



1995

Antitrust at Century's End

Gary Minda

Follow this and additional works at: <https://scholar.smu.edu/smulr>

Recommended Citation

Gary Minda, *Antitrust at Century's End*, 48 SMU L. Rev. 1749 (1995)
<https://scholar.smu.edu/smulr/vol48/iss5/6>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

ANTITRUST AT CENTURY'S END

Gary Minda*

TABLE OF CONTENTS

I. INTRODUCTION	1749
A. A STORY	1749
B. THE CURRENT PREDICAMENT	1754
II. WHATEVER DID HAPPEN TO THE ANTITRUST MOVEMENT?	1759
A. HOFSTADTER'S THESIS	1759
B. LEGAL PROCESS JURISPRUDENCE AND ANTITRUST	1762
C. THE NEW ANTITRUST MOVEMENT	1768
III. ANTITRUST IN THE POSTINDUSTRIAL ERA	1771
IV. ANTITRUST LAW FOR THE TWENTY-FIRST CENTURY	1776
V. CONCLUSION: SEARCHING FOR ANTITRUST AT CENTURY'S END	1778

I. INTRODUCTION

A. A STORY

IN the winter of 1995 I attended a conference of the Association of American Law Schools ("AALS"),¹ an annual event that offers law professors an opportunity to attend different meetings and lectures on the latest legal trends and pedagogical issues involved in the law school curriculum. My interest was tweaked by the lecture topic for the antitrust and economic regulation section meeting entitled "Antitrust's Special Role in the Law School Curriculum."² Now that promised to be

* Professor of Law, Brooklyn Law School. I would like to greatly acknowledge the continuing generosity of Brooklyn Law School's faculty research stipend program. I would also like to thank Stetson University College of Law for allowing me to be a scholar in residence during which time I authored this essay.

1. Association of American Law Schools Conference, New Orleans, La., Jan. 4-8, 1995.

2. The meeting was held on Jan. 6, 1995. Professor Stephen Calkins (Wayne State University School of Law) served as moderator. Professors Jean Burns (Brigham Young University School of Law), George Hay (Cornell University School of Law), Thomas Morgan (George Washington University National Law Center), Rudy Peritz (New York Law School), and John Wiley (U.C.L.A. Law School) were the principle speakers. William Page (Mississippi College of Law) was the chair and organizer of the meeting.

Professor Page's idea for the program's topic—"Antitrust's Special Role in the Law School Curriculum"—was meant to stimulate interest in the teaching of antitrust at law schools. The speakers addressed the relevance of historical approaches to the teaching of antitrust (Morgan and Peritz), the role of economic analysis (Hay and Burns), the peda-

an interesting meeting, I thought. At the very moment public concern about antitrust enforcement was loosing ground and was on the verge of becoming marginalized³ in the emerging postindustrial era,⁴ antitrust teachers were meeting to discuss the importance of antitrust in legal education.⁵ I was obviously curious to know what the scholars of antitrust

gical problems of teaching antitrust injury (Page), and the importance of ethical considerations in antitrust practice (Wiley). I found the meeting discussion to be interesting and helpful, contrary implications notwithstanding. Sorry, Professor Calkins.

3. See, e.g., Robert Pitofsky, *Antitrust in the Next 100 Years*, 75 CAL. L. REV. 817 (1987) (identifying the emergence of a "minimalist" antitrust enforcement policy). As Professor Pitofsky has explained:

The only matters that regularly attract the attention of the enforcement authorities are cartels, horizontal mergers tending to create a monopoly, and various forms of predation. Other practices and transactions that have been the conventional stuff of antitrust—including all vertical restrictions, price discrimination, vertical and conglomerate mergers, and non-price connected boycotts—are either per se legal or challenged only in exceptional circumstances. Even in the cartel, horizontal merger, and predation cases, enforcement agencies have introduced various exceptions and qualifications into prior law and today tend to resolve most doubts in favor of nonintervention.

Id. at 818. See also Robert Pitofsky, *Airlie House Conference on the Antitrust Alternative: Does Antitrust Have a Future?*, 76 GEO. L.J. 321 (1987). The minimization of antitrust enforcement has accelerated in the face of the realities of global competition. In 1990, for example, the Antitrust Division of the Department of Justice successfully persuaded Congress that a relaxation of antitrust law was necessary to permit domestic corporations to enter into joint production agreements in order to compete more effectively in the global market place. See Alan Murray & Paul M. Barrett, *Bush Aides Urge Antitrust Restrictions Be Eased for U.S. Firms' Joint Ventures*, WALL ST. J., Jan. 22, 1990, at A4.

4. "Postindustrial era" refers to the culmination of social, political, and economic forces now transforming world economies into global markets linked by new informational technologies. The new markets of the postindustrial era represent what Robert Reich has identified as "new organizational webs of high-value enterprise, which are replacing the old core pyramids of high-volume enterprise . . . reaching across the globe." ROBERT B. REICH, *THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST-CENTURY CAPITALISM* 110 (1991).

The postindustrial era signifies the emergence of a new type of social life and a new economic order, which social theorists have called the "postindustrial" or "consumer" society of late capitalism. Fredric Jameson, *Postmodernism and Consumer Society*, in *THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE* 111, 112-13 (Hal Foster, ed. 1983). Key features of the postindustrial era include the following: the increasing importance of multinational corporations and institutions in the economy; the development of an information economy rather than one based on old notions of "production"; economic power resulting from the ability to manipulate information rather than the fact of "ownership"; and the decreasing relevance of the nation-state as the source of power and influence. See *id.* at 113-14.

5. Antitrust law is a unique course in the law school curriculum. It was one of the first courses to offer a truly interdisciplinary approach to the study of law, blending as it does law, history, economics, and politics. I have always thought that antitrust, like labor law, offers law students an extremely important subject for gaining insight about how our legal system has attempted to deal with problems of economic power and collective organization that are not normally discussed in the other subjects taught in the law curriculum. See Gary Minda, *The Common Law, Labor and Antitrust*, 11 INDUS. REL. L.J. 461 (1989). Because antitrust law is uniquely an American phenomenon (no other country has such a similar body of law regulating monopolies and restrictive business practices), the study of antitrust law also offers law students a unique opportunity to gain insight into an important subject for learning about an important American institution. Antitrust law is an important American institution precisely because it is one of the few courses that deals directly and systematically with value-laden issues about the role of the legal system in curbing, as well as facilitating, the exercise of private economic power.

law might have to say about antitrust's significance in an era in which antitrust law, like its distant cousin, labor law,⁶ seems to be exhausted, as a political and legal specialty.⁷

I arrived at the meeting room of the antitrust section early so that I could get a seat up front, thinking that attendance at the meeting might fill the room. The room was large. There were at least a hundred empty chairs neatly lined up facing a large table for speakers. There were seven microphones at the podium facing seven professors of law and I expected that the pending discussions would be a lively event indeed. As the designated starting time drew near, however, I was surprised that so few law teachers came. As I sat there, I wondered where were all the antitrust teachers. Was there a mistake in the program?

The moderator of the meeting, Professor Stephen Calkins of Wayne State University School of Law, opened the meeting with a brief statement. Yes, there had been a mistake; the meeting room had been changed at the last moment in anticipation of a large audience, and the change in the meeting room had not been noted in the program. (I was unaware of this and accidentally walked into the correct meeting room by chance!) The audience was informed that someone would be posted outside the listed meeting room to round up antitrust teachers roaming the halls looking for the antitrust meeting. Apparently, the lost antitrust teachers were never found since the attendance at the meeting never greatly appreciated in size.

As I sat there waiting for the meeting to begin, I thought about all those antitrust teachers "roaming" the halls searching for the antitrust meeting. The image of the lost antitrust teachers seemed somehow to be relevant to the meeting's discussion. It then occurred to me that the position of antitrust law was very much like the position of the lost antitrust teachers searching for the antitrust meeting room. Like the law professors at the law conference, antitrust as a legal and political specialty seems to be in search of its mission and justification in the emerging new

6. See, e.g., Paul Weiler, *Promises To Keep: Securing Workers' Rights To Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) (detailing how collective bargaining law has declined in contemporary society).

7. One measure of antitrust's steady decline is the dramatic decline in antitrust enforcement. See, e.g., U.S. GEN. ACCTG. OFC., REPORT TO THE CHAIRMAN, COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES: CHANGES IN ANTITRUST ENFORCEMENT POLICIES AND ACTIVITIES (1990) (reporting on the dramatic decline of merger notifications challenged by the Antitrust Division during the merger-mania years, 1981-1989); William E. Kovacic, *Steady Reliever at Antitrust*, WALL ST. J., Oct. 10, 1989, at A14 (reporting on the dramatic decline of monopolization suits). See also Walter Adams & James W. Brock, *Antitrust, Ideology, and the Arabesques of Economic Theory*, 66 COLO. L. REV. 257, 259 (1995).

My experience, as well as that of many antitrust law teachers I know, is that teaching the basic course in antitrust at the end of the twentieth century—an era characterized by fast-moving changes brought by globalization, internalization, and technological advancement—is a daunting and frustrating experience. See Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936 (1987); Eleanor M. Fox, *Teaching and Learning Antitrust—Politics, Politics, Casebooks, and Teachers*, 66 N.Y.U. L. REV. 225 (1991).

global world order. The discussion at the AALS antitrust meeting made this even more clear as the program progressed.

As the title to the program, "Antitrust's Special Role in the Law School Curriculum" suggested, the meeting offered the distinguished speakers an opportunity to address a number of interesting issues arising out of the incredible changes in the world following the end of the Cold War and the globalization of the American marketplace. A number of speakers made reference to the pedagogical problems of teaching antitrust law from a body of case law that developed largely during the Cold War period when competition policy was analyzed from a domestic rather than international perspective.

Many of the classic Supreme Court decisions taught in the basic antitrust course, for example, were decided in the 1960s and 1970s when the Cold War policies of monopoly regulation of large firm size seemed to be the primary goal of antitrust.⁸ Most of the leading contemporary decisions—*Sylvania*,⁹ *Maricopa*,¹⁰ *NCAA*,¹¹ *Hyde*,¹² *Aspen*,¹³ *Northwest Wholesale Stationers*,¹⁴ *Matsushita*,¹⁵ and *Sharp*¹⁶—were decided in the late 1970s and 1980s, before the break-up of the Soviet Union and the fall of the Berlin Wall. In the post-Cold War era, antitrust litigation in the Supreme Court dwindled to only a few relatively unimportant and questionable decisions. A number of the speakers at the antitrust meeting lamented that they lacked a meaningful body of post-Cold War era decisions to teach.¹⁷

If that were not enough, speakers also reported on the daunting challenge of teaching the theoretical economic approaches to antitrust analysis, especially those associated with the "Chicago" and "post-Chicago" schools of antitrust economics.¹⁸ The teaching of antitrust law has indeed

8. Indeed, the Supreme Court's antitrust docket, once fertile ground for antitrust scholars, has shrunk to only a few cases decided each term, most of which have involved rather uninteresting and relatively unimportant antitrust issues.

9. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

10. *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982).

11. *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984).

12. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

13. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

14. *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985).

15. *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

16. *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).

17. Perhaps judges are coming to question the presumed logical connection between large firm size, monopoly power, and harmful business practices. Many seem to believe that American corporations need monopoly power in order to compete efficiently in global markets. Competition of foreign trade, a distinctively post-Cold War phenomenon, has also transformed some of the basic ideas of competition which the law has used analytically to deal intelligently with antitrust problems.

18. Since the enactment of the Sherman Antitrust Act of 1890, there have been a succession of theoretical "schools" of antitrust analysis, the most recent one shaped by the antitrust scholarship of Richard A. Posner, Robert Bork, and Frank Easterbrook, which many regard as the work of the "Chicago School" of antitrust economics. See, e.g., ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978); RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976); RICHARD POSNER

posed special challenges given that the theoretical base of antitrust seems to be disintegrating.¹⁹ The "norm-oriented" perspective of the Chicago School approach favoring efficiency analysis has faded in the shadow of the new sophistication of the "fact-oriented" post-Chicago thinking, which has rejected the wisdom of many of the simplifying assumptions of the Chicago School approach.²⁰ The new economic sophistication has

& FRANK H. EASTERBROOK, *ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS* (2d ed. 1981). The Chicago Law School has traditionally established a strong alliance with the economics department at the University. See NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 348-64 (1995). While it is true that the law and economics types at Chicago Law School never really adopted the theoretical stance of Chicago School economists, see RICHARD A. POSNER, *OVERCOMING LAW*, 408, 419-20 (1995), the name "Chicago School" stuck, forever type-casting the work of law and economics scholars associated with the market-oriented analysis of scholars like Henry Simon, Aaron Director, and Ronald Coase.

The speakers at the meeting talked about the difficulty of introducing economic concepts and economic theory to second and third year law students who had been trained in the methods of legal analysis and who were likely to resist the strange new world of economic analysis. One speaker, an economist, said he never explicitly taught economic theory in his antitrust classes for fear of losing future class attendance. At least one person from the audience volunteered, however, that he taught introductory economic analysis in one or two introductory classes and that his experience was that class size never dropped after so doing.

19. A new school of economics, known as the "post-Chicago" School, offers new theories of market behavior and strategic decision making developed from particularized studies of real markets to challenge the ideological orientation of the Chicago School. See, e.g., *Symposium on Post-Chicago Economics*, 63 *ANTITRUST L.J.* 445-695 (1995). Moving from the "norm-oriented" Chicago School approach to the "fact-oriented" post-Chicago approach, with its focus on particularized analysis of specific industries and market practices, has meant that antitrust analysis has become more complicated and daunting in the post-Chicago School era. See, e.g., Lawrence A. Sullivan, *Post-Chicago Economics: Economists, Lawyers, Judges, and Enforcement Officials in a Less Determinate Theoretical World*, 63 *ANTITRUST L.J.* 669, 677, 681 (1995) (arguing that because post-Chicago analysts reject the generalizations of Chicago's deductive theoretical approach, post-Chicagoans offer policy makers and law enforcement decision makers a more complex analysis); Michael S. Jacobs, *The New Sophistication in Antitrust*, 79 *MINN. L. REV.* 1, 53 (1994) (arguing that the "atheoretical complexity" of the post-Chicago approach to antitrust economics poses many practical problems of implementation which will encourage decision makers to return to antitrust's "jurisprudential past."). See also Adams & Brock, *supra* note 7 (arguing that the "revisionist" approach of the Chicago School of antitrust economics is incapable of providing useful insights for judicial antitrust proceedings).

20. See *supra* note 18. For example, post-Chicago analysts have recently questioned the assumptions which Chicagoans have relied upon in concluding that the Supreme Court's theory of leveraging was anti-competitive to the extent that it put into question leveraging by vertically integrated firms with monopoly power to obtain monopoly positions in new markets. See, e.g., POSNER, *supra* note 18, at 8-22, 171-84; BORK, *supra* note 18, at 90-116, 372-82. See also Sullivan, *supra* note 19, at 671-77. The post-Chicago thinking on leveraging rejects the Chicago School's conclusion that leveraging by a vertically integrated dominant firm is efficient, and instead views leveraging as an open-ended indeterminate strategic form of business behavior which may or may not be efficient. See Severin Borenstein et al., *Antitrust Policy in Aftermarkets*, 63 *ANTITRUST L.J.* 455 (1995); Louis Kaplow, *Extension of Monopoly Power through Leverage*, 85 *COLUM. L. REV.* 515 (1985); Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 *ANTITRUST L.J.* 513 (1995); Carl Shapiro, *Aftermarkets and Consumer Welfare: Making Sense of Kodak*, 63 *ANTITRUST L.J.* 483 (1995). The relevant caselaw on leveraging is examined in Lawrence A. Sullivan, *Section 2 of the Sherman Act and Vertical Strategies by Dominant Firms*, 21 *Sw. U. L. REV.* 1227 (1992).

eroded the once uniform assumption of rationality, making it much more difficult to engage theoretical analyses of economic problems.

A number of the speakers ended their discussion by making fond reference to what they called the "great antitrust cases" decided by the Warren Court during the 1960s and 1970s, especially those cases dealing with the monopoly power of the dominant firm.²¹ The speakers referred to this time as an era in which antitrust practice was in its "heyday." During antitrust law's heyday, ethical issues of litigation and settlement, problems of proving antitrust injury, and the role of antitrust attorneys in the protracted antitrust litigation were common problems that were explicitly discussed by some of the speakers.²² I found the discussion of these issues, especially those dealing with the ethical dimension of antitrust practice, to be interesting and stimulating, but I wondered if I had mistakenly walked into a meeting on legal history devoted to antitrust's glorious past.

Indeed, the concluding moments of the antitrust meeting exhibited the somber mood of a funeral wake—there were speeches about the good old days when the deceased was alive and kicking, and many stories were told about the deceased. The speakers spoke with fondness for the good old days—a time when much energy and money was spent in decentralizing the American economy. The discussion seemed to break down into a nostalgiafest devoted to the time when antitrust was a growing legal specialty responsible for the employment of many young lawyers. What the speakers neglected to tell the audience was what happened when the good old days were over.

B. THE CURRENT PREDICAMENT

Antitrust law once reflected a political consensus informed by a general popular distrust of private monopoly power. The popular consensus that launched the antitrust movement and led to the enactment of the

21. See, e.g., *United States v. Topco Assocs.*, 405 U.S. 596 (1972); *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); *FTC v. Brown Shoe, Co.*, 384 U.S. 316 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *United States v. American Telephone & Telegraph Co.*, 524 F. Supp. 1336 (D.D.C. 1981).

22. During the 1970s, when antitrust litigation was on the upswing, many large and protracted suits were brought involving ethical and practical problems of case management. The litigation involved in *Berkey Photo*, 444 U.S. at 1093, for example, raised serious ethical issues involving the destruction of documents relevant to the litigation that were never produced and false representations by a lawyer seeking to keep this fact secret from the judiciary (comment by Professor Wiley discussing the "Peck Incident.") See JAMES B. STEWART, *THE PARTNERS: INSIDE AMERICA'S MOST POWERFUL LAW FIRMS* ch. 8 (1983). Some of the issues were also particularly troublesome in the IBM cases which had dominated the attention of the Antitrust Division of the Justice Department during much of the sixties and seventies. See *id.* ch.2. For a discussion of the legal issues involved in the IBM cases, see Lawrence A. Sullivan, *Monopolization: Corporate Strategy, the IBM Cases, and the Transformation of the Law*, 60 TEX. L. REV. 587, 599-604 (1982).

Sherman Antitrust Act²³ was erected upon a rough political ideal of the social value of curbing the excesses of private economic power. The Sherman Act was thus the product of a political and social movement, rather than a legal or economic convention, that was "characteristically American."²⁴ The primary goal of the legislation was premised upon a political judgment that decentralized market power was essential to a free society.²⁵ This vision of antitrust—the traditional understanding—assumed that antitrust should commit itself to the goal of decentralizing private economic power.²⁶ The political passions that once fueled the antitrust movement, however, quickly faded as lawyers and economists transformed antitrust into a legal specialty.²⁷

As a legal specialty, antitrust law peaked during the Warren Court era and has steadily declined ever since. The decline of antitrust law can be traced to a number of factors, but certainly one major source has been the change in antitrust enforcement policies. During the 1980s, policy makers moved toward what Robert Pitofsky called a "minimalist" policy of non-enforcement.²⁸ In the last twenty years, antitrust enforcement has declined substantially such that "[t]he antitrust laws are enforced more leniently today than they have been for the last fifty years."²⁹ While private treble damage litigation continues to be a lucrative enterprise for a handful of antitrust trial lawyers, private litigation peaked in the 1970s³⁰ and every indication suggests that this trend of declining private litigation will only accelerate in the future.³¹ Public and private antitrust enforcement is thus at an all-time "minimal" level.

23. 15 U.S.C. §§ 1-7 (1988). For a history of the period leading to the enactment of the Act, see HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 227 (1955).

24. Richard Hofstadter, *What Happened to the Antitrust Movement, in THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 188, 195 (1965). See also, *infra* notes 48-68 and accompanying text.

25. Hofstadter, *supra* note 24, at 205. Of three legislative objectives attributed to the Sherman Act—economic, political, and social—only the political and social goals seem to have enjoyed a general consensus in American society. The economic goal, that regulation of monopoly power promote economic efficiency, has been "cluttered with uncertainties, so much so that it seems to be no exaggeration to regard antitrust as being essentially a political rather than an economic enterprise." *Id.* at 200.

26. See Walter Adams & James W. Brock, *The Antitrust Vision and Its Revisionist Critics*, 35 N.Y.L. SCH. L. REV. 939 (1990).

27. As Richard Hofstadter once put it: "The antitrust movement is one of the faded passions of American reform." Hofstadter, *supra* note 24, at 188.

28. See Pitofsky, *Antitrust in the Next 100 Years*, *supra* note 3, at 821.

29. *Id.* at 818.

30. See Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 1003 (1986). See also Pitofsky, *Antitrust in the Next 100 Years*, *supra* note 3, at 832.

31. Today federal judges are quick to grant summary judgment and motions to dismiss, making it increasingly difficult for plaintiffs to reap the benefits of the treble damage remedy. See Salop & White, *supra* note 30, at 1011; Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1127-37 (1986). These developments were facilitated by the appointment of judges to the federal bench during the Reagan and Bush administrations who were staunch supporters of free market and anti-regulatory views. In appointing a number of leading Chicago School lawyer-economists to the federal bench, Presidents Reagan and

Antitrust declined in part because changes in the world have made "antitrust enforcement politically impracticable."³² In the late 1960s and early 1970s, for example, antitrust litigation was brought against America's most powerful corporations. By the 1980s, however, antitrust enforcement shifted from regulatory enforcement to de-regulation as social, economic, and political changes in the American political scene worked to undermine the self-confidence of the antitrust enforcers of earlier years. During the Warren Court years, antitrust enforcement was viewed by many policy makers as a necessary solution to the problem of the "market failure" brought about by monopoly power. Today, policy makers are more concerned with the problem of "regulatory failure and government excesses."³³ Changes in prevailing attitudes about big business and government have since eroded the once solid consensus that supported antitrust as a legal specialty during the sixties and early seventies.

The legal profession also lost interest in antitrust enforcement as the antitrust bar came to accept the *New Antitrust* policy creed of the Chicago School of antitrust economics.³⁴ The policy creed of the Chicago School

Bush were able to influence the development of antitrust enforcement. See DUXBURY, *supra* note 18, at 358. See also William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 *FORDHAM L. REV.* 49 (1991). The appointment of Richard Posner, Robert Bork (whose subsequent nomination to the Supreme Court failed), and Frank Easterbrook to the federal appeals bench "epitomized" the influence of the Chicago School in the federal judiciary during the Reagan presidency. DUXBURY, *supra* note 18, at 358. Also important has been the Law and Economics Center founded by Henry Manne which offers a two-week intensive course of study in law and economics for federal judges. Manne's Chicago-inspired summer seminar for federal judges has so far introduced antitrust economics from the Chicago School perspective to over one-third of the federal judiciary (judges attend with all expenses paid by corporate sponsors). *Id.* at 360. As Professor Duxbury recently concluded:

[T]he Manne initiative has clearly proved successful in exposing a significant proportion of the federal judiciary to a particular style of legal-economic inquiry; and there indeed appears to be at least some evidence that certain judges, after having attended the programme, have begun to apply the principles of Chicago neo-classical analysis in the resolution of antitrust cases.

Id. at 360-61 (footnote omitted). The fact that corporations fund "Manne's initiative" to essentially persuade federal judges on the wisdom of a minimal antitrust enforcement policy is rather curious and troublesome.

32. Pitofsky, *Antitrust in the Next 100 Years*, *supra* note 3, at 821.

33. ELEANOR M. FOX & LAWRENCE A. SULLIVAN, *CASES AND MATERIALS ON ANTI-TRUST* 3 (1989) (stating that "[T]oday . . . American productivity has been falling and American hegemony fading. We talk less of market failure, more of regulatory failure and governmental excesses.").

34. In the Cold War era, antitrust law had become almost the exclusive concern of a handful of legal specialists who were concerned with protecting a domestic economy from the dangers of monopoly power. By the late 1970s and throughout the 1980s, a new group of antitrust thinkers came to adopt a pro-monopoly bias as they turned away from the non-economic justifications and embraced the single policy goal of allocative efficiency and maximization of wealth. See, e.g., BORK, *supra* note 18; Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 *U. PA. L. REV.* 925 (1979); Frank H. Easterbrook, *Correspondence: Workable Antitrust Policy*, 84 *MICH. L. REV.* 1696 (1986). The efficiency-oriented approach of this new type of antitrust thinking, however, failed to remove from antitrust adjudication the necessity of making value choices. See, e.g., Eleanor M. Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window*, 61 *N.Y.U. L. REV.* 554, 558 (1986) ("The tools of economics may be neutral, but we who must

attempts to explain and justify business practices of large firms on the basis of economic models developed from assumptions of rational behavior. Rational behavior is defined in terms of self-interested profit-maximizing conduct. If the business practice serves the purpose of maximizing firm profits, it is presumed to be rational and, therefore, beneficial to competition.³⁵ Antitrust enforcement has thus been limited to forms of irrational business behavior that cannot be explained on rational (i.e., profit-maximizing) grounds.³⁶

The success of Chicago School thinking in antitrust has helped to bring about a body of antitrust doctrine which evaluates the legality of business practices in terms of whether they promote or hinder economic efficiency in production (a factor essential to profit-maximizing behavior). An early example of this was the Supreme Court's 1977 decision in *Sylvania* which rejected the Warren Court's per se vertical restraint test and adopted the Chicago School's "free rider" analysis of vertical territorial restraints.³⁷ While the Court has not yet overruled many of the leading Warren Court precedents, there is ample evidence indicating that a majority of the Supreme Court justices accept now the Chicago School analysis and policy creed in antitrust decision making.³⁸ The resulting shift in the Supreme Court's thinking in antitrust has contributed to the decline in antitrust enforcement. Suffice it to say that antitrust law is no longer a growth industry.

One would think that much ink would be spilled in the popular press about antitrust's current predicament. Antitrust, after all, has been a peculiar American institution which historically has been as American as "apple pie" and the "fourth of July." Indeed, the fear of concentrated private power which has historically justified enforcement of the antitrust laws has a long and meaningful history in American culture. Antitrust legislation was inspired by the same social and political concerns and

select and use them are not."). For a critical review of the Chicago School approach in the Supreme Court, see William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221 (1989).

35. Robert Bork thus argued that terms like "competition" and "monopoly" should be read by antitrust judges as shorthand expressions, or terms of art, designating states of affairs that refer to the economist's concepts of productive efficiency and consumer welfare. BORK, *supra* note 18, at 61. In linking competition and monopoly to economic concepts of productive efficiency and consumer welfare, Bork was able to argue that the only real goal of antitrust enforcement was the promotion of economic efficiency. See *id.*

36. See Page, *supra* note 34, at 1232-33.

37. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). In rejecting the Warren Court's per se test in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) the Court reasoned that vertical territorial restrictions would be justified when they were found to prevent competitors from taking a "free ride" on the distributional services of a dealer. The Court's "free rider" analysis was explicitly borrowed from Chicago School antitrust scholars.

38. The Court has not, however, accepted the full implications of the Chicago School's theoretical models of antitrust (e.g., the Court has refused to adopt the suggestion of Chicago analysts who argued in support of antitrust rules of per se legality in vertical restraint cases). See William H. Page, *Legal Realism and the Shaping of Modern Antitrust*, 44 EMORY L.J. 1, 49 (1995). The Court has also declined to overrule the Warren Court's leading antitrust precedents since *Sylvania*. *Id.* at 48.

precepts that motivated our founding fathers to adopt a constitutional policy of limited government and deconcentrated government powers.³⁹ Like the American constitutional system, the Sherman Act can be read as a text that "prescribes a central governance system for the economy which is also based on the principle of decentralized decision making."⁴⁰

Is it not strange then that there has been so little public interest in the decline of antitrust?⁴¹ Why has the media not reported on more of antitrust's new policy supporting the existence of centralized economic decision making? Why has there been so little concern for the steady decline of what has been an important and peculiarly American hundred-year institution? It would indeed appear that politicians, historians, social critics, and media types have ignored "one of the most delicious minor ironies of our reform history and one of the most revealing facets of our institutional life."⁴²

Any effort to explain the current predicament of antitrust would require some explanation of the decline of antitrust as a legal and political movement. Antitrust can be retold in terms of a story about what happens when a reform movement becomes institutionalized, first by the "law," and then later by a social science—"economics." We can retell the story of antitrust in terms of a progression of events that moved from politics, to law, to economics. Each stage in this progression has led to a transformation in antitrust enforcement. Each stage in this progression has also distanced antitrust law from its political origins as a reform movement in American politics.⁴³ Antitrust began passionately as a reform movement, but then fizzled and cooled as the movement was institutionalized and rationalized first by lawyers, and then later by lawyer-economists. Today, antitrust has lost touch with its origins and history and, therefore, it has become (like the lost antitrust teachers at the AALS conference) a law "in search of itself."⁴⁴

39. See Adams & Brock, *supra* note 26, at 940.

40. *Id.*

41. Surely, if some future Solicitor General publicly declared that the S.G. office was intending to do to the United States Constitution what the Antitrust Division of the Justice Department during the Reagan and Bush administrations did to the Sherman Act (i.e., interpret the document to authorize centralized government power at the expense of the states), there would be much public debate and criticism in the popular media. Consider, for a moment, the dramatic public statement of William F. Baxter, President Reagan's first Chief of the Justice Department's Antitrust Division, made soon after Baxter took over at the Antitrust Division: "There is nothing written in the sky that says that the world would not be a perfectly satisfactory place if there were only 100 companies . . ." *Big Shift in Antitrust Policy*, *Dun's Rev.*, Aug. 1981, at 38, 38. The statement was hardly even noticed by the media.

42. Hofstadter, *supra* note 24, at 189-90.

43. For an earlier account of this, see *id.* at 188. See also *infra* notes 48-68 and accompanying text.

44. Other antitrust thinkers have borrowed this phrase in describing the current predicament in antitrust law. See Phillip Areeda, *Monopolization, Mergers, and Markets: A Century Past and the Future*, 75 CAL. L. REV. 959, 959 (1987) ("My theme is the narrower one of, to borrow a phrase, the law in search of itself.").

In what follows I will attempt to begin where my story left off (i.e., I will attempt to explore the reasons for antitrust's current predicament). First, I will re-examine some of the reasons for the decline of antitrust as a political and legal movement.⁴⁵ Second, I will examine some of the current competitive problems that are just now arising in the emerging postindustrial markets in the informational economies of the information superhighway.⁴⁶ Finally, I will conclude by speculating on the likely changes that must take place if antitrust, as a legal specialty, is to remain more than just a "faded passion" in the twenty-first century.⁴⁷ The loss of belief in antitrust's historical role in regulating monopoly power must be recovered if antitrust is to remain politically relevant in the next century.

II. WHATEVER DID HAPPEN TO THE ANTITRUST MOVEMENT?

My attendance at the section meeting on antitrust law succeeded in making Richard Hofstadter's classic essay "What Happened to the Antitrust Movement?"⁴⁸ especially relevant to me. In that essay (first published in 1964), Hofstadter argued that antitrust had lost its historical role and meaning as a movement because it was no longer the subject of public agitation—in short, it had become (at or around 1938) a "complex, difficult, and boring" legal specialty.⁴⁹ The late Hofstadter went on to argue that historians had lost interest in antitrust because what was once a subject of public concern had become a baffling maze of technical refinements created by lawyers and economists that historians and enlightened citizens were ill-equipped to comprehend. Hofstadter saw a paradox in this: "once the United States had an antitrust movement without antitrust prosecutions; in our time there have been antitrust prosecutions without an antitrust movement."⁵⁰

A. HOFSTADTER'S THESIS

In viewing the Sherman Act as the "manifestation of an enduring American suspicion of concentrated power,"⁵¹ Hofstadter wondered if antitrust could survive in "an age in which the big corporation has become a way of life."⁵² Hofstadter identified three distinct phases in the

45. See *infra* Part II.

46. See *infra* Part III.

47. See *infra* Part IV. My effort here is not to run down antitrust law and policy. To the contrary, I count myself as someone who believes that the "old problem" of market power remains a danger justifying governmental regulation. On the other hand, because I believe that the problem of market power has evolved into new forms in the emerging postindustrial markets, I will argue that policy makers need new tools and new methods for rendering the antitrust laws applicable to new competitive dangers.

48. Hofstadter, *supra* note 24, at 188. Hofstadter was a distinguished professor of American history at Columbia University.

49. *Id.* at 189.

50. *Id.*

51. *Id.* at 205.

52. Hofstadter, *supra* note 24, at 224.

history of antitrust. First, in the "Progressive era" from about 1890-1914, Hofstadter saw the antitrust movement in "high gear" where politicians and judges attempted to define an antitrust response to the consolidation of business enterprises and the popular hostility to big business.⁵³ During the Progressive era, the Sherman Act was signed into law and federal judges tentatively began the difficult process of applying the law to big business. Hofstadter found that "[t]he Progressive era, which culminated in 1914 with the passing of the Clayton Act and the creation of the Federal Trade Commission, probably marks the high point of anti-big-business sentiment in our history."⁵⁴

In the second phase, what Hofstadter called the "era of neglect," that lasted from approximately 1914 to about 1937, antitrust enforcement was, as it is today, "minimal."⁵⁵ During this time, the antitrust movement was seriously questioned by those who "saw the Western world as entering upon a new era of organization and specialization for which the old competitive philosophy [of the Sherman Act] was hopelessly retrograde."⁵⁶ These early critics of antitrust "foresaw the decline of antitrust as a movement, and in some instances recognized that if the Sherman Act persisted it would be as a basis for occasional *ad hoc* regulatory suits rather than as an instrument for dismantling the corporate economy."⁵⁷

In the third phase, the era of antitrust's "revival," that dated from 1937 to the mid-1960s, antitrust enforcement by the Antitrust Division of the Department of Justice and the Federal Trade Commission accelerated and the law congealed as a serious legal specialty.⁵⁸ Hofstadter found the revival period to be quite "ironic" in that legal and administrative activity flowered at the same time that public sentiment against big business dissipated.⁵⁹ Hofstadter concluded that antitrust as a political movement steadily declined during this time as more Americans became more respectful to the existence of large corporations.

During the era of antitrust revival, when enforcement accelerated, Hofstadter saw antitrust becoming "almost exclusively the concern of small groups of legal and economic specialists, who carry on their work without widespread public interest or support."⁶⁰ Hofstadter thus concluded that the traditional American fear of big business that fueled the passions of the antitrust movement in the period of 1890-1937, dissipated in the years following the New Deal, and thereafter, up until the present, antitrust has been a legal and bureaucratic specialty and not a "movement" as such. Hofstadter sought to explain why "the fate of antitrust is an excellent illustration of how a public ideal, vaguely formulated and often hope-

53. *Id.* at 193.

54. *Id.*

55. *Id.* at 193.

56. *Id.* at 204.

57. *Id.*

58. Hofstadter, *supra* note 24, at 194.

59. *Id.*

60. *Id.*

lessly at odds with stubborn realities, can become embodied in institutions with elaborate, self-preserving rules and procedures, a defensible function, and an equally stubborn capacity for survival.”⁶¹

The rise in living standards in the American economy in the post-World War II era was hardly the basis for sustaining the traditional American fear of big business.⁶² Hofstadter went on to explain how the transformation of antitrust from a political movement to a legal specialty had nonetheless enabled the “antitrust enterprise” to persist and grow despite the fact that antitrust was often “hopelessly at odds with stubborn realities” of a “business structure [that] has brought into being a managerial class of immense social and political as well as market power.”⁶³ As Hofstadter saw it, by the mid-1960s, the problem of bigness was no longer a “problem” for most Americans.⁶⁴ And yet, paradoxically throughout the 1960s the Supreme Court under the leadership of Chief Justice Earl Warren developed antitrust doctrines under an “intentionalist vision”⁶⁵ that helped to solidify an antitrust policy favoring deconcentrated markets.

Hofstadter was interested in knowing why historians had lost interest in antitrust; he wanted to know why there were no serious histories of antitrust and why there was so little academic interest in the subject. He concluded that historians dropped antitrust from their academic agendas shortly after the New Deal reactivated the Antitrust Division and private antitrust lawyers and economists became serious about enforcing the Sherman Act. According to Hofstadter, some time after 1934 or thereabouts, “[a]ntitrust [became] almost exclusively the concern of small groups of legal and economic specialists, who carry on their work without widespread public interest or support.”⁶⁶ What was once a movement of public concern and agitation had become a legal-administrative specialty carried on by bureaucratic experts in an institutional bureaucracy called antitrust.

61. *Id.* at 228.

62. As Hofstadter observed: “Today the public needs no persuading that it is the large corporations, with their programs of research, that are technologically progressive.” *Id.* at 217. This is even more true in today’s global markets dominated by multinational corporations. It is also interesting to note that antitrust has continued to decline even during the protracted economic recession following the market crash of 1987. Economic prosperity cannot therefore be the sole cause of antitrust law’s decline.

63. Hofstadter, *supra* note 24, at 236.

64. Hofstadter relied on a 1951 research study of the University of Michigan, entitled *Big Business as the People See It*, that showed “big business was no longer a scare word to the public at large.” *Id.* at 212, 213.

65. See Page, *supra* note 38, at 6, 29-42. Professor Page calls the Warren Court’s vision of antitrust “intentionalism” because the Court instrumentally attempted to shape antitrust law to protect the competitive freedom of individual actors in the marketplace. “In the intentionalist view of things, injury to the individual firm was in itself an injury to competition when it limited the individual’s ability to make critical decisions.” *Id.* at 28-29. Professor Page thus rejects the revisionary account of Chicago School theorists like Robert Bork who argue that the Warren Court’s vision of antitrust protected small business as such. *Id.* at 28. See, e.g., BORK, *supra* note 18, at 200-2, 204-5, 256-57.

66. Hofstadter, *supra* note 24, at 194.

Without doubt, by the mid-1960s, the legal specialty that had come to represent antitrust was enormously successful in establishing antitrust as an institution "with elaborate, self-preserving rules and procedures, a defensible function, and an equally stubborn capacity for survival."⁶⁷ The decline of the antitrust movement was thus seen by Hofstadter as the logical consequence of antitrust becoming a legal specialty. As Hofstadter explained:

In ceasing to be largely an ideology and becoming largely a technique, antitrust has taken its place among a great many other elements of our society that have become differentiated, specialized, and bureaucratized. Since no layman can any longer concern himself with the enormous body of relevant case law or with the truly formidable literature of economic analysis and argument that has come to surround the issue, the potentialities of antitrust action have become almost exclusively the concern of a technical elite of lawyers and economists. Indeed, the business of studying, attacking, defending, and evaluating oligopolistic behavior and its regulation has become one of our lively small industries, which gives employment to many gifted professional men. No doubt this is another, if lesser, reason why antitrust has become self-sustaining: it is not our way to liquidate an industry in which so many have a stake.⁶⁸

Hofstadter concluded that America's old romance with antitrust had run its course by the mid-1960s as antitrust became entrenched as a bureaucratic specialty administered by lawyers and economists.

B. LEGAL PROCESS JURISPRUDENCE AND ANTITRUST

Antitrust was a vibrant legal specialty with a glowing future during the mid-1960s, the period when Hofstadter wrote his essay. As a legal specialty, antitrust was an important legal specialty as Hofstadter explained, but it was hardly evident, even during Hofstadter's time, that the antitrust movement had run its course. It may have been true that the attitudes and values of the old antitrust reform movement no longer captured the attention of the American public by the mid-1960s, but this did not mean that antitrust law failed to sustain a political vision or ideology. To the contrary, antitrust lawyers, economists, and judges throughout the 1960s and 1970s developed a powerful new ideology providing support for antitrust as a legal institution.

The legal ideology of antitrust law (as distinguished from the ideology of antitrust's early reform movement) developed from the law's legal process jurisprudence. Legal process jurisprudence was dominant during the Warren Court era and it continues to influence the Court's current anti-

67. *Id.* at 228. According to Hofstadter, "[i]nstitutions are commonly less fragile than creeds." *Id.*

68. *Id.* at 235-36.

trust philosophy.⁶⁹ To be sure, legal process jurisprudence has been on a steady decline as new scholarly movements like law and economics, critical legal studies, and postmodernism came on the scene and moved beyond process theory.⁷⁰ Process theory nonetheless remains dominant in the legal academy, and many lawyers and judges, indoctrinated by traditional modes of legal pedagogy, continue to adhere to the views of process theory in their various legal practices. Antitrust law, like many other legal subjects, was, and continues to be, shaped by the popular influences of the legal process tradition.

Hofstadter, writing in 1964, believed that once antitrust was taken over by lawyers and economists, antitrust was purely a technical, bureaucratic specialty.⁷¹ As it turns out, however, it was that and much more. As a legal specialty, antitrust became fused with the lawyer's professional ideology. It was the lawyer's faith in the law's process that, more than anything else, encouraged antitrust lawyers and judges during the Warren Court era to focus on the process of competition as a basis for implementing the goals of the antitrust laws.

Beginning in the early 1960s, for example, the Warren Court developed the notion that the antitrust laws required the courts to protect the competitive process against the tendency toward market concentration. A majority of the justices believed that it was the responsibility of the federal judiciary to ensure that "local control" over industries be preserved and that the law protect the small business person from the overreaching of those who had access to overpowering wealth.⁷² "[I]njury to the indi-

69. See Page, *supra* note 38, at 49-70. For a review and summary of the legal process tradition in American jurisprudence, see GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 33-36 (1995).

70. See MINDA, *supra* note 69, at 83-127, 224-46.

71. Hofstadter, *supra* note 24, at 235. Hofstadter's essay also failed to acknowledge the non-technical contribution that antitrust juries have performed in private treble actions. Juries composed of lay persons selected from the community are likely to bring to antitrust decision making the traditional attitudes and fears about big business that had nurtured the early passions of antitrust when antitrust was a political movement. Jury trials have also softened the highly technical nature of antitrust legal theories by forcing lawyers and economists to translate technical legal theories into a language which is understandable by lay persons. The practical abilities of juries have justified the denial of jury trials in highly complex antitrust cases. See, e.g., *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970); *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1089 (3d Cir. 1980); Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 813 (1987). Antitrust juries continue to play an important social and political function in private antitrust suits. Thus, antitrust jury trials have served an important function in preserving the "populist goals" of the antitrust movement. *But see id.* (arguing that there would be "no overriding disadvantages to eliminating jury trials of private antitrust suits").

72. Chief Justice Earl Warren thus began his famous opinion in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) (involving the legality of a merger under § 7 of the Clayton Act of 1950) by declaring that: "The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy . . . [and] the desirability of retaining 'local control' over industry and the protection of small business." *Id.* at 315. Robert Bork correctly associates this statement with one of the central creeds of the Warren Court's antitrust philosophy. BORK, *supra* note 18, at 201-202. Bork assumes that such statements illustrated that the Court was primarily concerned with protecting small business. Other

vidual firm was in itself an injury to competition when it limited the individual's ability to make critical decisions. This was what the Warren Court meant by injury to competitive processes. . . . Private discretion and competitive markets were [assumed to be] inseparable."⁷³

The Warren Court's focus on protecting competitive process was very much in keeping with legal process jurisprudence, which encouraged lawyers and judges to place emphasis on process issues rather than on the substance of antitrust adjudication generally.⁷⁴ The most basic insight of process theory was the idea that the efficient administration of legal disputes required an analysis of how different institutions of government resolve disputes. The relative effectiveness of institutions in solving social problems was viewed by process theorists as peculiarly a matter of process and procedure. The institutional competency of different institutions (e.g., courts, legislature, and markets) thus required a comparative analysis of the different procedures and processes utilized by each institution to resolve social problems.⁷⁵ Efficient dispute resolution was thus aimed at discovering the most effective process for resolving disputes.

Process theorists assumed that private ordering of social problems was generally the preferred process for resolving most social problems.⁷⁶ Public regulation of private activity was thought to be warranted only when the "processes of private ordering [was] found to be wanting."⁷⁷ The role of the judiciary was, therefore, one of preserving the effective processes of private markets and majoritarian politics. In this way, legal process jurisprudence supported and justified a form of "utilitarian lais-

commentators, however, argue that the Warren Court was more interested in protecting "injury to the individual firm" and that this was more in keeping with the Court's interest in protecting the process of competition rather than simply favoring small businesses. See Page, *supra* note 38, at 28-29.

73. Page, *supra* note 38, at 29.

74. Professor Page has recently explained how process thinking has influenced the way the Supreme Court has incorporated the Chicago School approach to antitrust in its antitrust decisions.

Rather than overrule established precedents, the Court has reinterpreted those precedents in light of Chicago's positive models, integrating the insights of the models with the Warren Court's formal standards. They have altered the doctrine primarily by formulating subsidiary decisional rules that govern the application of the rules of liability, that define the types of harm that are compensable in private suits, and that determine the sufficiency of evidence to go to the jury.

Id. at 51.

75. To this end, legal process theorists developed an analysis of "institutional settlement"—hence, "[t]he central idea of law [was] *the principle of institutional settlement.*" HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 4 (10th ed. 1958) (emphasis in original). Hart and Sacks legal process material represents the foundational text of legal process jurisprudence.

76. This assumption emerges from Hart and Sacks's comparative analysis of courts and the legislature. See DUXBURY, *supra* note 18, at 257.

77. *Id.* at 257 (discussing the nature of legal process jurisprudence associated with the work of Henry Hart and Albert Sacks).

sez-faire liberalism," which legal thinkers have assumed to be the consensus ideology of the American polity.⁷⁸

From the perspective of legal process, judges in antitrust disputes viewed the private competitive process as the desirable means for achieving the goals of antitrust legislation. The open-ended nature of the antitrust laws have enabled antitrust decision makers to develop the insights of economic analysis within a framework of antitrust process. Protecting competition has thus meant that judges might have to come to the aid of an individual competitor whenever the competitive process was found to be "injured" by the monopolistic and predatory conduct of dominant firms.⁷⁹ It has been assumed that the competitive process provided the courts with an objective and neutral medium for establishing an efficient system of private market ordering. Ideas about competitive process have thus been used by antitrust judges to develop a body of administrative rules to guide the development of antitrust doctrine.

For example, the focus of the Warren Court in antitrust during much of the 1960s and 1970s was not one of protecting small competitors as such, but rather one of protecting the process which enabled individual actors to act freely in the market.⁸⁰ The Court's focus on protecting against interferences with the "process" of competition was thought necessary for the preservation of the presumed link between competitive process and democracy.⁸¹ Process theorists assumed, for example, that the competitive process of interest group representation in the legislative branch of government would serve to realize the maximization of the public interest. For process theorists, the process of competition was a crucial vehicle for maintaining the functions of a pluralistic, democratic society. Hence, it was thought that it was the judiciary's function to ensure that the process of competitive forces would "harness the individual appetite for private gain to social ends."⁸²

While the Warren Court antitrust decisions were consistent with the political and social values of the antitrust movement (values like diver-

78. *Id.*

79. See Page, *supra* note 38, at 29; John J. Flynn, *Antitrust Policy and the Concept of a Competitive Process*, 35 N.Y.L. SCH. L. REV. 893 (1990).

80. It is often said that the Warren Court was concerned with the problem of big business since its antitrust decisions seemed overly protective of small business, but, as Professor William Page has recently pointed out, "the Warren Court did not frame rules simply to favor small business." Page, *supra* note 38, at 28. The history of antitrust enforcement during the Warren Court era reveals that the Court was concerned with protecting "the individual's ability to make critical decisions" in the market. *Id.* at 29. The Warren Court assumed that "injury to the individual firm was in itself an injury to competition when it limited the individual's ability to make critical decisions." *Id.* at 28-29.

81. The Warren Court was undoubtedly influenced by the theory of political pluralism. The theory of political pluralism, advanced in the work of 1950s theorists such as Robert Dahl, assumed that interest group representation provided an integral process for the effective administration of representative democracy. The theory of political pluralism can be seen to justify the Warren Court's *Noerr-Pennington* doctrine in antitrust law. See Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HASTINGS L.J. 905 (1990).

82. Adams & Brock, *supra* note 26, at 941.

sity, individual autonomy, deconcentrated power, etc.), the Court's legal process jurisprudence attempted to justify antitrust doctrine and caselaw on the basis of an objective and consistent body of principles, purposes, and, of course, process.⁸³ The rationalistic premises of process jurisprudence thus pulled antitrust law away from its political and social origins and placed the law of antitrust on a legal trajectory that has since exhibited an "other-world" quality. Competitive policy was to be structured by a natural and enduring competitive process regulated by objective legal criteria.⁸⁴ The problem was the competitive process could not be realistically defended on the basis of such criteria because competition was neither fixed nor natural, but was rather an essentially contested concept.⁸⁵

Legal process jurisprudence nonetheless encouraged antitrust judges to try to develop a legal theory of antitrust—one that was quite different from the vision reflected in antitrust's political and social origins. Eschewing substance and favoring process meant that process theorists were strong advocates of principled reason in legal decision making. It meant that political values would be given effect only if they complied with the legal process values—that is conformed to "reasoned elaboration" and satisfied the test of neutral principles (i.e., be applied consistently and rationally in all similar antitrust decisions). Antitrust as a legal specialty

83. Throughout the 1960s and 1970s, the Warren Court was busy developing legal rationales for the view that the Sherman Antitrust Act mandated the development of a body of antitrust rules and procedures to govern the process of competition of private enterprise. Suffice it to say that the Warren Court's efforts to develop a consistent body of antitrust doctrine failed. The Warren Court's efforts in antitrust led to the development of a policy that came to be recognized as a "policy at war with itself." See BORK, *supra* note 18.

84. Ideas developed from the political theory of democratic pluralism undoubtedly influenced the Court's legal process thinking.

In public law areas, process theorists relied on the political theory of *pluralism* in their analysis of the functions of democratically elected legislatures and they used this analysis to expose the antidemocratic nature of the judiciary. . . . In private law areas, process theorists urged the 'reasoned elaboration' of the principles and policies of the common law. This meant that judges, unlike legislators, had limited discretion; they were supposed to decide like cases alike under the guiding force of case precedent and statutory law. Judges were supposed to 'elaborate' rational 'reasons' for their decisions.

MINDA, *supra* note 69, at 34-35.

85. The effort to develop consistent administrative rules to govern the process of competition was doomed from the start. To put it simply, competition is an essentially contested concept, defined by opposing ideas about competition. One way to understand this is to consider the relationship that competition shares with its antitheses—contract and combination. Ideas of contract, combination, and competition share a dangerous supplementary relation—contract and combination are necessary for competition to work in some cases, yet the existence of contract and combination are also dangerous to the process of competition in other cases (they may lead to monopoly, the antithesis of competition). Hence, protecting the freedom of individual competitors may sometimes undermine competition by allowing inefficient actors to exist free of the disciplinary forces of the market; and protecting competitive process may sometimes mean that individual choice must be limited. See Minda, *supra* note 5, 462-63.

came to reflect the lawyer's faith in process jurisprudence.⁸⁶ Antitrust law thus developed on the basis of legal concepts of reason based on ideas about the political and legal process.⁸⁷

As a consequence of legal process thinking, antitrust judges focused their energies on developing administrative principles, purposes, and processes for determining how the substantive merits of antitrust disputes should be resolved. Hence, we see throughout the 1960s and 1970s judicial emphasis on the development of decisional rules like *per se* and the rule of reason, the doctrines of standing and antitrust injury for determining the types of antitrust harm that are compensable, and evidentiary standards for determining the sufficiency of the evidence that would justify decisions on the merits.⁸⁸ Even today, commentators see the Supreme Court's antitrust decisions attempting to integrate new learning about antitrust within an incremental "process" of case-by-case decision making.⁸⁹

By the end of the 1970s, antitrust's specialists—lawyers and economists—were building new foundations for a new antitrust movement. What Hofstadter failed to foresee was the possibility that a new type of movement might emerge within the legal institution of antitrust.⁹⁰ In-

86. It has been said that legal process jurisprudence "exemplifies the emergence of reason as the dominant ideological and theoretical motif in American legal thought The history of process jurisprudence is a history of American lawyers attempting to uncover reason immanent in law." DUXBURY, *supra* note 18, at 205, 298. As Duxbury explained:

Process jurisprudence . . . marks the beginning of American lawyers attempting to explain legal decision-making not in terms of deductive logic or the intuitions of officials, but in terms of reason which is embodied in the fabric of law itself. By finding faith in reason, it has been remarked, process jurisprudence illustrates how post-war American legal theorists turned their attention to 'the task of finding an objective basis for legal decision-making.'

Id. at 205 (quoting James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 703 (1985)). In other words,

[p]rocess theorists defend[] the view that right answers in legal decision making could be developed from a conceptual understanding of the institutional functions and competency of different governmental agencies of the legal system. . . . Because they asserted the autonomy of the legal process, process theorists rejected the claims of those . . . who advocated the development of non-legal criteria for judicial decision making.

MINDA, *supra* note 69, at 34. In antitrust law, legal process jurisprudence thus helped to de-radicalize antitrust by minimizing the importance of the social and political values in antitrust decision making.

87. MINDA, *supra* note 69, at 34-35.

88. See Page, *supra* note 38, at 51.

89. *Id.* at 5.

90. Hofstadter's idea of an "antitrust movement" was wedded to traditional thinking about the reform movements of politics, such as the civil rights movement of the 1960s. Disenchanted with the politics of the mainstream, reform movements such as the civil rights movement, attempted to reform law and society through direct forms of non-violent political unrest. See BARBARA EPSTEIN, *POLITICAL PROTEST AND CULTURAL REVOLUTION: NONVIOLENT DIRECT ACTION IN THE 1970s AND 1980s* (1991).

If we think of the antitrust movement as a reform movement like civil rights, it should not be all that surprising that the "antitrust movement" lasted for a relatively temporary period following the enactment of the Sherman Act. Like all political reform movements, the direct popular action inspired by the antitrust reform movement was certain to dissi-

deed, by the late 1970s, one can detect the formation of a new antitrust movement constructed from a new theoretical perspective of the legal process developed from economics.⁹¹ This new antitrust movement developed first in the law schools, and then later it became part of the official policy of the Antitrust Division of the Justice Department during the Reagan and Bush administrations. The New Antitrust movement advanced the case for a minimalist antitrust enforcement policy, and it has since nurtured the deregulatory impulses favoring big business. This new vision of antitrust was established by Robert Bork, Richard Posner, Frank Easterbrook, and other Chicago School Law and Economics theorists who proclaimed to have launched a New Antitrust movement.⁹²

C. THE NEW ANTITRUST MOVEMENT

The Chicago School of antitrust economics has since become enormously successful in shifting antitrust policy to an efficiency analysis that rejects, in many cases, the traditional policy bias against big business. In emphasizing the past failures of antitrust as a legal specialty, Chicago School antitrust scholars argued with considerable passion and persuasion that the only legitimate goal for antitrust law is efficiency and the maximization of wealth. The Chicago School antitrust advocates argued that business restraints of trade should be immunized from antitrust prosecutions whenever it can be shown that the challenged practice promotes economic efficiency. While the Chicago School advocated an explicit economic agenda, its agenda was just as "political" as the agenda of the

pate in the years following the enactment of the Sherman Antitrust Act. As the courts became serious about antitrust enforcement in the Progressive era, there was little for antitrust activists to protest, and thus the energy for getting the public involved in antitrust reform dissipated.

What Hofstadter failed to foresee is the emergence of a new type of antitrust movement in legal academia. During the 1970s and 1980s, for example, new scholarly movements came into existence claiming to represent legal and nonlegal academics and practitioners who adhere to diverse understandings about modern law and adjudication. See MINDA, *supra* note 69. Indeed, one of the most salient characteristics of reform movements in the post-war era, has been the formation of a new type of social movement within academic and theoretical communities. The movements of the sixties (e.g., feminism, the New Left, and Marxism) developed from a critical analysis of traditional theories and conventional practices. See EPSTEIN, *supra* note 90, at 227-61. These movements have been limited to academic and scholarly communities, but they aspire, like all reform movements, to influence the views of a larger audience—judges, lawyers, and citizens in general. In antitrust law, one could detect the development, in the early 1970s and thereafter, of a scholarly antitrust movement known as the Chicago School of antitrust or the "New Learning." See, e.g., Adams & Brock, *supra* note 26, at 941-46.

91. Like other reform movements, the Chicago School of antitrust analysis could claim a membership of individuals who shared a common vision aimed at reforming antitrust law. Like all reform movements, the Chicago School advanced a political perspective and method that departed radically from the mainstream view of antitrust law. The political vision of the Chicago School antitrust analyst was as political and visionary as that of the early trustbuster during antitrust's progressive era. The new antitrust movement was aimed at reinvigorating antitrust with a political mission, albeit a mission that was quite different from the one imagined by the likes of Senator Sherman or the other drafters of the Sherman Antitrust Act.

92. See *supra* note 18.

earlier antitrust reform movement, or, for that matter, the antitrust agenda of the Warren Court. Hence, "[w]hile the image of Chicago economic analysis embodying an 'anti-antitrust' perspective is somewhat exaggerated—most lawyer-economists in the Chicago tradition wish to see the legal regulation of monopoly limited and exercised realistically rather than abolished—it is by no means insignificant."⁹³

There is ample reason for associating the New Antitrust movement with an "anti-antitrust" perspective.⁹⁴ Indeed, the antitrust vision of the Chicago School of antitrust came to support the political agenda of Ronald Reagan's administration throughout the 1980s. The antitrust vision of the Chicago School was manifested when President Reagan appointed William Baxter, a Chicago School antitrust legal academician from Stanford University, to the Antitrust Division of the Justice Department.⁹⁵ The dominant policy perspective of Reagan's Antitrust Chief was much in keeping with the basic normative dimension of Chicago antitrust analysis—the judiciary should cease protecting competitors as such, and instead focus their effort in protecting the ability of American corporations to promote allocative efficiency.⁹⁶

The New Antitrust movement attempts to perfect and render pure the aspirations of the legal process tradition by marrying antitrust to economics rather than law. Antitrust principles, purposes, and processes would be rendered coherent and objective by interpreting the Sherman Antitrust Act in light of the Chicago School's normative vision of economics; the law would be applied so that it would promote economic efficiency and wealth maximization in the economy.⁹⁷ The legal regulation of monopoly would be limited and antitrust enforcement policy, shaped by this creed, would adopt its current "minimalist" stance. The legal specialty that Hofstadter had identified in the mid-1960s had thus become prisoner to the New Antitrust movement which many now see as embodying an "anti-antitrust perspective."⁹⁸

Hofstadter's prediction about the passing of the antitrust "movement" was therefore premature. The antitrust movement had not died in 1964; it had laid dormant for a while, but by the late 1970s a new breed of antitrust reformer became vocal in the legal academy proclaiming the case for a new type of antitrust law which ironically came to favor big

93. DUXBURY, *supra* note 18, at 357.

94. The "New Antitrust" movement helped to resurrect the "nineteenth-century belief in economic Darwinism, including an abiding faith that (with the exception of price fixing) the 'firm, in its own interests, will make the best choice for consumers.'" Adams & Brock, *supra* note 26, at 942 (quoting BORK, *supra* note 18, at 208).

95. See *Big Shift in Antitrust Policy*, *supra* note 41, at 38; William F. Baxter, *Responding to the Reaction: The Draftsman's View*, 71 CAL. L. REV. 618, 630 (1983).

96. See Adams & Brock, *supra* note 7, at 258. Thus William Baxter, as Chief of the Antitrust Division, helped promulgate new merger guidelines based on the policy that "most mergers do not threaten competition and that many are in fact procompetitive and benefit consumers." *Merger Guidelines*, 49 Fed. Reg. 26,824 (1984), reprinted in 46 Antitrust & Trade Reg. Rep. (BNA) No. 1169, at S-1 (Supp. June 14, 1984).

97. See DUXBURY, *supra* note 18, at 356.

98. *Id.* at 357.

business and justified minimal antitrust enforcement.⁹⁹ The New Antitrust movement ultimately served to provoke a general debate about the goals and objectives to be served by antitrust enforcement.

A coalition of liberal antitrust scholars came to rethink the implications and meaning of the intellectual history recounted in the Hofstadter essay. Thus, by the mid-1980s one could also find a counter-movement within the scholarly ranks of antitrust law teachers, such as Professor Eleanor M. Fox, who openly proclaimed that they were “battling for the soul of antitrust.”¹⁰⁰ These antitrust “true believers” described themselves as “faithful interpreters of the law,” who understood the “real history of antitrust” as one representing “concern for consumers; concern for the ‘little man’; interest in access, diversity, and pluralism; and condemnation of coercion and exploitation.”¹⁰¹ In their view, the New Antitrust movement was “at war with law” because it had turned its back on the values and practices of a great legal specialty.

As the 1980s came to a close, antitrust law seemed like it might be going somewhere. The debate between the New Antitrust advocates and the “true believers” suggested that antitrust was on the move again—that the passion that had fueled the movement had been ignited again by a new debate about the politics and social meaning of antitrust. At least that is how it seemed as we approached the 1990s.

But then something happened. The debate fizzled and cooled. It fizzled because the world changed unexpectedly. There were new marketplaces and new technologies that required new thinking about the relevance of antitrust’s traditional philosophy and analytic framework in a new world order. These changes have provoked antitrust thinkers to make shifts in the theoretical models they use in antitrust analysis. New forms of competition posed new sorts of problems that required a new sophistication. The passion of the New Antitrust movement thus cooled as policy makers and antitrust thinkers contemplated the limits of the theoretical complexity of economic analysis.

The dominant assumption of firm rationality central to the Chicago School of antitrust could no longer explain patterns of strategic behavior exhibited in markets linked globally by new information technologies. Sophisticated accounts of firm behavior now justify the relaxation of the assumption of rationality in favor of strategic or opportunistic accounts of behavior. As one commentator recently explained: “In the past ten years, antitrust economists of the post-Chicago School, applying insights from game theory, have postulated that strategic behavior can enable

99. The influence of the New Antitrust movement was aided by the Reagan administration’s appointment to the federal judiciary of individuals who satisfied a political litmus test in support of limited government and big business. See DUXBURY, *supra* note 18, at 358-59.

100. See Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 CAL. L. REV. 917 (1987).

101. *Id.* at 917.

firms to achieve market dominance."¹⁰² The post-Chicago School approach, building a more sophisticated framework upon the Chicago School's theory of rational firm behavior, offered complicated strategic behavior models for understanding "how small and moderate-sized firms can use market imperfections to disadvantage competitors."¹⁰³

Antitrust law now presides over postindustrial markets—markets that entail new competitive conditions and require new critical techniques of investigation. It is now recognized that in high-tech markets involved in the information superhighway (e.g., computers, program design, chips, and fiber-optics), innovation and standard design will be more important to antitrust analysis than the traditional pricing and output considerations.¹⁰⁴ In these high-tech industries, a small handful of firms establish alliances that become the basis for vigorous forms of rivalry and approximate the level of competition expected in highly concentrated market structures. In the information economies of advanced informational systems, markets are created and destroyed quickly and endlessly as technology is manipulated and refigured to establish new symbols, new information, and new markets. The reality of a new form of competition arising in the emerging postindustrial markets has exasperated antitrust's current predicament.

III. ANTITRUST IN THE POSTINDUSTRIAL ERA

As I sat listening to the speakers at the AALS meeting, I was reminded how much the world has changed in the last few years. In just a few short years, the social, political, and economic landscape of the world changed. We now live in the postindustrial era.¹⁰⁵ In the postindustrial era, markets are linked globally by informational systems and information is itself the most important product in the market. The growth of information economies based on computer systems and the emerging information su-

102. Jacobs, *supra* note 19, at 36 (contending that, "[t]o behave strategically, firms need not be large, but they must understand and seize opportunities for gaining power at their rivals' expense.").

103. *Id.* at 37.

Post-Chicagoans have described several ways in which firms can put such strategic behavior to anti-competitive use. Some have suggested that firms in competitive markets can attain monopoly power by foreclosing rivals from lower cost inputs; this practice raises rivals' costs and forces them either to quit the market or to increase prices to levels at which the strategic firms can earn supra-competitive profits. Others have proposed that predatory pricing, which some judges and academicians consider implausible, can succeed in certain markets if the predator implements the proper strategy. Still others have hypothesized that strategic behavior can take the form of advertising, investment, product selection, or other activities that raise the cost of doing business or deter entry. In general, post-Chicagoans emphasize the capacity of market imperfections to create market power, even for firms with small market shares.

Id. at 37-38 (footnotes omitted).

104. See, e.g., *Symposium: Joint Ventures, Including Strategic Alliances, To Develop Computer Technology*, 61 ANTITRUST L.J. 859-973 (1993).

105. See *supra* note 4.

perhighway of the internet have provided new forms of competition which do not easily fit within the traditional concepts of competition used by antitrust policy makers in the recent past.

There are many different concepts of competition,¹⁰⁶ but the one most relevant to modern antitrust law has been understood as “a term of art,” which refers to the idea of “competition on the merits.”¹⁰⁷ In antitrust law, “competition on the merits” has been conceived in terms of a market construct in which numerous, small, independent actors make individual choices based on the separate price of a good and its merits. Competition on the merits describes a state of affairs that closely resembles the economists’ notion of perfect competition. In perfectly competitive markets, the product is homogeneous and the only real basis for competition is price. Competition on the merits is thus a shorthand expression that designates lawful competition based on product prices.

In postindustrial markets, competition has a new meaning that is linked to technology and information. What we see developing in the emerging information economies of postindustrial markets is a new form of competition based on the development of technologies utilized for processing and disseminating information. The industries which are now involved in the development of information technologies (e.g., computer software programs, fiber-optics, wireless cellular communication) compete on the basis of offering new and better systems for processing and disseminating information. Technological competition, based on the development of new and better information systems, provides these markets with a different understanding of what competition on the merits means.

In the emerging informational economies linked by computer networks, it is difficult to defend the old policy justifications that once molded the solid consensus in support of antitrust regulation of big business. When transactions are transnational and competition is global, national law can be a hindrance to economic development and market competition.¹⁰⁸ The stakes are especially high for multinational corporations involved in information technologies that are quite unlike the old

106. See BORK, *supra* note 18, at 58-61 (identifying at least four different conceptions of competition utilized by judges in thinking about antitrust problems). Bork says ‘Competition’ may be read: (1) “as the process of rivalry”; (2) “as the absence of restraint over one person’s or firm’s economic activities by any other person or firm”; (3) “as that state of the market ‘in which the individual buyer or seller does influence the price by his purchases or sales’”; (4) “in a meaning closely related to the one just discussed, as the existence of ‘fragmented industries and markets’ [reserved] ‘through the protection of viable, small, locally owned businesses’ ”; or (5) “as a shorthand expression, a term of art, designating any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree.” *Id.* at 58-60. Professor Rudolph J. Peritz has in turn chronicled a different understanding of competition based on the identification of two paradigms of competition in the history of antitrust law—a dominant paradigm of competition policy favoring competitive freedom and a less visible, but nonetheless existent, paradigm of common law property rights. See Rudolph J. Peritz, *The “Rule of Reason” in Antitrust Law: Property Logic in Restraint of Competition*, 40 HASTINGS L.J. 285 (1989).

107. BORK, *supra* note 18, at 61.

108. See, e.g., Eleanor M. Fox, *The Tenth Milton Handler Lecture: Antitrust, Trade and the 21st Century — Rounding the Circle*, 48 REC. ASS’N B. CITY N.Y. 535, 558 (1993).

smokestack industries that national antitrust law was created to regulate.¹⁰⁹ In the emerging new global webs of information economies, we are thus witnessing what Professor William F. Baxter has called a "new kind of competition" that "presents a new problem for Government, and we're going to see it again and again."¹¹⁰

This "new kind of competition" is premised upon the ability of firms to manipulate and disseminate information over the information highway of the computer networks of the world. Traditional thinking about the way markets operate has been influenced by a market framework of analysis that has assumed competition is a process involving prices and output decisions of different firms and different industry structures. For example, traditional antitrust analysis has assumed that as the number of firms in the industry decline (i.e., as the industry became relatively concentrated), output would be restricted, prices would go up, and consumers would be worse off. "In the world of computer software and microchips," however, "markets are often guided by different rules, which can result in a near-monopoly position for the winner."¹¹¹

In the marketplaces established by informational economies, new technologies frequently require capital investments and research capabilities that only a few firms can manage and deploy in the competitive struggle. Competition in such cases can be vigorous and extreme even though only a handful of firms are involved. The dangers of monopoly may be present, but it is difficult to determine the exact nature of such danger if the market for some new technology has yet to materialize. Firms that compete to be industry leaders in high-tech markets never know where the

109. The question posed by the new technologies of postindustrial markets is whether the same antitrust rules applicable to the oil, steel, and telephone industries should also apply to the computer software industry. See Edmund L. Andrews, *A Question of Trust: Oil, Phones, Software: Do the Same Rules Apply?*, N.Y. TIMES, May 1, 1995, at D1. IBM's recent \$3.3 billion takeover of Lotus Development Corporation, which specializes in notebook computer programs, and Microsoft's failed \$2 billion attempt to take over Intuit, a rival software company specializing in financial software, are recent examples of the emerging information economy. Should the antitrust laws be interpreted to forbid these takeovers? Should the same rules applicable to oil and phones apply to them?

These recent developments have been reported as the beginning of a new "collaborative computing environment" where "people can work and communicate across corporate and national borders—without worrying about things like incompatible hardware and software." Steve Lohr, *From Calculator to Communications Tool: As the Role of the Computer Changes, Companies Try to Keep Pace*, N.Y. TIMES, June 6, 1995, at D1 (quoting Louis V. Gerstner, Jr.'s "Dear Colleague" letter to IBM workers). IBM's acquisition of Lotus, for example, gives IBM a new basis to challenge Microsoft's competitive advantage in computer-linked programs that have replaced the need for IBM's once dominant mainframe computer systems. Lotus Notes is now an industry leader in a category of software programs called "groupware" that allows desktop computers to be linked as a computer-team system. The IBM-Lotus merger and Microsoft's failed attempt to take over Intuit, are just the first examples of the new wave of organizational changes many observe believe are necessary to render American computer firms competitive in the emerging information economy.

110. See Steve Lohr, *Power Grab: Ground Rules for the Great Global Connection*, N.Y. TIMES, May 7, 1995, § 4, at 1 (quoting William F. Baxter). Professor Baxter was Chief of the Antitrust Division of the Justice Department from 1981 to 1983. *Id.*

111. *Id.* at 16.

technological winds will blow. Today's investment may be tomorrow's loss in a useless technology if it is no longer regarded as a standard for the industry. Market domination of relevant markets may quickly erode as new alliances between technology-oriented firms enable competitors to develop new and better design technologies.

Market dominance in technology-based markets may be the result of what happens when popular technology becomes the de facto standard for the industry. This is what happened when the VHS format of videocassette tapes became the favored industry standard for all VCRs, thereby relegating Betamax tapes to the dust bin of industrial obsolescence. The beta format for videocassette recorders was developed by Sony of Tokyo, and the VHS format was developed by Victor Company of Japan, a subsidiary of the Osaka-based Matsushita Corporation. These two Japanese giants are now embroiled in a similar competitive struggle over whether the cassette or mini-disk formats will be used in the next generation of audio systems. Digital compact cassettes and mini-disks represent two alternative formats for audio systems. The two systems, on the market since 1992, are designed to provide digital sound and the ability to record. By some accounts, Sony's mini-disks seem to be winning the approval of consumers, and may provide Sony with "sweet revenge" for its loss in the earlier standard battle with Matsushita over video cassette format.¹¹²

Another recent example involves a standards battle over a new computer-disk technology that uses a new high-density compact disk, similar to music CD or CD-ROM disks, but one that would store substantially more information. The high-density compact disks will "reap billions of dollars in royalties" in light of the likely "cross industry" uses of the new compact computer disks in various computer systems and functions.¹¹³ Two different standards for these disks have been introduced by Phillips Electronics and Sony, on the one hand, and Time Warner and Toshiba Corporation on the other.¹¹⁴ The struggle to determine who will be the standard bearer for high-density compact disks will likely determine who will reap the lion's share of the royalties, and will thus serve to establish a new dominant player in the informational economy of the twenty-first century.

Other examples can be expected as firms enter the information markets linked by the internet and groupware computer systems. We can expect to see much more interdependence in these markets as the developing technologies enable users located in different countries to work collaboratively on the same file simultaneously. These new global information economies depend on communication technologies struc-

112. See Andrew Pollack, *Matsushita Says It Will Sell Rival's Mini-Disk System*, N.Y. TIMES, June 23, 1995, at C5.

113. See Lawrence M. Fisher, *Gateway 2000 Backs Sony/Philips Disk Format*, N.Y. TIMES, June 16, 1995, at C8.

114. *Id.*

tured by a common systems standard. Information technology generates a new form of market rivalry that will culminate in the selection of a technology standard, and the selection of the standard will serve to entrench the market position of the firm responsible for the standard.

Economists call this the "bandwagon effect" of standards competition. The bandwagon effect describes the choice that results when firms within an industry agree to adopt a single standard for their products and technologies.¹¹⁵ The bandwagon effect, characteristic of high-tech industries (especially those involved in information technologies), fosters the conditions that lead to large firm size and concentrated market structures.¹¹⁶ The bandwagon effect is an important characteristic of market behavior in high-tech industries where standards play a crucial role.¹¹⁷ We can expect to see more and more firms in the information economies attempting to reap the huge advantages of the bandwagon effect in the next generation of information technologies.

In the current postindustrial landscape, global multinational corporations and institutions will disrupt the influence of nation-based corporations and institutions. In the emerging informational economies, power will be manifested not by allocative efficiency in production as such, but rather by the ability to manipulate and disseminate information. Whomsoever has the ability to specify the standards used to gain access to information systems will have the power to influence price and output decisions. Those "in power" will be those who have won the battle for the prevailing technological standards of the industry. The development of new industry standards will, therefore, require firms to invest in risky technologies that only the largest corporations can support. The bandwagon effect of competition for standards will ensure that only a handful of the largest firms will survive in the future.

Traditional antitrust thinkers understand "power" as something that can be empirically measured in terms of the percentage share of a relevant product and geographic market.¹¹⁸ Traditional antitrust thinking about power issues thus assumes that legal inferences about unlawful acts of monopolization can be drawn after measuring the percentage of a firm's share of a relevant product and geographical market definitions. The larger the percentage of the relevant market, the more likely it will be that antitrust decision makers will draw an inference that the firm has unlawfully monopolized a market, or conclude that a pending merger may substantially lessen competition. Firms with large market shares

115. Lohr, *supra* note 110, at 16.

116. As Charles F. Rule, a partner at Covington and Burling, a law firm in Washington D.C., who was chief of the Antitrust Division at Justice from 1986 to 1989, explained: "In high-tech markets where standards are important, the big get bigger . . . and there's nothing necessarily wrong with it." *Id.*

117. It is recognized that "[s]upplying the hardware, software and services for these networks looms as a huge business for the computer industry." Lohr, *supra* note 109, at D1.

118. See *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

must always keep one eye on the Antitrust Division whenever they attempt to stay ahead of new technological developments. The ever-present threat of antitrust intervention has influenced what firms do in these high-tech markets.

For example, the Antitrust Division's recent antitrust suit to block Microsoft's attempted acquisition of Intuit, Inc.¹¹⁹ chilled the deal and was purportedly a reason for Microsoft's subsequent decision to rescind its offer. It was hardly clear, however, that Microsoft's entry into the personal finance computer market would have diminished competition, given that many other dominant firms were attempting to establish themselves as major players in the personal computer market in which Intuit now operates.¹²⁰ It may not be in the best interest of consumers to prevent firms like Microsoft from expanding in order to become more technologically competitive in global markets.

It is far from clear whether traditional antitrust concepts work in such cases. Assume, for a moment, that Microsoft went ahead with its plan to acquire Intuit, and the antitrust suit by the Justice Department went forward. A key issue in the case against Microsoft would have involved the definition of the relevant product market.¹²¹ The problem is that the personal finance computer market is just now emerging, and it is far from certain how that market should be defined.¹²² Even if the relevant market could be defined (which is highly doubtful), does it follow that Microsoft's share of that market (even if substantial in percentage terms) would justify the legal inference that the merger might substantially limit market competition given IBM's recent acquisition of Lotus? Can we be certain that the underlying technology for this market will remain constant over the relatively short-run? The problem with traditional antitrust notions of the "relevant market" is that the relevant market may not exist at the time the analysis must be conducted, because the technology establishing the market has not yet congealed with sufficient clarity to identify the dimensions of the market.

IV. ANTITRUST LAW FOR THE TWENTY-FIRST CENTURY

Antitrust law needs a new framework and justification for responding to the political, social, and economic conditions that are now shaping the emerging postindustrial marketplace. The political, social, and economic conditions in which advanced Western societies find themselves are un-

119. Intuit is the maker of Quicken, the leading personal finance software program.

120. See Andrews, *supra* note 109, at D7. The merger would have enabled Microsoft to establish entry into the electronic banking, bill paying, and other financial computer systems in which a number of large corporations like Mastercard, Visa, American Express, and Bank of America, are aspiring to enter.

121. *Id.*

122. Should it be defined to include only "personal finance-check writing programs" as the Justice Department claimed, or should it be broadened to include all potential users who might view computer financial software as an attractive substitute to manual computation (e.g., balancing a checkbook "with a pencil.") See *id.*

like those that shaped the structure of American antitrust law in the nineteenth century. The traditional fear of concentrated power that justified antitrust regulation seems less relevant today.

Today, the traditional notions of "industry" and "production," which have historically shaped antitrust analysis of market power, seem less pertinent in a world dominated by multinational corporations operating within an information economy linked globally by computers and the internet. In collaborative computing environments, businesses and people communicate across corporate and national borders on the information highway structured by collaborative technologies and linked by the compatible information systems of multinational corporations. The nation-state framework of traditional antitrust analysis is becoming irrelevant to the information economy of the twenty-first century.

Traditional measures of market power, based on relevant product and geographic market definitions, would seem to be ill-suited for markets characterized by technological competition. In high-tech markets, for example, strategic alliances between large firms in the market may be necessary to implement technological developments. The emergence of strategic alliances in the computer and electronics industries, for example, have promoted the development of new technologies and consequently have enabled these firms to compete in the global marketplace. "High technology companies are typically locked in a vicious circle of global competition: Innovation creates demand; demand creates more competition; competition leads to lower prices and more innovation, at ever-increasing fixed costs; price erosion and performance improvements accelerate demand further."¹²³ As a result, competition in high-tech industries has required strategic alliances and cooperative arrangements between firms. It thus remains a debatable point whether Microsoft's acquisition of Intuit would enhance or hinder competition in the emerging personal finance computer market.

If there is a danger posed by the existence of monopoly power in the emerging information economies, it is likely to come from an industry standard bearer's ability to control access to the market by manipulating the conditions for use of the standard technology used by the industry. In high-tech information markets, technological standards used by the industry can give firms like Microsoft and IBM dominant market positions. Problems of foreclosure are likely to be great in technological markets based on standards. Foreclosure dangers, however, are difficult to assess given that market position is achieved initially through the development of new technologies.

Technological manipulation may indeed be a new predatory strategy utilized by high-tech firms to foreclose competition in developing new markets, but the welfare effects of such a strategy remain indeterminant.

123. Charles T.C. Compton, *Cooperation, Collaboration, and Coalition: A Perspective on the Types and Purposes of Technology Joint Ventures*, 61 ANTITRUST L.J. 861, 868-69 (1993).

The problem is that even in traditional markets, "true anticompetitive foreclosure cases—those involving practices that unambiguously reduce economic welfare—may well exist, but they have yet to be confidently identified [by modern economic thought]."¹²⁴

This suggests that some of the key concepts of traditional antitrust law utilized to analyze problems of monopoly power may no longer be useful for evaluating antitrust enforcement policy in the emerging postindustrial markets. Postindustrial markets are structured by new technologies that render the nation-state framework of antitrust regulation irrelevant. Globalization and transnational transactions remain largely outside the reach of domestic antitrust regulation. New sources of power (e.g., power developed from the control of information and technology) seem to fall outside the measures of monopoly power utilized in the traditional antitrust analysis of power issues. The measurement of market power, which under traditional analysis requires the definition of the relevant product and geographic market, will be one of the most elusive and difficult problems of antitrust law in the next century. At the same time, new theories of foreclosure are needed to explain how technological foreclosure can be utilized to entrench monopoly power.

In the emerging postindustrial economies of global multinational corporations and institutions, economic models developed originally for analyzing the smokestack industries of the nineteenth century may seem more relevant as historical fact than as a functional framework for understanding contemporary economic realities. Changes in theoretical thinking about antitrust problems, globalization of markets, new technological developments, as well as the serious practical problems of implementing the new sophistication of antitrust economics, have shattered the once confident vision of legal process theorists. Lacking a theoretical consensus for engaging their analysis, antitrust specialists have lost confidence in antitrust enforcement, and hence, antitrust's current predicament.

V. CONCLUSION: SEARCHING FOR ANTITRUST AT CENTURY'S END

Aware of the limitations of the new sophistication of the post-Chicago approach to antitrust, some antitrust thinkers are calling for a return to antitrust's "jurisprudential past."¹²⁵ Some antitrust thinkers go so far as to call for a return to the legal process jurisprudence that historically shaped the Supreme Court's vision of antitrust ever since the Warren Court era.¹²⁶

The appeal of process thinking is attractive because it is thought that a return to the rationalistic analytic of legal reasoning might stabilize anti-

124. John E. Lopatka & Andrew N. Kleit, *The Mystery of Lorain Journal and the Quest for Foreclosure in Antitrust*, 73 TEX. L. REV. 1255, 1306 (1995).

125. Jacobs, *supra* note 19, at 53. See also Page, *supra* note 38 (arguing for a return of the influence of legal process jurisprudence in antitrust adjudication).

126. See Page, *supra* note 38; Jacobs, *supra* note 19.

trust law and thus be the basis for the emergence of a new antitrust consensus. It is, however, difficult to imagine the possibility of a return to legal process thinking in antitrust or any other area of the law today. The central challenge to legal process thinking posed by now diverse theoretical movements such as law and economics, critical legal studies, and postmodernism makes it difficult to imagine the return of the legal analytic of process theory at the end of the twentieth century.¹²⁷ "After the critiques of law and economics, critical legal studies and postmodernism, the legal process confidence in courts seems difficult to maintain, and impossible to use as the basis of a new synthesis for legal scholarship."¹²⁸ The effort to preserve the image of law and adjudication as an apolitical process has become exhausted, and there is no reason for believing that antitrust law is an exception to the current situation.

We can, however, learn from antitrust's recent history. That history tells us what can happen when antitrust becomes entrapped by dogma, whether it be legal or economic. Dogmas can be helpful if they are relevant to their times, but when change does come, old dogmas can lead us down the wrong road. The old problem of monopoly power remains as relevant today as it was when the Sherman Antitrust Act was enacted, but the old dream of achieving certainty through contemporary legal process theory or contemporary economics has been shattered by an ever-changing and highly diverse new world order. Legal process theory can provide lawyers with a useful framework for analyzing legal issues; and economic theory can "provide a powerful, general set of guidelines for posing questions, and for framing the analysis of issues in industrial organization and antitrust policy."¹²⁹ But each acting alone cannot provide a guide for deciding competitive problems in the emerging postindustrial markets.

Economic conditions are now changing in ways that could not have been imagined when antitrust policy makers developed legal process and economic theories for antitrust law. Antitrust law in the postindustrial era must, therefore, be rethought from the "bottom up." We need to rethink how some of the most fundamental concepts of antitrust—concepts like "relevant market," "monopoly power," "anticompetitive foreclosure," and "competition on the merits"—actually work in postindustrial markets. We also need to study the operation of postindustrial economies so that we might discover new concepts to understand better how the old problem of monopoly power functions in these emerging marketplaces.

In our search for a new postindustrial law of antitrust, we should also reexamine antitrust's history and development during the Reagan-Bush

127. See MINDA, *supra* note 69, at 224-57.

128. Edward L. Rubin, *Institutional Analysis and the New Legal Process*, 1995 WIS. L. REV. 463, 477 (reviewing NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994)).

129. Adams & Brock, *supra* note 7, at 326.

era. We need to reexamine the reasons for the dramatic decline of anti-trust enforcement. We should also be more curious about the lack of public attention now afforded antitrust. We should think more about what did happen to the antitrust movement. An examination of such things might shed new insight needed for determining what to do about antitrust law's current predicament. It might also enable us to figure out how antitrust regulation should proceed in the postindustrial era.

In order to do this, antitrust decision makers will have to rethink the purpose and justification of antitrust regulation in the emerging new world order. Judges and lawyers must give more consideration to how the historical goals of antitrust regulation would play out in the emerging postindustrial marketplaces. For

[a]bove all, resolving antitrust issues calls for judgment. And that judgment is—and must be—informed as much by socio-political values as it is by economic facts and theory, because the interpretation of antitrust statutes, and the operational policies derived from their application to concrete cases, ultimately are determined by the kind of society a nation prefers.¹³⁰

Antitrust law must change in fundamental ways if it is to remain relevant in the twenty-first century. The economy in which antitrust now resides is quite unlike the one that existed in 1890 or 1960. The development of new technologies and the unfolding of world events have completely changed antitrust's landscape. Today our greatest danger lies in the fear of change. Antitrust specialists must be willing to resist their fear of change; they must be willing to consider new possibilities and new ways of dealing with antitrust problems now unfolding at the century's end. One does not have to be an enemy of antitrust to see that we desperately need new ways of responding to the emerging economic problems of postindustrialism.

I do not mean to suggest that traditional antitrust analysis of market power is no longer relevant for the twenty-first century. In the next century, we will surely have many local and national markets involving hospitals, telephones, cement, steel, and other domestic industries where traditional antitrust analysis will remain relevant.¹³¹ On the other hand, we are also witnessing the development of new industries and new markets, including computers, VCRs, CD-ROM, and telecommunications, that no longer seem to fit within antitrust's traditional framework of analysis. Moreover, even long-established industries like the automobile industry have been fundamentally transformed by global competition, rendering antitrust analysis less relevant to the products they produce.¹³²

130. *Id.* at 327.

131. *See* Fox, *supra* note 108, at 228.

132. In the postindustrial era there "is coming to be no such organization as an 'American' (or British or French or Japanese or West German) corporation, nor any finished good called an 'American' (or British, French, Japanese, or West German) product." REICH, *supra* note 4, at 110. In the emerging postindustrial global webs, "products are international composites":

Many thoughtful practitioners and scholars believe that antitrust law remains relevant for analyzing the new technologies of the next century. Anne K. Bingaman, of the Antitrust Division, is certainly correct when she says that "vigorous, intelligent antitrust enforcement is as vital to the economic health of our nation in the twenty-first century as it has been for the twentieth century."¹³³ Of course, the real question is how do we ensure that antitrust enforcement remains vital to the economic health of our nation in the twenty-first century? Should we continue to develop enforcement policies based on traditional analysis of smokestack industries, or should we seek to formulate a new enforcement policy developed from an understanding of the new industry structures now emerging in the postindustrial marketplaces of the informational economy?

These are the "big" questions posed by antitrust at century's end. I do not have any quick fixes or easy solutions to these "big" questions. I can offer only one insight. It is this. Only one thing can be said with certainty—antitrust law must change if it is to remain relevant in the next century. The steady decline in antitrust's importance will continue if antitrust law remains stable and does not change. Of course, this should come as no surprise—the only reliable constant is change; there is no reason for expecting that antitrust law is immune to change.

If antitrust is to remain relevant at century's end, antitrust law and policy will have to be reinvented for postindustrial world markets. Antitrust, like everything else in the law, will have to be updated for the times in which it resides, otherwise it will become, like the antitrust teachers searching for the meeting room at the AALS conference, a law "in search of itself." Antitrust at century's end is, therefore, very much in the same position as the lost antitrust teachers at the AALS conference. Antitrust is in search of its historical mission and justification in a new world order.

In the postindustrial world order, however, we need to do more than just find our way. We need to rediscover where we want to go before we can determine how to get there. We need a competition policy for dealing with the competitive dangers of an increasing global and interconnected market economy. We need new metaphors and new concepts for dealing with the competitive challenges of living in a postmodern and postindustrial world order. We need to rethink antitrust's purpose in the

When an American buys a Pontiac Le Mans from General Motors, for example, he or she engages unwittingly in an international transaction. Of the \$10,000 paid to GM, about \$3,000 goes to South Korea for routine labor and assembly operations, \$1,750 to Japan for advanced components (engines, transaxles, and electronics), \$750 to West Germany for styling and design engineering, \$400 to Taiwan, Singapore, and Japan for small components, \$250 to Britain for advertising and marketing services, and about \$50 to Ireland and Barbados for data processing. The rest—less than \$4,000—goes to strategists

Id. at 113. In such a world it is difficult to tell who is whom. See also Fox, *supra* note 108, at 558.

133. See Anne K. Bingaman, *Antitrust Policy for the Twenty-First Century*, 48 SMU L. REV. ?, ? (1995).

emerging new economies of the world. In short, we need to develop a postindustrial law of antitrust for the twenty-first century. We should not be deterred by our natural fear of change.