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The End of Antitrust—Or a New Beginning?

Joe Sims

Robert H. Lande
University of Baltimore School of Law, rlande@ubalt.edu

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BY JOE SIMS and ROBERT H. LANDE*

Antitrust is in one of its periodic states of decline. Historically, it has rebounded from these valleys to rise to even higher peaks of enthusiastic public and political popularity. The first period of substantial antitrust activity began 15 years after the passage of the Sherman Act, and lasted into the 1920s. The Great Depression saw antitrust at its lowest, followed by Thurman Arnold's aggressive tenure, but World War II was hardly a period of great antitrust enthusiasm. The 1950 Celler-Kefauver amendment to section 7 began the golden age of antitrust, a period that lasted until the middle 1970s. So far, each rebound has resulted in broader and more vigorous antitrust enforcement efforts.

There is, however, growing evidence that this particular decline may be different—that we may be witnessing a true metamorphosis, or perhaps even the demise of antitrust as we know it. We are nearing the climactic stage of our prolonged romance with economics—and, recently, Chicago school economics—as the guiding principle of antitrust. If current trends continue, the result could very well be the end of antitrust as it has traditionally been conceived.

Despite the considerable momentum generated, we doubt this will happen. Traditional antitrust principles are so firmly en-

* The authors are, respectively, Partner and Associate at Jones, Day, Reavis & Pogue, Washington, D.C.

trenched in our American social fabric and psyche that they will not disappear, no matter what the logical weight of a particular brand of economics. The difficult question is what form antitrust will take, and exactly how economic analysis and populist-oriented notions will eventually combine. To borrow an earlier line, antitrust is not dead—it has merely grown up. The interesting uncertainty is how it will age.

Differing perspectives

Of course, there are many "antitrusts," depending on whose perspective you accept. We know from experience that individual perspectives can influence perceptions and actions. Consider the case of Ken "the Snake" Stabler, one of the NFL's premier "free spirits." A writer once read the former Raider and Saints quarterback this passage from adventure writer Jack London: "I would rather be ashes than dust. I would rather that my spark should burn out in a brilliant blaze that it should be stifled by dry rot. I would rather be a superb meteor than a sleepy, permanent planet." What message was London trying to convey? "Throw deep," said Stabler.

There are still some Stabler-like perspectives on antitrust; some are more interested in the size of the splash than the direction of the rock. But these are a very small minority, and other perspectives dominate.

To the scholar, antitrust is an analytical framework for answering legal questions about business conduct. Optimally, it would provide predictable answers to common problems and at least a basis for reasonable guessing in unusual situations. It is the scholars, both economic and legal, who have promoted economics as the only (or at least the most attractive) analytical infrastructure for antitrust, one clearly preferable to the whims and chance of transient political or social policy. They value logic, coherence, and long-run predictability. The scholars are at the top of the Ferris wheel now, masters of all they see, in charge of federal enforcement policy and exercising a growing influence on judicial decision making.

To the politician, however, economics is only marginally relevant.[1] The politician knows that antitrust has always been a powerful rhetorical weapon, useful for raising the bile of those voters who are not members of boards of directors (a fairly substantial majority of the voting public) and a convenient excuse for not approving something that he opposes for some wholly unrelated reason. To the politician, whether in Congress, the executive branch, or a state attorney general's office, antitrust was always—and remains—us against them, the people against the corporate behemoths, the populist politician against the champions of entrenched greed. To many in this group, antitrust is even more attractive when it is inactive, since they can criticize without having to worry about the consequences of action. To the politicians, economic analysis is a tool, to be used or discarded as convenient.

Then there are the internationalists, who see antitrust as an archaic doctrine—except when it can be used offensively against the hordes from across the sea. The old-style antitrust politicians argued—and still do—that the antitrust laws reflect social concerns about fairness, equal opportunity, the virtues of individual entrepreneurs, and protection against the unfair use of economic and political power. The internationalists say the same thing, but their villains are foreign governments and companies, especially when subsidized or operating from nonmarket economies. Their social concerns are American competitiveness in international markets, jobs, trade balances, and protection against the unfair use of economic and political power.

To much of the general public, antitrust is simpler, more basic. Antitrust is about fairness, equal opportunity in the marketplace, low prices for consumers, and let the best man win. This is similar to the politician's perspective, but the politicians have frequently misused this rhetoric to protect particular private interests—whether it be small grocers, druggists, auto dealers, or discounters—even when the interests of those groups were com-

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1 The exceptions will no doubt excuse the overgeneralization.

pletely inconsistent with those of the general public. This public perception is, however, radically different from that of the scholar. While the scholars are concerned about the perverse results of government interference with natural market forces, the man on the street believes strongly in the *process* protected by the antitrust laws—the system of marketplace competition that is the utopian view of antitrust. He believes that, as on the playing field, the better team (or company) will win *if* everyone follows the rules and, moreover, that is the way it should be. He believes society benefits from the competitive struggle itself, although he probably also believes that the struggle needs to be regulated to prevent cheating. The man on the street doesn't really mind companies growing large until, because they get so big or last so long, their continued prominence seems unlikely to be the result of mere "skill, foresight and industry," to borrow an old phrase. In other words, a hard-fought contest is fine, but people get worried when the score gets too lopsided.

To the body politic, "allocative efficiency" is gibberish, and "supply-side substitutability," not much better. Because their focus is on both process and results, people are susceptible to the populist rhetoric of the politicians, but at the same time are leery of putting too many constraints on energetic enterpreneurs. They don't like bureaucrats, private or governmental. Economic analysis is fine, but when used to justify mergers of $10 billion oil giants, many think someone has his head screwed on wrong. Free markets are fine, until they see conglomerate acquisitions that appear to make no sense. They don't like regulation in concept, but if it means the airlines won't overbook their planes and bump them from a long-planned trip, it's probably desirable in that specific instance. They don't mind a little uncertainty or inconsistency because all the precise rules anyone advocates are wrong. Finally, they can be persuaded to become more interested in this subject when the economy is doing fine than when things are going bad. Antitrust is to some extent a luxury product, to be enjoyed when possible but set aside when more important things, like food on the table, are concerned.

It's not clear there is a "business community" perspective. Many large businesses view the antitrust laws as impediments to efficient operations, particularly in light of the growing threat of international competition. But many smaller businesses see antitrust as a business civil rights statute, intended to ensure equal opportunity and maybe even an egalitarian result. Individual businesspeople have about as many differing views on antitrust as they do on politics. The so-called "business community" has proven over the years to be quite diverse indeed.

These inconsistent and, indeed, warring perspectives all exist today. The scholars—more specifically, those scholars who are members of the Chicago school—control the federal enforcement agencies and a growing portion of the courts and the law schools. Thus, the basic organs of antitrust all trumpet efficiency-oriented economic analysis (although even in this happy land there are rumblings of discontent, with some arguing that things have gone too far and others arguing that we have not gone far enough). The politicians survive in the Congress and in state prosecutors' offices, proving that there is still an audience for populist rhetoric, even if there is not enough political support for aggressive action. Economic times aren't quite good enough for the public to get too enthusiastic about antitrust, and there is growing concern about America's position in international markets. And so we sit, in an uneasy truce, with no one perspective in absolute control, with economics dominating the rhetoric but the politicians continuing to play a good rubber-band defense—easily bending but never breaking.

The signs of this uneasy truce are all around us. Recent years have seen the blurring of the per se and rule-of-reason approaches.[2] Only hard-core price-fixing really remains per se illegal. The merger rules have been loosened in the name of economics, but the rationale for change is in major respects inconsistent with the remaining rules, and there seems every reason to anticipate further change if economic analysis continues to control enforcement decisions. Private suits are down, but suits by competitors are up and (most surprisingly) occasionally

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2 *See* Gellhorn & Tatham, *Making Sense Out of the Rule of Reason*, 35 Case W. Res. L. Rev. 155 (1985).

successful, even after enforcement agency approvals. Vertical cases brought by the government have disappeared, but the politicians continue to beat on the vertical drum. Some new (frequently small) antitrust targets appear—the professions, the health industry, and the traditionally exempt—but those efforts increasingly arouse spirited political opposition. There are calls for further—and more substantial—antitrust reform from the scholars and the internationalists, but public support seems shallow or nonexistent and the politicians seem able to prevent dramatic change. It is like a basketball game played in three-foot-deep mud—a lot of movement with considerable effort, but so far very low scoring.

The current orthodoxy—not yet universal

There is no doubt that Chicago school concepts have taken control of the federal enforcement agencies, and are increasingly influential in the courts. Much, if not all, of this current orthodoxy is based on "new"[3] views of microeconomics and the belief that economic efficiency is the only legitimate goal of antitrust enforcement. The following principles are some of the key building blocks for this approach to antitrust to which many scholars—as previously defined—subscribe in varying degrees.

a. Industry concentration may not matter at all. Large firms are probably large because they are efficient and there may be no relationship whatsoever between industry structure and performance. If there is a relationship, it is complex and variable, not subject to simple correlations.

b. Entry into many markets is relatively easy and many markets are contestable. Either new entry or the threat of new entry makes existing market power much less of a problem than traditionally perceived.

c. The world is changing faster than ever. Technological change in many industries is so rapid we can't even describe it adequately. Even an illicit monopoly in a rapidly changing industry is little

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3 Whether these views are "new" or simply extensions of traditional economic principles is an interesting but largely irrelevant debate.

cause for antitrust concern because the monopoly will disappear before enforcement action could be effective.

d. Even if it could move fast enough, the government is demonstrably not wise enough to intervene in markets in a manner likely to solve more problems than it creates.

e. Capital markets are relatively efficient and know (or learn quickly) just about everything worth knowing. Thus, since market power is often derived from, or supported by, imperfect information and thus limited access to capital, there is less cause for antitrust concern than historically believed.

f. More and more industries function in international markets today. If a domestic cartel attempts supracompetitive pricing, there will often be a quick foreign response. While the domestic industry may occasionally be successful in creating barriers to foreign competition, these barriers are generally ineffective. Steel is the commonly used example.

If you put all these principles together, and if you were to accept them completely and uncritically, there would hardly be any need for antitrust as we have traditionally known it.[4] The Department of Justice Merger Guidelines would be unnecessary, since they continue to rest on the notion that market concentration is important and predictive. Nor would you consider vertical restraints guidelines. Even the current enforcement priority—cartels—would become largely irrelevant, since cartels would be believed likely to dissolve before the government could find and successfully prosecute them. Only efforts to remove governmental restraints would be sensible.

But not everyone accepts this new religion; indeed, some in positions of influence violently oppose it. And so, almost like Scrooge and his bothersome ghosts, we continue to see, on a regular basis, examples of the old-time antitrust religion:

a. The Sixth Circuit reverses a summary judgment per curiam, holding that a driver who bought a tractor-trailer from a trucking company was entitled to a trial on his allegation that the trucking

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4 For an articulation of something close to this position, *see* Fred L. Smith, Jr., *Why Not Abolish Antitrust?*, REGULATION, Jan./Feb. 1983, at 23.

company illegally tied the financing of the truck to the driver's acceptance of an offer of employment. While the trucking company obviously lacked power in the relevant market (the financing of tractor-trailer trucks), said the court, "it is clear that, as a matter of law, submarket analysis, if not a substitute for the standard market test, is a factor to be considered in defining the relevant market." The driver contended that there was a submarket consisting of the trucking company and its owner-operators; the Sixth Circuit found this allegation sufficient to avoid summary judgment.[5]

b. The Eighth Circuit reverses a dismissal of a claim that subdivision lots were illegally tied to golf club memberships. The district court dismissed the case because lot purchasers were not required to buy club memberships. But, said the Eighth Circuit, a complaint "should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances. . . ."[6]

c. A trucking company that entered the garments-on-hangers market between Pennsylvania and New York City is found liable for more than $39 million in trebled damages in a suit brought by a competitor charging attempted monopolization. Since there were a "limited number of competitors" and since, within three months of entering the market, the defendant had "procured seven of plaintiff's customers," the jury found (and the district court denied a motion for judgment n.o.v.) that there was a dangerous probability of monopolization.[7]

d. A district court rules that the acquisition of Kitchen Aid by Whirlpool violated section 7, notwithstanding approval of the transaction by the Federal Trade Commission. The court "stress[ed] that it is not bound in any way by the determination made by the" FTC.[8]

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5 Hand v. Central Transport, Inc., 779 F.2d 8, 11 (6th Cir. 1985) (per curiam).

6 Terre Du Lac Ass'n, Inc. Terre Du Lac, Inc., 772 F.2d 467 (8th Cir. 1985).

7 International Distribution Centers, Inc. v. Walsh Trucking Co., 1985-2 Trade Cas. (CCH) ¶ 66,665, at 63,118 (S.D.N.Y. June 20, 1985).

8 White Consolidated Industries, Inc. v. Whirlpool Corp., 1985-2 Trade Cas. (CCH) ¶ 66,699 at 63,313 n.1 (N.D. Ohio July 3, 1985), *vacated*, 1985-2 Trade Cas. (CCH) ¶ 66,797 (N.D. Ohio Aug. 1, 1985) (defendants modified their contract and the court vacated the preliminary injunction; its statements about the FTC were not discussed).

e. The Supreme Court refuses to hear an appeal from the Ninth Circuit ruling that Data General Corp. violated the antitrust laws by selling its computer software only to purchasers of its computers. The relevant market, said the court of appeals, was purchasers of Data General computers.[9]

f. The Supreme Court also refuses to review a Ninth Circuit ruling that proof of per se violations of section 1 can sustain an attempted monopolization finding, regardless of the probability that the conduct will lead to the monopolization of a relevant market.[10]

g. The Supreme Court holds that a refusal by the owner of three mountains in Aspen to sell a multiarea ticket in conjunction with the other ski mountain in Aspen was illegal monopolization. The relevant market was destination skiing in Aspen.[11]

h. A competitor is granted an injunction preventing a merger because of the possibility that the resulting entity could conceivably gain market share by an illegal cost-price squeeze. The competitor had standing, said the court, because of other two groups affected—suppliers and consumers—would benefit (at least in the short run) from the merger and thus would be unlikely to seek to block it.[12]

i. The National Association of Attorneys General produces its version of antitrust guidelines for vertical restraints,[13] and the House of Respresentatives passes a nonbinding resolution condemning the DOJ Vertical Guidelines.[14] Both represent a wholesale rejection

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9 Digidyne Corp. v. Data General Corp., 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 3534 (1985).

10 Mobil Oil Corp. v. Blanton, 105 S. Ct. 2369 (1985).

11 Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 105 S. Ct. 2847 (1985).

12 Monfort of Colorado, Inc. v. Cargill, Inc., 761 F.2d 570 (10th Cir. 1985), *cert. granted*, 54 U.S.L.W. 1108 (U.S. Jan. 13, 1986) (No. 85-473).

13 *NAAG's Vertical Restraints Guidelines*, [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 1243, at 996 (Dec. 5, 1985).

14 *Resale Price Maintenance Portion of House Judiciary Committee's Report on H.R. 2348 to Authorize Appropriations for Justice Department for Fiscal 1986,* [Jan-June] ANTITRUST & TRADE REG. REP. (BNA) No. 1219, at 1025 (June 13, 1985).

of the "new" economic analysis as the touchstone of antitrust enforcement.

We could go on, but you get the picture. The antitrust world today is not as simple as some would make it seem. These examples illustrate the dramatic dichotomy between the rhetoric of the scholars (as defined earlier) and the not infrequent judicial and other decisions that completely ignore both that rhetoric and the analytical approach that supports it. Of course, there are also a large (and growing) number of decisions that are perfectly consistent with the scholarly rhetoric. As a result, the one word that most accurately describes antitrust today is "unstable."

Antitrust in the future

Where do we go from here? One possible scenario is the logical conclusion of our 20-year economic romance: we don't need antitrust, or worse, antitrust enforcement is positively harmful. In either case, let's get rid of it. The federal enforcement budgets have steadily shrunk in the last half decade; a continuation of this trend would be consistent with this scenario. We may even see legislative initiatives that are consistent with this possibility; the administration is proposing legislation to refocus the Clayton Act (and there continues to be some support for outright repeal of section 7). The internationalists provide another impetus for change in this same direction. Indeed, the administration's legislation includes antitrust relief for "declining" industries. Both the scholars and the internationalists are strong forces pushing toward the end of traditional populist antitrust enforcement.

Despite their best efforts, however, these groups do not yet control Congress, and broad legislative initiatives are not likely to be successful absent some significant economic or political changes. Of course, the politicians can't legislate their view of the world either, and so are reduced to passing nonbinding resolutions and inserting language in appropriations bills that tries to prevent proselytizing by the Antitrust Division. Thus, we seem to have a stalemate on the legislative front, to go along with the instability evident in the judiciary. All in all, an unsatisfying situation for everyone concerned, including the business community, which above all else abhors uncertainty.

This stalemate means that we will not see the end of traditional (which is to say, populist) antitrust anytime soon. Antitrust is, after all, still mom and apple pie, as well as a convenient excuse for failure and a handy weapon for revenge. Marketplace injuries will continue to prompt a search for relief, and antitrust remains enough of a possible source of compensation that it seems unlikely to fade away entirely. We may see new and different forms of attack—state antitrust or unfair competition statutes, the use of state tort law (interference with business relationships, etc.), state franchise and similar statutes, or even the U.C.C. (Uniform Commercial Code)—and RICO (Racketeer Influenced and Corrupt Organizations Act) will continue to attract venture capital until amended. But where there is business pain, there will continue to be antitrust screams, and until (and if) the scholars completely capture the judiciary or gain working control of the Congress, those screams will continue to be heard.

But if the end of antitrust is not near, what is the future? While our crystal ball is hazy, the fact that there has been a growing gap between antitrust theory and populist politics—with the resulting destruction of the theoretical-political consensus that fueled antitrust's golden age—must have a dramatic effect. The notion that increased concentration will lead to increased profitability and poorer competitive performance was a more powerful one *because* it was consistent with a visceral public concern over agglomerations of private economic power. But new economic insights have been accompanied by a growing willingness to look beyond simple market structure to the inevitably more complicated actual performance of markets. This has meant the end of simple but arbitrary legal rules, and a general reduction of previous prohibitions on a variety of forms of business conduct that may have procompetitive effects.

Whether economics is the cause of, or merely a convenient excuse for this change is unclear. Other forces, including most importantly the growing internationalization of markets, have also been critically important. Nonetheless, economic analysis has at least been the tool of change, and even if it does not become dominant, it promises to remain important in the transition years to follow. The inevitable result will be complex rules and proceedings, ambiguity, and the absence of enforcement principles that can be translated into simple political principles—or slogans. Remember "Big is bad"? No comparable flag for current enforcement leaps to mind. This has to lessen political support for antitrust, and that has to have an impact on the shape of antitrust in the future. Still, given the critical role to be played by world economic conditions, the variables are just too complex to make prediction a worthwhile enterprise.

The best we can do is suggest that we are most likely in for a very lengthy period of transition, perhaps not ending before the next century. We don't think traditional antitrust will disappear, but the exact characteristics of the antitrust that will emerge are impossible to predict.

Antitrust tomorrow

Shorter-term predictions are slightly less foolish. If this administration is succeeded by another like it, you can reasonably expect more of the same. The antitrust initiatives of a new Republican administration would probably be influenced more by general economic circumstances than by any other single factor.

Should the White House change hands in 1988, by contrast, some modest changes could be expected. These changes would, of course, depend critically on who was elected and on the national and international economic circumstances faced during his or her term. The enforcement philosophy and approach of future heads of the antitrust agencies might have some minor impact. But even if a Democrat is elected president in 1988, and even if the Democrats control both houses of Congress following that election, it is hard to visualize a dramatic short-term swing from the current situation. This is true for several reasons.

First, the scholars will still control the policy issues, and even the politicians recognize the power of the economic logic. No responsible antitrust agency head—of either party—would ever return to many of the antitrust initiatives of the 1960s or 1970s.

Second, the federal judiciary is becoming increasingly conservative. By the time President Reagan leaves office, he will have appointed approximately half of the then-sitting federal judges. These judges are likely to be especially receptive to the new antitrust learning. Even the Supreme Court seems on the verge of a close embrace of much of the new philosophy (see, for example, Justice O'Connor's concurring opinion in *Hyde*[15]), although decisions like *Maricopa*[16] and *Aspen Skiing* leave one to wonder whether there really is a common thread there after all. Even if Mike Pertschuk showed up back in charge of the FTC, with Sandy Litvack at Justice, the courts would probably prevent them from moving antitrust sharply away from its present course. Given the moderating influence of the judiciary in the late seventies and early eighties, it seems reasonable to expect that after 1988 the more conservative judiciary would operate as even more of a constraint on any "misguided" enforcement initiatives that might arise.

This does not mean, of course, that it would necessarily make no difference in antitrust enforcement if the Democrats were elected in 1988 (or 1992). Those who see antitrust as an affirmative instrument for economic justice, however defined, would no doubt seek to come up with "responsible" antitrust initiatives that integrated the new antitrust learning into positive enforcement programs, yet did so in a way that avoided the old failures. This could conceivably affect both the length of the current transition and the final structure of the antitrust of the twenty-first century.

A relatively easy approach would be to simply tighten standards in a number of conventional areas. This would result from

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[15] Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2 (1984).

[16] Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982).

taking all of the "new economics" outlined earlier less seriously than many do today. A new generation of antitrusters could believe that concentration probably matters, that entry is often difficult and lengthy, that technological change is not always so great that it would prevent or cure monopolies, that many markets are not world markets, and that cartels do not self-destruct quickly enough.

These differences in degree of belief on these issues could mean, for example, somewhat tighter market definitions and relatively lower market share threshold levels in merger enforcement. This could have significant effects in the short run. Most merger enforcement tends to be on the margin. Since the antitrust community has now adjusted to the current merger enforcement standards, even a small downward shift of the margin between permissible and challenged mergers could produce a significant number of cases, at least at first. After the antitrust community figured out where the new equilibrium was, of course, we would expect firms and their lawyers to adjust to this new situation. But the post-1988 standards could be somewhat tighter than the current ones without truly significant defections from an economic standard of the sort being applied today.

It is this very possibility, of course, that provides the impetus for the current legislative initiatives aimed at rewriting the merger enforcement statute. It is because it is so easy to influence merger policy at the margin that, for those who view merger enforcement as an important factor in economic performance, a tightening of the statutory standard is such a high priority.

There are some other, more controversial possibilities for short-term change. A number of new and not so new ideas could alter the antitrust balance, sometimes by reinjecting more populist notions into antitrust analysis.

A first possibility is the "raising rivals' costs" idea.[17] This approach reasons that if a firm wishes to disadvantage a rival,

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[17] This theory is primarily being developed by Steve Salop and others. *See* Salop & Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983); Salop, Scheffman & Schwartz, A Bidding Analysis of

instead of doing such things as pricing predatorily low, the firm can instead (or in addition) attempt to raise its rivals' costs. Such techniques can disadvantage a competitor without unduly harming the firm employing the practice. For example, suppose that a large firm with market power which uses relatively little labor conspires with its unions to dramatically increase wage rates throughout the industry. If the unions succeed in obtaining the same increase from industry firms which use relatively large amounts of labor, the wage increase will have the net effect of disadvantaging the first firm's competitors by raising their (relative) costs.[18]

Of course, it is difficult to predict how this concept would or could be applied, and whether it would prove useful.[19] There has already been an effort by the FTC to explicitly utilize this concept in the *U-Haul* case,[20] albeit in circumstances where the government was involved, and Acting Chairman Calvani has aggressively advanced the concept. But it may in practice be very difficult to distinguish honest industrial conduct from predatory

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Special Interest Regulation: Raising Rivals' Costs in a Rent Seeking Society (FTC Bureau of Comp. Working Paper No. 114, Sept. 1984). *See also* Calvani, *Non-Price Predation: A New Antitrust Horizon*, 54 ANTITRUST L.J. 409 (1985). Like virtually all economic theories, however, it has antecedents. *See* R. BORK, THE ANTITRUST PARADOX 156-59 (1978); Marvel, *Factory Regulation: A Reexamination of Early English Experience*, 20 J. LAW & ECON. 379 (1977); Williamson, *Wage Rates as a Barrier to Entry: The Pennington Case in Perspective*, 82 Q.J. ECON. 85 (1968).

18 This scenario assumes effective import restraints. For a more detailed discussion, *see* Lande & Zerbe, *Reducing Unions' Monopoly Power: Costs and Benefits*, 28 J. LAW & ECON. 297, 305 (1985).

19 The idea of raising rivals' costs could also be applied to vertical restraints. *See* Krattenmaker & Salop, Antitrust Analysis of Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price (draft, Nov. 1985) (unpublished manuscript).

20 *In re* Amerco and U-Haul International, Inc., No. 9193 (FTC, filed June 24, 1985). Indeed, Salop and other proponents would argue that this is merely a synthesis of the reasoning underlying a number of earlier antitrust decisions and currently pending cases.

conduct that raises rivals' costs. In the labor example given above, for example, it may be very difficult to determine whether a firm agreed to an unusually high labor rate as part of a scheme to disadvantage its rivals, or because the union forced it to do so. The one complaint filed so far leaves much to be desired in clarity; other investigations have fizzled. A new administration might be less finicky about the use of this theory, but it is not at all clear how important an additional weapon this could be.

Another approach to antitrust would follow from a reinterpretation of the overall goals of the antitrust laws. The current orthodoxy is that the sole goal of antitrust is economic efficiency. Some scholars believe this uncritically.[21] Neither the courts nor the enforcement agencies, however, have (yet) accepted this completely. While the old "big is bad, small is good" view of antitrust has been soundly rejected, a new enforcement regime could give more weight to populist or consumerist principles by adopting a "price" or "wealth transfer" approach to antitrust enforcement.[22] Although the price approach differs from the efficiency approach as a practical matter only at the margin, the theoretical differences can be illustrated by considering two examples of what antitrust enforcement would be like if the economic efficiency notion were ever totally accepted and taken to its logical extreme.

Consider first the hypothetical of an insulin cartel.[23] Suppose that the cartel doubled the price of insulin but that every insulin

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21 *See, e.g.*, R. Bork, *supra* note 17, at 66; R. Posner, Antitrust Law: An Economic Perspective 23, 99-100 (1976); Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 Tex. L. Rev. 661 (1982); Calvani, *Consumer Welfare Is Prime Objective of Antitrust*, Legal Times, Dec. 24, 1984, at 14.

22 *See* Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L.J. 65 (1982).

23 Although this hypothetical might be somewhat extreme, there are many products, particularly products with industrial uses, whose demand is very inelastic, at least in the short term.

consumer still purchased the drug.[24] This cartel would cause no economic inefficiency, since output would not fall,[25] yet would transfer a significant amount of wealth from insulin consumers to cartel members. Under a pure efficiency approach, we would not challenge this cartel since efficiency would be unaffected.[26] Under a price or wealth transfer approach, the cartel would nonetheless be challenged since it raised prices to consumers and "unfairly" transferred some of their wealth to the cartel members.

To further contrast these approaches, consider a horizontal merger leading to a monopoly. Under a pure efficiency model, even if the merger would result in significantly higher prices to consumers for a significant period, it would nevertheless be permitted if it were likely to lead to productive efficiencies that would offset the inefficiency created by higher prices.[27] By contrast, a price or wealth transfer standard would make it more likely that the merger would be challenged, on the ground that it was likely to result in significantly higher prices for consumers.[28]

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24 Also assume that new entry into the industry took 10 years, that no patents were involved, and that government regulation forbade imports.

25 This ignores deterrence effects from attacking a publicly known cartel, and also the other advantages of having a per se rule against cartels. It also assumes that the cartel members engage in no rent-seeking behavior. We also assume no efficiencies from the cartel, although they too are possible.

26 Since we assume that the cartel would cause no inefficiency, we would not expend resources to challenge it. We could, of course, postulate advertising or distribution economies from the cartel to make it even more certain that the cartel would not be challenged under an efficiency approach.

27 *See* Williamson, *Economies as an Antitrust Defense: The Welfare Trade-offs*, 58 AM. ECON. REV. 18 (1968); Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 30 CASE W. RES. L. REV. 381 (1980).

28 Nolan Clark reaches the same result on the grounds that such a merger would reduce output. *See* Clark, *Antitrust Comes Full Circle: The Return to the Cartelization Standard*, 38 VANDERBILT L. REV. 1125 (1985).

A price or wealth transfer approach would not permit mergers to "efficient monopolists" if it was thought that the monopolists would raise prices to consumers.[29]

Of course, we think it is unlikely that any enforcement agency or court would today permit a cartel, or a merger to monopoly, that it believed would actually result in higher prices to consumers. The efficiency model has not completely triumphed. Such a conclusion would, however, be the logical result of the efficiency approach to antitrust enforcement carried to an extreme. It is conceivable that a new Bill Baxter could explicitly adopt and defend this approach after a decade of less candid application of an efficiency standard, but we cannot today say this is likely. Higher prices to consumers would be difficult public policy to explain, no matter how the scholars balanced their triangles and rectangles. But there certainly is a theoretical difference, and an emphasis away from efficiency and more toward a price or wealth transfer approach to antitrust enforcement could make a difference on the margin.[30]

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29 *See* Fisher & Lande, *Efficiency Considerations in Merger Enforcement*, 71 CALIF. L. REV. 1580 (1983).

30 Another illustration of the difference a wealth transfer approach could make might come in the tying area. Suppose tying is being used to price discriminate among customers. Suppose purchasers consume two products—the classic example is computers and computer cards—in variable proportions. If a computer monopolist were to tie the sale of computers to the sale of computer cards, it could extract additional revenue from consumers of computer services. Under an efficiency approach, this tying would be desirable since it would increase output and economic efficiency.

By contrast, under a wealth transfer standard, tying might not be permitted since it would "unfairly" transfer wealth from consumers to the firm or firms imposing the tie. (Of course, whether such tying should be prohibited could depend upon how this market power was achieved. Tying that was a result of single-firm market power could be justified as a reward to innovation, whereas tying as a result of mergers or a cartel would be more suspect.)

Interestingly, if you contrast the majority and minority opinions in *Hyde*, it is possible to explain their differences along such lines. The concurrence by Justice O'Connor seems to evaluate tying solely in efficiency terms, extensively cites Chicago school literature, and could

"Rent-seeking" behavior could also give rise to enforcement possibilities. Rent-seeking emphasizes that firms will often go to great lengths to obtain monopoly power (or other types of economic rent) and that this behavior often wastes society's resources. A growing body of literature suggests that rent-seeking might be an important and widespread phenomenon.[31]

For example, reconsider the merger to monopoly example discussed above. Under a pure economic efficiency approach which did not factor in rent-seeking, the merger might be allowed. If, however, rent-seeking behavior was thought likely, it would be more likely that the merger would be challenged to avoid what would otherwise be monopoly profit—a "neutral" transfer from consumers to the monopoly[32]—from being dissipated as inefficient rent-seeking behavior.[33] Since rent-seeking would cause us to weigh the harms from market power more heavily, a belief that rent-seeking was common could make it more likely that mergers and other practices that could give rise to market power would be challenged.[34]

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not find much, if anything, wrong with tying. Although the majority opinion was not explicit, it could be read as containing a suspicion of tying arrangements, since they might be used to force consumers to pay more for their goods. *See* Sims, *"Monsanto," "Hyde" Rulings Put Baxter Slightly Ahead*, Legal Times, Apr. 16, 1984, at 14.

31 *See, e.g.*, Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). *See also* Tullock, Peltzman, Posner, Maloney, McCormick & Tollison, and other sources cited in Salop, Scheffman & Schwartz, *supra* note 17.

32 As noted earlier, one could also conclude that the transfer was not neutral.

33 Interestingly, the implementation of rent-seeking theories within an efficiency framework could lead to antitrust enforcement similar to that which could arise from the use of a wealth transfer or price standard, since both accentuate the harm from market power.

34 Many vertical restraints could also be explained by rent-seeking behavior. Firms might impose vertical restraint on their distributors, for example, in an attempt to extract their rents.

As an even more unconventional example, it might be possible for a new administration to reexamine and partially rehabilitate the most thoroughly discredited of all the antitrust statutes—the one statute which virtually all observers agree is totally useless and harmful—the Robinson-Patman Act. This law has been criticized on an unending number of grounds, but the main criticisms have a common theme:[35] Robinson-Patman Act enforcement, by prohibiting price discriminations in favor of large customers, results in economic inefficiency *and* higher prices for consumers.[36]

Some might argue, however, that it may not be impossible to bring intelligent Robinson-Patman Act cases if the rent-seeking concept is accepted as a justification for enforcement. For example, the act could be used to prevent retailers' rents from being acquired by manufacturers (or other sellers) with market power. In this respect, its purpose could be thought of as parallel to the above-described approach to the other antitrust laws which suggests their concern with preventing certain transfers of wealth from consumers to firms with market power. Whether this is a realistic vision is open to argument.

This by no means exhausts potential theories that could be explored if a new administration decided (for whatever reason) to increase its antitrust enforcement profile.[37] For example, a recent study incorporating imperfect information into predation analysis suggests that enforcement against predatory pricing should be rare, but probably not as rare as many members of the Chicago school suggest.[38] Recent work in the vertical restraints

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35 *See* H. HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 338-54 (1985), and the sources cited therein.

36 There are many other problems with the act, of course, such as the difficulty in applying the cost justification defense.

37 *See generally*, Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981).

38 *See* Zerbe & Cooper, *An Empirical and Theoretical Comparison of Alternative Predation Rules*, 61 TEX. L. REV. 655 (1982); *compare with* R. BORK, *supra* note 17, at 144-60; Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981).

area (focusing on inframarginal consumers, as distinct from the conventional focus on marginal consumers) argues that vertical restraints may be more likely to harm economic efficiency than is often believed.[39] A recent article on tying suggests how imperfect information can lead to tying which harms consumer welfare.[40] A recent article on market definition suggests an approach which could lead to stricter merger enforcement.[41] A recent analysis of leveraging raises questions with the prevailing views on the issue.[42] Any or all of these theories or suggestions could be persuasive to a new administration, and the list will surely increase during the next two years.

It is difficult to predict whether any of these theories or approaches would actually prove to be important or even useful, or whether any future antitrust enforcers, or private plaintiffs, would actually embrace them. It is certainly possible that new administrations of either party could continue the current enforcement philosophy, or perhaps even reach further toward the logical implications of today's dominant economic analytical framework. Merger enforcement may become less aggressive rather than more aggressive; vertical restraints law may be legislatively or judicially loosened further; international competition may result in less concern over domestic competition. Many of the ideas outlined above have severe theoretical or practical problems and, especially if used indiscriminately, could con-

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39 *See* Comanor & Kirkwood, *Resale Price Maintenance and Antitrust Policy,* 3 CONTEMPORARY POLICY ISSUES 9 (1985); Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy,* 98 HARV. L. REV. 983 (1985); Scherer, *The Economics of Vertical Restraints*, 52 ANTITRUST L.J. 687 (1983).

40 *See* Craswell, *Tying Requirements in Competitive Markets: The Consumer Protection Issues*, 62 B.U.L. REV. 661 (1982) (cited by the Supreme Court in *Hyde*).

41 *See* Harris & Jorde, *Antitrust Market Definition: An Integrated Approach*, 72 CALIF. L. REV. 1 (1984).

42 *See* Kaplow, *Extension of Monopoly Power Through Leverage,* 85 COLUMBIA L. REV. 515 (1985).

ceivably spark an even more determined movement away from antitrust as an economic civil rights policy.

All of these possibilities exist, and the only guide to the future that seems at all reliable to us is the belief that American political opinion still values traditional antitrust principles highly. Antitrust is an American invention, one that people are still proud of, and we are not yet convinced that its traditional, populist articulations are about to be finally discarded.

Wallowing in the bog

So, the 100th anniversary of the Sherman Act promises to find us still wallowing in the bog of transition or stalemate. The state of play at the 110th anniversary, however, is much harder to predict. The one certainty is that there will always be the little guys and the big guys, the wealthy and the poor, the powerful and the weak, and there will always be politicians who attempt to exploit these facts of life and judges influenced by them. Some will listen to the scholars, and some will merely use them, but we think it is much too early to conclude that the scholars will ever gain full control over the American antitrust agenda. Antitrust is aging, but it's not dying yet.