THE POLITICS OF FEDERAL ANTITRUST ENFORCEMENT

WILLIAM J. BAER
DAVID A. BALTO*

This symposium considers the impact of politics on antitrust enforcement by asking whether antitrust enforcement is corrupted by politics. Fred McChesney, although opting for less pejorative terminology, answers in the affirmative. He argues that the antitrust laws were established as a child of special-interest politics and that enforcement continues to be driven, as in regulated industries, by political pressure.[1]

We take the contrary view. While we concede that politics obviously plays a role in antitrust—after all, the antitrust laws were created by politicians and are enforced by political appointees[2]—McChesney's public choice argument ultimately fails because there is little credible evidence that politics drives enforcement. To the contrary, experience suggests that recent antitrust enforcement, which has been marked by both analytical rigor and consistency, should bolster public confidence that politics does not improperly influence enforcement decisions.[3]

---

* William J. Baer is the Former Director, Bureau of Competition, Federal Trade Commission. David A. Balto is the Assistant Director of the Office of Policy and Evaluation in the Bureau of Competition. The ideas expressed in this article are the authors' own and not necessarily those of the Commission or any Commissioner. This article expands upon oral remarks delivered at the Federalist Society Eighteenth Annual Student Symposium at The University of Chicago Law School on April 9-10, 1999.

1. *See* Fred S. McChesney, *Economics Versus Politics in Antitrust*, 23 HARV. J.L. & PUB. POL'Y 133 (1999).

2. Two agencies share jurisdiction over the federal antitrust laws. The Federal Trade Commission ("FTC") consists of five commissioners appointed by the president for seven-year terms, and no more than three can be from any political party. The Antitrust Division of the Department of Justice ("DOJ") is presided over by an assistant attorney general who is appointed by, and serves at the pleasure of, the president. Both the commissioners and the assistant attorney general must be confirmed by the Senate.

3. *See generally* Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713 (1997) (arguing that antitrust law is best understood as a way of protecting the variety of consumer

To be sure, the antitrust laws are the product of a political system. They were born out of politics, and antitrust policy over the years has been influenced by elections and larger political trends. Politics, in its broadest sense, *should* affect antitrust policy, just as it affects every other important public policy issue in the United States, be it international trade, health care, or defense. Politics, as the science of government, shapes the way our elected and appointed officials do their jobs every day. Without the pressure of political forces, government would not be accountable.

Professor McChesney argues that political influence *improperly* affects individual enforcement decisions. His approach is based in part on a body of scholarly work teaching that any economic regulatory policy inevitably fails to serve the public interest, either because the law behind the policy was initially designed to further some private interests over others[4] or because the regulatory authorities have been captured over time by those upon whom they were supposed to impose the public interest.[5] Supporters of both theories assert that cases are brought at the behest of interested parties in conjunction with congressional and executive office pressures from political sponsors.

We argue in this paper that political pressure does not motivate antitrust enforcement. Public interest considerations do. Section II delves into the background of the antitrust laws and considers the political content inherent in the antitrust laws. Section III discusses early enforcement policies, which sometimes were based on political ideas of competitive harm. Section IV considers the evolution of modern antitrust enforcement into a more coherent, economically sound policy that courts can understand and embrace. Section V looks at the theory and evidence behind the public choice arguments.

I. ENACTMENT OF THE ANTITRUST LAWS

Politics played an important role in the early history of antitrust. The late 1800s were a period of rapid economic

---

options in the marketplace).

4. *See* Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. 335, 341-43 (1974).

5. *See* Thomas J. DiLorenzo, *The Origins of Antitrust: An Interest-Group Perspective*, 5 INT'L REV. L. & ECON. 73 (1985).

growth and the beginnings of a technological revolution in manufacturing, distribution, and marketing. The American economy underwent fundamental structural changes. Economies of scale became more important in manufacturing industries due to the widespread adoption of standardized interchangeable parts and continuous processing.[6] Falling transportation costs enabled manufacturers and retailers to grow as they became able to serve ever-larger geographic markets. Fierce competition for these regional or national markets sometimes gave way to consolidation or collusive behavior. With almost no government regulation of the competitive environment, cartels were formed in many major industries, including oil, sugar, tobacco, and railroads.[7] Many of these cartels were quite successful in reducing output and raising prices to consumers.[8]

This swift accumulation and abuse of market power provoked a strong political reaction. Numerous state antitrust laws were enacted in response to these commercial trusts, which were thought to be otherwise beyond any effective public control.[9] The effectiveness of state statutes was hampered, however, by jurisdictional limitations. The federal courts consistently struck down state statutes that attempted to regulate commerce between the states.[10] In 1890, Congress passed the Sherman Act,[11] a broad proscription against

---

6. *See* STUART BRUCHEY, THE WEALTH OF THE NATION: AN ECONOMIC HISTORY OF THE UNITED STATES 116-19 (1988).

7. *See generally* HANS THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION (1954).

8. Many of the industries dominated by trusts actually experienced expanding output and falling prices in the late 1800s. *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 96-98 (1982). This fact does not mean, however, that the trusts were unable to exercise market power. In any period of rapid technological change, it is likely that prices will fall and output will expand whether or not market power is being abused. The question is whether that abuse of market power has caused prices and output to diverge from competitive levels. This is currently an important issue in the application of the antitrust laws to high technology industries.

9. *See* James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257 (1989).

10. *See, e.g.*, Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557 (1886) (prohibiting state regulation of interstate rail shipments); THORELLI, *supra* note 7, at 107 ("By 1890 it was plain that the federal courts, through the interpretation of the due process and interstate commerce clauses, intended to review and control the legislative enactments of the states, especially as they related to the ownership, operation, regulation, control and disposition of private property.").

11. 15 U.S.C. §§ 1-7 (1994).

collective and unilateral anticompetitive practices. Early in the twentieth century, the Clayton Act[12] and the Federal Trade Commission Act[13] were enacted to militate against the apparent ineffectiveness of the Sherman Act in asserting control over certain activities of large corporations.

Pressure for the enactment of the antitrust laws came from the grass roots, beginning with Southern and Western farmers and spreading to consumers in urban areas.[14] Some commentators, however, have characterized the enactment of the antitrust laws as a special interest process, with small businessmen, who wanted protection against larger competitors, providing the impetus for the laws.[15] While pressure from small business interests was certainly a factor, consumer interests were also aligned with the interests of the farmers, who wanted protection against railroad cartels. Consumers also rebelled against higher prices in other markets where competition was stifled by collusive arrangements.[16] The trusts of the late nineteenth century were widely regarded as "a new form of tyranny" that other market participants were powerless to stand against.[17] Justice Brandeis, writing before his appointment to the court, characterized the purpose of trusts as "usually and mainly one of monopoly."[18] Furthermore, in the Presidential election of 1888, the platform of every major political party contained an antitrust plank—strong evidence that the demand for these laws was widespread and that the Sherman Act was not a response to

12. 15 U.S.C. §§ 12-27 (1994).

13. 15 U.S.C. §§ 41-58 (1994).

14. *See* THORELLI, *supra* note 7, at 58-62.

15. *See* WILLIAM F. BAXTER, *The Political Economy of Antitrust, in* THE POLITICAL ECONOMY OF ANTITRUST: PRINCIPAL PAPER BY WILLIAM BAXTER 8 (Robert D. Tollison ed., 1980); DiLorenzo, *supra* note 5, at 76.

16. *See* THORELLI, *supra* note 7, at 138-52 (discussing the non-business groups, including farmers, labor, religious groups, rural newspapers, and academics, that opposed the trusts before 1890); *see also* George J. Stigler, *The Origin of the Sherman Act*, 14 J. LEGAL STUD. 1, 7 (1985) (finding that the vote in Congress on the Sherman Act provides only "modest support for the view that the Sherman Act came from small business interests or that opposition came from areas with potential monopolizable industries, or both").

17. 2 JAMES BRYCE, THE AMERICAN COMMONWEALTH 407 (1888), *cited in* THORELLI, *supra* note 7, at 54.

18. Louis Brandeis, *Lecture Notes for a Course on Business Law* 320-21 (1895), *cited in* THOMAS K. MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN 95 (1984).

narrow special interest pressure.[19] The Sherman Act debate in Congress showed overwhelming concern for consumers.[20] The votes in Congress on the Sherman Act likewise illustrate the broad public support for antitrust legislation. The House vote for passage was 242–0, and the Senate vote was 52–1.[21]

Widespread political interest in the antitrust laws continued for the first half of the twentieth century, resulting in additional legislative action. The 1912 presidential election was in large part a referendum on government control of large corporations, as Wilson's victory presaged passage of the Clayton and FTC Acts in 1914. In 1936, the Robinson-Patman Act[22] was passed as an amendment to section 2 of the Clayton Act. In 1950, Congress substantially reshaped section 7 of the Clayton Act to strengthen the law against mergers and acquisitions, in response to fears that the increasing concentration of business would have dire political consequences. As FTC Chairman Pitofsky has written, "A striking feature of the legislative history of amended section 7 was the widely-shared perception of danger to the political well-being of the country and its citizens stemming from the merger movement."[23] In more recent years, bipartisan support has continued for such legislation as the National Cooperative Research and Production Act[24] and the Export Trading Company Act.[25]

II. EARLY ENFORCEMENT OF THE ANTITRUST LAWS

Just because antitrust enforcement originated in broad political support, however, does not mean that our argument

19. *See* ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 61-66 (1978) (arguing that Congress's intent in passing the Sherman Act was to promote consumer welfare).

20. *See* Lande, *supra* note 8, at 86-93.

21. *See* Stigler, *supra* note 16, at 5.

22. 15 U.S.C. §§ 13-13b, 21a (1994).

23. Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1064 (1979). According to Pitofsky, antitrust policy has always held that an "overriding political concern is that if the free-market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs." *Id.* at 1051. *See also* Lande, *supra* note 8, at 96-105, 118-20, 134-40.

24. 15 U.S.C. § 4301-4305 (1994).

25. 15 U.S.C. § 4001-4021 (1994).

against inappropriate political influence as the prime mover of antitrust enforcement can rest. Even laws enacted for appropriate and necessary purposes can still be abused by improper enforcement.

Looking back, one must concede that the evolution of antitrust enforcement did not always proceed in a linear fashion from its populist roots. Early enforcement was sometimes based on formalistic adherence to presumptions, and it lacked an understanding of how markets work. At times, the fact that vigorous competition creates both winners and losers failed to be adequately appreciated, leading to confusion about whether the antitrust laws were supposed to protect competitors or consumers.

There are several examples of cases brought without hard evidence of harm to consumers. A number of 1960s merger cases, while not specifically motivated by political pressure, would not be brought under today's more rigorous analytical enforcement model.[26] For instance, in the *United States v. Von's Grocery Co.*[27] and *Brown Shoe Co. v. United States*[28] merger cases, the section 7 incipiency standard was used to prohibit, with Supreme Court approval, mergers that probably had little or no effect on competition. In *Von's Grocery*, the Supreme Court struck down a merger of two Los Angeles-based supermarkets that together accounted for 1.4 percent of the stores and 7.5 percent of the sales in the relevant geographic market.[29] It was in *Von's Grocery* that Justice Potter Stewart famously noted that "[t]he sole consistency that I can find is that in litigation under § 7, the Government always wins."[30] In *Brown Shoe*, the Court condemned a horizontal acquisition of two companies engaged in the manufacturing and retailing of shoes even though the merging firms accounted for only 5 percent of the relevant

26. The following discussion of case law in the context of political influence on antitrust enforcement is not meant to indicate that such influence extends to the judiciary. Public choice advocates do not make that argument. Rather, such analysis of case law highlights the importance of these decisions as the ultimate expression of enforcement policies, and the changing nature of judicial decisions illustrates the change in these policies over time.

27. 384 U.S. 270 (1966).

28. 370 U.S. 294 (1962).

29. *See Von's Grocery*, 384 U.S. at 302 (Stewart, J., dissenting).

30. *Id.* at 301.

retail market.[31] In both cases, the Court was concerned about a trend towards concentration, but it ignored important economic factors such as the growth of the automobile and the changing nature of grocery shopping (*Von's Grocery*), and the substantial distributional efficiencies of a national retail brand (*Brown Shoe*).

Similarly, in the analysis of vertical issues, some of the older cases evince a willingness to rely on legal formalism rather than to understand important economic principles. For example, in the 1967 case of *United States v. Arnold, Schwinn & Co.*,[32] the Supreme Court held that a nonprice vertical restraint—the grant of exclusive territories—was per se illegal. In so holding, the Court relied on the ancient common law rule of restraints on alienation and ignored—or was perhaps simply ignorant of, and ignoring—or being ignorant of—the modern economic understanding of efficient vertical distribution practices. To make matters worse, the Supreme Court's message in *Schwinn* was so muddled that the lower courts were unable to apply it consistently over the next decade.[33]

In *Albrecht v. Herald Co.*,[34] the Supreme Court applied a per se prohibition to maximum resale price maintenance. The Court reasoned that if it did not apply such a prohibition, suppliers could discriminate against certain dealers, which could lead to dealers offering fewer services to customers and disguising minimum price fixing.[35] In his dissent, Justice Stewart noted that maximum vertical price fixing could even be procompetitive by preventing dealers from exercising market power over price.[36] Numerous commentators also identified the potential procompetitive benefits of maximum resale price maintenance.[37]

Until the 1970s, there were antitrust decisions that appeared

---

31. *See Brown Shoe*, 370 U.S. at 343-44.

32. 388 U.S. 365 (1967).

33. *See* 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 151-52 (4th ed. 1997); Donald I. Baker, *Vertical Restraints in Times of Change: From White to Schwinn to Where?*, 44 ANTITRUST L.J. 537 (1975).

34. 390 U.S. 145 (1968).

35. *See id.* at 152-53.

36. *See id.* at 168 (Stewart, J., dissenting).

37. *See, e.g.*, PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 340.30b, at 378 n.24 (1998 Supp.); Frank Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886, 887-90 (1981).

to be based on both a populist fear of large corporations and a sense that fair competition required legal protection for many competitors, especially smaller ones. The enforcement agencies and the courts were distrustful of efficiencies, as the *Brown Shoe* case made clear, and fearful of the relentless drive to innovate that was evidenced by firms already enjoying large market shares.

This lack of analytical rigor in antitrust analysis is important because it means that there are no standards with which to evaluate the agencies' actions. The absence of standards does not mean that politics drove individual antitrust decisions, but the lack of analytical rigor did help create an environment in which political influence could more easily affect enforcement.

III. THE EVOLUTION OF ANTITRUST ENFORCEMENT

Federal antitrust enforcement has changed considerably since the early 1970s. The main shift in focus has been that rigorous economic analysis of markets and competition has become the norm for both the agencies and the courts. Scholarly research, much of it initiated by the "Chicago School," exposed the inconsistencies and sloppiness of some prior antitrust thinking.[38] Today, courts and antitrust enforcers rely much less on structural presumptions and more on the consumer welfare standard of anticompetitive harm.[39] A case will not be filed unless there is a compelling anticompetitive justification.

The result is a body of law that relies on certain core principles of neoclassical economic theory and that has widespread political support. The fundamental tenets of modern antitrust enforcement follow.

Hard core, per se offenses such as price fixing and naked

38. Numerous scholars at the University of Chicago, both economists and lawyers, were the prime movers in applying economic theory to the study of law, particularly antitrust law. *See* Richard Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979). The Chicago School generally holds that market-based allocative efficiency should be the only goal of antitrust policy. For a discussion of the evolution of antitrust theory at the University of Chicago, see *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 J.L. & ECON. 163 (Edmund W. Kitch ed., 1983).

39. *See* 1 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 110, at 97 (rev. ed. 1997) ("economic concerns have generally dominated antitrust policy, and trumped competing 'populist' concerns").

horizontal boycotts should be prosecuted. Consumers are harmed when a group of firms can raise prices or restrict output. In such instances, the agencies and courts assume harm from the deeds themselves. Experience has shown this assumption to be valid. In recent years, the Justice Department has filed suit against a number of international cartels that were fixing prices for vitamins, graphite electrodes, and others.[40] A few years earlier, in affirming the Commission's case against the Superior Court Trial Lawyers Association, the Supreme Court did not require a showing of market power where the purpose of a group boycott was to raise prices.[41] In this case, a group of private lawyers who regularly represented indigent defendants agreed among themselves to boycott the government-paid program until the District of Columbia increased hourly rates of compensation.[42] There can be no economic defense for such clearly anticompetitive activities.

Substantial horizontal mergers in concentrated industries should be prohibited where the evidence shows that firms may be able unilaterally or collusively to raise prices or reduce output after the merger. Mergers that create or enhance market power may allow the surviving firms to exercise that power by raising prices or reducing output.[43] Mergers are analyzed by identifying the relevant product and geographic markets of the merging firms, considering the overlap between those products and the resulting increase in concentration, and then determining the likely anticompetitive effects.

Efficiencies are important. Therefore, most vertical relationships should be analyzed under the rule of reason, so that efficiencies can be measured against anticompetitive effects. In setting up distribution systems, manufacturers may place nonprice restrictions on their dealers, such as territorial restrictions or exclusive dealing requirements. These restrictions may be procompetitive because of their ability to decrease transactions costs, restrict "free riding"[44] by certain dealers, or induce extra

40. *See* Gary R. Spratling, *Are the Recent Titanic Fines in Antitrust Cases Just the Tip of the Iceberg?*, Remarks Before the 12th Annual National Institute on White Collar Crime (Mar. 6, 1998).

41. *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 436 (1990).

42. *See id.* at 414.

43. *See* FTC v. Staples, Inc., 970 F. Supp. 1066, 1082-83 (D.D.C. 1997); United States v. Archer-Daniels-Midland Co., 866 F.2d 242, 246 (8th Cir. 1988), *cert. denied*, 493 U.S. 809 (1989).

sales effort by dealers. Because the net economic effect of such nonprice restrictions cannot be determined *a priori*, each case must be judged under the rule of reason so that competitive efficiencies are not lost.

The antitrust laws should protect competition and consumers, not competitors. When competition is protected, consumer welfare will also be protected. This assertion rests on the presumption that efficient, innovative firms will increase profits and market share, and other firms may suffer economic loss. Competition between the surviving efficient firms will then drive prices down toward marginal costs. Loss of profits by an inefficient firm due to legally protected actions of a more efficient firm is not an antitrust concern.[44]

Intellectual property is neither more nor less likely to be abused in an anticompetitive fashion than real property, but its importance to the economy, and the frequent necessity of joint collaboration to maximize efficiencies associated with its creation and use, cautions a measured and reasonable approach in this area. The agencies are now focused on a dynamic economic analysis that considers the effect of commercial actions on innovation as well as the traditional static effects on price and output. This emphasis on how the market will look in the future has important consequences for enforcement decisions. Technological innovation is procompetitive, even if it comes from firms with large market shares.[45]

Acceptance of these core principles by the entire antitrust community has enabled federal and state enforcers to provide the business community and consumers with effective guidance. The transparency of enforcement policies has been important in building support from persons who are impacted by those policies.

Beginning with Assistant Attorney General William Baxter in the early 1980s, the Justice Department and the Federal Trade Commission have issued a series of Guidelines covering mergers, health care, international antitrust law, R&D joint ventures, and intellectual property. The Guidelines are based

44. *See* AREEDA & HOVENKAMP, *supra* note 39, ¶ 113, at 137-40 (discussing the irrelevance of the intent to harm competitors to most antitrust analysis).

45. *See* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 281-82 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); California Computer Products, Inc. v. IBM, 613 F.2d 727, 742 (9th Cir. 1979).

on an understanding of economics and markets that points the way to consistent antitrust enforcement. Over the past twenty years, as economic theory and the agencies' understanding of markets have evolved, so too have the Guidelines. The current set of Merger Guidelines[46]—in place since 1992—raises a much higher threshold for prosecutors than the initial efforts.[47] These Guidelines are the model for the competitive analysis of acquisitions around the world. They reflect the evolution from "wooden rules of universal application . . . [and] provide a more reasoned analysis of the likely competitive effects of individual transactions based on the real-world market circumstances in which those transactions occur."[48] Revisions to these Guidelines over the years—the latest in 1997 clarified the analysis of efficiencies—have consistently raised the bar for enforcement action by requiring the agencies to apply more rigorous analysis before bringing a case. The joint FTC/DOJ Health Care Guidelines of 1996[49] and the Intellectual Property Guidelines of 1995[50] assist the business community in efficiently consolidating and using its resources in these critical areas without worrying about antitrust prosecution in situations where competition has not been harmed. These Guidelines have been widely accepted by the courts, with the result that antitrust enforcement is now sounder and more predictable than ever.[51]

---

46. U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (May 5, 1992) (including the Apr. 8, 1997 revisions to sec. 4 on Efficiencies), *reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,104 (1997).

47. The first set of Merger Guidelines was actually issued in 1968 by the Department of Justice. The 1968 Guidelines remained in place until they were overhauled in 1982, and subsequent revisions have retained the basic structure of the 1982 Guidelines. *See* U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, *supra* note 46, *reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,104 (1997).

48. James F. Rill, Remarks Before the 40th Annual Antitrust Spring Meeting (1992), *in Report from Officialdom: 60 Minutes With the Honorable James F. Rill*, 61 ANTITRUST L.J. 229, 231-32 (1992).

49. U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, STATEMENT OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE (August 28, 1996), *reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,153 (1996).

50. U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (April 6, 1995), *reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,132 (1995).

51. Judges, including appointees of both liberal and conservative presidents, have also embraced the new economic learning in the antitrust sphere. A study of appellate court antitrust decisions by Carter and Reagan appointees shows that "conservative antitrust perspectives have deeply influenced a significant number of Carter appellate judges. This trend reflects a rightward shift in Supreme Court and academic antitrust

The courts have embraced the new economic paradigm as well. Beginning with *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[52] the Supreme Court decided a number of important antitrust cases in which it reinvigorated rule of reason analysis and began to focus on the economic effects of a particular practice rather than on legal formalisms. Only ten years after it had held nonprice vertical restraints per se illegal, the Supreme Court overruled *Schwinn* and held that such restraints should be governed by the rule of reason.[53] Two years later, in *Broadcast Music, Inc. v. CBS*,[54] the Court considered a blanket licensing system for copyrighted music under which the plaintiff broadcast network paid a percentage of network advertising revenues for the right to broadcast any recording. The Court held that the arrangement should be analyzed under the rule of reason.[55] Since the transactions costs of negotiating with individual authors for each song would be prohibitive, the "blanket license developed . . . out of the practical situation in the marketplace . . . ."[56] Thus, the actual economic effect of the licenses was the creation of a product—and competition—where there otherwise would have been neither.

In its most recent resale price maintenance case, the Supreme Court revisited the potential anticompetitive effects from maximum resale price maintenance presented in *Albrecht* and found that "[n]ot only are the potential injuries cited in *Albrecht* less serious than the Court imagined, the per se rule established therein could in fact exacerbate problems related to the unrestrained exercise of market power by monopolist-dealers."[57] Because of "insufficient economic justification for

---

thinking since the early 1970s." William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 FORDHAM L. REV. 49, 56 (1991).

52. 433 U.S. 36 (1977).

53. The Court relied heavily on economic learning showing that "[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." *Id.* at 54. Henceforth, a finding of illegality in a vertical nonprice case "must be based on demonstrable economic effect rather than-as in *Schwinn*-upon formalistic line drawing." *Id.* at 59. Judge Bork noted that "[t]he great virtue of *Sylvania* is not so much that it preserves a method of distribution valuable to consumers . . . but that it displays a far higher degree of economic sophistication . . . and introduces an approach that, generally applied, is capable of making antitrust a rational, proconsumer policy . . . ." BORK, *supra* note 19, at 287.

54. 441 U.S. 1 (1979).

55. *See id.* at 24.

56. *Id.* at 20.

57. State Oil Co. v. Khan, 522 U.S. 3, 18 (1997).

per se invalidation of vertical maximum price fixing,"[58] *Albrecht* was overruled.

A body of antitrust case law that relies on sound economic principles does not always dictate the exoneration of defendants. Certain activities may raise prices or reduce output—if not in all cases, then at least in those where anticompetitive effects outweigh procompetitive effects. Rule of reason analysis allows the courts and the agencies to make this balancing determination. In *Eastman Kodak*,[59] the Supreme Court reiterated that the actual economic effect of the defendant's activities, as shown by the unique facts of each case, should determine how the law should be applied. The Court noted that its

> requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment.[60]

Thus, the Court reasoned, "It [was] clearly reasonable to infer that Kodak ha[d] market power to raise prices and drive out competition . . . since respondents offer[ed] direct evidence that Kodak did so."[61]

How, then, does the evolution of antitrust thinking just described bear on the question of political influence on enforcement decisions? The answer lies in the fact that consistency and predictability of enforcement help insulate the agencies from political pressure. Agency decisions are now more transparent. If an agency initiated an action inconsistent with the Guidelines or other enforcement actions, it would immediately be subjected to countervailing pressures from the press and the public. In addition, the current practice of following previously published and widely disseminated policies provides another layer of support for those policies.

Far from being a conduit for political influence, the antitrust

58. *Id.*
59. 504 U.S. 451 (1992).
60. *Id.* at 468.
61. *Id.* at 477.

laws are actually a significant countervailing force to certain types of political interference in the marketplace.[62] The antitrust laws are not the only statutes that have an impact on markets. Health and safety regulations, along with the police powers of state and local governments, can sometimes replace competition with government-controlled outcomes. The federal antitrust agencies expend considerable resources making sure that any displacement of competition by state regulation is the result of "clearly articulated" state policy,[63] and not a private scheme to cartelize an industry or profession.[64] Absent effective antitrust enforcement, there would greater incentives for the states to interfere with markets through regulation.

The FTC and the DOJ also have long been active in advising state governments and other federal agencies about the competitive consequences of the actions they are contemplating. The agencies have advocated marketplace solutions in numerous filings—including advertising by professionals, slot allocation in airports, antitakeover legislation, and the sale of non-OEM (Original Equipment Manufacturer) auto parts—before state agencies and legislatures that were considering regulatory solutions to perceived market problems. All of these initiatives help keep politics out of the marketplace.[65] As Judge Bork has noted, "in this area, antitrust can not only perform a valuable service but, as a by-product, can also contribute to the integrity and efficiency of administrative processes."[66]

The evolution of enforcement by the FTC and the DOJ has coincided with a change in the way the antitrust laws are perceived by Congress. The last decade has brought

62. *See* Stephen Calkins, *In Praise of Antitrust Litigation*, 72 ST. JOHN'S L. REV. 1, 35 (1998) ("Clear rules . . . help to insulate government enforcement . . . . The response, 'We are law enforcers, enforcing laws that Congress wrote,' is a powerful shield to outside pressure.").

63. *See* Parker v. Brown, 317 U.S. 341 (1943).

64. *See, e.g.*, FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986).

65. *See* Special Committee to Study the Role of the Federal Trade Commission, ABA Section of Antitrust Law, *Kirkpatrick Committee Report*, 58 ANTITRUST L.J. 43, 94 (1989). ("Kirkpatrick Commission") ("The FTC's Competition and Consumer Advocacy Program is one of the most important of the FTC's various projects . . . . It is the potential for the FTC to undo governmentally imposed restraints that lessen consumer welfare, and to prevent their imposition, that warrants the program's continuance and expansion.").

66. BORK, *supra* note 19, at 364.

increasingly bipartisan support for the mainstream work of the enforcement agencies. This was not always the case. In the past, serious attempts to restructure the antitrust laws were motivated by Congressional dissatisfaction with both the enforcement of antitrust laws and with the interpretation of those laws by the courts. For instance, in 1976, Congress, concerned that over time a greater percentage of economic assets was being concentrated in the hands of fewer corporate entities, considered a no-fault monopolization statute that would have substantially changed the way unilateral theories were applied to dominant firms.[67] Along with industrial deconcentration bills that were advocated by some members, these bills may have ultimately led to the restructuring of entire industries.[68] In 1985, congressional concern that merger enforcement was too strict led to a proposal to eliminate section 7 of the Clayton Act and rely instead on section 1 of the Sherman Act to analyze mergers. Strong opposition from the Federal Trade Commission and the Department of Justice led to the abandonment of this effort.[69]

These kinds of radical restructuring proposals are absent from today's legislative climate. Congress' interests in competition these days are instead more likely to be focused on attempts to make industries more market-oriented through deregulation. Serious legislative efforts are underway in electrical generation, transmission, and distribution, banking and other financial services, and telecommunications. For instance, in banking, in 1999 a comprehensive reform bill was

---

67. Senator Phillip Hart of Michigan introduced S. 1167, "The Industrial Reorganization Act," on March 12, 1973. Over the next three years the Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, chaired by Senator Hart, held a series of hearings on the theme of industrial deconcentration. *See The Industrial Reorganization Act: Hearings on S. 1167 before the Subcomm. On Antitrust and Monopoly of the Sen. Comm. On the Judiciary*, 93rd-94th Congress, pts. 1-9 (1973-76).

68. *See id.* at 1, Part 1. Senator Hart noted that "this bill suggests a way to establish competition by outlawing monopolies and oligopolies. It also takes the next step and provides for reorganizing seven significant industries into ones which are more competitive." *Id.*

69. *See* Letter from James C. Miller III, Chairman of the Federal Trade Commission, to James M. Frey, Assistant Director for Legislative Reference, Office of Management and Budget 4-5 (Mar. 28, 1985) ("In light of current knowledge regarding the potential efficiencies that mergers may produce, it is now indeed clear that past merger policies were too harsh .... Merger theory has evolved since then, based on the quantum leaps in antitrust learning, and is now more thoroughly based on hard economic evidence .... Federal antitrust policy regarding mergers reflects this change.").

passed and signed into law which repealed in part the Glass-Steagall Act,[70] which for over 70 years required separation of commercial banking from insurance, securities, and other industries.[71] In the electric power industry, various proposals would mandate retail competition, so that consumers could choose their power supplier. These efforts accompany successful deregulatory legislation in airlines, natural gas, and telephony, among others. Congress has also focused recently on antitrust exemptions—repealing them where not justified by a necessity to encourage competition, and extending them where helpful in promoting efficiencies of collaborative activities. Just last year, Congress partially repealed the antitrust exemption granted to baseball by the Supreme Court in 1922.[72] Congress also enacted recent legislation granting partial protection from the antitrust laws for research and development and manufacturing joint ventures.[73] All this is further evidence that Congress wants enforcement of the antitrust laws to focus on conduct and mergers that are most likely to harm competition, and not to discourage actions that unleash the efficiencies of market forces.

IV. THE PUBLIC CHOICE THEORIST'S CASE

The case for a public interest perspective on antitrust enforcement is strong. The case for the public choice perspective, on the other hand, is mostly anecdotal, and the scant empirical evidence that has been offered is unpersuasive.

Two popular anecdotes for the public choice argument are the *Microsoft* and *Intel* cases. Because the defendants in those cases were the undeniable leaders in two of the most important industries in the economy, microprocessors and PC-based software, the cases engendered the usual commentary about the application of the antitrust laws to high technology industries and the efficiencies that each firm provided in the

70. 12 U.S.C. § 24 (1994).

71. *See* Financial Services Modernization Act of 1999, Pub. L. No. 106-102 (Nov. 12, 1999).

72. *See* Curt Flood Act of 1998, 15 U.S.C.A. § 1 (1998) (partially overruling Federal Baseball Club v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922)).

73. *See* National Cooperative Research and Production Act of 1993, 15 U.S.C. § 4301-05 (1994). By filing notifications with the Federal Trade Commission and the Department of Justice under the act, joint venture parents may limit their antitrust exposure to actual, rather than treble, damages in private antitrust litigation.

marketplace. The cases also generated much commentary about political pressures applied to enforcement agencies, particularly in *Microsoft*, where it was reported that Utah Senator Hatch supported the government, and Washington Senator Gorton supported the defendant.[74]

The fact that important cases engender political interest is unremarkable. It certainly does not show that the cases were politically motivated. Moreover, whatever one thinks of the *Intel*[75] or *Microsoft*[76] cases, it is clear that there is both an economic basis and substantial section 2 precedent for challenging a monopolist's efforts to unfairly exclude potential competitors.[77] The *Microsoft* case also illustrates a fatal contradiction in public choice theory. There is political support for both sides in almost every antitrust case, thus diluting the public choice argument that politics drives enforcement decisions. Public choice advocates conveniently point to political support on one side or the other to support their theory that decisions were politically motivated. They can then argue that any expression of political interest or pressure corrupts the enforcement decision, even if there is no evidence that the decision was actually based on it.

Other anecdotes cited by public choice advocates do not withstand scrutiny. Professor McChesney, for example, cites the attempted takeover of Marathon Oil by Mobil Oil in 1981, claiming that the FTC delayed the deal at the insistence of Senator Metzenbaum because he did not want an out-of-state firm to take over a major Ohio corporation.[78] In fact, the Mobil offer was enjoined by a district court judge in a private action

---

74. *See* William H. Page, *Microsoft and the Public Choice Critique of Antitrust*, 44 ANTITRUST BULL. 5 (1999).

75. *See* Robert Pitofsky, Remarks Announcing *Intel* Settlement, Washington, D.C. (Mar. 17, 1999) (noting that there was no congressional pressure during the *Intel* litigation).

76. The *Microsoft* case is publicly supported by antitrust specialists from Howard Metzenbaum to Robert Bork. *See* Robert Bork, *The Case Against Microsoft, ProComp, The Project to Promote Competition and Innovation in the Digital Age* (Sept. 22, 1999) <http://www.procompetition.org/research/bork.html>; Letter from Howard Metzenbaum, Chairman, Consumer Federation of America to Orrin G. Hatch, Chairman, Senate Judiciary Committee (Oct. 7, 1988) <http://lists.essential.org/1998/info~policy~notes/msg00047.html> (supporting "a new public policy mechanism that prohibits Microsoft's past practices").

77. *See* William J. Baer & David A. Balto, *Antitrust Enforcement and High-Technology Markets*, 5 MICH. TELECOMM. TECH. L. REV. 73, 85-86 (1999).

78. *See* McChesney, *supra* note 1, at 141-42.

brought by Marathon,[79] which ultimately sold itself to U.S. Steel, another out-of-state corporation.

The empirical evidence mustered in support of the public choice argument also lacks staying power. In a 1980s vintage econometric study of FTC merger enforcement decisions, Professor McChesney and his co-authors tested three variables—the degree to which agency lawyers and economists agree on the merits of the case, the level of public and political interest in the case as reflected in articles in the *Wall Street Journal*, and the number of congressional hearings held in the days prior to the decision to sue.[80] Not surprisingly, the authors found a positive correlation between all of these variables and the number of antitrust cases filed by the agency. But what does the study prove? Certainly not that politics drives antitrust enforcement. The results are equally consistent with the view that anticompetitive mergers are likely to draw political scrutiny, public interest, and consensus among FTC lawyers and economists. In other words, the study equally supports the view that politics *reacts* to antitrust enforcement, rather than *drives* it.

Equally unpersuasive are the public choice claims that antitrust enforcement is unnecessary and does not provide any observable benefits. Professor McChesney reiterates the argument that cartels are inherently unstable and will fall of their own accord without government intervention.[81] To make that argument, he must ignore the evidence provided by the recent Justice Department international cartel cases, in which major multinational firms orchestrated price fixing and market division cartels across national boundaries for decades, costing consumers hundreds of millions of dollars in illegal overcharges. In the most recently uncovered cartel, which involved vitamins, the "conspirators actually held 'annual meetings' to fix prices and to carve up world markets, as well as frequent follow-up meetings to ensure compliance with their illegal scheme."[82] This complex conspiracy lasted for almost a

79. Marathon Oil Co. v. Mobil Corp., 530 F. Supp. 315 (N.D.Ohio 1981).

80. Malcolm B. Coate *et al.*, *Bureaucracy and Politics in FTC Merger Enforcement*, 33 J.L. & ECON. 463 (1990).

81. *See* McChesney, *supra* note 1, at 139.

82. Joel I. Klein, Statement on Announcement of Consent Decree on Vitamin Cartel, Washington, D.C. (May 20, 1999). One of the members of the vitamin cartel, Hoffman

decade before it was uncovered.[83] This evidence shows that whatever instability exists in cartels can be overcome by the almost unimaginable riches to be gained by illegally raising prices in an international market with hundreds of millions of consumers.

Merger enforcement also makes a difference. One example is the merger case of *FTC v. Staples, Inc.*[84] In that case, two of only three office supply superstores attempted to merge but were blocked by a district court that issued an injunction at the behest of the Commission.[85] By conservative estimates, the merger would have cost consumers over $250 million a year in higher prices.

To discover the benefits of antitrust enforcement, we need look no further than the successful monopolization case against AT&T.[86] If this case had never been brought, most of us would be paying high prices for the privilege of talking on black rotary phones owned and serviced by a monopoly. The competition resulting from the AT&T divestiture has brought forth an explosion of innovation and new products, as well as lower prices.

We could never claim that individual antitrust enforcement efforts are completely devoid of *attempts* at political influence. Targets of hostile takeovers are almost certain to complain to their elected representatives. Competitors often seek political support for their efforts to use the antitrust laws to protect themselves from rivals. However, the Merger Guidelines and current enforcement actions make it easier to keep the focus on consumer welfare.

The appropriate question, then, is not whether attempts are made to influence enforcement but whether such attempts succeed. Experience indicates that agency enforcement decisions and judicial outcomes are consistently and transparently made on the basis of the law, the facts, and sound economics. The public choice theorists have failed to

---

LaRoche, continued its active involvement even after being investigated and forced to pay a $14 million fine in 1997 for its involvement in the citric acid cartel.

83. *See id.*

84. 970 F. Supp. 1066 (D.D.C. 1997).

85. *See id.* at 1069.

86. *See* United States v. AT&T, No. 82-0192 (D.D.C. Jan. 8, 1982) (order issuing competitive impact statement), *enforced*, 552 F. Supp. 131 (D.D.C. 1982) (entering final judgment).

supply the evidence needed to show that politics corrupts enforcement efforts by causing the agencies or the courts to apply the laws without regard to precedent, rigorous economic analysis, or some sense of fairness or consistency.

V. CONCLUSION

Antitrust helps insulate the competitive marketplace from political interference. Enforcement is entrusted to professional agencies that are more rigorous and transparent than ever before in their attempts to protect the competitive process and maximize consumer welfare. The core values of current antitrust enforcement enjoy widespread political support, which helps further diminish the impact of special interest political lobbying.

So the answer to the question of the day is that politics does not corrupt antitrust enforcement. The science of a government that is responsive to the will of the people constantly affects antitrust policy, and rightly so. Over the years, these forces have forged a policy that is consistent, fair, and protective of consumer welfare.