given the existing distribution of wealth. They insist that minimum levels of welfare be provided for all.²⁵

ment—*The Rise and Fall and Future of Antitrust as Regulator*, 10 CARDOZO L. REV. 1981 (1989).

22. Barnes, *supra* note 6, at 863.

23. Vogel, *Political Science and the Study of Corporate Power: A Dissent from the New Conventional Wisdom*, 17 BRIT. J. POL. SCI. 385, 387 (1987) (quoting Menninger, *Business and Politics*, 18 POL. SCI. 210 (1985)). A shortened version of Professor Vogel's article appeared as *The New Political Science of Corporate Power*, PUB. INTEREST, Spring 1987, at 63.

24. Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CALIF. L. REV. 1, 11 (1980). See also Cann, *supra* note 6, at 311-12 ("In addition to the growth in the political influence of large corporations, the tremendous discretion vested in the hands of a few powerful individuals is also problematic.').

25. Sullivan, *supra* note 24, at 5-6.

Similarly, Professor Fox has described a significant group of antitrust activists, herself apparently included, who,

[p]ointing to an abundance of real world evidence . . . challenge the belief in the natural efficiency of business acts. . . . [They] worry about private as well as government power, the coercion and exclusion of the weak by the powerful, and the distribution of power and opportunity. They take seriously the imperfections of free market competition.²⁶

In short, the populists wish to trade market decisionmaking for political and judicial decisionmaking.²⁷ A populist antitrust regime might mirror the “multivalued antitrust tradition” espoused by the Warren Court, under which multiple interests were supposedly balanced, and “[t]he lack of precise scales was not regarded as disabling.”²⁸ Such a regime would certainly displace market-based decisions and outcomes to a much greater degree than the law does currently. No longer would antitrust be shackled by the view that “public intervention [is advisable] only when market failures can be explicitly diagnosed and efficiently corrected.”²⁹

There are two principal, long-standing objections to the populist agenda for antitrust: lack of support in the legislative history for such an open-ended set of goals, and the difficulty in knowing to what degree consumer welfare “should” be traded off against non-consumer welfare goals, such as protecting small businesses. In their classic rebuttal to populism, Professors Bork and Bowman argue that:

26. Fox, *The Battle for the Soul of Antitrust*, 75 CALIF. L. REV. 917, 918 (1987). Elsewhere, Professor Fox has noted with dismay that “Chicago is fighting a war for private freedom of action.” Fox, *Consumer Beware Chicago*, 84 MICH. L. REV. 1714, 1715 (1986) (emphasis in original).

27. For interesting empirical examinations of the consequences of choosing between highly regulated and more *laissez faire* regimes, see Scully, *The Institutional Framework and Economic Development*, 96 J. POL. ECON. 652 (1988) (during the period 1960 to 1980, politically open societies that subscribed to the rule of law, private property, and market allocation of resources grew at three times the rate of, and were two and one-half times as efficient as, societies in which these freedoms were abridged); M. OLSON, *THE RISE AND DECLINE OF NATIONS* (1982) (arguing, *inter alia*, that over time stable societies accumulate more collusive and rent-seeking organizations that reduce efficiency and aggregate income and make political life more divisive); and S. MAGEE, W. BROCK & L. YOUNG, *BLACK HOLE TARIFFS AND ENDOGENOUS POLICY THEORY: POLITICAL ECONOMY IN GENERAL EQUILIBRIUM* 111-21 (1989) (concluding that “the relationship between GNP growth rates and redistributive activity” is more subtle and harder to predict than suggested by the work of Olson and others, but nonetheless presenting empirical evidence that a large number of lawyers (compared to the number of physicians) in a society acts as an “invisible foot” braking GNP growth).

28. Sullivan, *supra* note 24, at 4.

29. *Id.* at 8.

[I]f antitrust is to turn from its role as the maintainer of free markets to become the industrial and commercial equivalent of the farm price-support program, then we are entitled to an unequivocal policy choice by Congress and not to vague philosophizing by courts that lack the qualifications and the mandate to behave as philosopher kings.³⁰

I wish to concentrate on a third objection to the populist agenda that has to date received relatively little attention. This objection focuses on the rent-seeking implications of populist proposals. In the next section of this Article, I outline public choice theory's explanation of rent-seeking behavior and conclude that it provides a strong reason to believe that a populist antitrust policy would prove to be a bad bargain for society.

III. RENT SEEKING: THE SOCIAL COSTS OF PRIVATELY-INTERESTED BEHAVIOR UNDER POPULIST DOCTRINES

The theory of rent seeking is largely the product of the "Virginia School" of public choice theorists. Public choice is "the economic study of nonmarket decisionmaking, or simply the application of economics to political science."³¹ It applies the basic behavioral postulate of economics, namely, "that man is an egoistic, rational, utility maximizer,"³² to the study of human behavior in politics and government. Economics posits that markets are dominated by self-interested actions; "public choice holds that political processes are likewise dominated by self-interest."³³

The self-interest or "private-interest" view of politics used by public choice scholars stands in direct conflict with "the alternative model, implicit in conventional welfare economics and widespread in conventional political science, that political agents can be satisfactorily modeled as motivated solely to promote the 'public interest,' somehow conceived."³⁴ Rather than treat the government as an autonomous scourge of market fail-

30. Bork & Bowman, *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 370 (1965).

31. D. MUELLER, *PUBLIC CHOICE II* 1 (rev. ed. 1989). Far from a monolithic "movement," public choice comprises several groups of scholars whose work show differing emphases and methodologies. See Mitchell, *Virginia, Rochester, and Bloomington: Twenty-five Years of Public Choice and Political Science*, 56 PUB. CHOICE 101 (1988).

32. D. MUELLER, *supra* note 31, at 2 (footnote omitted).

33. Wagner, *Morals, Interests, and Constitutional Order: A Public Choice Perspective*, 67 OR. L. REV. 73, 77 (1988).

34. Brennan & Buchanan, *Is Public Choice Immoral? The Case for the "Nobel" Lie*, 74 VA. L. REV. 179, 181 (1988). (James Buchanan, one of the chief architects of public choice theory, received the Nobel Prize in Economic Science in 1986.)

ures and the benevolent protector and promoter of the common good, public choice theorists explain government activity as largely the product of the demands placed on the political system by self-interested groups. Public choice thus views "politics without romance,"³⁵ and embodies a strong skepticism about government action.³⁶ For purposes of evaluating public policy options, public choice provides a theory of "government failure" that can serve as a counterpoint to the theory of market failure.³⁷ Recently, public choice has attracted the attention of legal scholars. Some have used the theory in creative ways to discuss legal issues;³⁸ others have reacted to the approach quite negatively.³⁹

35. See Buchanan, *Politics without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, in *THE THEORY OF PUBLIC CHOICE-II* 11 (J. Buchanan & R. Tolison eds. 1984).

36. As Professor Buchanan puts it,

[p]ublic choice theory has been the avenue through which a romantic and illusory set of notions about the workings of governments and the behavior of persons who govern has been replaced by a set of notions that embody more skepticism about what governments can do and what governors will do, notions that are surely more consistent with the political reality that we may all observe about us."

Id. at 11.

For a thorough survey of the public choice literature, see D. MUELLER, *supra* note 31. See also Tullock, *Public Choice*, in 3 *THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS* 1040 (J. Eatwell, M. Milgate & P. Newman eds. 1987) [hereinafter *THE NEW PALGRAVE*].

37. For an explanation of the need to consider both market and government "failure" in devising public policy, see Wolf, *Market and Non-Market Failures: Comparison and Assessment*, 7 *J. PUB. POL'Y* 43 (1987); and C. WOLF, *MARKETS OR GOVERNMENTS: CHOOSING BETWEEN IMPERFECT ALTERNATIVES* (1988).

38. See Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 *VA. L. REV.* 265 (1990); Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 *CORNELL L. REV.* 43 (1988); and several of the articles in *Symposium on the Theory of Public Choice*, 74 *VA. L. REV.* 167 (1988).

39. See Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 *U. CHI. L. REV.* 63, 106 (1990) (arguing that the "market for legislation" is "a competitive market, and it is presumptively as efficient as any other form of competition"); Kahn, *The Politics of Unregulation: Public Choice and Limits on Government*, 75 *CORNELL L. REV.* 280 (1990); Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 *CHI.-[KENT L. REV.]* 123, 145 (1989) (declaring studies that "demonstrat[e] first that one or another group has reaped a windfall from this or that piece of legislation and, then, conclud[e] explicitly or implicitly with a smirking, 'See there, rent-seeking again!'" to be "annoying, to put it mildly," but then declaring "this approach to the study of legislation" to be "useful"); Farber, *Democracy and Disgust: Reflections on Public Choice*, 65 *CHI.-[KENT L. REV.]* 161 (1989); Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 *VA. L. REV.* 199 (1988) (prominent Critical Legal Studies professor finds public choice unacceptable "bashing"); Farber & Frickey, *The Jurisprudence of Public Choice*, 65 *TEX. L. REV.* 873, 874 (1987) (worrying that "a simplistic reading" of public choice "threatens to distort public law"). The reader interested in these critiques may also wish to read DeBow & Lee, *Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey*, 66 *TEX. L. REV.* 993

The public choice theory of rent seeking focuses on the processes by which government dispenses favorable treatment (for example, tax breaks, direct subsidies, or protection from competition) to private parties (for example, firm owners or employees). If a society's government is prone to dispense such prizes, one would expect that rational, self-interested individuals will attempt to organize and gain access to a share of this largesse. Public choice theorists refer to such expenditures of effort and resources as "rent seeking." In this sense, the term "rent" means "a return in excess of a resource owner's opportunity cost [that is] contrived artificially through . . . government action."⁴⁰

Rent seeking is the purposeful pursuit, through the political process, of above-normal profits. By engaging in rent-seeking activities, private parties "compete for artificially contrived transfers."⁴¹ The classic example of rent seeking is a domestic industry seeking protection under United States trade laws from foreign competition.⁴² Possible forms of rent-seeking activity in this example include: illegal side payments to public

(1988); and Farber & Frickey, *Integrating Public Choice and Public Law: A Reply to DeBow and Lee*, 66 TEX. L. REV. 1013 (1988).

In his review of R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985), Professor Thomas Merrill offers one explanation of the aversion some legal scholars have to public choice generally, and rent-seeking theory in particular. Merrill describes Epstein's work as grounded in the view that governmental processes are dominated by rent seeking, and then observes:

I believe there is a great deal of truth in Epstein's depiction of the modern American political process, more so than many law professors care to admit. This may account, at least in part, for the intensely hostile reaction to Epstein's book. Most academics retain a deep, abiding faith in government as an institution for social good. Epstein's model of politics threatens this faith, triggering strong emotions that often overcome the analysis.

Merrill, *Rent-Seeking and the Compensation Principle* (Book Review), 80 NW. U.L. REV. 1561, 1587 (1986).

40. Tollison, *Rent Seeking: A Survey*, 35 KYKLOS 575, 575 (1982). The confusion that may be generated by the term "rent seeking" has been noted by the economist most responsible for the development of the theory:

[T]he term itself is an unfortunate one. Obviously we have nothing against rents when they are generated by, let us say, discovering a cure for cancer and then patenting it. Nor do we object to popular entertainers like Michael Jackson earning immense rents on a rather unusual collection of natural attributes together with a lot of effort on his part to build up his human capital. On the other hand, we do object to the manufacturer of automobiles increasing the rent on his property, and his employees increasing the rent on their union memberships, by organizing [to obtain] a quota against imported cars. All of these are economic rents, but strictly speaking the term "rent seeking" applies only to the latter.

Tullock, *Rent-Seeking*, in 4 THE NEW PALGRAVE, *supra* note 36, at 147, 148-49.

41. Tollison, *supra* note 40, at 576.

42. This discussion follows Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5

officials; legal campaign contributions of cash, non-cash material support, or "volunteers" to influential officeholders; the employment of public relations specialists, lobbyists and lawyers in efforts to influence government actions; and the employment of lawyers to litigate over lack of compliance by foreign firms with the protection granted (such as dumping duties, or import quotas).⁴³

Rent-seeking activities obviously entail out-of-pocket costs to those who engage in them. More importantly, public choice theorists characterize rent-seeking efforts as "wasteful," from society's point of view, for two reasons. First, *successful* rent seeking imposes costs on society that are quite similar to the social costs of monopoly (or price fixing). Consider Figure 1. If

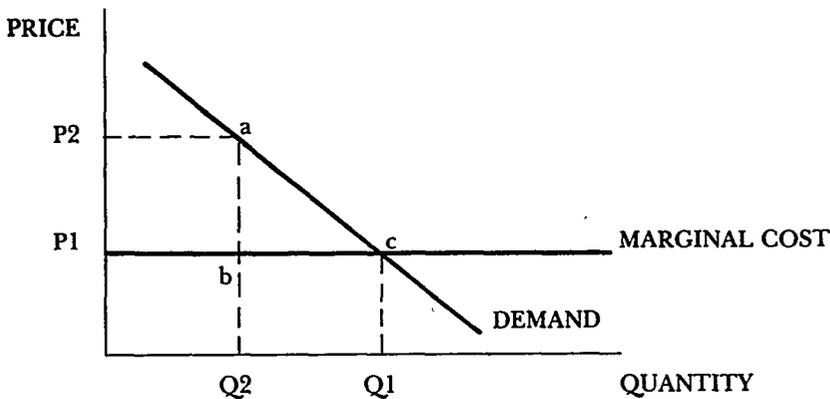


Figure 1

an industry secures governmentally-provided trade protection, then it may be able to charge higher prices (say, P_2) and earn higher profits (represented by rectangle P_2abP_1). As a result, the quantity sold decreases to Q_2 , and society suffers a deadweight loss—represented by triangle abc —that is directly analogous to that imposed by a monopoly.

One might suppose that policymakers would resist decisions

W. ECON. J. 224 (1967). For further elaboration, see Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975).

43. "Legal proceedings sometimes are rent-seeking, e.g., a particular company attempting to enforce some kind of a restriction on its competition." Tullock, *Future Directions for Rent-Seeking Research*, in *THE POLITICAL ECONOMY OF RENT SEEKING* 465, 466 (C. Rowley, R. Tollison & G. Tullock eds. 1988). See also Formby & Millner, "Comparable Worth" and Rent Seeking, 7 INT'L REV. L. & ECON. 65 (1987) (treating litigation costs as rent-seeking costs).

that result in deadweight losses to society as a whole. However, public choice theorists argue that, even though such decisions result in net losses to society, private interests are successful in extracting rents through government processes because of the "rational ignorance" of voters in not following government actions closely. In the tariff example, the increased profits made possible by the tariff are enjoyed by a relatively small group of shareholders, managers, and employees of the advantaged firms, while the costs of the tariff in terms of higher prices and decreased product selection are spread over a much larger number of consumers and would-be consumers. As a result of this disparity between concentrated benefits and dispersed costs, the recipients of the benefits have a greater incentive to engage in rent seeking than the consumers, as voters, have to follow the complexities of government actions in hopes of holding their representatives accountable in the next election. Because the costs to the average voter of following complex government decisionmaking processes tend to outweigh the benefits to that voter of following these processes, public choice theorists believe that rent seeking is loaded in favor of the supplicants for government favors.⁴⁴

Moving to the second source of social loss imposed by rent-seeking behavior, both *successful and unsuccessful* rent seeking consumes at least a part of the higher profit sought by the rent seeker and thereby causes a socially harmful diversion of the efforts of individuals who could otherwise be engaged in more productive work than "the negatively productive activity of creating a trade restriction of some sort."⁴⁵ That is, rent seeking involves the use of

real resources to capture a pure transfer. Since expenditures to take a dollar from A and give it to B produce nothing, they are wasted from the point of view of the economy at large; they are zero-sum at best and are probably negative sum. A lawyer, for example, employed to transfer a dollar from A to B has an opportunity cost in terms of the lawyer output he or she could have produced alternatively. This op-

44. See generally Mitchell, *Interest Groups: Economic Perspectives and Contributions*, 2 J. THEORETICAL POL. 85 (1990).

45. Tullock, *supra* note 40, at 147. Professor Jagdish Bhagwati refers to such exertions as "directly unproductive" activities. See Bhagwati, *Directly Unproductive Profit-seeking (DUP) Activities*, 90 J. POL. ECON. 988 (1982).

portunity cost is the social cost of rent-seeking.⁴⁶

Significantly, in many cases private parties will engage in defensive forms of rent seeking, actively seeking to convince the government to refrain from action that would strip them of a privately-created rent, or to deny the rent-seeking petitions of third parties that would adversely affect them. The costs of "rent protecting"⁴⁷ and "rent avoiding"⁴⁸ thus constitute further social costs of rent seeking.

This outline of rent-seeking theory is aptly concluded by recalling Oscar Wilde's remark that "[t]he trouble with Socialism is that it uses up too many evenings."⁴⁹ This observation conveys the key insight of rent-seeking theory: Real resources are spent in non-market decisionmaking. The politicization of decisions requires the investment of time and effort in the task of

46. Tollison, *Is the Theory of Rent-Seeking Here to Stay?*, in *DEMOCRACY AND PUBLIC CHOICE: ESSAYS IN HONOR OF GORDON TULLOCK* 143, 145 (C. Rowley ed. 1987).

Because of the costliness of rent seeking, public choice theorists claim that the supposed transfer to the rent-seeking producer(s) in the form of monopoly profits—illustrated by rectangle P2abP1 in Figure 1—will not (fully) materialize. Early research on rent seeking "assumed that profit-seeking businessmen would be willing to use resources in an effort to obtain a monopoly, whether it was privately or government sponsored, up to the point where the last dollar so invested exactly counterbalanced the improved probability of obtaining the monopoly." Tullock, *supra* note 40, at 147. In this model, each firm's investment in rent seeking "perfectly dissipates" the capitalized value of the rent sought. More recent work on "perfect dissipation" has led to something of an impasse. Depending on the institutional setting, "competitive" rent seeking—in which two or more actors compete for governmentally-created rents—can result in total investments in rent seeking equal to, greater than, or less than the value of the rent to the "winning" competitor. *Id.* at 148. In order to shed further light on the relationship between rent seeking and the value of the rent, "what is needed is empirical research, and an effort to measure the production functions appropriate to rent seeking." *Id.* at 148. See also Flowers, *Rent Seeking and Rent Dissipation: A Critical View*, 7 *CATO J.* 431 (1987); D. MUELLER, *supra* note 31, at 231-35.

47. See McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 *J. LEGAL STUD.* 101, 102-03 (1987) ("Political office confers a property right, not just to legislate rents, but to impose costs. . . . A politician thus can gain by forbearing—for a price—from exercising his right to impose costs on private actors that would reduce rents from capital they have created or invested themselves.").

48. See, e.g., Tullock, *supra* note 40, at 147.

49. Of course, as is clear to anyone who has spent time recently in a law school, a sizable number of legal academics do not share this view of politics or politicization. Indeed, many appear to prefer government precisely because it involves more verbal combat—or, to use the legal academy's vernacular, "dialogue"—than the market. Consider, for example, Professor Owen Fiss's plea for government subsidies and other actions to "put on the [political] agenda issues that are systematically ignored and slighted and allow us to hear voices and viewpoints that would otherwise be silenced or muffled." Fiss, *Why the State?*, 100 *HARV. L. REV.* 781, 788 (1987). This government action is necessary, Professor Fiss argues, because only government "has the power we need to resist the pressures of the market and thus to *enlarge and invigorate our politics.*" *Id.* at 794 (emphasis added).

arguing about how to divide the social "pie"—time and effort that could have been used to bake a larger pie in the first place.

Although the exact amount spent on rent-seeking, rent-protecting, and rent-avoiding activities in the American polity has not been precisely determined,⁵⁰ it is clear that such activities are widespread and the social costs are substantial.⁵¹ Furthermore, *as the size and scope of government expands, the opportunities for rent seeking will multiply and, as a result, the social costs incurred will increase.* This prediction applies fully to an increase in the size and scope of antitrust policy, and it reflects not only the rent-seeking, rent-protecting, and rent-avoiding costs that increased antitrust litigation would impose, but also the deadweight losses that successful rent-seeking antitrust litigation would engender.

For example, less efficient firms might seek to have the government, through the judiciary, act to deprive more efficient firms of the rents they would otherwise earn. Such litigation would produce both rent-seeking and rent-protecting costs. The litigation could come in a number of forms, such as a firm's challenge to the merger of two of its competitors that would result in a stronger merged firm,⁵² and a firm's challenge

50. Professor Tullock has stated that "the total amount spent in lobbying, etc., in Washington does not seem to be even close to the economic value of the favors dispensed by the government. Note that I say in Washington. I suspect that in Mexico City the two are in quite close agreement." Tullock, *supra* note 43, at 469.

In a landmark article, Professor Anne Krueger estimated that in 1964, governmentally-created rents, particularly in the form of import licenses, constituted approximately seven percent of Indian national income and 15 percent of Turkish gross national product. See Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291, 294 (1974). Professor Krueger noted dryly that "it would be surprising if competition did not occur for prizes that large," *id.*, and suggested that outright bribery constituted a significant form of competition for rents in the countries she studied. See *id.* at 292-94.

For interesting discussions of the burden of rent seeking in lesser-developed countries, see H. DE SOTO, *THE OTHER PATH* (1989); and Schuck & Litan, *Regulatory Reform in the Third World: The Case of Peru*, 4 YALE J. ON REG. 51 (1986). For a discussion of the burden of such behavior in "older," industrialized economies, see S. MAGEE, W. BROCK & L. YOUNG, *supra* note 27, at 225 (estimating that 10 to 20 percent of gross national product in such economies is "lost" through "overregulation, excessive redistributive lawyering, and inefficient conflict resolution").

51. "The realization that . . . the large scale lobbying industry is truthfully a major social cost is new although presumably, at all times, anyone who thought about the matter must have realized that these highly talented people could produce more in some other activity." Tullock, *supra* note 40, at 149.

52. See Werden, *Challenges to Horizontal Mergers by Competitors Under Section 7 of the Clayton Act*, 24 AM. BUS. L.J. 213, 242 (1986) (arguing in favor of denying standing to such firms, in part because such a rule would eliminate "suits that seek to block efficient, procompetitive mergers"). See also *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S.

to a competitor's introduction of a superior new product. Courts have in the past adjudicated cases that fall into these categories.⁵³ Such claims are consistent with populist rhetoric and would be encouraged under a populist antitrust regime. Such a development would make the antitrust laws an even more lucrative vehicle for firms that fail in the competitive arena and seek compensation through litigation.⁵⁴ In such a setting, the temptation of private parties to use "antitrust law[s] . . . in ways that are not desirable"⁵⁵ would be greatly reinforced, and the associated rent-seeking costs and deadweight losses would increase.⁵⁶

Even populist-inspired government suits would generate at least rent-protecting costs on the defendants' side, and might produce deadweight losses if the government succeeds. Two examples suffice to illustrate the point: A government challenge to the "excessive" introduction and promotion of new products⁵⁷ and a challenge to a firm's policy of expanding its productive capacity in order to meet future demand growth⁵⁸ could both probably be justified under a populist policy of promoting small firms over large ones. Regardless of how one evaluates the policy, pursuing it would generate deadweight

104, 113-22 (1986) (discussing the problem, but refusing to adopt blanket denial of standing to competitors in merger cases).

53. See *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986); *Werden*, *supra* note 52 (collecting cases in which competitors challenged proposed mergers). See also *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979) (relatively small plaintiff firm alleged that Kodak violated Section 2 of the Sherman Act by introducing new camera and film without first notifying plaintiff of its plans and giving plaintiff opportunity to market competing new camera simultaneously), *cert. denied*, 444 U.S. 1093 (1980).

54. Numerous antitrust scholars are concerned that the payment of treble damages and attorney's fees to successful plaintiffs provides an incentive for plaintiffs to bring, and defendants to settle, cases of dubious merit. See *Breit & Elzinga, Private Antitrust Enforcement: The New Learning*, 28 J.L. & ECON. 405 (1985) (surveying the literature, which is described as "almost uniformly critical" of the current structure of antitrust incentives). The introduction of populist doctrines would introduce more uncertainty into the law—recall that "[t]he lack of precise scales" would probably not be "regarded as disabling," *Sullivan*, *supra* note 24, at 4—and would make estimation of the chances of winning or losing at trial more difficult than at present. This would almost certainly exacerbate the problem of "overinvestment" in private antitrust actions.

55. *From Economic Theory to Harvard Don*, N.Y. Times, Apr. 1, 1984, § 3, at 4, col. 3 (quoting economist Michael Spence).

56. For excellent discussions of the problem of private abuse of antitrust, see *Baumol & Ordover, Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985); *Miller, Comments on Baumol and Ordover*, 28 J.L. & ECON. 267 (1985); M. GREENHUT & B. BENSON, *AMERICAN ANTITRUST LAWS IN THEORY AND PRACTICE* 145-222 (1989); and *Hazlett, Is Antitrust Anticompetitive?*, 9 HARV. J.L. & PUB. POL'Y 277, 319-29 (1986).

57. See, e.g., *Kellogg Co.*, 99 F.T.C. 8 (1982).

58. See, e.g., *E.I. du Pont De Nemours & Co.*, 96 F.T.C. 650 (1980).

losses if the government prevailed in enforcing such a regime, and rent-protecting costs would be incurred by the defendant firms in any event. The important point is that, as the government expands the scope and aims of antitrust enforcement, private parties will invest larger sums in manipulating this greater government intervention in the economy to glean rents—or in resisting the extraction of rents by the government or competitors.

A populist, responding to the analysis of this Article, might argue that viewing populist antitrust through the lens of rent-seeking theory is inappropriate, because such an analysis treats the benefits conferred on small businesses (and others) by populist antitrust as a “pure transfer” (to borrow Professor Tolison’s phrase) and thus overlooks the “public goods” generated by populism.⁵⁹ This counter-argument fails to address the point, however, that even if one agrees that the populists’ goals are laudable, rent-seeking theory helps illuminate the social costs of populist antitrust doctrines in the form of rent-seeking costs and deadweight losses.

Despite these costs, populists appear eager to have taxpayers fund the types of government suits just described. Indeed, populists may be largely disinterested in the magnitude of resources diverted into populist antitrust litigation by private parties.⁶⁰ The amounts already spent on antitrust litigation, however, even under a “minimalist” regime, are substantial. Professor Robert Reich has estimated that public expenditures on antitrust prosecutors and judges, and private expenditures on antitrust litigation and counselling, totalled approximately \$2.5 billion in 1979.⁶¹ If these total annual expenditures have grown at a rate equal to the rate of inflation since 1979, direct expenditures on antitrust litigation in 1990 totalled approximately \$4.3 billion. It follows that, if the adoption of a populist antitrust regime resulted in a fifty-percent increase in direct expenditures on antitrust litigation—which seems a conservative estimate, given the open-endedness and ambitious scope of populist doctrines—rent-seeking costs would increase by \$2.2 billion *annually*. This estimate, of course, does not take account

59. See *supra* notes 9, 13-14 and accompanying text.

60. On this point, it should be remembered that populists seem to regard the politicization of decisions heretofore left to market determinations as an end in itself. See *supra* notes 23-29, 49 and accompanying text.

61. See Reich, *The Antitrust Industry*, 68 *Geo. L.J.* 1053, 1068-70 (1980).

of the associated deadweight losses that would accrue to society.⁶²

It would be charitable to state that populists have devoted little attention to the costs that their programs would impose on the public. Indeed, Professor Fox has argued that such intervention might be costless, stating that "jurists may find that they can advance values of antitrust law—diversity, opportunity, fair process, choice, and fairer distribution—without also raising the costs of goods and services to consumers."⁶³

Professor Hovenkamp has also failed to address the question of the social costs of a populist antitrust regime. He has expressed a strong enthusiasm for the "noneconomic, or political, content"⁶⁴ of antitrust. It is difficult to square this enthusiasm, however, with his repeatedly-expressed concerns about rent seeking. He has utilized the economic model of rent seeking, for example, in two leading law review articles on antitrust policy.⁶⁵ Furthermore, he has suggested that rent seeking is "the greatest social cost of monopoly."⁶⁶ Professor Hovenkamp is clearly aware of the concept of rent seeking; he simply fails to examine its implications for his proposals for antitrust enforcement. He accordingly fails to observe that his antitrust agenda would almost certainly increase the rent-seeking costs that rightly concern him. For example, he does not recognize that, to the extent that antitrust is transformed into a redistribution program, one can expect an increase in self-interested, rent-seeking behavior.⁶⁷

62. The \$2.2 billion cost increase is approximately four times as large as the average annual budget authority of the Small Business Administration for fiscal years 1989 through 1991. See EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1991, at A-253 (1990). These additional outlays, of course, would be committed to hiring lawyers, retaining expert witnesses, paying court fees, et cetera, rather than to promoting small businesses. This analysis of rent-seeking behavior thus lends support to the long-standing criticism that populist antitrust would be a remarkably inefficient way to subsidize small businesses.

63. Fox, *supra* note 16, at 584. See also *id.* at 584 nn.146-48 (urging inclusion of harder-to-quantify "soft data" and "dynamic implications" in the cost-benefit analysis of intervention).

64. Hovenkamp, *supra* note 8, at 284.

65. See Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 15-17 (1989); Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1, 13 n.51 (1982) [hereinafter *Distributive Justice*]. The analysis also appears in the excellent casebook that Professor Hovenkamp coauthors. E. SULLIVAN & H. HOVENKAMP, *ANTI-TRUST LAW, POLICY AND PROCEDURE* 504-07 (2d ed. 1989).

66. See Hovenkamp, *Chicago and Its Alternatives*, 1986 DUKE L.J. 1014, 1028.

67. Professor Hovenkamp's lack of concern for the social costs of rent seeking induced by increased government intervention can be explained in part by his view that

Regardless of the position one takes regarding the substance of populist antitrust policies, the adoption of such an agenda for antitrust would expand the field of play for rent-seeking activity. It is reasonable to expect that, as more and larger government-provided rents are made available via populist antitrust policy, litigation and political and other government activity in search of these transfers will increase, as will the total social costs of rent seeking associated with antitrust. A reasoned choice between antitrust policies based on microeconomic theory and those based on vague populist ideals requires a weighing of the costs and benefits of the two, a balance that cannot accurately be struck without considering the social costs of rent-seeking behavior.

IV. CONCLUDING THOUGHTS

In considering whether the government should intervene in the marketplace to correct a perceived market failure,⁶⁸ it is standard procedure in most policy areas to conduct a cost-benefit analysis of the intervention.⁶⁹ Unfortunately, this is often overlooked in the antitrust debate. The costs and benefits that would result from the extension of antitrust doctrine beyond

"[t]he political process, whose purpose is to give effect to majority values, tends to produce policies that maximize wealth, as long as the process is working democratically." *Distributive Justice*, *supra* note 65, at 30. Such a claim is somewhat startling, in light of the public choice analyses described in this Article. See *supra* notes 31-37 and accompanying text. This claim, however, can be partially explained by Professor Hovenkamp's unique definition of "social well-being," which he claims "capture[s] significant aspects of social utility" that are not encompassed in economists' concept of "welfare." Hovenkamp, *supra* note 39, at 63-64 (emphasis in original). He has elaborated on this point in his recent critique of public choice theory. Using his concept of social "well-being," he argues that competition in political markets is "presumptively as efficient as any other form of competition," *id.* at 106, and takes issue with the public choice view that market exchange is generally preferable to government action:

Everyone agrees that rent-seeking is a universal phenomenon. . . . But the attitude toward rent-seeking in economic markets is very different from that in political markets. . . . Why doesn't the public choice literature assume that [in political markets] self-interested actors produce products or offers to purchase designed to maximize their own welfare; that others come in with alternatives; and that the resulting give-and-take generally results in optimal outcomes?

Id. at 105 (emphasis added).

68. The classic treatment of this subject is Bator, *The Anatomy of Market Failure*, 72 Q.J. ECON. 351 (1958). For a survey of recent developments, see Stiglitz, *Information and Economic Analysis: A Perspective*, 95 ECON. J. 21 (1985 Supp.).

69. See generally S. BREYER, REGULATION AND ITS REFORM 15-35 (1982); DeMuth & Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081 (1986) ("[C]entralized review of proposed regulations under a cost-benefit standard, by an office that has no program responsibilities and is accountable only to the president, is an appropriate response to the failings of regulation.").

the present minimalist agenda should be thoroughly discussed before such an extension is adopted. This is particularly true in the case of the highly interventionist proposals advanced by populist critics of the present regime.

More broadly, it is regrettable that cost-benefit analyses—in antitrust and in other areas of government intervention—typically do not take into account the possibility that the intervention will induce additional, socially wasteful expenditures on rent-seeking activity. In an ideal world, the costs of increased rent-seeking activity would play a part in every decision whether to increase the government's role in the economy.

