

The Limits of Antitrust Scholarship

THE GLOBAL LIMITS OF COMPETITION LAW. Edited by Ioannis Lianos & D. Daniel Sokol. Stanford University Press, 2012. 288 pages. \$50.00.

Reviewed by Barak Orbach*

About thirty years ago, Professor Frank Easterbrook published his seminal article, *The Limits of Antitrust*, in the *Texas Law Review*.¹ Easterbrook declared that “[t]he goal of antitrust is to perfect the operation of competitive markets,”² and concluded that “[a]ntitrust is an imperfect tool for the regulation of competition.”³ It is an imperfect tool, he explained, “because we rarely know the right amount of competition there should be, because neither judges nor juries are particularly good at handling complex economic arguments, and because many plaintiffs are interested in restraining rather than promoting competition.”⁴

Since Easterbrook published his article, the intellectual resources invested in antitrust in the United States have been in decline (see Figure 1). Easterbrook wrote about institutional and conceptual limits of antitrust—the *internal limits* of antitrust. Others have addressed the *extrinsic limits* of antitrust—the relationships of antitrust with other areas of law, such as intellectual property and regulation.⁵ The decrease in depth of antitrust writing introduced a new form of limits in antitrust: diminishing critique and intellectual development in the field. This is the *depth limit* of antitrust. Of course, one may argue that there is no need for antitrust enforcement or antitrust scholarship, or at least no need for much.⁶ Such arguments, however, tend to reflect general objections to regulation that have their own

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1. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEXAS L. REV. 1 (1984).

2. *Id.* at 1.

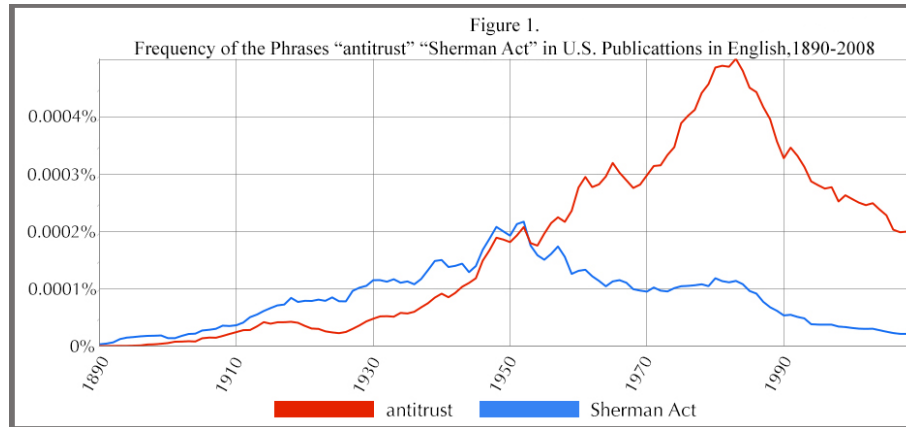
3. *Id.* at 39.

4. *Id.*

5. See, e.g., Dennis W. Carlton & Randal C. Picker, *Antitrust and Regulation*, in ECONOMIC REGULATION AND ITS REFORM: WHAT HAVE WE LEARNED? (Nancy L. Rose ed., forthcoming) (on file with the author); Louis Kaplow, *The Patent-Antitrust Intersection: A Reappraisal*, 97 HARV. L. REV. 1813, 1816–18 (1984) (proposing a new framework for balancing the inherent conflict between trade restrictions provided for by patent law and prohibited by antitrust law).

6. See, e.g., Robert W. Crandall & Clifford Winston, *Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence*, 17 J. ECON. PERSP. 3, 4 (2003) (“We find little empirical evidence that past [antitrust] interventions have provided much direct benefit to consumers or significantly deterred anticompetitive behavior.”); Thomas W. Hazlett, *Is Antitrust Anticompetitive?*, 9 HARV. J.L. & PUB. POL’Y 277, 336 (1986) (“Given the long history of antitrust law and its contempt for true market rivalry, perhaps the most effective proconsumer program would be to consider federal enforcement of the antitrust laws to be a per se restraint of trade.”).

social costs.⁷ They often rely on “fire of truth” theories that no knowledge or analysis can possibly challenge.⁸ The oversimplicity of such “fire of truth” arguments has been burdening antitrust for too long.



Ioannis Lianos and Daniel Sokol’s *The Global Limits of Competition Law (GLCL)* is the first book in a series intending to develop antitrust scholarship.¹⁰ *GLCL*’s “starting point [is] the intrinsic limits of competition law that Judge Frank Easterbrook highlighted.”¹¹ The purpose of the book is to explore a broad set of limits to competition laws, “some intrinsic to antitrust, others extrinsic.”¹² By definition, antitrust scholarship, including scholarship about the limits of antitrust, expands the depth limits of antitrust.

7. For a critique of those general objections to regulation, see generally BARAK ORBACH, *REGULATION: WHY AND HOW THE STATE REGULATES* (2012). See also Barak Orbach, *What Is Regulation?*, 30 *YALE J. ON REG. ONLINE* 1, 9–10 (2013) [hereinafter Orbach, *What Is Regulation?*] (arguing that the preponderance of irrational, ideological positions on regulation obstruct a more productive approach that acknowledges regulation’s strengths and weaknesses); Barak Orbach, *How Antitrust Lost Its Goal*, 81 *FORDHAM L. REV.* 2253 (2013) [hereinafter Orbach, *How Antitrust Lost Its Goal*] (describing the reflection of the trend against regulation in antitrust); Thomas Philippon & Ariell Reshef, *Wages and Human Capital in the U.S. Finance Industry: 1909–2006*, 127 *Q.J. ECON.* 1551 (2012) (finding correlation between deregulation and substantial wage premiums in the financial industry).

8. See Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago 1932–1970*, 26 *J.L. & ECON.* 163, 183 (1983) (reproducing a discussion among leaders of the Chicago School, who compare their experiences with the movement to “religious conversion”); Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 *MICH. L. REV.* 213, 216 (1985) (“[N]othing—not even an intellectual structure as imposing as the Chicago School—lasts forever.”).

9. For the methodology and its limitations, see Jean-Baptiste Michel et al., *Quantitative Analysis of Culture Using Millions of Digitized Books*, 331 *SCIENCE* 176 (2011).

10. *THE GLOBAL LIMITS OF COMPETITION LAW* (Ioannis Lianos & D. Daniel Sokol eds., 2012) [hereinafter *GLCL*].

11. Ioannis Lianos & D. Daniel Sokol, *Introduction*, in *GLCL*, *supra* note 10, at 1, 1.

12. *Id.*

GLCL is a book about competition laws, known in the United States as antitrust.¹³ The book examines “competition laws” as a concept. It consists of fifteen essays written by prominent antitrust scholars. As a collection of essays, *GLCL* presents complementary perspectives of today’s limits of antitrust.

The understanding of *GLCL* requires some appreciation of the simplicity and hospitality traditions in antitrust. The simplicity tradition refers to the tendency of individuals to view markets, businesses, and business practices either as competitive or as anticompetitive. That is, the individual simplifies facts and realities in a manner that allows her to consistently reach the same conclusion about competitiveness. In *The Limits of Antitrust*, Frank Easterbrook described the “inhospitality tradition” as “[t]he tradition [in which] judges view each business practice with suspicion, always wondering how firms are using it to harm consumers. If the defendant cannot convince the judge that its practices are an essential feature of competition, the judge forbids their use.”¹⁴

GLCL’s essays shed light about the complexities of reality effectively rejecting the simplicity and hospitality traditions. As Herbert Hovenkamp sums up in his essay: “extremes [in] antitrust policy should [be] avoid[ed].”¹⁵

Easterbrook’s *The Limits of Antitrust* is a seminal article that, unlike ordinary academic works, has survived developments in time and is still relevant.¹⁶ Being a Chicago School disciple, Easterbrook presented a taxonomy of antitrust errors, arguing that if we “let some socially undesirable practices escape, the cost is bearable,”¹⁷ while the “costs of deterring beneficial conduct (a byproduct of any search for the undesirable examples) are high.”¹⁸ This taxonomy was insightful as an instrument against the “inhospitality tradition of antitrust.”

Easterbrook’s taxonomy, however, is simple and may backfire under the antithetical tradition where judges perceive the marketplace as the cure for all problems and government intervention as the source of all problems. The taxonomy was helpful for certain things, but it reflects the simplicity tradition in antitrust. To illustrate, consider judges who endorse the Chicago

13. For the significance of the label “antitrust,” see Barak Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605 (2012).

14. Easterbrook, *supra* note 1, at 14. Easterbrook attributed the phrase to Donald Turner. *Id.* at 4. While heading the Antitrust Division at the Department of Justice, Turner described the “inhospitality in the tradition of antitrust law.” Donald F. Turner, *Some Reflections on Antitrust*, 1966 N.Y. ST. B.A. ANTITRUST L. SYMP. 1, 1–2. The phrases “a tradition of inhospitality” and “inhospitality in a tradition” are not equivalent, of course.

15. Herbert Hovenkamp, *Antitrust and the Close Look: Transaction Cost Economics in Competition Policy*, in *GLCL*, *supra* note 10, at 66, 80.

16. See, e.g., Fred S. McChesney, *Easterbrook On Errors*, 6 J. COMPETITION L. & ECON. 11, 12–13 (2010) (highlighting the large number of citations to Easterbrook’s article in cases and secondary sources as evidence of its success).

17. Easterbrook, *supra* note 1, at 14.

18. *Id.* at 15.

tradition at its extreme.¹⁹ For example, in 1979, relying on a dubious study written in the Chicago tradition, the Supreme Court stated that the goal of antitrust is “consumer welfare.”²⁰ The U.S. Supreme Court has never examined the standard, yet it keeps using it.²¹

While antitrust has many limits, studies show that human overconfidence tends to have fewer limits. People tend to be dismissive of and reject information that conflicts with their own beliefs.²² Specifically, people who hold strong opinions are likely to evaluate facts and empirical evidence in a biased manner.²³ This well-documented tendency has profound effects on communication and political polarization.²⁴ It also explains the simplicity tradition in antitrust. An influential article, which argues that action is costly but inaction is bearable, may become immortal for those who want to believe that, notwithstanding evidence to the contrary, government action is costly. That is, a study of policy limits may establish limits, if the study forms a belief that problems solve themselves, while policies cause problems.

19. For a discussion of this culture in courts, see generally Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039 (1997).

20. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). See generally Barak Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133 (2011) (chronicling the academic and judicial confusion with respect to the meaning of consumer welfare).

21. See generally Orbach, *How Antitrust Lost Its Goal*, *supra* note 7.

22. See generally Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129 (1954) (explaining divergent perceptions of violence in a football game corresponding to team identification with the proposition that from the total array of possible perceptions, viewers select those which they understand as significant); Hugo Mercier & Dan Sperber, *Why Do Humans Reason? Arguments for an Argumentative Theory*, 34 BEHAV. & BRAIN SCI. 57 (2011) (reevaluating the function of human reasoning to account for the fact that people typically ignore arguments that do not support their own views); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998) (marshaling evidence demonstrating the strength of confirmation bias).

23. See generally Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979) (finding that people who hold strong opinions on complex social issues fail to give equal weight to confirming and disconfirming evidence).

24. See generally James Andreoni & Tymofiy Mylovanov, *Diverging Opinions*, 4 AM. ECON. J.: MICROECONOMICS 209 (2012) (noting the limited effectiveness of communication due to persistence of disagreement even in the face of sufficient information to reach agreement); Roland Bénabou & Jean Tirole, *Self-Confidence and Personal Motivation*, 117 Q.J. ECON. 871 (2002) (examining how self-serving beliefs factor into internal, intrapersonal communication); Avinash K. Dixit & Jörgen W. Weibull, *Political Polarization*, 104 PROC. NAT'L ACAD. SCI. 7351 (2007) (offering an explanation of how voter processing of information can result in polarization of the electorate); Barak Orbach & Frances R. Sjoberg, *Excessive Speech, Civility Norms, and the Clucking Theorem*, 44 CONN. L. REV. 1 (2011) (arguing that extraneous societal communication imposes costs that impede beneficial changes); Barak Orbach, *On Hubris, Civility, and Incivility*, 54 ARIZ. L. REV. 443 (2012) (questioning the effectiveness of certain social norms purportedly designed to encourage openness to differing viewpoints); Rajiv Sethi & Muhamet Yildiz, *Public Disagreement*, 4 AM. ECON. J.: MICROECONOMICS 57 (2012) (suggesting that communication in certain societies can serve to magnify existing biases and to create new biases where none previously existed).

Scholarship, antitrust scholarship included, has its own limits. This is why we should be concerned about the depth limits of antitrust. *GLCL* is an important book for its survey of the constraints of antitrust. The works in the book explain how antitrust can work in the real world when constraints exist. Under the simplistic tradition, the government is the primary source of constraints, and we should “let some socially undesirable practices escape [because] the cost is bearable.”²⁵ In the real world, however, there are several sources of constraints: transaction costs, inadequate information, preferences for differentiation, bounded rationality, and fallibility. Antitrust as a form of government regulation is needed to address the way market participants utilize these constraints or to evaluate the effects of these constraints on business conduct. The imperfections of antitrust, its intrinsic limits, are a byproduct of these constraints.²⁶

GLCL explores some of the complexities of managing antitrust in the real world. The book includes three essays about the institutional design of antitrust. Javier Tapia and Santiago Montt describe the relationships between courts and competition agencies.²⁷ Frédéric Jenny analyzes the significance of independency and advocacy for the work of competition agencies.²⁸ Ioannis Lianos describes the misunderstanding of antitrust remedies.²⁹

GLCL includes four essays on the intrinsic limits of antitrust. George Priest explains the intellectual foundation of Easterbrook’s *The Limits of Antitrust* in the Chicago School tradition.³⁰ Herbert Hovenkamp describes the relationships among several schools of thoughts in antitrust, focusing on transaction cost economics, which is related to the Chicago School of antitrust.³¹ Hovenkamp’s review stresses the need for depth in antitrust, describing several points of stagnation.³² Jeffrey Harrison presents the challenges of competition policy in addressing the powerful buyers.³³ Anne-Lise Sibony reviews the challenges of the legal institution to properly utilize

25. Easterbrook, *supra* note 1, at 14.

26. Orbach, *How Antitrust Lost Its Goal*, *supra* note 7. See generally Orbach, *What Is Regulation?*, *supra* note 7 (observing that imperfect regulation is a necessary consequence of human limitation).

27. Javier Tapia & Santiago Montt, *Judicial Scrutiny and Competition Authorities: The Institutional Limits of Antitrust*, in *GLCL*, *supra* note 10, at 141.

28. Frédéric Jenny, *Competition Authorities: Independence and Advocacy*, in *GLCL*, *supra* note 10, at 158.

29. Ioannis Lianos, *Competition Law Remedies: In Search of a Theory*, in *GLCL*, *supra* note 10, at 177.

30. George L. Priest, *The Limits of Antitrust and the Chicago School Tradition*, in *GLCL*, *supra* note 10, at 15.

31. Hovenkamp, *supra* note 15, at 66.

32. *Id.*

33. Jeffrey L. Harrison, *Complications in the Antitrust Response to Monopsony*, in *GLCL*, *supra* note 10, at 54.

economics.³⁴ In some ways, her essay explains the spirit of the simplistic tradition.

Like most distinctions, the distinction between the intrinsic and extrinsic limits of antitrust is somewhat artificial. These limits are interrelated and define each other. The internal strengths and weaknesses of competition policies influence their reach, while other legal regimes and policies external to antitrust influence the effectiveness of competition policies.

GLCL's essays on the extrinsic limits of antitrust illustrate this point. Daniel Sokol reviews the effects of government policies on the strength of antitrust policy, focusing on regulatory regimes that weaken antitrust.³⁵ Damien Gerard's essay describes one form of such regulatory policies: the state action doctrine in Europe.³⁶ Daniel Crane describes choices of litigants between antitrust and intellectual property, considering the limits of each area of law.³⁷ And Paolisa Nebbia describes the relationships between competition law and consumer protection.³⁸ One of the central debates in antitrust is whether the law serves (or ought to serve) as a means for consumer protection, or whether consumer protection is outside the limits of the field.³⁹

GLCL does not explore or even present all the limits of antitrust. The book offers fifteen perspectives of certain limits. It should be understood as a book that seeks to challenge the present depth limits of antitrust by offering important antitrust contributions. As such, *GLCL* is indeed an important antitrust book.

Contrary to Easterbrook's statement, the goal of antitrust is *not* "to perfect the operation of competitive markets."⁴⁰ Perfection has never been the goal of antitrust, and it should not be the goal of any policy.⁴¹ Perfection is also not a trait of scholarship. But antitrust scholarship is too often a messenger of the tradition of hospitality in antitrust. *GLCL* is a successful collective effort to explain the depth needed in antitrust.

34. Anne-Lise Sibony, *Limits of Imports from Economics into Competition Law*, in *GLCL*, *supra* note 10, at 39.

35. D. Daniel Sokol, *Anticompetitive Government Regulation*, in *GLCL*, *supra* note 10, at 83.

36. Damien M.B. Gerard, *A Global Perspective on State Action*, in *GLCL*, *supra* note 10, at 99.

37. Daniel A. Crane, *IP's Advantages over Antitrust*, in *GLCL*, *supra* note 10, at 117.

38. Paolisa Nebbia, *Competition Law and Consumer Protection Against Unfair Commercial Practices: A More-than-Complementary Relationship?*, in *GLCL*, *supra* note 10, at 127.

39. For the controversy on consumer protection in antitrust, see John B. Kirkwood, *Protecting Consumers and Small Suppliers from Anticompetitive Conduct: The Goal With the Widest Support*, 81 *FORDHAM L. REV.* 2425 (2013); Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 *U. PITT. L. REV.* 503 (2001); Robert H. Lande, *A Traditional and Textualist Analysis of the Antitrust Statutes: Efficiency, Wealth Transfers, and Consumer Choice*, 81 *FORDHAM L. REV.* 2349 (2013); and Joshua Wright & Douglas Ginsburg, *The Goals of Antitrust: Why Welfare Trumps Choice*, 81 *FORDHAM L. REV.* 2405 (2013).

40. Easterbrook, *supra* note 1, at 1.

41. See generally STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993).