THE SHIFTING SANDS OF ANTITRUST POLICY: WHERE IT HAS BEEN, WHERE IT IS NOW, WHERE IT WILL BE IN ITS THIRD CENTURY

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INTRODUCTION

Antitrust law practice is the occupation and preoccupation of several thousand lawyers and economists across the United States. What they do from day to day consumes the attention of several thousand business executives on the receiving end of antitrust trouble. It was a matter of some interest in many boardrooms when, last May, one admitted antitrust wrongdoer (the ringleader of a worldwide conspiracy to raise vitamin prices) accepted a spectacular $500 million fine and one of its top executives agreed to serve time in prison.[1]

Too few of us stop often enough to reflect on the history of this distinctly American enterprise and the core values that are its roots. Last year provided ample opportunity with the publication of formidable new biographies of John D. Rockefeller and J.P. Morgan[2] that one could read simultaneously with front-page coverage of dramatic developments throughout the Microsoft trial.[3] One of the burning questions of the mo-

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1 U.S. DEP'T OF JUSTICE, F. HOFFMAN-LAROCHE AND BASF AGREE TO PAY RECORD CRIMINAL FINES FOR PARTICIPATING IN INTERNATIONAL VITAMIN CARTEL (May 10, 1999). *See also* Steven D. Moore, *Scandal Likely to Cost Roche $1 Billion*, WALL ST. J., May 25, 1999, at A20.

2 RON CHERNOW, TITAN (1998); JEAN STROUSE, MORGAN (1999).

3 United States v. Microsoft Corp., No. 98-1232 (D.D.C., filed May 28, 1998).

ment is whether the 1911 Standard Oil breakup and the 1984 AT&T breakup are apt models for the future of what many people see as the most notorious and dangerous monopoly of our age.

Controversial at its inception eleven decades ago, antitrust policy remains controversial to this day and there is considerable debate over what it should be in the years ahead. This debate, however, is too important to be the sole preserve of antitrust specialists. Indeed, antitrust developments are appearing with increasing frequency on the front pages of our major newspapers and on evening TV news programs. The time has come to demystify this subject and thereby invite a broader, more open dialogue about the role that antitrust policy should play in our society.

I. IN THE BEGINNING

I first learned about antitrust in the always-exciting and always-provocative American History classroom of Professor Robert Huff at Hobart and William Smith Colleges in the mid-1960s. Somehow it seemed that he actually knew those Robber Barons who dominated the scene from the Civil War to World War I.[4] He certainly brought them to life and made vivid the fear and alarm that their unbridled power unleashed throughout the country. They were the builders of the great trusts that monopolized whole industries, stifled individual opportunity and initiative and indeed threatened democracy itself. Professor Huff made us see and appreciate the antitrust movement as the inevitable response of a country with a deep aversion to concentrations of power of all kinds and a deep commitment to both individual and business freedom. It was a fundamentally political response to perceived abuses pervading the transformation from a local agrarian to a national industrial economy. (We will later get to the relevance of this background to today's transformation from a national industrial to a global information economy.)

Both John Sherman, the Senator who fathered the Sherman Antitrust Act of 1890, and Benjamin Harrison, the President who signed it into law, were pro-business conservative Republicans who saw the need for this legislation as a safeguard for the free-enterprise system.[5] There

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4 Among assigned readings that surely remain on the minds of countless Huff students was MATTHEW JOSEPHSON, THE ROBBER BARONS (1934).

5 As Senator Sherman warned his colleagues, "the popular mind is agitated with problems that may disturb the social order" such as, in particular, inequities of wealth and combinations of capital so great that they threatened to produce "a trust for every production and a master to fix the price for every necessity of life." Congress, he continued, must heed the appeal of the voters "or be ready for the socialist, the communist, and the nihilist. Society is now disturbed by forces never felt before." 21 CONG. REC. 3, 2460 (1890) (Statement of Sen. Sherman). Eighty-two years later, Supreme Court Justice Thurgood Marshall would applaud the antitrust laws generally and the Sherman Act in particular as "the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-

are two rather simple prohibitions in this Act. First, Section 1 of the Act declared that in all agreements, combinations and conspiracies in restraint of trade are unlawful. Section 2 made unlawful the monopolization or attempted monopolization of any part of trade or commerce. The courts were left to interpret and apply these prohibitions to the whole array of common and uncommon business practices, arrangements and transactions throughout the economy.

The courts quickly determined that the first prohibition did not really make illegal all concerted action in restraint of trade but only concerted action in "unreasonable" restraint of trade. How and where to draw the line between reasonable and unreasonable restraints of trade was hotly debated at the turn of the 19th century and remains so as we now begin the 21st century. Teddy Roosevelt popularized the notion that the second prohibition did not make illegal all monopolies but only "bad" ones. Again, how to distinguish between good and bad monopolies remains a lively debate spanning the turn of two centuries.

The fault lines were clear by 1912 when Woodrow Wilson and Louis Brandeis captured the prevailing mood of the country with their attacks upon "the curse of bigness."[6] It was clear to them that the line between reasonable and unreasonable agreements was determined by the size of the parties to the collaboration: trade associations among small businesses should be free of any antitrust constraint; industrial giants had no justification for getting together, and bigness was bad in and of itself. New laws were needed because conservative courts and a Justice Department too much under the thumb of big business were not protecting local entrepreneurs from the tyranny and predations of all-powerful national rivals. In any contest between "consumer" interests in "efficient" organization of vast new industries and "small business" interests in maintaining their entrepreneurial freedom, antitrust policy should favor the latter without any question.

Populist sentiment enabled Wilson to win the election that year, and two years later Congress enacted two new statutes. The Federal Trade Commission Act established an "independent" administrative agency—supposedly independent of political influence—with a mandate to prevent all "unfair methods of competition." The Clayton Act declared unlawful corporate mergers and stock acquisitions where the effect "may" be substantially "to lessen competition or tend to create a monopoly in

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enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." United States v. Topco Associates, 405 U.S. 596, 610 (1972).

6 That was a phrase popularized by Brandeis in his writings on the "trust" problem, but Wilson captured the idea behind it in his campaign speeches. *See* THOMAS K. MCCRAW, PROPHETS OF REGULATION 94-114 (1984); RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION 327-36 (1948).

any line of commerce in any section of the country."[7] The Clayton Act also provided new weapons against such practices as coerced exclusive dealing, "tying" arrangements and price discrimination; and it enhanced the standing of private parties injured by these and other antitrust violations to bring their own suits for treble damages and injunctive relief.

II. RETREAT AND DISENCHANTMENT

This new burst of antitrust enthusiasm soon took a back seat to the imperatives of World War I, followed by a decade of big-business-boosting Republican rule that then cascaded into the Great Depression of 1929. Economic misery throughout the 1930s undercut faith in the free-enterprise system. Antitrust appeared little more than an inadequate band-aid for a fundamentally flawed organization of an industrial economy. More intrusive means of organizing the economy came into vogue; socialism and communism gained many adherents. FDR's response was government regulation, the rise of the welfare state and—of most relevance for our purposes—the National Industrial Recovery Act, NRA Codes and the resulting government sponsorship of industry cartels throughout the economy. Cartels were plainly to be preferred over "free" competition and the chaos it brought.

One new form of competition that emerged in those Depression years was discounting through newly-emerging giant mass merchandisers. These vast chains leaned on manufacturers for far better prices than mom-and-pop stores paid for their goods, and the chains passed the benefit onto their customers. While their lower prices were a boon to consumers, they were a threat to the survival of mom-and-pops. Huey Long sought to champion the cause of mom-and-pops everywhere with his declaration that he "would rather have thieves and gangsters than chain stores in Louisiana."[8] In this spirit, Congress passed and FDR signed the 1936 Robinson-Patman Act that broadened prohibitions on "price discrimination" and actually encouraged cartel pricing in many industries.

The discounting that threatened those mom-and-pops had been encouraged by a 1911 antitrust ruling of the Supreme Court that declared it illegal for manufacturers to prevent their resellers from discounting below manufacturer-suggested resale prices, the practice then known and still known today as "resale price maintenance."[9] Mom-and-pops wanted that price maintenance to be restored. Congress obliged in 1937 with its passage of the "Miller-Tydings Act" that authorized states to

[7] The Federal Trade Commission Act is now codified at 15 U.S.C. §§ 41 et. seq. The Clayton Act is now codified at 15 U.S.C. §§ 18 et. seq.

[8] Quoted in THEODORE N. BECKMAN & HERMAN C. NOLAN, THE CHAIN STORE PROBLEM 336-337 (1938).

[9] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

enact "Fair Trade Laws" allowing manufacturers to impose and enforce price maintenance agreements on their resellers. A majority of states accepted this invitation, thereby again promoting cartel pricing.

III. RENEWED COMMITMENT

By the end of the 1930s, FDR and his advisors had soured on cartel solutions. FDR appointed Thurman Arnold as Chief of the Antitrust Division of the Justice Department. The budget and staff of the Antitrust Division were quadrupled in the first three years of Arnold's reign, and he declared war on cartels and monopolies across the economy. He focused in large part on attacking what came to be described as "naked" agreements among leading competitors to fix prices and divide markets. His prosecutions of these kinds of cases provided opportunities for the Supreme Court to strengthen and extend prior holdings that agreements of this sort were illegal *per se.*[10]

Arnold won a major monopolization suit against Alcoa with an opinion by Judge Learned Hand that resonates with provocative albeit contradictory ramifications for antitrust policy to this day. Judge Hand observed that "the successful competitor, having been urged to compete, must not be turned upon when he wins."[11] Yet he held that Alcoa had unlawfully acquired monopoly power over the aluminum industry because it constantly expanded production capacity over 20 years to meet every expected increase in demand before others had a chance to enter; it thereby "forestalled all competition and succeeded in holding the field alone."[12]

Arnold's reign coincided with a period during which the entire industrial base of the country mobilized in support of a new World War against the forces of international fascism. It also coincided with a rising tide of industrial concentration sparked by a new wave of merger activity that once again alarmed a great many people. The Federal Trade Commission published a report in 1948 that documented the trend and highlighted the dangers to the economy in this "unchecked" corporate consolidation.[13] Congress responded with its enactment of the Celler-Kefauver Act of 1950 that closed major loopholes in the coverage of mergers under the 1914 Clayton Act—extending its reach to "asset" as well as stock acquisitions, covering vertical as well as horizontal mergers, establishing that the law could stop mergers even when they

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10 *See, e.g.,* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940); American Tobacco Co. v. United States, 328 U.S. 781, 813 (1946).

11 United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945).

12 *Id.*

13 FTC, THE PRESENT TREND OF CORPORATE MERGERS AND ACQUISITIONS (1948).

presented only an "incipient" rather than an actual concentration threat, and inaugurating a period of aggressive anti-merger enforcement activity over the course of the next two decades.[14]

The Eisenhower Administration embraced not only the mandate of the Celler-Kefauver Act but the thrust of the Thurman Arnold antitrust enforcement program generally. It was during the Eisenhower years that the Antitrust Division initiated a spectacular series of criminal price-fixing conspiracy cases against General Electric Company, Westinghouse Corporation, and a number of smaller electrical equipment manufacturers. Several high-level executives were actually sent off to prison; the private plaintiffs' antitrust bar followed up with an unprecedented burst of actions for treble damages on behalf of all electric utilities and other equipment buyers. Lots of people in high positions then got the message that antitrust compliance was a matter of critical importance. Surveying the landscape in the mid-1960s, Richard Hofstadler captured the essence of how antitrust enforcement was affecting the business community generally by that time: "Today, anybody who knows anything about the conduct of American business knows that the managers of the large corporations do their business with one eye constantly cast over their shoulders at the Antitrust Division."[15]

IV. THE 1960s

The "Populist School" of antitrust thinking dominated developments in antitrust law throughout the 1960s. The Warren Supreme Court interpreted the Celler-Kefauver Act as establishing a presumption of illegality for mergers in already concentrated industries between competitors with a combined market share as low as 30% and, in some cases, condemning mergers involving combined market shares that were well below 10%.[16] Challenges to mergers as well as joint ventures between firms that were only "potential" competitors of each other were also upheld.[17] Vertical mergers between manufacturers and downstream distributors were treated almost as harshly.[18] At the high tide of this run, dissenting Supreme Court Justice Potter Stewart complained that "[t]he

[14] *See* Dereck C. Bok, *Section Seven of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226 (1960).

[15] RICHARD HOFSTADLER, *What Happened to the Antitrust Movement,* in THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 192-93 (1965).

[16] United States v. Philadelphia National Bank, 374 U.S. 321, 364 (1963); United States v. Von's Grocery Co., 384 U.S. 270,(1966); United States v. Pabst Brewing Co., 384 U.S. 546, 272 (1966).

[17] United States v. Penn-Olin Chemical Co., 378 U.S. 158, 173 (1964); FTC v. Procter & Gamble Co., 386 U.S. 568, 581 (1967).

[18] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 323-334 (1962).

sole consistency" he could find in the Court's merger cases was that "the Government always wins."[19]

Vertical arrangements under which a manufacturer assigned exclusive territories or allocated customers among its distributors were condemned under Section 1 of the Sherman Act as illegal *per se*.[20] Vertical "tying" arrangements also became easy targets of attack under Section 1.[21] As already mentioned, a manufacturer's prescription of "minimum" resale prices that prevented resellers from reducing consumer prices below suggested levels had been deemed illegal *per se* since 1911 (except when allowed by the Miller-Tydings Act). The Warren Court extended that prohibition to manufacturer prescriptions of "maximum" resale prices, thereby ensuring resellers' freedom to *raise* consumer prices above suggested levels.[22] The Warren Court's rulings under Section 2 of the Sherman Act and under the Robinson-Patman Act exposed market leaders in many industries to antitrust liability under exceptionally vague notions of "exclusionary" conduct and of "predatory" pricing defined to encompass even prices above the market leader's costs but low enough to make life difficult for its smaller, less efficient rivals.[23]

Most of those cases came to the Supreme Court on appeals from dismissals of the antitrust claims at issue by lower court judges schooled in a more conservative environment and slow to embrace populist thinking. Their resistance to the directions in which the Supreme Court was pushing antitrust policy was supported by a cadre of prominent scholars, some of whom were openly hostile to the whole idea of an antitrust law regime.[24] While they were little more than a fringe element of the academic community during this period, we will shortly see how they came to dominate the antitrust landscape a generation later.

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19 United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966).

20 *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379 (1967).

21 *See* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 498-99 (1969).

22 *See* Albrecht v. Herald Co., 390 U.S. 145, 152-54 (1968).

23 *See* United States v. Grinnell Corp., 384 U.S. 563, 576 (1966); Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 697-98 (1967).

24 Among their ranks was a relatively young firebrand by the name of Alan Greenspan, the man later destined to lead the Federal Reserve and in that role to wield as much influence over the economy of the 1990s as J.P. Morgan wielded in the absence of a Federal Reserve in the 1910s. Before even the first of the Warren Court's expansive interpretations of antitrust law, he was calling for repeal of the Sherman Act in its entirety: "The Sherman Act may be understandable when viewed as a projection of the nineteenth century's fear and economic ignorance. But it is utter nonsense in the context of today's economic knowledge . . . . The entire structure of antitrust statutes in this country is a jumble of economic irrationality and ignorance. It is a product: (a) of a gross misinterpretation of history, and (b) of rather naive, and certainly unrealistic, economic theories." A. Greenspan, Paper delivered at the Antitrust Seminar of the National Association of Business Economists in 1961 and published by the Nathaniel Brandon Institute in 1962.

On the last day of the Johnson Administration in 1969, the Justice Department filed a massive Section 2 monopolization suit against IBM that the Nixon, Ford and Carter Administrations would then pour endless resources into litigating throughout the 1970s. It was in many respects the Antitrust Division's Vietnam War, and it became a lightning rod for growing opposition to populist-oriented antitrust policy.

V. THE 1970s

Aggressive antitrust enforcement activity, however, continued apace. With virtually all significant horizontal and vertical merger transactions blocked by controlling Warren Court precedents, corporate empire-building moved in the direction of "conglomerate" combinations of firms in seemingly unrelated businesses and industries. The Nixon Administration's Justice Department mounted a series of celebrated cases based on novel theories of how a conglomerate merger could threaten competition even without any increased concentration or vertical foreclosure within any specific affected market. The Federal Trade Commission in this same period developed the theory of unlawful "shared" monopoly and applied it in huge cases—under Section 5 of the FTC Act—against the leading firms in the petroleum and cereal industries. The Ford Administration filed a monopolization suit against AT&T that rivaled the IBM suit in scope and notoriety. The Carter Administration's Justice Department sought to extend the FTC's shared monopoly concept and mounted highly publicized investigations into dozens of industries in search of a Section 2 shared monopoly case.

The antitrust story of the 1970s includes a considerable amount of new legislation, mostly sponsored by the Ford Administration. Thus, Congress (a) sharply raised the penalties for criminal violations by, for example, raising the maximum prison sentence for convicted individuals from one to three years per violation; (b) repealed the 1937 Miller-Tydings Act, thereby again exposing manufacturers' resale price maintenance practices to full-scale attack regardless of state law; (c) authorized state attorney-generals to file federal antitrust suits for both treble damages and injunctive relief as "parens patriae" on behalf of all citizens within their states, and appropriated substantial sums of money to subsidize the building of antitrust enforcement staffs within every state across the country; and (d) created a new scheme of pre-merger notification and waiting-period requirements enabling the antitrust agencies to investigate every significant merger transaction *prior* to consummation. This last development, enacted as the Hart-Scott-Rodino Antitrust Improvements Act of 1976, effected a sea-change in merger enforcement activity, away from litigation seeking "divestiture" relief years after a merger had been completed and toward much more of a "regulatory" regime of advance review and negotiation over competitive concerns before a merger is allowed to proceed.

Serious attention during that same period was also given to two quite radical legislative proposals. One would have restructured the entire petroleum industry through massive divestitures that would completely eliminate vertical integration (from exploration through refining and marketing) and prohibit any future reintegration. The other would enact a "no-fault" standard for unlawful monopolization, enabling the enforcement agencies to seek dissolution of any firm found to possess monopoly power without regard to whether it obtained that power through predation or efficiency. These proposals received considerable support from some quarters of the business community as well as from the enforcement agencies and academia, albeit not enough to bring them to fruition.

But at the same time that Congress as well as both enforcement agencies were pushing into these new frontiers, the Burger Supreme Court with Nixon appointees was pushing its antitrust jurisprudence in an opposite direction—one at odds with the populist thrust of the 1960s Warren Court precedents. The Court importantly qualified past rulings on horizontal mergers by cautioning that findings of high market shares and concentration were only the beginning of a required deeper inquiry into whether a merger presented serious risk to future competition generally.[25] The Court also imposed high barriers to any merger challenge based on the theory that the merger would eliminate "potential" competition between the merging parties.[26] Thus, notwithstanding Justice Stewart's complaint of a half decade earlier, the 1970s found the Government consistently losing merger cases at the end of appeals processes.

In 1977, the Supreme Court expressly overruled its own decision of 1967 that declared all vertical territorial and customer restraints on resellers illegal *per se*, now holding that arrangements of this sort could be "efficient" and justified by a showing that their elimination of "intrabrand" competition was outweighed by their enhancement of "interbrand" competition.[27] That same year, the Court put brakes on the proliferation of private antitrust litigation by establishing new criteria for the "antitrust standing" of a would-be plaintiff and barring altogether "indirect" purchasers from any opportunity to sue for damages.[28] In 1979 the Court allowed a form of horizontal price-fixing to escape *per se* con-

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25 *See* United States v. General Dynamics Corp., 415 U.S. 486, 497-98 (1974).

26 *See* United States v. Marine Bancorporation, 418 U.S. 602, 641-42 (1974).

27 *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54 (1977).

28 *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. 429 U.S. 477, 489-90 (1977); Illinois Brick Co. v. Illinois, 431 U.S. 720, 746-47 (1977).

demnation by a showing that it was a necessary part of an otherwise lawful collaboration with significant efficiency-enhancing potential.[29]

In short, while the "Populist School" of antitrust thinking was in ascendancy at both the Supreme Court and the enforcement agencies throughout the 1960s, and remained very much alive at the agencies throughout the 1970s, something quite different was taking hold at the Supreme Court as the 1970s unfolded. That something was the rise in the influence of the avowedly anti-populist "Chicago School" of antitrust thinking. This school evolved from the work of an army of antitrust critics populating both the law schools and economics departments of prominent universities across the country. The University of Chicago was the center of this effort and thereby gave the movement its name.[30] By the mid-1970s, Robert Bork became its most prominent spokesman and he captured the essence of Chicago School philosophy in a broadly influential 1978 book entitled *The Antitrust Paradox: A Policy at War with Itself.* An understanding of the thrust of this philosophy is critical to an appreciation of what has happened to antitrust policy from the end of the 1970s to our day.

The core of this philosophy is that the sole legitimate objective of antitrust law should be maximization of "consumer welfare." Under this view, antitrust policy lost its way under the influence of populist concerns with "small business" welfare and negative attitudes toward both single-firm bigness and industrywide concentration generally. Chicago School advocates denied the legitimacy of any political or social policy purposes behind antitrust law; consumer welfare demanded an exclusive focus on "economic efficiency" throughout the economy. Professor Bork and his Chicago School brethren accepted the validity of tough rules against naked cartels that raised consumer prices without off-setting efficiency benefits. On the other hand, they opposed any and all antitrust strictures on "vertical" arrangements that impeded the freedom of manufacturers to distribute their products as they saw fit; opposed vague notions of "predatory" conduct that became tools for attacking efficient monopolies; and opposed any attack on mergers other than those that would leave a market with fewer than three rivals since all other mergers were likely to be more efficiency-enhancing than competition-threatening.

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29 *See* Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1, 19-20 (1979).

30 It may or may not be more than a coincidence that the University of Chicago owes its founding to the philanthropy of John D. Rockefeller, and he played an active role in selection of its faculty as well as curriculum in its early years. *See* CHERNOW, *supra* note 2, at 301-29, 492-97.

While Chicago School adherents trumpeted their support of "consumer welfare," they used that term in a counterintuitive manner to mean overall economy-wide efficiency rather than the protection of consumers as a class distinct from producers or a producer's shareholding owners. Under their view, a practice or transaction may well result in higher consumer prices as a result of reduced competition and thus some degree of monopoly power, but that was only the start of the analysis and not a sufficient basis to invoke antitrust condemnation. The higher prices would reduce demand for and thus output of the particular product involved, and that would result in what economists call reduced "consumer surplus" and "deadweight loss." On the other hand, the same practice or transaction may reduce producer costs and increase producer profits, and that would result in what economists call increased "producer surplus" that could then induce an "efficient" reallocation of productive resources into some other market. As long as the increase in producer surplus outweighed both the decrease in consumer surplus and the deadweight loss, the net result was increased overall economic output and thus increased "allocative" efficiency. On that ground, the practice or transaction should be lawful under the antitrust laws. The mere fact that there was a wealth redistribution from consumers to producers (or their shareholders) should be irrelevant to the antitrust equation.[31]

It is hard to imagine that anyone who attended and was half-awake during Professor Huff's American History classes would buy that line. The idea that antitrust is about "allocative efficiency" and has nothing to do with political, social or wealth redistribution concerns does not square with what we know to have been the historical roots of antitrust policy.[32] Nonetheless, as the 1970s came to a close, the country as a whole was more into economics than history. Inflation and unemployment were at record highs, productivity was going nowhere, and the whole economy was in bad shape. People were attracted to Ronald Reagan's call to "get the government off the backs of business," and that call included ideas about a sharply reduced role for antitrust enforcement. The Chicago

[31] *See* Oliver Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoff*, 58 AM. ECON. REV. 18 (1968).

[32] *See* Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979) ("It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws. By 'political values,' I mean, first, a fear that excessive concentration of economic power will breed antidemocratic political pressures, and second, a desire to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all. A third and overriding political concern is that if the free-market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs.").

School provided the overall theory as well as specific prescriptions for this reorientation.

VI. THE 1980s

The Reagan Administration installed true believers in Chicago School thinking at both enforcement agencies and also appointed Chicago School scholars to the Supreme Court and the lower federal courts. The result was a major shift of antitrust policy in several respects, albeit not in an entirely one-sided direction. Reagan appointed William Baxter as his first Chief of the Antitrust Division, and his first priority was an in-depth reexamination of the two long running monopolization cases that he inherited from his predecessors. He announced his decision on how to dispose of both cases on the same day in 1982: (a) the IBM challenge was to be abandoned altogether as completely without merit; and (b) the AT&T case was to be settled with the largest breakup in antitrust history. The separation of the Ma-Bell empire into seven independent local exchange carriers and a "new" AT&T focused on long-distance telephone service and equipment manufacturing came to be seen as an act of courage that Baxter's successors heartily applauded even while sharply criticizing his policy directions in other respects.[33]

Also in 1982, the Baxter regime promulgated new "Merger Guidelines" that transformed merger policy into an exclusively "economic analysis" discipline. At the same time, however, his approach to merger economics fell short of that urged by Chicago School purists. The new Guidelines declared the fundamental purpose of merger policy to be the prevention of any merger that created, increased or facilitated the exercise of "market power," defined as either the unilateral or collective ability to raise prices above "competitive" levels. In short, if a merger threatened to result in higher prices to the consumer, it was presumed to be illegal—subject to fairly narrow exceptions. On the other hand, under these new Guidelines, lots of mergers between leading competitors that seriously increased market concentration would escape challenge if remaining competition or low barriers to new entry could be expected to discipline pricing and prevent a price increase. In practice, this new paradigm resulted in an exceptionally permissive merger policy throughout the 1980s: a great many major mergers were found safe from any risk of creating, increasing or facilitating the exercise of market power despite

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33 *See* Louis Galambos, *When Antitrust Helped, and Why it Doesn't Now*, THE WASHINGTON POST, June 13, 1999, at B-5 ("Everyone involved knew from the start that this was a historic occasion, maybe even a defining moment in U.S. political economy. A Republican administration - Reagan's - was breaking up a monopoly, in this case the largest private corporation in the world. Ma Bell was such a fixture in American life that her passing at first elicited a shock, and then a flood of sentimentality.").

their size and market share dimensions, often because the agency was quick to accept arguments about low entry barriers and thus ease of entry into the markets in question. Enforcement activity against vertical or any other non-horizontal mergers was non-existent in this period.

Baxter had been a long-time critic of all antitrust strictures upon vertical restraints, including the law against resale price maintenance. His predecessor in the Carter Administration had gone so far as to file a criminal prosecution against one manufacturer's resale price maintenance policy.[34] Moving to the opposite extreme, he entered a private treble-damage case before the Supreme Court to urge abandonment of the *per se* rule against this practice. In the aftermath of the Court's reaffirmation of that *per se* rule in that case,[35] the Reagan Administration (under Baxter's successor) promulgated a set of "Vertical Restraint Guidelines" with the purpose and effect of virtually foreclosing any federal enforcement activity against vertical restraints of any kind, including resale price maintenance restraints.

By this time, however, a counter-revolution was well underway at the state enforcement level. The seed money for state antitrust enforcement provided by the Ford Administration in the mid-1970s had borne fruit and antitrust staffs of state attorneys-general organized into a formidable new army of populist warriors under the umbrella of the National Association of Attorneys-General—known as "NAAG". In direct defiance of the new bent at the federal level, the state antitrusters promulgated their own aggressive NAAG Merger Guidelines and NAAG Vertical Restraint Guidelines. They began challenging mergers approved by the federal agencies and mounting nationwide parens patraie suits against manufacturers engaged in various forms of vertical price maintenance. The Reagan Administration was mortified by this new strain of activist federalism and this rebirth of "states rights."[36]

Just as the Populists in the 1970s lobbied Congress to expand the scope of antitrust law, the Reaganites in the 1980s mounted legislative initiatives of their own but in the opposite direction. The Administration sponsored but failed to elicit much Congressional interest in amendments to the Clayton Act that would have created an "efficiencies" defense to

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34 *See* United States v. Cuisinarts, Inc., 1981-1 Trade Cas. (CCH) ¶63,979 (D. Conn. 1981).

35 *See* Monsanto Co. v. Spray-Rite Services Corp., 465 U.S. 752, 763 (1984).

36 *See* Albert A. Foer, The Federal Antitrust Commitment: Providing Resources to Meet the Challenge at 9 n.12 (1999) (unpublished manuscript, on file with the *Cornell Journal of Law and Public Policy*) (arguing that far from being new to this period, state antitrust enforcement activity had roots deeper than federal antitrust enforcement activity) ("At least 26 states had adopted constitutional or statutory antimonopoly statutes prior to the Sherman Act. In the 1970s over 20 states enacted new antitrust statutes and many state antitrust enforcement offices were created or expanded.").

an otherwise unlawful merger and would have required more consideration of foreign competition and "international competitiveness" concerns in the evaluation of a merger's legality. On the other hand, the Administration sponsored and won Congressional approval of legislation reducing antitrust exposure for competitor collaborations aimed at promoting export trade and for R&D joint ventures. Finally, Congress on its own initiative slapped Mr. Baxter's wrists by prohibiting any use of appropriated funds for the Antitrust Division to advocate reform of the existing *per se* prohibition on resale price maintenance.

The federal agencies during those Reagan years devoted considerable resources to the pursuit of naked cartels. Their targets, however, tended to be rather small-scale: the Antitrust Division concentrated upon conspiracies among local cement producers, milk distributors and wholesale bakeries; the FTC concentrated upon competition-restraining codes of conduct promulgated by associations of small businesses and professionals. Perhaps it would have been more rational for state antitrusters to pursue those cases, but state antitrusters were too busy attacking mergers and practices of nationwide scope that the Feds chose to ignore. (It was particularly ironic that the FTC in these years devoted so much of its resources to a reign of terror upon association restraints. Wilson and Brandeis envisioned this agency as one that would encourage association activities among small businesses struggling to survive against industrial titans at their throats.)

Meantime, at the Supreme Court, antitrust law development was a mixed bag from the standpoint of the Chicago School. On the one hand, the Court markedly toughened evidentiary requirements for inferring concerted action among independent firms, thereby making it tougher for either government enforcers or private plaintiffs to win suits alleging either horizontal collusion or vertical restraints of trade under Section 1 of the Sherman Act.[37] On the other hand, as already mentioned, the Court reaffirmed the *per se* rule against resale price maintenance and also reaffirmed the *per se* rule against vertical "tying" arrangements (albeit with a sharpened requirement for proof of market power before *per se* illegality would apply).[38] The Chicago School was particularly critical of a 1985 ruling[39] in which the Supreme Court upheld a jury finding of unlawful maintenance of monopoly power based on a dominant company's refusal to assist and cooperate with its smaller rival, a ruling that reenergized monopolization suits by the private plaintiffs' bar under Sec-

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37 Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 582-83 (1986); Business Electronics Corp. v. Sharp Electronics Corp. 485 U.S. 717, 724 (1988).

38 Monsanto Co. v. Spray-Rite Services Corp., 465 U.S. 752, 760 (1984); Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 12-13(1984).

39 Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 610-11 (1985).

tion 2 of the Sherman Act. A 1986 ruling sharply curtailed competitors' standing to challenge mergers between their direct rivals;[40] on the other hand, a 1990 ruling squarely upheld state attorney-general standing to obtain divestiture relief against a consummated merger that one of the federal agencies previously approved.[41] Two rulings during the 1980s condemned nontraditional horizontal arrangements that, while not entirely "naked" restraints like price-fixing or market division, were held to be sufficiently anticompetitive on their face to be illegal under a sharply abbreviated version of the rule of reason.[42] These latter rulings provided ammunition for much of the FTC's program of attacking trade association restraints of all kinds during this same period.

As the 1980s came to a close, thoughtful observers from many quarters of the political landscape came to believe that antitrust permissiveness and indeed the more general "deregulation" of big business had gone too far. The nation suffered through a stock market crash, the S&L debacle and other disasters with their roots in anything-goes cowboy capitalism. By the time of George Bush's inauguration, there was a consensus even among most segments of the Republican Party that the country again needed serious antitrust cops on the beat. President Bush appointed enforcers who were believers in mainstream antitrust policy—neither excessively intrusive Populists as in the 1960s nor excessively permissive Chicagoists as in the 1980s. James Rill, the new Chief of the Antitrust Division, and Janet Steiger, the new Chair of the FTC, began a revival of federal antitrust enforcement policy that won a broad degree of bipartisan support.

VII. THE 1990s

One of Rill's and Steiger's first priorities was to end the war between federal and state antitrust enforcers and to sponsor a "new federalism" of cooperative activity. As the Feds became more enforcement-minded and the State AGs became less populist in their orientation, they found common ground and moved in the direction of joint Federal-State enforcement investigations. One major focus of this cooperation was merger policy, an area where conflicting standards were particularly anathema to the business community. The Bush agencies promulgated revised Merger Guidelines that retained the essence of the Baxter Guidelines with their focus on "market power" analysis but that markedly toughened the requirements for an "ease of entry" defense to a horizontal merger between major rivals in a concentrated industry. The State AGs

40 Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 117 (1986).

41 California v. American Stores Co., 495 U.S. 271 (1990).

42 NCAA v. Board of Regents, 468 U.S. 85 (1984); FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986).

revised State Merger Guidelines to bring them closer to federal standards. Merger enforcement increased at both levels, and there were no more mergers approved by the federal authorities that were then challenged by state authorities.

Another top priority of the Bush agencies was to "internationalize" antitrust enforcement. There were several dimensions to this initiative. First, international trade was expanding at a rapid pace and our domestic markets were being transformed into global markets. In this environment, collusive and other anticompetitive conduct among European and Asian firms—undertaken within their own countries but affecting how they did business within the United States—was seen as detrimental to the interests of U.S. consumers, and these firms became major targets of Bush antitrust enforcement activity. Second, European and Asian firms were also seen as engaging in actions aimed at protecting their own markets from U.S. exports to the detriment of the U.S. business community. The Bush Administration asserted the right to employ the U.S. antitrust laws against foreign conduct undercutting the ability of U.S. businesses to compete abroad even in the absence of any impact on U.S. consumers. This new focus on both foreign conduct that restrained imports and thus adversely affected U.S. consumers and foreign conduct that adversely restrained exports and thus adversely affect U.S. businesses pushed the frontiers of the "extraterritorial" application of U.S. antitrust law. Some of our largest trading partners abroad saw this as improper conflation of antitrust and trade policy or a new form of "antitrust imperialism," but it was applauded by many voices within the U.S. business community.

A third major dimension of this "foreign policy" was international antitrust enforcement cooperation along with aggressive assistance in the growth of foreign antitrust enforcement regimes. Of course, our promotion of antitrust policy abroad was not an entirely new idea. Fifty years earlier, we recognized that unrestrained concentrations of industrial power had fueled the forces of totalitarianism on two continents. In the immediate aftermath of World War II, in our role as overseer of the defeated Axis powers, we insisted that both Germany and Japan enact antitrust laws as among the core infrastructures of new free, democratic societies. Similar thinking inspired the Bush Administration, in the immediate aftermath of the collapse of the Soviet Union and Communist regimes throughout Eastern and Central Europe at the beginning of the 1990s, to promote the adoption of antitrust laws in all of the newly emerging states in that region. A steady stream of both lawyers and economists from the Bush agencies journeyed to those emerging states to assist in drafting antitrust legislation and training the people within those countries who would be responsible for enforcement activity. Russian, Polish, Czech, Hungarian and other new European antitrusters traveled to the United States to see first-hand U.S. antitrust enforcement in action.

Antitrust policy had been a significant feature of the European Economic Community since its creation in the 1950s, and its antitrust enforcement apparatus had developed by the early 1990s to a point where it had become a matter of importance to U.S. companies doing business in Europe. The Bush Administration's antitrust agencies found themselves increasingly concerned with international mergers and collusive arrangements that were also of concern to the E.C.'s competition authority. In 1991 the Antitrust Division, the FTC and the E.C.'s competition authority jointly announced their execution of a U.S.-E.C. Antitrust Enforcement Cooperation Agreement, inaugurating a liaison that became a significant feature of antitrust enforcement activity on both continents over the course of this decade.

While the Bush appointees did reinvigorate antitrust enforcement,[43] they did not stray far from the Chicago School orientation of the Reagan years. By the time of President Clinton's first inauguration in 1993, however, the Chicago School was losing its lustre and becoming upstaged in Washington salons by what came to be called the "post-Chicago School." This post-Chicago economics crowd accepted the Chicago School's "consumer welfare" standard but redefined it to mean preservation of competition for the unambiguous benefit of consumers rather than unfettered freedom of producers to undertake whatever might be rationalized in the name of maximizing allocative efficiency. They brought insights from business management and "game theory" scholars about certain kinds of "strategic" conduct that could enable dominant firms in concentrated industries to raise entry barriers and raise rivals' costs in ways that this school considered appropriate targets of antitrust enforcement.[44] Among the adherents of post-Chicago thinking of this sort were Clinton's appointees to the enforcement agencies and courts.

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43 Many members of the academic community were shocked to find the Bush Administration extending antitrust enforcement into academia itself by challenging "collusion" among universities in the allocation of student financial aid. *See* United States v. Brown Univ., 5 F.3d 658 (3d Cir. 1993). If it is any solace, many members of the legal profession were shocked to discover in the mid-1970s that the antitrust laws apply to their profession and thereby prohibit collectively devised minimum fee schedules, *see* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); and law school professors were shocked to discover four years ago that the antitrust laws prohibit their collective determination of minimum faculty salaries, *see* United States v. American Bar Association, 934 F. Supp. 435 (D.D.C. 1996).

44 *See* Lawrence A. Sullivan, *Post-Chicago Economics: Economists, Lawyers, Judges and Enforcement Officials in a Less Determinate Theoretical World*, 63 Antitrust L.J. 669 (1995): "Post-Chicago antitrust economics is a world of the imagination, an intellectual neighborhood where a number of economists, lawyers, judges, and enforcement officials are to be found these days. It is a neighborhood in transition, not a well-planned, fully wrought new town. It defines itself largely by the ways it differs from the antitrust thinking associated with . . . Chicago theory. . . The difference between Chicago and post-Chicago thinking about

Thus, Anne Bingaman, Clinton's first Chief of the Antitrust Division, began her reign by announcing the rescission of the Reagan regime's excessively permissive Vertical Restraint Guidelines and her determination to reinstate serious enforcement against anticompetitive vertical arrangements generally and resale price maintenance practices in particular. She took on Microsoft in the first new government monopolization challenge since the 1970s. Her successor, Joel Klein, brought a more far-reaching monopolization case against the same target, the Microsoft case discussed later in this paper. The Antitrust Division under both Bingaman and Klein sharply increased criminal enforcement against price-fixing conspiracies of international scope, extracting huge fines from their corporate targets and serious prison sentences for responsible individuals.[45] Merger enforcement activity escalated as well, with vertical as well as horizontal mergers becoming targets again for the first time since the 1970s.

Clinton's appointment as the new Chairman of the FTC was Robert Pitofsky, a widely respected antitrust scholar who had been a sharp critic of the Chicago School and of lax enforcement policy throughout the 1980s. His first priority was a broad-ranging reassessment of antitrust policy in light of how both globalization trends and high-technology developments were transforming the nature of competition throughout our markets. Following three months of public hearings that obtained input from all quarters of the antitrust community as well as from many prominent business executives, the agency published an in-depth report on "Anticipating the 21st Century: Competition Policy in the New High-

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competition and monopoly is related to the difference often noted between neoclassical and industrial organization (IO) economics. Both recognize the efficiency of competition and the allocative costs of monopoly. Chicago analysts . . . tend both to start and stop with deductive analysis based on a sequence of truisms expressed through highly abstracted models of reality. Post-Chicago antitrust starts from essentially the same position but, in the IO tradition, digs into empirical material in an effort to fathom the significance of observed distinctions between classic models and the configuration of the particular market under examination." *See* also Joseph F. Brodley, *Post-Chicago Economics and Workable Legal Policy*, 63 Antitrust L.J. 683 (1995).

45 One of Ms. Bingaman's first acts as Antitrust Chief was promulgation of a sharply expanded "amnesty" program for companies self-reporting their participation in price-fixing conspiracies and other criminal violations of the antitrust laws before the Division uncovers the conduct on its own. The program is credited with having brought a twenty-fold increase in the number of informers showing up at the Antitrust Division and having become a "most effective generator of large cases" over the course of the past six years. Gary R. Spratling, "Making Companies an Offer They Shouldn't Refuse," Presentation to D.C. Bar Symposium on Associations and Antitrust, Feb. 16, 1999; Gary R. Spratling, "Negotiating the Waters of International Cartel Prosecutions," Presentation to National Institute on White Collar Crime, March 4, 1999. *See also* Janet Novack, FORBES, May 4, 1998, at 46: "If someone in your company has been conspiring with competitors to fix prices, here's some sound advice. Get to the Justice Department before your co-conspirators do. Confess and the U.S. Department of Justice will let you off the hook. But hurry! Only one conspirator per cartel."

Tech, Global Marketplace." It was a masterful brief in support of the continued and indeed heightened importance of antitrust policy to our new economy. It also identified new issues confronting antitrust policy in this new environment, issues at the heart of much of the enforcement activity at both the FTC and the Antitrust Division over the course of the past few years.

One such issue has been how to deal with the rapid pace of innovation and its critical role in global high-technology and information markets. Whereas, in the past, the main focus of antitrust attention was "price" competition and preventing either conduct or mergers that could result in higher prices, the far more important focus today is innovation competition and preventing either conduct or mergers that could result in less innovation. The Clinton antitrusters have been sensitive to the fact that in many parts of the high-technology sector collaborations or mergers between major competitors may well enhance innovation prospects. The challenge has been to distinguish between those more likely to enhance competition and those more likely to retard competition in this innovation dimension. The Clinton agencies have repeatedly confronted mergers between rivals in pharmaceutical, computer, defense and other high-technology sectors that are seen as threatening to reduce innovation in some areas while at the same time creating the potential to accelerate innovation in other areas. Rather than seeking either to stop or allow these kinds of mergers altogether, the agencies have fashioned "surgical" remedies that condition clearance upon such arrangements as technology licensing to third parties and that thereby preserve the potential for innovation enhancement in some respects while eliminating the risk of adverse innovation effects in other respects.[46]

Another closely related issue has been how to deal with the growing centrality of intellectual as opposed to physical property as assets that determine which firms thrive and which firms struggle or fail to survive in the new markets that dominate the economy. For Standard Oil a hundred years ago, the key to dominance was control of petroleum transportation, refining and distribution facilities. For Microsoft today, the key to dominance is control over the source code to its operating system and application programming interfaces to it. Again, the Clinton antitrusters have been sensitive to the concern that enforcement activity should not dilute incentives to invest in high-risk and hugely expensive intellectual property development efforts to the disadvantage of society as a whole.

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[46] *See generally* C. Robinson, "Leap-Frog and Other Forms of Innovation: Protecting the Future for High-Tech and Emerging Industries Through Merger Enforcement," Address Before the American Bar Association, June 10, 1999; Richard J. Gilbert and Steven C. Sunshine, *Incorporating Dynamic Efficiency Concerns in Merger Analysis: The Use of Innovation Markets*, 65 Antitrust L.J. 569 (1995).

At the same time, they recognize the reality that intellectual property control over new core technologies can result in enduring monopoly power over multiple complementary or adjacent markets. The challenge has been to distinguish between legitimate enjoyment of the fruits of investment in intellectual property development and predatory abuses of intellectual property control to foreclose access and entry opportunities of would-be rivals.[47]

The rapidly changing health care sector has been a major antitrust battleground throughout the Clinton years. The increasing clout of managed care enterprises and the cost-containment pressures they bring have caused physicians, hospitals and other health care providers throughout the country to respond in many ways that have run afoul of the antitrust laws. Physicians in particular have combined forces to protect their interests (and purportedly the interests of their patients) against what they see as abusive controls by health care payors; the antitrust authorities have seen these efforts as naked cartels to maintain fees. The Clintonites have been sensitive to the need to clarify and adjust the application of antitrust strictures to unique aspects of health care markets and thereby facilitate the evolution of more efficient means of providing health care services. At the same time, however, they have drawn the line against provider practices that restrain competition without off-setting efficiency justifications.[48]

Not satisfied with where those lines have been drawn, the American Medical Association has now turned to Congress for an antitrust exemption that would allow physicians and other health care providers to engage in "collective bargaining" with health care payors. As of this writing, there appears to be growing support for this initiative, particularly throughout the House of Representatives. Both Mr. Pitofsky and Mr. Klein have testified in opposition; they have forcefully defended their agencies' actions in this area and eloquently presented the case for continued antitrust oversight of the health care sector generally in the years ahead.[49]

While the Clinton antitrusters have been hard at work refining and updating antitrust policy for its third century, the Supreme Court has continued to march to its own unique drummer in its evolution of antitrust jurisprudence. Over the course of the 1990s, it (a) opened the floodgates to a whole new world of antitrust litigation against efforts by high-tech-

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47 *See* T. Cotter, *Intellectual Property and the Essential Facilities Doctrine*, The Antitrust Bulletin 211 (Spring 1999); DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995).

48 *See* DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE (1996).

49 *Quality Health Care Coalition Act of 1999: Hearings on H.R. 1304 Before the House Committee on the Judiciary*, June 22, 1999.

nology equipment manufacturers to suppress competition for after-sale service of their equipment by small independent service providers;[50] (b) endorsed an exceptionally expansive application of the extraterritorial jurisdiction of the antitrust laws over foreign conduct aimed at restraining U.S. commerce;[51] (c) confirmed that *per se* illegality remains the rule applicable to efforts among professionals to increase fees for their services and market divisions among otherwise competing service providers;[52] and (d) narrowed the exemption from antitrust liability for anticompetitive conduct approved by state governments.[53]

On the other hand, the Supreme Court also in this same period (a) sharply constricted the circumstances in which dominant firms can be found liable for unlawful "predatory pricing" against smaller rivals;[54] (b) tightened the requirements for any kind of "attempted" monopolization claim;[55] (c) repudiated its own 30-year-old precedent against manufacturers' efforts to impose "maximum" resale prices on their resellers, holding such practices to be entitled to more permissive rule of reason treatment;[56] (d) narrowed the circumstances in which vertical refusals to deal could be successfully challenged as antitrust offenses;[57] and (e) narrowed the circumstances in which horizontal restraints of various kinds could be condemned without detailed market analysis.[58]

These rulings reflect divergent inclinations among the current members of the Supreme Court, some of whom remain die-hard adherents of the Chicago School and others of whom are more receptive to insights offered by the post-Chicago School. The Court as a whole, however, remains supportive of the fundamental premises that have driven antitrust policy for 110 years.

VIII. THE FUTURE

At this dawn of the 21st Century, antitrust policy has once again captured the attention of the general public as a result of numerous high-visibility enforcement actions[59] but none more dramatically than the Jus-

50 Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451 (1992).

51 Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

52 FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990); Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990).

53 FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992).

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

55 Spectrum Sports v. McQuillan, 506 U.S. 447 (1993).

56 State Oil Co. v. Khan, 522 U.S. 3 (1997).

57 NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998).

58 California Dental Ass'n v. FTC, 526 U.S. 756 (1999).

59 Beyond the already mentioned $500 million fine extracted in its vitamin cartel case and its pending Microsoft monopolization case, the Justice Department has in the last few years won a considerable amount of national news coverage for its wide-ranging conspiracy prosecution of Archer-Daniels-Midland and other competitors in the food additives industry,

tice Department's monopolization suit against Microsoft Corporation. The public is divided between Microsoft defenders aghast at the notion that the antitrust laws would attack the most successful and innovative enterprise of our day[60] and Microsoft detractors aghast at the prospect of one firm's control over all of the ramps to the information superhighway and over the whole emerging electronic commerce world. Close observers appreciate the fact that the case does not challenge the manner in which Microsoft initially acquired its monopoly power over PC operating systems; rather, it is about Microsoft's maintenance of that power through exclusionary practices aimed at impeding the growth of rival software platforms and Microsoft's extensions of that power into dominance over a host of related markets and technologies. Even among those who believe Microsoft's conduct crossed the line from aggressive competition to unlawful predation, there is spirited debate over the most appropriate antitrust remedy: a mere injunction against the continuation of anticompetitive acts or a breakup of the company into several pieces.[61]

There is fundamentally nothing new about these issues. Ninety-five years ago, part of the public was aghast at the notion that the antitrust laws would attack the most successful and innovative enterprise of that day—The Standard Oil Company, the firm responsible for developing the world-changing petroleum industry and bringing the bright light of kerosene into homes throughout the nation and the world. A larger part of the public feared the raw power of this Leviathan and cheered the Government on. John D. Rockefeller was simultaneously attacked as a predator who killed off rivals by selling kerosene at too low a price and

its war against the Lockheed-Martin/Northrop-Grumman defense industry merger, its now-pending restraint-of-trade case against both VISA and Mastercard credit card systems, and its now-pending predatory pricing case against American Airlines, among many other enforcement actions. The FTC over this same recent period has garnered considerable national media coverage of its precedent-setting prosecutions of Toys-R-Us for strong-arming toy manufacturers into keeping popular toys out of discount outlets and of Mylan Labs for cornering the supply of a key ingredient in several generic drugs and thereby enabling as much as a 3,200 percent increase in the price of its products; its wars against Staples' attempt to acquire Office Depot and proposed mergers among the four largest national drug wholesalers; and its recently settled monopolization case against Intel Corporation, among many other enforcement actions. Of course, both agencies also garnered considerable publicity and controversy over decisions not to challenge some of the largest corporate consolidations of our day, e.g., the Justice Department's clearance of the Bell Atlantic-NYNEX merger and the FTC's clearance of the Boeing-McDonnell Douglas merger.

60 Recall Judge Hand's admonition that "the successful competitor, having been urged to compete, must not be turned upon when he wins." United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945).

61 Scott McNealy, CEO of Sun Microsystems and a strong supporter of the Government's case, told Congress that the remedy should include prohibiting Microsoft from acquiring any other technology companies: "Allowing Microsoft to acquire smaller technology companies is akin to Standard Oil buying up all the gas stations in the U.S." THE WASHINGTON POST, June 17, 1999, at E-9.

as a robber who fleeced consumers by selling kerosene at too high a price. Bill Gates surely sees himself as victimized by similarly contradictory charges—predation because his internet browser has been bundled into the operating system without added charge and robbery because his operating system is overpriced. In the Supreme Court 89 years ago, the critical remedial issue was whether an injunction against bad practices would be sufficient or a breakup into several firms was the only way to bring competition to the petroleum industry. The Supreme Court reached the latter conclusion.[62]

Of course, these comparisons can be attacked as superficial and even disingenuous, ignoring vast differences between the state of the world 90 years ago and the state of the world today. Modern debunkers of antitrust policy emphasize that we now live in a world driven by vast, interconnected "network" industries with intense and healthy rivalry to capture "first-mover" advantages in what are inherently "winner-take-all" markets. In this view, antitrust law should not intrude into contests for dominance over any given market "space"; today's leader can be quickly displaced by tomorrow's young upstart. The Microsoft case highlights this argument as Microsoft denies it possesses any degree of "lasting" monopoly power and claims its position in operating systems is now threatened by emerging competition from a host of directions including from hand-held devices and web-based applications. One close observer framed the central question as follows: "Do the antitrust laws have a place in the digital economy, or are they obsolete, destined to join Soviet-style central planning on the proverbial 'ash heap of history'?"[63]

There are rumblings among some Republican leaders in Congress that would suggest a negative answer to the first part of that question.[64] On the other hand, among prominent members of the antitrust community quick to respond with a resounding "yes" to the first and "no" to the

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62 The two largest parts of the Standard Oil empire—Standard Oil Co. of New Jersey and Standard Oil Co. of New York—thereafter became Exxon Corporation and Mobil Corporation. The FTC recently allowed Exxon and Mobil to reunite, albeit subject to a consent order requiring diventiture of overlapping operations. *See* Exxon Corp., 5 Trade Reg. Rep. (CCH) 24, 677 (FTC Nov. 30, 1999).

63 Eisenach, Forward to Eisenach & Lenard, COMPETITION, INNOVATION AND THE MICROSOST MONOPOLY: ANTITRUST IN THE DIGITAL MARKETPLACE (1999).

64 See June 23, 1999, "E-Contract" promulgation by House Majority Leader Dick Armey on behalf of self-described "High-Tech Leaders of Congress" (emphasis in original): "The regulatory and legal framework of yesterday will not fit the economy of tomorrow. . . . Excessive government intervention threatens future growth and prosperity for this nation. . . . We should be careful about allowing anti-trust law to become an excuse for bureaucratic interference with innovation and competition. When federal agencies use heavy-handed tactics to target specific companies, the real message they send to the marketplace is this: *You could be next*." As we have seen, the pace of innovation is so quick that today's market giant often fades into the background in a matter of months."

second part of that question has been none other than Chicago School Champion Robert Bork who in his role as consultant to a coalition of Microsoft antagonists has been a forceful supporter of the Government's Microsoft case. Others responding in like manner are (a) David Boies, distinguished defense counsel for IBM against the Government's monopolization charges throughout the 1970s but more recently lead counsel *for* the Government in the Microsoft suit; and (b) Franklin Fisher, distinguished economist and star expert witness in IBM's defense 25 years ago more recently now star expert witness *for* the Government in the Microsoft suit.[65]

Another strong supporter of the prosecution is Senator Orin Hatch, among the most conservative Republicans in the Senate and in many respects a modern-day version of Senator John Sherman. As Senator Hatch has noted, "Microsoft has made no secret of the fact that it has made dominating the Internet space a corporate priority." In his view, if the Internet is controlled by one company and the Internet becomes a critical underlying medium for commerce and the dissemination of news and information, "we will be hearing calls from all corners for the heavy hand of government regulation—for a new 'Internet Commerce Commission.'" In short, he admonished, "vigilant and effective antitrust enforcement today is far preferable to the heavy hand of government regulation of the Internet tomorrow."[66]

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65 Mr. Fisher provided one of the most dramatic moments during the Microsoft trial last year. Microsoft's counsel, on cross-examination, challenged Fisher to explain what is harmful about Microsoft's decision to "give away" Internet Explorer without any charge. Fisher responded that, while a "free" browser may be easy to accept, ""This case is not about being easy. If Henry Ford had a monopoly, we'd all be driving black cars." Voice slowly rising, he continued that "that's not what competition is about. That's not what helping consumers is about. If Microsoft forced upon the world one browser, that would be really simple." Mr. Lacovara (counsel for Microsoft) said "Now you seem agitated." "I am agitated," Fisher shot back. "I feel strongly on this point. We're going to live in a Microsoft world. It may be a nice world, but not a competitive world."" Steve Lohr, N.Y. TIMES, January 8, 1999, at C-1.

66 O. Hatch, "Antitrust in the Digital Age," Chapter 2 at 26 in Eisenach & Lenard, COMPETITION, INNOVATION AND THE MICROSOFT MONOPOLY: ANTITRUST IN THE DIGITAL MARKETPLACE. Robert Pitofsky expressed this same point in a broader context 20 years ago in his essay on the political content of antitrust policy generally: an "overriding political concern is that if the free-market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs." Robert Pitofsky, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051 (1979). *See also id. at* 1057-58: "If a few companies were to grow to dominate most of the major product markets in the United States, it is inconceivable that those companies would be left free of political accountability. . . . Eventually such companies surely would come under direct governmental control. An antitrust system that occasionally disregards claims of efficiency, as in the imposition of per se rules against certain kinds of horizontal cartels or unwillingness to take dubious evidence of efficiencies into account in judging the legality of mergers, reflects these political concerns."

Beyond pros and cons of the Microsoft case itself, FTC Chairman Robert Pitofsky and a prominent staff colleague have eloquently elaborated upon what they see as the need for "heightened antitrust scrutiny" of today's leading high-technology industries "to be certain that economic growth is not compromised by the abuse of private market power." They note that historically "the process of industry-building, from railroads and oil to communications and computers, draws the attention of those charged with protecting competition"; that "the antitrust laws apply as equally to high-tech as other industries, but high-tech industries impose some special challenges" for enforcers due to a number of characteristics that make competition different from that observed in traditional smokestack industries; in some respects, however, the differences call for more rather than less antitrust intervention because they can make "market power more durable."[67]

Antitrust Division Chief Joel Klein has also forcefully joined this debate. As he observed in remarks to a bar association two years ago, "the issues raised by antitrust enforcement in high-tech industries are not nearly so new as some may think. Ironically, perhaps the most novel of the phenomena that tend to characterize the software industry in particular—*i.e.*, the strong presence of network effects—would appear to warrant increased antitrust concern over certain kinds of monopolistic practices, because network effects can make it especially difficult for a new entrant to penetrate the market."[68]

In a speech to the National Consumers League last May, Mr. Klein urged consumer advocates to focus more energy on antitrust issues in the years ahead. As he explained on that occasion, electronic commerce and information technology will raise "enormous issues" for consumers and antitrust enforcement will be vital as the information economy replaces smokestack industries. "The opportunity for abuse of . . . new technology is great," he warned, and for this reason antitrust policy "is going to be critical to consumers in the 21st Century." He lamented that most people do not understand that "everything we do in antitrust—whether we get it right or wrong—is consumer driven"; that "our interest is to protect what the economists call consumer welfare."[69]

67 David Balto and Robert Pitofsky, *Antitrust and High Tech Industries: The New Challenge*, XLII Antitrust Bulletin 583, 583-585 (1998). *See also* Robert Pitofsky, Antitrust Analysis in High-Tech Industries: A 19th Century Discipline Addresses 21st Century Problems, Remarks at the ABA Antitrust Section Workshop on High-Tech Industries (Feb. 25, 1999) (Scottsdale, Arizona).

68 Joel Klein, The Importance of Antitrust Enforcement in the New Economy, Address at the New York State Bar Association (Jan. 29, 1998).

69 *Klein Spurs Consumer Action to Address Challenges of Information Age, Globalization*, Antitrust & Trade Reg. Report (BNA) 559 (May 20, 1999).

Importantly, however, Klein at that point in his remarks defined "consumer welfare" in a manner quite different from that sponsored by Robert Bork and his crowd 25 years earlier: "the more people chasing after the consumer, to serve him or her better, to get lower prices, to get new innovations, to create new opportunities—the more of that juice that goes through the system, the better." Finally, he offered his own summary of the past 40 years of antitrust history: in the 1960s government "challenged everything," even combinations that would have created new industry synergies and consumer benefits; in the 1980s, the government allowed too much consolidation to occur; but the antitrust "pendulum" on his watch had swung back to the "middle" where "big is not necessarily bad" but government prudently cracks down on anti-consumer deals and practices.[70]

CONCLUSION

Thirty-six years ago, Richard Hofstadter published a provocative essay entitled "What Happened to the Antitrust Movement?"[71] There he described the antitrust movement as "one of the faded passions of American reform"; observed that antitrust had "become almost exclusively the concern of small groups of legal and economic specialists who carry on their work without widespread public interest or support"; bemoaned that antitrust was no longer an "ideology" and had aged into a bureaucratized program; and concluded that this evolution illustrated how antitrust policy, "after two generations of noisy but seemingly futile agitation, [had] been quietly and effectively institutionalized."[72] I suspect Hofstadter would revise his thesis in some respects were he here to revisit it today. While passions may have faded by the time of his essay, they came back to life a decade later as the Chicago School revolution began and they then intensified throughout the 1980s. Passions are evident in today's debate over the Microsoft case and more generally over the role of antitrust policy in the new economy.

While antitrust, moreover, certainly remains an "institutionalized" enforcement program,[73] it is seriously underfunded and understaffed.

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70 *See id.*

71 Richard Hofstadter, *What Happened to the American Antitrust Movement, in* THE BUSINESS ESTABLISHMENT (Cheit, 1964), *reprinted in* RICHARD HOFSTADTER, THE PARANOID STYLE IN AMERICAN POLITICS 188 (1965) (in revised form).

72 RICHARD HOFSTADTER, *What Happened to the American Antitrust Movement, in* THE PARANOID STYLE IN AMERICAN POLITICS 188, 194, 235-36 (1965).

73 *But see* H.R. 1789, the "Market Process Restoration Act of 1990," which would repeal all of the antitrust laws, introduced in the U.S. House of Representatives on May 18, 1999, by Congressman Ron Paul of Texas. Among the premises are that (a) the antitrust laws "governmentally facilitate interference in the voluntary market transactions of individuals;" and (b) the Sherman Act "was a tool used to regulate some of the most competitive industries in America" and "was used as a political fig leaf to shield the real cause of monopoly in the late 1880's—

This is particularly evident in the struggle of both enforcement agencies to cope with today's dramatic and unprecedented wave of mergers that are restructuring the entire world economy.[74] In this environment, a new public interest organization—the American Antitrust Institute ("AAI")—has emerged with the objective of promoting support for increased antitrust enforcement resources and a more activist enforcement agenda.[75] The AAI may well qualify as an advance guard for the rebirth of antitrust as a "movement" in the sense Hofstadter meant by that term. Its founder and president, Albert Foer, published a report last year on "The Federal Antitrust Commitment: Providing Resources to Meet the Challenge." His opening lines capture the essence of his thesis: "The modern American political economy is based on the idea of competition. But competition does not automatically occur and it cannot be maintained without a national competition policy and appropriate institutions for sustaining competition."[76]

Foer might have added that a continuation of sound and effective antitrust policy cannot be assumed and there is considerable unpredictability in how it evolves in the decades ahead. Much depends on political and funding support from the Congress, the predilections of future appointments to the Supreme Court, and the caliber of successors to Messrs. Pitofsky and Klein at the enforcement agencies. I don't believe it is an exaggeration to say that how all three branches of government respond to today's and tomorrow's antitrust issues will have a significant impact on the health of our economy and the overall character of our society.

This writer has no crystal ball but is nonetheless convinced that antitrust policy directions of the sort we have seen in the last half decade will continue to the benefit of the country as a whole for several decades to come. There surely is plenty of room for further reform: the merger

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protectionism." In introducing this legislation, Congressman Paul explained that "Microsoft, Alcoa and Standard Oil represent cases of a sole supplier, or at least come close to such a case. However, totally unlike the cases of exclusive government franchises, their position in the market [is or was] the result of their successful free competition." Claiming that even proponents of antitrust prosecution acknowledge the foregoing, he quoted the Supreme Court's *Standard Oil* decision of 1911 (endorsing the breakup of that monopoly) as follows: "Much has been said in favor of the objects of the Standard Oil Trust, and what it has accomplished. It may be true that it has improved the quality and cheapened the costs of petroleum and its products to the consumer." 145 CONG. REC. 72, E1001-02 (daily ed. May 18, 1999) (Statement of Rep. Ron Paul).

74 The number of mergers annually reported and reviewed by the enforcement agencies increased from 1,529 in 1991 to 4,728 in 1998. The total value of U.S. mergers completed in 1998 exceeded $1.2 trillion, almost one-seventh of the gross domestic economy of the United States.

75 I am pleased to be on the AAI Advisory Board.

76 Albert Foer, The Federal Antitrust Commitment: Providing Resources to Meet the Challenge 1 (March 24, 1999) <http://www.antitrustinstitute.org>.

review process is often far more burdensome than necessary, both to the parties and to the Government; antitrust class actions too often become monumentally abusive tools for extortion that line lawyers' pockets despite the absence of any substance to the underlying allegations; virtually all kinds of antitrust litigation—government and private alike—take too long and cost too much; there are many remaining doctrinal anomalies and inconsistencies that both the Supreme Court and the lower courts need to address with more wisdom and sophistication. The antitrust system will address and resolve all of these problems, albeit not to the entire satisfaction of all affected parties, in due time.

Our national leaders of all stripes rightly applaud our three centuries of commitment to both individual freedom and the collective responsibility for it that we call democracy as it has evolved to our present day. Antitrust policy has been part of that commitment for half our existence as a free country and must continue to be part of it as we march forward. It is fundamentally about preservation of the freedom to compete and become the next Microsoft; freedom to innovate and change the world in the process; freedom of choice in our role as consumers of every product and service that enriches our lives; and, in the end, freedom from *both* intrusive government *and* private monopolies.

A wise philosopher said that "[l]ife is lived forward but understood backwards."[77] If this is true, then my wish for the country is that architects of future antitrust policy will have studied American history during their formative years under professors of Robert Huff's ilk and will thereby appreciate the past on which they build.

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[77] Soren Kierkegaard in *The Concluding Unscientific Postscript to the Philosophical Fragments* (1846). Kiekegaard, like Hofstadter, understood the critical importance of "passion" as a supplement to reason. "An age without passion has no values" and "leads to a general state of apathy" whereas "the passionate use of thought has consequences . . . and provokes action." *See generally* L. Skitol, *The Speculative Wonder of the Leap of Faith* (Reflections on Kierkegaard) at 4-9 (1999).