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ARTICLE 82: GESTALT, MYTHS, QUESTIONS
Reza Dibadj

Abstract
Article 82 of the Treaty Establishing the European Community is the counterpart to the anti-monopolization provisions contained in Section 2 of the Sherman Act. Commentators have criticized recent applications of Article 82 as outdated, protectionist, inconsistent — and perhaps most damaging of all, based on faulty economics. This paper takes issue with these critiques to offer support for a robust Article 82. An appreciation for Article 82 can only emerge through a contextual analysis of its historical origins and its regulatory role within a broader policy of European economic integration.

In developing its argument, the paper explores two common myths. The first is that Article 82 pits innovative American businesses against bureaucratic European regulators. The reality, however, is quite different: faced with lax antitrust enforcement at home, American competitors have found it necessary to turn to Europe for redress against monopolistic abuses. The second is that antitrust should espouse a laissez-faire approach toward dominant firms — a mentality that has most prominently led to anemic interpretations of Section 2 of the Sherman Act.

In recent months Europe has begun to fall under the spell of laissez-faire rhetoric as it explores reinterpreting Article 82 to mimic Section 2. This paper concludes by arguing that these new developments, while troublesome, provide a window to debate three basic sets of questions. First, what interests desire a weakening of the law of abuse and dominant position? Second, can Section 2 learn from Article 82, rather than the other way around? Third, and most fundamentally, can Article 82 provide insight into a broader discussion about the goals and methods of antitrust?

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I. INTRODUCTION

Article 82 of the Treaty Establishing the European Community, which prohibits "abuse... of a dominant position," is the counterpart to the anti-monopolization provisions contained in Section 2 of the Sherman Act. While Section 2 enforcement has been quiescent for over two decades, Article 82 can present a minefield for American multinationals in Europe—to wit, high profile examples of companies that have come under European scrutiny include IBM, Coca-Cola, Microsoft, Intel, and Apple.

2. Section 2 reads in it entirety:

   Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the direction of the court.

8. The Apple case is somewhat different in that the controversies have occurred at the national, not EU, level and has focused on copyright law, rather than antitrust qua antitrust. See,
The fact that these companies have not faced comparable scrutiny in the United States under Section 2 of the Sherman Act is symptomatic of what has emerged as a transatlantic dissidence as to the dangers of monopoly. Interpretative differences between "monopolization" in the U.S. and "abuse of dominance" in the EU are "now the area[s] of greatest divergence between competition policies of the United States and Europe." Judge Diane Wood has even called this divergence "the single most problematic one that exists" in transnational antitrust.

Unfortunately, Article 82 has become a convenient punching bag in a lopsided debate. It is popular today to argue that the current American perspective on monopoly is inherently superior. When discussing the European approach to dominant firms, some critics bemoan a "form-based approach that too easily assumes the existence of [anticompetitive] effects"—a regime where rules against dominant companies have been applied "too rigidly and too aggressively." Others variously lament that "Article 82 of the EC Treaty is being used more as an adjunct to industrial policy than as a


10. Diane P. Wood, The U.S. Antitrust Laws in a Global Context, 2004 COLUM. BUS. L. REV. 265, 272 (2004) [hereinafter Wood, U.S. Antitrust Laws]. See also Roger Parloff, Intel's Worst Nightmare, FORTUNE, Aug. 21, 2006, at 64 ("For while there is wide consensus among antitrust experts about the harmfulness and, consequently, illegality of collusive activity among competitors—e.g., cartelization, bid-rigging, price-fixing—there is no comparable agreement about conduct by one very big competitor acting alone."); Kolasky, What Is Competition?, supra note 9, at 37 ("The number one priority of any competition law regime should be vigorous anticolter enforcement.").


pure competition law tool,”\textsuperscript{13} that the “[European] Commission has been more interested in controlling large companies than with curtailing actual monopoly power,”\textsuperscript{14} and that the abuse of dominant position is a concept “too vague and potentially too restrictive.”\textsuperscript{15} Indeed, Article 82 has emerged as a pitiful poster child for a European competition policy that is pejoratively described as “legalistic”\textsuperscript{16} and characterized by “the absence of economic considerations.”\textsuperscript{17} As a sign of the times, think tanks publish articles disparagingly titled “Europe: Global Antitrust Policeman?”\textsuperscript{18}

This paper takes issue with this overwhelming mass of criticism to offer support for Article 82. In marked contrast to the prevailing wisdom that strongly urges that the Europeans should adopt the contemporary American approach to monopolization, this paper suggests precisely the opposite: that Article 82 not only offers some lessons for Section 2, but also provides insight into a broader discussion about what antitrust law should be.

The argument is divided into three principal sections. Section II suggests that narrow analyses focused on the provision’s language or specific judicial decisions offer little insight. Rather, an appreciation for Article 82 can only emerge through a richer contextual analysis of its historical origins and its regulatory role within a broader policy of European economic integration.

Building upon this framework, Section III attempts to debunk two common myths. The first is that Article 82 pits innovative American businesses against bureaucratic European regulators. The reality, however, is quite different: faced with lax antitrust enforcement at home, American competitors have found it necessary to turn to Europe for redress against monopolistic abuses. A second misperception is that antitrust policy should espouse a laissez-faire

\begin{itemize}
  \item \textsuperscript{13} Forrester, \textit{supra} note 11, at 920.
  \item \textsuperscript{16} Gunnar Niels & Adriaan ten Kate, \textit{Introduction: Antitrust in the U.S. and the EU—Converging or Diverging Paths?}, 49 \textit{Antitrust Bull.} 1, 11 (2004).
  \item \textsuperscript{17} Brian A. Facey & Dany H. Assaf, \textit{Monopolization and Abuse of Dominance in Canada, the United States, and the European Union: A Survey}, 70 \textit{Antitrust L.J.} 513, 522 (2003).
\end{itemize}
approach toward dominant firms—a mentality that has most prominently led to anemic interpretations of Section 2 of the Sherman Act. This so-called "economic" approach, however, is based on the faulty premises of Chicago School economics that, among other ills, misdefines "consumer welfare," overplays contestability theory, and ignores core theory. It also slights path dependence, network effects, and the anticompetitive dangers of overbroad intellectual property rights.

Finally, Section IV begins by outlining how in recent months Europe has begun to fall under the spell of laissez-faire rhetoric as it explores reinterpreting Article 82 to mimic Section 2. The paper concludes by arguing that these new developments, while troublesome, provide a window to debate three basic sets of questions. First, what interests desire a weakening of the law of abuse of dominant position? Second, can Section 2 learn from Article 82, rather than the other way around? Third, and most fundamentally, can Article 82 provide insight into a broader discussion about the goals and methods of antitrust?

II. GESTALT

Several paths might offer insight into Article 82. One might begin by looking at its text. The Article states that "[a]ny abuse by one of more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States."\(^{19}\) It then continues by offering four examples of offensive activities.\(^{20}\) While more detailed than Section 2 of the Sherman Act,\(^{21}\) Article 82 similarly uses "open-textured"\(^{22}\) and "broad

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19. Consolidated EC Treaty art. 82 (emphasis added).
20. The illustrations are as follows:
   Such abuse may, in particular, consist in:
   (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
   (b) limiting production, markets or technical development to the prejudice of consumers;
   (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   (d) making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Id.
21. See supra note 2 and accompanying text.
22. Gifford & Kudrle, supra note 14, at 770.
and non-specific”\textsuperscript{23} language that provides little guidance. If anything, Section 2 is more ambitious in proscribing “attempt to monopolize”\textsuperscript{24} and imposing criminal penalties—neither of which Article 82 provides for.\textsuperscript{25} To boot, one might plausibly argue that Article 82, unlike Section 2, does not prohibit a “dominant position” per se, but only its abuse.\textsuperscript{26} Quite ironically, then, the European language appears less ambitious than the American one. Put bluntly, textual analysis provides little insight as to why Article 82 has been enforced more vigorously than its American counterpart.\textsuperscript{27}

\begin{itemize}
  \item \textsuperscript{24} See supra note 2.
  \item \textsuperscript{25} See, e.g., Barry E. Hawk, United States, Common Market and International Antitrust: A Comparative Guide 680 (Law & Business, Inc. 1981) (“Article 86 [82], unlike section 2, does not include an attempt and conspiracy to monopolize. In this respect, Article 86 [82] is narrower in scope than section 2, for its application is conditioned on the finding of an already existing ‘dominant position,’ while section 2 reaches attempts or conspiracies to attain monopoly power.”); Facey & Assaf, supra note 17, at 576 (“Where the EC finds an infringement of Article 82, the only sanctions available are orders requiring the undertaking to cease the infringing action, fines and penalties.”). In addition, unlike the European regime, § 4 of the Clayton Act provides for treble damages. See 15 U.S.C. § 15 (2000).
  \item \textsuperscript{26} As one commentator observes:
    \begin{quote}
    [D]ominance in Community law is not the same as “monopoly” in United States antitrust law…. The mere existence of the power to exclude competition, without its exercise, is lawful under Community law…. But, once dominant, a firm may not use unlawful methods to maintain, consolidate or strengthen its dominance. It is not absence of competition, but taking advantage of it or imposing further restrictions on competition which is unlawful.
    \end{quote}

  \item \textsuperscript{27} For example, criminal sanctions for violations of Section 2 are unheard of today. See, e.g., William E. Kovacic, \textit{Designing Antitrust Remedies for Dominant Firm Misconduct}, 31 Conn. L. Rev. 1285, 1292 (1999) [hereinafter Kovacic, \textit{Designing Antitrust Remedies}] (“Although the Sherman Act treats Section 2 offenses as crimes, few cases alleging single-firm misconduct (as opposed to conspiracies to monopolize) have pressed criminal charges against dominant firms, and none have done so since 1940.”). Interestingly, some observers suggest that the ambition of the text may be inversely related to the vigor of its enforcement. See, e.g., Michal S. Gal, \textit{Monopoly Pricing as an Antitrust Offense in the U.S. and the EC: Two Systems of Belief About Monopoly?}, 49 Antitrust Bull. 343, 354 (2004) (“The remedy for infringement—treble damages or even a criminal prosecution—may have also encouraged a narrower interpretation of the antitrust laws [in the U.S.]”); Lang, supra note 26, at 49 (“In the United States monopoly power, not merely its abuse, may be unlawful. In the EEC, monopoly power is clearly lawful, and therefore the need to prevent its exploitation is greater than in the United States.”).}
\end{itemize}
Perhaps case law might offer a more useful perspective. While not as rich as Article 81 jurisprudence, there is significant body of Article 82 caselaw dating back to the early 1970s. And overall, a pattern does emerge: European courts have defined "abuse of dominance" less stringently than American courts have defined "monopolization." Relatedly, the Europeans have used Article 82 to combat discriminatory pricing, loyalty rebates, and refusals to supply. In doing so, Article 82 jurisprudence has diverged from that of Section 2.

But the caselaw unfortunately does not provide a basic framework from which to make sense of transatlantic differences. Fundamental principles are vaguely articulated. For example, the canonical definition of "dominant position" in European caselaw is: "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable

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28. For a succinct overview of cases on abuse of dominant position, see Microsoft Decision, supra note 6, ¶¶ 542-559. For a more detailed historical analysis, see HAWK, supra note 25. See also Damien Geradin et al., The Concept of Dominance in EC Competition Law (July 2005) (unpublished research paper, College of Europe), available at http://ssm.com/abstract=770144.

29. See, e.g., HAWK, supra note 25, at 680.

30. See, e.g., Gal, supra note 27, at 345 ("U.S. antitrust law sets a straightforward rule: monopoly pricing, as such, is not regulated. In contrast, under European Community (EC) law excessive pricing is considered an abuse of dominance and is punishable by fine and subject to a prohibitory order."); Waller, supra note 3, at 70 ("Article 86 [82] has been applied extensively to the pricing policies of dominant firms.").

31. See, e.g., Waller, supra note 3, at 71 ("Highly discretionary year end rebate systems that create disincentives to change suppliers have been held to constitute an abuse of a dominant position."); Niels & Kate, supra note 16, at 7.


33. See, e.g., Facey & Assaf, supra note 17, at 549-64; HAWK, supra note 25, 723-57.
extent independently of its competitors, its customers and ultimately of the consumers." In turn, "abuse" of such a position is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

While perhaps displaying a certain rhetorical elegance, these articulations — much like the American definition of "monopolization" — offer precious little guidance as to how a court might rule in one case versus another. Case outcomes are highly fact-dependent and often feature ambiguous rhetoric. Unfortunately then, "[t]he legal definition of dominance and monopoly power —


36. The definition provided in United States v. Grinnell remains canonical:
The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.


37. See Facey & Assaf, supra note 17, at 521 ("[T]he economics of monopolization cases are complex, sometimes controversial, and highly fact-driven.").

38. For example, in Irish Sugar, the European Court of First Instance holds that [W]hilst the finding that a dominant position exists does not in itself imply any reproach to the undertaking concerned, it has a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the common market. Similarly, whilst the fact that an undertaking is in a dominant position cannot deprive it of its entitlement to protect its own commercial interests when they are attacked, and whilst such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect those interests, such behaviour cannot be allowed if its purpose is to strengthen that dominant position and thereby abuse it.

Irish Sugar, Case T-228/97, 1999 E.C.R. II-2969, ¶ 112 (citations omitted). Of course, drawing the line between the protection of the dominant firm’s commercial interests and distorting competition is left as an exercise to the reader.
that is the ability to exclude competitors or to act independently of competitors and customers — is also of limited use.”

If analysis of the text and its interpretative caselaw does not yield clues as to what might explain Article 82’s vitality, perhaps one might look to its history and context. Specifically, the European approach to dominant firms might be usefully understood based on two factors: its historic roots in Austrian and German deliberations about market regulation and its role as an instrument of European market integration.

First, a bit of history. As David Gerber has argued, European distrust of dominant enterprises has its roots in the intellectual foment of late nineteenth century Austria. Austrian intellectuals believed in the need to establish a separate legal system to punish anticompetitive behavior:

The Austrian proposals and debates provided not only a framework for analysis of the problem of economic competition, but also a model for responding to that problem. The starting point of this response has been the belief that the objective of protecting competition has little to do with the traditional goals and methods of civil and criminal law. It thus requires a legal regime specifically adapted to achieving that objective. This has precluded reliance on the procedures of the ordinary courts and required a fundamentally different procedural framework for competition law. This view of competition law contrasts sharply with the tendency in U.S. antitrust law to employ the existing conceptual and procedural molds of criminal and civil law to deal with competition law issues.

Crucially, the Austrians believed that American overemphasis on cartel-busting had led to the emergence of dangerous monopolies in the form of trusts. As Gerber recounts, the Austrians believed that “the lack of flexibility and cumbersomeness of the U.S. treatment of cartels as well as its reliance on the regular court system were thought to have encouraged the formation of trusts and thus to have increased economic concentration. The Austrians feared such concentration far

39. Kolasky, What Is Competition?, supra note 9, at 43. See also Gifford & Kudrle, supra note 14, at 728 (“[C]ompetition-law rhetoric is often deeply ambiguous.”). Cf. Sullivan, supra note 23, at 469 (“Although they do not appear in exactly the same form, the substantive laws applied to Microsoft’s actions by the EU and the United States are very much the same, or at least not so different as to explain the potential discrepancies in the outcomes of the two cases.”).

Thus already we see an important precursor to EU competition law that recognizes the dangers of monopoly and grapples with antitrust law as a regulatory problem meriting a separate institutional framework.

At the beginning of the twentieth century, the Austrian debate was joined with German Ordo-Liberalism. As Gerber puts it:

The Ordo-Liberals believed that socialism and classical laissez-faire economics had been discredited, respectively, by the rise of authoritarianism and by the Great Depression. They developed, therefore, a set of ideas about the relationship between political and economic institutions which combined classical laissez-faire economics with concepts of state intervention.

One of the central components of the Ordo-Liberal program was the idea that where competition was weak or non-existent, the state should require enterprises to conduct themselves as if there were essentially perfect competition.

Thus, Ordo-Liberals sought to move away from the problems wrought by nineteenth century liberalism:

Ordo-Liberal ideology stressed the need for an economic constitution that would limit the convergence of private economic power in the interest of a free and fair political and social order. To achieve this goal, it posited the need to regulate the conduct of dominant firms by requiring them to act in a manner consistent with a competitive economic model.

Crucially, ordo-liberalism postulated "that competitive rivalry should be protected as such." Ordo-Liberalism's distaste for monopoly and desire to encourage rivalry thus provides at least a partial explanation for why Europeans interpret Article 82 in a manner that, to contemporary American tastes, might seem too protective of competitors.

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41. *Id.* at 437 (emphasis added).
43. Gal, *supra* note 27, at 364. *See also* Gerber, *Economic Power*, *supra* note 42, at 69 n.63 ("In their [Ordo-Liberal] view, history had demonstrated that without government intervention competitive processes tended to collapse, because enterprises preferred private (i.e., contractual) regulation of business activities rather than competition, and because market-dominating enterprises often acquired such power that they were not affected by competitive pressures. Thus, the state had to enforce competition.").
44. Ahlborn et al., *supra* note 11, at 27 (emphasis added).
45. *See* Gal, *supra* note 27, at 364 ("At its inception and during the first two decades of its application, the Treaty of Rome was strongly influenced by the Ordo-liberal ideology..."
The intersection between market integration and competition law provides the second piece of the interpretive puzzle. Article 82 is but one small part of a very ambitious treaty that seeks to establish "a common market and an economic and monetary union ...." In implementing this goal, Article 3(g) of the Treaty Establishing the European Community provides that the Community will include "a system ensuring that competition in the internal market is not distorted." As two commentators observe, in Europe "the behavior of dominant undertakings is analyzed with respect to a broader range of concerns.... The concerns encompass such broad, although not always explicit, goals as establishing a common market, promoting harmonious development and economic expansion, increasing living standards, and bringing about closer relationships between EU Member States."
As if the objective were not aspiring enough, the starting point for Europe has been a challenging one. European economies after World War II hardly exhibited competitive vigor. By the 1950s, the six original members of the European Community (West Germany, France, Belgium, Italy, Luxembourg, Netherlands) all had strong protectionist and prescriptive traditions. These member states were much less skeptical than the U.S. about the efficiency of direct regulation of the market. In fact, Germany, which had the strongest antitrust tradition of the six signatories, prohibited the earning of "monopoly rents." It might also be that rampant inflation after World War II experienced by many European countries naturally led to a strong interest in an economic policy that ensured lower prices. The fact that many dominant firms were created, controlled or protected by national governments might also have played a role, as such monopolies were not likely to be eliminated by market forces.49

Dismantling these traditions has, to say the least, been neither a straightforward nor expeditious task. Decades later, "EC competition authorities, unlike their U.S. counterparts, face the challenge of attaining a single market for products and services in a region where there are many dominant positions and numerous sectors where markets are regional."50 Examples might include policing traditional national monopolies,51 ensuring that multinational firms "deal in fair and nondiscriminatory ways with their local distributors,"52 or "reducing significant price disparities among consumers in different member states."53

More generally, European competition law is not just about the microeconomics of industrial organization, but fulfills a function within macroeconomic trade policy. As one European jurist suggests,

49. Gal, supra note 27, at 361. See also Waller, supra note 3, at 57 ("EC competition law represents a model which integrates competition principles into the broader traditions of a social market economy in which governments intervene more frequently and more directly in economic and social issues.").


51. See, e.g., Kolasky, What Is Competition?, supra note 9, at 41 ("In Europe, national markets were formerly protected by internal trade barriers, resulting in more local monopolies, and many more government-owned monopolies. As a result, there may be more undertakings with dominant positions that are not the natural result of market dynamics that exist in the United States."); Fox, Toward World Antitrust, supra note 32, at 7 ("Established firms in Germany, Belgium, France and other nations erected border barriers in markets for sugar, quinine, dyestuffs and cement to prevent market liberalization from eroding their historic national monopolies."); Roeller & Stehmann, supra note 11, at 292.

52. Gifford & Kudrle, supra note 14, at 753.

53. Gal, supra note 27, at 362. See also HAWK, supra note 25, at 721.
"[t]he basic idea behind articles 85 [81] and 86 [82] was that if you are to dismantle barriers between states within a common market, both tariff barriers and non-tariff barriers, you cannot risk having those barriers re-erected by private agreements or abuses of monopoly by private parties."

An appreciation for Article 82 can thus only emerge if one is willing to go beyond a narrow analysis of its text and caselaw. When comparing attitudes toward monopoly on either side of the Atlantic, "[s]uperficially similar provisions may mask highly contradictory policy goals and widely differing procedural assumptions." Indeed, being too literal can be deeply misleading. As Eleanor Fox observes:

[Disparate antitrust treatment, where it occurs, normally results not from different formulations of the principles but from the different meanings given to specific key words—particularly, "anticompetitive" and "abuse"—and different methodologies for defining markets and assessing market power. These differences in treatment are not apparent in the literal words of the antitrust rules; the rules could have exactly the same wording and the differences would persist. The persistent differences tend to be based on matters of principle . . . .]

This divergence does not imply that one set of attitudes is necessarily always right or wrong; rather, it reflects a different set of concerns and attitudes toward monopoly. Put simply, Article 82's gestalt is different than that of Section 2.

54. Bellamy, U.S. and the EU, supra note 46, at 16-17. See also Waller, supra note 3, at 55 ("EC competition law must be understood in the context of the need to break down the national boundaries between member states of the EC and to complete the unification of the common market."); Facey & Assaf, supra note 17, at 527 ("It is apparent that competition law in the European Union also rests upon a desire for market integration, which is related to the principle of free movement of goods and services across Member State lines.").

55. Cf. Niels & Kate, supra note 16, at 25 ("More importantly, [European competition law] reflects different objectives, such as those of the establishment of a European common market and of fairness."); Jebsen & Stevens, supra note 48, at 446 ("Articles 85 [81] and 86 [82] of the Treaty of Rome, which are the primary articles governing European competition—i.e., antitrust—law, are not only concerned with competition matters, but are also seeking to implement a broader range of industrial, social, and political policies.").


57. Fox, Toward World Antitrust, supra note 32, at 16 (emphasis added).

58. See Eleanor M. Fox, Antitrust and Regulatory Federalism: Races Up, Down, and Sideways, 75 N.Y.U. L. Rev. 1781, 1798 (2000) [hereinafter Fox, Antitrust and Regulatory Federalism] ("European competition law is based on an eclectic set of objectives: to integrate the common market, to protect firms from abusive domination, to provide openness and access, to level the playing field, to foster efficiency and competitiveness, and to serve citizens as consumers."). Cf. Bellamy, U.S. and the EU, supra note 46, at 16 ("It is extremely difficult to
III. MYTHS

Even with an appreciation for Article 82's history and context, some might still argue that it makes for poor public policy fifty years after the Treaty of Rome was signed. This contention typically rests on two superficially appealing narratives: first, that Article 82 is too often a protectionist measure implemented by European bureaucrats against innovative American companies; second, that its use reflects weak economics. Unfortunately for their proponents, these stories are myths.

The first charge is straightforward to debunk. Even a casual glance at European proceedings reveals a plain fact: American companies are turning to Europe to address their antitrust concerns. A few examples should illustrate the point. Sun Microsystems initiated the epic Microsoft proceedings.59 Similarly, Advanced Micro Devices ("AMD") raised its concerns about Intel in Europe after being rebuffed by the FTC.60 Another American company, NDC, has spearheaded the IMS litigation through its German subsidiary.61 In addition to their direct involvement, American firms have participated in European proceedings indirectly through associations fighting dominant firms.62 As one business journalist sums it up, "[t]he European Union is increasingly becoming the arena where U.S. tech companies fight their antitrust battles."63 This, of course, is a far cry from the conventional picture of stodgy European bureaucracy and protectionism that dominant players wish to paint.
The next myth — that of bad economics — is more convoluted, but equally wrong. The central claim is that Article 82 is out of touch with modern economics. The standard critique suggests that "not only the Commission but also the Community courts have too easily condemned practices because they were presumed to lead to foreclosure of competitors. The prohibition has been applied without due regard for business justification. In short, the application of the Article lacks an economic-based approach." The argument then suggests that Article 82 focuses neither on "consumer welfare" nor "efficiency." EU law, it is claimed, should strive toward "catching up" to the US; after all, "the goal of the U.S. antitrust law is the maximization of consumer welfare, while the EC protects competition by protecting competitors." At one level, these assertions are very alluring. Who, after all, can disagree with reassuring terms like "efficiency" and "consumer welfare"?

Yet this rhetoric is strikingly misleading. The lionized U.S. approach does not reflect the rich history of antitrust regulation in America, but only that of a particular brand of antitrust theory championed eloquently by the so-called "Chicago School" that "emphasizes the role of market forces and is generally reluctant to attribute an important role to competition policy." Terms like

64. Piet Jan Slot, *A View from the Mountain: 40 Years of Developments in EC Competition Law*, 41 COMMON MKT. L. REV. 443, 462 (2004) (emphasis in original). See also Niels & Kate, supra note 16, at 12-13 ("First, dominance is determined, and then the practice is assessed mainly on the basis of its form, rather than its economic effects. In other words, there is an implicit assumption that any practice that is undertaken by a dominant firm and that is not a 'normal' competitive action has the effect of distorting competition."); Roeller & Stehmann, supra note 11, at 287.


66. See, e.g., Jebsen & Stevens, supra note 48, at 513 ("The underlying assumptions of EU competition law do not make efficiency the sole, or even principal, criterion.").

67. Niels & Kate, supra note 16, at 18.


69. Slot, supra note 64, at 445. See also Hochstadt, supra note 68, at 325. At least some of today's regulators seem not to question the Chicago School's approach. For example, the Chairman of the Federal Trade Commission (FTC), Deborah Platt Majors, has recently written that "[w]hile we have had great success in achieving widespread adoption of Aaron Director's [the intellectual father of the Chicago School] reliance on free market principles as the surest
"efficiency" and "consumer welfare" come directly from the Chicago School's playbook. As linguistically creative as the Chicago School might be, these terms reflect facile assumptions and archaic economics.

As I have argued in detail elsewhere, the Chicago School's approach is riddled with glaring inconsistencies. To begin with, the words "consumer welfare" are disingenuously defined to mean overall allocative efficiency.70

As Eleanor Fox and Lawrence Sullivan amusingly describe:

[T]he Chicago School defines competition in terms of efficiency; defines efficiency as the absence of inefficiency; defines inefficiency in terms of artificial output restraint; and thus concludes that any activity that does not demonstrably limit output is efficient and therefore procompetitive. Thus, it "proves" that almost all business activity is efficient—a neat trick.71

Allocative efficiency, in turn, is based on the Kaldor-Hicks criterion which slights distributional concerns.72

This fallacy reflects just the beginning of the Chicago School's problems. The approach conveniently ignores the legislative history of the antitrust laws and assumes markets are contestable.73 It ignores advances in the economics of industrial organization that have occurred over the past three decades, including an understanding of scale, transaction costs, dynamic analysis and core theory.74

way to maximize consumer welfare, we apparently cannot take this reliance for granted." Deborah Platt Majoras, Reflections on the Evolution of European Community Competition Policy Under Commissioner Monti, 13 GEO. MASON L. REV. 251, 256 (2005).

70. See Reza Dibadj, Saving Antitrust, 75 U. COLO. L. REV. 745, 749-55 (2004). See also Eleanor M. Fox & Lawrence A. Sullivan, Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?, 62 N.Y.U. L. REV. 936, 959 (1987) ("[T]he producer-plus-consumer-welfare paradigm presses the analyst to think only in terms of aggregate outcomes or wealth of the nation. But this concept is static and outcome-oriented, while the antitrust laws are dynamic and process-oriented. They protect not an outcome, but a process—competition."). Some observers even define "competition" in terms of allocative efficiency. See, e.g., Kolasky, What Is Competition?, supra note 9, at 35 ("[C]ompetition is the process by which market forces operate freely to assure that society's scarce resources are employed as efficiently as possible to maximize total economic welfare.") (emphasis in original).

71. Fox & Sullivan, supra note 70, at 959.


73. See Dibadj, Saving Antitrust, supra note 70, at 755-60. See also Jesen & Stevens, supra note 48, at 456 (discussing the assumptions undergirding the Chicago School's approach).

74. See Dibadj, Saving Antitrust, supra note 70, at 762-75. Unfortunately, these new learnings have had precious little impact. See, e.g., Niels & Kate, supra note 16, at 10
Chicago School's bromides are especially dangerous in so-called new economy industries where network effects, path dependence, and overly expansive intellectual property rights can combine to entrench monopolies and thwart innovation. As Eleanor Fox aptly puts it, "[t]he 1980s victory of the Chicago School was more a victory of economic libertarianism and political conservatism than of maximization of a microeconomic welfare function." One should thus be very wary of critiques of Article 82 based on attractive, but disingenuously defined terms such as "consumer welfare" and "efficiency." These terms have been misdefined and misapplied in a rhetorically masterful way that unfortunately belies modern economics.

One might even turn the tables on the critics and argue that vigorous enforcement of anti-monopolization laws, as exemplified by Article 82, actually represents more consumer-friendly economics that the laissez-faire attitudes that have so enraptured U.S. antitrust in recent decades. The central point is that Article 82 focuses on market structure. By contrast, contemporary U.S. doctrine seems to find...

("However, the rise of post-Chicago has not affected the prevalence of the Chicago ground rules for antitrust listed above.").

75. See Dibadj, Saving Antitrust, supra note 70, at 776-81. See also Reza Dibadj, Small Firms, Speak Up Loudly for Innovation, SAN JOSE MERCURY NEWS, Jan. 30, 2005, at 5P. Consider what might happen, for instance, to the global distribution of software development firms if Article 82 remains a more potent weapon against dominant firms than an ineffectual Section 2:

In such a scenario it is easy to see total U.S. software exports decline as Microsoft's U.S. rivals weaken in the face of its increasing returns in the U.S. market, while barriers to entry are lowered in Europe making it more likely that competitors will thrive there. It is even foreseeable in such a situation that, so long as Microsoft's operating systems are deemed both dominant and amenable to essential facility analysis, U.S. software firms whose development efforts now are exclusively U.S.-based would shift some portion of those development efforts to a European base.

Harz, supra note 32, at 233-34 (emphasis added).


77. See, e.g., Case T-219/99, British Airways PLC v. Comm'n, 2003 E.C.R. II-5917, ¶ 306 ("The Commission recalls that Article 82 EC is aimed not only at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competitive structure."); Fox, What Is Harm to Competition?, supra note 76, at 375 ("[T]he European competition system turns at least as much on preserving competitive structure and open market values as on prohibiting conduct because it has exploitative outcomes."). As I have argued elsewhere, antitrust should focus on structure rather than on nebulous concepts such as competitive versus anticompetitive intent. See Dibadj, Saving Antitrust, supra note 70, at 819-23.
monopolization only where there is a short-term reduction in output, and the longer-term consequences on structure somehow magically becomes irrelevant. The importance of market structure, however, is a fundamental one, with significant pedigree in the economics of industrial organization.

Careful emphasis on structure also helps relieve the putative tension between protecting consumers and competitors. As William Kovacic notes, "[i]t misrepresents EC policy to say that these [European] perspectives betray a basic decision to protect competitors without regard to consumer interests. Rather, EC policy continues to place more faith in structural criteria as predictors of future consumer well-being." After all, consumers generally prefer to have more competitors rather than fewer — it is no coincidence, for example, that consumer advocates tend to oppose mergers. The European emphasis on "rivalry" — a concept with its roots in Ordo-Liberalism — therefore, might actually better protect consumers than policies focused solely on allocative efficiency. In other words, a market structured with many rivals may be more protective of "consumer welfare" than a market that is simply efficient, assuming

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78. See Fox & Sullivan, supra note 70, at 959. Focusing simply on output is different than focusing on structure:

    Principally, U.S. antitrust law proscribes only that which artificially lowers output and raises price (with a few exceptions); even a dominant firm has the right to compete hard and may do so even if it excludes competitors. EC competition law, among other things, protects small and middle-sized business from unfair exclusion and has a broader sweep against abusive practices.

Fox, Toward World Antitrust, supra note 32, at 12.

79. Cf. Takahashi, supra note 7 ("The EU is more sensitive to the dynamic aspects of competition and how certain of these contracting parties may hurt innovation and stop rivals from competing." (quoting David Balto, former policy director at the FTC)).

80. See, e.g., JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 1-2 (MIT Press 1988). Rivalry is also essential to Adam Smith's famous "invisible hand." ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 345 (George Routledge & Sons 1890) (1776). After all, this mechanism is predicated on the "perfect liberty" of exchanges and "competitors of equal wealth and luxury." Id. at 43.


82. As I have suggested elsewhere, a "consumer monopsony" standard might represent a more attractive objective for antitrust policy than allocative efficiency. See Dibadj, Saving Antitrust, supra note 70, at 814-19.

83. See Gifford & Kudrle, supra note 14, at 761 ("The European Union has appeared to follow a competition policy best described as the preservation of rivalry.").

84. Ahlborn et al., supra note 11, at 27.

85. Cf. HAWK, supra note 25, at 684 ("A more important distinction may lie in Article 86's [82's] greater emphasis on protection of consumers."); Bellamy, U.S. and the EU, supra.

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arguendo that efficiency can even be defined meaningfully. It is important to remember that the portrayal of "efficiency" as an American standard is only a recent phenomenon inspired by the Chicago School. Up until the 1970s, American antitrust law appreciated the importance of rivalry.

As Daniel Gifford and Robert Kudrle observe, "the present divergence between American and European approaches to competition law can be seen largely as the result of the break up of an earlier similarity. That earlier similarity dissolved when American courts, scholars and practitioners adopted the Chicago school approach in the mid-to-late 1970s." Indeed,

[The European Union's treatment of exclusionary practices is sympathetic with the one theme of the 1960s-1970s' American jurisprudence that had a lasting resonance. That is: Competition laws protect the competitive structure and dynamic of the market. They protect openess of and access to markets, and the right of market actors not to be fenced out by dominant firm strategies that are not based on competitive merits.]

It is amusing that even some of laissez-faire's most eloquent proponents believe in the importance of rivalry when dealing with cartels, but not with dominant firms.

This critique of the so-called "economic" approach will likely be subject to two sophisticated criticisms. One is institutional; the other, theoretical. The first is that one implication of vigorous anti-monopolization laws is that "an undertaking enjoying a dominant position is under a special responsibility not to engage in conduct that

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86. See Fox & Sullivan, supra note 70, at 959. See also supra note 72 and accompanying text.
87. See Gifford & Kudrle, supra note 14, at 741-46.
88. Id. at 746. See also Fox, Monopolization and Dominance, supra note 4, at 983 ("[A]t the time of the adoption of the Treaty of Rome, the Supreme Court of the United States was applying antitrust law to protect the viability of small and middle-sized businesses, to preserve the freedom of action of independent business people, and to disperse economic and political power.").
89. Fox, What Is Harm to Competition?, supra note 76, at 392 (emphasis added).
90. See, e.g., Timothy J. Muris, The FTC and the Law of Monopolization, 67 ANTITRUST L.J. 693, 693 (2000) ("Collaboration between competitors, whether aimed at stifling some aspect of rivalry, such as fixing prices, or ending competition entirely via merger, is the lifeblood of antitrust.").
may distort competition" — smacks of regulation. As William Kovacic observes:

The design and implementation of remedies in abuse of dominance cases confront courts with challenges for which judicial bodies historically have been ill suited. Implementing some forms of conduct remedies, such as mandatory access requirements and nondiscrimination obligations, can require extensive continuing oversight. The requisite oversight functions can entail regulatory tasks that historically have been vested in regulatory commissions with more suitable institutional features (including a large permanent staff and superior ability to collect and evaluate relevant information).

Critics lament, for instance that "the tag of 'dominance' in Europe has often led to various kinds of essentially regulatory control, severely constraining a firm's pursuit of profit in a way that contrasts with American practice," or that "Article 86 [82] has developed in a way that leaves the Commission as a kind of regulatory agency." As I have argued in detail elsewhere, however, antitrust is nothing but economic regulation. As such, administrative agencies — not generalist courts — must play the frontline role in enforcing antitrust laws. The fact that European competition law might better reflect regulatory conceptions is therefore a strength, not a weakness.

91. Microsoft Decision, supra note 6, ¶ 542. See also T-65/98, Van den Bergh Foods Ltd. v. Comm'n, 2003 E.C.R. 4653, ¶ 158 ("Consequently, although a finding that an undertaking has a dominant position is not in itself a recrimination, it means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market."); Niels & Kate, supra note 16, at 12.

92. See, e.g., Faccy & Assaf, supra note 17, at 579 ("[I]n the European Union it appears that the competition regime is more regulatory in tone... based on the notion of 'special responsibility' between a dominant party and its competitors..."); Jebsen & Stevens, supra note 48, at 488.

93. Kovacic, Designing Antitrust Remedies, supra note 27, at 1317. See also Slot, supra note 64, at 454 ("On a practical level it may be questioned whether the Commission, or national competition authorities for that matter, are equipped to assume day-to-day controls. Such controls would change the function of competition authorities into regulatory agencies.").

94. Gifford & Kudrle, supra note 14, at 739.

95. Jebsen & Stevens, supra note 48, at 448. See also O'Dell, supra note 68, at 118.

96. See Dibadj, Saving Antitrust, supra note 70, at 802-10. As Kovacic himself acknowledges:

In theory, an expeditious, expert administrative process would seem to offer considerable advantages over litigation of abuse of dominance cases in the district court. ... If the existing quality of relevant institutions, both judicial and administrative, cannot be surpassed, the possibilities for using antitrust doctrine to do more than impose modest conduct remedies will be severely limited, especially for high technology sectors.
The second criticism is more theoretical than institutional. It suggests that protecting consumers necessarily implicates distributional concerns, something which antitrust law should not concern itself with. After all, "[i]n the eyes of many North American economists and antitrust thinkers, capturing a fair share of economic surplus for consumers is not necessarily a job for antitrust; rather, the job of antitrust is to promote maximum efficiency and reduce deadweight loss."98 One easy response to this assertion is that it is simply irrelevant. After all, antitrust law is all about protecting consumers — whether or not this implicates distributional goals is beside the point. Another, more nuanced, rejoinder is that antitrust should be viewed as a regulatory tool precisely because it necessarily implicates distributional concerns. Both attacks dissolve provided one is willing to recognize that antitrust implicates equity. The institutional implication of this reality is that antitrust should be viewed holistically as a form of regulation designed to protect consumers.

Beginning in the 1970s and 80s, the Chicago School successfully shifted attention from these vital goals, sapping antitrust of its energy. As scholars have pointed out, this effort reflects an "'anti-antitrust' perspective,"99 a "reductionist paradigm"100 that "in the name of law and economics, has waged ideological warfare, assaulting antitrust itself."101 In the end, the idea that meaningful enforcement of antimonopolization laws reflects poor economics is driven by facile assumptions fueling a normative agenda — not economics.102 The

Kovacic, Designing Antitrust Remedies, supra note 27, at 1318. Some commentators suggest that the institutional differences between American and European competition law have led to a preference for the efficiency standard in the U.S. and the rivalry standard in Europe, given that generalist judges might prefer the former and expert agencies the latter. See, e.g., Gifford & Kudrle, supra note 14, at 754; Kovacic, Transatlantic Turbulence, supra note 81, at 852; William J. Kolasky, Mario Monti's Legacy: A U.S. Perspective, 1 COMPETITION POL'Y INT'L 155, 167 (2005) [hereinafter Kolasky, Monti's Legacy]. For a discussion of similar institutional issues, see Dibadj, Saving Antitrust, supra note 70, at 840-60.

97. Cf. Fox, Toward World Antitrust, supra note 32, at 17 n.84 ("EU abuse of dominance law is more regulatory than U.S. law, which permits greater freedom of action, even by dominant firms, e.g., in cutting off distributors, charging very low prices, and entering exclusive contracts.").

98. Kobak, supra note 47, at 353.


100. Fox & Sullivan, supra note 70, at 945.

101. Id. at 957.

102. See, e.g., Eric J. Stock, Explaining the Differing U.S. and EU Positions on the Boeing/McDonnell-Douglas Merger: Avoiding Another Near-Miss, 20 U. PA. J. INT'L ECON. L. 825, 834 (1999) ("T[he influence of the so-called 'Chicago School' in U.S. law has resulted in various assumptions that migrate fears of the concentration of monopoly power, suggesting that
concern, however, is fundamental: is it not better "to let the chances of competition — rather than the strategies of the dominant firm" guide markets?

IV. QUESTIONS

Perhaps because these deep problems have not been brought to the fore, in recent months Europe has begun to fall under the spell of laissez-faire rhetoric as it explores reinterpreting Article 82 to mimic Section 2. In 2005, the European Commission’s Directorate-General Competition (DG-Comp) issued a Discussion Paper on Article 82 that reads oddly like something the Chicago School would have written in the 1970s. For instance, the paper argues that "[t]he Community competition rules protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources" and that "it is competition, and not competitors as such, that is to be protected."

In a recent and well-publicized speech, Neelie Kroes, the Commissioner responsible for Competition Policy similarly speaks of an approach focused on so-called “consumer welfare,” not fairness:

I am aware that it is often suggested that—unlike Section 2 of the Sherman Act—Article 82 is intrinsically concerned with “fairness” and therefore not focused primarily on consumer welfare. As far as I am concerned, I think that competition policy evolves as our understanding of economics evolves. In days gone by, “fairness” played a prominent role in Section 2 enforcement in a way that is no longer the case. I don’t see why a similar development could not take place in Europe.

most markets are indeed competitive . . .

To be sure, the analysis of monopolization can often pose difficult questions. See, e.g., Facey & Assaf, supra note 17, at 586. Tossing around misleading terms such as “consumer welfare” and “efficiency,” however, provides little engagement.

Cf. Niels & Kate, supra note 16, at 17 (“[I]t should be noted that overall EC competition law has been moving much closer toward U.S. antitrust.”). For a discussion of recent trends in the EU’s strategy, see generally Roeller & Stehmann, supra note 11.


Id. ¶ 88. Of course, neither “consumer welfare” nor “efficient” is defined.

Id. ¶ 54.

Neelie Kroes, Member, European Comm’n, Preliminary Thoughts on Policy Review of Article 82, Speech at the Fordham Corporate Law Institute 3 (Sept. 23, 2005), available at http://ec.europa.eu/comm/competition/speeches/index_2005.html. See also Kolasky, Monti’s Legacy, supra note 96, at 162 (“There has also been salutary recognition by senior Commission
Similarly, a group of European economists argues that Article 82 analysis should shift to an “effects-based approach [where] the focus is on the use of well-established economic analysis.” There is even evidence from the European courts that they are less interested in policing dominant firms — as witnessed most prominently by the Bronner case which limited application of the essential facilities doctrine.

Whether and how such currents will overwhelm the historic and contextual realities discussed in Section II that undergrid a robust Article 82 cannot be predicted. But the trend is worrisome, especially because it rests on the pseudo-economics that Section II has tried to debunk.

The debate that is taking place in Europe, however, does at least provide an opportunity of opportunity to ask three basic sets of questions. First, what commercial interests desire a weakening of

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110. See Case C-7/97, Oscar Bronner GmbH & Co. v. Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co. KG, 1998 E.C.R. 1-7791, ¶ 47. Bronner “restricts the scope of the essential facilities doctrine by limiting its application to situations in which the owner of a facility holds more than a dominant position. Bronner requires that a facility be indispensable.” Evrard, supra note 32, at 491. The upshot is that “the criteria set forth by Bronner move the concept of abuse of dominant position towards that of monopolization as developed in Section 2 of the Sherman Act.” Id. at 520. See also Geradin, supra note 32.
111. Cf. Gifford & Kudrle, supra note 14, at 728 (“The prospect of convergence is, we believe, constrained by history, ideology, politics and legal tradition.”).
112. For instance, perhaps the national courts will resist weakening Article 82. As Michal Gal argues in the context of pricing:

Under the regulatory system of the EC, national competition authorities may generally apply national competition laws—which largely follow the EC laws—in cases that involve an anticompetitive conduct that affects the member state. The formal legal EC rule, which still prohibits excessive pricing, enables national authorities and courts to take a different stance with regard to its practical application. As a result, the rule against excessive pricing may be awakened from its dormant state. In fact, some authorities have adopted a much more interventionist approach than the Commission.

Gal, supra note 27, at 378.
113. Even those who support weakening Article 82 acknowledge the problems their position creates. See, e.g., Editorial, A Competition Policy Overdue for Review, supra note 12 (“New guidelines [on Article 82] would have to suggest how the short-term benefits to consumers of allowing an efficient company to dominate less efficient competitors could be balanced against the longer-term harm if those competitors were driven out of the market.”).
abuse of dominant position doctrine? Might these interests influence competition authorities? As William Kovacic observes:

Antitrust agencies do not operate in a political vacuum. When they challenge significant economic interests, they must be prepared to withstand close scrutiny from legislators and other public officials to whom the dominant firm complains about the government's decision to prosecute. As the government pursues more ambitious remedial ends, the intensity of political opposition is likely to increase.

Similarly, how much faith should we place in research funded by dominant firms that, unsurprisingly, argue against the dangers of monopoly?

Second, is there something we in the U.S. might learn from Article 82? As Judge Diane Wood has written in the context of competition law more generally:

Even if it turns out that there is never any formal globalization of antitrust law, the mere fact that an entity as large as the European Union is soon to be has chosen a slightly different path raises important questions for both scholars and practitioners in the area. Are the principles we now regard as essential for a soundly based antitrust law universal? Does the social science of economics describe accurately all human behavior, in all countries, at all times? Is a country's history unimportant when we consider what kind of competition law it needs?

114. To state the obvious, debilitating Article 82 would be good for dominant firms. As one article in the financial press notes:

Lawyers said the changes would require much greater use of economic data and analysis and would probably mean that some categories of abuse would no longer be pursued by the European Commission.

"It will be much more difficult and time-consuming to establish that a company has abused its dominant position," said Chris Thomas, a partner at Lovells in Brussels. "This is fundamentally good news for powerful companies, because it will be exceptionally difficult for their rivals to demonstrate an abuse," he added.


115. Kovacic, Designing Antitrust Remedies, supra note 27, at 1316.

116. See, e.g., David S. Evans & A. Jorge Padilla, Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach, 72 U. CHI. L. REV. 73, 73 n.† (2005) ("We thank . . . Microsoft and Visa for research funding."). The authors determine that "[e]conomics has not identified the necessary and sufficient conditions for any unilateral practice to be anticompetitive. But it has done a better job at determining the necessary conditions that can be used to screen out practices that could not be anticompetitive." Id. at 86. While one might disagree with their conclusions, the authors are, of course, to be praised for disclosing the sources of their funding.

Notwithstanding the current push to refashion Article 82 into Section 2, Wood's questions are especially relevant given that other countries are adopting the European rather than the U.S. model for their own competition laws. Yet the concept of abuse of dominance remains largely alien to U.S. discourse. If the European approach to monopoly were better understood, it would perhaps be less easy to dismiss it using facile bromides like "consumer welfare," "efficiency," and "competition." Thus a more substantive dialogue might begin.

Third, and most fundamentally, can Article 82 provide a window into a broader debate about what antitrust law should be? Thanks to the Chicago School and its acolytes, antitrust law in the U.S. has shriveled. The current ethos seems to have lost sight of the fact that the "primary goal of the [Sherman Act] was premised upon a political judgment that decentralized market power was essential to a free society." As Rudolph Peritz eloquently argues in his history of competition policy, the broader danger is that antitrust will be isolated from such political judgments:

In the last two decades, the political sphere has come to be identified as an economic domain—most zealously so under the influence of Chicago School economist George Stigler's market metaphor for government regulation and the Public Choice school that has reified Stigler's metaphor. Thus, the logic of unification produces one domain—whether political or economic—rather than the first logic's bipolar opposition. But the purity produced by the logic of unification comes at a high price: Lost in the collapse is one sphere's ethical principles and social goals. For example, equality may give way to liberty, as happened in the Lochner era, or equitable concerns may yield to wealth maximization . . . .

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118. See, e.g., Fox, Antitrust and Regulatory Federalism, supra note 58, at 1799 ("In any event, the European Union is winning the competition. More nations are finding the E.U. model, in contrast to the U.S. model, congenial to their economies and polities.").
119. See, e.g., Gifford & Kudrle, supra note 14, at 738 ("We were unable to find a single U.S. industrial organization textbook account that uses [dominance] regularly or even explores the term as it is used in Europe.").
120. Cf. Minda, supra note 99, at 1755 ("As a legal specialty, antitrust law peaked during the Warren Court era and has steadily declined ever since.").
121. Id. This attitude persisted more or less until the 1970s: In the 1960s, U.S. antitrust law was synergistic with civil rights law; it protected the underdog. It protected the freedom of independent traders to sell where and to whom they chose, and protected their right not to be fenced out of any significant market by the use of leverage. It valued market governance by impersonal forces, rather than by dominant firms. Fox, Antitrust and Regulatory Federalism, supra note 58, at 1798.
both theoretical and practical terms, competition policy comes to reflect only one rhetoric, one vision of society, untempered by its historical counterweight, because the unifying logic of collapsing domains either ignores ethical and teleological differences between economic and political realms or understands them as closed to negotiation.  

The current fashion in antitrust has been simply to ignore these concerns. But if antitrust law is to continue to have substance rather than become merely a convenient tool of antiquated laissez-faire economics, it must squarely confront the dangers of monopoly rather than hide behind facile and misleading slogans like “consumer welfare” and “efficiency.” The current controversy surrounding Article 82 provides an excellent opportunity to debate the first principles of antitrust more generally. If one believes in antitrust law as something more than pretty rhetoric, then crafting Article 82 to mimic the non-enforcement of Section 2 is precisely the wrong approach. Paradoxically, Article 82 is actually closer to original spirit of antitrust than Section 2.

V. CONCLUSION

Arguing about transnational antitrust has become a small cottage industry. Extraterritoriality has of course been the staple, but it is increasingly supplemented with interesting discussions on topics such as the use of private rights of action and the desirability of

122. RUDOLPH J. R. PERITZ, COMPETITION POLICY IN AMERICA, 1888-1992: HISTORY, RHETORIC, LAW 302 (Oxford University Press 1996) (emphasis added). Cf. Fox & Sullivan, supra note 70, at 944 (“[A]ntitrust traditionally had two central concerns. The first was political—distrust of bigness and of fewness of competitors as well as a policy preference for diversity and opportunity for the unestablished. The second was socioeconomic, especially as seen from the vantage point of the small businessman and the consumer”).

123. See supra notes 87-89 and accompanying text.

124. Cf. Minda, supra note 99, at 1759 (“The loss of belief in antitrust’s historical role in regulating monopoly power must be recovered if antitrust is to remain politically active in the next century.”).


establishing international antitrust enforcement mechanisms.\textsuperscript{127} Monopolization, however, remains understudied. This state of affairs is especially curious, given that the treatment of dominant firms reveals a striking area of transatlantic divergence.\textsuperscript{128}

To the extent that writers engage the monopolization issue, the overwhelming mass of commentary suggests that Section 2 has got it right and Article 82 has got it wrong. Critics disingenuously portray abuse of dominance doctrine as an imposition by European bureaucrats upon American innovators. Or worse yet, they paint attempts at cabining monopoly as somehow based on faulty economic analysis. This article has tried to show that these arguments are based on a series of reassuring bromides that, while rhetorically elegant, ultimately do not survive critical inquiry. In fact, the prevailing wisdom may have it exactly backward: current interpretation of Section 2 has more to learn from Article 82 than the other way around. Analysis of Article 82's history, purpose and context suggests that it is emblematic of the useful role competition laws can play as regulatory tools.

The time is especially ripe to begin this conversation, as recent developments in Europe suggest that Article 82 may yet come to mimic Section 2. While the trend is troublesome, the emerging debate provides an opportunity to focus not only on whether or not curbing monopoly is a worthy policy objective, but more generally on whether antitrust regulation has lost its way.


\textsuperscript{128} Cf. Facey & Assaf, supra note 17, at 581 ("[I]n the area of monopolization, convergence and enforcement cooperation are less settled and have received much less attention . . .").