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A Quick Look at Two Areas of Doctrinal Difference Between EU and U.S. Decision Makers

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I. INTRODUCTION

In 1969, Walter Hallstein, the first President of the European Commission (1958-1967), wrote: "The supreme necessity facing the Economic Community is to cultivate economic relations across the Atlantic, in particular with the United States of America. For every responsible European and American politician this is a permanent task of the highest significance."[1] Forty years later, the economic ties between the European Union and the United States are unquestionably close and significant. Transatlantic trade exceeds €2 trillion per year.[2] In the aggregate, the EU and U.S. economies represent approximately one-half of global Gross Domestic Product.[3] Relative to these enormous numbers, it is fair to conclude that the relationship has lived up to Hallstein's imperative, despite a modicum of friction over tariff or nontariff (behind-the-border) measures.

To be sure, there are periodic "mini-trade wars,"[4] disagreements over geographic indicators and flare-ups over such matters as the GE/Honeywell[5] and Boeing/McDonnell Douglas mergers.[6] Despite a certain difference in rhetoric,[7] however, trade relations tend to be

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1. WALTER HALLSTEIN, EUROPE IN THE MAKING 251 (George Allen & Unwin Ltd. 1972) (1969).

2. *Countries: United States*, EUR. COMM'N, http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/united-states/ (last visited Oct. 10, 2011).

3. *Id.*

4. *See, e.g.*, Fritz Breuss, *WTO Dispute Settlement in Action: An Economic Analysis of Four EU–US Mini Trade Wars—A Survey*, 4 J. INDUS. COMPETITION & TRADE 275 (2004) (reviewing disputes over bananas, hormones, foreign sales corporations, and steel cases).

5. Among the many accounts of the failed merger, one that vividly recounts both the legal and political aspects is Eleanor M. Fox, *GE Honeywell: The U.S. Merger that Europe Stopped—A Story of the Politics of Convergence*, *in* ANTITRUST STORIES (Daniel A. Crane & Eleanor M. Fox eds., 2007).

6. William E. Kovacic, *Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy*, 68 ANTITRUST L.J. 805 (2000-2001).

7. The European Commission's Web site states:

> Inevitably for two economies of such size with such a high volume of trade, the EU and the US encounter a number of trade disputes which are handled through the dispute settlement mechanism of the WTO. Although they tend to grab headlines, disputes currently only impact some 2% of EU-US trade.

Countries: United States, *supra* note 2. The U.S. Trade Representative's Web site is a bit sharper in tone:

> Although disagreements affect only a small fraction of total U.S.-EU trade and investment, several EU trade restrictions have received significant attention from the U.S. Government in recent years. Barriers to access for key U.S. agricultural exports continue to be a source of particular frustration. . . . The United States continues to be concerned about EU and member state measures that subsidize the development, production, and marketing of large civil aircraft.

harmonious and, whatever the issue *du jour*, mutually beneficial. Indeed, both parties share an interest in avoiding fissures in their trade relations, which other countries or trading blocs might exploit to their own economic advantage.

Without questioning the overall importance and solidity of transatlantic trade, this Article highlights two areas where authoritative decision makers in the EU and U.S. approach two substantive topics differently: (1) competition (or antitrust[8]) law and (2) genetically modified agricultural products (GMOs). Despite representing barely a rounding error in overall trade relations, these areas command the attention of hundreds of books, articles, and conferences. Indeed, differences in antitrust and GMO policy are remarkably persistent and, for the reasons this Article discusses, seemingly intractable.

There is little substantive overlap between the legal and regulatory regimes governing antitrust and the use of GMOs. Nor is there much, if any, commonality from a public interest perspective; those who protest in the streets over GMO corn are unlikely, except by coincidence of individual interests, to have a passion for the rules on vertical restraints. Further, although each area undoubtedly influences and reflects economic policy and conditions, they do so from different, if not unrelated, perspectives. Antitrust influences and reflects economic policies and conditions from the perspective of theory about properly functioning markets, and GMOs from the perspective of proper regulation of potential health hazards. At the same time, of course, the respective approaches to GMOs in the EU and United States ultimately have market (economic) impacts.

Nevertheless, examining these two areas sheds light on similarities and differences in how decision makers in the EU and United States look at two important aspects of transatlantic relations. Part II of this Article sketches the history of antitrust in the United States and the EU and notes

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European Union, OFFICE OF THE U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/countries-regions/europe-middle-east/europe/european-union (last visited Oct. 1, 2011). *See generally* CONG. RESEARCH SERV., RL34381, EUROPEAN UNION–U.S. TRADE AND INVESTMENT RELATIONS: KEY ISSUES (2008).

8. In the EU, the phrase "competition law" is broader than the rules that govern restraints of trade and monopolization and includes, for example, rules on state aid. EUR. COMM'N, EU COMPETITION LAW: RULES APPLICABLE TO STATE AID (2011), *available at* http://ec.europa.eu/competition/state_aid/legislation/compilation/toc_11_1_2011_en.pdf. "Antitrust" has a particularly American ring to it but appears often in the EU, in sources as varied as the EU Commission's Web site and speeches by European officials in the 1950s. *Competition: Antitrust: Overview*, EUR. COMM'N, http://ec.europa.eu/competition/antitrust/overview_en.html (last visited Oct. 10, 2011). This Article focuses on the subset of competition law that both jurisdictions tend to refer to as antitrust.

in broad terms certain ways in which the Supreme Court of the United States and the Court of Justice of the European Union, particularly the decisions of the European Court of Justice (ECJ), diverge in their analysis of comparable fact patterns. Part III looks briefly at the conflict in regulatory policy in regard to GMOs. Finally, Part IV suggests possible unifying themes in the different approaches to antitrust and GMOs, with an emphasis on error tolerance in decision making.

This Article does not purport to offer anything close to a comprehensive review or analysis of antitrust developments or GMO regulations, each of which is the subject of a huge body of literature. Instead, the modest aim of this Article is to point out that historical, social, psychological, and other factors collectively play a similar role in influencing how decision makers in the EU and United States address antitrust and GMOs. The divergent approaches to GMOs are well-known. By contrast, there are many similarities between U.S. and EU antitrust law (e.g., enforcement policy). This Article suggests, however, that there are in fact significant substantive differences, such that divergence is closer in degree to that of GMOs than one might assume. In any event, greater awareness and more intensive study of these factors might help bridge differences or, if not, at least enable a clearer picture of what underlies those differences.

II. ANTITRUST

Modern antitrust law might have been an American invention, but the EU has matched, if not surpassed, the United States' role as the leading "exporter" of antitrust.[9] Today, more than 100 countries have antitrust laws, many of which derive from or reflect EU rather than U.S. law.[10] There are many points of similarity between the two systems, but that similarity, whether in statutory text or broad principles, can mask important substantive differences, as words from two languages can seem

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9. In its original meaning, "antitrust" refers to control of business activities through the form of an actual trust. Early in the history of antitrust law, however, the word became more metaphoric than literal. As William Hornblower wrote in 1911: "Today, and for many years past, the so-called trust in its original sense has become rare, but the expression survives and has assumed a generic significance as indicating and connoting every form of combination of competing interests." William B. Hornblower, Anti-Trust Legislation and Litigation, Annual Address (Aug. 30, 1911), *in* Thirty-Fourth Annual Rep. A.B.A., 1911, at 304-38. Hornblower argued before the Supreme Court in the tobacco trust case and briefly served on the New York Court of Appeals before his death. *Judge Hornblower Dies in 64th Year*, N.Y. TIMES, June 17, 1914, at 11.

10. Kenneth M. Davidson, *Assisting Foreign Competition Agencies and the AMC Recommendations*, US ANTITRUST MODERNIZATION COMM'N 2, http://www.ftc.gov/os/comments/intltechassistworkshop/061001kmdpaper1.pdf (last visited Oct. 10, 2011).

to have the same meaning when in fact they are what linguists call false friends (for example, "gift" in English and "Gift" in German, the former meaning a present and the latter meaning poison). Similarly, the fact that Dutch and English are closely related does not mean the typical American can easily understand Dutch.

The following Subparts outline, in broad strokes, the origins of U.S. and EU antitrust law and then discuss how certain fundamental doctrines have evolved, or not, in Supreme Court and ECJ jurisprudence. The discussion focuses on the outer boundaries of restrictions on multifirm conduct under § 1 of the Sherman Act[11] and article 101(1) of the Treaty on the Functioning of the European Union (TFEU).[12]

A. United States

When Cornelius Vanderbilt died in 1877, he left an estate worth $90 million,[13] a large amount today and a staggering figure in the nineteenth century. Vanderbilt's legacy is emblematic of an era in which the United States emerged from the Civil War into a period of industrialization and expansion; of social change; of individual aspiration and group resentment in the growing tension between the tradition of "rugged individualism" and the aggregation of wealth not only by individuals but by the modern corporation, a legal fiction that few understood and many feared.

Vanderbilt, Morgan, Rockefeller, and Carnegie, among others, are names that still connote success through hard work and cunning, even if tinged with sharp and conniving practices. Yet the legal forms by which they conducted business—corporations, trusts, and holding companies—spurred vitriol from scholars, muckrakers, politicians, and social reformers.[14] The twenty-first-century boom in corporate social

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11. 15 U.S.C. § 1 (2006).

12. Consolidated Version of the Treaty on the Functioning of the European Union art. 101(1), Sept. 15, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]. Article 101(1) of the TFEU preserves the text of, but renumbers, article 81(1) of the Treaty Establishing the European Community (TEC). FOREIGN & COMMONWEALTH OFFICE LONDON, A COMPARATIVE TABLE OF THE CURRENT EC AND EU TREATIES AS AMENDED BY THE TREATY OF LISBON (2008), *available at* http://www.official-documents.gov.uk/document/cm73/7311/7311.pdf. The TEC likewise renumbered article 85(1) of the Treaty of Rome. *Competition*, GLOBAL VISION: EUROPEAN NATION, GLOBAL FUTURE, http://www.global-vision.net/facts/fact7_5.asp (last visited Oct. 10, 2011). Single firm conduct under § 2 of the Sherman Act or article 102 of the TFEU merits a paper in itself.

13. ROBERT H. WIEBE, THE SEARCH FOR ORDER, 1877-1920, at 8 (David Donald ed., 1967).

14. *See id. passim*; RICHARD HOFSTADTER, THE AGE OF REFORM FROM BRYAN TO F.D.R. (1955).

responsibility is little different from its antecedents in the nineteenth and early twentieth centuries. The "trust problem" and the "corporation problem" were common phrases during this era. Long before a *Rolling Stone* columnist vividly compared a well-known investment firm with a "giant squid,"[15] cartoonists used the imagery of a giant octopus to depict Standard Oil.[16] Another frequent turn of rhetoric was to compare the corporation with Frankenstein's monster: The scientist and the state had equally lost control of their respective creations (or creatures).[17] In a speech on the Senate floor in 1890, Senator John Sherman of Ohio metaphorically linked control of business combinations with the spirit of American independence:

> If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.[18]

Public anger and resentment spurred congressional action. On December 4, 1889, Senator Sherman introduced a bill to "declare unlawful trusts and combinations in restraint of trade and production."[19] Senator Sherman's bill did not become law but a substitute received congressional approval on June 24, 1890, after extensive debate in the Senate and House, but without a single change to the text.[20] On July 2, President Harrison signed "[a]n Act to protect trade and commerce against unlawful restraints and monopolies."[21] Section 1 provides: "Every contract, combination in the form of trust or otherwise, or

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15. Matt Taibbi, *The Great American Bubble Machine*, ROLLING STONE, July 9, 2009, at 52.

16. NAT'L HUMANITIES CTR., THE IMAGE OF THE OCTOPUS: SIX CARTOONS, 1882-1909, at 5, *available at* http://nationalhumanitiescenter.org/pds/gilded/power/text1/octopusimages.pdf.

17. An early example is James Medbery, *The Great Erie Imbroglio*, ATLANTIC MONTHLY, July 1868, at 111. Of many other examples, see *Interstate Commerce Debates*, 48 CONG. REC. 97 (1884) (statement of Sen. Zebulon Vance) ("It would be the story of Frankenstein converted into actual fact."); *Corporations and the Public*, U.S. INVESTOR, June 3, 1899, at 768, 769 ("[T]he corporations unless checked in their career seem likely to develop into a modern Frankenstein and to turn and rend their creator asunder.").

18. 21 CONG. REC. 2456 (Mar. 21, 1890) (statement of Sen. John Sherman).

19. *Id.*

20. Senator Sherman was without doubt a powerful advocate for the legislation that bears his name, but the main drafting was the work of Senators Edmunds (R. Vt.) and Hoar (R. Mass.). *See* MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916, at 105-17 (1988). In his autobiography, Senator Hoar states: "In 1890 a bill was passed which was called the Sherman Act, for no other reason that I can think of except that Mr. Sherman had nothing to do with framing it whatever." 2 GEORGE F. HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS 363 (1904).

21. 15 U.S.C. § 12(a) (1890).

conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[22]

There was little disagreement over the need to do something to address the widespread concern—indeed, the public outrage—over concentrations of wealth. Instead, much of the debate over the Sherman Act centered on its constitutionality and the respective roles of the Federal and State governments. Thus, Senator Sherman viewed the Act as mainly jurisdictional rather than substantive.[23] In his view, Congress was giving the federal courts the means to apply *existing* common law doctrines to control trusts and other restraints of competition in a more effective way than had proven possible under state law.[24] In this light, the Act did not so much create a new legal standard as empower federal courts to evolve a common law of antitrust:

> [I]t is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts of England and the United States have done for centuries.[25]

The four months of debate over the Sherman Act reflected the country's ongoing struggle to come to terms with modern business and its volatile mix of desirable, disdained, controllable, and ineluctable aspects. As a detailed study of competition policy has shown, there was a measure of comfort in casting the Sherman Act in terms of the common law, which called to mind familiar concepts from the pre-Industrial Era.[26]

The Supreme Court decided the first case under the Sherman Act in 1895. In *United States v. E.C. Knight Co.*,[27] the government sought to unwind a series of transactions by which the American Sugar Refining Company had obtained near "complete control of the manufacture of refined sugar within the United States."[28] The Government's pleadings

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22. *Id.* § 1.

23. "It does not announce a new principle of law, but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government." 21 CONG. REC. 2456 (Mar. 21, 1890) (statement of Sen. John Sherman).

24. *Id.*

25. *Id.*; *see also* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2720 (2007) ("Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on 'restraint[s] of trade' evolve to meet the dynamics of present economic conditions.").

26. RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA, 1888-1992, at 24-25 (1996).

27. 156 U.S. 1 (1895).

28. *Id.* at 9.

were not compelling, and the Court took a narrow view of Congress's authority under the Commerce Clause, holding that the Sherman Act did not apply to local manufacturing, which it considered intra-state even if there are indirect effects elsewhere—as compared with buying, selling, transporting, and other activities that are in interstate trade.[29] The decision was hugely disappointing to Justice Harlan, who wrote a 10,000 word dissent, and to proponents of antitrust generally.[30] As William Howard Taft wrote in his 1914 treatise: "The effect of the decision in the Knight case upon the popular mind, and indeed upon Congress as well, was to discourage hope that the statute could be used to accomplish its manifest purpose and curb the great industrial trusts . . . ."[31]

In any event, *Knight* quickly lost significance, and the Government improved its win-lose record before the Supreme Court.[32] In this formative phase of antitrust law, the Court applied the Sherman Act to railroad tariffs[33] and amalgamations,[34] subordinated individual rights to contract to congressional authority under the Commerce Clause,[35] set the principle that an agreement on prices is illegal even if the prices themselves are reasonable,[36] condemned resale price maintenance,[37] and confirmed a seller's unilateral refusal to deal.[38] The two blockbuster

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29. *Id.* at 16-17.

30. *Id.* at 18.

31. WILLIAM HOWARD TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 60 (1914). By contrast, from the outset, the European Court of Justice took a fairly broad view of the scope of the Treaty of Rome's antitrust provisions. *See* ALFRED GLEISS, COMMON MARKET CARTEL LAW 14-21 (3d ed. 1981).

32. *See* Victor H. Kramer, *The Antitrust Division and the Supreme Court: 1890-1953*, 40 VA. L. REV. 433, 436 (1954). Kramer's article summarizes the Antitrust Division's record before the Supreme Court, noting that the Division won seventy percent of its cases over the sixty-three years under review.

33. United States v. Joint Traffic Ass'n, 171 U.S. 505, 568-70 (1898); United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 316-18 (1897). These cases are also notable for the Court's first discussion, in the majority opinions of Justice Peckham and dissents of Justice White, of whether § 1 only applies to undue or unreasonable restraints of trade. Former Senator Edmunds represented the railroads before the Court.

34. N. Sec. Co. v. United States, 193 U.S. 197, 349-53 (1904).

35. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 234-35 (1899) ("[T]he plain language of the grant to Congress of power to regulate commerce among the several States includes power to legislate upon the subject of those contracts in respect to interstate or foreign commerce which directly affect and regulate that commerce, and we can find no reasonable ground for asserting that the constitutional provision as to the liberty of the individual limits the extent of that power. . . .").

36. *Id.*

37. Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 401-04 (1911), *overruled by* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007).

38. United States v. Colgate & Co., 250 U.S. 300, 306-08 (1919).

decisions of the era, however, were those ordering the break-up of the oil and tobacco trusts (as they were commonly called).[39]

Beyond their commercial significance, *Standard Oil Co. of N.J. v. United States* and *United States v. American Tobacco Co.* permanently removed any ambiguity over how the Court would interpret the phrase "restraint of trade." As discussed more fully below in comparing U.S. and EU law, the Court held, in opinions by Chief Justice White, that it was necessary to read the statutory text in "the light of reason" and according to "the rule of reason," which requires a fact-based analysis.[40] Doing so reveals that § 1 of the Sherman Act prohibits, for example, *undue* restraints and agreements that *unreasonably* restrain trade.[41]

The majority's interpretation infuriated Justice Harlan, who concurred in the outcome of the decisions but wrote long, separate opinions to object to what he perceived as an unwarranted judicial gloss of clear statutory text.[42] Nonetheless, Congress did not amend the Sherman Act. To the contrary, the "rule of reason" is a bedrock principle of U.S. antitrust law.[43] It is the "prevailing standard"[44] that "presumptively applies"[45] to the "majority of anticompetitive practices challenged under" § 1.[46] Under this standard, a factual inquiry, particularly into the "market impact" of the alleged infringement, is necessary.[47] According to the Court, a "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing."[48]

Nonetheless, certain agreements are in their very essence, or unto themselves, antithetical to competition and therefore deemed to be undue or unreasonable restraints of trade under § 1 without the factual analysis that must normally precede such a finding.[49] This is the category of

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39. United States v. Am. Tobacco Co., 221 U.S. 106, 184-88 (1911); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 77-82 (1911).

40. *Standard Oil*, 221 U.S. at 62-64.

41. *Id.* at 78, 103.

42. *Id.* at 82 (Harlan, J., concurring).

43. Cont'l T.V. v. GTE Sylvania, 433 U.S. 36 (1977). As a legal doctrine, the "rule of reason" is not, however, unique to antitrust. *See, e.g.*, Marsh v. Or. Natural Res. Council, 490 U.S. 360, 373-74 (1989) (applying the "rule of reason" in the context of environmental impact statements).

44. *GTE Sylvania*, 433 U.S at 50, 59.

45. Texaco v. Dagher, 547 U.S. 1, 5 (2006).

46. *GTE Sylvania*, 433 U.S at 50, 59.

47. Monsanto v. Spray-Rite Serv. Corp., 465 U.S. 752, 761-62 (1984); *GTE Sylvania*, 433 U.S. 36.

48. *GTE Sylvania*, 433 U.S at 58-59.

49. 15 U.S.C. § 1 (2006).

infringements per se, a description that the Court explicitly used for the first time in 1940.[50]

Certain practices have an intuitive appeal as being per se infringements. A classic example is an agreement among competitors to fix prices. Nonetheless, the Supreme Court has emphasized the need for a sound empirical basis before affixing the per se label, stating the "rule is appropriate only after courts have had considerable experience with the type of restraint at issue."[51] Even then, the Court reserves per se treatment for a narrow set of practices "that would always or almost always tend to restrict competition and decrease output."[52]

A finding that a practice "always or almost always" tends to restrict competition might imply that the per se taint is indelible. Over the last twenty-five years, however, the Supreme Court has in fact *reduced* the number of practices on the list of per se violations. Important examples include maximum and minimum resale price maintenance (RPM), which are now subject to the rule of reason.[53] According to the Court:

> The case-by-case adjudication contemplated by the rule of reason has implemented [a] common-law approach. . . . Likewise, the boundaries of the doctrine of *per se* illegality should not be immovable. For "[i]t would make no sense to create out of the single term 'restraint of trade' a chronologically schizoid statute, in which a 'rule of reason' evolves with new circumstance and new wisdom, but a line of per se illegality remains forever fixed where it was."[54]

Depending on one's perspective, the years from 1938, when Thurman Arnold went to the Justice Department, until the early 1970s were either a golden age of antitrust enforcement or a period of misguided access.[55] Statistically, the Supreme Court ruled in favor of the

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50. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223-24 (1940).

51. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2713 (2007).

52. Bus. Elec. Corp. v. Sharp Elec. Corp., 485 US 717, 723 (1988) (internal quotation marks omitted); *see also* Texaco v. Dagher, 547 U.S. 1, 5 (2006) ("*Per se* liability is reserved for only those agreements that are 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'" (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978)); N. Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.").

53. State Oil Co. v. Khan, 522 U.S. 3, 22 (1997) (overruling per se rule for maximum RPM); *Leegin*, 127 S. Ct. at 2705 (overruling per se rule for minimum RPM).

54. *Leegin*, 127 S. Ct. at 2720-21.

55. Spencer Weber Waller, *The Antitrust Legacy of Thurman Arnold*, 78 ST. JOHN'S L. REV. 569, 569 (2004); Daniel A. Crane, *Did We Avoid Historical Failures of Antitrust Enforcement During the 2008-09 Financial Crisis?* 4 (Univ. of Mich. Law Sch. Pub. Law & Legal Theory

government in a high percentage of cases.[56] Indeed, as Justice Stewart stated in his dissent to *United States v. Von's Grocery Co.*, "The sole consistency that I can find is that in litigation under § 7 [of the Clayton Act], the Government always wins."[57] Whether its restrictive doctrine reflected excessive formalism, a tendency towards deterrence, or other factors, the Court has since dramatically changed course.

Beginning with *Continental T.V., Inc. v. GTE Sylvania*, however, the odds have tilted in favor of the defendant,[58] because the Court has reduced the number of per se offenses, heightened the standards for civil pleadings, and focused on anti-interventionist modes and economic analysis. As a result, U.S. antitrust law today is in many ways reminiscent of the Court's pre-1950 jurisprudence.[59] Whatever one's view of the merits of the Court's landmark cases, one thing is clear: The Court has shown its receptivity to changing social and economic analysis in an explicit effort to keep antitrust doctrine contemporary.

B. Europe

While the United States was beginning the long period of Reconstruction, Europe witnessed the Franco-Prussian War. Ending in 1871, the War extended Prussian territory west into the Lorraine region and deepened French animosity towards Germany.[60] Franco-German rivalry and diplomacy has in fact been the *leitmotiv* of European integration, including in regard to antitrust law (hence the focus below on antitrust in Germany, especially during the post-War occupation).[61] For the most part, however, Europe between 1871 and 1914 saw less social foment, at least in regard to "big business," than in the United States.

Working Papers Series, Paper No. 10-006, 2010), *available at* http://www.law.umich.edu/centersandprograms/elsc/abstracts/2010/Documents/10-006crane.pdf.

56. From 1940-1949, the Court ruled for the Government in sixteen of twenty antitrust cases. *See* Kramer, *supra* note 32.

57. United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

58. According to Professor Elhauge: "Since 1994, every U.S. Supreme Court antitrust case has been consistent with the rule that the antitrust defendant always wins. That is a remarkable fourteen cases in a row. . . . Although I have not done so here, one could extend this analysis to every Supreme Court case since the 1970's." Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent U.S. Supreme Court Decisions?*, 3 COMPETITION POL'Y INT'L 59, 77 (2007).

59. *See* Assistant Att'y Gen., Antitrust Div. of U.S. Dep't of Justice, Address at the British Institute of International & Comparative Law Conference in London, England: Antitrust Law in the U.S. Supreme Court (May 11, 2004).

60. MICHAEL HOWARD, THE FRANCO-PRUSSIAN WAR: THE GERMAN INVASION OF FRANCE, 1870-1871, at 453 (1962).

61. WILLIAM DIEBOLD, JR., THE SCHUMAN PLAN: A STUDY IN ECONOMIC COOPERATION, 1950-1959, at 22 (1959).

America's "Progressive Era" did not have an exact parallel on the Continent;[62] nor did most Europeans share the American blend of antipathy to aggregation of capital and trepidation over government intervention. To the contrary, cartels were common in Europe. Often there was no law against them, and in some instances they received government appropriation, particularly in the context of international trade.[63]

During the political and economic turmoil of the interwar years,[64] however, the Weimar Republic introduced a Regulation Against Abuse of Economic Power Positions (hereafter 1923 Cartel Law)[65] in response to "an outburst of feeling against the cartels in the post-war inflation period of 1919-23, caused mainly by the opinion that these organizations were attempting to shoulder inflation risks upon the consumers and raise the price level still further."[66] The law regulated and controlled cartels but did not prohibit or ban them. In this way, the 1923 Cartel Law reflects the concept of "control," as distinct from prohibition. Thus, German cartels continued in force[67] either overtly or through secret meetings that, in retrospect, could have an almost cinematic quality.[68]

By the mid-1930s, the 1923 Cartel Law, and the industrial enterprises it sought to control, succumbed to National Socialism. According to a 1947 analysis by the United States Decartelization Branch in Germany:

> The new centralized Third Reich, determined to rule untroubled by any sort of rival authority, viewed with alarm any large concentration of economic

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62. ROBERT GILDEA, BARRICADES AND BORDERS: EUROPE 1800-1914, at 351 (1987).

63. In the United States, the Webb-Pomerene Act of 1918 exempted export cartels from the Sherman Act. 15 U.S.C. § 62 (2006).

64. The First World War brought horrific destruction to the Continent. The peace treaties that ended the War also created conditions and set in motion events that would reverberate for decades to come through to the present. For an excellent examination of the Treaty of Versailles, see MARGARET MACMILLAN, PARIS 1919: SIX MONTHS THAT CHANGED THE WORLD (2001).

65. "Verordnung Gegen Missbrauch Wirtschaftlicher Machtstellungen," REICHSGESETZBLATT [RGBL] I, 1067, 2 Nov. 1923, *translated in* ROBERT LIEFMANN, CARTELS, CONCERNS AND TRUSTS 351-57 (1932).

66. William C. Kessler, *German Cartel Regulation Under the Decree of 1923*, 50 Q. J. ECON. 680, 681 (1936).

67. Pio Baake & Oliver Perschau, *The Law and Policy of Competition in Germany*, *in* REGULATING EUROPE 131, 131 (Giandomenico Majone ed., 1996) ("The influence of such regulations [under the 1923 Cartel law] was marginal . . . and at the end of the Weimar Republic the estimated number of cartels still stood at around three to four thousand.").

68. *See, e.g.*, Henry Ashby Turner, Jr., *The* Ruhrlade*, Secret Cabinet of Heavy Industry in the Weimar Republic*, 3 CENT. EUR. HIST. 195, 197-99 (1970) (describing gatherings of tuxedo-clad industrial magnates at the Krupp family palace); *cf.* William H. Page, *The Gary Dinners and the Meaning of Concerted Action*, 62 S.M.U. L. REV. 597, 600-01 (2009) (describing dinners that Elbert Gary, Chairman of United States Steel, hosted between 1907 and 1911).

> power in the hands of privately controlled, independent associations, whether they be political parties or cartels; so, under the Nazis, cartels were converted into instruments of economic planning to be used only with the consent and under the supervision of the state.[69]

The links between German industry and the Third Reich were a topic of political, legal, and public interest at the end of the war. The declaration that followed the Potsdam conference among President Truman, Prime Minister Attlee, and Marshal Stalin at the end of July 1945 included in article 3(12) a provision addressing "excessive concentration of economic power."[70] Building on the Potsdam Agreement, the French, American, and British authorities promulgated cartel laws in their respective zones of occupation in Germany.[71] There were, however, different viewpoints on the substantive standards for dissolving cartels, with the British advocating what they deemed a more pragmatic approach than the other allies.[72]

The United States Office of Military Government for Germany, issued Law No. 56 in February 1947 to codify U.S. policy in accordance with article 3(12) of the Potsdam Agreement. Law No. 56 reiterated the aims of preventing further German aggression and laying the "groundwork for building a healthy and democratic German economy."[73] It provided:

> (1) Excessive concentrations of German economic power, whether within or without Germany and whatever their form or character . . . are prohibited, their activities are declared illegal and they shall be eliminated, except as hereinafter provided . . . .
> (2) Cartels, combines, syndicates, trusts, associations or any other form of understanding or concerted undertaking between persons, which have the purpose or effect of restraining, or of fostering monopolistic control of, domestic or international trade . . . or of restricting access to domestic or international markets are hereby declared to be

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69. SIMON REICH, THE FRUITS OF FASCISM: POSTWAR PROSPERITY IN HISTORICAL PERSPECTIVE 24 (1990) (citing 1 OFFICE OF MILITARY GOVERNMENT OF THE U.S., REPORT ON GERMAN CARTELS AND COMBINES 1946 (1947)).

70. "At the earliest practicable date, the German economy shall be decentralised for the purpose of eliminating the present excessive concentration of economic power as exemplified in particular by cartels, syndicates, trusts and other monopolistic arrangements." HRH BRITANNIC MAJESTY'S GOV'T, REPORT ON THE TRIPARTITE CONFERENCE OF BERLIN (1945), *available at* http://collections.europarchive.org/tna/20080205132101/fco.gov.uk/files/kfile/potsdam_tripartite berlin020845.pdf.

71. GARY HERRIGEL, INDUSTRIAL CONSTRUCTIONS: THE SOURCES OF GERMAN INDUSTRIAL POWER 171 (1996).

72. *See* U.S. ARMY SPECIAL COMM. TO STUDY DECARTELIZATION & DECONCENTRATION IN GERM., REPORT TO THE HONORABLE SECRETARY OF THE ARMY (1949).

73. 10 C.F.R. § 3.31 (1947).

> excessive concentrations of economic power with the purview of this section.[74]

The Decartelization and Deconcentration Branch of the Office of Military Government had the primary responsibility for enforcing Law No. 56 and implementing regulations.[75] Opinions differed among U.S. officials on the best approach to balancing the goals of rebuilding German industry, meeting the immediate needs of the populations, and preventing rearmament, among other issues. Fairly or not, the Decartelization Branch became the subject of controversy as a result of a congressional inquiry that Federal Trade Commission Commissioner Garland Ferguson chaired.[76] The Committee's report set out numerous criticisms of the way the Branch carried out, or failed to carry out, its mandate.[77]

In the wake of the Ferguson Committee Report, responsibility for the occupation moved from the Army to the State Department. John J. McCloy became the United States High Commissioner for Germany (HICOG), and the High Commission replaced the Office of Military Government.[78] In early 1950, Robert Bowie became McCloy's General Counsel and in that capacity, oversaw HICOG's Decartelization and Deconcentration Division.[79] Bowie moved quickly to reorganize and expand the Decartelization Division.[80]

After the turmoil in and controversy over the work of his predecessors, Bowie set a clear mandate for the Division's work. For example, Bowie stated in a speech:

> The United States has basically just one objective in Germany: to encourage the growth of a healthy, firmly rooted and peaceful democracy which can be accepted as a full partner in the community of free democratic nations. To that end, and that end only, an important goal of our occupation policy has been to do away with the excessive concentrations of

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74. *Id.*

75. Three important actions—those against I.G. Farben, the banking cartel and the coal cartel in the Ruhr Valley—were not under the control of the Decartelization Branch. John C. Stedman, *The German Decartelization Program—The Law in Repose*, 17 U. CHI. L. REV. 441, 441-42 (1949-50).

76. *See id.* Stedman was Secretary to the Ferguson Committee.

77. *Id.* at 442-46.

78. *Germany: HICOG with a Horn*, TIME, Oct. 3, 1949, at 20.

79. *Personnel Notes: Dr. Bowie Named General Counsel*, U.S. HIGH COMM'N FOR GER. INFO. BULL., Mar. 1950, at 73.

80. *Id.* For one of the few extended discussions of Bowie, see Chris Tudda, *"The Devil's Advocate": Robert Bowie, Western European Integration, and the German Problem, 1953-1954*, *in* THE POLICY MAKERS: SHAPING AMERICAN FOREIGN POLICY FROM 1947 TO THE PRESENT 29 (Anna Kasten Nelson ed., 2009).

> economic power. We want to spread in Germany the belief that the economy should be dynamic . . . .[81]

Nonetheless, ideological differences regarding antitrust policy persisted among the allies, with German officials and industry, and within the HICOG. A history of the period relates the sentiments of a member of the division circa 1951: "I became accustomed in finding myself . . . being called a fanatic. I think the characterization is very apt and correct. . . . In the States, antitrust is almost a religion. It is similar to a religious doctrine and expresses the belief of people to freely compete to the best of their abilities."[82] Some advocated "ruthless" action against cartels and conglomerates.[83] Others thought there needed to be a pragmatic approach so that German industry could meet the country's needs and regain competitiveness.[84] The former rejected suggestions that there was a punitive motive at work; the latter, that they lacked commitment to the antitrust regulation as the means to peace and prosperity.[85]

C. The Coal and Steel Community

On May 9, 1950, French Foreign Minister Robert Schuman announced a bold plan to create a common market for coal and steel among France, Germany, Italy, Belgium, the Netherlands, and Luxembourg (the "Six").[86] A native of Lorraine, part of the oft-disputed borderland with Germany, Schuman became Foreign Minister in the summer of 1948, shortly after the ministry issued a statement laying out new thinking for diplomacy towards and rapprochement with Germany.[87] The Schuman Plan was the foundation for the European Coal and Steel Community (ECSC), a historic step towards European integration.[88]

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81. Robert R. Bowie, *Freedom of Trade*, U.S. HIGH COMM'N FOR GER. INFO. BULL., Oct. 1950, at 65.

82. WYATT WELLS, ANTITRUST AND THE FORMATION OF THE POSTWAR WORLD 147 (2002) (internal quotation marks omitted).

83. *Id.* at 148.

84. *Id.*

85. *Id.*

86. *See generally* JOHN GILLINGHAM, COAL, STEEL, AND THE REBIRTH OF EUROPE, 1945-1955: THE GERMANS AND FRENCH FROM RUHR CONFLICT TO ECONOMIC COMMUNITY 228 (1991); DIEBOLD, *supra* note 61, at 1.

87. Franz Knipping, *Que Faire de l'Allemagne? French Policy Toward Germany, 1945-1950*, *in* FRANCE AND GERMANY IN AN AGE OF CRISIS, 1900-1960: STUDIES IN MEMORY OF CHARLES BLOCH 67, 80-81 (Haim Shamir ed., 1990).

88. *Robert Schuman (1886-1963)*, EUR. COMM'N, http://europa.eu/about-eu/eu-history/1945-1959/foundingfathers/schuman/index_en.htm (last visited Oct. 10, 2011).

The negotiations over the ECSC mixed economic, political, military, and social goals, centering mainly on the respective desires and needs of France and Germany.[89] In very broad terms, for example, France wanted to prevent further militarization in Germany by limiting the industrial power of the Ruhr Valley collieries.[90] Germany wanted again to be a full participant in European affairs.[91]

A key element of the ECSC concerned the status of cartels, particularly the Deutsche Kohle-Verkaufs Gesellschaft (DKV), which the French viewed as a threat to peace.[92] Breaking up DKV and otherwise preventing similar barriers to a common market was essential to achieving the aims of the Schuman Plan and, as such, linked to executing the ECSC Treaty.[93]

A major figure in European integration, Jean Monnet, faced months of opposition over the issue of cartels,[94] including from Walter Hallstein, at the time the German Secretary of State and, as noted at the outset, the first President of the European Commission.[95] Monnet, however, was determined to break up the German cartels in the Ruhr Valley. Behind-the-scenes engagement by U.S. officials on the critical topic of cartels (and antitrust generally) proved decisive.[96] The United States had an enormous interest in European economic integration but was not directly a party to the ECSC negotiations. Unexpected global events shifted U.S. priorities and impacted the negotiations of the ECSC. The outbreak of the Korean War in June of 1950 led to the reluctant decision by the United States to allow (controlled) German rearmament as part of its new defense policy. In order to adapt, decision makers needed to reevaluate the Ruhr Valley situation and the ECSC. The unanticipated need for Germany's reentry into European affairs prompted Law 27, which called for the deconcentration and decartelization of the DKV.

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89. DIEBOLD, *supra* note 61, at 53.

90. *Id.* at 29.

91. *Id.* at 9-10.

92. Of the many sources on this point, see JEAN MONNET, MÉMOIRES 350-52 (Richard Mayne trans., Doubleday & Co. 1978) (1976).

93. *Id.* at 351; *see also* Letter from Jean Monnet to Robert Schuman, French Foreign Minister (July 1, 1952), *available at* http://www.cvce.eu/viewer/-/content/997fe68f-dbc7-43e9-8dad-0836fdf5bc30/en;jsessionid=EE0C83E67CB70AB8F57105A0F098D8FE (discussing the status of DKV and other deconcentration measures as a prerequisite to the ECSC).

94. MONNET, *supra* note 92, at 352-53.

95. MERRY & SERGE BROMBERGER, JEAN MONNET AND THE UNITED STATES OF EUROPE 125 (Elaine P. Halperin trans., 1969).

96. *See* A.W. Lovett, *The United States and the Schuman Plan: A Study in French Diplomacy 1950-1952*, 39 HIST. J. 425, 441-42, 452-53 (1996).

American support was crucial in implementing Law 27, which dissolved the DKV.

In particular, John McCloy and Robert Bowie—as mentioned earlier, the High Commissioner and General Counsel for the High Commission—were instrumental in drafting and securing German agreement to the antitrust provisions of the Treaty.[97] At the same time, McCloy and Bowie also benefited from the supportive views of the German Minister of Economics, Ludwig Erhard, who helped bridge extreme positions,[98] and the political will that Adenauer exhibited in reaching an agreement with Schuman in the face of domestic opposition.[99]

Representatives of the Six signed the Treaty on April 18, 1951.[100] It went into force on July 23, 1952, with the common market opening for coal, iron ore, and scrap in February 1953 and for steel in May 1953.[101] Articles 65 and 66 of the ECSC constituted what Monnet called Europe's first antitrust law.[102] In the terminology of the period, article 65 covered cartels and article 66 covered concentrations.[103]

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97. MONNET, *supra* note 92, at 352 ("McCloy, more than anyone else, had become the advocate of decartelization. He had with him a young Harvard professor, Robert Bowie, who was said to be the leading expert on U.S. anti-trust legislation, which the Americans applied as rigorously as morality itself."); GILLINGHAM, *supra* note 86, at 270.

98. According to HERRIGEL, *supra* note 71, at 172, ¶ 11:

> Erhard[] took a position that mediated between the political views of the United States and the Ordo-liberal school, on the one hand, and the material interests of large-scale industry, on the other. He believed first that the preservation of a market economy was the only way to construct a democratic social order that protected the rights of the individual. But, like the Americans, he also was convinced that the way to achieve this was to create a set of conditions in the economy that would continuously increase productivity and make the spread of mass production possible. As such, he tended to be attentive to the economic interests of large potential mass producers. Most obviously, Erhard restricted his campaign against market behavior that limited competition to cartels, while supporting processes of concentration that lead to an improvement in industrial productivity and efficiency.

99. MONNET, *supra* note 92, at 350-52.

100. *Id.* at 356.

101. The Coal and Steel Community ended when the Treaty expired on July 23, 2002. CENTRE VIRTUEL DE LA CONNAISSANCE SUR L'EUROPE, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (2011), *available at* http://www.cvce.eu/viewer/-/content/a1d171c1-e894-493d-8ee5-106573135a89/4a537592-d9d0-41a7-853a-f6cd74aed386/en.

102. Grant W. Kelleher, *The National "Antitrust" Laws of Europe*, 17 ABA ANTITRUST SEC. 506, 516 (1960). The ECSC was a huge achievement, but it was far from a "constitution" for a "united states" of Europe. By contrast, the Sherman Act came into force *within* a well-established legal system and framework for adjudicating suspected violations.

103. Article 66 requires High Authority authorization to acquire control of another company but states that the High Authority "shall grant" authorization upon a finding that the transaction would not enable the power

Article 65(1) prohibited "agreements between undertakings, decisions by associations of undertakings and concerted practices tending directly or indirectly to prevent, restrict or distort normal competition within the common market."[104] Article 65(2) allowed for exceptions to the prohibitions in article 65(1).[105] In particular, the High Authority "shall authorise specialisation agreements or joint-buying or joint-selling agreements in respect of particular products" upon a finding that there would be "a substantial improvement in the production or distribution of those products" and that the agreement "is essential in order to achieve these results and is not more restrictive than is necessary" but "is not liable to give [the parties] the power to determine the prices, or to control or restrict the production or marketing, of a substantial part of the products in question within the common market, or to shield them against effective competition from other undertakings within the common market."[106]

Two points bear mention in regard to article 65. First, article 65 refers to *normal* competition (*le jeu normal de la concurrence*).[107] The qualifier "*normal*" did not appear in antecedent French texts nor, as noted below, in the subsequent analogue provision in the Treaty of Rome. Second, the exemptions under article 65(2) are mandatory: The High Authority "shall" exclude agreements that article 65(1) catches if the conditions apply.[108] Whatever might have been the precise intent behind the text,

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> -to determine prices, to control or restrict production or distribution or to hinder effective competition in a substantial part of the market for those products; or
> -to evade the rules of competition instituted under this Treaty, in particular by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets.

Treaty Establishing the European Coal and Steel Community art. 66(2), Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty].

104. *Id.* art. 65(1).

105. The pairing of a prohibition on anticompetitive practices with a basis for exemption was not a new concept. Preexisting French law, for example, had a similar structure. *See, e.g.*, CODE CIVIL [C. CIV.] art. 59, 45-1483 (Fr.) (French price control regulation). Indeed, in 1909, the U.S. Senate considered a bill to amend the Sherman Act to enable a procedure whereby corporations could seek approval for otherwise prohibited practices from the Commissioner of Corporations. OSWALD WHITMAN KNAUTH, THE POLICY OF THE UNITED STATES TOWARDS INDUSTRIAL MONOPOLY 58-59 (1914). The Judiciary Committee rejected the bill, stating that it "'would lead to the greatest variableness and uncertainty in the enforcement of the law,' and 'would entirely emasculate it, and for all practical purposes, render it nugatory as a remedial statute.'" *Id.* at 60 (quoting S. REP. NO. 848 (1909)).

106. ECSC Treaty art. 65(1). Article 65(2) also extended to agreements that "are strictly analogous in nature and effect to those referred to [in subsections (a)-(c)]." *Id.* art. 65(2).

107. *Id.* art. 65(1).

108. *Id.*

> the Treaty drafters had the problem of providing not only an immediate compromise but also a set of rules and procedures that would serve the Community in various market conditions. The provisions that emerged show all these influences. They blend several European approaches to cartel questions with elements drawn from American practice and experience. They provide statements of principle, specific rules, a strong indication of direction, and a rather wide area in which the High Authority has discretion (or at least the room for judgment that goes with applying rules to cases).[109]

After his great success in implementing the ECSC, Monnet had wanted his encore to be a European Defense Community. Unfortunately, this effort failed in August of 1954 when the French Parliament rejected ratification of the European Defense Community and the matter was put to an end.[110]

D. The Treaty of Rome

After unsuccessful efforts to establish a European Defense Community, work focused on creating both an economic community that would extend far beyond coal and steel and an atomic energy community.[111] As ever, there were many elements at play: European concerns about the intentions of the United States to the west and the Soviet Union to the east, French concerns over the allocation of nuclear power within the nascent European community, American concerns about the emergence of community-wide cartels with which it would have to compete, and so on.[112] External events in 1956, most notably Egypt's annexation of the Suez Canal and the Soviet incursion into Hungary, spurred action on the treaties that created the European Community and the European Atomic Energy Community (Euratom).[113]

The Treaty of Rome, the foundational document for the current EU, created a common market for the free movement of goods, services, people, and capital among the six signatories.[114] As with the ECSC, the bedrock principle was that economic integration would preserve peace between France and Germany and promote a higher standard of living

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109. DIEBOLD, *supra* note 61, at 352.

110. MERRY & SERGE BROMBERGER, *supra* note 95.

111. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

112. Among the numerous histories on this subject, see HALLSTEIN, *supra* note 1; WALTER HALLSTEIN, UNITED EUROPE: CHALLENGE AND OPPORTUNITY (1962).

113. Alfred Grosser, *Suez, Hungary and European Integration*, 11 INT'L ORG. 470, 475 (1957).

114. EEC Treaty art. 3 (as in effect 1957) (now TFEU art. 26).

and social progress.[115] Rules against barriers to trade or abuses of economic power that would result in renewed segmentation of the hoped-for common market were therefore key to the plan.[116] Hence, the Treaty of Rome, included two "antitrust" provisions, articles 85 and 86, along with those that addressed other aspects of free competition, such as restrictions on state aid.[117]

Articles 85 and 86 do not replicate, but clearly derive from, the postwar antitrust developments that the preceding Parts describe, with article 85 covering multifirm conduct and article 86 covering abuse of dominant position.[118] The structure of article 85 (current TFEU article 101) is similar to that of the postwar decrees and article 60 of the ECSC Treaty in both declaring certain practices illegal and then providing a basis for exemption.[119]

The official English version of article 101(1) reads as follows:

> The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.[120]

Walter Hallstein believed that "the wording of the Treaty is clear and unequivocal . . . particularly the wording of Article 85,"[121] but since the early days there have been issues of interpretation (as well as policy). In a 1960 speech, for example, Pieter Verloren van Themaat, Director-General for Competition, noted:

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115. *Id.*

116.

> Les principes inscrits dans le traité . . . auront pour objet d'élaborer les règles détaillées concernant la discrimination, d'organiser un contrôle des opérations de concentration, et de mettre en pratique une interdiction des ententes qui auraient pour effet une répartition ou une exploitation des marchés, une limitation de la production ou du progrès technique.

PAUL-HENRI SPAAK, RAPPORT DES CHEFS DE DÉLÉGATION AUX MINISTRES DES AFFAIRES ETRANGÈRES [REPORT OF THE HEADS OF DELEGATION TO THE MINISTERS OF FOREIGN AFFAIRS] 56 (1956), *available at* http://aei.pitt.edu/996/1/Spaak_report_french.pdf.

117. EEC Treaty arts. 85-86 (as in effect 1957) (now TFEU Treaty art. 101).

118. Unlike the ECSC, the Treaty of Rome did not include a provision on "concentrations." The emphasis on cartels and abuse of dominance is consistent with the relative priorities in postwar Germany where decartelization tended to receive more focus than deconcentration, with notable exceptions such as the break-up of IG Farben. Stedman, *supra* note 75, at 442; EEC Treaty arts. 85-86 (as in effect 1957) (now TFEU art. 101).

119. EEC Treaty art. 85-86 (as in effect 1957) (now TFEU art. 101); ECSC Treaty art. 60.

120. EEC Treaty art. 85 (as in effect 1957) (now TFEU art. 101).

121. HALLSTEIN, *supra* note 1, at 116.

> A third problem of interpretation concerns the practical content of Articles 85 and 86, partly owing to different conditions of competition as between Member States, partly owing to their differing legal traditions, and partly because of the difficulty of deciding the precise meaning of "adverse effects on trade between Member Countries", which is the basic criterion for inadmissibility of the agreements in question.[122]

Notable is Van Themaat's inclusion of "adverse" before "effects." Whether this was the correct reading of the article was a topic of much debate. Indeed, differences in language among the four original versions (French, Dutch, German, and Italian) spurred discussion over important substantive points, including the appropriate reading of the text related to an alleged infringement's effect on trade among Member States.[123] Are a restriction on competition on the one hand and an effect on trade on the other hand separate or overlapping conditions? Is "affect[s] trade" a neutral standard or does it imply a negative or adverse effect? Is it a jurisdictional or a substantive standard? The debate over these and other points is no longer as intense but, despite ECJ rulings and Commission guidelines, important foundational questions remain: What *exactly* does article 101(1) prohibit? To what end? What is the *minimum* threshold for finding an infringement? In other words, what are the outer boundaries of article 101(1)?

In any event, in a comment that calls to mind the similar views that the drafters of the Sherman Act held, Van Themaat added: "These problems, I think, will only be solved comparatively slowly and largely by the gradual development of practical jurisprudence. Here, for once, continental legal practice may have something to learn from the English case-law tradition."[124] The following Subpart looks at the "practical jurisprudence" under article 101(1), focusing on core interpretational issues (rather than particular business practices).

E. Interpreting Article 101(1)

Consistent with general principles, interpretation of article 101(1) turns on the meaning of the text and the provision's role in supporting the

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122. Pieter Verloren Van Themaat, Dir.-Gen. of Competition, EEC Comm'n, Speech Before the Conference on the Legal Problems of the European Economic Community and the European Free Trade Association (Sept. 29-30, 1960), *available at* http://aei.pitt.edu/14963/1/S146.pdf.

123. *See* Joseph J.A. Ellis, *Source Material for Article 85(1) of the EEC Treaty*, 32 FORDHAM L. REV. 247, 268-72 (1963-1964); Helmut Coing, *Interpretational Problems of Article 85*, 38 N.Y.U. L. REV. 441, 442-46 (1963); Ernest Wolf, *Cartel and Monopoly Legislation: Its Application in the European Economic Community*, 11 AM. J. COMP. L. 539, 539 (1962).

124. *Id.*

overall goals of the Treaty.[125] Article 101(1)'s introductory clause puts the text that follows within the context of incompatibility with the common market. The phrase "incompatible with the internal market" reinforces the article's role in enabling continued economic integration, with the expected benefits that Bowie described in the speech quoted above.[126] "Incompatibility" can therefore guide teleological interpretation but is not strictly speaking a predicate element for an infringement. On the other hand, if a practice is *compatible* with the internal market, it is reasonable to ask why it should be subject to sanction or whether it should at least define the outer boundaries of article 101(1) by reference to the overall goals of the Treaty.

More concretely, the general prohibition of article 101(1) describes four elements: (1) an agreement, decision, or concerted practice that (2) may affect trade between Member States and (3) has as its (i) object *or* (ii) effect (4) the distortion of competition within the internal market. Elements 1 and 2 form a unit: an agreement, decision, or concerted practice that is incapable of or does not affect trade is outside the text of article 101(1). Likewise, 3 and 4 also form a unit: the object or effect must be to distort competition to fall within article 101(1). Finally, 3 and 4 together modify 1 and 2.[127]

Some fact patterns, such as the horizontal price-fixing in the *ABB* case,[128] raise no significant interpretational issues as to the scope of article 101(1). For comparative purposes, however, the more interesting questions arise when the conduct is far less blatant (or, at least where the accused firms can make credible arguments in defense, even in vain). This is often the case when the alleged infringement rests on allegations of a concerted practice the object of which is to distort competition.

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125. Nial Fennelly, *Legal Interpretation at the European Court of Justice*, 20 FORDHAM INT'L L.J. 656, 657 (1996).

126. *See supra* text accompanying note 75.

127. In the form of an equation, the scope of article 101(1) = (A + B) + [C(i) *or* C(ii)] + D. Using notation of this sort can help flag circular reasoning, as when the effect of a legal presumption is to enable one independent element to define (or establish) another independent element.

128. In the *ABB* case, for example, a price-fixing conspiracy had clear effects across several countries, was long-standing, and persisted *after* the Commission launched an investigation. A transmittal note between two of the companies in the alleged cartel went so far as to warn: "Pekka: to be destroyed—completely . . . EU case looks bad—be careful for Christ's sake." Commission Decision 1999/60/EC, of 21 October 1998 Relating to a Proceeding Under Article 85 of the EC Treaty, 1999 O.J. (L 24) 1, 40-41.

In principle, infringements by object are activities "that by their very nature have the potential of restricting competition."[129] Further, they "have such a high potential of negative effects on competition that it is unnecessary . . . to demonstrate any actual effects on the market."[130] This presumption reflects "the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market."[131] Examples include price fixing, market allocation, export bans, and other cartel-like behavior that seriously threaten the common market and consumer welfare. The ECJ's landmark ruling in *Grundig* has long supported findings of infringement by object without inquiry into effects. *Grundig*, however, involved a written agreement, from which the object (legal or not) was at least easy to discern. In other words, when there is an actual agreement at issue, as in *Grundig*, discerning the object might be straightforward.

By contrast, concerted practices do not rise to the level of an agreement (legally) and are more ambiguous (factually) than actual agreements (written or oral). At a minimum, however, concerted practices must entail "*knowingly* substitut[ing] practical cooperation . . . for the risks of competition"[132]

Nonetheless, in a long line of cases, with results that call to mind Justice Stewart's observation that "the government always wins," the ECJ has rejected almost every argument in defense of alleged concerted practices with an anticompetitive object.[133] For illustrative purposes in the present context, a rough synthesis of the reasoning in these cases, many of which involved some form of information exchange among competitors, is the following:

- Effects are irrelevant to a finding of infringement. Certain forms of collusion can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.
- To have an anticompetitive object under article 101(1), a concerted practice need only have the potential to have a negative effect on

129. Commission Communication 2004/C 101/08, Guidelines on the Application of Article 81(3) of the Treaty, 2004 O.J. (C 101) 97, 100.

130. *Id.*

131. *Id.*

132. Case 48/69, Imperial Chem. Indus. Ltd. v. Comm'n, 1972 E.C.R. 619, 655 (emphasis added).

133. *See, e.g.*, Case C-8/808, T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoritat, 2009 E.C.R. I-4529; Case C-49/92, Comm'n v. Anic Partecipazioni SpA, 1999 E.C.R. I-4125; Case T35-92, John Deere Ltd. v. Comm'n, 1994 E.C.R. II-957; Case C199/92, Hüls AG v. DSM NV, 1999 E.C.R. I-4287; Case C-89/85, Ahlström Osakeyhtö v. Comm'n, 1993 E.C.R. I-1307.

competition or "simply be capable" of resulting in distortion of competition.

- Even though "object" might connote a purpose or intent, the parties' intentions are not an essential factor in determining whether a concerted practice has an anticompetitive object.
- The concept of a concerted practice does not necessarily imply that that conduct should produce the concrete effect of restricting, preventing or distorting competition.
- There must be a causal connection between the concerted practice and a firm's conduct on the market, *but* there is a presumption of such a connection if the firm remains on the market.
- If there is evidence of an anticompetitive concerted practice, article 101(1) does not require proof that the practice manifested itself in conduct on the market.

Taken literally, these principles suggest that contact between competitors might violate article 101(1) even though there is no impact on the market, whether in the form of harm to consumers or interference with market integration; even though the conduct at issue reflects or was a response to market conditions; and even though the firms were acting without any intent to distort competition.

Cases involving information exchange are in fact an example of how strictly the ECJ applies article 101(1). In *T-Mobile*, for example, which involved arguably the narrowest set of facts the ECJ had yet considered, the Court reiterated its view that the

> requirement of independence . . . strictly preclude[s] *any direct or indirect contact* between . . . operators by which an undertaking *may* influence the conduct on the market of its actual or *potential competitors* or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to normal conditions on the market.[134]

By contrast, in *Maple Flooring Manufacturers Ass'n v. United States*[135] the Supreme Court held that there was no violation of § 1 despite a more extensive and structured information exchange, albeit factually different, than the one at issue in *T-Mobile*. Writing for the majority, Justice Stone referenced the views of economists regarding the role of information gathering as part of normal competitive conditions. While noting that

134. Case C-8/808, *T-Mobile*, 2009 E.C.R. I-4529, para. 33 (emphasis added).
135. Maple Flooring Manufacturers Ass'n v. United States, 268 U.S. 563 (1925).

information exchange *can* rise to the level of an illegal agreement, the Court stated:

> It is not, we think, open to question that the dissemination of pertinent information concerning any trade or business tends to stabilize that trade or business and to produce uniformity of price and trade practice. Exchange of price quotations of market commodities tends to produce uniformity of prices in the markets of the world. Knowledge of the supplies of available merchandise tends to prevent over-production and to avoid the economic disturbances produced by business crises resulting from over-production. But the natural effect of the acquisition of wider and more scientific knowledge of business conditions, on the minds of the individuals engaged in commerce, and its consequent effect in stabilizing production and price, can hardly be deemed a restraint of commerce or if so it cannot, we think, be said to be an unreasonable restraint, or in any respect unlawful.[136]

F. The Rule of Reason and Per Se Violations

The different views in *T-Mobile* and *Maple Flooring* capture the divergent approaches that the ECJ and the Supreme Court have taken in setting the boundaries of article 101(1) and § 1, respectively. In large part, this reflects the fact that the Supreme Court adheres to the "rule of reason," while the ECJ has consistently stated that the "rule of reason"[137] and per se violations[138] do not exist under article 101(1). Herein lies a fundamental difference in reasoning and outcome between U.S. and EU antitrust law.

1. Rule of Reason

In rejecting the "rule of reason," the ECJ views it as a method of analysis that necessarily requires a balancing of the pro- and anticompetitive effects of the conduct at issue. From there the argument asserts that the existence of article 101(3) shows that there is no "rule of reason" in article 101(1). In other words, the factors in 101(3) are the "balancing" that would otherwise come from a "rule of reason" analysis. The paradox, however, is that article 101(3) only comes into play if there is a violation of article 101(1). The existence of 101(3) does not answer

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136. *Id.* at 582.

137. *E.g.*, Case T-112/99, Métropole Télévision II v. Comm'n, 2001 E.C.R. II-2459, para. 74 ("[I]n various judgments the Court of Justice and the Court of First Instance have been at pains to indicate that the existence of a rule of reason in community competition law is doubtful.").

138. *E.g.*, Case 56/65, Societé La Technique Minière v. Maschinenbau Ulm, 1966 E.C.R. 235, 248 ("[A]s Article 85(1) is based on an assessment of the effects of an agreement from two angles of economic evaluation, it cannot be interpreted as introducing any kind of advance judgment with regard to a category of agreements determined by their legal nature.").

the predicate question of the boundaries of 101(1); indeed, it leads to a de facto expansion of 101(1) by implicitly positing that article 101(1) can apply broadly since article 101(3) provides an escape valve. Yet, as Advocate General Roemer stated in his opinion in the *Grundig* case: "It would be artificial to apply Article 85(1), on the basis of purely theoretical considerations, to situations which, upon closer inspection would reveal no appreciable effects on competition, in order then to grant exemption on the basis of Article 85(3)."[139]

To interpret article 101(1) in "light of reason" would hardly render article 101(3) redundant, which is the essence of the argument just summarized. The starting point in *Standard Oil* was that the Sherman Act required interpretation according to the "rule of reason" and under the "light of reason"—phrases that the opinion used six times and five times, respectively—in the sense of "reason dictates that" or "the reasonable interpretation is." Thus, in *Standard Oil*, the Court held that where § 1 refers to "every agreement . . . in restraint of trade," the sound interpretation is that the prohibition applies to *undue* restraints or agreements that *unduly* restrain trade. The phrase "rule of reason" has become a term of art, connoting a specific form of antitrust analysis but there is nothing inherently American or non-European about the "rule of reason" any more than there is about the phrase "the light of reason."[140]

Further, the doctrine that effects are "irrelevant" to assessing whether there is an infringement means that using article 101(3) as a tool in defining the scope of article 101(1) can lead to a paradoxical conclusion. Overcoming the burden of proving the negative would be in vain, because the literal text of article 101(3) requires evidence that would not exist in the absence of some anticompetitive effects. If there are no "effects," how can there be countervailing efficiencies or consumer benefits, which are two of the four cumulative elements of article 101(3)? To be sure, article 101(1) refers to "object *or* effect," but infringement by object still requires a showing that the challenged conduct is "likely to have an appreciable adverse impact on the parameters of competition on the market" even if there isn't evidence of actual market effects.[141]

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139. Joined Cases 56 & 58/64, Consten SaRL and Grundig-Verkauts-GmbH v. Comm'n, 1966 E.C.R. 299.

140. For two early references to the rule of reason in the context of European antitrust, see the speech by Albert Wehrer, Member of the High Authority of the Coal and Steel Community, *Le Plan Schuman et Les Cartels*, International Law Association, Luxembourg (Sept. 24, 1954), *available at* http://www.aei.pitt.edu/14368/1/530.pdf. *See also* Joined Cases 56 & 58/64, *Consten & Grundig*, 1966 E.C.R. 299, 358 (opinion of Advocate General Roemer).

141. Commission Communication, *supra* note 129, at 99.

A third argument is that a rule of reason analysis is, in loose terms, too messy and imposes an administrative burden on enforcement authorities.[142] Predictability is doubtless an admirable element in a legal system, but so is a certain suppleness. It is true that a disadvantage of the rule of reason

> lies in the fact that it is more difficult to enforce compliance with a prohibition of a vague and pragmatic nature than with a rigid and dogmatic prohibition. But this cannot justify a bad law. Thus, in order to limit accidents in road traffic, rather than suppressing the production of automobiles, it is better to prohibit excessive speed.[143]

Nonetheless, the ECJ has shown little interest in or sympathy towards arguments that expressly or otherwise rest on any form of rule of reason analysis. Instead, the Commission's win-loss record corroborates the view that EU antitrust law does not accommodate interpretation according to the "rule of reason"—even though it is doubtful anyone would argue for an *unreasonable* interpretation or application of article 101(1).

2. Per Se Violations

The status of per se violations under EU law is less clear than that of the rule of reason. The ECJ has disclaimed per se rules,[144] but the underlying concept influences numerous decisions. The holdings on concerted practices by object and on information exchange—in which presumptions establish core elements of the infringement and actual effects are irrelevant—are hard to distinguish from cases to which a per se rule applies.

In *T-Mobile*, the Advocate General's opinion, which uses the phrase "per se," states:

> The prohibition of a practice simply by reason of its anti-competitive object is justified by the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition. The *per se* prohibition of such

142. *E.g.*, Case C-8/808, T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoritat, 2009 E.C.R. I-4529, para. 43 (opinion of the Advocate General Kokott).

143. Wolf, *supra* note 123, at 552; *cf.* Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 895 (2007) ("*Per se* rules may decrease administrative costs, but that is only part of the equation. Those rules can be counterproductive. They can increase the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage . . . they also may increase litigation costs by promoting frivolous suits against legitimate practices.").

144. *See* Société la Technique Minière v. Maschinenbau Ulm, 1966 E.C.R. 235, 248-49.

> practices recognised as having harmful consequences for society creates legal certainty.[145]

The ECJ has repeatedly held that in assessing whether there has been an infringement, it is necessary to consider the actual context, market conditions, and the like. In *Miller International Schallplatten*, however, the Court seemed to contradict that doctrine:

> Arguments based on the current situation cannot sufficiently establish that clauses prohibiting exports are not such as to affect trade between member states, *even if it were possible to establish beyond reasonable doubt* the accuracy of such general statements, since that situation may vary from one year to the next in terms of changes in the conditions or composition of the market.[146]

Miller involved an export ban—albeit one that the defendant credibly if vainly argued to be insignificant—and in that respect it might be unsurprising that the Court did not hesitate to condemn it. The Court's view, however, is surprising: a contract clause can infringe article 101(1) despite proof "beyond reasonable doubt" that there is no effect on trade. Apparently, it would be necessary to show that the clause will *never* affect trade. An ex ante prohibition of this sort *might* make sense when a company is seeking *prior* approval but does it make equal sense in the enforcement context?

Finally, there is another aspect of the Advocate General's opinion in *T-Mobile* that bears mention in regard to legal analysis that is comparable in tone and substance to a per se rule. In particular, the Advocate General uses an analogy to drunk driving and "risk offenses":

> [T]he prohibition on 'infringements of competition by object' resulting from Article 81(1) EC is comparable to the risk offences . . . known in criminal law: in most legal systems, a person who drives a vehicle when significantly under the influence of alcohol or drugs is liable to a criminal or administrative penalty, wholly irrespective of whether, in fact, he endangered another road user or was even responsible for an accident. In the same vein, undertakings infringe European competition law and may be subject to a fine if they engage in concerted practices with an anti-competitive object; whether in an individual case, in fact, particular market participants or the general public suffer harm is irrelevant.[147]

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145. Case C-8/808, *T-Mobile*, 2009 E.C.R. I-4529, para. 43 (opinion of Advocate General Kokott).

146. Case 19/77, Miller Int'l Schallplatten GmbH v. Comm'n, 1978 E.C.R. 131, para. 14 (emphasis added).

147. Case C-8/808, *T-Mobile*, 2009 E.C.R. I-4529, para. 47 (opinion of Advocate General Kokott).

The ECJ did not invoke the analogy but its reasoning and holding are consistent with it. How far does the concept of a risk offense extend in the context of antitrust? Someone who drives "significantly under the influence" significantly increases the risk of an accident. The offense is based on risk but the risk is sufficiently palpable that, in regulatory terms, ex ante and ex post are nearly contiguous (or concentric). What about less obvious situations: Someone is in a bar, drinking heavily and *likely* to drive. Or has entered the bar and is *planning* to drink heavily. Or is at home and thinking seriously about heading out to a bar. At what point, and under what reasoning, is intervention justifiable?

This is not a new issue in antitrust. An early example is testimony before a Congressional Committee in 1912 during which there was much discussion over "constructive criminality" and how far the Sherman Act should or should not go in proscribing a propensity or tendency towards restraints of trade or monopoly.[148] Further, as discussed below, similar questions arise in addressing GMOs.

In stating that there is no "rule of reason" under article 101(1), or in rejecting the concept as inimical to the Treaty, there is a missing piece—the way the Supreme Court first used the phrase in the context of the Sherman Act. Rather than creating a dichotomy between "rule of reason" and per se analysis (or between practices that fall into one or the other categories, as though there were "Column A" and "Column B"), the phrase was one of ordinary usage (albeit with historic significance). Whereas the Supreme Court read *into* § 1 the word "undue" or "unreasonable," the ECJ has arguably read *out* of article 101 words (or concepts) that would follow from a reasonable interpretation in light of the text and its origins, even though the history of post-War antitrust does not indicate a compelling reason to do so. At the same time, while disclaiming per se infringements under article 101(1), the ECJ often holds conduct to infringe article 101(1) based on factual assumptions, legal presumptions, and reasoning that, in reality, are hard to distinguish from U.S. per se rules (with the important exception that the Supreme Court has been explicitly pruning the list of practices that receive per se treatment).

Just as two languages might be in the same linguistic family, sound alike and have certain words in common, their grammar and other attributes might make them mutually unintelligible. Similarly, there is much in common between EU and U.S. antitrust law, despite the

148. *Control of Corporations, Persons, and Firms Engaged in Interstate Commerce: Hearing Before the S. Comm. on Interstate Commerce*, 66th Cong. 1434-35 (1912) (testimony of L.C. Krauthoff).

differences between civil and common law traditions or differences in antitrust goals (e.g., market integration or consumer welfare). Nonetheless, as long as the Supreme Court and the ECJ take such different approaches to "rule of reason" and per se doctrines, the two systems will be no more (or less) proximate than Dutch and English or Romanian and Catalan.

III. GMOs

The "thorny problem of agriculture,"[149] to use Hallstein's phrase, has been among the most complex, most controversial, and most important aspects of European integration. As Hallstein wrote:

> [I]t says much for the ingenuity and persistence of all responsible that early on the morning of January 14, 1962, after a final all-night session, the Community's Council of Ministers finally reached agreement on the first measures of a common agricultural policy. The courage of the ministers should not be underrated—nor, indeed, their endurance. Forty-five separate meetings, 7 of them at night; a total of 137 hours of discussion, with 214 hours in subcommittee; 582,000 pages of documents; 3 heart attacks—the record is staggering.[150]

The EU is the world's largest exporter and importer of agricultural goods.[151] Transatlantic trade is significant but uneven. The United States is the EU's largest export market, whereas the United States ranks second, after Brazil, for imports.[152] More notably, from 1995 through 2007, U.S. exports as a percentage of EU imports had a negative annual growth rate, falling from sixteen percent of EU imports in 1995 to nine percent in 2007.[153]

Since the early days of the Common Market, agriculture has been a source of tension between the EU and the United States. Sharp language and finger pointing have been a drain on each side. One (in)famous example was the dispute in the early 1960s over tariffs that reduced U.S. exports of chickens to the EU and in turn prompted retaliatory measures

149. HALLSTEIN, *supra* note 112, at 54.

150. *Id.* at 55.

151. *Economic Sectors: Agriculture*, EUR. TRADE COMM'N, http://ec.europa.eu/trade/creating-opportunities/economic-sectors/agriculture/ (last visited Oct. 1, 2011).

152. Caroline Henshaw, *EU Agricultural Exports Surge*, WALL ST. J., May 4, 2011, http://online.wsj.com/article/SB10001424052748703937104576302730492468252.html; *EU Trade in Agriculture*, EUR. TRADE COMM'N, http://trade.ec.europa.eu/doclib/html/129093.htm (last visited Oct. 1, 2011).

153. *EU Trade in Agriculture*, *supra* note 152.

by the United States.[154] As a German official stated in 1963: "One can hardly believe that such friendly animals, so crisp when fried, could cause so much trouble."[155]

Nearly forty years later, the United States Trade Representative's Web site is rather blunt in describing U.S.-EU agriculture trade:

> Barriers to access for key U.S. agricultural exports continue to be a source of particular frustration. Even where its agricultural tariff barriers are relatively low, the EU has restricted or excluded altogether U.S. exports of commodities such as beef, poultry, soybeans, pork, and rice through nontariff barriers or regulatory approaches that do not reflect science-based decision-making or a sound assessment of actual risks to consumers or the environment.[156]

Among all of the disputes over trade in agricultural products, the one concerning GMOs is the most contentious and enduring.

A. United States

In the early 1970s, U.S. scientists experimenting with recombinant DNA technology (combining the genes of different organisms) expressed concern that their research would soon be politicized and, as a result, subject to government regulation. In 1975, a group of scientists met in California to ask the National Institutes of Health (the government agency that provides grants and funding to scientists) for regulatory oversight and peer review of experiments in the field of biotechnology. The government agreed to the scientists' proposal and this served as an important first step in "walling off participation" from both Congress and the public.[157] In the next decade, events such as House inquiries and local protests served as catalysts for the Reagan administration to address the topic of biotechnology.

Since 1986, the United States has regulated GMOs under a "Coordinated Framework" that rests on preexisting laws and regula-

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154. *See* ROSS B. TALBOT, THE CHICKEN WAR: AN INTERNATIONAL TRADE CONFLICT BETWEEN THE UNITED STATES AND THE EUROPEAN ECONOMIC COMMUNITY, 1961-1964 (1978).

155. *Common Market: Ruffled Feathers*, TIME, Aug. 13, 1963, at 70 (internal quotation marks omitted); *see also Common Market: The Chicken War*, TIME, June 14, 1963, at 92 ("Konrad Adenauer confided not long ago that he and President Kennedy have had voluminous correspondence during the past two years, 'and I guess that about half of it has been about chickens.'").

156. *European Union*, *supra* note 7.

157. Michael C. Nisbet & Mike Huge, *Attention Cycles and Frames in the Plant Biotechnology Debate: Managing Power and Participation Through the Press/Policy Connection*, 11 HARV. INT'L J. PRESS/POL. 3 (2006).

tions.[158] The United States Department of Agriculture (USDA) has primary authority over GMOs, while the Food and Drug Administration (FDA) and Environmental Protection Agency (EPA) also participate in decision making.[159] This allocation of oversight is itself a reflection of the U.S. approach to GMOs. GMO proponents were largely successful in steering oversight towards the USDA, whose mission includes promoting technological advances in agriculture.[160] Further, the procedures for seeking approval of GMOs took place with relatively little public involvement or scrutiny.[161]

GMOs are regulated under a substantial equivalence approach. Specifically, regulators assess a GMO in comparison to its traditional, non-GMO counterpart. If the GMO is substantially equivalent in safety and nutritional value to its conventional counterpart, it will be approved for commercial use in the United States.[162] In other words, "without scientific evidence of risk to human health, animal health, or the environment, permission to experiment with, and ultimately commercialize, [approval for GMOs] is granted."[163] In short, regulators evaluate the product itself rather than the process used to create the GMO.[164]

B. Europe

The EU did not begin regulating GMOs until 1990.[165] Before then, each Member State either had its own regulations to govern biotechnology or had no specific regulations in this area. Currently, the EU's Directorate General XI (Environment) oversees GMO regulation under Regulation (EC) No. 1829/2003, which provides a single

158. PEW INITIATIVE ON FOOD & BIOTECHNOLOGY, GUIDE TO U.S. REGULATION OF GENETICALLY MODIFIED FOOD AND AGRICULTURAL BIOTECHNOLOGY PRODUCTS 5-6 (2001), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Food_and_Biotechnology/hhs_biotech_0901.pdf.

159. *Id.* at 5.

160. U.S. DEP'T AGRIC., STRATEGIC PLAN FOR FY 2005-2010, at 12 (2006), *available at* http://www.ocfo.usda.gov/usdasp/sp2005/sp2005.pdf.

161. *Inadequate Safety Assessment of GE Foods*, PHYSICIANS & SCIENTISTS FOR RESPONSIBLE APPLICATION OF SCI. & TECH. (May 6, 2010), http://www.psrast.org/subeqow.htm.

162. *The NCBE Guide: US Regulations*, NAT'L CTR. FOR BIOTECH. EDUC., http://www.ncbe.reading.ac.uk/ncbe/gmfood/usregulations.html (last visited Oct. 10, 2011).

163. Daniel Lee Kleinman, Abby J. Kinchy & Robin Autry, *Local Variation or Global Convergence in Agricultural Biotechnology Policy? A Comparative Analysis*, 36 SCI. & PUB. POL'Y 361 (2009).

164. *The NCBE Guide: US Regulations*, *supra* note 162.

165. R. Daniel Kelemen, Globalizing EU Environmental Regulation, Paper Prepared for Conference on Europe and the Management of Globalization 3 (Feb. 23, 2007), http://www.princeton.edu/~smeunier/Kelemen.doc.

authorization procedure at the EU level.[166] Member States may not ban the placing on the market of GMOs except in accordance with Regulation (EC) No. 1829/2003.[167]

Most significantly, EU regulation of GMOs is based on the "precautionary principle," which entails a more risk-averse approach to approval (or more commonly, disapproval) of the development or importation of GMOs than in the United States.[168] Specifically, the burden is on the applicant to persuade the authorities that the GMO is free from harm, a much tougher standard than that of the United States.[169] As another point of comparison, the EU bases the regulation of GMOs on the process by which the GMO is created in order to determine its fitness for use.[170] As a necessary result of the EU's process-based, precautionary approach, very few GMOs have received approval for commercial use in the EU.[171]

In 1999, the EU imposed a de facto moratorium on GMO imports.[172] In response, the United States filed a complaint with the World Trade Organization (WTO).[173] The proceeding was massive, raising numerous issues from highly technical to broadly philosophical. In 2006, the WTO ruled in favor of the United States, but the parties have yet to resolve the conflict.[174]

In parallel with the EU-U.S. dispute over GMOs, there are important differences, often contentious, within the EU itself. For example, Austria, France, Greece, Hungary, Germany, and Luxembourg

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166. Council Regulation 1830/2003, 2003 O.J. (L 268) 24 (EC). Authorization requires an independent risk assessment by the European Food Safety Authority (EFSA). Directive 2001/18/EC governs the "deliberate release" of GMOs into the environment. Council Directive 2001/18, 2001 O.J. (L 106) 1 (EC). Regulation 1830/2003 governs labeling and traceability. Council Regulation 1830/2003, *supra*.

167. Council Regulation 1829/2003, 2003 O.J. (L 268) 1 (EC).

168. James Cameron & Juli Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, 14 B.C. INT'L & COMP. L. REV. 1, 13-14 (1991).

169. *Id.*

170. *The NCBE Guide: US Regulations*, *supra* note 162.

171. The main GMO crop in the EU is a form of corn (maize) that Monsanto developed (MON810). A list of GMO authorizations is available at *GM Food & Feed*, EUR. COMM'N, http://ec.europa.eu/food/dyna/gm_register/index_en.cfm (last visited Oct. 10, 2011); *see also* JORGE FERNANDEZ-CORNEJO & MARGRIET CASWELL, U.S. DEP'T OF AGRIC., THE FIRST DECADE OF GENETICALLY ENGINEERED CROPS IN THE UNITED STATES (2006), http://www.ers.usda.gov/publications/eib11.pdf.

172. CHARLES E. HANRAHAN, CONG. RESEARCH SERV. 21556, AGRICULTURAL BIOTECHNOLOGY: THE US-EU DISPUTE 2 (2010), *available at* http://www.cnie.org/nle/crsreports/10May/RS21556.pdf.

173. *Id.* at 1.

174. *Id.* at 2-3.

rely on the "safeguard clause" in the 2001 EU Directive to ban cultivation of certain GMOs on health or environmental grounds.[175] Further, while battling with the United States before the WTO, in a number of instances the European Commission has referred several Member States to ECJ for failing to honor EU-level GMO authorizations.[176] There is also a degree of divergence among EU institutions. In particular, the European Parliament recently voted in favor of a measure that would permit Member States to ban GMO cultivation based on environmental concerns.[177]

C. Rhetoric and Reality

Ideally, the question of GMOs would be one for objective analysis: Is there a risk? Is there a benefit? What is the probability of error in assessing risk and benefit? Is a Type I or Type II error likely to be more costly? Yet even accepting the inherent epistemic challenges in regulating scientific advances, the U.S.-EU dispute over GMOs is far from a dispassionate inquiry into facts. Instead, the extent of rhetoric calls to mind Thurman Arnold's observation about political discourse over government policy during the 1930s:

> The present status of fact-minded observations on governmental affairs can be pictured by comparing it with the diagnosis of a physician. Such diagnoses may be, and often are, wrong; everybody knows that they are only the guesses of experts. A consultation of physicians, however, does not descend to the level of oratory about principle. It gets its authority from the standards by which men judge the expertness of physicians. The best physician under these standards is not the one who can make the most powerful public speech, giving the reason for supporting his diagnosis. Ability to expound reasons in public, which is the ability of an actor, has nothing to do with correct diagnosis or prediction. In fact, it usually obscures that ability.[178]

Joyce Tait, who has written extensively on GMOs, echoes Judge Arnold's metaphor in stating: "Ideally, public policy makers and regulators should take the lead in managing the framing of the risks and

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175. *GMOs in a Nutshell*, EUR. COMM'N, http://ec.europa.eu/food/food/biotechnology/qanda/d1_en.htm (last visited Sept. 6, 2011).

176. *See* Press Release, Eur. Comm'n, GM Feed Ban: Commission Takes Poland to the EU Court of Justice (Mar. 14, 2011), *available at* http://europa.eu/rapid/pressReleaseAction.do?reference=IP/11/292.

177. Press Release, Eur. Parl., GMOs: Parliament Backs National Right to Cultivation Bans (July 6, 2011), *available at* http://www.europal.europa.eu/en/pressroom/content/20110705IPR23305/html/GMOs-Parliament-backs-national-right-to-cultivate-bans.

178. THURMAN W. ARNOLD, FOLKLORE OF CAPITALISM 137 (1973).

benefits of new technology to minimise the biases likely to be introduced by both industry and public advocacy groups."[179] When rhetoric overwhelms reality, or merely fogs an inquiry into reality, it is difficult to reach sound public policy decisions about scientific questions, let alone resolve a conflict in which a scrum of political and economic interests is grappling for control.

D. Public Opinion

More so than current antitrust policy in the United States or EU, public opinion figures heavily in national and international policy regarding GMOs. In many EU countries, public opinion is significantly more negative regarding GMOs than in the United States.[180]

Strength of public opinion, however, does not always correlate with public understanding of the substantive or technical aspects that are at the heart of the issue.[181] In a recent study of public attitudes towards GMOs, there was a tendency to weigh perceived risks more heavily than perceived benefits.[182] Further, according to the study, consumers "are willing to accept higher levels of voluntary risk, but risks that seem out of their control are much less acceptable. The perceived control that consumers feel over what they purchase and eat is a crucial driver of attitudes."[183]

In reality, it is more likely that public opinion can provide a convenient basis on which various parties can promote their respective

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179. Joyce Tait, *Risk Governance of Genetically Modified Crops—European and American Perspectives*, *in* GLOBAL RISK GOVERNANCE 133, 145 (Ortwin Renn & Katherine D. Walker eds., 2007) [hereinafter Tait, *Risk Governance of Genetically Modified Crops*], *available at* http://www.irgc.org/IMG/pdf/Chapter_7_GM_Crops_final.pdf; *see also* Joyce Tait, *More Faust than Frankenstein: The European Debate About the Precautionary Principle and Risk Regulation for Genetically Modified Crops*, 4 J. RISK RES. 175, 185 (2001).

180. *Global Issues: Biotechnology*, WORLDPUBLICOPINION.ORG, http://www.americans-world.org/digest/global_issues/biotechnology/biotech2.cfm (last visited Oct. 10, 2011).

181.

> Understanding of the science of novel food technologies is low. Even for animal cloning, where levels of awareness are high relative to the other technologies, understanding generally does not extend to the technical or scientific aspects of the process. Similarly, the majority of people say that they are not confident enough in their own knowledge to explain most technologies to another person.

BROOK LYNDHURST, AN EVIDENCE REVIEW OF PUBLIC ATTITUDES TO EMERGING FOOD TECHNOLOGIES: A REPORT CARRIED OUT ON BEHALF OF THE SOCIAL SCIENCE RESEARCH UNIT 6 (2009), *available at* http://www.food.gov.uk/multimedia/pdfs/emergingfoodteches.pdf.

182. *Id.* at 8.

183. *Id.* (citations omitted).

points of view.[184] The way in which an issue is framed determines, in part, how the government will evaluate it and the extent of public involvement (or even awareness). Not surprisingly, the initial framing of GMOs in the United States and Europe, respectively, reflects the divergence in regulation.

In the United States, GMOs were introduced to the public in the context of scientific advancement and commercialization. The decision by the Supreme Court in 1980 that companies could patent the products of biotechnology, led to private investments in the research and development of new GMOs to be commercialized.[185] Corporate interest in GMOs naturally led to corporate lobbying for favorable GMO regulation. The scientific and industrial framing of GMOs in the United States, coupled with relatively limited public participation in the regulatory process, help to explain why GMOs never had the chance to become an inflammatory issue.

By contrast, GMOs were controversial in many EU countries from the outset. As mentioned above, GMOs were not originally subject to regulation at the EU level, and the Member States had different attitudes towards GMOs. In the 1990s, when the EU attempted to develop supranational regulation of GMOs, Member State resistance and political debate quickly put the issue of GMOs in the public arena.[186] Discussion of GMOs was "woven into a field of discourse that included intra-European disputes over the 'mad cow' crisis, transatlantic trade wars over products such as hormone-treated beef, and ongoing state society

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184. Johan F.M. Swinnen & Thijs Vandemoortele, *Policy Gridlock or Future Change? The Political Economy Dynamics of EU Biotechnology Regulation*, 13 AGBIOFORUM 291, 293 (2010). The American sociologist Edward Alsworth Ross wrote in 1915:

> The place reserved to public opinion in the system of social control should depend, furthermore, on its competency to coerce in the right direction; for it must not only drive men, but drive them along the paths it is necessary they should go in. Now, in respect to technique, public opinion is, as we have seen, primitive. It is vague as to requirements. It is indefinite as to kind and quantity of sanction. It is crude as to procedure. It is evidently not a product fashioned for he the purpose of regulation, but the *original plasm* out of which various organs of discipline have evolved.

EDWARD ALSWORTH ROSS, SOCIAL CONTROL: A SURVEY OF THE FOUNDATIONS OF ORDER 98-99 (1915). Similarly, Arthur Todd distinguished public opinion in the sense of "sound, ordered social judgment" from "popular whim or popular impression." He described the latter as "highly prevalent, but frothy, fatuous superficialities" and the former as "serious and profound even if mistaken." ARTHUR JAMES TODD, THEORIES OF SOCIAL PROGRESS: A CRITICAL STUDY OF THE ATTEMPTS TO FORMULATE THE CONDITIONS OF HUMAN ADVANCE 367 (1918).

185. Diamond v. Chakrabarty, 447 U.S. 303, 318 (1980).

186. Gal Hochman, Gordon Rausser & David Zilberman, *U.S. versus E.U. Biotechnology Regulations and Comparative Advantage: Implications for Future Conflicts and Trade*, KATHOLIEKE UNIVERSITEIT LEUVEN (Apr. 2009), http://www.transatlantic.be/publications/hochman_rausser_zilberman.final.pdf.

conflicts over environmental issues."[187] The media coverage emphasized the lack of benefits and focused on the scientific uncertainty and risk of harm. This dramatic and politically unpopular introductory framing of GMOs helped shape the nature of regulation.[188]

The divergences in GMO regulation between the United States and EU cause significant unrest in transatlantic trade. Despite constant efforts to harmonize regulations, the United States and the EU cannot reach an agreement on the issue of GMOs. Even intervention by the WTO has not resolved the dispute. Indeed, the issue of GMOs seems destined to fall within a special category of trans-Atlantic relationship labeled "Agree to Disagree." Political and economic interests, consumer and public sentiment, and divergent regulatory systems are among the factors that seem to make the problem insoluble.

In rough terms, one could say that the United States moved (too) early and (too) fast, while the EU has moved (too) slowly and (too) late with regard to GMOs. This asynchronous and asymmetrical relation between the respective regulatory schemes has made progress a challenge. As Tait has suggested, for negotiators to analyze the other side's approach effectively, they must understand the underlying causes for the differences in regulation. A possible way forward is at least to agree on a dispassionate methodology or, put differently, to harmonize methodologies for risk assessment (without prejudging the outcome).[189]

IV. ERROR TOLERANCE

The preceding Parts have highlighted substantive differences between EU and U.S. antitrust law and GMO regulation. It is certainly possible to explain those differences by reference to the legal frameworks, political systems, public opinion, and other elements of what one might call the "regulatory *supra*structure." At the same time, below the surface (or behind the curtain) there are common themes to a "regulatory infrastructure." These include social myths and political narratives,[190] institutional culture,[191] and a complex mix of social and economic interests (overt or *sub rosa*).[192]

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187. SHEILA JASANOFF, DESIGNS ON NATURE: SCIENCE AND DEMOCRACY IN EUROPE AND THE UNITED STATES 89 (2005).

188. Tait, *Risk Governance of Genetically Modified Crops*, *supra* note 179, at 6.

189. *See id.*

190. *See generally* Andrea Lenschow & Carina Sprungk, *The Myth of a Green Europe*, 48 J. COMMON MARKET STUD. 133 (2010); THURMAN ARNOLD, SYMBOLS OF GOVERNMENT (1935).

191. *See, e.g.*, Michelle Cini, Administrative Culture in the European Commission: The Case of Competition and Environment, Paper Presented at the European Community Studies

An incomparable example of describing "what's really going on" is Thurman Arnold's description of the roots of U.S. antitrust. It merits lengthy quotation:

> We have seen that the growth of great organizations in America occurred in the face of a religion which officially was dedicated to the preservation of the economic independence of individuals. . . . The learned mythology of the time insisted that American industry was made up of small competing concerns which, if they were not individuals, nevertheless approach that ideal. "Bigness" was regarded as a curse because it led to monopoly and interfered with the operation of the laws of supply and demand. At the same time specialized techniques made bigness essential to producing goods in large enough quantities and at a price low enough so that they could be made part of the American standard of living. In order to reconcile the ideal with the practical necessity, it became necessary to develop a procedure which constantly attacked bigness on rational legal and economic grounds, and at the same time never really interfered with combinations. Such pressures gave rise to the antitrust laws. . . .[193]

In comparing EU and U.S. policy on antitrust and GMOs, the difference appears to rest in different views—sometimes explicit, sometimes hard to spot—on error tolerance. To be clear, this is not to say that European *society* is more or less risk averse than American society (or vice versa). The difference is about the approach of courts and regulators to *their* errors. Space does not permit even a cursory review of the "regulatory infrastructure" that accounts for the differences in EU and U.S. approaches to antitrust and GMOs. Instead, the following will cover a single aspect—error tolerance.

Error tolerance arises in the face of uncertainty, when individuals or decision makers have to choose between two courses: One with a risk of a false positive and one with a risk of a false negative.[194] Each risk has a cost, whether personal, societal, or otherwise. The costs of error tend to be unequal, which can lead to a conscious and justifiable bias.[195] Safety procedures, for example, usually assess the cost of false negatives as

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Association, Fourth Biennial International Conference, Charleston, South Carolina, United States (May 11-14, 1995).

192. *See, e.g.*, Celina Ramjoue, *A Review of Regulatory Issues Raised by Genetically Modified Organisms in Agriculture*, CAB REVIEWS: PERSPECTIVES IN AGRICULTURE, VETERINARY SCIENCE, NUTRITION AND NATURAL RESOURCES (2008), http://www.princeton.edu/morefood lesscarbon/reading/files/Ramjoue-review-of-Reg-ISSUES.pdf.

193. ARNOLD, *supra* note 178, at 207.

194. Reynold Cheng et al., *Adaptive Stream Filters for Entity-Based Queries with Non-Value Tolerance, 31st Very Large Database Conf.* 5 (2005).

195. Martie G. Haselton & Daniel Nettle, *The Paranoid Optimist: An Integrative Evolutionary Model of Cognitive Biases*, 10 PERSONALITY & SOC. PSYCHOL. REV. 47, 48 (2006).

greater than false positives: it is better to have extra life boats than worry about carrying a little extra weight on the ship. When decision makers discount, perhaps to zero, the cost of a false positive or false negative, they are expressing a judgment as to error tolerance.

A well-established technique in statistical analysis is to assess the probability of accurately testing a null hypothesis against alternative hypotheses; the null hypothesis is either true or not true.[196] Here is a simple example. You are dining out and, because of your food allergies, you ask the waiter if there are any tree nuts in the carrot cake that you are tempted to order. The restaurant does not make the cake onsite, and there is no ingredient information. If you ask the waiter, "Are there nuts in the cake?," and the answer is "Yes," there is a false positive if the cake is nut-free in reality. If the cake does have nuts, and the waiter says it is nut-free, there is a false negative. Here is a matrix that shows this simple example:

	In Reality:	
	The cake has nuts.	**The cake is nut-free.**
Waiter says the cake has nuts.	✓	**False Positive (Type I Error)**
Waiter says the cake is nut-free.	**False Negative (Type II Error)**	✓

In this example, the costs of a false negative (eating an allergen) are greater than a false positive (not ordering the carrot cake). Twentieth-century statistical techniques have formalized the use of false positives and false negatives in hypothesis testing.[197] There is, however, a compelling argument that the underlying concepts have an evolutionary

196. Whether the null hypothesis is "true" in some absolute sense raises knotty philosophical issues that are beyond the scope of this discussion. For present purposes and, indeed in many contexts, the "truth" of the null hypothesis depends on whether it conforms to nature or an accepted state of "reality." *Hypothesis Testing*, METAGORA.ORG, http://www.metagora.org/training/encyclopedia/hypothesis.html (last visited Oct. 10, 2011).

197. This approach derives from work by Neyman and Pearson in the 1930s. J. NEYMAN & E.S. PEARSON, *The Testing of Statistical Hypotheses in Relation to Probabilities* a Priori, *in* JOINT STATISTICAL PAPERS OF J. NEWMAN & E.S. PEARSON 186, 188-97 (1967). For a historical review of statistical methods and terminology, see Carl J. Huberty, *Historical Origins of Statistical Testing Practices: The Treatment of Fisher versus Neyman-Pearson Views in Textbooks*, 61 J. EXPERIMENTAL EDUC. 317, 318-19 (1993).

basis.[198] Indeed, a preference for one type of error over the other in different contexts can explain various aspects of human adaptation. For example, an innate aversion to snakes and spiders makes good sense when considering the costs of a false negatives, e.g., a fatal bite, relative to the cost of a false positive, which is essentially a lost opportunity.[199] The presumption of innocence is a classic example of high costs for false positives (i.e., convicting the innocent).

Reflecting concerns over "mistaken inferences," the Supreme Court shows a preference for false negatives (or aversion to false positives) in antitrust cases.[200] The ECJ has not espoused a similar concern, and regulators tend to be at most neutral. As a former Director General of the European Commission Directorate General of Competition (DG COMP) put it: "[A]s head of a competition authority charged with protecting consumer welfare, I am at least as concerned about false negatives, i.e. under-enforcement, as I am about false positives, i.e. over-enforcement."[201]

A similar divergence exists in regard to GMOs. If one judges GMOs to offer little, if any, benefit, then the potential risks, however abstract, lead to a preference for false positives (i.e., there is a serious risk): Why take a chance? The view that GMOs are useful and that there is unlikely to be a significant risk leads to the opposite view.

Casting issues in terms of error tolerance helps tease out the stated and unstated premises of a position: What is the basis for believing there is a risk? What is the basis for believing there are, or are not, benefits? Is there a tendency to attribute risks and dismiss benefits on the basis of a comparable amount of data? What are the likely consequences of being wrong? A common methodology for addressing these and related questions would perhaps reduce divergence.[202]

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198. Haselton & Nettle, *supra* note 195.

199. *Id.* at 52.

200. *See, e.g.*, Verizon Commc'n Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) ("Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.' The cost of false positives counsels against an undue expansion of § 2 liability." (citations omitted)).

201. Philip Lowe, Dir. Gen., Directorate Gen. for Competition Eur. Comm'n, Consumer Welfare and Efficiency—New Guiding Principles of Competition Policy at the 13th International Conference on Competition and 14th European Competition Day 9 (Mar. 27, 2007), *available at* http://ec.europa.eu/competition/speeches/text/sp2007_02_en.pdf.

202. Tait, *Risk Governance of Genetically Modified Crops*, *supra* note 179, at 141-42, 146.

V. CONCLUSION

There is an important, tight bond between the EU and United States. Conflicts tend to be transient and tolerable. In the fields of antitrust and GMOs, however, there are enduring differences. There is ongoing cooperation between the EU and United States in antitrust enforcement, and the two systems have much in common. At the same time, the Supreme Court and the ECJ have developed bodies of jurisprudence under § 1 and article 101(1) that differ in fundamental ways, one of which this essay has highlighted: the way in which the Supreme Court has steadily reduced the list of practices subject to a per se rule, while the ECJ has tended to hold fast to a very broad interpretation of article 101(1)'s scope, eschewing a rule of reason analysis.

The transatlantic GMO dispute seems intractable. It might only be a "mini-trade war," but it is enduring and inflammatory. Unlike in the antitrust context, there seems to be little on which the parties agree. A common methodology for risk assessment or other mechanism that turns down the rhetoric would help, but an insuperable barrier might be reluctance to agree to anything that risks an unfavorable outcome from the perspective of the many constituencies on each side. In historical perspective, it seems odd that Minister Schuman and Chancellor Adenauer were able to change history by creating the ECSC but three percent of transatlantic trade is such a sticking point. Perhaps it is not a sufficiently big enough problem to energize the parties to find a solution, as the Korean conflict did for the ECSC and Egypt's nationalization of the Suez Canal did for the Treaty of Rome.