ANTITRUST AND THE JUDICIAL VIRTUES

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Although commentators frequently debate how judges should decide antitrust cases substantively, little attention has been paid to theories of judicial virtue in antitrust decision making. This essay considers four pairings of virtues: (1) striving for substantive purity versus conceding to institutional realism; (2) incrementalism versus generalism; (3) presenting a unified face versus candidly conceding differences among judges on an appellate panel; and (4) adhering strictly to stare decisis versus freely updating precedents to reflect evolving economic learning or conditions. While recognizing the complexities that sometimes pull judges in the opposite direction, this Article gives the nod to institutional realism, incrementalism, candor, and relatively unconstrained updating of precedent.

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I. INTRODUCTION

The Supreme Court's recent decision[1] on the Affordable Health Care Act,[2] and Chief Justice John Roberts's plurality opinion upholding the individual mandate in particular, have reignited the conversation over judicial virtues. Some view Roberts's recharacterization of the individual mandate, as a tax, as a cheap parlor trick designed to protect the Chief's personal legacy at the expense of principle. Others view the same move as a statesman-like measure to restore the Court's legitimacy, badly damaged by the partisan divide in *Bush v. Gore*.[3] Given the importance of the case, these debates will likely continue for some time.

The participants in this debate share a common assumption that there are such things as judicial virtues (such as "principle" or "statesmanship") that command adherence regardless of the stakes in any particular case. But even if the virtues do not vary by the *stakes* in any case, their relative importance surely varies by the *context* of a decision. The virtues most important to good judging in the context of, say, constitutional skirmishes between Congress and the President, are likely somewhat different than the virtues most important to resolution of breach of contract cases, the construction of statutes, the interpretation of wills, or the sentencing of criminal defendants.

In sorting through the catalogue of potential virtues and figuring out which ones are most important where, one should keep in mind that the prioritization of any one virtue usually means the demotion of another. The legal realist Karl Llewellyn famously argued that canons of statutory interpretation hunt in pairs, that "there are two opposing canons on almost every point."[4] The same is arguably true of

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1 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

2 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

3 Bush v. Gore, 531 U.S. 98 (2000).

4 Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950). *But see* ANTONIN SCALIA, A MATTER OF

judicial virtues. For many virtues, there is arguably an equal and opposite virtue. Thus, for example, "temperance" and "boldness" are both virtues when applied to judging, yet they could often be used to describe opposing possible treatments of a particular case.

I propose in this essay to consider judicial virtues and antitrust adjudication—to ask which virtues are most conducive to "good judging" in antitrust cases in the contemporary American context. To that end, I first situate the process of antitrust adjudication within the broader project of adjudication. It is well understood that antitrust adjudication is largely a common law process, but common law adjudication comes in a variety of forms and contexts. Therefore, fleshing out the nature of antitrust's common law process sheds light on the question of judicial virtues.

I then turn to four pairings of possible virtues: (1) substantive purism versus institutional realism; (2) incrementalism versus generalism; (3) harmony versus candor; and (4) adherence to precedent versus keeping up with the times. Each pairing reflects a tension about how judges should decide antitrust cases. With antitrust's common law nature as a backdrop, I discuss the relative prioritization of these virtues in the decision of antitrust cases.

II. CONSTITUTIONS, STATUTES, AND THE COMMON LAW

Theories of good judging abound. Most of them relate to one of three contexts in which judges are often called upon to make decisions: constitutional questions, statutory interpretation, or common law reasoning. None of these contexts, in their pure forms, fits the model of contemporary antitrust.

Contemporary theories of good constitutional judging usually play in the shadows of what Alexander Bickel called the countermajoritarian difficulty—the fact that judges are

INTERPRETATION: FEDERAL COURTS AND THE LAW 26–27 (Amy Gutmann ed., 1997) (disputing Llewellyn's characterization of the canons).

unelected, democratically unaccountable actors who wield the power to invalidate the public will at some peril.[5] In light of that difficulty, Bickel argued that some of the most important judicial virtues were the passive ones—the virtue of *not* deciding cases at all by withholding adjudication until a later date.[6]

Antitrust law is not plagued by a substantial countermajoritarian difficulty and thus presents no reason for judges to exercise passive or avoidant virtues. Judges making antitrust law do not have to worry that their decisions will trump the popular will, except in the limited sense that they may reject suits by public enforcers like the Justice Department or Federal Trade Commission ("FTC"). To the extent that judges promulgate legal norms different from those favored by the executive branch, a small countermajoritarian difficulty is presented. But since judicial antitrust decisions are theoretically reversible by Congress, the courts do not have the final word on antitrust questions, as they do in constitutional cases. There is therefore little reason for judges to worry that their decisions in antitrust cases will compromise the legitimacy of the courts by undermining popular will.

Antitrust adjudication also does not fit into the broad debate over appropriate judicial approaches to statutory interpretation. Theorists of statutory interpretation often conceive of statutory interpretation as a dialogue between the courts and Congress, where the courts attempt to divine legislative intent through a variety of textual or intentionalist tools, and Congress responds by amending the statute or ratifying the judicial interpretation through inaction. But this does not describe antitrust adjudication, for two reasons.

First, the important operative sections of the antitrust laws—Sections 1 and 2 of the Sherman Antitrust Act (the "Sherman Act"), Sections 2, 3, 4, and 7 of the Clayton Act,

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[5] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986).

[6] Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

and Section 5 of the Federal Trade Commission Act—are so sparsely worded and open-textured that the courts have made no serious effort at interpretation since Justice Peckam's misguided formalism in *Trans-Missouri,*[7] with the possible exception of some early efforts to spell out Congress's intent in the Celler-Kefauver amendments to the Clayton Act.[8] During the 1970s and 80s, there was a vigorous debate over what, based on the legislative history of the Sherman Act, Congress intended the purpose of the statute to be.[9] However, the legislative history is inconclusive at best, and confounding at worst.[10] Antitrust courts are rarely involved in questions of statutory interpretation. Even the broader category of construction,

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7 United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 312 (1897) (holding that the text of Section 1 of the Sherman Act categorically prohibits all restraints of trade without regard to their reasonableness).

8 Brown Shoe Co. v. United States, 370 U.S. 294, 311–23 (1962) (enunciating seven points of legislative intent in the passage of the Celler-Kefauver Act).

9 *Compare* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966) (arguing that Congress was primarily concerned with promoting economic efficiency), *with* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982) (arguing that Congress was primarily concerned about wealth transfers from consumers to producers).

10 *See* Michael A. Carrier, *Unraveling the Patent-Antitrust Paradox*, 150 U. PA. L. REV. 761, 815 (2002) (describing the Sherman Act's legislative history as indeterminate); Michael S. Jacobs, *An Essay on the Normative Functions of Antitrust Economics*, 74 N.C. L. REV. 219, 232 (1995) (describing some academics' views that the Sherman Act's legislative history is "confused"); Paul E. Levine, Note, *Attempt to Monopolize Under the Sherman Act: Defendant's Market Power as a Requisite to a Prima Facie Case*, 73 COLUM. L. REV. 1451, 1452 n.9 (1973) ("The legislative history of the Sherman Act is so inconclusive as to be useless in the disposition of litigation arising under it."); *see also* 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 61 (3d ed. 2006) ("Taking the legislative history of the antitrust laws as a whole, we would give it relatively little weight on the fundamental question of whether economic efficiency, injury to competitors, or some alternative 'populist' goal should guide antitrust policy.").

which imagines the courts as applying statutory meanings in concrete circumstances,[11] does not fit the antitrust enterprise. The antitrust statutes are widely recognized as open-ended delegations to the courts to create a common law of competition.[12]

A second reason that the judicial virtues associated with statutory interpretation have little relevance to antitrust adjudication is that Congress so rarely responds to judicial decisions by amending the antitrust laws. The last significant substantive amendments to the antitrust laws were the Celler-Kefauver amendments to the merger statute in 1950.[13] Although there have been occasional threats of congressional action to overrule unpopular decisions, such as *Leegin*'s overruling of *Dr. Miles*, such threats have usually gone nowhere.[14] In 2007, the bipartisan, congressionally-

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11 *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1–2 (1999); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65 (2011) (discussing the distinction between construction and interpretation).

12 *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 409 (1978) (describing the "open-textured" nature of the Sherman Act's language).

13 There have been several important largely procedural or jurisdictional amendments to the antitrust laws since 1950. *See* Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (codified as amended at 15 U.S.C. §§ 1, 45 (2011)) (repealing the Miller-Tydings Act, which allowed states to enact minimum resale price maintenance laws); Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (requiring premerger notification, expanding the Justice Department's civil investigatory powers, and giving states parens patriae standing); Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233 (codified at 15 U.S.C. § 6a (2011)) (specifying the jurisdictional reach of the Sherman Act to foreign commerce).

14 Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). In the modern era, Congress has shown little interest in overturning Supreme Court antitrust precedents, as it has done in many other statutory areas. Following the Court's decision in *Leegin*, which jettisoned a nearly century-old rule of per se illegality for resale price maintenance, there were congressional threats of a legislative override. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

appointed Antitrust Modernization Commission made a variety of recommendations for legislative amendments to the antitrust laws,[15] ranging from repealing the Robinson-Patman Act to creating a statutory solution to the vexing problem of indirect purchaser standing. None of these recommendations has gained significant legislative traction. Very little antitrust adjudication turns on the meaning of statutes or the expressed or unexpressed will of Congress.

It is de rigueur to recognize that antitrust adjudication is a common law process.[16] But what sort of common law? It is not the historic common law where judges developed substantive and procedural legal doctrines largely free from a statutory framework. Judges make modern antitrust law work within a procedural and remedial framework established by statute. They create law enforceable both publicly and privately with both criminal and civil

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Leegin-override legislation has passed committees in both houses of Congress, but has thus far failed to gain traction in the full Congress. *Cf.* Joanna Anderson, *Effort to Ban "Vertical Price-Fixing" Wins Panel's Approval*, CQ ROLL CALL, Nov. 3, 2011, http://www.cqtoday.com/doc/committees-2011110300292061?wr=bzR2QWhQbmtjMG5tSk9KQjNsbmlKUQ.

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

16 *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978) ("Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that [Congress] expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition."); AREEDA & HOVENKAMP, *supra* note 10, at 62 (stating that the Sherman Act "invest[ed] the federal courts with a jurisdiction to create and develop an 'antitrust law' in the manner of the common law courts"); William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 663 (1982) ("Congress adopted what is in essence enabling legislation that has permitted a common-law refinement of antitrust law through an evolution guided by only the most general statutory directions."); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983) ("The statute books are full of laws, of which the Sherman Act is a good example, that effectively authorize courts to create new lines of common law.").

application. They work in the shadow of an executive and an administrative agency with concurrent jurisdiction to enforce and shape the antitrust laws. They purport to follow a "consumer welfare" norm ostensibly established by Congress.[17]

Antitrust common law also bears little relation to popular theories of federal common law, such as the theory espoused in Guido Calabresi's *A Common Law for the Age of Statutes*.[18] Calabresi urges courts to exercise "the judicial power to force legislative agendas" to interpret or to invalidate statutes that are seen to be inconsistent with the "legal topography" of the times, thus forcing legislators to reengage the relevant statutory terrain to the benefit of democracy and law.[19] As already noted, antitrust courts are not generally engaged in a dialogue with Congress, in either interpreting or invalidating statutes.

Antitrust adjudication is a differentiated subspecies of common law. It therefore calls for a somewhat different set of judicial virtues than those called for in constitutional adjudication, statutory interpretation, or conventional common law circumstances.

III. VIRTUES THAT HUNT IN PAIRS

A. Substantive Purism vs. Institutional Realism

Our first pairing of equal and opposite judicial virtues is what I will call substantive purism and institutional realism. Substantive purism can be defined as the view that judges should decide cases entirely on their substantive merits, without worrying about the consequences of a decision for the legal and political institutions implicated, or trying to adjust the substantive rule to fit the relative strengths and weaknesses of the different institutional actors involved in

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17 Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (attributing to Congress a consumer welfare goal in the adoption of the antitrust laws).

18 GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

19 *Id.* at 18, 120.

antitrust adjudication. Institutional realism, by contrast, is the view that judges should formulate substantive legal rules by taking consideration of the systemic effects of different substantive rules along with the competencies of trial judges, appellate judges, lawyers, experts, juries, legislators, agencies, and other actors in the system.

A clash between substantive purism and institutional realism can be seen in the divide between the majority and dissenting opinions in the two most important antitrust cases on the summary judgment and motion to dismiss standards, respectively—*Matsushita*[20] and *Twombly*.[21] *Matsushita* involved a claim by American television manufacturers that their Japanese competitors had engaged in a prolonged predatory pricing conspiracy in the United States.[22] During the course of litigation, the U.S. Court of Appeals for the Third Circuit entertained an appeal from a pretrial order of the district court holding that parties to antitrust cases have an automatic right to a jury trial.[23] While not deciding whether there was a jury trial right in the *Matsushita* case, the Third Circuit held that a party does not have a Seventh Amendment right to jury trial in an antitrust case if the trial would be so complex that the jury could not rationally perform its function.[24] That provocative decision never reached the Supreme Court because it was preempted by summary judgment. After rejecting the defendants' motion to strike the plaintiffs' jury trial demand, the district court entered summary judgment for the defendants on the merits.[25]

The Court's decision in *Matsushita* is widely understood as asking district courts to make liberal use of summary

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20 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

21 Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

22 *See Matsushita*, 475 U.S. at 577, 584.

23 *See In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1071–72 (3d Cir. 1980).

24 *See id.* at 1086, 1090–91.

25 *See id.* at 1073 n.4; Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1190, 1203, 1241–42 (E.D. Pa. 1980).

judgment in complex antitrust cases in order to avoid poor decision making by juries. The majority presented a lengthy theoretical argument that predatory pricing is generally an unprofitable and unlikely strategy for a group of oligopolists who have to share the high cost of predation.[26] Thus, in the majority's view the plaintiffs' claim was implausible.[27] Implausible did not mean impossible, and the Court recognized the possibility that the plaintiffs' theory might actually be true.[28] Consistent with the Chicago School error-cost framework,[29] the majority apparently believed that economic efficiency and consumer welfare would best be served by adjudicatory rules that screen out false positives, even at the cost of permitting some false negatives.

The majority's recognition that the plaintiffs' theory might possibly be true was the point of departure for Justice White's dissent. White argued that, in contravention of longstanding summary judgment rules, the majority had gone beyond asking whether there was a disputed issue of material fact necessitating trial, but had actually weighed the evidence and found the defendants' position more likely to be right.[30] The majority's error, in White's view, was to give dispositive weight to a particular economic theory about the likelihood of collusive predatory pricing and require the plaintiff to overcome a presumption that such conduct would

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26 *See Matsushita*, 475 U.S. at 588–95 (concluding that the self-deterrent effects of these strategic concerns will sufficiently counteract the potential encouragement of such activities caused by courts granting summary judgment in cases where plaintiffs offer only speculative or ambiguous evidence of conspiracy).

27 *Id.* at 575.

28 *See id.* at 587 (holding that "if the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary").

29 *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 3 (1984) (arguing that false positives are more costly than false negatives in antitrust adjudication).

30 *See Matsushita*, 475 U.S. at 600 (White, J., dissenting).

ordinarily not occur. Accordingly, the majority made "assumptions that invade the factfinder's province."[31]

In *Twombly*, the Court extended this conversation to the motion-to-dismiss context. The plaintiff class alleged that incumbent local exchange carriers ("ILECs") had conspired not to enter each other's local telephone and Internet service markets in the manner contemplated by the 1996 Telecommunications Act.[32] Justice Souter's majority opinion affirmed the dismissal of the claims on the grounds that plaintiffs failed to allege facts plausibly showing the existence of a conspiracy.[33] Plaintiffs alleged only parallel conduct—that the ILECs did not enter each other's markets—but failed to allege facts making it plausible that this parallel conduct evidenced the existence of a conspiracy.[34] The majority emphasized the heavy costs to litigants and the courts of allowing plaintiffs to pass the motion-to-dismiss hurdle and obtain discovery on such thin proof—really just suspicion—of conspiracy.[35]

Justice Stevens's dissenting opinion chastised the majority for excessive institutional realism:

> Two practical concerns presumably explain the Court's dramatic departure from settled procedural law. Private antitrust litigation can be enormously expensive, and there is a risk that jurors may mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when they in fact merely made similar independent decisions.[36]

Justice Stevens argued that these concerns should be addressed through careful management of the discovery process and lucid jury instructions, but that they could not

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31 *Matsushita*, 475 U.S. at 601 (White, J., dissenting).

32 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558–59 (2007).

33 *Id.* at 545.

34 *Id.*

35 *Id.* at 558–59.

36 *Id.* at 573 (Stevens, J., dissenting).

justify a departure from accepted pleading rules.[37] Justice Souter's majority opinion implicitly accepted that these institutional concerns motivated its decision.[38]

Putting aside the question of whether the institutional concerns over excessive discovery and overwhelmed jurors were accurate, were the justices in the *Matsushita* and *Twombly* majorities justified in allowing their concerns over the institutional realities of litigation to shape their promulgation of the substantive norms on proof of conspiracy to predate, and pleading conspiracy to divide markets? Or, as urged by the dissenting justices, should the Court have focused more on the substantive merits of the questions before them?

In the last several decades, the U.S. courts have displayed a high, but selective, degree of institutional realism. As many commentators have shown, the courts have been very willing to take into account some of the perceived institutional weaknesses of the private antitrust litigation system, such as juries overwhelmed by technical economic reasoning, the chilling effects of treble damages and class actions, and abusive suits by rent-seeking competitors.[39] These institutionalist concerns, which have often seen expression in the Harvard School perspective of Justice Stephen Breyer and others,[40] have as much explanatory power in understanding the conservative fabric

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[37] *Twombly*, 550 U.S. at 573 (Stevens, J., dissenting).

[38] *See id.* at 559 (asserting that careful scrutiny of evidence at the summary judgment stage and lucid jury instructions could not cure discovery abuse problems).

[39] The Court's institutional realism does not always appear on the surface of the opinions. In neither *Matsushita* nor *Twombly* did the majority overtly rest its decision on the institutionalist concerns that the context of the decisions suggests were strongly influential. This may be due in part to concerns that excessive candor about institutionalist calculations suggests that judges are doing something other than deciding pure questions of law.

[40] *See* Daniel A. Crane, *A Neo-Chicago Perspective on Antitrust Institutions*, 78 ANTITRUST L. J. 43, 45–46 (2012) (examining the influence of the Neo-Harvard School perspective).

of modern antitrust law as the more laissez-faire, substantive views of Chicago School justices.

But this institutional realism has been selective. While the courts have been willing to contract liability norms because of concerns over the infirmities of private litigation, they have been far less willing to expand liability norms in government suits that arise in very different institutional contexts, where juries, treble damages, class actions, and abusive competitor suits are not at issue. For example, in 2003, the U.S. Court of Appeals for the Eleventh Circuit rejected a private lawsuit challenging the legality of so-called reverse payment settlements between a branded and a generic drug company.[41] There are several good reasons, grounded in institutional limitations of private litigation, for the rejection of that claim. But, two years later, when the Court faced an FTC challenge to reverse payments, it reflexively applied its prior private litigation precedent without pausing to ponder whether the very different institutional constraints in FTC litigation merited a different consideration.[42] Again in 2012, the Eleventh Circuit rejected an FTC reverse payment challenge on the authority of the framework established in its earlier decision in the private case, and the Supreme Court has now granted certiorari to resolve a circuit split on the issue.[43] Rather than simply challenging the original Eleventh Circuit decision in the private lawsuit as wrongly decided, the FTC would be wise to argue about how the institutional differences between public agency and private enforcement should matter to the outcome of the case.

Similar issues have arisen with respect to the FTC's efforts to reinvigorate Section 5 of the FTC Act[44] as an independent basis of authority to stop anticompetitive behavior. To substantive purists, the FTC's efforts may look

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41 Valley Drug Co. v. Geneva Pharm., Inc., 344 F.3d 1294 (11th Cir. 2003).

42 Schering-Plough Corp. v. FTC, 402 F.3d 1056 (11th Cir. 2005).

43 FTC v. Watson Pharm., Inc., 677 F.3d 1298, 1312 (11th Cir. 2012), *cert. granted*, 133 S. Ct. 787 (Dec. 7, 2012) (No. 12-416).

44 Federal Trade Commission Act § 5; 15 U.S.C. § 45 (2011).

like an affront to the rule of law, as former FTC Chairman Bob Pitofsky has complained.[45] To institutional realists, however, it should make perfectly good sense that the liability norms are broader in public cases than in private ones. Hints in this direction have appeared in a few cases. In *linkLine*, for example, Justice Breyer stated, without explanation, that a price squeeze case, though properly rejected in the private litigation context, might make perfectly good sense as a *government* case.[46]

Institutional realism is a sound and necessary virtue in the modern antitrust context. Congress created a remedial structure for antitrust litigation and has shown little appetite for amending it since 1914, despite radical changes in the culture of private litigation and other institutional dynamics since that time. Courts need to take into account these realities and adapt the substantive law to suit them. They should do so comprehensively rather than selectively, however. Institutional realism should be observed both in private and public suits.

B. Incrementalism vs. Generalism

The strength of the common law is its adaptive incrementalism. Rather than starting from a general principle and deducing applications, common law judges arguably start from facts and work up to principles. This inductive approach has the virtue of preventing judges from announcing overbroad rules that work as to the facts of the case before them, but fail in other, unanticipated

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[45] *See* Robert Pitofsky, Sheehy Professor of Antitrust Trade and Regulation Law, Georgetown Univ. Law Ctr., Panel Discussion at the FTC Workshop on Section 5 of the FTC Act as a Competition Statute: Interpretations of Section 5, at 59 (Oct. 17, 2008), *available at* http://www.ftc.gov/bc/workshops/section5/transcript .pdf.

[46] Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 458 (2009) (Breyer, J., concurring) ("A 'price squeeze' claim finds its natural home in a Sherman Act [Section] 2 monopolization case where the Government as plaintiff seeks to show that a defendant's monopoly power rests, not upon 'skill, foresight and industry,' . . . but upon exclusionary conduct.") (citation omitted).

circumstances. It suggests that a certain degree of humility and experientialism is the hallmark of good judging. As Oliver Wendell Holmes famously remarked, "The life of the law has not been logic: it has been experience."[47]

On the other hand, the common law method's cautious incrementalism can be maddening to subjects of the law trying to predict how courts will rule in the next case. When courts take each case on its own facts, and refuse to announce general principles governing all cases within the relevant category, they make it difficult for people to predict legal outcomes, which—to reference Justice Holmes again—is the core of the legal enterprise.[48] The unpredictability of the incremental approach makes it hard for legal subjects to order their lives and businesses.

The tension between generalism and incrementalism is partly the inherent tension in law between rules and standards. Antitrust law could be governed by broad standards like the open-ended rule of reason, or by narrower rules like the per se rule of illegality for price-fixing agreements.[49] But generalism and incrementalism raise distinct questions from those presented in the rules and standards discourse. A rule can be broad (e.g., no predatory pricing liability absent a showing of pricing below marginal cost) or narrow (e.g., no predatory pricing liability in airline cases absent a showing of pricing below fully allocated earnings plus upline/downline contribution net of costs). Similarly, a standard can be broadly or narrowly applicable. So the question with incrementalism and generalism is not just whether the liability determinant should be flexible or rigid, but whether the court should announce a rule of decision narrowly tailored to the facts before it, or a more

47 OLIVER W. HOLMES, JR., THE COMMON LAW 1 (1881).

48 Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

49 *See* Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1214 (2008); Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 50 (2007).

general principle intended to provide guidance in future cases.

How do the conflicting impulses toward generalism or incrementalism play out in the antitrust context? In recent years, the tendency has been toward generalism, with a number of prominent decisions attempting far-reaching pronouncements on antitrust law.

Perhaps the best example of this is the D.C. Circuit's en banc opinion in *United States v. Microsoft*,[50] which is a rich and widely cited opinion for a variety of reasons. The case covered a broad range of technical, economic, and legal issues, and was highly important to the information technology sector, and the national economy more generally. It also marked an opportunity for a broad statement about antitrust principles governing unilateral exclusionary conduct in the information economy, and it was decided en banc by the most prestigious court in the land, other than the Supreme Court. Given that commentators frequently refer to the D.C. Circuit as ideologically polarized, the Court's en banc unanimity was a remarkable achievement.

But the unanimity and generality of the opinion may have come at the price of analytical incoherence, making the *Microsoft* opinion—though often cited—relatively unhelpful to the future adjudication of monopolization cases. The decision has the feeling of a grand compromise that resolves an important case and announces broad principles that have little chance of guiding courts and litigants in the future.

Take, for example, the *Microsoft* court's announcement of five principles of monopolization gleaned from "a century of case law."[51] The fourth principle is that "if the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit."[52] This suggests that antitrust courts, which in most civil cases means juries, should be asked to weigh the benefits of

50 United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

51 *Id.* at 58–59.

52 *Id.* at 59.

undisputedly procompetitive behavior, such as the development and introduction of new products, against the behavior's anticompetitive effects. I seriously doubt that most judges on the D.C. Circuit, or any other court, would be comfortable having juries make such determinations. As a panel of the D.C. Circuit recognized in the earlier *Microsoft* decision, "[a]ntitrust scholars have long recognized the undesirability of having courts oversee product design, and any dampening of technological innovation would be at cross-purposes with antitrust law."[53] Further—as scholars have noted—although announcing a general balancing test, there was no occasion on which the *Microsoft* court found that an act was prima facie exclusionary, that Microsoft had offered a procompetitive justification for the conduct, and then proceeded to balance the procompetitive virtue against the anticompetitive effect in any meaningful way.[54] Once the court found that Microsoft had satisfied its burden of proving a procompetitive justification, it uniformly held that practice legal without engaging in balancing.

But this has not stopped lower courts from citing *Microsoft* for the proposition that monopolization cases require balancing the procompetitive virtues of new products

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53 United States v. Microsoft Corp., 147 F.3d 935, 948 (D.C. Cir. 1998).

54 *See, e.g.*, Spencer W. Waller, *The Past, Present, and Future of Monopolization Remedies*, 76 ANTITRUST L.J. 11, 23 (2009); Yane Svetiev, *Antitrust Governance: The New Wave of Antitrust*, 38 LOY. U. CHI. L.J. 593, 626–27 (2007). On one occasion, the court held that Microsoft had presented a valid procompetitive justification for a contractual restriction, and that this outweighed the alleged anticompetitive effect. *Microsoft*, 253 F.3d at 63 ("We agree that a shell that automatically prevents the Windows desktop from ever being seen by the user is a drastic alteration of Microsoft's copyrighted work, and outweighs the marginal anticompetitive effect of prohibiting the [Original Equipment Manufacturers ("OEMs")] from substituting a different interface automatically upon completion of the initial boot process."). However, the court made no serious effort to explain the weighting of the competing effects, and seems to have believed that there were no important anticompetitive effects from requiring OEMs to show at least some of Microsoft's copyrighted Windows interface upon booting of the operating system.

against their anticompetitive effects.[55] Other courts have felt obliged to express quiet disagreement with the suggestion that balancing of procompetitive benefits and anticompetitive effects is required, pointing back to the D.C. Circuit's 1998 *Microsoft* opinion.[56] Litigants often spar at length over the meaning of *Microsoft*, picking and choosing from different corners of the opinion to justify their positions. Much of this could have been avoided if the D.C. Circuit had hewn more closely to the controversy before it, instead of reaching out to express a grand unifying theory of Section 2 of the Sherman Act.

Expressing broad principles of antitrust law might be more expedient if the broad principles expressed were highly predictive of future results, and hence allowed firms and litigants to better organize their activities and predict judicial outcomes. For better or worse, most efforts at generalization in antitrust have done little to help predict the next decision, and have instead invited diversion of resources into esoteric debates over the meaning of the general principle. Although there is a time and place for antitrust generality, judges deciding antitrust cases would be well advised to follow the incrementalist virtue in most cases.

A distinction might be drawn here between rules and frameworks for decision. Anticipating the pairing of virtues that follows, it is often desirable—and consistent with the

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[55] *See, e.g.*, Abbott Labs. v. Teva Pharm. USA, Inc., 432 F. Supp. 2d 408, 422 (D. Del. 2006) ("Contrary to Defendants' assertion, Plaintiffs are not required to prove that the new formulations were absolutely no better than the prior version or that the only purpose of the innovation was to eliminate the complementary product of a rival. Rather, as in *Microsoft*, if Plaintiffs show anticompetitive harm from the formulation changes, that harm will be weighed against any benefits presented by Defendants.").

[56] *See, e.g.*, Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 1000 (9th Cir. 2010) ("There is no room in this analysis for balancing the benefits or worth of a product improvement against its anticompetitive effects. If a monopolist's design change is an improvement, it is 'necessarily tolerated by the antitrust laws,' . . . unless the monopolist abuses or leverages its monopoly power in some other way when introducing the product.") (citation omitted).

longstanding culture of common-law judging—for judges to make clear their working assumptions and decisional frameworks. For example, as already noted, Chicago School judges have been heavily influenced by Frank Easterbrook's error-cost framework, and have explicitly cited his influence.[57] The error-cost framework is a broad principle with far-reaching implications for antitrust adjudication, and understanding its influence on judges is helpful to litigants and other consumers of legal decisions. It would be a mistake, however, for judges to invoke the error-cost framework to announce antitrust rules too far removed from the specific facts in controversy. Incrementalism in the announcement of liability rules can and should co-exist with transparency concerning overall decisional frameworks.

C. Harmony vs. Candor

The judiciary seems to be at the zenith of its strength when the panel of judges hearing a case speaks with a single voice. The Supreme Court's unanimity in *Brown v. Board of Education*[58] remains legendary as an example of judicial ability to move forward an important social agenda in the face of virulent opposition. Many judges believe that they should concede on minor points of disagreement and sign onto opinions that are not fully theirs in order to preserve the institutional position of the court. On the other hand, grumbling concurrences and dissents have a long and storied history in the Anglo-American tradition. When it comes to antitrust cases, which virtue is more important? Presenting a slightly misleading unified front and thereby preserving harmony, or letting it all hang out?

Some of the most important antitrust opinions of the last few decades have been studies in harmony. Consider the Supreme Court's landmark decision in *Trinko*, which drew

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57 *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 233 (1993); Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 345 (1990); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 591 n.15 (1986).

58 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

no dissent.[59] Clearly, the superficial harmony of the opinion masked unresolved tensions between the judges who signed onto the opinion.

The big story of *Trinko* was that Justice Scalia could write a consummately Chicago School opinion in which the consummately Harvard School Justice Breyer could also join. The opinion is extraordinary in its versatility and contradictions. On the one hand, it celebrates monopoly, indulging in a sublime triple negative to explain that "[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system."[60] On the other hand, it celebrates the presence of a command-and-control regulatory structure designed to eliminate market power in telecommunications networks.[61] On the one hand, it interprets the Telecommunication Act's antitrust savings clause as preventing reliance on that Act to answer the antitrust question through the implied repeal doctrine.[62] On the other hand, it finds the presence of the statutory scheme significant in finding the absence of a duty to deal.[63] On the one hand it disparages *Aspen Skiing* to the point of overruling.[64] On the other hand it treats *Aspen Skiing* as an authoritative set of principles about duties to deal.[65] On the one hand, it belabors the risks of false positives—finding that the defendant should be obliged to share its network

59 Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004). Three justices—Stevens, Souter, and Thomas—concurred in the judgment, not because they necessarily disagreed with the majority's opinion, but because they would have resolved the case by finding plaintiffs lacked standing to bring the relevant claim. *Id.* at 416–17.

60 *Id.* at 407.

61 *See id.* at 401.

62 *Id.* at 406.

63 *Id.* at 407–08.

64 *Id.* at 408–09 (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 (1985)).

65 Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 410 (2004).

when good economic theory suggests it should not.[66] On the other, it celebrates the presence of regulators who can order the defendant to share its network with rivals.[67]

Like *Microsoft*, which suffers from overgenerality, *Trinko* suffers from overinclusiveness. True, the complex of factors discussed in the opinion amounted to a victory for the defendant on this particular day. However, it would be a mistake to read *Trinko* as an appreciation note from Justice Breyer to monopolists, or from Justice Scalia to regulators. When just regulators alone are at issue, we get cases like *FDA v. Brown & Williamson*, holding that the FDA lacked authority to regulate tobacco, with Scalia in the majority and Breyer in the dissent;[68] or *California Dental Association v. FTC*, in which the Chicago School justices joined the majority opinion overruling the FTC's efforts to prevent restrictions on dental care advertising; and Justice Breyer dissented, arguing that the FTC, the expert agency on advertising, should receive deference.[69]

A decision with less harmony but more candor is the aforementioned *linkLine* decision.[70] All nine justices voted against price squeeze liability on the facts of the case, but four justices, led by Justice Breyer, concurred in the judgment in order to draw out their distinctive perspective. For the five justices in the majority, price squeeze liability simply is unavailable under the authority of the duty to deal (*Trinko*) and predatory pricing (*Brooke Group*) cases, not to mention the pro-monopolist thematics of *Trinko*.[71] For the Breyer group, price squeeze liability might be available in a different institutional context—particularly where the government was the plaintiff, or where regulators had failed to control the exercise of monopoly power. [*L*]*inkLine* is less of an achievement than *Trinko* in putting together a

66 *Trinko*, 540 U.S. at 414.

67 *Id.* at 413.

68 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

69 Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999).

70 Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438 (2009).

71 *See Trinko*, 540 U.S. 398; Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

harmonious coalition, but it serves as a far better identification and exposition of the real views on the court today, and is thus much more helpful in predicting how cases will be decided in the future.

In *Trinko* and *Microsoft*, the judges spoke with a unified voice, politely papering over their deep differences. There is a moment for such harmony, particularly in cases like *Brown v. Board of Education*,[72] where the political legitimacy, independence, and power of the Court would be instantly challenged by powerful reactionary forces. One could only wish that the Supreme Court could have spoken with an equally unified voice in *Bush v. Gore*,[73] whichever way the decision came out. Thankfully, courts deciding antitrust cases have few reasons to worry that their decisions will provoke serious challenges to their legitimacy, independence, or power. Given the luxury of relative indifference to their decisions in the general population, and even among the political elite, antitrust judges may, and often should, candidly disclose their differences.

D. Adherence to Precedent vs. Keeping Up with the Times

A final pairing of virtues concerns the tension between adhering to precedent and keeping up with the times—or, perhaps, developments in economic theory and business experience. Stare decisis applies to antitrust as to other fields, but to what degree? The poster child for the stare decisis doctrine is an antitrust case, *Flood v. Kuhn*, in which the Supreme Court upheld baseball's antitrust exemption even though the original justifications for that exemption had long since evaporated.[74] *Flood* reduces to the proposition that some principles stand the test of time not because they continue to have persuasive power but merely because they have been repeated so many times. But, of course, not everyone appreciates the continuing wisdom of

72 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

73 Bush v. Gore, 531 U.S. 98 (2000).

74 Flood v. Kuhn, 407 U.S. 258 (1972).

the baseball antitrust exemption, particularly when "MLB" stands as much for Major League Business as Major League Baseball,[75] and sports like football, basketball, hockey, and soccer, which are economically indistinguishable from baseball, face full antitrust scrutiny. Under one view, antitrust is precisely the sort of common law field in which courts should feel the maximum latitude to update out-of-date precedents.

No case better tees up two contrasting visions of antitrust stare decisis than *Leegin*, which jettisoned a ninety-six-year-old rule of per se illegality for vertical resale price maintenance.[76] Led by Justice Kennedy, the five justices who voted to overrule *Dr. Miles*[77] argued that stare decisis considerations were weak because *Dr. Miles* relied on outdated, formalistic common law conceptions, economic theory had proven its foundational assumptions wrong, and the surrounding legal rules governing maximum resale price setting and non-price vertical restraints had been decided in favor of the rule of reason in the intervening years.[78] The majority also noted that the common law nature of antitrust adjudication permitted and, indeed, required the court to reconsider the need for a per se rule.[79]

By contrast, Justice Breyer's dissenting opinion argued that stare decisis required that the Court not so lightly jettison *Dr. Miles*.[80] He argued that the "ordinary criteria for overruling an earlier case" had not been met, since there had been no change in circumstance warranting reconsideration

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75 *See* Mike Ozanian, *The Business of Baseball 2012*, FORBES (Mar. 21, 2012, 12:27 PM), http://www.forbes.com/sites/mikeozanian/2012/03/21/ the-business-of-baseball-2012 (reporting average revenue per MLB team of $212 million).

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

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

78 *Leegin*, 551 U.S. at 887–99.

79 *Id.* at 888–89.

80 *See id.* at 908–29 (Breyer, J., dissenting).

of the earlier opinion.[81] Congress had not undertaken action undermining *Dr. Miles*, nor had there been significant shifts in the organization of American business that would call for a different rule.[82] As to the intervening economic literature, the results were inconclusive at best.[83] Breyer further observed that *Dr. Miles* was not unworkable as a legal rule, and that reliance on the rule of per se illegality pointed against a sudden transition toward the rule of reason.[84]

One point that Justice Breyer made can be dismissed rather quickly. Seeking to hoist Justice Scalia by his own petard, Breyer notes that Scalia argued in an earlier case that "the Court applies *stare decisis* more 'rigidly' in statutory than in constitutional cases."[85] Breyer then adds that "[t]his is a statutory case."[86] As noted earlier, however, antitrust cases are not "statutory" in the ordinary sense, since they involve no question of statutory interpretation and very little "dialogue" with Congress. Antitrust cases much more closely resemble common law adjudication, where the courts form norms over time. Scholars have often distinguished between the importance of stare decisis in statutory interpretation—where legislative will is at issue—and in common law cases, where it is not.[87]

As a form of common law adjudication, antitrust law is subject to the inherent tension in the common law over questions of legitimacy and reform. The political legitimacy of the common law is predicated on judges' ostensible adherence to precedent. Judges, who are not politically accountable or representative, can claim legitimacy in

81 *Leegin*, 551 U.S. at 918–19 (Breyer, J., dissenting).

82 *Id.* at 919–20.

83 *Id.* at 920.

84 *Id.* at 924.

85 *Id.* at 923.

86 *Id.* at 924.

87 *See, e.g.*, Michael P. Van Alstine, *Stare Decisis and Foreign Affairs*, 61 DUKE L.J. 941, 960 (2012) (arguing that "the Supreme Court seemingly has endorsed a more relaxed version of the doctrine of stare decisis when courts take the lead in developing the law based on a corresponding delegation of authority from Congress").

"making law" since they are not just enacting their own opinions but, in theory, following what judges in the past have done. But this backward-looking orientation makes reform and updating difficult. The great common law reformers, like Justice Benjamin Cardozo, were ever juggling to explain how their decisions were grounded in precedent, even while subtly moving the ball forward.

But herein lies an important difference between antitrust and non-statutory common law. Non-statutory common law judges need to adhere closely to their precedents in part because frequent or sudden upheavals in the law suggest that judges enact their own preferences without objectivity or constraint. By contrast, when judges create law pursuant to a congressional delegation, they do so as agents of Congress—as Congress's "junior partners." Even if Congress does not frequently intervene, it can always overturn those antitrust precedents of which it disapproves. The same is only true in a limited sense for non-statutory common law. Congress or state legislatures can, of course, alter the rules of contract, tort, or property at will, but doing so invites the criticism that the legislature is invading what has been the province of the courts since time immemorial. It is politically easier for Congress to overturn antitrust precedent, which is its indirect creature, than to overturn non-statutory common law precedents, which belong to others. Judges have considerable freedom to modify their antitrust precedents when they act explicitly as Congress' junior partners, finding the source of their authority to create and modify antitrust law in a congressional delegation, and serving in this role at the pleasure of Congress.

Antitrust law cannot afford to remain riveted to the past. Once the courts concluded that antitrust analysis should be driven by consumer welfare and efficiency considerations, retaining precedents like *Dr. Miles*, and similar cases that were driven by other goals, made little sense. Economic theory, business practice, market structures, and other commercial realities require continual adaptation and reconsideration of antitrust precedents. Congress has delegated the responsibility of both forming and updating

antitrust law to the courts, and has shown little interest in doing this work itself. It therefore left the courts to review and revise their precedents without much concern for past decisions. Whatever the level of deference owed to precedent in the context of statutory interpretation, stare decisis is less important in the antitrust setting. A final observation: the point just made—that courts should not be shy about updating and modernizing antitrust law—may sound like an endorsement of the Chicago School project of reversing the interventionist and sometimes protectionist precedents that limited commercial behavior in a wide variety of areas, such as vertical price and non-price restraints, aggressive price discounts, vertical and horizontal mergers, exclusive dealing, and tying arrangements. But we are now in an area where many of the Chicago School precedents, and the theoretic assumptions on which they were based, are under attack in the academy. As courts reevaluate the Chicago School precedents, they should not feel particularly bound to them by virtue of stare decisis. If the cases remain persuasive, they should be retained. But if advances in economic learning or the evolution of normative criteria through common law iteration have undermined their force, they should be jettisoned.

If all of this suggests that a troublesome level of unconstrained judicial activism is permissible in antitrust, observe that this kind of activism does not raise many of the concerns associated with activism in other contexts, particularly constitutional adjudication. As noted at the outset, antitrust adjudication raises few, if any, countermajoritarian difficulties. If by periodically reinventing the meaning, purposes, and scope of the antitrust laws judges are overriding the will of Congress, it is the will of Congresses long past, and with the tacit acquiescence of contemporary Congresses. But it is doubtful that even transformative antitrust adjudication really tramples on the will on past Congresses, since those past Congresses expressed their will in such open-textured delegations of authority to the courts.

IV. CONCLUSION

Antitrust law occupies an idiosyncratic niche in the federal statutory scheme. Congress has chosen to answer few challenging questions of competition policy, largely leaving them to the antitrust agencies and the courts. Antitrust is no longer politically salient or closely monitored by either the general populace or the political elite, as it was during the first half of the twentieth century.[88] With few exceptions, antitrust law is the province of the courts.

This wide latitude calls for a distinct set of judicial virtues in the antitrust space. Judges can afford to be realistic about the institutional strengths and limitations of the system with which Congress has entrusted them, and to adapt substantive legal norms accordingly. They should proceed incrementally and stepwise rather than trying to organize the whole house at once. Judges should happily tell us when they agree and tell us just as happily when they do not. And judges should not be shy about reversing older precedents when they no longer bear the force of reason or fact. These virtues do not hold for all times and places; they hold for U.S. antitrust in the twenty-first century.

88 *See* Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159 (2008).