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# Post-Chicago School Paradigm Emerges: A New Foundation For Antitrust Law

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## A NEW FOUNDATION FOR ANTITRUST LAW

After more than a decade of decline, antitrust appears to be on the mend. While Department of Justice antitrust chief Joel Klein is not yet as famous as Monica Lewinsky, the Microsoft case has become a topic of table conversation, and Aunt Betty wants to know if the merger wave means she will ultimately have to do all her shopping at one store.

What drives the resurgence of antitrust? Will the public's recent fascination with monopoly and mergers be converted into a sustainable base of political support for a more competitive economy in the 21st century?

The first driving force is the tidal wave of mergers. The number of federal premerger filings has risen from 1, 529 in 1991 to an estimated 4, 500 this year, and according to Federal Trade Commission Chairman Robert Pitofsky, the market value of merger transactions this year could exceed \$2 trillion, compared to \$600 billion for the peak year (1989) during the merger wave of the 1980s. As a result, some markets are becoming significantly more concentrated. Economic theory tells us that collusion and other forms of competition-reducing behavior might well increase.

Second, as new technologies emerge, monopolies are being created in markets that didn't even exist a decade ago. Predictions that today's high-tech information age has no need for antitrust have proven to be embarrassingly off the mark. Battles are being fought in industry after industry as the new high-tech monopolists strategize to prolong their reigns. The most notable example is the Microsoft case, with its potential for determining who will control the Internet for the foreseeable future.

Third, deregulation has brought sudden and dramatic change to many industries, whose players have had to adjust to a culture based on free market competition rather than cozy cooperation and regulated behavior.

The trade-off that supported deregulation was that direct economic regulation by government would be replaced by market forces reinforced and invigorated by antitrust. It now seems clear that antitrust has not always played its intended role, and critics are beginning to formulate an either/or mandate: Either make these industries work competitively in the consumer's interest by the vigorous application of antitrust, or go back to direct government regulation.

Fourth, there is a growing consensus that the laissez faire reforms of the Chicago School, which have dominated the antitrust field since 1980, went too far. For example, many believe that the virtual absence of merger enforcement in the airline industry, caused in part by the application of the now discredited contestability theory, led to many monopolistic markets.

#### ACTIVISTS HAVE CHANGED

There has been a backlash by post-Chicago scholars who are planting the seeds of what may become an antitrust renaissance. These scholars are writing in the hope that their ideas will one day have as much influence as the ideas of Robert Bork, Richard Posner, and other Chicago School thinkers did in the 1980s.

Although the merger trend may be slowed somewhat during the current stock market correction and the turmoil on Wall Street, these driving forces will remain in place.

But who will actually push an activist agenda for antitrust?

The antitrust constituency used to be led by small business, but that's rarely 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.

There are many other relevant sectors. In many instances, large second-tier companies are seeking antitrust help in their fight against a dominant player. Pepsi brings a civil antitrust suit against Coke. Netscape feeds information to Joel Klein at Justice. Such companies--along with those that want to participate on a level playing field in deregulated markets--could become the newest and best-organized advocates 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 a merged company, and subsequently, there are fewer companies left to bid for an employee's specialized skills.

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

In the antitrust defense bar, many 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 a century. The American

Enterprise Institute, the Heritage Foundation, and the 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 1970s.

Consumer groups turn out to be the primary political supporters of antitrust today. They recognize that free markets work best when there is active antitrust enforcement to ensure that 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 thus adopt antitrust as a second-best solution.

Even though big business and the big think tanks are well-organized and well-funded and their opponents are not, recent years have seen real signs of antitrust life at the Justice Department, at the FTC, and among state enforcers.

But in the face of the position papers and the political donations of their opponents, how long will it be before the Joel Kleins and Bob Pitofskys are replaced at the helm by faceless, comparatively passive enforcers--or even worse, by Chicago School ideologues? How can supporters of vigorous antitrust take advantage of the current moment? Three things are required.

First, the forces that have a current or latent interest in robust antitrust must effectively coalesce.

Second, the public must be educated about the value of antitrust. How many know that when the FTC blocked the proposed merger between Staples and Office Depot, the government's estimate of the annual savings for consumers was approximately equal to the annual federal budget for antitrust?

Third, politicians at the federal and state levels must be convinced that vigorous antitrust enforcement is a bipartisan, mainstream capitalist issue, and 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. A small, independent nonprofit 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 advisers. This already includes Alfred Kahn, the father of deregulation; Howard Metzenbaum, the former chair of the Senate antitrust subcommittee and current chair of the Consumer 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, the 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 labeling price predation as a virtual impossibility). The AAI offered a creative safe harbor alternative that 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.

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

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 nontraditional 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 linchpin of competitive capitalism, rests on a solid, bipartisan tradition. Rather 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 the broad institutional base it so desperately needs.

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