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New Forces Chip Away at Agencies' Policy of Antitrust Abandonment

Joe Sims

Robert H. Lande

University of Baltimore School of Law, rlande@ubalt.edu

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Body

Analysis

ANTITRUST IS AT A CROSSROADS. THE FEDERAL **AGENCIES** ARE DOMINATED BY THE ECONOMIC APPROACH OF THE CHICAGO SCHOOL, BUT CONGRESS AND THE STATES ARE EXPRESSING SHARP DISSENT

We are beginning a **new** period in **antitrust**. The last comparable period was more than a decade ago, during the final two years of the Ford administration, when a Democratic Congress stuffed money into the unwilling pockets of a Republican administration and passed significant **antitrust** legislation.¹

During the next two years, another Democratic Congress will try to stuff the pockets of yet another unwilling Republican administration and push also for **new antitrust** legislation. The pendulum swings back.

There are, however, some important differences. In the 1970s, many people running the **antitrust agencies** really wanted more resources and thus were **forced** to pretend to support the administration's official position. And the administration actually was asking for budget increases--disagreement arose because Congress wanted to award even larger increases.

The **agencies** were then very active, in some cases even testing the frontiers of **antitrust**. **Antitrust** was still struggling to find a sensible analytical infrastructure, and the economists--particularly those with a Chicago School bent--were only beginning to be influential.

Yet now, on the other hand, at least some people running the **agencies** enthusiastically support the budget cuts, although others clearly are just doing their political duty. The administration is requesting significant budget decreases for the **Antitrust** Division but, strangely enough, not for the Federal Trade Commission. And the **agencies** are under increasingly harsh attack for not doing enough--an attack accountable partly to politics as usual and partly to poor public relations by the **agencies**, which sometimes seem more interested in rhetoric than in results or good congressional relations.

Most important, the **agencies**--and, significantly, the **antitrust** field as a whole--have been captured by the economists and, to some extent, by Chicago School ideologues. The analytical approach at the **agencies** is set: Economic efficiency is the touchstone, and the market is almost always presumed to function competitively and to correct problems expeditiously. The inevitable result is less--and less visible--**antitrust** enforcement.

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Still, this is a much more complex picture than some would depict. To other observers, the Reagan administration has abandoned the very concept of *antitrust* enforcement, turning basic *antitrust* principles upside down. According to this view, the *agencies*, instead of protecting the consumer, the little guy, or the discounter from the big monopolist, are attacking the discounter as a free rider and are trying to persuade courts to allow a manufacturer even more freedom to control the distribution of its products.

From this perspective, instead of preventing consolidations of economic, social, and political power through multibillion dollar mergers and takeovers, the *agencies* are actually facilitating bigness through negotiated settlements of potentially troublesome transactions. These thinkers believe that the *antitrust agencies* have defected to the enemy: it's as if Custer had joined *forces* with Crazy Horse and Sitting Bull to wipe out the wagon trains on the Oregon Trail.

View From the Other Pole

But to thinkers on the other end of the political spectrum, the *agencies* are headed in the right direction, but still have a long way to go--after all, the FTC recently affirmed a Robinson-Patman case and occasionally will still attack mergers or *force* unnecessary divestitures. From this perspective, FTC Chairman Daniel Oliver gives good speeches, but too frequently is on the wrong end of a 4-1 vote to take some ill-advised enforcement initiative.

The *Antitrust* Division has brought or threatened a half-dozen merger challenges in the last two months, some involving relatively small market shares by today's standards, but which nevertheless have been justified by a prior history of collusion in the industry. To these thinkers, the 1984 Merger Guidelines themselves, heralded as a breakthrough, still rely excessively on structural presumptions as the basis for enforcement decisions, when everybody knows that structure has nothing to do with performance.

Advocates of this perspective recently started a newsletter. **The Washington *Antitrust* Report**, whose philosophy can be summarized by its letterhead slogan. Busting the Trustbusters Since '86.² To these writers, Custer is still commanding the 7th Cavalry and gratuitously attacking Indians, with very little regard for whether they are friendly or hostile.

The reality is more complex. There has been a substantial change in merger enforcement in the last decade, but much less change in other areas. After all, the *Antitrust* Division was not bringing vertical cases in the mid-1970s; it was trying to repeal or modify the Robinson-Patman Act.

In those years, the division vigorously advocated regulatory reform, both through intervention in the administrative process and through legislation. It believed that government, through regulation and subsidy, was the most important anti-competitive *force* in our economy. It was using economic analysis in its enforcement decisions, and it had largely abandoned populism as an underlying principle of *antitrust* enforcement.

The FTC story is more complicated and the changes somewhat more dramatic. Recall the shared-monopoly cereal case and all the vertical restraints cases the FTC filed during the mid and late 1970s.

But former Chairman Michael Pertschuk never tried to resurrect a **Von's Grocery**³ approach to *antitrust*, and even the FTC of the 1970s accepted the importance of economic analysis. Today, of course, the FTC is charting a more complex enforcement plan of action than is the *Antitrust* Division, with its multimember commission regularly demonstrating independence from its chairman's control.

Mergers the Exception

Mergers are a different story. Merger enforcement is undeniably looser today than a decade ago. The 1982 and 1984 Merger Guidelines raised the numerical thresholds both directly and, to a much greater extent, indirectly by changing market definition techniques and introducing an efficiencies defense. The very analytical framework imposed by the guidelines ensures a more skeptical approach to proposed merger challenges.

Actually, the guidelines completely shifted the burden of proof to those wishing to challenge a merger and structured that burden to make it relatively easy for those opposing a challenge to claim that the burden had not been met.

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But perhaps the greatest change of all has been that the government has not followed its own guidelines. For example, although the guidelines state that the *Antitrust* Division is likely to challenge any merger resulting in a post-merger Herfindahl-Hirschman Index (HHI) of between 1,000 and 1,800 and an increase of at least 100 points in the index,⁴ challenges to mergers with a post-merger HHI of less than 1,800 have been rare.⁵

As a practical matter, 2,000, not 1,000, seems to be the real danger line in most cases, and a 200-point increase, rather than one of 100 points, may often be the red flag.

The fact of looser enforcement is of course subject to political misuse. The House Judiciary Committee recently released a list of the 16 largest corporate acquisitions in history.⁶ All exceeded \$3.5 billion in value, and all took place during the Reagan administration. This list has been widely used by populist politicians, including the state attorneys general, to show how weak merger enforcement has been. But would the right level of enforcement have blocked these mega-mergers? Hardly.

Virtually all of these 16 large mergers were either conglomerate mergers with, at most, small horizontal overlaps,⁷ leveraged buyouts without even a hint of an *antitrust* problem,⁸ or mergers primarily involving crude oil, a notoriously unconcentrated market.⁹

More aggressive enforcement *agencies* might have been able to extract larger spin-offs of overlapping assets, but it is unlikely that they would have been able, or would even have wanted, to prevent these deals from taking place.

Despite this fact, it is true that merger enforcement could be stricter than it is today. But the political and academic consensus has changed in the last decade. If any responsible critic of the current regime were making the enforcement decisions, the divergence from current practice would be surprisingly modest. Even the most zealous enforcer would, after all, have to answer to an increasingly conservative judiciary.

Triumph of the Economists

The biggest real change in both *agencies* over the last six years has been their near total adoption of economic analysis as the determinant in enforcement decisions. Accompanying this change has been an increased rhetorical barrage from the *agencies*, intent on proclaiming their ideological purity throughout the world and spreading the gospel of less is more.

The *agencies'* attitude, set early in the administration by former Assistant Attorney General William Baxter, has been confrontational--sometimes deliberately so. This approach had some early benefits and some real positive impact--a reduction in the lip service being paid to traditional *antitrust* while enforcement patterns were moving further from its dictates.

But this benefit has long since dwindled, if not disappeared. Continuing the unyielding rhetoric simply reinforces the arguments of those who regard the Chicago School adherents as thinly disguised shells for big business and believe that the *antitrust* laws should serve values other than economic efficiency. The drawing of the rhetorical battle lines by both sides is now serving only to undermine the validity of *antitrust* enforcement across the board.

Morover, this rhetorical stalemate has encouraged the addition of a relatively *new* player to this game--state attorneys general. On March 10, they issued their own set of horizontal merger guidelines,¹⁰ after issuing vertical restraints guidelines just over a year ago.¹¹ They have also been increasingly active in filing Supreme Court amicus briefs¹² and in giving testimony on Capitol Hill.¹³

It is not yet clear whether this activity will have any impact. Will the courts pay attention to the guidelines or amicus briefs of the state enforcers? Will they actually fill the void created by the diminution of enforcement at the federal level by bringing more than a token number of cases--particularly cases of the type federal enforcers are not inclined to bring?

After all, it is much more difficult to find and prove a good vertical price-fixing case than a good horizontal price-fixing case. Even if the states have the inclination, do they have the resources to make much of a difference? Or is all this just the kind of political posturing one would expect from elected officials who would like to be elected again?

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The rise of the state attorneys general is only one reason the antitrust scene is likely to be interesting for the remainder of the Reagan administration. While the past two years were largely more of the same as Chicago School analysis gained supremacy, the last election changed all that.

When the administration had a friendly Senate, it was relatively safe from anything but small skirmishes. When the Democrats gained control, that protection was lost. The election results not only give a much better lever (although not a totally free hand) to Sen. Howard Metzenbaum (D-Ohio), but also should encourage Rep. Peter Rodino (D-N.J.), the chairman of the House Judiciary Committee, to become more active.

Chairman Rodino is nothing if not a realist. Although he was interested in some antitrust projects, he did not push for them when doing so was sure to prove futile. Since the chance of passing some legislation has now increased, so, too, will Rodino's interest in this area reawaken. The next two years are likely to see bigger battles.

In fact, probably the only thing that will prevent a real antitrust war is that Congress has bigger fish to fry. The Iran-Contra affair, trade legislation, budget battles, the deficit, financial reform--all are more compelling issues that will divert time and attention from antitrust.

There also does not appear to be the kind of public interest today that would fuel a legislative war. Perhaps the kind of major oil mergers that took place in the early 1980s would do it, but a repetition seems unlikely.¹⁴

A major scandal involving antitrust enforcement would, of course, be useful; the controversy over the Nixon administration's handling of the ITT case in the early 1970s was directly responsible for the Tunney Act limitations on consent decrees and for the change in antitrust criminal penalties from misdemeanor to felony. Today, of course, we have the Wall Street insider trading scandal, but it is too soon to say whether it will have an impact on antitrust laws, as opposed to SEC-administered takeover rules.

Taking everything into consideration, however, even if a major war is not waged, at least a series of antitrust battles will be fought.

What kind of battles? Oversight hearings and a confirmation hearing (once the administration formally selects its new Antitrust Division head) will be the first skirmishes. Senate oversight will be handled by subcommittees headed by Metzenbaum and Sen. Albert Gore Jr. of Tennessee; they are not likely to be friendly to the agencies.

Still, for all the ulcers Congress can give to the folks running the FTC and the Antitrust Division, Congress cannot make the agencies bring more cases.¹⁵

House oversight will be handled by Rodino and Rep. Thomas Luken (D-Ohio), and therein lies another story--unrelated but interesting.

The House Energy and Commerce Committee, with jurisdiction over the FTC, has a Subcommittee on Commerce, Consumer Protection, and Competitiveness--the logical place, some think, for FTC jurisdiction. The subcommittee is headed by Rep. James Florio (D-N.J.), an active critic of the Reagan FTC.

But for reasons unstated, FTC jurisdiction was given to the Transportation and Hazardous Materials Subcommittee, to be chaired by Luken. This subcommittee will have jurisdiction over, among other things, acid rain, toxic waste, noise pollution, and the movement of hazardous wastes.

Metzenbaum's Agenda

On the Senate side, Metzenbaum has already announced a very ambitious agenda for his subcommittee. He favors legislation overturning the Supreme Court's Monsanto¹⁶ decision, which he views as setting too tough an evidentiary standard for proving existence of vertical price-fixing conspiracies. He also wants to repeal the McCarran-Ferguson antitrust exemption for insurance.

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Metzenbaum also advocates allowing state attorneys general to bring damage actions on behalf of indirect purchasers of products subject to a price-fixing or bid-rigging conspiracy--recovery now prevented by the Court's **Illinois Brick**¹⁷ decision. He wants to do something to increase the leverage of gasoline retailers in dealings with their suppliers. He wants to change the Hart-Scott-Rodino pre-merger notification statute to lengthen some of the waiting periods, giving the antitrust agencies more time to review transactions. He would also like to allow state attorneys general to gain access to pre-merger filings, which the federal antitrust agencies cannot now disclose.

Metzenbaum also intends to hold oversight hearings on the competitive problems caused by airline deregulation and the airline mergers that have followed and to increase the liability of railroads to antitrust challenges.

Chairman Rodino has not released nearly so comprehensive a list, but he too wants changes in Hart-Scott-Rodino and relief from the evidentiary burdens of **Monsanto**.

Both chairmen may consider relaxing the prohibition against interlocking directors in 8 of the Clayton Act, but Rodino has gone on record as wanting to extend some of the act's constraints to corporate officers as well as directors.

The administration's own antitrust initiatives, including treble damage reform and changes in merger standards, will get attention, but they will hardly be supported by the chairmen. With the possible exception of 8 reform, everything suggested by the administration faces a bumpy road at best.

So where will all of this take us after the next two years? A possible look at the future was provided at a conference held in late March at Airlie House in Virginia. The conference, organized by Ralph Nader, Georgetown Law Dean Robert Pitofsky, Professor Eleanor Fox of New York University Law School, and San Francisco practitioner Fred Furth, brought together virtually every leading left-of-Chicago antitrust scholar to strut their stuff.¹⁸

If antitrust does have a respectable rebirth following a victory by the Democrats in the 1988 election, this conference will probably be pointed to as the beginning of that revival--just as the 1974 Airlie House conference was a landmark event in the rise of the Chicago School.¹⁹

If antitrust continues to wither, however, we will probably look back at this conference as populist antitrust's last gasp, as its strongest advocates' best but dying shot at respectability. If this group cannot pick off at least a few of the Chicago sharpshooters, no one else will be able to either. The massacre of the populists will be complete.

The perception of this conference--whether it convinces the antitrust community that responsible yet aggressive antitrust enforcement is possible-- will be of great significance to the future of antitrust. But that impact is uncertain. The only certainty is that the next two years will be more interesting than the last two years. And then, of course, there is 1989!

1. For example, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18(a), and the Antitrust Procedures and Penalties Act (Expediting Act), 15 U.S.C. 16(b)-(h).

2. Competitive Enterprise Institute. **Washington Antitrust** Report (J Gattuso & T. Miller, eds.), 611 Pennsylvania Ave., S.E., Washington, D.C. 20003.

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

4. U.S. Department of Justice, **1984 Merger Guidelines** at 3.11(b).

5. See Leddy, **Recent Merger Cases Reflect Revolution in Antitrust Policy**, Legal Times, Nov. 3, 1986, at 17; testimony of Robert Pitofsky before the Senate Antitrust Subcommittee, Mar. 11, 1987. Justice did challenge a transaction recently in which it computed the post-merger HHI as only 1747, an increase of 240. United States v. Domtar Inc., No. 87-0689RFP (N.D. Cal. Feb. 25, 1987), 52 Antitrust & Trade Reg. Rep. (BNA) No. 1305, at 432 (1987).

6. See House Judiciary Committee's charts on Federal Antitrust Enforcement, 52 Antitrust & Trade Reg. Rep. (BNA) No. 1305, at 451 (Mar. 5, 1987).

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7. For example, DuPont-Conoco, U.S. Steel-Marathon, Philip Morris-General Foods, General Motors-Hughes Aircraft, R.J. Reynolds-Nabisco Brands.

8. Beatrice Foods, Safeway Stores.

9. For example. Chevron-Gulf, Texaco-Getty, Mobil-Superior.

10. National Ass'n of Attorneys General, Washington, D.C., **Horizontal Merger Guidelines** (Mar. 10, 1987), 52 *Antitrust & Trade Reg. Rep.* (BNA) No. 1306 (Special Supp. Mar. 12, 1987).

11. National Association of Attorneys General, Washington, D.C., **Vertical Restraints Guidelines** (adopted Dec. 4, 1985), 49 *Antitrust & Trade Reg. Rep.* (BNA) No. 1243, at 996 (Dec. 5, 1985).

12. For example, 21 state attorneys general recently asked the Court to review and reverse Judge Richard Posner's decision in **Olympia Equipment Leasing Co. v. Western Union Telegraph Co.**, 797 F.2d 370 (7th Cir. 1986), **cert. denied**, 55 U.S.L.W. 3636 (Mar. 24, 1987).

13. For example, two representatives of the National Association of Attorneys General testified on mergers before the Senate *Antitrust* Subcommittee on March 11, 1987.

14. Moreover, even another round of oil mergers might not cause as much alarm. Except perhaps in some specific geographic areas, it is hard to point to evidence that the last round of oil mergers had anticompetitive effects, despite the fact that the failure to challenge those mergers is always a lead example in any criticism of the current administration's merger *policy*.

15. In this respect, Congress has no real leverage over the *agencies*. After all, what can it do--threaten to cut their budgets?

16. Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984).

17. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

18. Those presenting papers included Eleanor Fox, Lawrence Sullivan, Harvey Goldschmid. Oliver Williamson, F.M. Scherer, Joseph Brodley. Steven Salop, John Flynn, and William Comanor, Commentators and moderators included Robert Pitofsky. George Hay, Phillip Areeda, Walter Adams, Lawrence White. Willard Mueller, Donald Turner, Janusz Ordoover, and Thomas Jorde. One token genuine Chicagoist--Frank Easterbrook--made a presentation. The invited audience, by contrast, was a balanced sample of the *antitrust* community, the group the conference sought to influence.

19. The earlier Airlie House conference, however, had a balanced group of speakers. Interestingly, several economists--Scherer. Adams, and Mueller-- appeared at both.

Joe Sims is a partner and Robert Lande an associate at Jones, Day, Reavis & Pogue in Washington, D.C.

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