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**Global Collection: Reviewing the Global Limits of Competition Law
(Ioannis Lianos & D. Daniel Sokol, eds., 2012)**

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Book Review

A Global Collection

Reviewing *The Global Limits of Competition Law*
(Ioannis Lianos & D. Daniel Sokol, eds., 2012)

Max Huffman[†]

The Global Limits of Competition Law is the first installment in Daniel Sokol's and Ioannis Lianos's ambitious new series from Stanford University Press, Global Competition Law and Economics.¹ The project is ambitious because it takes on a potentially unbounded topic, and one that is constantly changing. It is also ambitious because Sokol and Lianos enter a saturated market. This first volume is sufficiently captivating, and represents such an extraordinary breadth of national and regional perspectives, that the authors appear to have fulfilled their ambitions.

Sokol and Lianos need no introduction to a follower of recent antitrust scholarship. Through their own scholarly achievements and extensive world-wide connections in the antitrust bar, bench, and academy, they are well—perhaps uniquely—positioned to bring together a collection of this sort. Sokol has published vigorously on a range of antitrust topics, employing comparative, international, and institutionalist perspectives to a degree that few, if any, in the U.S. academy can claim.² The Paul Caron of antitrust, he has a huge popular fol-

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

2. See, e.g., COMPETITION LAW AND POLICY IN LATIN AMERICA (Eleanor M. Fox & D. Daniel Sokol eds., 2009); D. Daniel Sokol, *The Future of International Antitrust and Improving Antitrust Agency Capacity*, 103 Nw. U. L. Rev. 1081 (2009); D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUSINESS LAW JOURNAL 37 (2007).

lowing through his work on the Antitrust & Competition Policy Blog.³ Early in his career, Sokol has achieved the enviable position of setting the terms of the scholarly dialogue. Sokol's work on the "antitrust law prof blog" deserves special mention in the light of this global collection. I am not being hyperbolic in proposing that one of the top few, if not the single, greatest contributions to antitrust thought in recent years has been the daily exposure of lawyers, judges, policy-makers, and scholars to work in competition policy being done around the globe.

Lianos is a leader in the study of global competition law and economics. He has written and edited several books and dozens of articles and book chapters, usually employing a comparative perspective. Lianos is well situated to bring off a multi-volume study of global competition law and economics. A lawyer and social scientist himself, he has published papers in at least three languages. He has taught in Britain, France, and the U.S., and he has worked with competition law enforcement agencies in both Europe and the U.S.

In *The Global Limits of Competition Law*, Lianos and Sokol appear to have followed a tried-and-true approach to producing a top-quality collaborative publication. They brought together an extraordinary cast of contributors, from leaders of the U.S. antitrust academy to noted economists, lawyers, and professors spanning four continents.⁴ Then, it appears they got out of the way and let their contributors do what they do best. Their approach produced a marvelous diversity of topics and points of view. The book juxtaposes George Priest's study of the origin and influence of the Chicago School of Antitrust⁵ with Arianna Andreangeli's study of the European Convention on Human Rights' relevance for competition law enforcement.⁶ Sokol writes about the competition policy implications of government regulation.⁷ Jeffrey Harrison discusses surprising complica-

3. D. Daniel Sokol, ANTITRUST & COMPETITION POL'Y BLOG, http://lawprofessors.typepad.com/antitrustprof_blog/. Professor Paul Caron is the Editor-in-Chief of Law Professor Blogs LLC. LAW PROFESSORS BLOGS, <http://www.lawprofessorblogs.com>.

4. See GLOBAL LIMITS, *supra* note 1, at xi–xiv.

5. George L. Priest, The Limits of Antitrust and the Chicago School Tradition, in GLOBAL LIMITS, *supra* note 1, at 15.

6. Arianna Andreangeli, *Competition Law and Human Rights: Striking a Balance Between Business Freedom and Regulatory Intervention*, in GLOBAL LIMITS, *supra* note 1, at 22.

7. D. Daniel Sokol, *Anticompetitive Government Regulation*, in GLOBAL LIMITS, *supra* note 1, at 83.

tions of the treatment of monopsony in U.S. law.⁸ Lianos imports lessons from Easterbrook's *The Limits of Antitrust*⁹ to inform the difficult question of remedying antitrust violations.¹⁰ And it goes on.

I. THE LIMITS BRAND

Lianos and Sokol's approach is not without drawbacks. Lianos and Sokol make a heroic effort in the book to weave together a collection of fundamentally disparate scholarly works.¹¹ They confess their challenge up front; any effort to draw out Easterbrook's seminal 1984 article to the global context necessarily will be frustrated by the article's ultimately narrow reach. *The Limits of Antitrust* is about intrinsic limits on U.S.-style antitrust enforcement.¹² Easterbrook's argument is fundamentally institutionalist rather than substantive in nature. He did not write with an eye to other enforcement systems with different procedures and different goals. It is unclear to what degree, for example, Easterbrook's concern with false positives in enforcement would apply in a jurisdiction without a private remedy, without punitive treble damages recovery, without the common law's stasis, and with technocrats at the center of the enforcement program—in short, a jurisdiction in which error is less likely and less costly.

Mr. Tapia and Mr. Montt's contribution, *Judicial Scrutiny and Competition Authorities: The Institutional Limits of Antitrust*,¹³ recognizes this reality: "Easterbrook's insights on the 'judicial' limits of antitrust crucially depend on the specific institutional design and the incentives it creates."¹⁴ They note that the prosecutorial system with decision-making by (and appeals to) generalist courts, which describes both private and Department of Justice enforcement in the United States, may be "idio-

8. Jeffrey L. Harrison, *Complications in the Antitrust Response to Monopsony*, in GLOBAL LIMITS, *supra* note 1, at 54.

9. Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1 (1984).

10. Ioannis Lianos, *Competition Law Remedies: In Search of a Theory*, in GLOBAL LIMITS, *supra* note 1, at 177.

11. See Ioannis Lianos & D. Daniel Sokol, *Introduction*, in GLOBAL LIMITS, *supra* note 1, at 1.

12. See Easterbrook, *supra* note 9, at 4.

13. See Javier Tapia & Santiago Montt, *Judicial Scrutiny & Competition Authorities: The Institutional Limits of Antitrust*, in GLOBAL LIMITS, *supra* note 1, at 141.

14. *Id.*

syncratic to the legal, institutional, and historical realities of the . . . United States.”¹⁵ Tapia and Montt conclude that “[p]olitical, legal and economic, and cultural idiosyncratic factors are too relevant to provide general answers” about institutional limits.¹⁶

There is even the question of whether a limit must be institutional in nature. Easterbrook’s limit of antitrust was a combination of mostly institutional features that Easterbrook contends renders antitrust unable to produce defensible results outside a narrowly drawn sphere.¹⁷ Professor Andreangeli’s contribution, *Competition Law and Human Rights: Striking a Balance Between Business Freedom and Regulatory Intervention*, raises an institutional concern that may be unique to the EU experience, although the due process concerns with a “[c]ommission [that] acts as investigator, prosecutor, and judge in the cases it deals with” and that renders “decisions [that] are subject to only limited review”¹⁸ have been raised with regard to the Federal Trade Commission as well.¹⁹ Tapia and Montt follow the institutional limits approach, as do other contributors to *Global Limits*—including Lianos, whose chapter on remedies is examined more closely below. Other authors (not contributing to this collection) employing the limits branding define it similarly.²⁰

One might propose a broader definition of limits that recognizes social goals that competition policy cannot achieve regardless of institutional structure. This broader definition of limits is at the core of the tension between regulation and antitrust.²¹ Regulation may seek to achieve goals like the public in-

15. *Id.* at 148.

16. *Id.* at 156.

17. See Easterbrook, *supra* note 9, at 1–4, 14–15, 39–40.

18. Andreangeli, *supra* note 6, at 23.

19. See Mark Leddy et al., *Transatlantic Merger Control: The Courts and the Agencies*, 43 CORNELL INT’L L.J. 25, 51–52 (2010).

20. See, e.g., Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Antitrust Case Against Google*, 34 HARV. J.L. & PUB. POL’Y 171, 177–78, 189–244 (2011) (relying on Easterbrook’s error-cost framework to argue that uncertainty favors lesser enforcement); Philip J. Weiser, *Regulating Interoperability: Lessons from AT&T, Microsoft, & Beyond*, 76 ANTITRUST L.J. 271, 272 (2009) (limits of antitrust include institutional limits on the ability to deal with rapidly changing technology industries).

21. This limit of competition policy is also implicated by constitutional questions under, for example, the *Noerr-Pennington* doctrine (First Amendment Petition Clause immunity) and the *Parker v. Brown* doctrine (state-action immunity based on federalism). See generally, United Mine Workers of

terest²² or maximal estate value.²³ Regulation's diverse goals may be broader than those of competition policy, which (in the United States) are frequently stated to be economic efficiency in service of consumers,²⁴ or even more succinctly, keeping prices low.²⁵ Regulation's goals may also be narrower than those of competition policy, which extend to the entire economy rather than to the sector under the regulator's jurisdiction (or the estate under the bankruptcy court's jurisdiction).²⁶ Under this approach, the limit of competition policy is where the social policy goal deviates from, or is even antithetical to, the goals of competition policy.²⁷

Am. v. Pennington, 381 U.S. 657 (1965); E. R. R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943).

22. In the case of FCC and FAA regulation. See AM. BAR ASS'N, THE MERGER REVIEW PROCESS 286–88 (3d ed. 2006); see also, e.g., 47 U.S.C. 309(a), (d), 310(d) (FCC); FED. COMM'NS COMM'N, STAFF ANALYSIS AND FINDINGS, AT&T/T-Mobile Merger, No. 11-65, at 3 (2011) (competitive concerns undermine public interest requirement); cf. 49 U.S.C. 41105 (requiring DOT approval for transfer of air carrier certificates); 14 C.F.R. pt. 135, FAA Order No. 8900.1 ¶¶ 3-3591–3-3596 (describing changes that follow from airline mergers which require FAA approval). See generally Howard Shelanski, *Justice Breyer, Professor Kahn, and Antitrust Enforcement in Regulated Industries*, 100 CAL. L. REV. 487, 505–06 (2012) (noting conflict between the FCC's broader public interest standard and antitrust's competition goals).

23. In the case of bankruptcy courts. See Thomas H. Jackson, *Bankruptcy, Nonbankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857, 857 (1982) ("[M]ost of the bankruptcy process is in fact concerned with creditor-distribution questions."). See generally Max Huffman, *Worlds in Collision: Merger Policy in Bankruptcy* (2013) (unpublished manuscript) (on file with author) (contrasting efficiency and consumer protection goals of antitrust with the estate-value-maximization goals of bankruptcy reorganization).

24. See ROBERT H. BORK, THE ANTITRUST PARADOX 51 (2d ed. 1993); Max Huffman, *Bridging the Divide? Theories for Integrating Competition Law and Consumer Protection*, 6 EUR. COMPETITION J. 7, 7 (2010); Paolisa Nebbia, *Competition Law and Consumer Protection Against Unfair Commercial Practices: A More-than-Complementary Relationship?*, in GLOBAL LIMITS, *supra* note 1, at 127.

25. See *Wallace v. IBM Corp.*, 467 F.3d 1104, 1107 (7th Cir. 2006).

26. Whether the "entire economy" means the global economy, a national economy, or something in between (e.g., a free trade zone or fiscal union) might be the subject of much debate. The rule for U.S. antitrust appears to be that antitrust's efficiency goals serve the U.S. economy only. See *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004) (stating that U.S. antitrust laws may be applied to foreign conduct to redress *domestic* antitrust injury).

27. This definition may beg as many questions as it answers: for example, to what degree a particular social policy like universal service in telephony or air transport deviates from efficiency and consumer-protection goals.

The regulation-competition interface underlies Sokol's contribution, *Anticompetitive Government Regulation*.²⁸ Rather than merely seeing the regulation-competition interface as another possible limit, Sokol asserts that "the real limit of antitrust is that antitrust enforcement (particularly public enforcement) may not reach the type of conduct that is most harmful to economic development—anticompetitive government regulation."²⁹ Sokol draws on his scholarly work in the field of competition advocacy as a solution to regulation that champions another policy over the narrow efficiency goals of antitrust.³⁰

Under this second understanding of limits—antitrust's goals' being subordinated to other social policies—it would be difficult or impossible to articulate a global limit, even a set of global limits, on competition policy. The limit will always be where some other social policy goal overcomes those goals that competition policy advances. That can be a substantive question in the case of a particular regime that narrowly defines the goals of competition policy.³¹ It can be an institutional question in the more difficult case of a regime that, like the United States, leaves the goals of antitrust open to interpretation and common-law development.

This latter approach will draw limits broadly where the institutions in place are capable of applying the law, and narrowly where they are not. The substantive and institutional limits themselves can be in tension. A substantive prohibition of price discrimination explicitly written into the antitrust laws in the United States and elsewhere reflects an extension of antitrust into the consumer-protection realm. That prohibition violates some commentators' sense of drawing limits narrowly based on institutional considerations, because price discrimination may be efficient and its prohibition inefficient,³² and because some do not trust our institutions to discern which is which.

28. Sokol, *Anticompetitive Government Regulation*, *supra* note 7, at 83.

29. *Id.* at 83–84.

30. See, e.g., D. Daniel Sokol, *Limiting Anticompetitive Government Interventions that Benefit Special Interests*, 17 GEO. MASON L. REV. 119 (2009).

31. This demonstrates the profound effect of defining the goals of antitrust narrowly to be only low prices in service of consumer interests. Antitrust enforcement will be curtailed any time the goals to be achieved do not include low prices.

32. See RICHARD A. POSNER, *ANTITRUST LAW* 27 (2d ed. 2001). Posner sees this as one of "two principal exceptions" to "the natural, the feasible, and the legitimate" economic guide to interpreting the U.S. antitrust laws. *Id.*

All this shows that there is no content to the idea of limits on competition policy. Defining limits becomes a Rorschach test for a commentator's views on the value of competition policy generally. Charged with writing about global limits, Lianos and Sokol's contributors gamely do so, but frequently in terms that are unrelated to Easterbrook's thesis. I found myself applauding that result. After a glut of scholarly work borrowing the limits brand that arose around the twenty-fifth anniversary of Easterbrook's work, it was refreshing to read about limits *writ large*, rather than the narrowly defined intrinsic failings of U.S. antitrust as it was enforced in the 1970s. And Lianos and Sokol structure this volume "start[ing] with the traditional limits imposed by the antitrust law process"—what I have called institutional or intrinsic limits—"before addressing other, broader limits of competition law relating to competition economics, synergies with other areas of law, institutional design, and culture."³³

II. SELECTED CONTRIBUTIONS

This review is concentrated on several of the chapters, selected partly at random, partly based on my interest in a particular author's work, and partly based on my interest in a particular topic. These chosen chapters are not necessarily representative: this is an incredibly broad and varied volume with contributions from around the world.

A. PROFESSOR PRIEST

George Priest may be uniquely positioned to teach about the history and meaning of the Chicago School of Antitrust, having been present for its early development but not frequently identified with the movement himself. His chapter, *The Limits of Antitrust and the Chicago School Tradition*, teaches that the Chicago School has its roots in early volumes of the *Journal of Law & Economics* and Friedrich Hayek's Mont Pelerin Society. The society "was, and to some extent still is, dedicated to the proposition that political interference with market activities is harmful to freedom—though the society avoided a purely libertarian approach."³⁴ That same minimalist program underlay Chicago School antitrust, which was "skeptical of governmental and judicial interference" but "never advocated abandoning an-

33. See Lianos & Sokol, *Introduction*, supra note 11, at 1–2.

34. Priest, supra note 5, at 15.

titrust law in the Armentano libertarian way. The Chicago School tradition sought to constrain antitrust law—chiefly by ridiculing its excesses—but accepted antitrust enforcement as an underlying background condition of market activity.”³⁵

Lianos and Sokol introduce Priest’s contribution as “historical context for Easterbrook’s writing.”³⁶ History would be enough, but Priest’s chapter is much more. He describes the “often unappreciated,” “political dimension” of the Coase theorem³⁷ and its relevance to Chicago School antitrust.³⁸ Priest conceptualizes the Coase theorem as supporting a non-interference role for the government in markets. Government support should be limited to reducing transaction costs, which would enhance welfare.³⁹ That is a precursor to the view, fundamental to Easterbrook’s error-cost analysis in *The Limits of Antitrust*, that “courts will make erroneous judgments.”⁴⁰ Priest sees Easterbrook’s error-cost analysis as a refinement of Chicago School antitrust, making the critique useful rather than merely hostile. In contrast with Robert Bork’s “sarcastic tone, largely dismissive of the ability of . . . courts to understand industrial organization,” Easterbrook “addresses, as science, the implications of inevitable judicial error for the fashioning of effective antitrust rules.”⁴¹ Priest does not draw the comparison in this chapter, but the preference for the Easterbrook approach over the Bork approach harkens to recent discussions of a “Neo-Chicago School,” which seeks to improve antitrust rules in light of error-cost analysis and empirical research.⁴²

Priest does not plow much new ground, and his contribution is limited to the U.S. antitrust experience. Because understanding the history of antitrust law and economics is helpful to its further development, because the U.S. experience with antitrust law and economics offers a lesson for global competition policy, and because Easterbrook’s article has made an outsize contribution to the subsequent common-law development in U.S. antitrust, Priest’s chapter is as important as it is inter-

35. *Id.* at 19.

36. Lianos & Sokol, *Introduction*, *supra* note 11, at 2.

37. *See generally* Ronald Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1 (1960).

38. *See* Priest, *supra* note 5, at 17.

39. *Id.* at 17.

40. *Id.* at 20.

41. *Id.*

42. *See* Max Huffman, *Marrying Neo-Chicago with Behavioral Antitrust*, 78 Antitrust L.J. 105 (2012) (citing sources).

esting. It is also well positioned in this volume, introducing the limits thesis as originally conceived before that thesis is broadened and reconceptualized throughout the rest of the collection.

B. PROFESSOR HARRISON

Jeffrey Harrison writes about our limited understanding of the economics of buyer power—“monopsony”—and its implications for U.S. antitrust law.⁴³ Harrison does not discuss the sort of intrinsic limit to our antitrust system that Easterbrook addressed—the institutional competence of U.S. enforcers and decision-makers to interpret the law properly to accommodate the economics of monopsony. Instead, this chapter is about the common law’s failure to date to accommodate the nuances of buy-side relationships, having been developed in the context of sell-side relationships.⁴⁴ Harrison’s chapter is also about U.S. antitrust, rather than global competition law, although of course economic lessons for competition policy are not subject to import duties. Lianos and Sokol explain that this chapter speaks to “the complexity of integrating economic concepts in legal outputs.”⁴⁵

Harrison teaches that economic theory “generally supports the idea of comparable treatment” of monopoly and monopsony.⁴⁶ (He later goes further: “[m]onopsony is the mirror image of monopoly.”)⁴⁷ That has always been my understanding. Cases involving employer and other buyer cartels follow rules that are difficult to distinguish from those involving producer cartels.⁴⁸ I lecture to my students that it does not matter whether we view the *Overlap Group* case,⁴⁹ which dealt with non-compete agreements among schools in scholarships for particularly attractive students, as an example of a joint exercise of buyer power (with the students as assets in the educational

43. Harrison, *supra* note 8.

44. *Id.*

45. Lianos & Sokol, *Introduction*, *supra* note 11, at 4.

46. Harrison, *supra* note 8, at 55.

47. *Id.* at 65.

48. Compare *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) (“If the plaintiff in this case could allege that defendants actually formed an agreement to fix MPT salaries, this *per se* rule would likely apply.”) with *Omnicare, Inc. v. UnitedHealth Group Inc.*, 629 F.3d 697 (7th Cir. 2011) (alleged buyer cartel in health insurance industry) and *White v. R.M. Packer Co.*, 635 F.3d 571 (1st Cir. 2011) (alleged seller cartel involving retail gas stations).

49. See *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993). Mark Anderson deserves credit for my understanding of this authority.

process) or as an example of a joint exercise of seller power (with students as consumers).

But it is not always so. Harrison goes on to discuss several areas, including territorial divisions, tying, and group boycotts, in which monopsony power complicates an analysis crafted for monopoly power. It is tempting to attribute these complications to the one-sided nature of antitrust's goals—protecting consumers but not necessarily investors—but that simplistic characterization misses the complexity of Harrison's argument. He notes that sell-side territorial divisions have pro-competitive justifications, such as the free-rider concern the dissent discussed in *United States v. Topco Associates*, while buy-side territorial divisions do not.⁵⁰ A fuller understanding of both horizontal territorial divisions and monopsony might preserve the *per se* rule for buy-side territorial divisions while moving to a rule of reason approach for sell-side territorial divisions.⁵¹

It is not clear that deviations in the law from the economic understanding regarding the symmetry of monopoly and monopsony reflect an example of a global limit of competition policy. The law of territorial divisions, tying, and group boycotts is murky in general.⁵² The limit that Harrison identifies exists whenever any body of law is in a state of flux. I do not come away from this chapter with a deeper appreciation of an intrinsic limit on competition policy in global economic governance. But that does not undermine my appreciation for Harrison's contribution. Like Priest's chapter, this one will inform my future research and teaching, and I imagine it would be of substantial use to an advocate, judge, or policy-maker seeking to understand better the competitive consequences of a particular observed practice.

50. Harrison, *supra* note 8, at 64 (citing *United States v. Topco Associates*, 405 U.S. 596 (1972)).

51. *Id.* at 65.

52. *Id.* at 63. See also Alan Devlin, *A Neo-Chicago Perspective on the Law of Product Tying*, 44 AM. BUS. L.J. 521, 522 (2007) ("The law governing tying arrangements is now a focal point of tension between the two major antitrust philosophies."); M. Todd Carroll, Note, *No Penalty on the Play: Why the Bowl Championship Series Stays In-Bounds of the Sherman Act*, 61 WASH. LEE L. REV. 1235, 1266–68 (2004) (describing the progression from *per se* treatment of group boycotts to rule of reason, except in the case of "classic boycotts"); Erica N. Andersen, *Schering the Market: Analyzing the Debate Over Reverse-Payment Settlements in the Wake of the Medicare Modernization Act of 2003 and In re Tamofixen Citrate Litigation*, 93 IOWA L. REV. 1015, 1042 (2008) (noting one instance in which *per se* treatment of horizontal market divisions gives way).

C. PROFESSOR NEBBIA

Paolisa Nebbia's contribution, *Competition Law and Consumer Protection Against Unfair Commercial Practices*, was one I picked for its subject matter. The intersection of competition law and consumer protection has become a global hot topic in recent years; Lianos and Sokol observe that it is "a natural area of overlap in competition and regulation."⁵³ Many regulatory agencies world-wide combine the functions, whether in the interest of cost savings or as a matter of best practices.⁵⁴

Some regulation and theories of enforcement are not easily categorized as either competition law or consumer protection. For example, the Federal Trade Commission has prohibited "fraudulent or deceptive conduct that could harm wholesale petroleum markets," a prohibition that has both consumer protection (fraud and deceit) and competition (wholesale markets) facets.⁵⁵ EU law, the law of South Africa, and some developing competition regimes have recognized monopoly exploitation—which in the U.S. presents consumer protection concerns in some narrow instances under state price-gouging legislation—as a competition concern.⁵⁶ (Evidence of frequent enforcement of exploitation prohibitions is not strong.⁵⁷)

Scholars recently have studied the intersection of competition law and consumer protection from a few perspectives. One approach is to view competition policy from a consumer perspective.⁵⁸ Another is to study the competition policy concerns

53. Lianos & Sokol, *Introduction*, *supra* note 11, at 6.

54. See FED. TRADE COMM'N, *Competition and Consumer Protection Authorities Worldwide*, <http://www.ftc.gov/oia/authorities.shtm> (last visited Aug. 28, 2013). Nebbia is well suited to make a contribution on this topic, working in the Italian competition authority. Italy's enforcement agency is another that combines the consumer protection and competition functions. See AUTORITÀ GARANTE DELLA CONCORRENZA E DEL MERCATO, <http://www.agcm.it/en> (last visited Aug. 28, 2013).

55. Prohibitions of Energy Market Manipulation Rule, 16 C.F.R. pt. 317(2013).

56. *Communication from the Commission, Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, ¶ 23, COM (2009) (EU law); see Case 27/76, *United Brands Co. v. Commission*, 1978 E.C.R. 207, (EU Law); *Harmony Gold Mining v. Mittal Steel S. Afr. Ltd.*, Case No. 13/CR (Feb. 2004). See generally Gregory B. Adams, *European and American Antitrust Regulation of Pricing by Monopolists*, 18 VAND. J. TRANSNAT'L L. 1 (1985).

57. See David S. Evans & Keith N. Hylton, *The Lawful Acquisition and Exercise of Monopoly Power and its Implications for Antitrust*, COMPETITION POL'Y INT'L, Autumn 2008, at 203.

58. See Robert H. Lande, *Revitalizing Section 5 of the FTC Act Using*

of what are classically consumer protection violations.⁵⁹ Nebbia's chapter is an excellent contribution to this developing body of scholarship. She notes the differences between competition law and consumer protection in terms of the types of claims each encompass as well as the directness of their operation: competition law protects consumers indirectly by ensuring properly functioning markets, while consumer protection protects consumers directly by attacking individual transactions.⁶⁰ But Nebbia suggests the complementary nature of the bodies of law outweighs the differences. Competition law enables the forces of competition to preserve welfare, and consumer protection fills the gaps that are left when the forces of competition are insufficient to protect consumers.⁶¹

In her description of the complementary nature of consumer protection and competition law, Nebbia recognizes the specific example of "market manipulation" through a process I have called "behavioral exploitation."⁶² "Advertising, promotion, and price setting are commonly used, to varying degrees, to alter the process of formation of consumers' preferences, which constitutes the key assumption of competition law."⁶³ It is not clear why Nebbia treats this theory of harm as distinct from her previous category of harm arising in the context of "credence goods." Behavioral exploitation represents a more nuanced explanation of an information-economics-based theory of welfare loss from inadequate disclosures in markets characterized by disparities in sophistication between the seller and buyer.⁶⁴

Nebbia offers a potent example of the interplay between competition law and consumer protection, comparing a challenge brought by the Italian authority under EC Directive 2005/29 of a "mass campaign" by former state monopoly telephone provider Telecom of deceptive statements and omissions to prevent consumers' migrating to competitors. The campaign "involved unfair practices carried out against a large number of

"Consumer Choice" Analysis, ANTITRUST SOURCE, Feb. 2009, at 1.

59. See generally Huffman, *Marrying Neo-Chicago with Behavioral Antitrust*, *supra* note 42; Maurice E. Stucke, *How Do (and Should) Competition Authorities Treat a Dominant Firm's Deception?*, 63 SMU L. REV. 1069 (2010).

60. Nebbia, *supra* note 24, at 127–28.

61. *Id.* at 128.

62. Huffman, *Marrying Neo-Chicago with Behavioral Antitrust*, *supra* note 42, at 130.

63. Nebbia, *supra* note 24, at 129.

64. Huffman, *Marrying Neo-Chicago with Behavioral Antitrust*, *supra* note 42, at 135–41.

migrating customers.”⁶⁵ The effects “were not limited to the individual case,” but because of a lack of market dominance, Article 102 of the EU Treaty did not apply.⁶⁶ The same conduct had taken place in France, with effects on the development of competing telephone service providers. In contrast with Telecom in the Italian case, France Telecom had market power making “it possible to resort to Article 102.”⁶⁷

Nebbia’s contribution speaks to the margins of the traditional views of competition law in a way that truly tests the substantive limits of that body of law. The intersection of competition law and consumer protection has been explored more fully in Europe than in the United States, despite the FTC’s longstanding status as a dual-purpose agency, so perhaps Nebbia’s contribution is an informative read primarily for a U.S. lawyer or academic. In particular, policy-makers at an agency like the FTC might do well to study Nebbia’s arguments regarding overlap and gap-filling benefits of the two bodies of law. And this sort of study of the parameters of what competition law can accomplish is precisely what one hopes to find when opening a volume like *Global Limits*.

D. PROFESSOR LIANOS

Professor Lianos previously has studied the role of remedies in competition law enforcement, including a forthcoming book on competition law remedies under EU law.⁶⁸ His chapter in *Global Limits, Competition Law Remedies: In Search of a Theory* builds on Easterbrook’s recognition that the limits of competition law are a function of the enforcement of competition law. But Lianos recognizes the importance of remedies to enforcement.⁶⁹ “It follows that the existence, or not, of appropriate competition law remedies might set limits to competition

65. Nebbia, *supra* note 24, at 131–32.

66. *Id.* at 132.

67. *Id.*

68. See generally IOANNIS LIANOS ET AL., COMPETITION LAW REMEDIES IN EUROPE (forthcoming May 2014); Nicholas Economides & Ioannis Lianos, *A Critical Appraisal of Remedies in the E.U. Microsoft Cases*, 2010 COLUM. BUS. L. REV. 346 (2010).

69. Easterbrook and others writing in his wake frequently assume remedies for a violation are fixed and certain. Under U.S. law, that assumption holds in private damages litigation (though the amount of damages may remain subject to judicial influence). The assumption fails when the remedy sought is injunctive relief or when settlement through consent decree or otherwise is a possibility.

law intervention.”⁷⁰ This chapter has the potential to offer the most direct response to the crucial question the volume’s title promises to address—where it is that competition policy ends and regulation begins. Philip Weiser has observed that behavioral remedies—remedial first-order regulation by antitrust courts and enforcement agencies—are likely to be part of the future of competition policy, at least in technology industries.⁷¹

Lianos raises the example of the *Microsoft* litigation in both the U.S. and the EU. In the U.S., the initial remedy ordered was both structural—breaking up the firm—as well as behavioral—taking steps to increase the number of licensees.⁷² In the EU, the remedy was behavioral, with Microsoft ordered to unbundle its Media Player application from the Windows operating system.⁷³ Though Lianos recognizes the remedies in *Microsoft* were “relatively complex and far-reaching,” the case nonetheless represents an interesting choice from which to propose a theory of remedies for competition law generally. In terms of size, novelty, and political salience, at least, *Microsoft* may be *sui generis*. Problems or successes in remedying consumer harm in those cases may say very little about competition policy generally.⁷⁴

Lianos’s purpose is to theorize a comprehensive approach to remedying competition law violations. Because no settled approach exists in any jurisdiction, Lianos takes the opportunity—which perhaps no other chapter author in *Global Limits* has—to propose a truly global approach. Lianos’s chapter is more deeply theoretical than the others I studied closely. Its intended targets are either academics or policy-makers, more than advocates or judges.

CONCLUSION

Lianos and Sokol offer a volume full of new and topical contributions from around the globe. It is difficult to define a single purpose for all of the chapters. Of those I studied closely,

70. Lianos, *Competition Law Remedies*, *supra* note 10, at 177–78.

71. See Weiser, *supra* note 20, at 277, 285, 293.

72. See *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59, 61 (D.D.C. 2000), *vacated*, 253 F.3d 34 (D.C. Cir. 2001). The structural portion of the remedy was reversed. See *Microsoft Corp. v. United States*, 253 F.3d 34, 49 (D.C. Cir. 2001).

73. See Case T-201/04, *Microsoft Corp. v. Commission*, 2007 E.C.R. II-491.

74. *But see* Weiser, *supra* note 20, at 279–86 (discussing *Microsoft* as one example of what is likely to be a continuing trend of antitrust challenges in platform industries).

some introduce a particular jurisdiction's approach that may be foreign to the reader; some take a historical approach; some concentrate on the U.S. experience with antitrust law and economics, relying on the U.S.'s historical first-mover status to provide the global relevance; and some attack a facet of competition law enforcement that has not been comprehensively theorized in any jurisdiction, let alone globally.

Thinking how I might use this volume in my work, I anticipate a combination of expanding my knowledge in preparation for class lectures (using, for example, chapters by Professors Priest and Harrison), providing background on a topic on which I hope to continue to engage in research (Professor Nebbia's chapter), and in some cases offering an utterly fresh theoretical look at competition law generally (Professor Lianos's chapter). Other chapters I will read because of the topic, because I make a practice of following all of the writing by some of these authors, or because I am unfamiliar with some of these authors' work and would like to change that.

I introduced this review by suggesting Lianos and Sokol may have overreached in seizing on the "limits" branding, but I conclude that if so, it does not matter. Whether the volume succeeds in extending Easterbrook's thesis to global study of competition law or merely offers a broad and fascinating collection of writing from an impressive gathering of authors, it serves an important purpose and is well worth studying closely.