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The Evolution of United States Antitrust Law: The Past, Present, and (Possible) Future

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THE EVOLUTION OF UNITED STATES ANTITRUST LAW:
THE PAST, PRESENT, AND (POSSIBLE) FUTURE

Albert A. Foer and Robert H. Lande¹

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As the world's nations rapidly move from systems in which central planning and monopoly are replaced by free markets,² it becomes increasingly valuable to consider the histories of competition policy experienced in different nations, on a comparative basis.³ In this article, we focus on the history of antitrust in the United States, the first nation to develop and fully-articulate a competition policy, drawing out themes that may be useful to other countries as they contemplate the shape and direction of their own competition regimes. We show that the American competition policy has reflected an underlying stability and bi-partisanship, but that it has also changed, often dramatically, from time to time and period to period, and is still in the process of change, reflecting changes in the political environment, our understanding of economics, and the perceived needs of the day. It is the combination of stability and flexibility that has kept antitrust relevant for more than a century, even as the nation has undergone remarkable changes.

I. THE LEGAL FRAMEWORK

Before there was an antitrust statute in the United States, the common law as it

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² See Daniel Yergin and Joseph Stanislaw, *The Commanding Heights* (N.Y., 1998).

³ See Michael E. Porter, *The Competitive Advantage of Nations* (N.Y., 1990); Spencer Weber Waller, "Comparative Competition Law as a Form of Empiricism," 23 *Brooklyn Journal of International Law* 455 (1997).

had developed in England and the United States recognized a positive value in competition, which was easy to find among the small businesses and small farms that dominated the scenery. Without putting a fine point on it, restraints of trade were considered illegal if they were unreasonable, but not otherwise, and it was up to judges to decide.⁴

With the coming of industrialization, the railroad, and the large corporation after the Civil War, a disrupted society began to worry about “trusts” which were rapidly moving to dominate a variety of important industries. The Sherman Act was passed in 1890, named for a Republican Senator, John Sherman, and signed into law by a Republican President, Benjamin Harrison.

Highly controversial and rarely enforced for about one generation, the Sherman Act was subjected to changing interpretations, reflecting varying visions of the proper role of the corporation in an economy that now included both vigorously competitive markets and markets dominated by one or two extremely large corporations.⁵ Did the Sherman Act merely codify the old common law or was it intended to outlaw all restraints of trade? Could it be used to break up the trusts? Two answers eventually became clear. With the break up of Standard Oil of New Jersey in 1911, it was clear that the government could separate a monopoly into viable smaller parts. But the Sherman Act would not reach all restraints of trade, but only those which a court holds to be unreasonable.⁶

By 1914, the desire had grown in many different sectors to define more clearly what restraints and what combinations would be predictably illegal. A burst of

⁴ See Martin J. Sklar, *The Corporate Reconstruction of American Capitalism, 1880-1916* (Cambridge: 1988), chapter 3.

⁵ See Federal Trade Commission Bureau of Competition, *National Competition Policy: Historians' Perspectives on Antitrust and Government-Business Relationships in the United States* (1981).

⁶ *Standard Oil Co. (N.J.) v. United States*, 221 U.S. 1 (1911).

Progressive legislation gave two responses. The Clayton Act outlawed mergers which may substantially lessen competition or tend to create a monopoly, and also outlawed several specifically defined behavioral abuses such as certain tying arrangements, exclusive contracts, and price discrimination. The Federal Trade Commission Act, taking the opposite approach, made illegal the very unspecific “unfair methods of competition”. It created an administrative system capped by a panel of expert commissioners in place of the trial level judiciary.

The structure of antitrust was now established, and it has changed very little since 1914. At different times the laws have been amended, generally to clarify certain terms and to “perfect” the existing laws. Thus, merger law was made more enforcement-friendly;⁷ price discrimination was given more specific meaning;⁸ and companies desiring to merge were required to provide prior notice to the enforcement agencies and then wait for a period of time, before consummating.⁹

Along with the antitrust laws, we developed a marbled cake of other laws that directly or indirectly affect competition. Most directly, laws established regulatory agencies like the Interstate Commerce Commission, the Civil Aeronautics Board, and the Federal Communications Commission. These had in common the authority to establish prices, terms of trade, and conditions of entry and exit for industries deemed “natural monopolies” or otherwise too essential and potentially dangerous to be left to the unregulated marketplace. But the theory of regulation was based on the desire to achieve the fruits of competition: if something about the market made laissez faire unworkable, public representatives would be empowered to create industries that

⁷ The Celler-Kefauver amendment to Section 7 of the Clayton Act, in 1950, closed major loopholes and opened a new era in merge enforcement.

⁸ The Robinson-Patman Act strengthened Section 2 of the Clayton Act in 1936.

⁹ The Hart-Scott-Rodino Antitrust Improvements Act of 1976 created the premerger notification program.

performed for the public *as if* they were competitive. Such, at least, was the theory.

More indirectly, a host of laws that were intended to deal with issues other than competition inevitably played a role in the shaping of markets. For example, tax laws often had unequal effects on different industries or on differently positioned competitors within a given industry. Trade laws had a huge impact on the conditions of entry into an industry, protecting some from foreign competition and imposing a traumatic level of competition on others. Procurement and subsidy programs often gave competitive advantages to favored recipients. In the 1960's and 1970's, a new crop of laws aimed at protecting consumers, the environment, and the workplace began to have their own indirect impact on competition in the markets they did (or did not) affect.

Finally, as the burdens of regulation became increasingly obvious, a deregulatory movement developed in the late 1970's, peaking in the early 1980's. The objective became to replace regulation with free markets –or, where that was not feasible, to redirect it—through greater reliance on market mechanisms.

II. THE INSTITUTIONS OF ANTITRUST AND COMPETITION POLICY

The legal structure established by 1914 was accompanied by an institutional structure that has also remained stable. There are still two federal antitrust agencies, the FTC and the Antitrust Division. Each has its distinct attributes. The Division has criminal enforcement power and thus specializes in dealing with price fixing and cartel behavior, where criminal penalties are sometimes imposed. Being part of the Executive Branch, the Division plays an active role in shaping an Administration's competition policy. The Commission, which includes a Competition Bureau, a Consumer Protection Bureau, and an Economics Bureau working side-by-side, has at various times focused more on structural issues and their implications for consumers. Formally an independent agency, the Commission often is more closely tied to Congress than the Division.

In recent years, the Division and the Commission have had roughly equal budgetary resources, in the neighborhood of \$100,000,000 each. However, the Competition Mission of the Commission (the resources allocated to antitrust and competition policy) receives only about half of the total Commission resources. Thus, it is accurate to generalize that the Division handles twice the antitrust load of the Commission, or two thirds of the total federal commitment.

Critics sometimes question why there are two separate antitrust agencies. The answer is first, that this is an historical rather than a logical happenstance, and second, that the agencies are similar but not identical. While they closely coordinate their investigations on the basis of expertise and available resources, a competitive factor exists between the agencies, which symbolically reflects the values they share, namely that two heads are often better than one. If we think of the agencies as two competing firms, a merger has not occurred because neither firm's stockholders (the Executive Branch and the Congress) nor management is likely to benefit sufficiently. In the absence of an antitrust statute that would keep them from conspiring together, they have attained a level of coordination that probably minimizes any efficiency gain from a conceivable merger.

Both federal agencies regularly use their expertise to influence other governmental agencies. Their importance in this role has increased with the movement toward deregulation as formerly regulated monopolies are transformed into what are intended to be aggressive competitors. Such restructuring has created an expanded need for the kind of expertise developed by antitrust lawyers and economists through their enforcement of the antitrust laws. With roughly twice the resources of the Commission and a closer relationship with the President, the Division generally plays a more active role. To give an example, on matters relating to electricity, which is in the process of being partially deregulated, the Division advises the Federal Energy Regulatory Commission on the handling of public utility mergers. The FTC, on the

other hand, has built a niche for advising the states on the competition and consumer protection aspects of electricity deregulation.¹⁰

One of the developments affecting antitrust in recent years has been the increased role of the states.¹¹ As federal antitrust efforts declined in the 1980's, many states expanded their antitrust role, particularly with regard to mergers and distributional restraints that were being ignored by the Reagan Administration. A recent manifestation is the current Microsoft case, which was filed jointly by the Antitrust Division and nineteen states.¹²

Competition policy is strongly influenced not only by the public antitrust agencies but also by private enforcement of the Sherman Act and the Clayton Act. The private bar and economic consultants advise private firms on how to accomplish their business strategies within an environment of antitrust and competition policy. In some cases, a strategy may be enhanced by threatening or bringing an antitrust case against a competitor, or by seeking out the assistance of a public antitrust agency.¹³ Recent examples apparently include Netscape, gaining assistance of the Antitrust Division against Microsoft, and American Express gaining the Division's assistance against Visa and MasterCard.

Generally, private attorneys tend to represent either plaintiffs or defendants, and they often find it difficult to cross the line. In addition to providing strategic advice to

¹⁰ See Stephen Calkins, "Energy Deregulation: A Special Role for FTC's Unique Mix of Authority," FTC:WATCH Dec. 27, 1998, also available at www.antitrustinstitute.org.

¹¹ At least 26 states had adopted constitutional or statutory antimonopoly statutes prior to the Sherman Act. In the 1970's over 20 states enacted new antitrust statutes and many state antitrust enforcement offices were created or expanded. See Ernest Gellhorn and William E. Kovacic, *Antitrust Law and Economics* (West Publishing, 1994) at 456.

¹² *United States of America v. Microsoft Corp.*, C.A. No. 98-1232, and *State of New York v. Microsoft Corp.*, C.A. No. 98-1233, D.D.C.

¹³ See, e.g., Michael Porter, *Competitive Strategy* (The Free Press, 1980), 85-86.

clients, the defense bar represents clients once they have been targeted for investigation or litigation. The plaintiffs' antitrust bar is considerably smaller than the defense bar and often functions on a contingent fee basis rather than on an hourly retainer. Plaintiffs' cases frequently "follow-on" government cases, sometimes in a class action format, attempting to recover for civil damages once the government has established a firm's antitrust liability. Since the early 1980's, a variety of procedural and substantive changes in the practice of antitrust have made it more difficult for a private plaintiff to succeed. Consequently, the plaintiffs' antitrust bar and with it the role of private enforcement has generally been reduced from the salad days of the 1970's.¹⁴

Finally, competition policy is influenced by judges, usually federal judges and most importantly Supreme Court justices, as they sit in judgment of specific cases. Since the early 1980's, the federal judiciary has become noticeably more conservative on antitrust matters. This reflects (a) the large number of judicial appointments by conservative Presidents, (b) a general intellectual trend led by "Chicago School" economists and lawyers, (c) an extraordinarily effective public relations effort to expose judges to Chicago School thinking, under the direction of conservative think tanks and institutes, and (d) the absence of an organized coalition dedicated to more expansive antitrust objectives.

As indicated, the direction and execution of antitrust is also affected by a community of scholars, think tanks, and legal and economic publications that constantly interacts with the antitrust process.

III. THE EVER-CHANGING ANTITRUST SCENE

¹⁴ According to Gellhorn and Kovacic, *op. cit.* at 462, from 1941 to the mid '60's, the ratio of private to government cases tended to be 6 to 1 or less. From the mid-'60's to the late '70's, private cases exceeded government filings by 20 to 1. During the 1980's, private filings fell substantially, and the ratio of private to public cases stabilized at roughly 10 to 1.

Despite the stability of the laws and institutions of antitrust for 85 years, ideas about the value and meaning of competition have been varied, with different ideas in ascendancy at different times. A review of the intellectual history of competition policy will help place the current period and near-term future in context.

One approach to the history of competition policy in America is to recognize fluctuations on a scale whose opposite ends are marked “competition” and “cooperation”. Another is to observe fluctuations on a spectrum running from unfettered private ownership to public ownership. Still a third is to define the interrelations among a series of “regulatory regimes”. We will look briefly at each of these perspectives.

When the giant corporation suddenly appeared on the American scene in the 1880’s, largely as the result of the basic communication and transportation infrastructure that was completed in the years after the Civil War, politicians and economists were faced with something new. How should the state deal with this powerful new institution? And those speaking for the big firm also had to create not only new methods of internal organization and management, but new methods of dealing with competitors. Small businesses and small farms had been competitive price takers. Big firms saw the potential for the first time of becoming price makers.

The big firms almost immediately took steps to consolidate their potential for controlling their markets. The first step was the development of cartels (trade associations) in the 1880’s. Next they moved toward legal consolidation, first in the form of the trust. In the 1890’s, the holding company became a popular way to transform old cartels into more effective horizontal combinations. Then, at the turn of the century came our first great merger wave, one of the most important structural developments in our economic history.¹⁵ Meanwhile, companies were becoming administratively

¹⁵ We are currently in the fifth great merger wave. The first, from 1887-1904, involved merging to monopoly status. The second, from 1916-1929, was characterized by merging to oligopoly. The third, was

centralized (something that was not happening concurrently in Europe) and finally they began to integrate vertically, forward and backward. From the big firm's perspective, this was a time of shifting from a highly competitive framework to one in which coordination and cooperation should prevail.

Horizontal combinations gave big firms the ability to administer prices – something they believed was essential for long-term planning and coordination of large-scale national operations. This probably meant higher prices, at least for some consumers, but it also may have permitted increases in efficiency. Vertical integration was perhaps more directly harmful to key economic players, such as the wholesalers who were powerful in every city and town. The changes spawned by the advent of the big firm naturally generated opposition, forcing the question of market structure into the political arena.

The earliest national reaction was the Sherman Act.¹⁶ As a compromise which nearly everyone seemed to favor, it necessarily contained a vagueness which covered over many important questions. Was the Sherman Act intended to maintain a highly competitive framework or was it intended to recognize the new dominance of big firms, simply placing constraints on the most anticompetitive situations? The ambiguous objectives had to be sorted out, first, by the Supreme Court. Its initial decisions limited the scope of the Sherman Act and treated it as a restatement of the common law,

the 1960's conglomerate merger wave. The fourth wave came in the 1980's; it reflected low stock prices, many foreign acquisitions, and an explosion of hostile tender offers. See F.M. Scherer and David Ross, *Industrial Market Structure and Economic Performance* (3rd Ed.)(Boston: Houghton Mifflin Co., 1990) 153 et. seq.; Kenneth M. Davidson, *Megamergers* (Cambridge:Ballinger Pub. Co., 1985) 129. The fifth wave began around 1994 and is not susceptible to easy generalization. Elements include strategic positioning for expanded international trade, restructuring around deregulation, and the shifting of strategy and structure in the face of rapid technological change. A major motivation of the fifth wave, like the first, is to prevent price decreases that otherwise would result from new technologies.

¹⁶ For overviews of the legislative history, see Robert H. Lande, "Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged," 34 *Hastings L.J.* 65 (1982); Andrew I. Gavil (ed.), *An Antitrust Anthology* (Anderson Publishing Co., 1996, part III; Herbert Hovenkamp, *Federal Antitrust Policy* (West Publishing Co., 1994), chapter 2; Sklar, op. cit., chapter 3.

basically saying that only unreasonable restraints of trade were illegal. With a change in the makeup of the Supreme Court, the opposite view prevailed: that the Sherman Act was not merely a restatement, but a new law for new times, and that *all* restraints of trade were now illegal. If this view held up, it would mean a return to the market competition model that existed before the big firms had appeared. Political battle lines were again forming over market structure issues.

Two Supreme Court decisions in 1911, the Standard Oil case and the American Tobacco trust case, split the difference: they held in favor of major divestiture remedies under the Sherman Act, while at the same time establishing that the rule of reason would predominate henceforth. This result, which was essentially satisfactory to the three leading presidential contenders, Roosevelt, Taft, and Wilson, upheld the ability of big firms to restrain trade (i.e., develop cooperative activities) in *reasonable* ways, but not in ways that involved unfair methods of competition or that unreasonably excluded competitors from the market. Judges would fill in the blanks.

The election of 1912 nevertheless became the forum for a sophisticated debate over the role of the big corporation. Competition policy has never again achieved a comparable level of political salience. Roosevelt, the former president, argued in favor of a statist control over the corporation, recognizing the importance of large-firm efficiencies, but distrusting the ability of courts and whatever competition still existed to be an adequate protector of the public interest. Taft, the incumbent, a judge by occupation, and a stronger trustbuster than Roosevelt had been, favored maintaining a rule of reason administered by the courts. Wilson, the Democrat in between, wanted a commission that would be able to define over time the line between fair and unfair competition. Wilson's approach preferred a panel of relatively independent experts rather than a single judge to be the initial decision-maker once there were claims of wrongdoing, but like Taft and unlike Roosevelt, he would leave the private sector with the initiative for acting. It was Wilson's vision that came closest to prevailing, with

passage of the FTC Act in 1914.

Actually, the antitrust laws were largely suspended only three years later, with the wartime mobilization. A new kind of bureaucratic structure arose that was part private and part public. The mobilization proved to be effective and after the war there were movements advocating amendments and reinterpretation of antitrust to help “rationalize” the economy. A leader in this movement was the engineer and post-war food administrator, Commerce Department Secretary Herbert Hoover. Hoover looked at the economy as a giant association, with the Secretary of Commerce at the top. As presidential candidate in 1928 and then as President, he espoused an associationalist perspective within the framework of an antitrust structure that he was constantly trying to stretch.¹⁷ This was in keeping with the popularity of associationalist schemes, both in Europe and in the U.S., during this period, schemes that included legalization of cartels. Indeed, the FTC at this time was busy adopting competition-restraining codes for each industry, until they were largely scrapped in 1930-31.

A renewed drive to end antitrust in the face of the Depression led to the National Recovery Act of 1933 under Franklin Roosevelt. In effect, antitrust was suspended and industrial associations functioned as industrial governments. But associations were unable to solve a series of political problems and could not deliver on re-employment. The NRA couldn't neutralize small business, local merchants, smaller farmers, and various groups committed to consumer interests. There was no satisfactory role for organized labor and large companies became increasingly unhappy with the arrangement. The eventual response was the arrival of Thurman Arnold as head of the Antitrust Division in 1937 and the revival of antitrust.¹⁸

¹⁷ See Ellis W. Hawley, *The New Deal and the Problem of Monopoly* (Princeton University Press, 1966), introduction.

¹⁸ *Id.*

The institutions of antitrust grew stronger, though hardly in a linear manner, from the Arnold revival through the late 1970's. Meanwhile, a reformation movement was growing in the economics departments and law schools of several campuses, with the University of Chicago generally considered to be in the lead.¹⁹ By the time of the Carter Administration, conservative economists were playing a larger role in both the FTC and the Antitrust Division, the more aggressive manifestations of antitrust were under not only academic but political attack, and the country was becoming comfortable with the idea of deregulating such industries as air transportation, trucking, oil, and railroads. A new consensus was forming in favor of competition, which would play an enlarged role even in industries where regulation would not be fully displaced. At the same time, a kind of libertarian, laissez faire attitude was rumbling in the background, with an underlying perspective that antitrust was itself just another form of regulation, in need of a serious haircut.

The election of President Reagan marked the triumph and the high water mark of the Chicago School in antitrust and competition policy. A conservative attorney, William Baxter, headed the Antitrust Division and a conservative economist, James Miller, headed the FTC. Economists played a far more important role within each bureaucracy, and the most influential economists were of the Chicago variety rather than the more traditional institutionalist school that had previously dominated industrial organization economics.²⁰ The Reagan antitrust regime was characterized by an emphasis on the prosecution of horizontal price fixing schemes. Structural cases more or less disappeared, once the ATT divestiture settlement was approved. Vertical relationships became virtually unrestrained by antitrust. Predatory pricing was dismissed as

¹⁹ For a brief overview, see Herbert Hovenkamp, *op. cit.* 61-71; Gavil (ed.), *op. cit.*, part X.

²⁰ On the transition to Chicago School domination, see Marc Allen Eisner, *Antitrust and the Triumph of Economics* (University of North Carolina Press, 1991).

something that rarely happened and shouldn't be prosecuted. Mergers became subject to a formal mode of economic analysis that was used with the effect of constraining merger enforcement. All antitrust activity was directed towards one goal: improving the economic efficiency of the economy.

At the same time, free trade was promoted. The pace of deregulation picked up. Government itself was under attack and many parts of the regulatory structure, including antitrust, suffered substantial resource cuts. Privatization and contracting-out occurred in a variety of areas. Judicial appointments had to pass a litmus test of conservatism. All in all, the laissez faire end of the competition-cooperation spectrum predominated.

The Reagan Administration represented one end of the spectrum of state-market relations. The pendulum began gradually to swing back with the election of President Bush. Resources for antitrust slowly increased from their low points and the antitrust agencies became somewhat more aggressive with respect to anticompetitive behavior outside of price fixing. Nevertheless, Chicago economists continued to occupy positions of influence and classical economics was now more or less entrenched, to one degree or another, in the thinking of all but the small populist wing of the antitrust community.

The Clinton Administration under Chairman Robert Pitofsky at the Federal Trade Commission and Assistant Attorney General Anne Bingaman and her successor Joel Klein at the Antitrust Division took a moderate but more expansive and activist view of antitrust. Classical economics remained an influential mode of thought, but was increasingly conjoined with what was becoming known as a "post-Chicago" outlook.²¹

²¹ See "The Economics of Antitrust: The Trustbusters' New Tools," *The Economist*, May 2, 1998; Lauren E. Zuckerman, "How the Antitrust Wars Wax and Wane," *New York Times*, April 11, 1998; Joel Brinkley and Laura M. Holson, "Aiding Consumers Is Now the Thrust of Antitrust Push," *New York Times*, March 22, 1998.

The post-Chicago outlook added an overlay of strategic thinking, nurtured in part in the nation's business schools and management consulting firms, in an effort to enrich economic theory and to provide a sense of empiric realism that many critics found absent in the purist Chicago vision. The emerging vision recognized the importance of free markets, but saw that markets are neither automatic nor natural; rather, they are always embedded in social, political, economic, and legal institutions whose proximate reality must be taken into account.²² While post-Chicagoists continue to value efficiency and innovation extremely highly, they also care about protecting consumers from paying supracompetitive prices due to illegally acquired market power.²³

To summarize, American history has a strong tradition of cooperative undertakings that run alongside our commitment to competition: the mercantilism of Alexander Hamilton, the War Industries Board, the NRA, even the FTC itself promoting associationalism. Particularly during times of crisis –depression or war—cooperation, order, and national interest have been more important guiding symbols than competition.

What is perhaps extraordinary is the resiliency of antitrust. Antitrust is part of the larger picture of business-government relations and its role has repeatedly expanded or declined in accord with other features of the political landscape. As much as it has been criticized over the years and as often as it has been suspended, undermined, and reinterpreted, it has always bounced back to a healthy norm. If it did not fulfil some substantial underlying needs of the American polity, the alternatives would surely have prevailed for longer periods.

Another extraordinary aspect of antitrust's history is its bipartisan nature. In

²² This is a primary point in a recent book by a University of Chicago Law School professor, Cass R. Sunstein, *Free Markets and Social Justice* (NY: Oxford Univ. Press, 1997).

²³ See Lande, *supra* note 15, *passim*.

recent years, it has seemed that antitrust was more of a Democratic than Republican interest.²⁴ That view belies both the full history and the more recent history. The Republicans Sherman and Harrison started the federal antitrust mission. Republicans Roosevelt and Taft became the first important trustbusters. Wilson, the Democrat, added the Clayton and FTC Acts. The Republican Harding carried on the tradition. The Republican Hoover, for all of his associationalism, opposed price fixing and monopoly and opposed efforts to suspend the antitrust laws. The Democrat Roosevelt virtually suspended antitrust, only to revive it later in the New Deal. The Republican Eisenhower initiated numerous important antitrust cases and expanded the mandate to include bank mergers. It was the Republican Nixon who reinvigorated the FTC and initiated suits to stop the trend toward concentration.

Against this background, the Reagan Administration represents a major deviation from the course of antitrust history, but even though it shifted priorities and dramatically slashed many aspects of antitrust, the Reagan Administration remained faithful to narrowly defined core values of antitrust, particularly bolstering its price-fixing agenda, and, indeed, brokered the landmark AT & T consent decree. The Bush Administration returned to a more traditional antitrust effort, which the Clinton Administration is carrying forward. Over the past century and in recent years, the antitrust mission has generally had a remarkable degree of bipartisan support.

IV. THE “REGULATORY REGIMES” OF ANTITRUST

²⁴ John W. Kwoka, Jr., has found, in reviewing the period from 1970 to 1997, that federal antitrust expenditures have been significantly greater under Democratic administrations, and that the antitrust enforcement budget as a percent of expenditures on industry regulation is significantly larger under Democratic administrations. “Antitrust Enforcement at the Millenium,” Industrial Organization Society Presidential Address, forthcoming, Review of Industrial Organization. “Antitrust Enforcement at the Millenium,” Industrial Organization Society Presidential Address, forthcoming, Review of Industrial Organization. These findings probably reflect the unusual hostility of the Reagan Administration rather than of Republican administrations over time.

An additional perspective on the ever-changing relationship between the market and the government is provided by political scientist Marc Allen Eisner.²⁵ Eisner defines a regulatory regime as "a historically specific configuration of policies and institutions which structures the relationship between social interests, the state, and economic actors in multiple sectors of the economy."²⁶ In his conceptualization, each generation interprets regulatory policies and state-economy relations from its own historical position as part of a specific political-economic milieu. A new regime emerges "when new regulatory policies are initiated in several regulatory issue areas (e.g., finance, agriculture, and industrial relations) and are combined with significant institutional changes."²⁷ He describes the history of regulation in the U.S. after 1880 in terms of four regimes, each of which was created in response to economic changes that threatened the perceived self-interest of various groups.

In Eisner's study, the emergence of a new regulatory regime does not necessarily entail the elimination of an earlier regime. Much remains the same, especially on the surface, as one regime shades into another, but the goals of regulation are continually changing, reflecting differences in the economic context, the demands for change, and the dominant conceptions in the political economy.²⁸

The "market regime" emerged in the decades surrounding the year 1900 as the benchmark of the Progressive Era. The creation of large corporations that swallowed up whole industries threatened the independence of many businesses and scared consumers. In response to popular demands, elected officials developed antitrust to force a return to the market and in the case of electric power generation and the

²⁵ Marc Allen Eisner, *Regulatory Politics in Transition* (Baltimore: Johns Hopkins University Press, 1993).

²⁶ *Id.*, at 1.

²⁷ *Id.*, at 3.

²⁸ *Id.* at 203.

railroads, legislation created administrative agencies to set rates roughly equal to what might have been set by market competition.

According to Eisner, a second wave of regulation followed the economy's collapse in the Great Depression. Although this new regime emerged during the New Deal, it was rooted in the associationalism of the 1920's, and so Eisner calls it the "associational regime." This layering of public policy promoted a more activist state than Progressivism, desiring to manage and guide economic change "by means of structured interaction with economic associations."²⁹ The National Industrial Recovery Act, which was central to the New Deal recovery effort, was an attempt to promote economic stability by means of an integrated regulatory framework governing production and pricing across multiple sectors of the economy. Many other initiatives used regulatory policies to redistribute national income toward certain regulated groups, with regulators giving economic associations a central role in defining and implementing regulatory policy. Antitrust was largely eclipsed during this period.

The third regulatory regime identified by Eisner is the "societal regime" which developed in the 1960's and 1970's. "The major initiatives of this period, rather than promoting economic stability or revitalizing markets, were designed to protect citizens from the health and environmental hazards that were an outgrowth of large-scale industrial production."³⁰ Examples were the acts that empowered the Environmental Protection Agency and the Occupational Safety and Health Administration. Some scholars refer to this as "New Wave" regulation.³¹

²⁹ Id. at 5.

³⁰ Id. at 6.

³¹ "New Wave" regulation, relating to the protection of consumers, workers, and the environment, differ from earlier regulatory initiatives in three ways: (a) they do not respond to concerns about the state of competition or monopoly; (b) they are not industry-specific; and (c) they do not impinge directly on the price and output decisions of private firms. Peter Asch and Rosalind S. Seneca, *Government and the Marketplace* (2d Ed.) (Chicago: The Dryden Press, 1989) at 445.

In part as a response to the increased amount of regulation apparent on the American scene, which was viewed as a cause of the nation's poor economic performance during the 1970's and 1980's, what Eisner calls the "efficiency regime" grew up. Its feature was deregulation, market-oriented regulation, and the application of free-market economics to a wide variety of policy issues.

Our view is that we are now into a new regime, not yet named or defined. The new regime accepts a great deal of classical economics and considers efficiency and innovation to be crucial values. But it is much more inclined than the Chicago School to observe market failures and to accept a governmental role in the correction of market failures. Rather than having faith that markets operate automatically and efficiently, it sees government as necessary to make and preserve markets. It values markets not only for the efficiencies they can facilitate and for the innovation they can generate, but also with the range of choices they can offer to consumers and with insuring that consumers do not pay artificially high prices for goods and services. The new regime is therefore multidimensional. To distinguish this new regime from its predecessors, we call it "the consumer protection regime."³²

V. CURRENT U.S. COMPETITION POLICY

In what ways has the environment of competition policy changed since the coming of the efficiency regime? Seven factors seem most important.

First, we are in the midst of a merger wave of unprecedented size and scope, which is rapidly restructuring the American and the world economy. Detailed information about merger trends is available in the annual report to Congress on the Hart-Scott-Rodino Act,³³ which documents the growth in number of transactions

³² See Lande, *supra* note 15; Robert H. Lande, "Consumer Choice as the Unifying Goal of Antitrust and Consumer Protection Law," 14 *Nihon University Comparative Law* 131 (1997).

³³ The most recent is Federal Trade Commission and Department of Justice, Annual Report to Congress,

reported: there were 2,883 in 1989, declining to 1,529 in 1991, then a period of rapid growth, hitting 2,305 in 1994, 2,816 in 1995, 3,087 in 1996, and 3,702 in 1997. The number of transactions jumped to 4,728 in 1998.³⁴ The New York Times reported on February 14, 1999, that “The frenzy over deals is likely to continue, particularly if American stock markets remain buoyant and European merger activity explodes, as Wall Street experts expect.”³⁵

The current merger wave is extraordinary not only for the number of transactions, but for the size. Assistant Attorney General Joel Klein advised Congress in mid-1998, “[I]f you combined the value of all U.S. merger activity that took place in 1990, 1991, 1992, 1993, 1994, 1995, and early part of 1996, it would approximately equal the value of merger activity that can be expected in 1998 alone.”³⁶ It appears that the total value of U.S. mergers completed in 1998 exceeded \$1.2 trillion³⁷ – in an economy with a gross domestic product of \$8.4 trillion!

To quote the New York Times, “Since January, 1994, roughly the starting point of the decade’s boom in deal making, \$7.1 trillion in deals have been announced worldwide. Of the 50 biggest American companies, measured by market value at the start of that year, six have disappeared through mergers –including Chrysler, Amoco and Nynex—and three more will vanish if announced deals are completed. Those 50 companies have been involved in 4,190 mergers or acquisitions in the last five years, with a total value estimated at \$1.4 trillion...”³⁸

Fiscal Year 1997 (20th Report), available at www.FTC.Gov .

³⁴ FTC, Mission Accomplishments (undated document provided by the Bureau of Competition, Jan. 26, 1999).

³⁵ Laura M. Holson, “The Deal Still Rules,” New York Times, Feb. 14, 1999, Section 3.

³⁶ Statement of Joel I. Klein before the U.S. Senate Committee on the Judiciary, June 16, 1998.

³⁷ Stephen Labaton, “Merger Wave Spurs a New Scrutiny,” New York Times, Dec. 13, 1998 at 38.

³⁸ Holson, *op. cit.*

Second, we have advanced a long way in the deregulation movement. Where the focus had been on defining what is to be deregulated and how to deregulate, we now must focus on making deregulated markets function competitively and on applying the learning we have gained to industries, such as electricity, which are still in the process of deregulating.

Whether one believes that deregulation has been an unmitigated success, a mixed picture, or a disaster, there is an emerging consensus that antitrust must play a larger role than it has to date in assuring that deregulated markets are competitive. This consensus is driven by recognition that formerly regulated companies do not suddenly gain a competitive mentality; that bureaucracies which formerly regulated do not suddenly shift to an antitrust mindset; that merger waves can all too quickly concentrate deregulated industries, depriving the public of the competitiveness that was supposed to take the place of regulation; and that antitrust enforcement has not played a sufficient role either in preparing for deregulation or in keeping deregulated industries competitive.³⁹

Third, we have moved into a more global marketplace. This does not imply, as some have argued, that antitrust is now irrelevant because increasing free trade makes markets adequately competitive. Rather, it makes antitrust more complicated and resource-intensive. International factors need to be taken into account in the investigation and analysis of antitrust allegations. With more nations committed to antitrust and competition policies,⁴⁰ there is more need to coordinate with other

³⁹ See Albert A. Foer, "Institutional Contexts of Market Power in the Electricity Industry," 12 *The Electricity Journal* 13 (May 1999), coining the term "Shermanization" for the institutional aspects of the transition from regulated monopoly to competition. Available at www.antitrustinstitute.org.

⁴⁰ Thirteen countries in the Western hemisphere currently have antitrust laws, with the majority of these laws enacted since 1990. Robert H. Lande, "Introduction to Symposium on Creating Competition Policy for Transition Economies," 23 *Brooklyn Journal of International Law* 339 (1997). "Since the late 1970's, nearly forty transition economies have created new competition policy systems or retooled dormant antimonopoly laws." William E. Kovacic, "Getting Started: Creating New Competition Policy Institutions in Transition

enforcement officials in terms of establishing and harmonizing policies and in terms of specific enforcement actions.

Fourth, we have become increasingly aware of networks, particularly in high tech industries. Microsoft and Intel are but two examples of companies which have been able to become globally dominant in a relatively short period of time by taking advantage of network effects and aggressively expanding into adjacent market space. Theories of efficient firm behavior have not proven satisfactory to justify the results.

Fifth, a “post-Chicago” reformation has questioned parts of the theory underlying the efficiency regime.⁴¹ This questioning has several components. One is derived from game theory and strategic behavior, utilized in the business schools and management consulting firms. This learning suggests that the strategic behavior of firms may frequently be different from the simplistic profit-seeking behavior postulated by classical economics. Another component is derived from dissatisfaction with the concept of efficiency, the meaning of which is not always clear (compare short-term efficiencies with long-term efficiencies; static efficiencies with dynamic efficiencies). A third component is derived from a history of antitrust, which concludes that antitrust has from its earliest days had a multitude of goals, not just economic efficiency.⁴²

Sixth, the political basis for antitrust has been shifting. With rare exceptions (e.g., in 1912-1914), antitrust has not had much political salience. To the extent that it had a constituency, it was primarily to be found in the small business and consumer

Economies,” 23 Brooklyn Journal of International Law 403 (1997).

⁴¹ See John W. Kwoka, Jr. and Lawrence J. White (Eds.), *The Antitrust Revolution* (3rd Ed.) (N.Y.: Oxford University Press, 1999) at 4: “[Post-Chicago economics] has gained acceptance as an intellectually rigorous alternative approach to antitrust. It represents a significant counterweight to the views that have dominated the past twenty years, with fundamentally different policy implications and with increasing impact on antitrust enforcement and court decisions.”

⁴² Robert H. Lande, “Beyond Chicago: Will Activist Antitrust Rise Again?” 39 *Antitrust Bulletin* 1 (1994); Lande, *supra* note 15.

communities. Antitrust's opposition came largely from big business and laissez faire economists. Today, the situation is changing. The large and long-lasting merger wave and the landmark Microsoft case have focused public attention on antitrust to a greater extent than any time since the ATT divestiture agreement.⁴³

Consumer groups have intensified their interest, recognizing that consumers are injured when competition is not vigorous. Organized labor has become interested in antitrust as a response to the downsizing and destabilizing effects of the merger wave. Small businesses seek antitrust protection from mergers and vertical restraints which threaten their ability to compete on the merits (an example being the opposition of the independent booksellers to the acquisition of their largest wholesale distributor by their largest competitor). Even relatively large companies have increasingly found it appropriate to support antitrust because of the strategic assistance it can give them in their fight to survive against a dominant rival. (Consider that the opponents of Microsoft have created the 'Pro-Competition' coalition;⁴⁴ that American Express and Discover have assisted the Division in its investigation and suit against MasterCard and Visa; that Pepsi Cola has brought a private antitrust action against Coca Cola.) State attorney generals, seeing a gap in enforcement and finding political benefit in pursuing antitrust cases, have responded to the political potential that is latent in antitrust.

Seventh, the federal antitrust budget has been changing. Between 1970 and 1997, the total budgets of the FTC and the Division grew from \$102 million to \$174 million in constant (1992) dollars. This represents a 70.6% overall increase and an annual rate of growth of 2%.⁴⁵ But this growth masks the substantial ups and downs that have occurred. The peak budget occurred in 1977. This was followed by more than

⁴³ See *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982).

⁴⁴ This is described at the coalition's home page, www.procompetition.org.

⁴⁵ Kwoka, *Id.*

a decade of decline, including the Reagan era of very dramatic cutbacks. A steady recovery began in 1990, but staffing levels have not yet caught up with where they were in 1980.

The two agencies have not been treated as twins. From 1970-1997, the Division budget grew by 151%, while the FTC's budget grew by only 32%.⁴⁶ For the last several years, the Division and the FTC have had roughly equal funding, but only half of the FTC's funding has been allocated to antitrust. Thus, it is accurate to say that roughly 2/3's of the federal antitrust mission is carried by the Justice Department.

The Antitrust Division in 1980 had a staff of 982. This declined to as low as 509 in 1989. Since then, it has gradually climbed back to 846. The number of attorneys in the Division was 456 in 1980. It dipped to 229 in 1989 and was 363 in 1998. One might have expected that the drop in attorneys would be offset by a growth in the number of economists, in that the influence of economists and economic analysis was increasing during this period. The number of economists was 47 in 1980; it had only grown to 54 in 1998. The occupational category that has grown is that of paralegal, which increased (as a matter of choice by the Division) from 53 in 1989 to 185 in 1998.

The FTC's staff included 1719 Full-Time Equivalents in FY 1980. This was cut precipitously to a low of 894 in F.Y. 1989. It grew slowly upward to 979 in F.Y. 1997.⁴⁷ Information on the Maintaining Competition Mission was obtained for the years 1990 through 1998 (estimate).⁴⁸ The actual obligations budget grew from \$34.4 million in F.Y. 1990 to \$55.6 million (56%, unadjusted for inflation) and the number of Full-Time Equivalents grew from 441 in 1990 to 458 in 1998 (4%).

For Fiscal Year 1999, Congress increased the Antitrust Division's budget by

⁴⁶ Kwoka, Id.

⁴⁷ FTC, *Anticipating the 21st Century*, Spring, 1997.

⁴⁸ FTC, *Actual Obligations and Full-Time Equivalents*, updated May 12, 1998, at www.FTC.Gov .

5.1%, to \$98,275,000 (an increase of 8 workyears) and increased the FTC's overall budget by almost 10%, to \$116,700,000. Much of the FTC's increase was directed, however, to internet fraud and a consumer response center, rather than to antitrust.

The federal antitrust mission is a government function that more than pays for itself. The premerger notification program includes filing fees of \$45,000 paid by each of the merging parties. These fees now supply almost 100% of the two agencies' 1999 budgets (including the FTC's consumer protection budget). The FY 2000 President's Budget takes no money from the General Fund, relying entirely on premerger filing fees.

By law, fees collected by the agencies in conjunction with the receipt of premerger notifications filed under the Hart-Scott-Rodino Act are for the exclusive use of the two antitrust enforcement agencies.⁴⁹ Thus, no program or priority other than antitrust enforcement has any expectation of receiving these funds, and—to the extent that filing fees are sufficient-- Congress need not take anything away from anyone else to fund antitrust.

In addition to the filing fees, the Justice Department obtains criminal fines in antitrust cases, against both individuals and corporations. The average annual total for 1997, 1998, and 1999 (estimated) is \$118 million, i.e., \$10 million more than the Division's budget. In 1999, the estimates proved grossly inadequate, as the Justice Department obtained record-setting fines in several international cartels. In fact, by the third quarter, fines had exceeded \$1 billion. These fines go into a special fund for

⁴⁹ See Pub. L. No. 101-162, sec. 605, 103 Stat. 1031 (1989), as amended by Pub. L. No. 101-302, Title II, 104 Stat. 217 (1990) ("Fees collected for [Hart-Scott-Rodino filings] shall be divided evenly between and credited to the appropriations, Federal Trade Commission, 'Salaries and Expenses' and Department of Justice, 'Salaries and Expenses, Antitrust Division'...*Provided further*, That fees made available to the Federal Trade Commission and the Antitrust Division herein shall remain available until expended."). Filing fees were initially proposed by Senator Howard Metzenbaum as a method of supplementing antitrust revenues, beginning in fiscal year 1990. The funds are split evenly between the Antitrust Division and the Federal Trade Commission, although the FTC uses some of the funding for consumer protection.

compensating victims of crime.

Finally, any consideration of the costs revenue sources of antitrust ought also to mention the savings to the American public which accrue from successful antitrust actions. There is, in general, relatively little data on this, although there is much theory as to the reasons we think there are large benefits. Based on detailed econometric work done by the FTC after it stopped the merger of Office Depot and Staples in 1977, a single case can save consumers as much as the combined cost of the FTC and Antitrust Division –for five years!⁵⁰

VI. WILL ANTITRUST HAVE A POST-CHICAGO FUTURE?

The previous Section shows that, after a generation of decline, antitrust appears to be making a comeback. But who will actually push an activist agenda for antitrust?

The antitrust constituency used to be led by small business, but rarely is that the case now. Today's "entrepreneur," taught in business school to focus even from start-up on an exit strategy, seemingly can't wait to be bought out by someone larger. This mentality is not likely to make antitrust a high priority.

By contrast, in many instances large second-tier companies seek antitrust help in their fight against a dominant player. Pepsi brings a civil antitrust suit against Coke. Netscape feeds information to Joel Klein. Such companies—along with companies that want to participate on a level playing field in deregulated markets—have the potential of becoming advocates of the institutions of antitrust.

Interestingly, organized labor, which historically has not been particularly supportive of antitrust, has become increasingly concerned about mergers. After all, it is often union employees who are downsized out of the merged company and there are

⁵⁰ Robert Pitofsky, "An Overview of FTC Antitrust Enforcement," Prepared Statement Before the Committee on the Judiciary, U.S. House of Representatives, Nov. 5, 1997.

fewer companies left to bid for an employee's specialized skills.

The antitrust plaintiffs' bar has the potential to supplement federal and state antitrust resources by taking on the role of private attorneys general. Their interests and those of consumers usually coincide. But this sector of the bar is much less organized than the defendants' bar and tends to be comprised of mavericks and individualists who are less likely, by nature, to join forces. All too often their reaction to the decline of antitrust has been to flee to other fields of law, such as securities litigation.

Many in the defense bar are allied with conservative foundations and the leaders of big business who have a stake in cutting antitrust back. Their institutions have dominated Washington for a quarter of the century. Three of the largest—The American Enterprise Institute, Heritage Foundation, and Cato Institute—each reportedly spends close to \$30 million per year, much of it on competition-related issues. They have helped cause the substantial reductions in federal antitrust resources since the 1970's.

Consumer groups are today the primary political supporters of antitrust. They recognize that free markets work best for consumers when there is active antitrust enforcement to ensure the market is free to offer consumers the choices they desire. Even those consumer advocates who would in their hearts prefer regulation understand that this will not happen, and so they adopt antitrust as a second-best solution.

Despite fact that one side is well organized and well funded and the other side is neither, recent years have seen real signs of antitrust life at the Justice Department, the FTC, and in many States. But, the advocates of constricted antitrust make their political donations and otherwise promote their views. How long will it be before the Joel Kleins and Bob Pitofskys are replaced by faceless, comparatively passive enforcers—or even worse, by Chicago School ideologues? How can supporters of vigorous antitrust take advantage of the current antitrust moment? Three things are required.

First, the forces which have a current or latent interest in robust antitrust must

effectively coalesce.

Second, the public must be educated as to antitrust's value. For example, how many are aware that when the FTC blocked the proposed merger between Staples and Office Depot, the annual savings for consumers was approximately equal to the annual federal budget for antitrust?

And third, politicians at the federal and state levels must be convinced that vigorous antitrust is a bipartisan, mainstream capitalist issue, and therefore they should significantly increase the public resources devoted to protecting competition.

The American Antitrust Institute (AAI) was created earlier this year to help coalesce, focus, and energize these forces.⁵¹ A small, independent non-profit organization whose mission is to develop a centrist/left coalition of supporters of antitrust, the AAI draws on the brainpower of a growing board of advisors. This already includes Alfred Kahn, the father of deregulation; Howard Metzenbaum, the former chair of the Senate Antitrust Subcommittee and current chair of the Consumers Federation of America; several entrepreneurs; and a variety of antitrust law professors, private practitioners, and economists. All are committed to a post-Chicago reconstruction of antitrust.

Early initiatives of the AAI have involved the airline and energy industries. When the Department of Transportation proposed rules for dealing with predation at hub terminals, AAI endorsed the effort, providing an explanation for why predation is an appropriate subject for antitrust-type scrutiny (in the face of the Chicago school's bewildering success in labelling price predation as a virtual impossibility). The AAI offered a creative "safe harbor" alternative which would permit dominant airlines to cut prices as low as they want, provided the low prices are guaranteed to stay in effect for a substantial period of time.

⁵¹ See www.antitrustinstitute.org.

When the Federal Energy Regulation Commission asked for comments on its proposed merger guidelines, AAI responded by calling for a moratorium on utility mergers until the infrastructure could be built for assuring competition in a deregulated electricity market. In view of what has been learned about the deregulation process in other industries, the AAI said, FERC will have to reinvent itself for antitrust responsibilities.

The AAI has also gone to bat for increased resources for the federal antitrust agencies. It recently provided an analytical memorandum to the Congressional Conference Committee working on the DOJ and FTC budgets. As part of its education mission, the AAI on October 30 conducted its first antitrust briefing for business and legal journalists, with Advisory Board members William Kovacic (George Washington University Law School) and Stephen Calkins (Wayne State University Law School) joining the two co-authors of this Article in a panel presentation on antitrust stories to follow over the next six months.

Among the projects the AAI is currently working on are: (1) continued participation in air transportation and electricity restructuring issues (2) proposals to strengthen the federal merger guidelines; (3) model state indirect purchaser legislation; (4) an analytic framework that will help identify non-traditional yet anti-consumer collusive activity, (5) a research agenda for antitrust academics, and (6) development of a position paper on federal antitrust resources in fiscal year 2000.

Antitrust, a lynch pin of competitive capitalism, rests on a solid, bipartisan tradition. Other than being outmoded by the development of new technologies, antitrust has become ever more relevant. Today we are participating in a post-Chicago reconstruction that may finally give antitrust a broad institutional base it so desperately needs.

CONCLUSION

We have painted a portrait of antitrust and competition policy in the United States, from the common law era, through the Sherman Act of 1890, to the present. We have shown that antitrust has rested on a remarkable degree of bipartisan political support. When the nation has been in crisis of war or unprecedented economic depression, it has sometimes backed off from antitrust, experimenting with alternative models of state-business relations. But the United States always came back to reliance on antitrust. Nonetheless, the content of antitrust has not remained static.

Among the factors responsible for the dynamics of competition policy have been: general attitudes toward the relationship between the state and markets; shifting coalitions behind or against various antitrust policies; changing economic environment and structural changes in the economy; developments in economic knowledge and theory; the personal impact of various political leaders; and occupational sociology within the enforcement agencies as lawyers and economists (of various schools) jockey for influence. As nations develop their own institutions for competition policy, they might well find in the rich historical experience of the United States a number of useful hints that can be assimilated into their planning.

