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Rebecca Haw Allensworth

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Articles

Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal

Rebecca Haw^{*}

Power to interpret the Sherman Act, and thus power to make broad changes to antitrust policy, is currently vested in the Supreme Court. But re-evaluation of existing competition rules requires economic evidence, which the Court cannot gather on its own, and technical economic savvy, which it lacks. To compensate for these deficiencies, the Court has turned to amicus briefs to supply the economic information and reasoning behind its recent changes to antitrust policy. This Article argues that such reliance on amicus briefs makes Supreme Court antitrust adjudication analogous to administrative notice-and-comment rulemaking. When the Court pays careful attention to economic evidence and arguments presented in amicus briefs, it moves the process away from a traditional Article III case or controversy and towards rulemaking under the Administrative Procedure Act (APA) where any interested party can influence the decision. In doing so, the Court sacrifices some of the epistemological benefits of Article III's standing requirements. In the case of antitrust, those costs are probably outweighed by how much the Court benefits from hearing the amici's economic arguments. But while the Court's hybrid rulemaking—quasi-administrative and quasi-judicial—may improve upon the traditional judicial model, it cannot realize the full benefits of APA rulemaking. The awkwardness of using amicus curiae briefs like comments on a rulemaking suggests a more dramatic shift in authority over the Sherman Act is necessary. Power to interpret the Act in the first instance should go to an administrative agency.

Introduction

The Sherman Act's condemnation of "[e]very . . . combination . . . in restraint of trade" and "[e]very person who shall monopolize" is so unfocused that whoever is in charge of its interpretation has broad leeway to

^{*} Climenko Fellow and Lecturer on Law, Harvard Law School. J.D., Harvard Law School, 2008; M. Phil, Cambridge University, 2005; B.A., Yale University, 2001. I am deeply indebted to Louis Kaplow, Richard A. Posner, Kathy Spier, and Adrian Vermeule for their thoughtful comments on previous drafts. I also had the help of excellent research assistance from Amanda-Jane Thomas and Ben Watson.

shape economic policy.¹ That duty falls on the courts, who must sort out the details of what practices and pricing schemes amount to unreasonably anticompetitive behavior. As in other federal statutory cases, the Supreme Court has the final word on the Act's meaning. But because the Sherman Act is so vague and so broad, the Court's task in developing specific rules under it is more like constitutional interpretation than statutory interpretation.² Like constitutional law, the modern law of the Sherman Act has been developed through the common law process: case-by-case adjudication of disputes between particular parties, over decades of refinement, and even reversals.³

But making law under the Sherman Act differs from deciding typical common law questions. In defining contract or property rights, Justices can reason primarily by analogy, informed by intuition and broad considerations of morality and efficiency and constrained, of course, by precedent. But the modern antitrust imperative demands technical and quantitative reasoning.⁴ Antitrust rules must be designed to maximize consumer welfare through economically efficient competition.⁵ For this kind of technical thinking, the Justices need help. In the Supreme Court, help with understanding economic theory and interpreting empirical data on competition (or, more often, its absence) comes from amicus briefs, which often present more economic arguments than the parties' briefs.⁶ Unsurprisingly, these amicus briefs receive considerable attention from the Court and influence its opinions.⁷

1. 15 U.S.C. §§ 1–2 (2006).

2. William Howard Taft wrote that the words of the Sherman Act were written “with the intention that they should be interpreted in the light of common law, just as it has been frequently decided that the terms used in our federal Constitution are to be so construed.” WILLIAM HOWARD TAFT, *THE ANTI-TRUST ACT AND THE SUPREME COURT* 3 (1914).

3. Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 *ANTITRUST L.J.* 135, 136–37 (1984).

4. See Abbott B. Lipsky, Jr., *Antitrust Economics—Making Progress, Avoiding Regression*, 12 *GEO. MASON L. REV.* 163, 165 (2003) (“[T]he rapid assimilation of microeconomics into antitrust thinking makes almost every antitrust controversy an exercise in microeconomic analysis.”).

5. See Daniel A. Crane, *Technocracy and Antitrust*, 86 *TEXAS L. REV.* 1159, 1212 (2008) (“Within the last few decades a broad consensus has emerged that consumer welfare and economic efficiency are the overriding, if not exclusive, goals.”); Easterbrook, *supra* note 3, at 138 (stating that the Court views antitrust laws as a consumer-welfare prescription).

6. See, e.g., Brief of the Commonwealth of Virginia and Eight Other States as Amici Curiae in Support of the Petitioners at 3–6, *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 129 S. Ct. 1109 (2009) (No. 07-512), 2008 WL 4154540 (arguing that the Ninth Circuit's decision harms consumers and protects competitors rather than competition); Brief of Amici Curiae Economists in Support of Petitioners, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 2506633 (discussing how the parallel-behavior-is-enough standard would increase economic costs).

7. See generally Stephen Calkins, *The Antitrust Conversation*, 68 *ANTITRUST L.J.* 625 (2001); Stephen Calkins, *Supreme Court Antitrust 1991–92: The Revenge of the Amici*, 61 *ANTITRUST L.J.* 269 (1993).

In relying so heavily on arguments from nonparties, the Court mimics the procedures used by other branches of government to make decisions involving technical inputs and reasoning. When an agency regulates complicated systems, like energy markets or the environment, it solicits third-party input through notice-and-comment rulemaking.⁸ Similarly, the Court looks to amici to parse difficult theoretical arguments and present empirical data about competition economics. Friends of the court—trade organizations, companies, and groups of professors—use amicus briefs to solicit a particular rule from the Court, in the same way that those same third parties lobby agencies through comments on rulemaking. And like an administrative agency, the Court seems to feel some obligation to respond to the amici's arguments in their final decision.

The Court is certainly right to open the conversation to all affected parties, including amici who have economic arguments and data but not Article III standing to join the suit. The Court is better off with the amici than without them—the informational benefits of open amicus participation outweigh the costs of relaxing justiciability requirements to give third parties such a powerful voice in the litigation.⁹ But to be complacent with the Court's current reliance on amici ignores a better solution.

Instead of forcing the Court to approximate agency decision making by relying on amicus briefs, we should endow an antitrust agency with authority to make Sherman Act rules in the first instance.¹⁰ Such an agency could go further than the Court can in soliciting expert opinions, conducting studies, and collecting data. It would have the advantage of economic expertise. And it would be accountable in a way that the Court is not, since its rules and decisions would be subject to judicial review.

This Article proceeds in five parts. In Part I, I summarize the history of amicus participation and justifications for its use in technical areas of law like antitrust. Part II shows that in relying on amici, the Court acts like an agency—but not quite. This Part explains the similarities and important differences between the antitrust Supreme Court and a proper rulemaking agency, arguing that the Court's hybrid solution sacrifices some of the benefits of Article III's cases and controversies requirement while failing to fully realize the benefits of Administrative Procedure Act (APA) rulemaking. Part III provides two recent examples of Supreme Court rulemaking in antitrust: *Pacific Bell Telephone Co. v. Linkline*

8. 5 U.S.C. § 553 (2006).

9. See Calkins, *The Antitrust Conversation*, *supra* note 7, at 628–38 (highlighting the ways in which amici's arguments have advanced antitrust doctrine).

10. For the case for administrative antitrust decision making, see Crane, *supra* note 5, at 1212–14 (discussing three features of modern antitrust that make it particularly suited to technocracy).

*Communications, Inc.*¹¹ and *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*¹² In these cases, the Court made mistakes that were at least partially attributable to its reliance on amicus briefs for economics. Finally, in Section IV, I take up the idea that an agency should be endowed with norm-creation authority over antitrust policy. I argue that where amicus briefs fail, administrative procedures are more likely to succeed. Part V concludes.

I. The Court's Use of Amici in Technical Cases

The Court's heavy reliance on amicus briefs is by no means unique to antitrust; almost no case is briefed before it without some help from a "friend."¹³ And the influence of amici on Supreme Court decisions is significant.¹⁴ But a narrow reading of Article III's cases and controversies requirement would make this participation of amici impossible, since under that clause only parties with a justiciable dispute can petition a court for redress. How did amicus briefs come to their current prominence, and what do we know about their influence on the Justices?

A. *The Rise of the Amicus Brief in the Twentieth Century*

Article III limits the Supreme Court's jurisdiction to "cases" and "controversies."¹⁵ To effectuate this requirement, the Court has created the doctrines of standing, ripeness, mootness, and personal jurisdiction, to name only a few. But amicus participation has opened a constitutional back door to interested third parties who want to influence a judicial decision but lack standing or injury.¹⁶ Although the constitutionality of amicus briefs is uncontroversial,¹⁷ at times the Court has seemed ambivalent about their proper role.

11. 129 S. Ct. 1109 (2009).

12. 551 U.S. 877 (2007).

13. Ninety-five percent of cases filed before the Supreme Court between 1996 and 2003 included at least one amicus brief. Omari Scott Simmons, *Picking Friends from the Crowd: Amicus Participation as Political Symbolism*, 42 CONN. L. REV. 185, 193 (2009).

14. See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 828–30 (2000) (concluding that amicus briefs do have an impact on the Court, particularly when they come from major institutional litigants or the Solicitor General).

15. U.S. CONST. art. III, § 2.

16. See Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 AM. U. L. REV. 1243, 1280–82 (1992) (warning that expanded use of the amicus device allows would-be litigants to circumvent the standing requirements of Article III).

17. Some scholars have gone as far as to find a constitutional right to participate as amicus curiae. Professor Ruben J. Garcia locates the right in the First Amendment's prohibition on governmental interference with the "right of the people . . . to petition the government for a redress

In 1939, the Supreme Court crystallized procedures for filing amicus briefs in what is now United States Supreme Court Rule 37.¹⁸ It allowed amicus briefs to be filed with the consent of all parties, or when that was denied, the consent of the Court.¹⁹ Governmental representatives—state attorneys general and the Solicitor General—could file in any case.²⁰ In the decades after promulgating this rule, the Court was inundated by “propagandistic” briefs in cases involving the House Un-American Activities Committee and the Rosenbergs’ espionage trial.²¹ Although the Court did not materially alter the rules, it responded by adopting an “unwritten policy of denying virtually all motions for leave to file as amicus curiae” when the parties denied consent.²²

But again the Court changed its mind, and by the 1960s its attitude towards amicus participation was laissez-faire. Today, leave to file an amicus brief is granted as a matter of course. Formally, the rules have not changed—an amicus must get permission from either the parties or the Court to file a brief.²³ But since the Court’s “current practice in argued cases is to grant nearly all motions for leave to file as amicus curiae when consent is denied by a party,” in practice amici face an open door.²⁴ Thanks to this permissive attitude, at least in part, the number of amicus briefs filed at the Supreme Court rose 800% between 1946 and 1995.²⁵

The Court’s attitude towards third-party participation in suits loosely tracked its feelings about another affront to Article III: administrative agencies.²⁶ In 1937, the same year it codified rules about amicus participation, the Supreme Court upheld the constitutionality of the

of grievances.” Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. ST. U. L. REV. 315, 336–38 (2008) (quoting U.S. CONST. amend. I) (emphasis added).

18. SUP. CT. R. 27.9, 306 U.S. 687, 708–09 (1939) (repealed 1954); see also Kearney & Merrill, *supra* note 14, at 761 n.54 (chronicling the Supreme Court’s changes to the rules governing amicus briefs).

19. *Id.*

20. Kearney & Merrill, *supra* note 14, at 761–62.

21. See Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 709–11 (1963) (describing the increasing irritation with amicus participation building during the 1940s and reaching “an apex of notoriety and criticism” in the early 1950s, due in large part to lobbying from liberal groups in cases involving communism).

22. Kearney & Merrill, *supra* note 14, at 763.

23. SUP. CT. R. 37.3.

24. Kearney & Merrill, *supra* note 14, at 762; see also Ed R. Hayden & Kelly Fitzgerald Pate, *The Role of Amicus Briefs*, 70 ALA. LAW. 115, 118 (2009) (asserting that the U.S. Supreme Court has traditionally been open to amicus curiae briefing); Simmons, *supra* note 13, at 195–96 (commenting on the Supreme Court’s allowance of virtually unlimited amicus participation).

25. Kearney & Merrill, *supra* note 14, at 749.

26. Professor Samuel Krislov has traced the rise of amicus advocacy in part to the “emergence of administrative agencies.” Krislov, *supra* note 21, at 706. For a more recent observation along these lines, see Simmons, *supra* note 13, at 193.

National Labor Relations Act,²⁷ a statute that gave broad authority to an agency to adjudicate controversies. Described by one commentator as the Court's "large-scale retreat from policing the structural boundaries of congressional power," the opinion favored the nemesis of anti-New Dealers: the NLRB.²⁸ And just as the 1940s saw a clamping down on amicus briefs, so the '40s witnessed the reining in of agency power in the form of the Administrative Procedure Act.²⁹ Again the Court's attitude reversed, and today it places minimal limits on agency action and effectively none on amicus participation.

B. *How the Court Uses Amicus Briefs*

What accounts for the liberalizing of judicial attitudes towards amicus participation? The Court's increased interest in amicus argument coincided with the rise of legal realism,³⁰ which rejected the idea that judges discover law as a scientist discovers physical properties of the universe. As the Court began to imagine its role to be policy making, access to information about the effects of that policy became necessary to make rules responsive to social needs.³¹ In *Muller v. Oregon*,³² Louis Brandeis filed an amicus brief citing social scientific data about women in the workforce that proved influential on the Court.³³ The case challenged the constitutionality of limitations on work hours for women, and the Court found support in studies cited in Brandeis's brief indicating physiological differences in women that the law could take notice of without violating equal protection.³⁴

27. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937).

28. GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 192 (4th ed. 2007).

29. See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1678-79 (1996) (describing the APA as the result of years of conservative attempts to curtail the power of New Deal administrative agencies).

30. Simmons, *supra* note 13, at 194-95.

31. Perhaps this is why Justices Frankfurter and Black, the former preferring an early form of judicial minimalism and the latter more willing to "depart from a role of narrowly resolving adversary disputes," disagreed about the proper role for amicus briefs. Krislov, *supra* note 21, at 717. Samuel Krislov, writing in 1963, traced the rise of amicus advocacy in part to the "emergence of administrative agencies." *Id.* at 706. For further discussion of the Frankfurter-Black debate about amicus curiae, see Simmons, *supra* note 13, at 195.

32. 208 U.S. 412 (1908).

33. Brief for the State of Oregon, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107), 1908 WL 27605. Justice Brandeis's role in the litigation was ambiguous, since he appeared for the State of Oregon, believing that "the status of appearing as an official participant on behalf of the state seemed . . . an important element of strength for the defense." Krislov, *supra* note 21, at 708 (quoting LOWELL MASON, *THE LANGUAGE OF DISSENT* 248 (1959)). It was not until 1916 that Frankfurter observed that "Brandeis' role was essentially that of amicus curiae." *Id.* at 708.

34. See Garcia, *supra* note 17, at 340 n.150.

After Brandeis's success in *Muller*, amici increasingly filed briefs citing social science data in favor of a legal outcome.³⁵ These briefs became known as "Brandeis Briefs."³⁶ Perhaps the most famous use of social scientific data in Supreme Court policy making is the brief submitted by the NAACP in *Brown v. Board of Education*.³⁷ The brief cited a study as empirical support for the idea that school children were injured by segregation in terms of academic advancement and self-esteem. The Court used the brief and the study to bolster its opinion that was ostensibly based on purely legal interpretations of equal protection, a notion not traditionally thought to have foundations in social science.³⁸

The empirics of Brandeis Briefs suggest that the Court pays attention to amici because they provide good informational inputs for its policy choice. Indeed, legal scholars have confirmed this hypothesis. In their empirical study of amicus briefs before the Court, Professors Joseph Kearney and Thomas Merrill tested the influence of amici against three models of judicial behavior—the legal model, the attitudinal model, and the interest-group model.³⁹ The legal model suggests that judges are interested in getting the case right, and the authors hypothesized that a judge operating under the legal model "should be receptive to 'Brandeis Brief'-type information that sheds light on the wider social implications of the decision."⁴⁰ While their observations about the influence of amicus briefs on the Court suggested some support for the attitudinal and interest-group models, on the whole they interpreted their "results as providing the most support for the legal model."⁴¹

Anecdotal evidence for the informational value of amicus briefs abounds. Justice Breyer has been an outspoken advocate of the informational benefits of amicus participation in particularly complex areas of law and in questions that implicate technical or scientific issues.⁴² Surveys of

35. See Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. REV. 197, 203 (2000) (noting that the introduction of nonlegal material at the appellate stage "has been done since the early twentieth century, when Louis Brandeis submitted his brief in *Muller v. Oregon*").

36. *Id.* at 199 & n.12.

37. 347 U.S. 483 (1954).

38. See Margolis, *supra* note 14, at 230 (asserting that the Supreme Court relied on empirical studies that indicated segregation "generates a feeling of inferiority as to . . . status in the community that may affect . . . hearts and minds in a way unlikely ever to be undone" to support the decision in *Brown*).

39. Kearney & Merrill, *supra* note 12, at 748–49.

40. *Id.* at 778.

41. *Id.* at 816.

42. In a media interview, Justice Breyer said that amicus briefs containing technical information "play an important role in educating judges on potentially relevant technical matters, helping to make us not experts but educated lay persons and thereby helping to improve the quality of our

judges, Justices, and clerks confirm that among the most helpful “briefs are those filed in technical cases by industry experts having a familiarity with the specialized legal issues at stake.”⁴³ The more sensitive and complex the regulated system, the more help experts and professors can provide generalist judges. Systems like the environment and economic competition fall in this category.

But the informational model of amicus participation is not the only one with traction; amicus briefs can also signal to the Court the number and kind of supporters a rule has. And the courts do seem to be influenced by this aspect of amicus participation, lending support to the affected groups’ model of judging under the influence of amici.⁴⁴ Some judges are highly critical of this use of amici. Judge Richard Posner has repeatedly rejected motions for leave to file as amicus curiae, saying that the amicus brief should not be a vehicle for groups to signal their political preference to the court.⁴⁵ In one instance denying such a motion, he said, “Essentially, the proposed amicus briefs merely announce the ‘vote’ of the amici on the decision of the appeal. But, as I have been at pains to emphasize in contrasting the legislative and judicial processes, they have no vote.”⁴⁶ Judge Posner has also complained about another effect of using amicus briefs to register policy preferences: the irksome “me too” phenomenon that occurs when amici pile on briefs that do not introduce new information or arguments.⁴⁷

decisions.” *Justice Breyer Calls for Experts to Aid Courts in Complex Cases*, N.Y. TIMES, Feb. 17, 1998, at A17.

43. Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 41 (2004); see also Luther T. Munford, *When Does the Curiae Need an Amicus?*, 1 J. APP. PRAC. & PROCESS, 279, 281 & n.14 (1999) (observing that expertise can be a benefit offered by amici and giving an example from the New Mexico Supreme Court involving the apportionment of water rights).

44. For defenses of this political use of amicus participation, see Garcia, *supra* note 17, at 317 (“The amicus brief is a form of speech and petition, to which the courts should give due consideration.”), and Simmons, *supra* note 13, at 190 (“[T]he political symbolism of amicus curiae participation reassures the public . . . of the Court’s democratic character.”).

45. For a discussion of Judge Posner’s attitude towards amicus participation and his hostility’s influence on other federal judges, see Garcia, *supra* note 17, at 326–30.

46. *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003).

47. See *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (“The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants’ briefs, in effect merely extending the length of the litigant’s brief. Such amicus briefs should not be allowed. They are an abuse.”). Ostensibly, Supreme Court Rule 37 allows only amicus filings that “bring[] to the attention of the Court relevant matter not already brought to its attention by the parties [that] may be of considerable help to the Court.” But the trouble is getting someone to go through the briefs in order to determine whether it meets this standard, thereby defeating the time-saving aim of the rule. See Garcia, *supra* note 17, at 325. Professor Stephen Calkins takes a positive perspective on redundant amicus briefs, extolling their ability to provide “special emphasis” to an aspect of an antitrust case. Calkins, *The Antitrust Conversation*, *supra* note 7, at 638–43.

For better or worse, the Court does seem to be affected by signals of policy preferences from amici.⁴⁸ But Merrill and Kearney found that identity, not number, of a party's supporters had the strongest influence on the Court.⁴⁹ Unsurprisingly, Kearney and Merrill showed that among all amici, the Solicitor General had the strongest influence on the Court,⁵⁰ but states, the NAACP,⁵¹ and the ACLU⁵² all seemed to enjoy the Court's ear. And any amicus curiae can boost its credibility with the Court by taking a position contrary to its apparent interests or from teaming up with an odd bedfellow to file a brief jointly. When an amicus goes against the Court's expectation, it is harder for the Court to dismiss the amicus brief as self-interested lobbying.⁵³

II. When the Court Uses Amici for Economic Arguments, It Acts Like an Agency . . . Almost.

When the Supreme Court relies on amici for economic arguments in deciding an antitrust case, it acts like an agency soliciting comments on a proposed rulemaking.⁵⁴ Interested parties—but not parties to a concrete, litigable dispute—are asked to present evidence and arguments relevant to a policy issue. Both decision makers consider the information they receive and justify their ultimate decisions against criticisms leveled in the comments. Seen in this way, Supreme Court antitrust adjudication begins to look more like administrative notice-and-comment rulemaking than it does a judicial appeal.

48. See Garcia, *supra* note 17, at 340–41 (“Amicus briefs have played an important role in communicating the views of social movements to the courts in numerous cases.”).

49. See Kearney & Merrill, *supra* note 14, at 801, 811 (finding that while the total number of briefs on a side was not correlated with success, briefs filed by the Solicitor General and other institutional filers significantly affected outcomes).

50. *Id.* at 803–04. For a broader discussion of the Solicitor General's participation as amicus curiae, see Simmons, *supra* note 13, at 211–14.

51. Lynch, *supra* note 43, at 50 (reporting that 11% of Supreme Court clerks responding to the survey said that the NAACP's amicus briefs “always receive closer attention”). The NAACP's influence with the Court has been long-standing. The group filed an amicus brief as early as 1915 in *Guinn v. United States*, 238 U.S. 347 (1915).

52. *Id.* at 49 (reporting that 33% of Supreme Court clerks responding to survey said that they gave the ACLU's amicus briefs more consideration).

53. See Calkins, *The Antitrust Conversation*, *supra* note 7, at 628–31 (discussing examples of “an important antitrust repeat playing tak[ing] an unpredicted position”).

54. *Cf.* Garcia, *supra* note 17, at 338–40 (explaining that in cases involving administrative rules, amici briefs provide an opportunity for interested parties to comment on administrative rulemaking, and that amicus participation in statutory cases can perform a similar function in cases interpreting statutes).

A. Similarities

1. *The procedures are the same.*—Congress authorizes the Supreme Court to regulate competition by giving it the last word on what the Sherman Act means.⁵⁵ Thus, the Sherman Act is to the Supreme Court as an organic statute is to an administrative agency—both a mandate and a constraint. The Act’s language is broad and imprecise; it is a significant delegation of authority.⁵⁶ And since a dozen petitions for certiorari raising antitrust issues are filed each year⁵⁷ and the Court takes only one or two of these,⁵⁸ it has some discretion in setting its antitrust agenda, if not quite the unfettered discretion an agency enjoys in considering areas for rulemaking under § 553 of the APA.⁵⁹

The involvement of amici completes the metaphor. When the Supreme Court grants certiorari in an antitrust case, it announces its intention to allocate rights and resources under the broad mandate of the Sherman Act. This announcement is like an agency’s notice of proposed rulemaking (NPR), with an important difference. In both cases, the decision maker invites those who believe they have a stake in the outcome to present evidence supporting their side. But when the Court grants certiorari, it announces merely its intention to resolve a dispute, not its proposed resolution.⁶⁰ The imprecision of the certiorari-as-NPR metaphor may have important implications since parties commenting on a rule making may have more information about the agency’s regulatory inclination than an amicus does about the Court’s.

Despite the imperfect fit, the similarities between certiorari and NPR are striking: like the comment period, the time between grant of certiorari and close of briefing gives third parties an opportunity to weigh in much

55. See *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978) (explaining how Congress never intended to provide the full meaning of the Sherman Act but rather authorized the courts to give meaning to the statute by drawing on common law tradition).

56. See Arthur S. Miller, *Statutory Language and the Purposive Use of Ambiguity*, 42 VA. L. REV. 23, 23, 30 (1956) (explaining that Congress’s use of ambiguous statutory language is purposeful in order to delegate interpretation authority to the courts).

57. See Thomas G. Hungar & Ryan G. Koopmans, *Appellate Advocacy in Antitrust Cases: Lessons from the Supreme Court*, 23 ANTITRUST 53, 53 (2009) (“From September 2002 to October 2008, 94 petitions were filed that presented issues of antitrust law . . .”).

58. *Id.* (stating that out of 94 petitions concerning antitrust law issues, “the Court granted certiorari in only ten, a rate of less than 11 percent”).

59. See LAWSON, *supra* note 28, at 195–96 (describing the minimal restrictions on informal agency rulemaking under the APA).

60. In this way, the Court’s grant of certiorari is more like an agency’s announcement that a certain issue is on its agenda—these notices are published semi-annually in the *Unified Agenda of Federal Regulation*. Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 761–62 (1996).

like the comment period in an administrative rulemaking. Without amici, the Court would be limited to considering two perspectives on the proposed economic policy. But with the benefit of amici, the Court can consider sometimes dozens of different perspectives on the issue, in the same way that the comment period allows agencies the benefit of many opinions and arguments about a rule.

Once the amici have spoken and the briefing period ends, the Court hears oral argument, makes its decision, and writes an opinion explaining and justifying the new antitrust rule. The opinion resembles the statement of basis and purpose that an agency is obliged to publish after issuing a final rule.⁶¹ In fact, the drafters of the APA probably had judicial opinions in mind when they created the statement of basis and purpose requirement.⁶²

Unlike the Court writing an opinion, an agency is required by law to respond to major objections in its statement of basis and purpose.⁶³ But even without this hard requirement, the Court's antitrust opinions often address counterarguments from amicus briefs. One might expect the Court to cherry-pick from the amicus briefs the arguments and data most supportive of their opinion and discuss only counterarguments that appear in the parties' briefs. But in recent antitrust jurisprudence, the Court has spent *more* time discussing the amicus briefs on the losing side than on the winning side. This suggests that the Court feels an agency-like responsibility to consider all the perspectives before it.

2. *The players are the same.*—*Amicus curiae* means “friend of the court,” and indeed the original idea seemed to be that these third parties would be nonpartisan sources of information that might direct the court to the objectively correct decision.⁶⁴ That naïve view has given way to the realistic perspective—now taken for granted—that amici are more “friends of a party” than “friends of the court.”⁶⁵ Although in formal filings the

61. 5 U.S.C. § 553(c) (2006). For a discussion of the statement and purpose rule, see LAWSON, *supra* note 28, at 280–83.

62. See LAWSON, *supra* note 28, at 280 (comparing the statement and purpose rule to a judicial opinion).

63. Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 1023 (2009); see also, e.g., *Reyblatt v. U.S. NRC*, 105 F.3d 715, 722 (D.C. Cir. 1997) (“An agency need not address every comment, but it must respond in a reasoned manner to those that raise significant problems.”).

64. Stuart Banner, *The Myth of the Neutral Amicus: American Courts and Their Friends, 1790–1890*, 20 CONST. COMMENT. 111, 111 (2003). The term comes from Roman law, under which “the amicus, at the court’s discretion, provided information on areas of law beyond the expertise of the court.” Lowman, *supra* note 16, at 1248.

65. See Krislov, *supra* note 21, at 704 (“The Supreme Court of the United States makes no pretense of such disinterestedness on the part of ‘its friends.’ The amicus is treated as a potential litigant in future cases, as an ally of one of the parties, or as the representative of an interest not

amicus curiae moniker has remained, in opinion writing the Court has all but dropped the “curiae.” So when a Justice uses the now-popular phrase “respondents and their amici” he makes no bones about who is friends with whom.⁶⁶

This evolution from friends of the court to friends of the parties need not be a bad thing. As long as the potential biases of the amicus are clear, a Justice can take its arguments and evidence with a grain of salt.⁶⁷ This procedure of discounting the value of an argument by the bias of its author is, after all, inherent to the adversarial process.⁶⁸ The trouble, of course, is making the biases clear. If a party can hide self-interest behind the ostensible neutrality of a friend of the court, then a Justice will not perform the appropriate discounting. The Court probably had this problem in mind when, well after it lost its innocence about who were its “friends,” it amended the amicus curiae rules to require a disclosure statement at the beginning of any amicus brief stating the author’s interest and relationship to the parties.⁶⁹ Now judges and Justices simply assume that filing an amicus brief is a self-interested act.⁷⁰

otherwise represented.” (citation omitted)). Or, in the words of then-judge Samuel Alito, “an amicus who makes a strong but responsible presentation in support of a party can truly serve as the court’s friend.” *Neonatology Assocs., PA, v. Comm’r*, 293 F.3d 128, 131 (3d Cir. 2002).

66. See, e.g., *Bilski v. Kappos*, 130 S. Ct. 3218, 3248 (2010) (Stevens, J., concurring) (“[P]etitioners and their amici . . .”); *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3047 (2010) (“Municipal respondents and their amici . . .”).

67. This is perhaps the reason why some of the most powerful briefs in antitrust cases are those in which the author advocates a position apparently contradictory to its interests. For example, amici briefs of the United States, though always influential, take on a particular persuasiveness when they support an antitrust defendant in the Supreme Court. “Attention is drawn any time an important antitrust repeat player takes an unpredicted position. No court can lightly dismiss an amicus filing by the Antitrust Division, the FTC, or the states that recommends a resolution against their litigating interests.” Calkins, *The Antitrust Conversation*, *supra* note 7, at 628.

68. Rejecting Judge Posner’s criticism of partisan amicus briefs, then-Judge Alito wrote that bias among amici comports with “the fundamental assumption of our adversary system that strong (but fair) advocacy on behalf of opposing views promotes sound decision making.” *Neonatology Associates*, 293 F.3d at 131.

69. *Kearney & Merrill*, *supra* note 14, at 766. The Court amended its formal rules on amicus participation in 1997 to require each nongovernment-authored amicus brief to “indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and [] identify every person other than the *amicus curiae*, its members, or its counsel, who made such monetary contribution.” SUP. CT. R. 37.6.

70. See *Jaffee v. Redmond*, 518 U.S. 1, 35–36 (1995) (Scalia, J., dissenting) (“Not a single amicus brief was filed in support of petitioner. That is no surprise. There is no self-interested organization out there devoted to pursuit of the truth in the federal courts. The expectation is, however, that *this Court* will have that interest prominently—indeed, primarily—in mind.”). This attitude is widespread. See Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 700, 708–

The authors of notice-and-comment rulemaking probably never went through the naïve stage of believing that third-party comments might come from selfless experts whose only interest was in helping the agency get it “right.” In its 1947 *Manual on the Administrative Procedure Act*, the Department of Justice anticipated that comments would come from “interested persons.”⁷¹ So as the Court’s attitude towards amicus briefs has become more jaded, it has approached the typical agency’s view of comments made during informal rulemaking.

In the same way that courts do not decide an antitrust case by tallying up the amici on either side, comment collection during agency rulemaking is not the same as putting the rule to a vote—agencies must respond to material comments, but they need not be swayed by the fact that a majority of interested parties favor one outcome.⁷² In this way, both administrative rulemaking and judicial decision making are less political than legislative proceedings, even if we grant that comments and amicus briefs come from politically motivated parties.

B. Differences—the Court’s Hybrid Falls Short of Notice-and-Comment Rulemaking

The analogy between antitrust adjudication in the Supreme Court and agency rulemaking is imperfect in salient ways. First, amici’s arguments are constrained by the existence of named parties to the dispute. Second, the Supreme Court lacks the expertise that would allow an agency to parse theoretical economic arguments and interpret data critically. Third, Justices have no obligation to respond to amicus briefs—indeed they don’t even have to read them. Finally, and somewhat ironically, Supreme Court decisions are not subject to judicial review. These differences mean the Court’s rulemaking lacks both the informational benefits and the procedural protections of notice-and-comment rulemaking. If we think the APA has improved agency decision making, then we should be worried about ways in which Supreme Court antitrust policy making falls short of the APA’s requirements.

1. Fewer Perspectives.—In its simplest form, a legal dispute in our adversarial system is polar: two sides represent opposed interests and each

09 (2008) (reporting that the majority of surveyed federal court judges and Justices consider an amicus curiae’s financial relationship to a litigant when deciding whether to grant leave to file).

71. LAWSON, *supra* note 28, at 240.

72. See *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998) (affirming that agencies must respond to comments that are “relevant and significant”); *Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 122 n.17 (D.C. Cir. 1987) (clarifying that an agency is not obliged to issue rules that comply with the position adopted by the majority of comments).

seeks to win the case. This structure is thought to ensure vigorous representation of the interests at stake.⁷³ In the traditional domain of the common law, this structure makes sense. Rights relating to property, contract, and tort can be easily conceived of as resolving a struggle between two individuals with conflicting interests. But for creating large-scale public policy—where the interests at stake are myriad, complex, and technical—this dialectic structure of adjudication makes less sense.⁷⁴

Crafting a new antitrust rule is a complex optimization problem in which economic theory and data are used to maximize the undefined “welfare” of a class of people that includes literally everyone: “consumers.” But the parties to a Supreme Court antitrust case are usually only two, and often neither can credibly claim to represent the consumer.⁷⁵ Naturally, a party only presents economic theory or data if it furthers its own litigation strategy. This leaves a lot of economics out of parties’ briefs, either because it is too complicated to be effective in swaying the Justices (as opposed to more familiar modes of argument like parsing precedent or statutes) or because the data or theory support a third position that benefits neither side.

In theory, the use of amici can ameliorate this problem. They can present a third (and fourth and fifth) perspective on the dispute, even suggesting an outcome not advocated by either side. And filing an amicus curiae brief is a way for an expert with all the right information but without the legally protectable interest to present economic evidence. Concern about the lack of consumers’ representation and about inadequate efficiency arguments from the parties’ briefs probably accounts for some of the Court’s attention paid to amicus briefs.⁷⁶ And it certainly would explain the attention paid to the Solicitor General, whose briefs have the technical savvy and pro-consumer focus of the Department of Justice Antitrust Division. And since it is the Court’s practice to allow all amicus briefing, then the Court could, in theory, get the same variety of perspectives that an agency enjoys during the comment period.

73. See, e.g., *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (“The paramount importance of vigorous representation follows from the nature of our adversarial system of justice.”).

74. See John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 109 (2008) (“[T]he judicial process has trouble capturing the multiple perspectives that best map reality, because in some cases there may be more plausible positions than there are litigants.”).

75. Cf. Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 ANTITRUST L.J. 761, 771 (2005) (“The usual complainant about a sales practice is not a consumer, who generally has little to gain from even a successful proceeding, but a competitor of the seller who is employing the practice.”).

76. See *United States v. Barnett*, 376 U.S. 681, 738 (1964) (“This court has recognized the power of federal courts to appoint ‘amici to represent the public interest in the administration of justice.’” (quoting *Universal Oil Prods. Co. v. Root Ref. Co.*, 328 U.S. 575, 581 (1946))).

But the number of amicus briefs that the Court receives in a case is typically a fraction of the number of comments an agency receives during a rulemaking.⁷⁷ This observation has several possible explanations. First, although it is the Court's practice to give permission to all amicus participation, it is free to deny it. In contrast, an agency engaged in § 553 rulemaking must allow any interested party an opportunity to comment on the agency's proposed rule.⁷⁸ If the Court can refuse to accept an amicus brief (and in the early part of the New Deal, it was the Court's practice to *not* accept amicus briefs), some groups may fear being perceived by the Court as unqualified to argue before the court or as representing fringe interests and so will not invest in writing a brief.

Second, amicus argument must conform to the format of a legal brief and any additional requirements Rule 37 imposes.⁷⁹ This means that writing an amicus brief without a lawyer is taking an unadvisable risk that your submission will appear amateurish. Legal writing takes time, and a lawyer's time takes money, typically enough to dwarf the fee for filing an amicus brief with the court in the first place.⁸⁰ And the brief must be filed according to the Court's byzantine filing procedures.⁸¹ Details matter; even slight deviations from the conventional font, color, or weight of page can mean your brief is not read.⁸² In contrast, comments on a proposed rulemaking can take any form and are often made online.⁸³ Ironically, courts cite the openness of notice-and-comment rulemaking as a reason for greater judicial deference when a rule is challenged in court.⁸⁴

77. See Kearney & Merrill, *supra* note 14, at 754 (discussing the increase in the mean number of amicus briefs per case from about .50 in the late 1940s to 4.23 in the 1990s); Stuart Shapiro, *Presidents and Process: A Comparison of the Regulatory Process under the Clinton and Bush (43) Administrations*, 23 J.L. & POL. 393, 404–05 (2007) (comparing the number of comments federal agencies received on rules under both the Clinton and Bush administrations). For example, in a typical EPA case from the 1980s the agency received 192 comments raising 400 issues. RICHARD J. PIERCE ET AL., *ADMINISTRATIVE LAW & PROCESS* 329 (5th ed. 2009).

78. 5 U.S.C. § 553(c) (2006).

79. SUP. CT. R. 37.

80. And this cost is incurred even if the Court ultimately denies the party the right to file. "It is awkward, to say the least, to bill a client for a brief the court refuses to accept." Munford, *supra* note 43, at 282.

81. See SUP. CT. R. 37 (indicating various requirements for the filing of amicus curiae briefs).

82. See SUP. CT. R. 33 (listing specific color, font, and weight requirements for different types of documents submitted to the Court); see also Lynch, *supra* note 43, at 44 (reporting clerks' bias against amicus briefs with even minor variations from the Court's paper weight and font requirements).

83. STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS* 118–19 (2008).

84. See, e.g., *Nat'l Petroleum Refiners' Ass'n v. FTC*, 482 F.2d 672, 683 (D.C. Cir. 1973) (observing that rulemaking opens up agency policy making to a broader range of criticism and advice than adjudication); cf. also CROLEY, *supra* note 83, at 118 ("Formally[] at least, rulemaking is open and inclusive, and parties can participate on their own initiative and directly with the agency.").

Not only are the numbers of participants lower in Supreme Court adjudication than in agency rulemaking, but also the spectrum of ideas and opinions put before the Court is likely to be more limited. Although they are not required to declare their support for one of the parties in the case,⁸⁵ most amici filing with the Court, including the Solicitor General, do.⁸⁶ This is probably because amicus briefs are often solicited by one side of an anti-trust dispute. And, even if a lawyer prepares a brief without prompting from either side, he is trained to see disputes as having two sides.⁸⁷ Moreover, from a rhetorical perspective, preserving the appearance of a two-sided debate makes sense, since the record and briefs from the lower court proceedings frame the issues as binary.⁸⁸ Justices, themselves lawyers trained in dialectic argument, are likely to consider each argument as cutting one way or another.⁸⁹ A good lawyer is loath to be seen by the Court as complicating the issues. So even if amici represent diverse perspectives on a case, all filing parties on a given side have incentives to downplay differences of opinion in order to conform to the adversarial model of litigation.

Amicus briefs sometimes provide good economic arguments, but the Court must take them as it gets them.⁹⁰ In contrast, agency rulemaking can involve active investigation into an issue.⁹¹ Comments made during a rule-making can inform an agency's decision, but the agency is by no means limited to those comments as informational inputs. An agency can solicit

85. See SUP. CT. R. 37.2(a) (setting forth the filing requirements for amicus briefs but not explicitly requiring briefs to support one side or the other). In *Leegin*, two economists filing as amici refused to take sides. See Brief for William S. Comanor & Frederic M. Scherer as Amici Curiae Supporting Neither Party, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (No. 06-480), 2007 WL 173679; see also McGinnis & Mulaney, *supra* note 74, at 109 (“[T]he judiciary permits amicus briefs to represent positions different from those advanced by the plaintiff or defendant.”).

86. EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 740 (9th ed. 2007).

87. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 244 (2003) (observing that American lawyers are trained to argue for their clients rather than for the “best” overall resolution).

88. Professor Horowitz makes the broader point that “*amici* do not have the ability to shape the issues or the factual record . . . *amicus* participation so often begins on appeal, after the record is frozen.” DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 44 n.56 (1977).

89. See KAGAN, *supra* note 87, at 244.

90. Technically, the Court can request amicus participation, but it usually only uses this power to ask the Solicitor General to file a brief. See Garcia, *supra* note 17, at 323 (noting that federal courts have the power to request amicus briefs and that the Supreme Court regularly invites the Solicitor General to submit them).

91. See LAWSON, *supra* note 28, at 8–9 (explaining that agencies spend most of their time “analyzing, investigating, synthesizing, deliberating, planning, and studying”).

data and opinions through a notice of proposed inquiry.⁹² And it can conduct hearings, depose experts, or conduct its own studies on the structure of competition.⁹³ But the Court lacks these powers and gets only a limited opportunity to ask questions directly of the parties during oral argument. Amici (with the exception of the Solicitor General) cannot participate,⁹⁴ so the Court cannot ask clarifying questions about an amicus brief's technical economic arguments.

2. *Inexpert Court.*—The Supreme Court is comprised of generalist Justices without any particular training in industrial organization.⁹⁵ None of the current Justices has an economics degree, even at the undergraduate level. As in all areas of law that require technical savvy, they rely on the parties to present data and theory in easy-to-understand ways, which, even when done well, tend toward oversimplification. On the other hand, anti-trust economics may be presented at too high a level, leaving federal judges to despair in their ability to assimilate economic principles into their decisions.⁹⁶

92. The FCC frequently uses this means of gathering information, a precursor to a proposed rulemaking. *See, e.g.*, 47 U.S.C. § 1302(b) (mandating the Commission to initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans).

93. *See* RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 946 (5th ed. 2010) (explaining that administrative agencies are not significantly limited in their ability to consider various legislative facts).

94. ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE: FOR PRACTICE IN THE SUPREME COURT* (8th ed. 2002) (explaining that since 1980 efforts of private amici to participate in arguments have seldom been successful, while the Court is more liberal to the Solicitor General and representatives of states); *see also* FED. R. APP. P. 29 (allowing amici oral argument only with court approval).

95. Although the Court is comprised of generalists and any Justice can write an opinion about anything, often the Justices informally specialize in an area of law, either because of expertise or interest. This is not the case in the last ten years of antitrust jurisprudence. Of the three Justices who have written more than one opinion (majority, concurrence, or dissent) in a substantive antitrust case, no one stands out as having written a particularly large share. Justice Breyer has written three opinions. *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 129 S. Ct. 1109, 1123–25 (2008) (Breyer, J., concurring); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004). Justice Stevens has written four opinions. *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2010); *Credit Suisse*, 551 U.S. at 285–87 (Stevens, J., concurring); *Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006); *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 182–88 (2006) (Stevens, J., dissenting). And Justice Thomas has written three. *Credit Suisse*, 551 U.S. at 287–90 (Thomas, J., dissenting); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006).

96. *See Findings and Recommendations of the Antitrust Modernization Commission: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 7 (2007) (testimony of Jonathan R. Yarowsky, Vice Chair, Antitrust Modernization Commission), available at <http://judiciary.house.gov/hearings/printers/110th/35243.PDF> (observing that judges “were particularly daunted by the economics” in antitrust cases).

Agencies, on the other hand, can be staffed by experts with education, research, and experience that help them understand technical arguments affecting policy decisions.⁹⁷ Moreover, these qualifications mean that they can actually conduct studies themselves to answer scientific questions relevant to regulation.⁹⁸ Independent agencies have perhaps the most potential as scientifically sophisticated decision-making bodies, since they are more shielded from political flux than their executive counterparts.⁹⁹ But even executive agencies enjoy insulation from political whim since only the top-level officers rotate with a change in administration. And both executive and independent agencies have access to nonpartisan scientific perspectives through their use of advisory committees.¹⁰⁰ These committees are comprised of working scientists who are not formally employed by the government at all. This is not to say that an agency's scientific perspective is always nonpartisan; gone are the days of lauding agency staff as neutral technocrats without political preferences.¹⁰¹ But even if those administrators have partisan leanings they also have superior education in and exposure to their field than do judges.

3. *No Obligation to Read and Respond.*—An agency “must respond in a reasoned manner” to comments made on a proposed rule that “raise significant problems.”¹⁰² Although the meaning of “reasoned” and “significant” is the subject of much debate, it is clear that an agency has at least some duty to attend to arguments made during the comment period. Justices are under no such obligation to consider amici's arguments.

97. For a discussion of the relatively high quality of agency science, see Wendy E. Wagner, *The “Bad Science” Fiction: Reclaiming the Debate Over the Role of Science in Public Health and Environmental Regulation*, 66 LAW & CONTEMP. PROBS. 63, 73–79 (Autumn 2003).

98. For a discussion of how “consensus” of experts should be measured by agencies, see Adrian Vermeule, *The Parliament of the Experts*, 58 DUKE L.J. 2231 (2009).

99. See Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1114 (2000) (stating that independent agencies are independent of the political will of the Executive Branch). This justification for agency decision making has its roots in the progressive movement and the creation of the FTC, see *id.* at 1131–32 (noting that during the progressive era, expertise and independence were thought to “safeguard the commissions from partisan politics”), but it continues to have traction today. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3174 (2010) (observing “the constitutional legitimacy of a justification that rests agency independence upon the need for technical expertise”).

100. See 4 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 14:53, at 547 (3d ed. 2010) (describing the use of scientific committees which must be fairly balanced and represent divergent interests with regard to the subject matter).

101. For this antiquated view, see works by Joseph Eastman and James Landis excerpted in LAWSON, *supra* note 28, at 25. For the modern understanding that agency decisions are influenced by specific industry interests instead of concern for public wellbeing, see Rachel Barkow, *Insulating Agencies: Avoiding Capture through Institutional Design*, 89 TEXAS L. REV. 15, 21–24 (2010).

102. *Reyblatt v. U.S. NRC*, 105 F.3d 715, 722 (D.C. Cir. 1997).

Whether and how carefully Justices even read amicus briefs varies greatly by Justice, as does the extent to which clerks are expected to inform a Justice about amicus arguments.¹⁰³ Unlike the parties' briefs, at least some amicus briefs probably do not get read at all.¹⁰⁴

Again, the lack of oral argument hurts third parties' ability to influence the Court. If the Court has not read an amicus brief, then at least oral argument could be an opportunity for its author to present its arguments. But the convention against allowing third parties to participate in oral argument¹⁰⁵ means that unless the parties' advocates choose to bring up the content of an amicus brief, it is a dead letter. And even if the Justices have read an amicus brief, they cannot ask questions about the often highly technical arguments directly to its author. Instead, the parties' lawyers have to become fluent in their amici's science, which is difficult given the time constraints on a noneconomist lawyer preparing for oral argument.

Even though Justices writing antitrust opinions seem to feel some obligation to respond to counterarguments in amicus briefs, they are not strictly obligated to do so. There are no requirements about what a judicial opinion must say, but a statement of basis and purpose must meet certain requirements designed to facilitate judicial review.¹⁰⁶ While a Justice will only address a counterargument from an amicus brief if he feels it rhetorically strengthens the opinion, an agency must thoroughly respond to dissenters. The level of detail required of these ostensibly "concise and general" statements has multiplied with the evolution of the "arbitrary and capricious" to become a "searching and careful" standard.¹⁰⁷ A typical statement of basis and purpose can be as long as 1,600 pages,¹⁰⁸ while the typical Supreme Court opinion is shorter by two orders of magnitude.

103. See Lynch, *supra* note 43, at 43–45 (describing the process by which Supreme Court clerks review amicus briefs).

104. Justice Ginsburg has said "that her clerks often divide the amicus briefs into three piles: those that should be skipped entirely, those that should be skimmed, and those that should be read in full." Simard, *supra* note 70, at 688.

105. See FED. R. APP. P. 29 (allowing amici oral argument only with court approval); Abramowicz & Colby, *supra* note 63, at 992 ("[T]hird parties generally cannot participate in oral argument.").

106. See Dominique Custos, *The Rulemaking Power of Independent Regulatory Agencies*, 54 AM. J. COMP. L. 615, 625 (2006) ("The exigencies judicially imposed on the writing of the statement of a rule by an American IRA seem to be unparalleled."); Strauss, *supra* note 60, at 757 ("[An] agency would be well advised to write its statement of basis and purpose in a manner clearly demonstrating the factual basis for and reasonableness of its judgments, and that it had taken a 'hard look' at any matters that had proved controversial.").

107. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

108. PIERCE ET AL., *supra* note 77, at 329; see also Strauss, *supra* note 60, at 760.

4. *No Judicial Review.*—When the Supreme Court makes antitrust policy, its decision is final in a way that an agency's is not. When an agency regulates, the substance of the rule and the procedures for making it can be challenged in a suit. To be sure, agency decisions are not subject to judicial review as a matter of course. Someone with standing must bring suit in court alleging that the rule or the process to create it was illegal. In this sense, judicial review is ad hoc.¹⁰⁹ But even if administrators cannot know for sure that their rule will be challenged, the possibility of a suit likely influences rulemaking. “[A]gency decisionmaking inevitably takes place in the shadow of judicial review.”¹¹⁰

But nobody has power to review a Supreme Court's decision—at least formally. Informally, Congress can override a bad Supreme Court rule in a nonconstitutional context, such as interpretations of the Sherman Act, by passing a bill that contradicts the decision's effect. In practice, Congress rarely abrogates a Supreme Court Sherman Act decision, either because of the high political costs of doing so or simple inertia.¹¹¹

Apart from concerns about separation of powers, there is a very practical reason why we might want a second pair of eyes on the Court's antitrust decisions. In a typical Supreme Court case, the Justices are at least the second (and usually the third) body to consider the evidence behind a decision. But because of the unusual amount of economic theory and data that is presented for the first time in Supreme Court amicus briefs, the Court is often the first—and the last—body to review it. Often the amici's economics were not presented at trial, where it would have been subject to the rigors of *Daubert*.¹¹² And often the economic arguments presented to the Supreme Court by amici did not appear even at the court of appeals level.¹¹³

109. CROLEY, *supra* note 83, at 99.

110. *Id.*

111. Lance McMillan, *The Proper Role of Courts: The Mistakes of Leegin*, 2008 WIS. L. REV. 405, 457 n.246 (“[L]egislative inertia often makes it difficult to overrule even unpopular decisions.”). *But see* 15 U.S.C. § 45(a) (overruling the Supreme Court's decision in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951)).

112. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993); Garcia, *supra* note 17, at 352–55; *cf. Simmons*, *supra* note 13, at 190 n.12 (“[E]vidence and arguments presented in amicus briefs . . . have not been challenged through the litigation process and are not subject to the same evidentiary safeguards as the parties' briefs.”).

113. The D.C. Circuit criticized the Court's willingness to attend to an amicus's Johnny-come-lately arguments, albeit in the administrative law context:

I recognize that the Supreme Court has moved pretty far from traditional notions of judicial restraint that confine courts to issues presented by the parties, but I think this decision represents another large step in that regrettable process insofar as it was an *amicus*—an *amicus* who had not appeared until the case reached the Supreme Court—who made the dispositive argument, one which was never once made before us.

Akins v. FEC, 146 F.3d 1049, 1050 (D.C. Cir. 1998) (citation omitted).

One might hope the inexpert Court's best understanding of economic theory would get at least a proofread.

Judicial review of agency action can be quite searching and substantive. Courts invalidate rules and decisions because the agency did not consider relevant facts or alternative regulatory outcomes.¹¹⁴ To a reviewing court, red flags may include an abrupt change in policy in response to political pressure, or asymmetrical attention to various represented interests. Professor Steven Croley argues that these filters serve the commendable purpose of impeding "easy agency delivery of regulatory rents."¹¹⁵ Besides thwarting rent seeking, judicial review can catch scientific errors.¹¹⁶

C. *Relying on Amici Sacrifices the Benefits of the Justiciability Doctrine*

The Court's reliance on amici in antitrust adjudication is a trade-off. On the one hand, it allows the Court to consider more and better economic arguments than it could without amicus participation, even if it falls short of what an agency can do. On the other hand, it may sacrifice some of the epistemological benefits of the legal approach to decision making. The sacrifice is probably worth it; at least one scholar is emphatic that, at least in antitrust cases, the Court is better off with amici than without them.¹¹⁷ But even if the current hybrid is an improvement upon a pure Article III model of judicial decision making, the hybrid has problems. A complete picture of those problems involves understanding not only how the hybrid falls short of agency decision making but also how it sacrifices the benefits of strict adherence to standing requirements.

Article III of the Constitution confers jurisdiction on federal courts only when they are presented with a live case or controversy.¹¹⁸ This requirement prevents courts from resolving disputes between nonadverse parties or parties without a tangible stake in the outcome and disputes involving merely speculative injury. In the antitrust context, the Court has further narrowed standing with its notion of "antitrust injury"—a stricter,

114. CROLEY, *supra* note 83, at 100.

115. *Id.*

116. See Wagner, *supra* note 97, at 81 ("Courts . . . provide valuable oversight of the quality of agency science through their review of rulemakings and by ensuring that interested parties have an opportunity to comment on proposed regulations.").

117. See Calkins, *The Antitrust Conversation*, *supra* note 7, at 658 ("The antitrust law that we know and apply is almost certainly richer and different because of the active participation of amici.").

118. U.S. CONST. art. III, § 2.

more specific requirement of harm than would satisfy constitutional limitations on standing.¹¹⁹

Limitations on justiciability serve both epistemological and political ends. First, they ensure that the legal rule is derived from a complete factual record of actually conflicting interests.¹²⁰ With this concrete factual context, a court can see the real-world effects of a statute or a rule and so better determine whether it is legitimate or efficient. Justiciability requirements also promote separation of powers.¹²¹ Without a concrete factual context, the Court would have to engage in speculation about the effect of rules on interested parties, a role that more comfortably suits the politically responsive branches of government.

The requirements of standing—*injury*, *ripeness*, and *mootness*—are, of course, not imposed on *amici*.¹²² A party with an interest in the dispute that falls short of the *injury* necessary to confer antitrust standing can get the Court's attention by filing an *amicus* brief. In the context of interpreting the Sherman Act, it makes sense for the Court to broaden the inputs to its decision. The Act delegates authority to make broad economic policy to the Court, and so the Court understandably seeks out the input of those affected by regulation when they regulate. But it is important to consider what is lost when the Court chooses to move away from the adjudicative model.

Without being able to ask of an *amicus* "what's it to you?,"¹²³ the Court may not be able to discount *amici*'s economic arguments according to how closely they serve their author's self-interest. It is true that the disclosure statement and the convention of declaring support for one side or the other give the Justices a hint as to a party's interest in a suit. But without a cognizable legal interest at stake, an *amicus*'s bias may not be clear even from these disclosures.

This is especially true in the context of *amici* such as antitrust and economics professors.¹²⁴ The impulse of an academic to file an *amicus*

119. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990). This higher bar for antitrust standing comes from the remedial provision of the Clayton Act. *See Ill. Brick Co. v. Illinois*, 431 U.S. 720, 728–29 (1977) (holding that a pass-on theory could not be used offensively by indirect purchasers).

120. Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEXAS L. REV. 73, 77 (2007).

121. *See, e.g., Antonin Scalia, The Doctrine of Standing as an Essential Element of Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983) (arguing that standing doctrine is an "inseparable element" of the principle of separation of powers "whose disregard will inevitably produce—as it has during the past few decades—an overjudicialization of the process of self-governance").

122. 15 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 101.60(12) (Daniel R. Coquillette et al. eds., 3d ed. 2007).

123. Scalia, *supra* note 122, at 882.

124. *See, e.g., Brief of Amici Curiae Professors and Scholars in Law and Economics in Support of the Petitioners, Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 129 S. Ct. 1109 (2009) (No. 07-

brief with the Court has many potential sources. It might be an opportunity to raise one's scholarly profile or build one's resume for consulting jobs. It could be a political preference, the return of a favor, or an act of collegiality. It might fulfill the professor's desire to see his scholarly position vindicated by a Supreme Court opinion that adopts it. It might even be an altruistic desire for the law to "get it right," as unlikely as this appears to cynics. For the most part, scholars have little to lose by filing an amicus brief, and this should worry the Court about its epistemological value.

Perhaps even more problematic, however, are situations in which the motivations of the amicus are all too clear. Many amici are firms with equivalent financial interests as the party. For example, when the Supreme Court declared that Verizon had no antitrust duty to deal with its competitors,¹²⁵ the decision impacted AT&T nearly as much as Verizon, since all incumbent LLCs as the firms had equivalent financial interests. So the two firms (and their successors in interest) took turns as parties and amici in the telecom antitrust cases of the 2000s. Verizon was a party in *Trinko*¹²⁶ and *Twombly*¹²⁷ and amicus curiae in support of AT&T in *LinkLine*.¹²⁸ AT&T was a party in *Twombly* and *Linkline* and amicus curiae in support of Verizon in *Trinko*.¹²⁹

Just because a firm has similar interests as a party and as an amicus does not mean that it presents the same arguments in both roles. Allowing a firm to argue through an amicus brief effectively reduces the cost of litigation for that party, altering its cost-benefit analysis when it decides between aggressive or conservative arguments. An amicus curiae who is not legally bound to pay treble damages to the plaintiff is naturally more inclined to take risks in its argument.¹³⁰ Nor is an amicus bound by the judgment under *res judicata* (absent privity).¹³¹ For example, an amicus might be willing to

512), 2007 WL 4132899; Brief of Amici Curiae Law Professors in Support of Respondent, Nynex Corp. v. Discon, Inc., 525 U.S. 128 (1998) (No. 96-1570), 1998 WL 331176.

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

126. *Id.*

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

128. Brief for Verizon Communications, Inc. & National Association of Manufacturers as Amici Curiae Supporting Petitioners, *Linkline*, 129 S. Ct. 1109 (No. 07-512), 2008 WL 4154538.

129. Brief of AT&T Corp., Cavalier Telephone, and Competitive Telecommunications Association as Amici Curiae in Support of Respondent, Verizon, 540 U.S. at 398 (No. 02-682), 2003 WL 21767975.

130. Professor Krislov observed that "[a]rguments that might anger the Justices, doctrines that have not yet been found legally acceptable, and emotive presentations that have little legal standing can best be utilized in most instances by the amicus rather than by the principals." Krislov, *supra* note 21, at 712; *see also* Simmons, *supra* note 13, at 228 (discussing the use of risky emotive argumentation in amicus briefs).

131. Lowman, *supra* note 16, at 1260-61.

ask the Court to change the law,¹³² but a party, faced with the threat of treble damages, may find that strategy intolerably risky. A party's tactic is likely to be more conservative, arguing for a narrow reading of precedent or for dismissal on a jurisdictional ground.

The Court benefits from amici's risk taking. If the Sherman Act's imperative is to optimize economic efficiency, then the Court should want to encourage arguments about what behavior encourages competition. But usually this kind of argument amounts to a request for a change in law. Lower risk litigation strategies include applying or distinguishing precedent or arguing for a flaw in the Court's jurisdiction. Not surprisingly, the parties emphasize these arguments, sometimes at the expense of more general economic-efficiency arguments. But amici seem more comfortable focusing on economic policy in their briefs, and so the Court benefits from them not being as invested in the outcome as the party. But this very detachment should raise concerns as well. As the Court moves away from a traditionally adjudicative process, it sacrifices something of epistemological value: arguments obtained only from firms forced to put their money where their mouth is.

III. The Court's Recent Mistakes in Antitrust

The Supreme Court's reliance on amicus briefs for economics leads them to make two kinds of mistakes. The first is substantive: because the Justices misunderstand economic theory and data, they sometimes make errors in their economic analysis. The second is procedural: without the right mechanisms for gathering information, the Court sometimes makes decisions without considering all the relevant data.

Two recent Supreme Court cases illustrate these two kinds of errors. In each case, the Court was asked to reconsider long-standing interpretations of the Sherman Act's proscriptions. Each decision required the Court to engage broad questions of economic policy and to estimate the efficiencies of the old rule. In both, the Court depended on amici to guide its theoretical economic analysis and to provide a solid empirical foundation for its decision. In both *Linkline* and *Leegin*, the amici's performance of these tasks left something to be desired.

A. *Linkline*

In *Linkline*, the Supreme Court all but foreclosed Sherman Act liability for "price squeezes," a basis of liability in *Alcoa*,¹³³ one of the most famous

132. For example, the amici in *Leegin* openly asked the Court to overrule a century-old precedent. See *infra* subpart III(B).

133. *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

American antitrust cases of the twentieth century. A price squeeze occurs when a vertically integrated firm, selling both wholesale inputs for manufacturing a product and the finished product itself, seeks to eliminate a rival who also manufactures the product.¹³⁴ If the rival relies on buying inputs from the integrated firm, then the integrated firm can “squeeze” its competitor out of the finished product market by raising the input price it charges the rival and lowering the finished product price it charges to the consumer.¹³⁵ The integrated firm adjusts these prices until the rival manufacturer cannot afford to buy the inputs, manufacture the product, and match the integrated firm’s low retail price.¹³⁶ The rival will (eventually) go out of business, and with the rival manufacturer out of the picture, the integrated firm can raise prices for the finished product and reap monopoly profits.¹³⁷

Linkline, a provider of retail DSL service, alleged that AT&T offered them DSL transmission service (an input for retail DSL) at a price too high to allow Linkline to compete with AT&T’s retail DSL prices to consumers.¹³⁸ Linkline could not obtain the transmission service from someone else at a lower price because AT&T controls “the ‘last mile’—the lines that connect homes and businesses to the telephone network.”¹³⁹ The Federal Communications Commission, presumably in an effort to subvert AT&T’s natural monopoly, required AT&T to “provide wholesale ‘DSL transport’ service to independent firms” as a condition to a recent merger.¹⁴⁰

The Supreme Court reasoned that a price squeeze was actually two allegations in one. First, Linkline was arguing that AT&T had an “antitrust duty to deal” with it in the DSL transmission service market, for if AT&T had a right not to deal at all with Linkline, surely Linkline could not complain about the terms of the dealing.¹⁴¹ Second, the Court said, Linkline accused AT&T of predatory pricing, for the only way low prices to consumers can amount to monopolization under the Sherman Act is in the context of predatory pricing.¹⁴² The Court analyzed these claims one at a

134. 3B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 141 (3d ed. 2008); Erik N. Hovenkamp & Herbert Hovencamp, *The Viability of Antitrust Price Squeeze Claims*, 51 ARIZ. L. REV. 273, 273 (2009).

135. AREEDA & HOVENKAMP, *supra* note 135, at 141.

136. *Id.*

137. *Id.*; see Hovenkamp & Hovencamp, *supra* note 135, at 274 (describing the traditional model of a “price squeeze” considered by Judge Learned Hand in *Alcoa*, which focused in part on the fact that Alcoa’s pricing would drive its manufacturing rivals out of business).

138. *Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc.*, 129 S. Ct. 1109, 1115 (2009).

139. *Id.*

140. *Id.*

141. *Id.* at 1115–16.

142. *Id.* at 1116.

time as “component[s]”¹⁴³ of Linkline’s claim. As for the allegedly “too-high” wholesale price, the Court’s opinion in *Trinko* made clear that an incumbent telecom company, already regulated by the FCC, has no antitrust duty to deal with competitor telecom providers.¹⁴⁴ And, as for the allegedly “too-low” prices that AT&T was charging to its retail DSL customers, because Linkline did not allege the elements necessary to state a predatory pricing claim under *Brooke Group*,¹⁴⁵ there could be no liability for the low retail prices.¹⁴⁶

The *Linkline* Court’s two-component conception of a price squeeze is incoherent. To begin with, the Court was unclear about the relationship between the two components. If a price squeeze plaintiff needs to prove both a duty to deal at the wholesale level and predatory pricing at the retail level, then the Court should have clarified that there is no such thing as a price squeeze under the Sherman Act—that is just what a competitor feels when a monopolizer does two anticompetitive things at the same time.

Instead, the Court articulated its holding thus: “[No] price-squeeze claim may be brought under § 2 of the Sherman Act when the defendant is under no antitrust obligation to sell the inputs to the plaintiff in the first place.”¹⁴⁷ So what happens when a defendant *does* have an antitrust duty to deal with the plaintiff, as the court found in *Aspen*,¹⁴⁸ its seminal duty-to-deal case? Although the *Linkline* Court suggested that the answer had to do with below-cost pricing, an economic analysis of the question reveals that the answer should have nothing to do with predatory pricing. The discussion of *Brooke Group* in the context of price squeezes is a non sequitur.¹⁴⁹

If there is a duty to deal, the integrated firm can squeeze its retail rival without below-cost pricing, but how it does so depends on whether the market for the finished product operates according to Bertrand or Cournot

143. *Id.* at 1119.

144. *Id.*; *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 410 (2004).

145. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

146. Predatory pricing claims brought under § 2 of the Sherman Act must meet two requirements. First, the plaintiff must prove that its rival’s prices are set “below an appropriate measure of its rival’s costs.” *Id.* at 222. Second, the plaintiff must show that the predator had “a dangerous probability” of recovering the losses incurred from selling at a below-market price. *Id.* at 224. The Court in *Linkline* found that the complaint contained “no allegation that AT&T’s conduct met either of the *Brooke Group* requirements.” *Linkline*, 129 S. Ct. at 1120.

147. *Linkline*, 129 S. Ct. at 1115.

148. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

149. See Sandeep Vaheesan, *Pacific Bell v. LinkLine: Price Squeezing and the Limits of Judicial Administrability*, 4 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 129, 135 (2008) (providing an example of a lower court confusing the similar but distinct concepts of price squeezing and predatory pricing).

competition. If in the hourglass market the firms compete on price (Bertrand), then the integrated firm can squeeze his rival by charging anything above cost for the inputs. To see this, suppose Firm A has a monopoly over the supply of sand, one of the inputs for its other business: manufacturing hourglasses. A's cost of harvesting the sand is \$1 per hourglass. It uses some sand to make its own hourglasses (it sells the sand to itself for \$1) and sells some sand to a rival hourglass manufacturer, Firm B. If A sells sand to B at the monopoly price, say \$3 per hourglass, and if both firms are equally efficient (they have the same average cost of making an hourglass), A will drive B out of business. In Bertrand competition, both firms will drop their price to marginal cost. With a lower cost for the input, A will be able to drop its retail price lower than B can, and B will be squeezed between a high input price and a low retail price and have to exit.

If firms in the hourglass market compete by setting quantity (Cournot), A might have to take an extra step to squeeze B, but still it need not drop its product below any measure of cost.¹⁵⁰ Say that A can price its hourglasses above cost; perhaps the Cournot oligopoly price is \$6. Again, the firms are equally efficient at manufacturing hourglasses—it costs them each \$2 to make the finished product. The integrated firm makes a profit of \$3 on each hourglass it sells (total cost = \$1 + \$2, revenue = \$6). A can charge B the monopoly price for sand (\$3) and still not put B out of business because B can turn a profit on its finished hourglasses, although that profit will be smaller than A's (\$1 instead of \$3).

A will not be happy with the status quo because, with B around, the Cournot oligopoly price is lower and A's market share is smaller. It will want to drive B out by lowering its retail price, temporarily, to \$4, which is still above A's cost. Since B's costs are \$5 per hourglass, it cannot profitably compete with A's \$4 price, and it will go out of business. After B ceases to exist, A can raise its prices again to something more than \$6.

A simpler way of saying the above is to say that if a firm has a duty to deal with another firm, it must have a duty to deal on terms that allow the rival to stay in business, or the duty has no meaning at all.¹⁵¹ So if the Court had found AT&T obligated to deal with Linkline, it would have had

150. A similar result would obtain if above-cost profits in the retail industry existed not because of a Cournot monopoly, but because the products were differentiated. Dennis W. Carlton, *Should "Price Squeeze" Be a Recognized Form of Anticompetitive Conduct?*, 4 J. COMPETITION L. & ECON. 271, 275–76 (2008).

151. Cf. Gregory J. Werden, *Remedies for Exclusionary Conduct Should Protect and Preserve the Competitive Process*, 76 ANTITRUST L.J. 65, 76 (2009) (describing the pervasive and continuing duties a court or regulatory agency would have to take on in order to maintain an effective duty to deal that actually preserves competition).

to set the wholesale price of DSL transport service (and perhaps even the retail price of DSL!) such that the gap between wholesale and retail prices covered Linkline's costs. This calculation would have nothing to do with *Brooke Group's* below-cost pricing or recoupment.¹⁵² Treating a price-squeeze claim as a "step-one, step-two claim," while simple for a judge to understand, misunderstands the economics of squeezes.

The Court's mistake was overzealous analogical reasoning,¹⁵³ perhaps a forgivable mistake for Justices who trade in analogy, not economics. For half of the analysis, the analogical technique worked. The Court was quite right to note that if the integrated firm could refuse to deal with its downstream rival altogether, and thus put it out of business, then the downstream rival cannot complain about a squeeze.¹⁵⁴ In this sense, a price-squeeze claim is "like" a duty-to-deal claim.¹⁵⁵ But analogy gets the Court in trouble later, when it reasons that any claim alleging low retail prices as part of an anticompetitive scheme must be "like" predatory pricing and so must meet the requirements of *Brooke Group*.¹⁵⁶ The analogy is tempting—a price squeeze resembles predatory pricing in that the monopolist sacrifices profits temporarily in order to harm a competitor and then recoups those losses (and then some) after the competitor fails and the monopolist can raise prices. But the structure of a squeeze is more complicated, rendering *Brooke Group* inapposite.

The author of the mistaken two-component conception of squeeze claims was Judge Gould, dissenting from the Ninth Circuit opinion below.¹⁵⁷ He suggested that "the notion of a 'price squeeze' is itself in a squeeze between two recent Supreme Court precedents," *Trinko* and *Brooke Group*.¹⁵⁸ This image—snappy and vivid—resonated with the Court because it appealed to analogical and precedential reasoning, the domain of legal thought.

152. To put the point yet another way: "In adjudicating predatory pricing claims, courts look to whether the *defendant* priced its product below its *own* costs. Courts deciding price squeeze claims, however, consider whether the defendant's pricing conduct reduced or eliminated the *plaintiff's* profit margins." Vaheesan, *supra* note 150, at 140.

153. For a discussion of the importance of analogy in granting certiorari to antitrust issues, see Hungar & Koopmans, *supra* note 57, at 55 (discussing analogies between *Weyerhaeuser* and *Brooke Group*, *Linkline*, and *Trinko*).

154. *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 129 S. Ct. 1109, 1119 (2009); see Carlton, *supra* note 151, at 276–77 (explaining the impact of a price squeeze when a duty to deal is, or is not, present).

155. See *Linkline*, 129 S. Ct. at 1119 ("If AT&T had simply stopped providing DSL transport service to the plaintiffs, it would not have run afoul of the Sherman Act.").

156. *Id.* at 1116.

157. *Linkline Commc'ns, Inc. v. SBC Cal., Inc.*, 503 F.3d 876, 885–88 (9th Cir. 2007) (Gould, J., dissenting).

158. *Id.* at 886.

Judge Gould's quip also led to another mistake that only made it harder for the Supreme Court to reject the analogy of squeeze as predatory pricing. Because the plaintiffs believed their claim *could* meet the requirements of *Brooke Group*, they made an unusual tactical decision when AT&T petitioned the Supreme Court for certiorari. Linkline conceded Judge Gould's point, and said it could, in fact, plead its case according to *Brooke Group's* requirements.¹⁵⁹ Now, Linkline argued, the parties were not adverse, the case was moot, and certiorari was inappropriate.¹⁶⁰ The Court rejected Linkline's claim of mootness,¹⁶¹ but its attention had been drawn to the idea that *Brooke Group* might apply to squeeze cases, since even the plaintiff concedes so!

Judge Gould's dissent might not have gained traction with the Court were it not for the participation of amicus curiae at the certiorari and merits stages of the Supreme Court case. Judge Gould and Linkline may have initiated the wrong turn in the analysis, but the amici guided the court further down the mistaken path. Amici for AT&T pressed the price-squeeze-as-predatory-pricing analogy in their briefs, even though AT&T itself did not mention it, nor did it argue for *Brooke Group* analysis of squeezes. In both of its amicus briefs, Verizon argued that plaintiffs could not succeed on their squeeze theory without showing below-cost pricing for AT&T's retail DSL service.¹⁶² Likewise, the Washington Legal Foundation and Abbott Laboratories, as amici for AT&T, each pressed the application of *Brooke Group* to the plaintiff's claim.¹⁶³ Perhaps most devastatingly, the United States organized its amicus brief in favor of AT&T around the "two component" structure of price squeezes that the Court ultimately adopted in organizing its analysis.¹⁶⁴

The Court does not directly cite amici for its two-component conception of price squeezes, but there is ample evidence that the Court (or

159. See Brief for Respondents at 13, *Linkline*, 129 S. Ct. 1109 (No. 07-512), 2008 WL 4606588 (stating that the price-squeeze claim only survives if it can satisfy the requirements of *Brooke Group*).

160. See Brief in Opposition at 2-4, *Linkline*, 129 S. Ct. 1109 (No. 07-512) 2007 WL 4458899 (arguing that a grant of certiorari is inappropriate because the Court has already established controlling precedent and a circuit split does not exist).

161. *Linkline*, 129 S. Ct. at 1117.

162. Brief for Verizon Communications Inc. & National Association of Manufacturers as Amici Curiae Supporting Petitioners, *supra* note 129, at 15-16, 22.

163. Brief for Abbott Laboratories as Amicus Curiae in Support of Petitioners at 9-13, *Linkline*, 129 S. Ct. 1109 (No. 07-512), 2008 WL 4154537; Brief of Washington Legal Foundation as Amicus Curiae in Support of Petitioners at 5, *Linkline*, 129 S. Ct. 1109 (No. 07-512), 2008 WL 4154539 (arguing that plaintiffs must show predatory pricing under the test provided by *Brooke Group*).

164. Brief for United States as Amicus Curiae Supporting Petitioners at 15-18, *Linkline*, 129 S. Ct. 1109 (No. 07-512), 2008 WL 4125498.

its clerks) read the amicus briefs carefully. The opinion's section on mootness responded directly to COMPTTEL's amicus brief, quoting from it twice.¹⁶⁵ The Court considered and rejected an alternative to the two-pronged inquiry, the "transfer price test," crediting the American Antitrust Institute's and COMPTTEL's amicus briefs for the notion.¹⁶⁶ Likewise, the Court considered and rejected AAI's argument that squeezes "raise entry barriers that fortify the upstream monopolist's position."¹⁶⁷ Additionally, the final opinion bears such striking similarity to the brief for the United States that it is implausible that the Court did not carefully read and consider the Solicitor General's position. And, of all the briefs filed in the case, the Solicitor General's was the most emphatic about the application of *Brooke Group* to price-squeeze claims.

B. *Leegin*

In *Leegin*,¹⁶⁸ the Court overturned *Dr. Miles*,¹⁶⁹ a century-old case that declared resale price maintenance to be illegal per se under the Sherman Act.¹⁷⁰ Resale price maintenance (RPM) occurs when a wholesaler and a retail distributor agree on the minimum price the retailer will charge for the wholesaler's product.¹⁷¹ Under the Court's 1911 decision in *Dr. Miles*, RPM was always illegal—if the plaintiff could show such an agreement was in place, he automatically prevailed even if the defendant could offer a pro-competitive justification for the practice.¹⁷²

The precedential erosion of *Dr. Miles* started just eight years later with *Colgate*,¹⁷³ in which the Court held that a plaintiff had to show actual agreement between wholesaler and retailer to prevail under *Dr. Miles*.¹⁷⁴ It was not enough to show that the wholesaler announced his wish that the retailer not sell for below a certain price and then unilaterally discontinued sales to retailers who did not oblige.¹⁷⁵ The erosion accelerated in the '70s and '80s

165. *Linkline*, 129 S. Ct. at 1117. The Court likewise felt obligated to address arguments made by amici that a ruling in favor of AT&T would overrule *Alcoa*. See *id.* at 1120 n.3.

166. *Id.* at 1121–22.

167. *Id.* at 1122.

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

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

170. *Id.* at 409.

171. OZ SHY, INDUSTRIAL ORGANIZATION: THEORY AND APPLICATIONS 383 (1995).

172. See *Leegin*, 551 U.S. at 881 ("In *Dr. Miles* . . . the Court established the rule that it is *per se* illegal under § 1 of the Sherman Act . . . to set a minimum price the distributor can charge for the manufacturer's goods.").

173. *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

174. See *id.* at 307–08 (distinguishing *Colgate* from *Dr. Miles* by noting that in *Colgate* there was no evidence of an agreement to control prices).

175. See *id.* at 307.

as legal scholars began to articulate pro-competitive justifications for vertical restraints like RPM.¹⁷⁶ And, in *GTE Sylvania*,¹⁷⁷ the Court removed the per se illegal status for nonprice vertical restraints, such as territories.¹⁷⁸

Dr. Miles was sick, but not dead, when Kay's Kloset sued Leegin in 2003. Kay's, a retail distributor of Leegin's line of accessories marketed under the brand "Brighton," claimed that Leegin conditioned the store's status as a Brighton retailer on Kay's promise not to cut prices.¹⁷⁹ Leegin had been more overt about its RPM policy than most firms who wanted the benefits of RPM but feared liability under *Dr. Miles*. Most firms sought the safe harbor of *Colgate* by only acting unilaterally, staying on the right side of the line between using termination threats to induce minimum pricing rather than making actual agreements with retailers.¹⁸⁰ Leegin's policy crossed that line flagrantly and in writing; they required stores carrying Brighton products to sign an agreement preventing markdowns.¹⁸¹ The suit should have been a slam dunk for Kay's, but the recent ill-health of *Dr. Miles* emboldened Leegin to take it to trial and even to introduce economic expert testimony to the effect that the per se prohibition on RPM, the governing Supreme Court rule for almost a century, was economically wrong headed.¹⁸² Of course, the district court excluded the testimony, found in favor of Kay's, and entered judgment against Leegin.¹⁸³

After the Fifth Circuit affirmed,¹⁸⁴ the controversy reached its intended audience: the Supreme Court, the only court that could actually overrule

176. See, e.g., ROBERT H. BORK, *THE ANTITRUST PARADOX* 280–98 (The Free Press 1993) (1978) (arguing that the law prohibiting RPM is "at war with sound antitrust policy" because manufacturers impose RPM not to restrict output and eliminate rivalry but to create distributive efficiency); Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 283–85 (1975) (explaining that manufacturers may set retail price minimums to encourage dealers to increase point-of-sale services for the product, thus improving the marketing for the manufacturer's product).

177. *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

178. Many commentators have noted the incoherency of treating non-price and price-based vertical restraints differently. E.g., Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 8–14 (1981).

179. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 883–84 (2007).

180. Christopher R. Leslie, *Unilaterally-Imposed Tying Arrangements and Antitrust's Concerted Action Requirement*, 60 OHIO ST. L.J. 1773, 1797–98 (1999). For a discussion of the inefficiencies of *Colgate*'s formalism, see Howard P. Marvel, *The Resale Price Maintenance Controversy: Beyond the Conventional Wisdom*, 63 ANTITRUST L.J. 59, 91 n.76 (1994).

181. *Leegin*, 551 U.S. at 883.

182. Deposition of Kenneth G. Elzinga, Ph.D., Ex. A to Leegin's Response to Plaintiff's Motion to Limit Testimony of Kenneth G. Elzinga, Ph.D., *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, No. 2:03-CV-107, 2003 WL 24080773 (E.D. Tex. March 18, 2003).

183. *Leegin*, No. 2:03-CV-107, 2004 WL 5374523, at *5 (E.D. Tex. March 26, 2004).

184. *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 171 Fed. App'x. 464 (5th Cir. 2006), *rev'd and remanded*, 551 U.S. 877 (2007).

Dr. Miles. Leegin was not coy about its intentions, arguing from the certiorari stage that the Court must overrule *Dr. Miles* if it hoped to maintain an economically coherent jurisprudence on vertical restraints.¹⁸⁵ Justice Kennedy, writing for the majority, did just that in a lengthy opinion that analyzed the economic arguments on both sides of the RPM debate, as well as more judgely considerations like *stare decisis* and the relative value of clear rules and fuzzy standards.¹⁸⁶ Justice Kennedy concluded that since economic theory raised several legitimate procompetitive justifications for RPM, the practice would not “always or almost always tend to restrict competition and decrease output” and so a *per se* ban was inappropriate.¹⁸⁷

Economists defend RPM by arguing that the practice can encourage competition along nonprice dimensions.¹⁸⁸ Without RPM, a retailer can always price compete with other retailers. He may find that he maximizes profit by investing in an elegant store and quality salespeople because he can sell belts and handbags for a price that more than makes up for these investments. Or he may find that a bin of discounted belts and handbags in a basement store attracts so many price-conscious customers that the sheer number of products he sells makes up for the low price he gets for each individual sale. But the retailer considering the high-end option encounters a problem in the form of free riding.¹⁸⁹ If his bargain-basement competitors offer the same product for less, then shoppers may start at his elegant store, benefit from the help of his knowledgeable staff, and then go to the bargain-basement to actually buy the product.¹⁹⁰ With free riding, shop owners have a reduced incentive to invest in service and presentation.

A manufacturer or wholesaler might want its brand to be associated with elegance, service, and status. But unless he can contract with each retailer for specific levels of service and display¹⁹¹ (and monitor their performance!) he may be powerless to influence the retailer’s choices, and this is especially troublesome if the free rider problem drives service and ambiance down anyway. But if he eliminates a retailer’s ability to drop the price, then the retailer’s only opportunity to compete with other retailers is

185. Petition for Writ of Certiorari at *5–7, *Leegin*, 551 U.S. 877 (No. 06-480), 2006 WL 2849384.

186. *Leegin*, 551 U.S. at 881–908.

187. *Id.* at 886 (quoting *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)).

188. One of the earliest proponents of this perspective was Professor Lester G. Tesler. See Lester G. Tesler, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1960).

189. BORK, *supra* note 177, at 290.

190. *Id.*; see also 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* 13–14 (2d ed. 2004).

191. *Cf.* Tesler, *supra* note 189, at 94 (“[A manufacturer] may refuse to sell his product to any retailer who does not provide the requisite special services.”).

to offer better service and presentation.¹⁹² In effect, RPM gives manufacturers control over the image of their products and the level of point-of-sale services available to their customers by getting rid of the free rider problem.¹⁹³ This stimulates interbrand competition, even if it reduces intrabrand competition.¹⁹⁴

Even the proponents of RPM acknowledge that it has its anticompetitive uses. It has the effect, always suspect under the Sherman Act, of raising the price of a given product.¹⁹⁵ RPM defenders counter that the product itself is different under an RPM scheme because it includes the prestige, experience, and service that would otherwise not have come without RPM.¹⁹⁶ Some economists counter that there is no reason to believe that consumers value these extra services. Professors (and *Leegin* amici) Scherer and Comanor argue that “RPM, as a result, need not enhance consumer welfare even when it is in the manufacturer’s interest.”¹⁹⁷

Perhaps most troubling is the possibility that RPM can be used to foster price fixing cartels, which are uncontroversially illegal per se under the Sherman Act.¹⁹⁸ If instead of nakedly colluding, a group of competing retailers could coerce their wholesaler into enforcing resale price agreements with them,¹⁹⁹ then they would get all the benefits of price fixing

192. See Posner, *supra* note 179, at 11 (“[T]he manufacturer’s objective in restricting competition among its dealers or distributors is to induce them to provide greater services to the consumer.”).

193. See Easterbrook, *supra* note 3, at 148 (explaining how “full service” stores that provide better point-of-sale services like information and support can be undermined by “low service” stores that provide no point-of-sale services when customers visit the full service store to obtain information but ultimately order the product from a low service store).

194. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 913 (2007) (Breyer, J., dissenting) (“The result [of RPM] might be increased competition at the producer level, *i.e.*, greater *inter-brand* competition . . .”).

195. *Leegin*, 551 U.S. at 912 (Breyer, J., dissenting) (citing 8 AREEDA & HOVENKAMP, *supra* note 191, at 40).

196. See 8 AREEDA & HOVENKAMP, *supra* note 191, at 12 (discussing how service and presentation can enhance brand image); Posner, *supra* note 179, at 19 (questioning the superiority of lower prices to better services). For an example of how provision of sales service can create product value, see Marvel, *supra* note 181, at 63 (“When first introduced, food processors did not have an obvious use. To be marketed effectively, consumers had to be shown the capabilities of food processors, a requirement met through expensive and detailed dealer-provided demonstrations.”).

197. Marvel, *supra* note 181, at 67 (citing works by Professors Comanor and Scherer).

198. 8 AREEDA & HOVENKAMP, *supra* note 191, at 42.

199. See Pauline M. Ippolito & Thomas R. Overstreet, Jr., *Resale Price Maintenance: An Economic Assessment of the Federal Trade Commission’s Case Against the Corning Glass Works*, 39 J.L. & ECON. 285, 298 (1996) (“Under this theory, [the manufacturer] would have been induced to use RPM by its dealers, through credible threats of a group boycott of [the manufacturer’s] products.”).

without the § 1 liability.²⁰⁰ In addition to facilitating retail cartels, RPM might help manufacturers police their own illegal arrangements.²⁰¹ A member of a manufacturer cartel may be tempted to cheat by lowering his wholesale price to a retailer, but if that retailer cannot pass that lower price on to his customers, then total demand for the product will not change.²⁰² The cheating wholesaler will only benefit, then, to the extent that some retailers stop buying from his coconspirators to buy from him.²⁰³ If the coconspirators' sales go down while the cheater's go up, coconspirators will know he is cheating.²⁰⁴

At bottom, *Leegin* was a case about rules versus standards. The question was not whether RPM should be legal or illegal but rather what kind of rule should apply to it: the bright line of *per se* or the flexibility of rule of reason analysis. The bright line invalidated the procompetitive uses of RPM, while the rule of reason would be clumsy and, in practice, would mean the defendant always wins.²⁰⁵ Appropriately, the *Leegin* opinion was framed around this question of what kind of rule is appropriate for a practice that has some good and some bad uses.²⁰⁶ But the Court failed to recognize that in order to answer this question, it needed to know something about the relative frequency of the good and bad uses.

The Court reasoned that if a practice has any theoretical benefits, then it cannot be properly subject to a *per se* rule,²⁰⁷ but the question was properly empirical, not theoretical. The Court was bombarded with theoretical arguments in favor of RPM from amici, but none could identify, as a practical matter, how often the practice was used for competitive good

200. See Easterbrook, *supra* note 3, at 141–43; Edward O. Correia, *Resale Price Maintenance—Searching for a Policy*, 18 J. LEGIS. 187, 230 (1992).

201. 8 AREEDA & HOVENKAMP, *supra* note 191, at 88; Correia, *supra* note 201, at 221–24. For example, the federal government's 1926 case against General Electric involved resale price maintenance of light bulbs that was used to police a manufacturer-level cartel. Tesler, *supra* note 189, at 101.

202. 8 AREEDA & HOVENKAMP, *supra* note 191, at 87.

203. *Id.*

204. *Id.* at 88–91.

205. See Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487, 1489–90 (1983) (“It is instructive that in the almost three years since the Department of Justice and the Federal Trade Commission took the enforcement position that vertical minimum price fixing is illegal only if unreasonable under a rule of reason, neither agency has found a single instance of vertical price fixing worthy of challenge.”).

206. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889 (2007) (noting the existence of authority supporting both procompetitive and anticompetitive effects of RPM).

207. See *id.* at 886 (“[W]e have expressed reluctance to adopt *per se* rules . . . where the economic impact of certain practices is not immediately obvious.” (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997))).

instead of competitive evil.²⁰⁸ The easier and more intuitively appealing way for the Court to approach the question, then, was to decide the case on purely theoretical grounds: if amici could produce enough hypothetical benefits of RPM, that would cast doubt on the proposition that RPM “always or almost always tend[ed] to restrict competition and decrease output,” making a per se rule inappropriate. Because “[v]ertical agreements establishing minimum resale prices can have either procompetitive or anti-competitive effects, depending on the circumstances in which they are formed,”²⁰⁹ a per se rule lacked the nuance necessary to sort out the good eggs from the bad ones.

But the question of which kind of rule is most efficient—bright line or standard—cannot be satisfactorily answered without data on the costs and benefits of each option. A good decision, therefore, depends not only on the frequency of anticompetitive uses of RPM but the magnitude of the competitive harm, as weighed against the frequency and magnitude of the competitive benefit. Indeed, this was the basis for Justice Breyer’s dissent.²¹⁰ The Court was woefully lacking in this information, and it had no investigatory abilities to gather it itself. So the case was decided a little on anecdote and mostly on theory. With the economic information before them, mostly from amici, the Court arguably made the best decision it could, but that is only slight praise when one sees the thinness of the data provided by amici.

The Court placed great weight on two amicus briefs²¹¹ (certiorari²¹² and merits) signed by twenty-five economists supporting rule of reason for RPM liability, citing them directly four times in the opinion (the dissent cited them once).²¹³ The economists’ briefs articulated the procompetitive justifications for RPM, with an especially lucid passage on the free-rider

208. Part of the problem, of course, is that RPM was per se illegal for a century, so it would naturally be difficult to extrapolate its use from past experience. But unilateral RPM, legal under *Colgate*, was frequently used and had some of the same procompetitive and anticompetitive aspects as RPM by agreement. Analogy, then, was possible, if imperfect.

209. *Leegin*, 551 U.S. at 894.

210. *Id.* at 909–18 (Breyer, J., dissenting).

211. Motion for Leave to File Brief and Brief of Amici Curiae Economists in Support of Petitioner, *Leegin*, 551 U.S. 877 (No. 06-480), 2006 WL 3244034; Brief of Amici Curiae Economists in Support of Petitioner, *Leegin*, 551 U.S. 877 (No. 06-480), 2007 WL 173681.

212. In an unusual move, Kay’s denied consent to all amicus participation in favor of certiorari, forcing amici to appeal to the Court for leave to file. See Motion for Leave to File Brief and Brief of Amici Curiae Economists in Support of Petitioner, *supra* note 212 (“Petitioner has consented to the filing of this brief, but Respondent has withheld consent, thus necessitating the filing of this motion.”). As discussed, the Court’s practice is to give its permission as a matter of course, see *supra* part I(A), and it did. Kay’s did not bother to oppose the amicus participation at the merits stage of briefing.

213. *Leegin*, 551 U.S. at 889, 900, 904, 914.

problem.²¹⁴ They explained why RPM is a more efficient means of ensuring point-of-sale perks than contracts between the manufacturer and retailer about the appearance and experience of buying a product.²¹⁵ But the brief was also up-front about the possible anticompetitive uses of RPM, identifying how the practice can be used to facilitate cartels at both the retail and wholesale levels.²¹⁶ After surveying the theoretical uses of RPM, the economists concluded with a syllogism that the Court ultimately adopted: if per se liability is only for practices that are almost always harmful, and RPM is sometimes harmful and sometimes beneficial, then the right rule cannot be per se condemnation.²¹⁷

Although Professors Comanor and Scherer signed the economists' brief, it turns out they did not endorse this syllogism. Leegin cited Comanor's and Scherer's economic scholarship as supporting rule of reason analysis for RPM.²¹⁸ But their scholarship explaining procompetitive uses for RPM was purely theoretical. Since the relative efficiency of rule of reason analysis depended on how often the practice would be used in the theoretically beneficial way, about which they had no data, they were agnostic about the choice.²¹⁹ Miffed at being co-opted to the rule of reason side, they filed an amicus brief after the twenty-five economists' "in support of neither party."²²⁰ In it they explained their academic work and said that they only signed the economists' amicus brief on the condition that it say "there is disagreement among economists about the prevalence of pro- and anti-competitive uses of RPM."²²¹

The Court was presented with some empirical information about the benefits and costs of the *Dr. Miles* rule, but it was thin and unconvincing.²²² Several amici cited an article with a promising title: "Resale Price

214. Brief of Amici Curiae Economists In Support of Petitioner, *supra* note 212, at 5–9.

215. *Id.* at 9.

216. *Id.* at 13.

217. *See id.* at 16 ("The position absent from the literature is that minimum RPM is most often, much less invariably anticompetitive. Thus, the economics literature provides no support for the application of a *per se* rule.")

218. Reply Brief for Petitioner at 7 n.3, *Leegin*, 551 U.S. 877 (No. 06-480), 2007 WL 835316.

219. Brief for William S. Comanor and Frederic M. Scherer as Amici Curiae Supporting Neither Party at 4–7, *Leegin*, 551 U.S. 877 (No. 06-480), 2007 WL 173679.

220. *Id.*

221. *Id.* at 3.

222. Perhaps even more problematic was the empirical evidence that was available but that was *not* presented to the Court by amici or anyone else. For example, Professors Ippolito and Overstreet have empirically examined how a judgment ending Corningware's decades-long use of RPM affected the market for glass cookware and serving ware. In the case study, the professors measured the competitive value of RPM by asking if its discontinuation made the relevant market more or less competitive. Ippolito & Overstreet, *supra* note 200, at 293–94.

Maintenance: Empirical Evidence from Litigation” by Pauline Ippolito²²³ of the Federal Trade Commission (FTC). Her study was cited by multiple amici (the economists, CTIA, the United States, and the American Petroleum Institute)²²⁴ for the proposition that, as an empirical matter, RPM is rarely used to facilitate cartels. But, as the dissent points out, the study’s methodology cannot support this conclusion.²²⁵ Ippolito found that among the 153 RPM cases filed in federal court from 1976 to 1982, only 5.9% alleged a manufacturer cartel.²²⁶ She concluded that “there is little evidence . . . to support the hypothesis that the RPM law primarily deters collusion or that collusion is the primary reason for the use of RPM.”²²⁷ But counting allegations of collusion in RPM cases is a faulty way to measure the frequency with which manufacturers use RPM to collude, because if a plaintiff has evidence of RPM, an allegation of horizontal collusion is redundant.

Another promising title, “Resale Price Maintenance: Economic Theories and Empirical Evidence,”²²⁸ provided a slightly more robust empirical payoff. Thomas Overstreet showed that during the reign of the Miller–Tydings Act,²²⁹ which allowed states to pass laws allowing RPM, the states that chose to allow RPM had higher average consumer prices (by as much as 27%) than the fourteen states that did not.²³⁰ Justice Breyer, in his *Leegin* dissent, multiplied this fraction by the amount the average family spends today on goods likely to be subject to RPM, to forecast “retail bills that are higher by an average of roughly \$750 to \$1,000 annually for an American family of four.”²³¹

Amici also presented empirical evidence by anecdote, most saliently by PING, Inc., a manufacturer of high-end golf equipment who filed an

223. Pauline M. Ippolito, *Resale Price Maintenance: Empirical Evidence from Litigation*, 34 J.L. & ECON. 263 (1991).

224. Brief of the American Petroleum Institute as Amicus Curiae Supporting Petitioner at 11 n.3, *Leegin*, 551 U.S. 877 (No. 06-280), 2007 WL 160781; Brief of CTIA—The Wireless Association as Amicus Curiae in Support of Petitioner at 14–15, *Leegin*, 551 U.S. 877 (No. 06-280), 2007 WL 160782; Brief of Amici Curiae Economists In Support of Petitioner, *supra* note 212, at 14–15; Brief for the United States as Amicus Curiae Supporting Petitioner at 20, *Leegin*, 551 U.S. 877 (No. 06-280), 2007 WL 173650.

225. *Leegin*, 551 U.S. at 920 (Breyer, J., dissenting).

226. Ippolito, *supra* note 224, at 282 tbl.7.

227. *Id.* at 281.

228. THOMAS R. OVERSTREET, JR., BUREAU OF ECONOMICS STAFF REPORT TO THE FTC—RESALE PRICE MAINTENANCE: ECONOMIC THEORIES AND EMPIRICAL EVIDENCE (1983), available at <http://www.ftc.gov/becourpt/233105.pdf>.

229. Miller–Tydings Fair Trade Act, ch. 690, 50 Stat. 693 (1937) (repealed 1975).

230. OVERSTREET, *supra* note 229, at 112.

231. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 926 (2007) (Breyer, J., dissenting).

amicus brief supporting Leegin.²³² In its brief, PING emphasized the costs of the current per se rule, claiming to have spent millions in legal fees on maintaining a unilateral price maintenance scheme that would pass *Colgate* muster.²³³ They highlighted the absurdity of having to tell their retailers that PING and the retailers cannot agree on a resale price, but if they sell golf clubs to customers for less than a given price, then they will be terminated.²³⁴ PING also pointed out the inefficiencies of having to divert all inquiries about resale pricing to their legal department.²³⁵ The National Association of Manufacturers, in its brief, made a similar point, slamming the inefficiencies of the *Dr. Miles–Colgate* line.²³⁶

What was the Court to do with scant, old, and anecdotal evidence of the per se rule's efficiencies? The answer, according to a dissenting Justice Breyer, was to leave standing precedent in place; in the face of indeterminacy, the law prefers the status quo.²³⁷ But the majority opinion had an equally appealing logic: in the face of indeterminacy, the law prefers a flexible standard that allows for individualized inquiry.²³⁸ Without rigorous data about the costs and benefits of RPM, neither position is epistemologically justifiable. The majority–dissent debate devolved into a discussion of whether a tie ought to go to the runner or the baseman, in this case to the plaintiff or the defendant. But what we have in the RPM debate is not a tie—it is an uncertainty. It is not that the benefits of RPM are close to its costs, but that the relative costs and benefits of RPM are *unknown*. The amici could only provide theory and anecdote, and without the ability to empirically investigate RPM itself, the Court ultimately divided according to political preferences about regulation.²³⁹

IV. A New Deal for Antitrust

Without the informational benefits of expertise and notice-and-comment rulemaking, the Court may be a poor choice to define the broad proscriptions of the Sherman Act. Framed this way, the problem has an

232. Brief of PING, Inc. as Amicus Curiae in Support of Petitioner, *Leegin*, 551 U.S. 877 (No. 06-480), 2007 WL 173680.

233. *Id.* at 10.

234. *Id.* at 15.

235. *Id.* at 11–15.

236. Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of the National Association of Manufacturers in Support of Petitioner at 6–11, *Leegin*, 551 U.S. 877 (No. 06-480), 2006 WL 3244035.

237. *Leegin*, 551 U.S. at 929 (Breyer, J., dissenting).

238. See *id.* at 894 (arguing that because RPM's anticompetitive effects are uncertain, "these agreements appear ill suited for *per se* condemnation").

239. Only the liberal Justices dissented: Justices Breyer, Stevens, Souter, and Ginsburg.

obvious solution: give the power to interpret the Act to an expert agency.²⁴⁰ This idea has academic support already,²⁴¹ and the case for it is strengthened by this Article's observation that the Court has tried to approximate administrative decision making by relying on amicus briefs. The obvious candidates for reallocation are the two existing antitrust agencies: the Department of Justice's Antitrust Division and the FTC.

A. *The Agency Solution*

Using agencies to give specific meaning to American antitrust's most important statute means avoiding the problems with the Court's current quasi-administrative process for rulemaking. As adjudicators, agency experts would know what kind of economic evidence is necessary for an efficient solution and would be better able to understand it when it is presented by the parties. Repeat exposure to antitrust cases would only reinforce this advantage, while also giving the administrative judges a broader perspective on what kinds of conflicts commonly arise in competition law, a perspective necessary for efficient policy making in the first instance. A Supreme Court Justice hears about one antitrust case a year, hardly the cross section of controversies necessary to make efficient economic policy writ large.

Agencies could take policy making a step further using notice-and-comment rulemaking. Unlike in adjudication, regulation by rulemaking can be initiated without the formal requirements of a case or controversy and a proper appeal to the Supreme Court. Informal letters of complaint could spark an investigation. A rule-making agency could announce its intention to regulate publicly and provide a convenient venue for, or even solicit, expert opinions on the economic impact of the proposed rule. Not only would it have the benefit of these numerous perspectives, but it would also have the obligation to respond to them in a reasoned manner. Its rule would be subject to judicial review, affording an opportunity to catch mistakes²⁴² or invalidate rules that do nothing but deliver rents to special interests.

Another advantage of rulemaking, an option for agencies but not for the Court, since it only operates through adjudication, is that rulemaking

240. I am indebted to Harvard Law School Climenko Fellow Michael Burstein for helping me develop this idea.

241. *E.g.*, Crane, *supra* note 5, at 1211.

242. In contrast, when a court makes an antitrust rule in the first instance, its mistakes may go unchecked. *See, e.g.*, C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 674 (2009) ("The Court relied, as a reason to deny antitrust liability, upon the mistaken idea that a settlement with one generic firm would spur other generic firms to action, and that these firms would have the large incentive provided by the exclusivity period. In fact, later filers are ineligible for the exclusivity period.").

regulates behavior *ex ante*, while resolution of economic policy through cases is necessarily *ex post*. Antitrust courts worry obsessively about “chill”—detering procompetitive behavior with overly broad rules for liability.²⁴³ In fact, the overruling of *Dr. Miles* in *Leegin* implies that the entire twentieth century was a period of inefficient business practices and stunted innovation in distribution because of an early misunderstanding of RPM. Only after a long and expensive period of litigation was *Leegin* redeemed for breaking the law by effecting a change in the law, and only after *Leegin* was issued were similar firms, perhaps walking the *Colgate* line better than *Leegin*, redeemed for wanting some control over their product’s ultimate retail price.²⁴⁴ The problem of *ex post* rulemaking is made worse by the treble damages afforded successful plaintiffs suing under the Sherman Act.²⁴⁵ To create a new form of liability, the Court has to punish a firm threefold for complying with standing antitrust norms. Thus Supreme Court lawmaking in antitrust is a kind of one-way ratchet.²⁴⁶

The result of the current *ex post* scheme is that “antitrust law leaves considerable gaps between what is permissible and what is optimal.”²⁴⁷ With judges making the rules one case at a time, this gap is justifiable. As discussed above, when judges are not economically sophisticated enough to know where “optimal” lies,²⁴⁸ *laissez-faire* is a very inexpensive regulatory regime for courts to follow, and raising the level of regulation would effect a kind of taking of property from firms operating under the status quo. So if the Court is making antitrust policy, *laissez-faire* may be the only sensible approach. But that is not to say that it is the *most* sensible approach. An agency could provide firms with the necessary clarity—*ex ante*—that they

243. See, e.g., *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.) (“Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve.”). Professors Hungar and Koopmans argue that Circuit cases that punish procompetitive behavior are especially likely to be reviewed by the Court. Similarly, the Court worries about the “chilling effect of vague rules.” Hungar & Koopmans, *supra* note 57, at 56; cf. Posner, *supra* note 179, at 15 (arguing that the vagueness of the Rule of Reason “places at considerable hazard any restriction that a manufacturer imposes on its dealers and distributors”).

244. And RPM is hardly the only example of conduct, once prohibited by antitrust, that has been made legal by the Court citing pro-competitive grounds. “Despite the fact that the Sherman Act’s text has remained unchanged the Court has pulled sudden ‘switcheroos’ on its rules for monopolization, mergers, and vertical integration.” Andrew S. Oldham, *Sherman’s March (In)to the Sea*, 74 TENN. L. REV. 319, 366–67 (2007) (citation omitted).

245. 15 U.S.C. § 15(a) (2006).

246. *Contra* Easterbrook, *supra* note 3, at 139 (“[T]here is no ratchet in antitrust. . . . The belated arrival of wisdom is no reason for refusal to learn and change.”).

247. Crane, *supra* note 5, at 1193.

248. See *United States v. Topco Assocs.*, 405 U.S. 596, 609 (1972) (“The fact is that courts are of limited utility in examining difficult economic problems.”); see also *id.* at 611 (Blackmun, J., concurring) (“[C]ourts are ill-equipped and ill-situated for” antitrust policy making).

need when conducting business in a world where competitive behavior so closely resembles anticompetitive conduct. The current state of affairs is that much more is illegal on the books than antitrust lawyers think is actually likely to be struck down in a court.²⁴⁹ Lawyers thrive in such a legally uncertain world, but firm efficiency suffers.

To inform its rulemaking and adjudicative decisions, an expert agency would have investigative abilities the Court lacks. It could gather data and conduct studies when good antitrust policy depends on hard facts, which, so the consensus holds, it usually does.²⁵⁰ Data collection would be much easier for an agency than for the Court, since an agency can be endowed with broad investigatory powers and some, unlike the Supreme Court, can demand discovery and “require firms to supply annual and special reports.”²⁵¹ An agency might employ hundreds of economists and statisticians well-qualified to design such a study and analyze its results. Defendants would no longer be able to advocate against liability by saying that the theoretically efficient rule is so unwieldy in the hands of inexpert judges that laissez-faire is the only workable option. To be sure, they could still argue that the theoretically efficient rule is too indeterminate even for economists to pinpoint, or too abstract to be clearly articulated to regulated firms. But if we think economists have at least a marginally higher tolerance for economic complexity than do lay judges, the economists must be better at fashioning and enforcing rules that regulate sensitive real-world economic systems.

B. The Antitrust Division or the FTC?

Under the current regime, the FTC and the Antitrust Division share the responsibility of promulgating and enforcing antitrust rules,²⁵² but neither is authorized to interpret the Sherman Act in the first instance. The Antitrust Division’s primary areas of activity are criminal cartel prosecution and merger law enforcement.²⁵³ The Antitrust Division does not issue rules subject to *Chevron* deference, but it does issue guidelines that are influential on courts and so also on firm behavior. The most well-known of these guidelines are the *Horizontal Merger Guidelines* that the FTC uses to

249. See, e.g., DOUGLAS BRODER, U.S. ANTITRUST LAW AND ENFORCEMENT 11–12 (2010) (characterizing the George W. Bush Administration’s approach to antitrust as a return to “the free-market, anti-enforcement policies of the Reagan and first Bush [A]dministrations”).

250. See generally 15 U.S.C. § 46 (2006) (describing the investigatory and reporting capabilities of the FTC).

251. MARK R. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 35 (3d ed. 2006).

252. ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 13–14 (2007).

253. JOELSON, *supra* note 252, at 31.

approve or block major combinations in administrative proceedings.²⁵⁴ Both the FTC and the Antitrust Division can bring suit alleging civil violations of the antitrust laws.²⁵⁵ For reasons related more to custom than to relative competency, they have awkwardly divided civil enforcement responsibilities: the FTC brings suits related to energy, healthcare, retail stores, and computer hardware, while the Antitrust Division brings suits related to agriculture, telecom, travel, and computer software.²⁵⁶ Only the Antitrust Division can bring criminal prosecutions.²⁵⁷

The Antitrust Division, as compared to the FTC, is a less attractive option for re-allocation of Sherman Act interpretive power. It is an executive agency authorized to enforce norms but not to create them. Since its head serves at the pleasure of the President, each change in administration brings the potential for new enforcement priorities. Interpretive power over the Sherman Act should go to an independent agency, one more likely to be technocratic, not political, in its execution. The FTC is such an agency.

The FTC is a superior choice also because it already plays a direct role in Sherman Act interpretation since it regulates mergers prohibited by § 2 of the Act.²⁵⁸ And unlike the Antitrust Division, it already has rulemaking ability. The FTC Act of 1914 created the agency and gave it authority to proscribe “[u]nfair methods of competition in or affecting commerce” and “unfair or deceptive acts or practices in or affecting commerce.”²⁵⁹ But Congress’s delegation of rulemaking authority to the FTC was ambiguous in scope, allowing it to “make such rules and regulations” but not specifying whether those rules would be binding.²⁶⁰ So the delegation has been interpreted to confer only interstitial jurisdiction to the agency; that is, the agency may use its rulemaking authority merely to fill the gaps left by the Sherman Act and the Robinson–Patman Act.²⁶¹ In fact, the FTC rarely uses

254. *Id.*; U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

255. See ELEANOR M. FOX ET AL., CASES AND MATERIALS ON U.S. ANTITRUST IN GLOBAL CONTEXT 645 (2d ed. 2004) (describing overlapping civil jurisdiction of the Antitrust Division and the FTC).

256. See Crane, *supra* note 5, at 1199.

257. *Id.* at 1198.

258. 15 U.S.C. § 18a gives the FTC express authority to regulate mergers under the Clayton Act. Conversely, the FTC’s authority to enforce the terms of the Sherman Act is not statutorily granted. However, the FTC Act grants the FTC broad powers to regulate “unfair methods of competition” and “unfair or deceptive acts or practices.” 15 U.S.C. § 45(a)(1) (2006). By exercising this power, the FTC can enforce the provisions of the Sherman Act. 1 JOHN J. MILES, HEALTH CARE AND ANTITRUST LAW § 6:13 (2010).

259. JOELSON, *supra* note 252, at 26.

260. Custos, *supra* note 107, at 619 & n.22.

261. Posner, *supra* note 75, at 766.

its power to promulgate such rules under notice-and-comment rulemaking,²⁶² a fact that prompted Professor Kenneth Culp Davis to say that the agency “should be ashamed” of its flimsy record of rulemaking.²⁶³

A change in the FTC’s statutory authority could change this. Congress could mandate *Chevron* deference for the agency’s interpretation of antitrust norms by amending the Sherman Act to confer primary authority over its interpretation to the FTC. The shift in legal regime might seem subtle since the FTC already has antitrust rulemaking authority (if weak and interstitial) under a different statute. But giving the FTC dominion over the Sherman Act, American antitrust’s constitution, would mean taking the task of large-scale policy making out of the hands of an inexpert Court whose best access to economic arguments are amicus briefs and placing it in the hands of an institution designed to deal with technical scientific matters thoroughly and transparently.

C. Objections

Giving an agency authority to interpret the Sherman Act in the first instance raises several concerns. First, if Congress were to give an agency the final word on how to implement the vague incantations against monopolization found in the Sherman Act, it might violate the nondelegation doctrine.²⁶⁴ For an agency’s norm-creation power to have any meaning, it would have to include the ability to override past precedent interpreting the Act. A century’s worth of jurisprudence on competition policy could be scratched and replaced by any set of rules that purport to invalidate any “combination . . . in restraint of trade,”²⁶⁵ which, by its plain meaning, could preclude partnership agreements and pedestrian mergers.

Of course, if giving an agency this power violates the nondelegation doctrine, then so does giving the courts this power; the nondelegation doctrine does not only limit delegation by Congress to agencies, but it also

262. *See id.* at 768–69.

263. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 70–74 (1969). The reason for its reluctance is that FTC rules outside of the merger context get little respect from the courts, as evidenced by a recent skirmish between the agency and the Eleventh Circuit over pharmaceutical pay-for-delay settlements. After following procedures that “loosely mimicked the Administrative Procedure Act’s requirements for agency rule making,” the FTC denounced any “reverse payments” between a branded drug manufacturer and its generic counterpart that exceeded \$2 million. The Eleventh Circuit reversed this rule in *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), implying that a regulation passed by the FTC must not clash with the Circuit’s own precedent. Although the FTC was neither a party nor an amicus to the earlier case in question, the court considered the agency bound by it and so precluded from promulgating a contrary rule. Crane, *supra* note 5, at 1200–01.

264. *See Oldham, supra* note 245, at 367–79 (sketching out the history of the nondelegation doctrine and its possible application to the antitrust context).

265. 15 U.S.C. § 1 (2006).

limits delegation to courts.²⁶⁶ So technically it would be incoherent to say that the delegation of power to an agency violates the nondelegation doctrine while delegation without saying the current state of affairs is unconstitutional. But Congress's delegation of power to the Court in the form of the Sherman Act is so entrenched, and the Court is now so limited by the stare decisis effect of its own decisions, that the delegation is not likely to be seen as controversial. In contrast, advocates of separation of powers might be understandably nervous about re delegating power of competition policy writ large to an agency today writing on a blank slate.

The transfer of power may need to be more piecemeal than that. Instead of amending the Sherman Act to confer broad interpretive authority to the FTC, Congress could pass statutes on individual competition law controversies—like tying, resale price maintenance, and refusals to deal—giving the FTC more guidance about how to prioritize rulemaking. These statutes would be designed to supersede the Sherman Act; they would displace the Court's interpretation of the Sherman Act as it related to the particular practices, while leaving in place less controversial Supreme Court rules under the Act, such as the prohibition on naked price fixing. Or Congress could achieve this same effect by amending the Sherman Act to be more precise in its economic aims.

Second, critics of my plan may object to the removal of antitrust from its populist roots and placing it in the hands of unelected technocrats. After all, “[t]here have been times in American history when antitrust was a magisterial pursuit that stirred the public imagination, exposed visceral ideological impulses, and shaped perspectives on adjacent matters, like labor policy, securities regulation, and taxation.”²⁶⁷ Professor Daniel A. Crane responds to this criticism in an article advocating increased norm-creation powers for the antitrust agencies. He argues that when a field meets three criteria, it is ready for a shift towards technocracy: “consensus on ends, resolution of foundational ideological questions, and the absence of explicit distributive considerations.”²⁶⁸ Antitrust meets these criteria. After Bork,²⁶⁹ any antitrust policymaker must defend his rule as promoting economic efficiency; there is wide consensus that this is the proper end of antitrust

266. See Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 421–43 (2008) (exploring the practice of delegating lawmaking authority to the Judicial Branch and arguing that this practice deserves more scholarly attention).

267. Crane, *supra* note 5, at 1159–60 (citation omitted).

268. *Id.* at 1161.

269. BORK, *supra* note 177; Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

regulation.²⁷⁰ Ideological debate, once prominent in antitrust, has largely given way to debate over economic theory and data.²⁷¹ Finally, as Crane argues, antitrust is no longer thought to have a serious redistributive effect—competitive efficiency seeks to expand the pie, not distribute the slices.

V. Conclusion

The Supreme Court is right to turn to amicus briefs in Sherman Act cases because it is there that the Court finds the economic evidence and reasoning that ought to influence antitrust policy. The move is evidence that scholars like Robert Bork and Richard Posner have succeeded in reforming antitrust legal analysis from analogical reasoning to scientifically informed pursuit of efficiency. But the Court can only go so far with its awkward hybrid of adjudication and administrative rulemaking. It is, after all, a court comprised of generalist judges charged with resolving individual cases and controversies. And amicus briefs are an anemic substitute for comments on a rulemaking. The Court's recent mistakes in *Leegin* and *LinkLine*, traceable to its reliance on amici, lend support for a further technocratic shift in Sherman Act rulemaking: a New Deal for antitrust.

270. See, e.g., *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 45–46 (2006) (citing “the virtual consensus among economists” that tying arrangements can be economically efficient in supporting a holding that a plaintiff must affirmatively prove that a tying arrangement confers market power to establish an antitrust violation); RICHARD A. POSNER, *ANTITRUST LAW* 2 (2d ed. 2001) (“[T]he only goal of antitrust law should be to promote efficiency in the economic sense”); Alan Devlin, *Antitrust in an Era of Market Failure*, 33 *HARV. J.L. & PUB. POL’Y* 557, 561–62 (2010) (observing that the view that agencies should protect consumers from market concentration was “most prevalent during the Warren Court era, [but] has been resoundingly rejected by U.S. courts for more than thirty years” and concluding that “[l]ong-run efficiency is the exclusive goal of modern competition enforcement”); Thomas O. Barnett, Assistant Att’y Gen., U.S. Dep’t of Justice, Luncheon Address to the Federalist Society, Washington, D.C. (Feb. 29, 2008), available at <http://www.justice.gov/atr/public/speeches/230627.pdf> (“[A]n analytical consensus [on the Supreme Court] has emerged. The Court has accepted the focus on economic efficiency”). But see John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 *NOTRE DAME L. REV.* 191, 196 (2008) (rejecting this view in arguing that “[t]he ultimate objective of [antitrust] laws, in short, is to protect consumers, not to increase overall efficiency”).

271. See Crane, *supra* note 5, at 1164 (observing that antitrust enforcement has ceased being an ideological battleground and has since become a “professional, active, and . . . quietly technocratic and successful enterprise” of legal and economic specialists).

