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ANTITRUST REACTION TO THE MERGER WAVE: THE REVOLUTION VS. THE COUNTERREVOLUTION

ARTHUR AUSTIN†

In the past antitrust laws have been used to regulate corporate mergers. In this Article Professor Austin discusses the major merger periods and subsequent antitrust reactions. He focuses on the clash between antimerger precedent which utilized antitrust law to regulate merger activity and the promoter "revolution" which fails to use antitrust to inhibit the current "merger mania." Austin observes the influence of the Chicago School of Economics on this promoter movement. The Article concludes with a discussion of whether an antimerger "counterrevolution" could succeed.

INTRODUCTION

The current corporate merger wave—commonly called "merger mania"¹—is setting new records² in exceeding the 1897-1905 "Turn of the Century" movement.³ Even the Black Monday stock crash of October 1987 has not deterred the frequency of "M & As."⁴ Like its predecessors, the new wave is sparking controversy.⁵

Since enactment of the Sherman Act in 1890, the antitrust laws have been used to regulate merger activity.⁶ Amendments, decisions, and regulatory policies under the Act provide the government with wide discretionary power to intervene and prohibit mergers. Prior to 1970 the government exploited this discretion to implement a sweeping antimerger campaign. Under the guidance of Chief Justice Warren, the United States Supreme Court created a phalanx of antimerger precedent. This precedent is now threatened by a revolution in antitrust.⁷ The efficiency school of economics, presuming procompetitive conse-

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1. The word "mania" has been popularized by the trade media. See, e.g., *Deal Mania: The Tempo Is Frantic, And The Future Prosperity Of The U.S. Is At Stake*, BUS. WEEK, Nov. 24, 1986, at 74 [hereinafter *Deal Mania*].

2. See *infra* notes 65-68 and accompanying text.

3. See *infra* notes 11-18 and accompanying text.

4. Lee, *Takeover Pace Is Seen Picking Up In 1988*, Wall St. J., Jan. 4, 1988, at B8, col. 4; *Takeover Fever Is Rising Again*, BUS. WEEK, Dec. 28, 1987, at 82; see *infra* notes 130-32 and accompanying text.

5. See *infra* notes 75-102 and accompanying text.

6. Sherman Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1-7 (1982)). The primary target of the Sherman Act was the "trust" form of consolidation. "The trust was popularly regarded as nothing but a new form of monopoly, and the whole force of the [Antitrust] tradition was focused against it immediately." W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 59 (1965).

7. Revolution in this context is "a political idea, not just a political act." Brown, *You Say*

quences of mergers, espouses nonintervention by government. The Reagan Administration adopted efficiency economics in enforcement of the antitrust laws, and as a consequence, antitrust has not been used to inhibit merger mania.

Confirming Professor Galbraith's principle of countervailing power,⁸ a counterrevolution is emerging. The advocates of the counterrevolution argue that antimerger enforcement should be instituted to control the new wave. The outcome of the revolution versus counterrevolution confrontation will determine the future of antitrust and section 7 of the Clayton Act (Clayton 7)⁹, the antimerger statute.

The current antitrust controversy is complicated by the growing presence of state antitakeover laws whose purpose is to protect home firms from hostile raiders.¹⁰ Moreover, attitudes on Clayton 7 enforcement may be influenced by judgments of whether mergers improve management efficiency and whether the interest of shareholders is protected during takeover battles.

This Article assays the major merger periods and describes the form and method of the subsequent antitrust reaction. It discusses the possibility of reviving Warren Court precedent to stop the present wave, as well as the two obstacles that stand in the way of such a revival—the administration's promerger policy and the influence of the Chicago School's efficiency economics. The Article concludes by focusing on the main issue: can a liberal-populist antimerger counterrevolution succeed?

I. THE LEGACY OF J.D., J.P. & THE JUDGE

A. *The First Wave*

"The Turn Of The Century Movement"¹¹ of mergers and acquisitions established the frame of reference for identifying a wave. From 1897 to 1905, John D. Rockefeller, Judge Gary, Andrew Carnegie, and J.P. Morgan outdueled rivals to aggrandize large segments of the economy. Their creations endure.¹² For example, USX (formerly U.S. Steel), originally a consolidation of 11 holding

Begin, I Say Commence — To The Victor Belongs The Language (Book Review), N.Y. Times, Dec. 20, 1987, at 13, col. 1.

8. See J. GALBRAITH, *AMERICAN CAPITALISM* (1956).

9. Clayton Act, ch. 3, § 7, 38 Stat. 730, 731-32 (1914) (current version at 15 U.S.C. § 18 (1982)).

10. See Romano, *The Political Economy Of Takeover Statutes*, 73 VA. L. REV. 111 (1987); see *infra* notes 210-11 and accompanying text.

11. J. BLAIR, *ECONOMIC CONCENTRATION: STRUCTURE, BEHAVIOR AND PUBLIC POLICY* 257 (1972).

12. One Commentator stated:

The importance of the initial era of merger activity in shaping our present day industrial structures can hardly be exaggerated. Not only did the consolidations put together during a short span of about 10 years transform competitive industries into oligopolistic structures, they determined the form of the oligopoly itself. Typically this form was asymmetrical, with one (and in some cases 2) oligopolists dominant and others of distinctively secondary importance. . . . [T]he asymmetrical oligopolist created during the "great consolidation movement" have endured for nearly three-quarters of a century.

Id.

companies and 785 operating plants,¹³ lingers on as a weather-beaten memorial to the golden age of holding companies. During this period, some 301 firms were absorbed annually. The peak year was 1899 when 1028 firms were acquired.¹⁴ Most mergers were horizontal, aimed at achieving dominance in a particular product market.¹⁵ The fashionable buzzwords were "robber baron," "survival of the fittest," and "morganizing" (the process of consolidating competing firms).¹⁶ Sermonizing on these themes, John D. Rockefeller advised a Sunday school class:

The growth of a large business is merely a survival of the fittest The American Beauty Rose can be produced in the splendor and fragrance which bring cheer to its beholder only by sacrificing the early buds which grow up around it. This is not an evil tendency in business. It is merely the working out of a law of nature and a law of God.¹⁷

This lecture was not the type to give a young nation with a strong Jeffersonian distrust of concentrations of power, whether political or economic. Public discontent with the Rockefeller-Carnegie philosophy of social Darwinism in the marketplace was exacerbated by the perceived inability of the Sherman Act to contain the agglomerating barons.¹⁸

13. C. CRAMER, *AMERICAN ENTERPRISE: FREE AND NOT SO FREE* 422 (1972).

14. J. BLAIR, *supra* note 11, at 258.

15. "The merger-consolidations in this period were comprehensive and included a large number of firms in an industry, with the purpose of establishing a dominant firm. It was these early consolidations that led to the linking of mergers in the economic literature to monopoly and oligopoly." S. REID, *MERGERS, MANAGERS AND THE ECONOMY* 39 (1968).

16. J. BLAIR, *supra* note 11, at 262. Morgan was clearly the leader. "Had it not been for the ability, energy, and drive for power of John Pierpont Morgan, the initial merger wave would never have reached the heights it did." *Id.* Morgan's objectives were efficiency and profit. "It struck him as wasteful for dozens of small, relatively inefficient companies to cut one another's throats to get business. Why not merge them into a few giant corporations that would avoid price wars and produce efficiently?" Merwin, *J.P. Morgan: The Agglomerator*, *FORBES*, July 13, 1987, at 275.

17. R. HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 45 (1962). Rockefeller also is quoted as saying: "God gave me money." Osinski, *The Rise Of The Beady-eyed Billionaire*, *Akron Beacon J.*, Aug. 26, 1984, at 1, 6. Carnegie adhered to the "law of competition." "[W]hile the law may sometimes be hard for the individual, it is best for the race, because it insures the survival of the fittest in every department." R. HOFSTADTER, *supra*, at 47.

Some historians argue that Rockefeller, Carnegie, and Morgan have gotten a "bad rap." "How did Carnegie and Rockefeller do so well? They cut costs, innovated, vertically integrated, and gave bonuses on the basis of merit. Competitors who did not do these things fell by the wayside, but consumers and job-seekers benefited from low prices and American dominance." Folson, *Entrepreneurs vs. The Textbooks*, *Wall St. J.*, July 22, 1987, at 18.

18. One commentator described the period:

During the administrations of Cleveland and McKinley, the laws had scarcely been enforced. Powerful new combinations had been formed in steel, tin cans, corn products, farm machinery, and many other industries. During the administrations of Roosevelt and Taft, monopolistic abuses had been disclosed in hearings before committees of Congress, in the reports of public agencies, and in the evidence presented in cases brought before the courts. Though it was shown that competition had been eliminated by particular business practices, these practices had not been held to be in violation of the law.

C. WILCOX, *PUBLIC POLICIES TOWARD BUSINESS* 55 (3d ed. 1955).

B. *The Reaction*

Although the "Turn of the Century Movement" ultimately was terminated by the effects of the 1903 depression,¹⁹ the deep anxiety over the "evils" of consolidation continued to ferment as a political issue. The debate was resolved by the enactment of the Clayton antimerger act in 1914.²⁰ As the first reformation of antitrust, Clayton 7 was more than a political accommodation to populism and other political pressures. The genius of Clayton 7 was that it initiated a policy for responding to the industrialization of a young economy. Congress sought "to create a legal framework in which private enterprise could operate with market conditions not necessarily perfectly competitive, but more competitive than the conditions that had come to be described as a monopoly in a particular market."²¹ As policy, Clayton 7 expressly identified merger and market concentration as public issues. Moreover, Congress formalized legal and administrative forums for dialogue by allocating enforcement to the Justice Department and the Federal Trade Commission (F.T.C.).²²

II. THE "INVISIBLE WAVE" AND THE "THREAT" OF CONCENTRATION

A. *The Amendment*

Gaps in coverage rendered Clayton 7 ineffective. The drafters were so riveted to trust formations via stock manipulation that they omitted coverage of asset acquisitions.²³ Because most of the "first wave" consolidations involved direct competitors, the courts assumed the Clayton Act applied exclusively to horizontal mergers.²⁴ These gaps neutralized enforcement; between 1927 and 1950, only thirty-one complaints were filed by the F.T.C.²⁵

The ineffectiveness of the Clayton Act contributed to a second merger wave that lasted from 1926 until staggered by the 1930 depression. Although involving a large number of acquisitions, the impact of this movement "was neither so pronounced nor so widely dispersed as that of the earliest period."²⁶ Very few

19. S. REID, *supra* note 15, at 50.

20. Clayton Act ch. 3, § 7, 38 Stat. 730, 731-32 (1914) (current version at 15 U.S.C. § 18 (1982)). In addition, Congress created the Federal Trade Commission with authority to prohibit "unfair methods of competition . . ." See generally D. MARTIN, *MERGERS AND THE CLAYTON ACT 20-56* (1959) (discussing the legislative history of the Clayton Act); Oppenheim, *Guide To Harmonizing Section 5 of the Federal Trade Commission Act With The Sherman Act and Clayton Acts*, 59 MICH. L. REV. 821 (1961) (addressing separate but interrelated antitrust problems).

21. D. MARTIN, *supra* note 20, at 43-44.

22. See 15 U.S.C. § 21 (1982).

23. "The reasons for this distinction were the particular aversion that had grown up to holding companies, and the old and somewhat superstitious desire to abolish secretive monopolizing, which many considered more reprehensible than open monopolizing." W. LETWIN, *supra* note 6, at 275.

24. *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 313 (1962).

25. D. MARTIN, *supra* note 20, at 150. During this period, the Justice Department played a minor role in Clayton 7 enforcement. *Id.* at 205. 1926 was the year of the first Supreme Court interpretation of Clayton 7. See *F.T.C. v. Western Meat Co.*, 272 U.S. 554 (1926).

26. Bok, *Section 7 of The Clayton Act And The Merging Of Law And Economics*, 74 HARV. L. REV. 226, 230 (1960). "A second merger movement in the 1920's affected a number of new and emerging industries and solidified the oligopolistic organization of the older basic industries." *F.T.C. Economic Report On Corporate Mergers*, Part 8A, at 30 (1969).

mergers were horizontal, thus escaping the reach of Clayton 7.²⁷

In a vigorous post-World War II economy, politicians, with the encouragement of economists, focused sufficient attention on the statutory gaps to create a national issue. F.T.C. economists provided rationalization for legislative reform with a 1948 study warning that "if nothing is done to check the growth in concentration, either the giant corporations will ultimately take over the country, or the Government will be impelled to step in and impose some form of direct regulation in the public interest."²⁸ In reality, there was no threat: "The supposed 'sharp rise in economic concentration' through mergers which concerned the Congress was long ago shown to be a piece of fiction."²⁹ Nevertheless, after widely publicized hearings, Congress plugged the gaps with the Celler-Kefauver Amendment of 1950.³⁰

The statutory and political foundation for an antimerger agenda was now on the books. A nonexistent merger threat concocted by F.T.C. economists had sensitized the political system to the popular appeal of antimerger rhetoric. In the 1960s the "sleeping" antimerger agenda was fulfilled with a vengeance.

B. *The Supreme Court Lays the Minefield*

Slightly over a decade after the amendment, the United States Supreme Court rendered a series of decisions whose only apparent logic was that, as Mr. Justice Stewart caustically complained, the government always won.³¹ The majority opinions of this period are a metamorphosis of economics, populism, and opaque value judgments. Chief Justice Warren orchestrated the new ideology in *Brown Shoe Co. v. United States*³² by announcing that in amending Clayton 7, Congress sought "to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization."³³

A majority of the Court followed the Chief Justice's antimerger obsession by helping to forge an impenetrable minefield of precedent. *Brown Shoe's* func-

27. *F.T.C. Economic Report on Corporate Mergers*, *supra* note 26, at 37.

28. F.T.C., *Report On The Merger Movement: A Summary Report*, V, at 68 (1948).

29. Adelman, *Economic Aspects Of The Bethlehem Opinion*, 45 VA. L. REV. 684, 685-86 (1959). According to Bok, "subsequent research and analysis have largely confirmed the conclusion that the postwar merger movement had rather harmless effects." Bok, *supra* note 26, at 232. Debate over the existence and effects of market concentration is inconclusive. The classic study on concentration is G. NUTTER & H. EINHORN, *ENTERPRISE MONOPOLY IN THE UNITED STATES: 1899-1958* (1969).

30. Act of December 29, 1950, ch. 1184, 64 Stat. 1125 (current version at 15 U.S.C. § 18 (1982)).

31. *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

32. 370 U.S. 294 (1962).

33. *Id.* at 344. The Bork and Bowman reaction: "No matter how many times you read it, that passage states: Although mergers are not rendered unlawful by the mere fact that small independent stores may be adversely affected, we must recognize that mergers are unlawful when small independent stores may be adversely affected." Bork & Bowman, *The Crisis In Antitrust*, 65 COLUM. L. REV. 363, 373 (1965).

tional test was a vacuum cleaner. Under the Court's interpretation of the 1950 amendment, it is doubtful that any merger could slip through the comprehensive enforcement net that proscribes merger activity when: (1) there is a probability or a "tendency" toward oligopoly; (2) other mergers will be "triggered"; (3) mom and pop enterprises may be eliminated; or (4) the acquisition creates efficiencies.³⁴

A subsequent decision, *United States v. Philadelphia National Bank*,³⁵ complemented *Brown Shoe* by introducing a static version of market structuralism as a test for liability: "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market" is presumptively illegal.³⁶ Similarly, interindustry mergers were thwarted by *United States v. Continental Can Co.*,³⁷ in which the Court maneuvered glass and metal containers into a single product market to satisfy the mathematics of the *Philadelphia National Bank* equation.³⁸ The possibility that a safe harbor might exist for "small" mergers was torpedoed by the court in *United States v. Von's Grocery*.³⁹ In *Von's Grocery* Justice Black relied on "mom and pop" protectionism and the assumption of a "trend" toward oligopoly to strike down a merger between two Los Angeles grocery chains that would have resulted in combined sales of 7.5 percent in a highly competitive market.⁴⁰

It was a remarkable crusade. Within two years the Warren Court supplied the Justice Department with a series of decisions that gave it the leverage to stop any and all horizontal mergers. Actual effects on competition were irrelevant.⁴¹ These court opinions relied on three broad assumptions: (1) aggregate concentration was a serious threat to the economy, (2) mergers constituted the main cause of concentration, and (3) mergers were, for various sociopolitical reasons, inherently "bad." Antimergerism was as American as apple pie.

34. See *Brown Shoe*, 370 U.S. at 311-23.

35. 374 U.S. 321 (1963).

36. *Id.* at 363.

37. 378 U.S. 441 (1964).

38. The decision was criticized for fostering unpredictability, "since it can never be clear precisely how far a court will go in any particular case in shaping a result-oriented market definition." Brodley, *Oligopoly Power Under The Sherman And Clayton Acts—From Economic Theory To Legal Policy*, 19 STAN. L. REV. 285, 307-08 (1967).

39. 384 U.S. 270 (1966).

40. "[T]he basic purpose of the 1950 Celler-Kefauver Act was to prevent economic concentration in the American economy by keeping a large number of small competitors in business." *Id.* at 275.

41. In criticizing the Antitrust Division's disdain for case by case evaluation of relevant economic facts, Milton Handler said:

Is the Court warranted in transforming an antimerger law designed to protect competition into an anti-concentration measure without regard to competitive effects? I think not, both as a matter of the proper relationship between the legislative and judicial branches of government and as a matter of legal and economic policy.

M. HANDLER, TWENTY-FIVE YEARS OF ANTITRUST 111 (1973).

III. THE CONGLOMERATE WAVE

A. *The Young Barons*

*As the 1890's were the heyday of the trusts, so this decade is rapidly emerging as the golden age of the conglomerates.*⁴²

The holding company concept of the robber baron period was finessed into "diversification" in the 1920s and 1930s and eventually exploded as "conglomeration" in the mid-1960s.⁴³ By conglomerating—connecting firms who were not in direct product or geographical competition—the executive suite outflanked the Warren Court's Maginot Line defense against horizontal mergers.⁴⁴ Tittilating the public with expressions like "synergy,"⁴⁵ "2+2=5," and "Chinese money,"⁴⁶ the conglomerate epidemic blitzed the marketplace. It was an era of slogans like "Welcome To Our Conglomerate. You're Fired!"⁴⁷ The conglomerate barons were young, brash, and aggressive newcomers whose lightning quick tactics offended the old boy executive suite establishment. "They have fought their way up from obscurity by innovating and taking risks in a way that flabbergasts conventional executives They are willing to dare much to gain a larger hold on the future."⁴⁸

In disrupting the status quo, the mavericks became so unpopular and threatening that the Nixon Administration's Antitrust Division interceded.⁴⁹ According to *Fortune*, "The events that triggered Washington into action are not hard to discern. It was not the number of mergers or the concentration ratios, but rather the threat to the established way of doing corporate business."⁵⁰

42. Davidow, *Conglomerate Concentration And Section Seven: The Limitations Of The Anti-Merger Act*, 68 COLUM. L. REV. 1231, 1231 (1968).

43. F.T.C. statistics indicate that during the years 1960-1966, 71% of all mergers involving large manufacturing and mining firms were conglomerate. *ABA Antitrust Developments 1955-1968*, at 83 n.57 (1968); see F.T.C. ECONOMIC REPORT ON CORPORATE MERGERS, *supra* note 26, at 62.

44. One commentator stated:

The rules developed for determining the validity of horizontal and vertical mergers clearly will not do for conglomerate acquisitions generally. In the familiar types of horizontal and vertical merger cases, the Supreme Court has come to place important . . . weight on the share of the relevant markets controlled by the acquiring and acquired companies But whatever significance can be attached to market shares in these cases, quite clearly the significance becomes less when we deal with conglomerate mergers, and indeed may completely vanish.

Turner, *Conglomerate Mergers And Section 7 Of The Clayton Act*, 78 HARV. L. REV. 1313, 1315-16 (1965); see J. NARVER, CONGLOMERATE MERGERS AND MARKET COMPETITION 4 (1968).

45. Synergy denotes "the fact that the firm seeks a product-market posture with a combined performance that is greater than the sum of its parts." H. AUSOFF, CORPORATE STRATEGY 75 (1965).

46. "Chinese money" was debentures and stock warrants. *The Conglomerates' War to Reshape Industry*, TIME, March 7, 1969, at 79 [hereinafter *The Conglomerates' War*].

47. I. BARMASH, WELCOME TO OUR CONGLOMERATE-YOU'RE FIRED! (1971).

48. *The Conglomerates' War*, *supra* note 46, at 76.

49. S. LAZARUS, THE GENTEEL POPULISTS 218 (1974). "Indeed, many observers believed it to be more than coincidental that the Nixon administration discovered the conglomerate issue only after established corporate managements . . . found themselves facing takeover threats from the new conglomerateurs." *Id.*

50. Caveron, *It's Open Season on Conglomerates and Established Business Couldn't Be Happier*, FORTUNE, May 1, 1969, at 43, 44.

B. *The Anticonglomerate Campaign*

The Antitrust Division brilliantly co-opted Clayton 7 flexibility (expressed in terms such as "may be," "probability," and "incipiency")⁵¹ to stretch antimerger proscription to the frontier of eccentricity. Converting *a priori* economic theory into legal precedent, the Justice Department set out to convince the courts that conglomeration was a curse on the economy. The first step was to conjure up "oligopoly" as the theoretical bogeyman.

Ubiquitous and virtually impossible to define, oligopoly became the point guard for the attack.⁵² According to government theory, when oligopolistic conditions existed, "actual competition ceases to be a vital force; by mutual consent, it is abandoned in favor of parallel behavior and the 'easy life.'"⁵³ The Antitrust Division briefs argued that Clayton 7 liability should descend on "evidence of oligopolistic tendencies."⁵⁴ Nonstructural factors such as innovation, management genius, and efficiencies were ignored.

The linchpins of the Department of Justice's game plan were "condition of entry," "potential competition," and the assumption that every firm in the universe is a potential competitor to other firms in some unidentified market.⁵⁵ Existing firms fear that potential competitors might enter the market *de novo* to become a new threat, and thus—theoretically—they operate more competitively than otherwise in order to discourage entry.⁵⁶ Moreover, rather than extract a

The combination of threatened or successful attacks on old line management in the steel industry, the oil industry, the insurance industry, and the banking industry culminated in far-reaching demands from industry itself for investigation and elimination of the disruptive conditions.

This public attention, notoriety and industry demand sparked unprecedented attention at the national level to the problems of corporate mergers. In the first six months of 1969 at least 8 major investigations were underway at the national level into federal questions concerning mergers and acquisitions by conglomerate corporations.

JUDICIARY COMM., ANTITRUST SUBCOMM., INVESTIGATION OF CONGLOMERATE CORPORATIONS, H. R. Doc., 92d Cong., 1st Sess. 5 (1971).

51. "Congress used the words 'may be substantially to lessen competition,' to indicate that its concern was with probabilities, not certainties." *Brown Shoe Co.*, 370 U.S. at 323 (1962).

52. The Government argued:

It is no answer to say that a merger need not be forbidden unless it actually creates oligopoly. For there is no magic point at which oligopoly springs full bloom into existence. Between the highly fragmented and the tightly concentrated market structure there is a middle area, one broad part of which is certainly a danger zone. No one can say—at least not without an inquiry far broader and deeper than practical law enforcement permits—at precisely what point a particular market will exhibit oligopolistic behavior. It is thus meaningless to speak of allowing firms to merge up to the lower limit of oligopoly; practically speaking, that limit is unascertainable.

Brief For the United States at 27-28, United States v. Von's Grocery Co., 384 U.S. 270 (1966) (No. 65-30).

53. *Brief For F.T.C.* at 31, *F.T.C. v. Proctor & Gamble Co.*, 386 U.S. 568 (1967) (No. 66-342).

54. *Brief For the United States*, at 25, *Von's Grocery Co.*

55. See generally J. BAIN, *INDUSTRIAL ORGANIZATION* (2d ed. 1968) [hereinafter *INDUSTRIAL ORGANIZATION*] (description and analysis of market structure, conduct, and performance of American economy with identification of those structures conducive to workable competition and implication for regulatory policy); J. BAIN, *BARRIERS TO NEW COMPETITION* (1956) [hereinafter *BARRIERS*] ("analyzes the character and significance of the 'condition of entry' to manufacturing industries").

56. See F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 233 (1970).

super-competitive price as the usual entitlement of an oligopolist, firms adopt a lower "limit" price that is set to discourage new entry.⁵⁷ This created a Catch-22 scenario: whenever a firm entered a market by acquisition of an existing firm, it eliminated its positive influence as a perceived potential competitor and thus—*theoretically*—lessened competition.

Potential competition theory became case law in *Federal Trade Commission v. Proctor & Gamble Co.*⁵⁸ Proctor & Gamble was ordered to divest Clorox when the Court detected a wickerwork of *a priori* threats: the merger eliminated Proctor as a "perceived" potential competitive threat to Clorox and its rivals. Proctor would have used its deep pockets to subsidize Clorox in activities such as advertising, and the Proctor-Clorox presence would inhibit the competitive aggressiveness of smaller rivals.⁵⁹

On a roll, the government antitrust witchdoctors concocted the "but for" theory; even if the present acquisition "probably" would not lessen competition at the time of consummation, "but for" the acquisition, the acquiring firm could have entered the market *de novo* sometime in the future to produce a procompetitive effect.⁶⁰ This theory was too much for Dean Rahl, who said, "The competition lessened is competition which did not exist, but which was 'potential' in the sense that it is competition which the firm in question might have created itself."⁶¹

With Kafkaesque sleight of hand, the government continued to stretch Clayton 7's "may be substantially to lessen competition" proscriptive standard. "Reciprocity effect" was invoked as another counter to conglomeration.⁶² For example, if a diversified food processor who buys products from meat suppliers acquires a firm that sells products used by the meat suppliers, a reciprocity configuration is created, and it is "probable" that to gain favor, meat suppliers will buy products from the acquired firm. The mere existence of the new relationship and the potential for reciprocal buying constitutes a "probability" of a les-

57. BARRIERS, *supra* note 55, at 4-13. For a critical view of Bain's assumptions see Markovits, *Potential Competition, Limit Price Theory, And the Legality Of Horizontal And Conglomerate Mergers Under The American Antitrust Laws*, 1975 Wis. L. REV. 658 (discussing the "limit price theory").

58. 386 U.S. 568 (1967).

59. *Id.* at 578-79.

60. *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 560-62 (1973) (Marshall, J., concurring).

61. Rahl, *Applicability Of The Clayton Act To Potential Competition*, 12 ABA ANTITRUST L.J. 128, 142-43 (1958); see Note, *Toehold Acquisitions And The Potential Competition Doctrine*, 40 U. CHI. L. REV. 156 (1972).

In *United States v. Marine Bancorporation*, 418 U.S. 602 (1974), the Court may have set such stringent requirements so as to render reliance on the "but for" premise tenuous. There must be proof that the defendant had a "feasible means" for entering the market other than by acquisition and "that those means offer a substantial likelihood of ultimately producing deconcentration . . . or other significant procompetitive effects." *Id.* at 633.

62. Reciprocity effect is "an alleged tendency for prospective suppliers of a firm to direct their purchases to that firm in order to maintain its goodwill. The larger the firm, presumably, the greater its leverage in the market-place and the greater the danger to competition from this 'reciprocity effect.'" *United States v. White Consol. Indus.*, [Jan.-June] Antitrust Trade Reg. Rep. (BNA) No. 504, at D-1 (March 16, 1971); see *Allis Chambers Mfg. Co. v. White Consol. Indus.*, 414 F.2d 506, 518-19 (3rd Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970).

sening of competition.⁶³

Like Captain Kirk and the U.S.S. Enterprise, the Antitrust Division traveled the domestic universe shooting down mergers with the "potential competition" phaser.⁶⁴ By the early 1970s the conglomerate wave had receded to a trickle. In addition to the government's attack, economic factors such as a recession and problems among Wall Street brokerage firms, in addition to the actions of OPEC and the effects of the oil crisis, contributed to the demise of the wave. For some conglomerates it was a time to pause and reorient their new empires. What remained intact, however, was a minefield of antimerger precedent.

IV. THE "NEW" CLASSIC MERGER WAVE

Dust off the record books. Fortune's tally of the 50 biggest U.S. deals completed in 1986 includes new highs in virtually every category.⁶⁵

A. *The Revival of Adam Smith Capitalism*

The present merger explosion surpasses the previous waves in the amounts of money involved and the size of firms. "Over the past four years the U.S. has witnessed the greatest reshuffling of corporate assets in its history."⁶⁶ Flamboyant personalities dominate the headlines as the media provides titillating descriptions of takeover warfare. T. Boone Pickens, Jr., the self-styled populist raider, claims to be the "champion of the small stockholder,"⁶⁷ while the candid Sir James Goldsmith says, "I do it [raid] to make money."⁶⁸

Why the merger wave? The Republican presidential victory in 1980 produced a unique political and economic climate that favored mergers. The Reagan Administration has been conservative both in rhetoric and in deed. In contrast to the Nixon Administration's ambivalence towards capitalism, as reflected in its vigorous but sometimes contradictory tirade against conglomeration,⁶⁹ the Reagan White House openly embraces John D. Rockefeller's

63. *F.T.C. v. Consol. Foods Corp.*, 380 U.S. 592, 594-95, 600-01 (1965). For a criticism of reciprocity doctrine, see J. MARKHAM, *CONGLOMERATE ENTERPRISE AND PUBLIC POLICY* 40-42, 61-63 (1973); Note, *Conglomerate Mergers And The Theory Of Reciprocity*, 22 *STAN. L. REV.* 812 (1970).

64. Lee Loewinger, a former head of the Antitrust Division, said, "Potentiality theory is a kind of legal ESP—extra sensory proof. It substitutes the ectoplasm of hypothesis for the protoplasm of fact, relies on potentiality instead of reality, and offers faith instead of proof." *How To Succeed In Business Without Being Tried* [Jan.-June] *Antitrust & Trade Reg. Rep. (BNA)* No. 496, at D-1, 12 (Jan. 19, 1971) (speech by Lee Loewinger to Association For Corporate Growth).

65. Wiener, *Deals of the Year*, *FORTUNE*, Feb. 2, 1987, at 68, 68.

66. *For Better Or For Worse?*, *BUS. WEEK*, Jan. 12, 1987, at 38, 38; see *Deal Mania*, *supra* note 1, at 74. As with all economic behavior, the extent of the wave is disputed. "Evidently we are near the crest of a merger wave, but there were three others in this century. The current wave is one of the smaller ones." Fuhrman, *Here We Go Again*, *FORBES*, July 13, 1987, at 242, 242.

67. *The Raiders*, *BUS. WEEK*, March 4, 1985, at 80.

68. *Id.* at 81. ("'I'm not a do-gooder.' says Goldsmith.") *The Two Worlds Of Jimmy Goldsmith*, *BUS. WEEK*, Dec. 1, 1986, at 98, 98.

69. Ironically, it was a campaign that did not meet with Nixon's approval, who stated: "[The Antitrust Division has] gone off on a kick, that'll make them big goddamn trust busters. That was all right fifty years ago. Fifty years ago maybe it was a good thing for the country. It's not a good

American Beauty Rose free enterprise gospel.⁷⁰ A revived form of social Darwinism has been implemented by a true believer who found a receptive constituency in Congress and among the public.

The deregulation policy—initiated, ironically, under President Carter—was an important factor in creating a positive climate for mergers. Symbolizing a distrust of “big government” and apprehension of inflation,⁷¹ the endorsement and active implementation by the Reagan Administration of deregulation was a shrewd political maneuver whose most important function was to attract strong support from conservative Democrats, the hard pressed middle class, and the new yuppie set. The result was an agreement on the principle that business—not government—should make the decisions that affect the marketplace. Acceptance of the principle that firms should have merger autonomy was assured.⁷²

The public, benefitting from the breakdown of OPEC, the slowing of inflation, and a productive economy, was receptive to Ronald Reagan’s vision of Adam Smith capitalism. Support for business autonomy also got a lift from the emergence of a global market, a circumstance that permitted rationalizing mergers as necessary counters to foreign competition.⁷³

B. *The Reaction*

Greed is healthy. You can be greedy and still feel good about yourself.⁷⁴

thing for the country today.” Falk & Landauer, *Nixon’s Own Views on Antitrust Policy, Big Business Didn’t Require ITT Lobbying Blitz, Document Shows*, Wall St. J., July 22, 1974, at 3, col. 1.

There were allegations of scandal. The Nixon Administration was accused of accepting \$400,000 from ITT to subsidize the 1972 Republican National Convention in San Diego in exchange for the Government’s settlement of antitrust cases against ITT. *ITT Drive for Settlement of Antitrust Case is Described by Kleindienst and McLaren*, Wall St. J., March 3, 1972, at 2, 4, col. 3; see Blake, *Beyond The ITT Case*, HARPER’S MAG., June 1972, at 74, 74.

70. President Reagan’s free market philosophy is described by two critics:

Bigness, especially when induced by mergers and acquisitions, marks the path to world-class economic performance. It promotes efficiency and economies of scale in production. It fosters technological invention and innovation. According to the President’s Council of Economic Advisors, mergers, takeovers, and the generalized “market for corporate control” discipline errant managements, transfer resources to higher-valued uses, and substitute good management for bad.

Adams & Brock, *The “New Learning” And The Euthanasia of Antitrust*, 74 CALIF. L. REV. 1515, 1519 (1986).

71. See Burnham, *Regulatory Agencies And Competition*, N.Y. Times, Sept. 20, 1975, at 37, col. 1. For a more extensive analysis see S. BREYER, *REGULATION AND ITS REFORM* (analysis of deregulation of airline, trucking, natural gas, and telecommunications industries) (1982).

72. Fear that the “window of opportunity” created by the Administration’s permissive antitrust policy may close after the next election “has also inspired mergers of companies in the same business.” Wayne, *1986’s Legacy: Tumultuous Era For Big Business*, N.Y. Times, Dec. 29, 1986, at 1, col. 5, D5, col.3.

73. See *infra* note 199 and accompanying text. For a contrary view see Adams & Brock, *supra* note 70, at 1537-40.

74. A quote attributed to Ivan Boesky, a Wall Street takeover expert caught and sentenced for using inside information. “His greedy deals hurt thousands of other investors and rocked the public’s confidence in the stock market.” *An Insider Goes Inside*, Wash. Post Nat’l Weekly, Jan. 3, 1988, at 27.

1. Hostility To Merger Mania

The contemporary wave of merger mania is unique in the large number of firms involved and the comprehensive reach into every market. The deals, sometimes nourishing chicanery and indictments,⁷⁵ conjure up comparisons with the tactics of the robber barons. Equally singular is the extensive controversy over their consequences. The controversy is building a backlash toward what is perceived as destructive merger mania. Greed is no longer chic.⁷⁶

With the resumption of the hostile raider versus management confrontation, commentary parallels the arguments exchanged during the conglomeration era.⁷⁷ Management argues that it must sacrifice efficiency, innovation, and long-range planning to resist money-grubbing raiders like Pickens and Goldsmith.⁷⁸ Defensive strategy forces managers to turn to "short-term payoffs": "How can anyone concentrate on doing what is needed for long-term competitiveness—spending for plant and equipment, R&D, and job training—when they're so busy battling for survival?"⁷⁹ Hence managers argue that the constant pressure from the raiders results in expedient and defensive management at the expense of vision, risk, and internal growth.⁸⁰

The raiders have a different interpretation; they contend that acquisitions root out incompetent and slothful management.⁸¹ "Hostile takeovers serve a useful economic and social role. They check corporate mismanagement by

75. See, e.g., Kerr, *15 Employees Of Wall Street Firms Are Arrested On Cocaine Charges*, N.Y. Times, April 17, 1987, at 1, col. 2.

76. Barol, *The Eighties Are Over*, NEWSWEEK, Jan. 4, 1988, at 40. Hollywood confirmed the public image of corruption and greed with the film *Wall Street*, originally entitled *Greed*. See *The Platoon Of Pros Who Helped Out On "Wall Street"*, BUS. WEEK, Dec. 21, 1987, at 38. Tom Wolfe contributed *THE BONFIRE OF THE VANITIES* (1987), a book about sleazy Wall Street operatives. See generally Groner, *White-Collar Defense: D.C.'s Hottest Specialty*, LEGAL TIMES, April 13, 1987, at 1 (growing legal practice defending corporations).

77. For recent literature on the debate see J. BROOKS, *THE TAKEOVER GAME* (1987); J. MADRICK, *TAKING AMERICA* (1987).

78. "The substantial amounts of money being channeled into hostile takeovers could be more productively used to build companies and improve productivity rather than to liquidate and eliminate." Kissinger, *The Word For Takeover: Pernicious*, N.Y. Times, Dec. 5, 1986, at A35, col. 2.

Gone is talk of balanced, long-term growth; impatient shareholders and well-heeled corporate raiders have seen to that. Now, anxious executives, fearing for their jobs or their companies, are focusing their efforts on trimming operations and shuffling assets to improve near-term profits, often at the expense of both balance and growth.

Winter, *Trying To Streamline, Some Firms May Hurt Long-Term Prospects*, Wall St. J., Jan. 8, 1987, at 1, col. 6; see Adams & Brock, *The Hidden Costs Of Failed Mergers*, N.Y. Times, June 21, 1987, § 3 (business), at 3, col. 1.

79. Jones & Berger, *Do All These Deals Help or Hurt The U.S. Economy?*, BUS. WEEK, Nov. 24, 1986, at 86, 86.

80. "The new order eschews loyalty to workers, products, corporate structure, businesses, factories, communities, even the nation. All such allegiances are viewed as expendable under the new rules. With survival at stake, only market leadership, strong profits and a high stock price can be allowed to matter." Prokesch, *Remaking The American C.E.O.*, N.Y. Times, Jan. 25, 1987, § 3 (business), at 1, col. 2.

81. One economist sees the takeover wave as a goad to managers who have allowed their companies

to get fat and inefficient because they are in mature industries that generate high cash flow but can find few profitable places to put it. With low growth prospects, they should be paying that money out to stockholders and letting them invest it. But instead, the USXs, Carbides, oil and tobacco companies, and a host of others diversified into industries with

threatening what executives value most: their jobs.”⁸²

Others see a mixed bag of trade-offs. In an ironical reverse twist of the synergy principle of “2+2=5”—used as a rationalization for conglomerating—firms now are forced to sell old acquisitions to engage in “restructuring.” The objective is to create a more efficient and competitive core while stockpiling a sufficient fund of financial resources to counter raiders.⁸³ On the negative side, restructuring can result in depressed personnel morale,⁸⁴ lay-offs, and a reduction in product consumption.⁸⁵

Threading through the skirmishes over effects is the poltergeist of all merger waves—market concentration. “In theory, mergers could hurt the economy by concentrating the resources of an industry in the hands of a few companies. With their stronger market positions, the survivors could gouge high prices out of consumers.”⁸⁶

2. Reviving The Antimerger Minefield

A reaction to the wave is smoldering among a cross section of disenchanted groups. Politicians and academics are positioning to control the form and method of the response. Op-ed articles appear to spread the call for a new antimerger campaign.⁸⁷ Advocates of Warren Court antitrust policy or of structural economics—who have been brooding in exile since their victory over conglomeration—sense an opportunity to regain command of antitrust policy.

The common rallying point is Reagan Nonantitrust. Professor Shephard, for example, says that under Reagan, “antitrust is in deep trouble,” adding that:

the same problems: The result . . . was a huge waste of resources that makes society worse off.

Jones & Berger, *supra* note 79, at 86-87.

82. Samuelson, *The Super Bowl Of Scandal*, NEWSWEEK, Dec. 1, 1986, at 64, 64.

83. *Deal Mania*, *supra* note 1, at 74, 76.

In deal after deal, the markets reward restructuring, which they identify with sharper corporate goals. In a world of gluts and low growth, only the most competitive can prosper. That usually means shrinking and stripping away tangential operations to return to the core business, then producing the lowest-cost, best-quality product available anywhere.

Id.; see *The Business Week Top 1000*, BUS. WEEK, April 17, 1987, at 31.

84. “The lesson to remaining employees is clear: place less trust in the company. Wall Street’s advice to managers searching for excellence has been to tell them to become excellent at searching for new jobs.” Hirsch, *So Much For Manager’s Loyalty*, N.Y. Times, Feb. 27, 1987, at A27, col. 2, A27, col. 4.

85. Much of the market’s gain goes to affluent individuals who devote only a small part of any incremental income to consumption. Says Robert Eisner of Northwestern University: “How can anyone say the market’s rise is great for consumption when the gain is predicated on takeovers that usually result in laying off thousands of workers with high propensities to consume?”

Deal Mania, *supra* note 1, at 87.

86. Dobryzynski & Berger, *For Better Or For Worse*, BUS. WEEK, Jan. 12, 1987, at 38, 39. Mergers are also blamed for a “slowdown in corporate gifts.” *Letter To The Editor*, N.Y. Times, July 30, 1987, at A24, col. 2.

87. Reich, *On The Brink Of An Anti-Business Era*, N.Y. Times, April 12, 1987, § 3 (business), at 3, col. 1; Adams & Brock, *supra* note 78, at 3 col. 1; Green & Berry, *Takeovers, A Symptom Of “Corpocracy”* N.Y. Times, Dec. 3, 1986, at A31, col. 1; Lodge, *How Should We Kick Out Our Inept Managers*, Wash. Post Nat. Weekly, Dec. 22, 1986, at 28. The Green and Lodge advocacy of populism dates back to the Nader era of the 1960s and 1970s.

"Since 1981 the Reaganists have pursued unproved theories developed at the University of Chicago that supposedly foster competition and growth but actually promote monopoly."⁸⁸ Willard Mueller writes that the "unprecedented failure to execute the [antitrust] laws . . . and the decisions of the courts would raise cries for impeachment if the laws involved private criminal behavior rather than powerful corporate interests."⁸⁹ Ravenscraft and Scherer reject the "hypothesis that the average merger or takeover yields significant improvements in efficiency and operating unit performance."⁹⁰ Concerned with the euthanasia of antitrust, Adams and Brock say that the justifications for merger permissiveness—the existence of global competition and a positive correlation between bigness and efficiency—are myths. They demand the "revitalization" of antitrust to "combat the backwardness of bigness."⁹¹ Structuralists are back in fashion with attacks on market concentration and market power.⁹²

Now controlling Congress and aspiring to occupy the White House in 1989, Democrats salivate over the opportunity to exploit a backlash by painting the Republicans as the instigators of a wasteful merger wave. According to Presidential candidate Jesse Jackson, "The challenge of our day is the merger maniacs who eat up weak companies and measure their strength by absorption."⁹³ While the media amuses the public with tales of Wall Street skullduggery and self-indulgent yuppies going to jail,⁹⁴ a wide mixture of politicians and commentators view merger gamesmanship as the inevitable consequence of morally bankrupt Reaganomics.⁹⁵ In particular, they are seething over Reagan antitrust policy as the source of moral corruption and the subversion of business ethics.⁹⁶

The Senate and House Judiciary Committees have expressed concern. Peter Rodino, Chairman of the House Judiciary Committee, complains that the

88. Shepherd, *Bust The Reagan Trustbusters*, FORTUNE, Aug. 4, 1986, at 225.

89. Mueller, *Market Power and Its Control In The Food System*, in ISSUES AFTER A CENTURY OF FEDERAL COMPETITION POLICY 22, 35 (1987).

90. D. RAVENSCRAFT, F. SCHERER, THE LONG-RUN PERFORMANCE OF MERGERS AND TAKEOVERS 17-18 (1986).

91. Adams & Brock, *supra* note 70, at 1566.

92. See ISSUES AFTER A CENTURY OF FEDERAL COMPETITION POLICY (1987) (essays extolling the structural model and condemning the Chicago model); W. ADAMS & J. BROCK, THE BIGNESS COMPLEX (1986).

93. Fly, *A Backlash Against Business Is Building—And the Democrats Know It*, BUS. WEEK, April 6, 1987, at 49.

94. See *supra* notes 74-75.

95. See, e.g., Hightower, *Where Greed, Unofficially Blessed By Reagan, Has Led*, N.Y. Times, June 19, 1987, at E-25, col. 1. Liberals blame Reaganism for yuppie materialism. See, e.g., Howe, *The Spirit Of The Times: Greed, Nostalgia, Ideologies & War Whoops*, 33 DISSENT 413, 414-16 (1986).

96. Before he withdrew from—and re-entered—the campaign, presidential candidate Gary Hart captured the theme by charging that the "business scandals are a direct consequence of the Reagan Administration's lenient attitude toward enforcement of antitrust and securities laws." Fly, *supra* note 93, at 49. Hart added: "It's a matter of the ethical values that this Administration has been communicating to Wall Street and the country." *Id.*

New Deal liberal moralists are emerging from the woodwork to equate Reagan ideology with Wall Street corruption. "The corporate buccaneers who now felt free to act out the ethos of Social Darwinism could also preach that 'the free market' brought plenty to all (which didn't, however, keep corporate America from pressing for every form of governmental hand out that would further its economic interests)." Howe, *supra* note 95, at 415.

Antitrust Division's performance in dealing with "the tremendous frenzy in merger activity is woefully lacking."⁹⁷ The revived Senate Antitrust Subcommittee is chaired by Howard Metzenbaum, who charges that Reagan's "antitrust record is a disaster," and vows to push for more active merger enforcement.⁹⁸ Any doubts about the Democrats' antagonism towards Reagan antitrust policy was settled when the House passed a bill that maintains per se liability for vertical price-fixing.⁹⁹ This bill is a direct challenge to the Justice Department's rule of reason recommendation.¹⁰⁰

Getting a head start on Washington politicians, the National Association of Attorneys General unanimously adopted merger guidelines designed to encourage enforcement.¹⁰¹ The counterrevolution continued to attract momentum when "experts gathered at a Virginia retreat to critique the federal government's policies and to try to demonstrate that claims of revolution that [have] forever transformed antitrust thinking are greatly exaggerated."¹⁰²

V. THE CHICAGO REVOLUTION

There is public and political support for the use of antitrust to inhibit merger activity. Many of the antitrust counterrevolutionaries argue that the solution is an antimerger campaign conducted under the *imprimatur* of Warren Court precedent. Other activists would settle for reliance on the structure-conduct-performance paradigm in intervening in the merger market. A revival of the antimerger crusade has a persuasive gloss; it worked against conglomeration and, most importantly, favorable antimerger precedent is lying in wait in the minefield. There is, however, a formidable obstacle: The Chicago School of Economics.

97. Pasztor, *Senate Panel Is Expected To Adopt Bill To Aid Federal Antitrust Enforcement*, Wall St. J., March 12, 1987, at 8, col. 2.

98. Hershey, *Metzenbaum Vows Antitrust Push*, Akron Beacon J., Jan. 8, 1987, at A-8, col. 1. The full Judiciary Committee "will take a 'broad, philosophical look' at federal antitrust laws and how they may be affecting the competitiveness of the United States." *Biden Out To Leave His Mark On Judiciary Panel*, Nat'l L.J., Feb. 9, 1987, at 5, col. 1.

99. H.R. 585, 100th Cong. 1st Sess. (1987) (Freedom From Vertical Price Fixing Act); see "House Committee Report On House-Passed Measure," Trade Reg. Rep. (CCH) (Trade Cases), No. 835 (Nov. 16, 1987).

100. See Stall & Goldfein, "Counter Revolution"—*Has It Begun?*, N.Y.L.J., Nov. 17, 1987, at 1, col. 1.

101. The guideline's relevant market criteria result in higher market shares, thereby increasing the probability of liability, and discount projected efficiencies. Pasztor, *State Attorneys General Set Guidelines Meant To Slow Pace of Major Takeovers*, Wall St. J., March 11, 1987, at 4, col. 1.

102. Victor, *Steam May Be Building For A Counterrevolution In Antitrust*, Nat'l L.J., May 4, 1987, at 1, col. 1; see Moskowitz, *Antitrust: The Pendulum Is Swinging Back*, BUS. WEEK, Dec. 9, 1985, at 38; see also *Special Report*, 52 Antitrust & Trade Reg. (BNA) No. 1309, at 641 (April 2, 1987) (summarizing proposals of the Conference on Antitrust Alternative).

Another factor that encourages the counterrevolution movement is the public's disenchantment with deregulation and what is perceived as detrimental consequences from mergers among public service enterprises like airlines. *Rolling Back Regulation*, TIME, July 6, 1987, at 50; *Re-Regulation Rag*, NEW REPUBLIC, May 18, 1987, at 5.

A. *The Chicago School Revolution*

"Free enterprise antitrust" derives energy and direction from a symbiotic exchange between conservative Reaganism and the ideology of the Chicago School of Economics. As an ideological alliance of lawyers and economists, the Chicago people are intent on revolutionizing antitrust according to the creed of "efficiency economics."¹⁰³

Chicago teaches that in enforcing the antitrust laws, the first priority is efficiency, "not legal rules designed to move the economy closer to a model of atomistic competition."¹⁰⁴ When business conduct results in efficiency, the consumer benefits from lower prices, effective service, and better product quality. Efficiency economists reject socioeconomic factors such as equality of opportunity for small but less efficient firms. "Goals based on something other than efficiency (or its close proxy consumer's welfare) really call on judges to redistribute income. How much consumers should contribute to small grocers is a political choice."¹⁰⁵ Likewise, other political factors, like the Jeffersonian notion that enterprise bigness exerts disproportionate and negative influence on government, are irrelevant to the marketplace and antitrust and hence must defer to efficiency.

Many of the scholarly advances of the efficiency school are the result of disillusionment with formalistic structuralist doctrine.¹⁰⁶ Another target of the Chicago school is the Warren Court's fuzzy sociological antitrust,¹⁰⁷ especially the Court's commitment to counterproductive small firm protectionism.¹⁰⁸ The early true believers were a dedicated core of lawyers and economists who published prolifically¹⁰⁹ from academic centers like the University of Chicago and Yale to build a network of zealous and energetic followers.¹¹⁰ Their analysis is crisp, lucid, and focuses on the objectives of the cause.¹¹¹ It gives Chicago a

103. See Posner, *The Chicago School Of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979). For a critique of the "market approach" to law and life, see Minda, *The Lawyer-Economist at Chicago: Richard A. Posner And The Economic Analysis Of Law*, 39 OHIO ST. L. REV. 439 (1978).

104. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1698 (1986).

105. *Id.* at 1703-04.

106. For the classic structuralist argument see C. KAYSER & D. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* 44-58 (1959). Criticizing the structuralism of the 1950s and 60s, Posner observes: "Casual observation of business behavior, colorful characterizations (such as the term 'barrier to entry'), eclectic forays into sociology and psychology, descriptive statistics, and verification by plausibility took the place of the careful definitions and parsimonious logical structure of economic theory." Posner, *supra* note 103, at 929.

107. See Austin, *The Emergence Of Societal Antitrust*, 47 N.Y.U. L. REV. 903 (1972).

108. Kauper, *The "Warren Court" And The Antitrust Laws: Of Economics, Populism, And Cynicism*, 67 MICH. L. REV. 325, 330-34 (1968).

109. Judge Posner, a persuasive theorist and advocate of the cause, is perhaps the most prolific of a prolific group. During 1980-83, he published an imposing collection of 22 law review articles. Swygert & Gozansky, *Senior Law Faculty Publication Study: Comparisons of Law School Productivity*, 35 J. LEGAL EDUC. 373, 382 n.39 (1985).

110. A critic concedes that "[i]t's the most important thing in legal education since the birth of Harvard Law School." Barrett, *A Movement Called "Law and Economics" Sways Legal Circles*, Wall St. J., Aug. 4, 1986, at 1, col. 1.

111. Counterrevolutionaries are chagrined by Chicago's "simplicity."

My explanation for the lack of an effectively-organized proantitrust position has to do with my sense that the "beauty" of the Chicago case is its simplicity and that the difficulty of the

distinct advantage in a comparison with the muddled value judgments of the Warren Court opinions, the Naderites,¹¹² and the "genteel populists."¹¹³

A devotion to the dynamic supply and demand values of free enterprise furnished a foundation for a natural affinity between conservative Republicans and efficiency economists. With the election of Ronald Reagan in 1980,¹¹⁴ the network left the underground of academe and entered the corridors of power. During the ensuing years the network exploited a strong commitment to the cause to introduce their philosophy into law and economic policy.

Chicago was mainstreamed into antitrust enforcement by William Baxter, a pragmatic professor from Stanford Law School, who practiced his convictions as the Justice Department's Antitrust Division Chief. "Only the most prescient could have predicted the boldness with which Professor Baxter has implemented his policy."¹¹⁵ One of his convictions is that the marketplace will Schumpeterize and become competitive from its own creative convolutions.¹¹⁶ Following the Chicago decree that mergers are neutral or procompetitive, Clayton 7 was mothballed.¹¹⁷ The Chicago School's campaign has become known as an anti-trust "revolution," prompting such headlines as "Recent Merger Cases Reflect Revolution In Antitrust Policy."¹¹⁸

With the help of friends in academe, Baxter worked to discredit the structure-conduct-performance paradigm.¹¹⁹ On the second floor of Tenth Street

proantitrust view—and of antitrust itself—is its complexity. In Chicago's simplicity, the real world operates almost like a textbook example of perfect competition. Competition is good; virtually all observed monopoly power is justified; mergers only occur if they improve efficiency; and so on.

Waldman, *Consulting And Reagan Antitrust*, 18 ANTITRUST L. & ECON. REV. (No.4) 36, 37 (1986).

112. See Austin, *The Closed Enterprise System: The Nader Study Group Report On Antitrust Enforcement* (Book Comment), 23 CASE W. RES. 678 (1972).

113. See, e.g., S. LAZARUS, *THE GENTEEL POPULISTS* (1974); G. LODGE, *THE NEW AMERICAN IDEOLOGY* (1975).

114. "The political development that has helped turn antitrust enforcement of the 1970's upside down and made it, in a sense, more leisurely was the arrival of the Reagan administration and its view that business is essentially good." Elias, *Scales Tip Against Antitrust Statutes*, *Insight* (Wash. Times), June 15, 1987, at 8, 11.

115. Bickel, *The Antitrust Division's Adoption Of A Chicago School Economic Policy Calls For Some Reorganization: But Is The Division's New Policy Here To Stay?* 20 HOUS. L. REV. 1083, 1099 (1983); see also Gellhorn, *Baxter In The Pantheon Of Antitrust*, *Wall St. J.*, Jan. 6, 1984, at 16, col. 1 (evaluating Baxter's record as Antitrust Division Chief).

116. Schumpeter believed that monopoly often occurs but eventually dissipates under the pressure of "creative destruction," a process of "industrial mutation" that "incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one. This process of Creative Destruction is the essential fact about capitalism." J. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 83 (1962) (footnote omitted).

117. "Merger enforcement by the Division and the F.T.C. from 1982-1986, as a percentage of reported transactions has been running at 28% of the level of 1979-1980." 52 *Antitrust & Trade Reg. Rep. (BNA)* at 422 (March 5, 1987). Noting that merger enforcement had dropped during the 1980s, Robert Pitofsky observed: "It was anticipated that this lenient drift would continue under the Reagan Administration, but few predicted just how lenient the policy would become. Mergers among giant competitors regularly have been cleared At times, people could not help wondering if the Administration would ever meet a merger it did not like." Pitofsky, *Coke And Pepsi Were Going Too Far*, *N.Y. Times*, July 27, 1986, at F2, col. 1.

118. Leddy, *Recent Merger Cases Reflect Revolution in Antitrust Policy*, *LEGAL TIMES*, Nov. 3, 1986, at 17.

119. In disdaining the quantitative test from *United States v. Philadelphia Nat'l Bank*, 374 U.S.

and Constitution Avenue, as well as next door at the Federal Trade Commission,¹²⁰ the structure-conduct-performance model became *persona non grata*. The bottom line: "The antitrust laws as enforced by the government are the most lenient in 50 years."¹²¹ To Chicago people, "lenient" means rational, with power over price and consumer welfare the criteria for enforcement of Clayton 7.

The judicial appointments of some of the brightest conservative scholars is providing an opportunity to spread the new economic culture in a range of areas.¹²² Former Chicago Law Professor Antonin Scalia is on the Supreme Court while prominent intellectuals like Easterbrook, Winter, and Posner are now on the federal circuit courts.¹²³ As a result, "a small number of brilliant Reagan judges, many in their 30's and early 40's, are carrying the law and economics crusade into the courts."¹²⁴ The Chicago judges are supported in their free market cause by a group of "rising stars" in academe and Congress.¹²⁵

B. *Rule of Reason: Chicago's Trojan Horse*

True believers use the per se/rule of reason characterizations to feed their ideology into antitrust. The conclusive presumption of a per se characterization supports proscription, while the rule of reason favors flexible judgments on enforcement. Because it renders the defendant's activities illegal "without elaborate inquiry as to the precise harm they have caused or the business excuse for their use,"¹²⁶ a per se rule is anathema to the aspirations of Chicago economists.¹²⁷ It is abhorred by Chicago people because it allows—even encourages—

321 (1963), Baxter said, "However, such analysis largely reflects, I believe, the static structuralism found in the economic literature of the 1930's and 1940's pertaining to competitive behavior and concentration, as well as a desire to simplify the analysis of such transactions for reasons of judicial economy." *Merger Enforcement Policy—Antitrust Division*, ¶ 50,435 CCH Analysis at 55991 (1982).

120. At the F.T.C., the Chairman "has serious questions about the need for antitrust laws." Dwyer, *Thunder From The Right At The Federal Trade Commission*, BUS. WEEK, Jan. 12, 1987, at 139.

121. Elias, *supra* note 114, at 11. "The so-called 'new antitrust'—marked by a significant decline in government enforcement—has gained momentum from the increasingly widespread adoption of the Chicago School of Economics marketplace-efficiency approach, along with the deregulatory fervor of the last five years." Middleton, "New Antitrust" *Era Takes Shape*, Nat'l L.J., Jan. 13, 1986, at 1, col. 2.

122. "Yet Reagan's deepest impact on the courts will be made not by the many Reaganites at the district level but by a small group of exceptionally smart and influential legal theoreticians he has appointed to the courts of appeal." Norton, *Reagan's Imprint On The Courts*, FORTUNE, Nov. 24, 1986, at 121.

123. As a lightning rod for charges that he ignores precedent while favoring Chicago ideology, Posner is the most controversial Reagan appointment. See, e.g., Riley, *Has Judge Posner Gone Too Far?* Nat'l L.J., Sept. 1, 1986, at 1, col. 1. Easterbrook and Posner are "showing signs of dominating" the Seventh Circuit. Middleton, *Shaping A Circuit In The Chicago School Image*, Nat'l L.J., July 20, 1987, at 1, col. 1.

124. Norton, *supra* note 122, at 124; see Note, *All The President's Men? A Study Of Ronald Reagan's Appointments To The U.S. Courts Of Appeals*, 87 COLUM. L. REV. 766 (1987).

125. "The Reagan administration's appointment of venerated conservative scholars to judgeships or administration posts has opened the way for other law school academicians to gain greater prominence and influence as intellectual gurus of both the administration and the New Right." Graham, *Conservative Academics: Rising Stars*, LEGAL TIMES, March 18, 1985, at 1, 11, col. 1.

126. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

127. Posner complains that the per se price-fixing rule has been transformed into a conspiracy

courts to make result-oriented conclusions by channeling "facts" into the per se loop. Warren Court merger decisions are virtual per se holdings.¹²⁸ Conversely, the elasticity of the rule of reason approach provides the opportunity for dialogue over acceptable market behavior and thus provides a forum for competing ideologies. The rule of reason is the Trojan Horse that Chicago uses to introduce its ideology into the citadels of policy and enforcement.

Those who detect a drift towards Chicago antitrust analysis point to the increasing reliance by courts on the rule of reason analysis.¹²⁹ The contention is that the easy task of satisfying the liability presumptions of the Warren Court have been replaced with a searching review of competitive effects. Accordingly, the primary focus is now on efficiency, in contrast with previous presumptions derived from market structure or *a priori* assumptions.

VI. ARGUMENTS FOR THE COUNTERREVOLUTION

A. *The Stakes Are High*

The merger wave is not slowing down.¹³⁰ A few deals were lost after the crash of 1987,¹³¹ but as one takeover specialist observed, "The basic velocity of deals is here to stay."¹³² New takeover strategies evolve, such as the growing attractiveness of American firms to foreign investors.¹³³ Public anxiety continues to focus on the takeover issue and mergers are held responsible for everything from labor problems to airplane wrecks.¹³⁴ The lack of antimerger

case, which ignores "the economics of price-fixing . . ." R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 25 (1976).

128. The "quantitative" structural test of *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), is an example. "[I]n any case in which it is possible, without doing violence to the congressional objective embodied in § 7, to simplify the test of illegality, the courts ought to do so . . ." *Id.* at 362.

129. Chicago critics argue that "rule of reason" constitutes a bias in favor of legality, *i.e.*, a Trojan Horse for Chicago anti-antitrust policy. "Business practices tested under a full rule of reason, with no presumptions based on any set of facts and with the burden of showing anticompetitive effect on the plaintiff, will usually turn out to be legal." Pitofsky, *The Sylvania Case: Antitrust Analysis Of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1, 2 (1978).

130. See *Who's Afraid Of The Big Bad Bear? Not The Dealmakers*, BUS. WEEK, Nov. 16, 1987, at 62; Burrough, *Reports of Takeover Demise Are Greatly Exaggerated*, Wall St. J., June 26, 1987, at 6, col. 1; *Raiders Smell Blood In Crash's Aftermath*, Wall St. J., Oct. 22, 1987, at 2, col. 2.

131. The mood was summarized by an investment banker who observed: "There is a high degree of uncertainty about whether deals will hold." Cohen, *Investors Are Increasingly Skeptical That Many Takeovers Will Be Completed*, Wall St. J., Oct. 23, 1987, at 4, col. 2 (quoting Joseph Perella, cohead of investment banking at First Boston Corp.).

132. Brill, *Deal Makers See Quick Rebound For Law Practices*, LEGAL TIMES, Oct. 26, 1987, at 6.

This year may well be the year of the big-boys—whether cash-rich corporations or cash-rich raiders. One of the biggest pushes is expected to come from large, well-capitalized corporations that feel compelled to consolidate within their industry before the Reagan Administration, and possibly its relaxed antitrust stance, ends.

Wayne, *Takeovers Return To The Old Mode*, N.Y. Times, Jan. 4, 1988, at D4, col.3.

133. *For Sale: America*, TIME, Sept. 14, 1987, at 52; Lublin, *British Firms Step Up Takeover Action In U.S.*, Wall St. J., June 15, 1987, at 13, col. 1; Rosen, *The Explosion In International Mergers And Acquisitions*, 71 A.B.A. J., May 1985, at 70 (1985).

134. Rowen, *Bring Back Regulation*, Wash. Post Nat'l Weekly, Aug. 31, 1987, at 5, col. 1; *Industry Groups Blame Deregulation For Diminished Safety By Air Carriers*, 53 Antitrust & Trade Reg. Rep. (BNA) No. 1337, at 626 (Oct. 22, 1987). Mergers are also blamed for "price-setting" among

enforcement by the Administration is still a lightning rod for a counterrevolution.

Whether the Rehnquist Supreme Court would support an antitrust merger counterrevolution campaign is a hot topic when antitrust experts—many of whom are moving into other fields—congregate.¹³⁵ The competing choices are as antithetical as at anytime in the history of the antitrust movement: the revolution of the efficiency economics of Chicago battling a counterrevolution sustained by those who espouse a liberal-populist antitrust antimerger policy. The stakes are high: if the Chicago School can repulse the counterrevolution, Clayton 7 will, in effect, be repealed. Victory by the Chicago school could also mean the demise of antitrust as a significant factor in the marketplace. Adam Smith, John D. Rockefeller, and Professor Schumpeter—wherever they are currently residing—would no doubt toast the victory.

B. *Prospects for a Successful Antimerger Counterrevolution*

Ironically, a Clayton 7 antimerger revival can achieve success by exploiting the Reagan administration's benign enforcement strategy. The real test, however, forces the counterrevolutionaries to assume that Judges Posner¹³⁶ and Easterbrook¹³⁷ are wrong in concluding that Chicago has achieved a "victory" at the Supreme Court level. As a result, the Rehnquist Court would follow the antimerger precedent, ignore Chicago, and influence the federal system to do likewise.

1. The Irony: Chicago Pays a Price For the Administration's Benign Enforcement

A conviction that mergers are presumptively procompetitive and a disdain for Warren Court ideology has resulted in a paucity of Clayton 7 complaints by the Reagan administration. Baxter and his successors at the Antitrust Division have practiced the Adam Smith philosophy that rejects government interference with the marketplace generally and with mergers in particular.¹³⁸ While this strategy is consistent with the Administration's policy, it does not produce case precedent. Despite a revolution, Chicago cannot cite a single Clayton 7 precedent of consequence. Baxter and his successors have allowed the Warren Court

rival carriers. Salpukas, *Climbing Air Fares Stir Wide Concerns*, N.Y. Times, Sept. 9, 1987, at 1, col. 1.

135. "The antitrust practice of many firms has dropped off sharply since the beginning of the Reagan Administration in 1981, forcing lawyers to scramble for work in other specialties." *Antitrust Lawyers Get Less Work As Rules Ease*, L. A. Times, March 24, 1986, at 11, col. 1.

136. Posner, *The Rule Of Reason And The Economic Approach: Reflections On The Sylvania Decision*, 45 U. CHI. L. REV. 1, 10 (1977).

137. Easterbrook, *Foreward: The Court And The Economic System*, 98 HARV. L. REV. 4, 59 (1984).

138. See *supra* notes 117-21 and accompanying text. This lack of litigation may be somewhat misleading. Although no longer inclined to litigate, the Antitrust Division does negotiate "restructuring" of the merger to meet the Department's criteria. This means that one of the merging firms must divest an affiliate firm. Sullivan, *A New Role: In Reviewing Mergers, The Antitrust Division Has Become An Economic Regulator*, Nat'l L.J., May 18, 1987, at 13, col. 1.

minefield and the Burger Court structural decisions to remain intact—available for use by the counterrevolutionaries.

2. Has Chicago Co-Opted The Supreme Court?

The side that dictates the ideology of the rule of reason will win the conflict. An acceptance of Chicago's version of the rule of reason by the Court is an implicit acceptance of Chicago's judgment that mergers are presumptively neutral or procompetitive. In the face of a Chicago Court, pursuing an antimerger counterrevolution would be superfluous.

The counterrevolutionaries can make a plausible argument that the Court's rule of reason/per se dialogue does not favor Chicago. A reading of the cases confirms Professor Arthur's judgment that the Supreme Court has consistently expressed a split personality in antitrust matters and that over the years the rule of reason/per se labels are often illusory or conflicting.¹³⁹ He makes an analogy to the split personality heroine in *The Three Faces of Eve*,¹⁴⁰ and concludes that the Court wears three faces: sometimes it follows precedent, sometimes it follows economic theory, and sometimes it engages in "policymaking."¹⁴¹

In *National Society of Professional Engineers v. United States*¹⁴² the Court adopted a "precedent" personality to strike down a professional association's ban on competitive bidding. Although the Court spoke rule of reason language, the defendant's argument that the restraint was in the public's interest was summarily rejected in deference to a string of precedent which held that competition, not competitors, should determine prices and hence price-fixing was per se illegal.¹⁴³ The next personality was a carryover of the efficiency theme of *Continental T.V., Inc. v. GTE Sylvania, Inc.*¹⁴⁴ In *Broadcast Music, Inc. v. Columbia Broadcasting System (BMI)*¹⁴⁵ blanket licensing arrangements that could have fallen into the per se category under precedent were exonerated, because the effect was to reduce costs, and the restraints were "a necessary consequence of

139. Arthur, *Farewell To The Sea Of Doubt: Jettisoning The Constitutional Sherman Act*, 74 CALIF. L. REV. 263, 309-17 (1986). Professor Arthur joins Edward Mason who said:

Pareto once remarked that the statements of Karl Marx are like bats; from one angle they resemble birds while from another view they look like mice. This observation is equally appropos with respect to antitrust decisions. It is possible for the skillful reader to buttress almost any preconceived notion of what the antitrust laws are about by judicious citation of chapter and verse.

E. MASON, ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM 391 (1959).

140. C. THIGPEN & H. CLECKLEY, *THE THREE FACES OF EVE* (1957).

141. Arthur, *supra* note 139, at 310.

142. 435 U.S. 679 (1978).

143. The Court wrote:

The fact that engineers are often involved in large-scale projects significantly affecting the public safety does not alter our analysis. Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to repeal of the statute The judiciary cannot indirectly protect the public against this harm by conferring monopoly privileges on the manufacturers.

Id. at 695-96.

144. 433 U.S. 36 (1977); *see infra* text accompanying notes 181-82.

145. 441 U.S. 1 (1979).

the integration necessary to achieve . . . efficiencies"¹⁴⁶

The Court continued to split its antitrust personality. A basic principle of Chicago's rule of reason is that maximum resale price fixing can be procompetitive and, therefore, should not be per se illegal.¹⁴⁷ The Supreme Court has long disagreed.¹⁴⁸ With the *GTE Sylvania* and *BMI* decisions on the books, the Court appeared headed on a one-way trip to Chicago to reverse precedent. Instead, the Court detoured. In *Arizona v. Maricopa County Medical Society*,¹⁴⁹ a case involving horizontal price fixing, the Court flatly rejected a rule of reason analysis built around efficiencies resulting from cost containment. One commentator called the opinion "retrogressive: it champions a wooden, mechanical view of the per se rule and fails to recognize the full range of circumstances in which trade restraints may promote competition."¹⁵⁰ To further confound Chicago, the Court gratuitously reaffirmed precedent on resale maximum price fixing.¹⁵¹

Two years later, both Chicago and their opponents received obfuscated signals from *Jefferson Parish Hospital District No. 2 v. Hyde*,¹⁵² in which four concurring Justices urged that the per se rule on tie-ins be abandoned and that inquiry be directed to "economic effects, and the potential economic benefits" of the restraint.¹⁵³ Even the majority opinion by Justice Stevens reduced the rigor of the per se standard by making the critical market power requirement more difficult to meet.¹⁵⁴

Professor Arthur concluded that the majority opinion in *Jefferson Parish* was an unsatisfactory "Jekyll and Hyde" blending of the "law" and "economic" personalities. The per se characterization was retained as a concession to precedent (law), while Justice Stevens used a "forcing" theory to rationalize a finding of insufficient market power (economic).¹⁵⁵ Justice Stevens did not, as Arthur

146. *Id.* at 21.

147. See, e.g., Posner, *supra* note 136, at 10-12 (discussing the per se tie-in rule and franchise distribution system). "Maximum resale price fixing has none of the potential anticompetitive consequences of horizontal maximum price fixing Moreover, maximum resale price fixing has a competitive benefit that does not occur in cases of horizontal maximum price fixing: The maximum resale price prevents distributors from exploiting territories given to them by manufacturers." Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886, 890 n. 20 (1981); see also Posner, *supra* note 103, at 925 (summarizing the central tenets of the Chicago school, including resale price maintenance).

148. *Albrecht v. Herald Co.*, 390 U.S. 145, 151-53 (1968); see L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 377-88 (1977).

149. 457 U.S. 332 (1982).

150. Gerhart, *The Supreme Court And Antitrust Analysis: The (Near) Triumph Of The Chicago School*, 1982 SUP. CT. REV. 319, 344.

151. *Maricopa County*, 457 U.S. at 347-48. William Baxter's reaction was succinct; he called the decision "very, very stupid and unfortunately so." *Antitrust Chief Suggests Price-Fixing Law Won't Be Enforced In Some Circumstances*, Wall St. J., Sept. 10, 1982, at 4, col. 2.

152. 466 U.S. 2 (1984).

153. *Id.* at 35 (O'Connor, J., concurring).

154. Justice Stevens concluded that 30% control over the tying product was "far from overwhelming." *Id.* at 26.

155. Arthur, *supra* note 139, at 311-12. The Circuit Court held that the Hospital's draw of approximately 30% of patients in the relevant market supplied sufficient market power to justify per se liability. Justice Stevens, noting that the patients generally were indifferent to price or quality, concluded that under these conditions, the Hospital could not "force" consumers to buy something that they would not otherwise purchase. He wrote:

correctly notes, apply Chicago economics, which considers tying arrangements to be presumptively procompetitive.¹⁵⁶ Arthur summarizes:

Indeed, if economic analysis were to be applied consistently to tying doctrine, the *per se* approach would have to be discarded altogether, for it is clear that at least some tie-ins are output-increasing arrangements which "make consumers better off." The *Hyde* majority's refusal to consider this basic economic objection to the tying *per se* rule, while employing economic analysis to find the rule inapplicable to the specific dispute, gives its opinion a distinctly split personality.¹⁵⁷

Several months later, in *NCAA v. Board of Regents of the University of Oklahoma*,¹⁵⁸ Justice Stevens relied on Robert Bork's "entity" theory of cooperation¹⁵⁹ to apply the rule of reason to behavior "ordinarily condemned as a matter of law under an 'illegal *per se*' approach . . ."¹⁶⁰ The analysis was economic; Justice Stevens discerned the existence and use of market power to limit output, enhance prices, and thwart consumer preference.¹⁶¹ Unable to demonstrate efficiencies, the defendant's other defenses crumbled.¹⁶²

In 1985 the Supreme Court blended populism and efficiency economics in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*¹⁶³ Justice Brennan, one of the populist holdovers from the Warren Court, accepted the relevance of efficiency analysis in boycott cases. He nevertheless ostensibly retained the *per se* criteria of proof of market power, coercive motive, and adverse effect.¹⁶⁴ In this case, the criteria were not satisfied. Most interesting was Bren-

If consumers lack price consciousness, that fact will not force them to take an anesthesiologist whose services they do not want—their indifference to price will have no impact on their willingness or ability to go to another hospital where they can utilize the services of the anesthesiologist of their choice. Similarly, if consumers cannot evaluate the quality of anesthesiological services, it follows that they are indifferent between certified anesthesiologists even in the absence of a tying arrangement—such an arrangement cannot be said to have foreclosed a choice that would have otherwise been made "on the merits."

Jefferson Parrish, 466 U.S. at 28.

156. Arthur, *supra* note 139, at 312-13.

157. Arthur, *supra* note 139, at 313 (footnote omitted).

158. 468 U.S. 85 (1984).

159. *Id.* at 101 (citing R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978)).

160. *Id.* at 100.

161. Arguably, Stevens in effect expunged *per se* by merging it with rule of reason.

Indeed, there is often no bright line separating *per se* from Rule of Reason analysis. *Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct. For example, while the Court has spoken of a "*per se*" rule against tying arrangements, it has also recognized that tying may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis.

NCAA, 468 U.S. at 104 n.26; see Note, *NCAA v. Board of Regents And A Truncated Rule of Reason: Retaining Flexibility Without Sacrificing Efficiency*, 27 *ARIZ. L. REV.* 193 (1985).

162. "The District Court did not find that the NCAA's television plan produced any procompetitive efficiencies which enhanced the competitiveness of college football television rights . . . There is therefore no predicate in the findings for petitioner's efficiency justification." *NCAA*, 468 U.S. at 114.

163. 472 U.S. 284 (1985).

164. *Id.* at 290-95. The dominant theme was proof of market power, rather than motive. "Of course, the purpose underlying the challenged conduct is always relevant to a rule of reason inquiry,

nan's use of efficiency analysis to implicate the Warren Court's populist ideals of mom-and-popism. "The cost savings and order-filling guarantees enable smaller retailers to reduce prices and maintain their retail stock so as to compete more effectively with larger retailers."¹⁶⁵

3. A Counterrevolution Interpretation

The most favorable scenario for the liberal-populist position is that Chicago did not ride the coattails of *GTE Sylvania* to gain complete command of Supreme Court antitrust analysis. Subsequent decisions are scattered according to Professor Arthur's "Three Faces of Eve" split personality thesis, leaving an erratic trail of confusion. Arguably, any drift to Chicago is more cosmetic than substantive. Hence, despite the optimistic assumptions of the Chicago proponents, the Court has not, as reflected in the traditional analysis of *Maricopa*, expunged the per se characterization from the antitrust lexicon.

Moreover, a conversion to rule of reason analysis does not necessarily settle the conflict to Chicago's advantage. The elimination of the varied and often mysterious permutations of per se presumptions shifts the focus of debate to the development of a more flexible system of rules.¹⁶⁶ Structuralism and populism would still compete with Chicago. Interestingly, the last major confrontation for control of the rule of reason ideology was won by the liberal-populists.¹⁶⁷

Reference to efficiency may be misleading. Efficiency is an open-ended word which, like any economic term, can be manipulated.¹⁶⁸ As noted, Justice Brennan used efficiency as a vehicle to advocate the sociological interests of mom and pop, a populist value disdained by Chicago. On the other hand, critics

and evidence of motive plays a particularly helpful role in assessing the credibility of the defendant's efficiency arguments. Nevertheless, market power, not motive, plays center stage in contemporary antitrust analysis." Brunett & Sweeney, *Integrating Antitrust Procedure and Substance After Northwest Wholesale Stationers: Evolving Antitrust Approaches To Pleadings, Burden of Proof, and Boycotts*, 72 VA. L. REV. 1015, 1044 (1986).

165. *Northwest Wholesale Stationers*, 472 U.S. at 295.

166. Expanding analysis into the swamp of competitive effect under rule of reason may generate a reverse effect. Lengthy, costly, and complex litigation will result in efforts to "streamline rule of reason analysis," perhaps ultimately leading to a return to "hard-boiled rule of reason" criteria or even per se. Popofsky & Goodwin, *The "Hard-Boiled" Rule of Reason Revisited*, 56 ANTITRUST L.J. 195, 196 (1987).

167. In the 1950s a campaign by what Alfred Kahn called the "new critics" sought to counter the per se condemnation of business size and monopoly power expressed in Judge Learned Hand's opinion in *United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416 (1945). The new critics offered a more flexible "workable . . . competition" standard that would consider effects "in terms either of concrete economic results or of the continuing vitality of competitive forces in the market as a whole." Kahn, *A Legal and Economic Appraisal of the "New" Sherman and Clayton Acts*, 63 YALE L.J. 293, 294-95 (1954). The "new critics" lost to the populism and structuralism of the Warren Court. See Austin, Book Review, 56 U. CIN. L. REV. 193, 201 (1987).

168. Manipulation is conducted under the "black box" doctrine. "You can't argue about what's inside my black box i.e., economic model) because I made it. The God's truth isn't in the black box, I am the God's truth!" *But Ceteris Are Never Paribus*, FORBES, Dec. 15, 1974, at 22, 23 (remark attributed to Franco Modigliani, M.I.T. economist). Economists are noted for intradisciplinary confrontation, accusing the "other side" of self-serving biased work, and charging critics with serving as instruments of evil forces. See, e.g., J. GALBRAITH, *ECONOMICS AND THE PUBLIC PURPOSE* (1973); A. LINDBECK, *THE POLITICAL ECONOMY OF THE NEW LEFT: AN OUTSIDERS VIEW* (1971); W. WEISSKOPF, *ALIENATION AND ECONOMICS* (1971).

contend that Chicago's *desiderata* of consumer welfare-efficiency is a dangerous Trojan horse hiding a big business bias that is in fact detrimental to consumers.¹⁶⁹ This assertion suggests that efficiency could become an Orwellian term easily twisted to conform to value judgments, prompting more split personality opinions. Moreover, citations to Chicago people lose vitality and original rigor when the economics are filtered through the various biases of the Justices. This is, for example, the legacy of the *Hyde* decision, which left a mangled and mysterious per se rule for tie-ins.¹⁷⁰

Translating Chicago's efficiency language into merger analysis will create debate. Whether this translation can, or should, be done, is the subject of controversy, even among Chicago proponents. Robert Bork rejects direct consideration of efficiencies,¹⁷¹ but others deem it necessary for credible analysis.¹⁷² The case law is contradictory, with some decisions suggesting that the creation of efficiencies is reason to proscribe a merger.¹⁷³ If the Court, for lack of expertise and with aspiration for simplicity and economy, opted to avoid the efficiencies swamp, the advantage would go to the counterrevolutionaries: without an up-front efficiency analysis, structure and other value judgments, including those from Warren Court precedent, would dominate.

C. Other Factors Favoring the Counterrevolution

One factor that may deter significant revision of precedent is the unique character of a merger. Conduct violations, such as tie-ins, boycotts, and price fixing, are transactions that are relatively comprehensible in terms of identifying effects on markets. Litigants in tie-in cases, for example, can produce a record of efficiencies, price discrimination, "coercion," or "foreclosure." This evidence usually provides sufficient information to make judgments on what effects should be relevant to antitrust liability.¹⁷⁴

169. A commentator wrote:

Judge Bork thus defines "consumers" to include monopolists and cartels. Antitrust based on Judge Bork's definition of "consumer welfare" makes no distinction between real consumers—the purchasers of goods and services—and the firms with market power that raise prices and thereby extract wealth from purchasers. Higher prices to consumers are fine with Judge Bork as long as the monopolist or the cartel produces efficiently.

Lande, *An Anti-Antitrust Activist?*, Nat'l L.J., Sept. 7, 1987, at 13, 28, col. 1.

170. Even before *Hyde*, the tie-in was recognized as a "mysterious phenomenon which is not wholly understood by anyone." G. HALE & R. HALE, *MARKET POWER: SIZE AND SHAPE UNDER THE SHERMAN ACT* 53 (1958).

171. "[S]ince the elements of the trade-off between output restriction and efficiency gain cannot be studied directly," Bork subsumes efficiency under "general legal rules." R. BORK, *THE ANTI-TRUST PARADOX: A POLICY AT WAR WITH ITSELF* 219 (1978). He would make "presumptively lawful all horizontal mergers up to market shares that would allow for other mergers of similar size in the industry and still leave three significant companies." *Id.* at 221-22.

172. Berg, *Cost Efficiencies In The Section 7 Calculus: A Review Of The Doctrine*, 37 *CASE W. RES.* 218 (1986).

173. F.T.C. v. Procter & Gamble Co., 386 U.S. 568, 580 (1967); *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962). Berg concludes that the discussion of efficiencies in these cases is dicta. Berg, *supra* note 172, at 233.

174. There is, as might be expected, controversy over what effects should be relevant to liability for imposing ties. The Chicago people give priority to efficiency, Bowman, *Tying Arrangements And The Leverage Problem*, 67 *YALE L.J.* 19, 20 (1957), while the cases have focused on foreclosure, and

Mergers are different, with a special mystique that conjures up imagery of warfare, greed, and skullduggery. With the possible exception of large horizontal consolidations, reasonably accurate judgments about the effects of mergers on competition are impossible. Basic issues, such as determination of relevant markets, are lost in guerrilla warfare between hired gun experts.¹⁷⁵ Without reliable judgments on competitive effects, other factors are drawn into the inquiry. The liability discussion is further expanded by the fact that mergers are more of a national political issue than an antitrust issue. As part of the benchmarks of history, they attract interest from every discipline. Historians, political scientists, and casual observers have said as much about mergers as economists and lawyers.¹⁷⁶

Under these conditions, societal antitrust, populism, and quantitative structuralism are never obsolete and are as relevant as Chicago economics. The debate over the impact of merger mania on managers, shareholders, and investors has at least subliminal impact on the judiciary, perhaps cultivating an antimerger bias. The historical relevance of these and other factors gives the cycle theory of antitrust credibility. Hence, while Chicago presently may have an edge as the conventional wisdom of the chic, "the historical record suggests that any form of vigorous antipopulism has a limited political life-span . . . Populism continues to enjoy support among academic commentators and within Congress and the judiciary, and its resurgence simply awaits the right set of political circumstances."¹⁷⁷

VII. ARGUMENTS FOR CHICAGO AND THE DEMISE OF ANTITRUST

A solid argument supports Judge Posner's conclusion that Chicago has won the struggle against what has been labeled "Coonskin" (liberal-populist) anti-trust.¹⁷⁸ Chicago disciples, ensconced in the White House for two terms, have exploited the leverage of an influential forum to spread the new creed. Members of the Chicago network are distributed among key federal circuit courts where their intelligence, stamina, and scholarship exert influence. Their academics continue an unrelenting effort to control the marketplace of ideas.¹⁷⁹ In addi-

"the polar concepts of coercion and free choice [rather] than . . . with the efficiency or allocation consequences of competitive structure and process." L. SULLIVAN, *supra* note 148, at 445.

175. Professor Phillip Areeda is quoted as saying: "Often, I'm sorry to say, economists testify to points they would be ashamed to publish in professional journals for the scrutiny of their colleagues." Schifrin, *Antitrust And Industrial Organization: The Loss of Idealism And Leadership (II)*, 18 ANTITRUST L. & ECON. REV. (No. 4) 43, 61 (1986) (quoting Areeda).

176. Justice Douglas attached an Art Buchwald article on mergers to *United States v. Pabst Brewing Co.*, 384 U.S. 546, 553-55 (1966) (appendix to concurring opinion of Mr. Justice Douglas, reprinted from Wash. Post, June 2, 1966 at A21).

177. Baker & Blumenthal, *Ideological Cycles and Unstable Antitrust Rules*, 31 ANTITRUST BULL. 323, 333 (1986).

178. Posner, *supra* note 136, at 13. "Coonskin" antitrust is Fortune's description of Justice Black's interpretation of Clayton 7. *Editorial: Antitrust in a Coonskin Cap*, FORTUNE, July 1966, at 65.

179. Chicago critics subvert their own cause. Dedication to the free market rewards of consulting is a factor in draining the scholarly resources of the counterrevolution. The majority of Industrial Organization economists—the group most concerned with antitrust—are counter-revolutionaries who would be expected to lead in the production of scholarship. Production, how-

tion to scholarship, a network of efficiency-oriented conferences convey the message to judges, young faculty, and lawyers.¹⁸⁰ However significant these successes are, the key to a long-standing or conclusive victory rests with control of the Supreme Court.

A. *Chicago's Trojan Horse Has Gained Access to the Supreme Court*

The most significant Supreme Court citation for Chicago School success is *Continental T.V., Inc. v. GTE Sylvania, Inc.*¹⁸¹ In reversing its ten year precedent of per se liability for vertical territorial restraints, the Supreme Court expressly endorsed the efficiency rationalization. The "redeeming virtues" [of efficiencies in distribution of products] are implicit in every decision sustaining vertical restrictions under the rule of reason.¹⁸² The Court's embrace of a rule of reason efficiency test foreshadows the demise of per se analysis in other vertical restraints such as tie-ins and maximum price control. For example, *Hyde* is a tentative step in the process of conversion to Chicago.

Efficiency advocates like Judge Posner interpreted the *GTE Sylvania* decision as a victory for Chicago. Posner wrote:

One must not read a Supreme Court opinion like a bond indenture, but it does appear that the Court is implying that antitrust prohibitions must have an economic rationale and that the aesthetic delights of smallness and the yearning to resurrect a nation of sturdy Jeffersonian yeomen will not be permitted to decide antitrust cases. This impression is reinforced by the frequency of the Court's citations to the writings of members of the "Chicago School," like Bork and me, who argue that economic efficiency is the only goal of antitrust law.¹⁸³

Writing in 1984—seven years after Posner—then Professor, now Judge, Easterbrook confirmed the trend: "Times have changed. In the 1983 Term the antitrust opinions read like short treatises on microeconomic analysis. All of the Justices asked economic questions, such as whether the arrangements in question increased prices by cutting back output."¹⁸⁴

Since *GTE Sylvania*, the rule of reason has been the primary issue in the Court's antitrust decisions. Literal characterization—if it looks like price-fixing, it is conclusively presumed per se illegal—is viewed as misleadingly simplistic

ever, is reduced by the fear of alienating potential clients. "[T]here's a strong income maximum in the IO [Industrial Organization] field, an incentive to protect one's income earning potential. You don't say things that are going to keep you off one of the two sides of the street . . ." Schiffrin, *supra* note 175, at 62.

180. The most controversial is Professor Manne's Law and Economics Center at George Mason University, which conducts intensive Chicago School programs for federal judges. See Guzzard, *Judges Discover The World of Economics*, FORTUNE, May 21, 1979, at 58. Another significant conduit for Chicago-conservative policy is the Federalist Society whose membership includes the main influences in Chicago economics. Abramson, *Right Place At The Right Time*, AM. LAW., June 1986, at 99.

181. 433 U.S. 36 (1977).

182. *Id.* at 54.

183. Posner, *supra* note 136, at 13.

184. Easterbrook, *supra* note 137, at 59.

and overbroad.¹⁸⁵ The ongoing debate among the Justices recognizes and explores the ideological and practical ramifications of switching liability tests from per se to rule of reason. Chicago scholarship is frequently cited.¹⁸⁶ In summary, the basis exists for a plausible argument that the anti-efficiency bias of the Warren Court has been replaced with a pro-efficiency inclination. Judge Posner is correct; *GTE Sylvania* was a major victory for Chicago and it established a theme and frame of reference for future antitrust analysis "Chicago style."

Although there have been instances of "split personality," the Court continues to ask economic questions. Rarely does Warren Court populism intrude. With several exceptions, the Justices seek to restrict antitrust evaluation to competition, rather than sociology or judgments on proper income redistribution. For example, in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*¹⁸⁷ a unanimous Court restricted analysis of a monopolization claim to a "harm to competition" standard while citing Bork's efficiency analysis to uphold a jury verdict for the plaintiff.¹⁸⁸ The Court likewise supported Chicago's concern with the negative effects of self-serving and frivolous private enforcement¹⁸⁹ by tightening standing requirements and by eliminating the *Pollar* rule which gave plaintiffs an advantage on summary judgment motions.¹⁹⁰

B. *The Kennedy Factor*

While Robert Bork personifies Chicago economics and Judge Ginsburg is a dedicated supporter,¹⁹¹ Justice Kennedy's vision of antitrust is considerably less focused. Ginsburg and Bork are scholars with Chicago antitrust track records;

185. See, e.g., *Broadcast Music, Inc. v. Columbia Broadcasting Sys.* 441 U.S. 1 (1979).

186. Justice White noted the majority's frequent citation of Posner. *GTE Sylvania*, 433 U.S. at 69-70 (White, J., concurring).

187. 472 U.S. 585 (1985).

188. "If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." *Id.* at 605. Although elated that "*Aspen* is in many ways an advance in the application of economic analysis to antitrust law," Judge Easterbrook did not claim a total Chicago victory. He faulted the Court for putting the burden on the defendant to show that its conduct is efficient and for asking the question—"is it efficient?"—without offering some criteria." Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 977-78 (1986). The debate continues: Wiley, "*After Chicago*": *An Exaggerated Demise?*, 1986 DUKE L.J. 1003; Hovenkamp, *Chicago And Its Alternatives*, 1986 DUKE L.J. 1014.

189. See Austin, *Negative Effects of Treble Damage Actions: Reflections on the New Antitrust Strategy*, 1978 DUKE L.J. 1353 (1978).

190. These changes are "access" obstacles:

With increasing frequency, plaintiffs have failed to achieve full adjudication of complaints. It is becoming substantially more difficult to prove conspiracies, and courts have been exhibiting greater receptivity to summary motions. Standing continues to bar many complaints. Other disputes are being kept from the courts by arbitration agreements, which enjoy a new found respectability. Even antitrust law's commerce requirement, once considered a largely meaningless restriction on jurisdiction, is being rejuvenated. And, with a few notable exceptions, many plaintiffs are being barred by the *Noerr-Pennington* and state-action exemptions.

Briggs & Calkins, *Antitrust 1986-87: Power And Access (Part I)*, 32 ANTITRUST BULL. 275, 332-33 (1987) (citations omitted).

191. Wermiel, *Bork Confirmation to Bench Could Give Rulings on Antitrust a Free-Market Slant*, Wall St. J., July 3, 1987, at 32, col. 5; Wermiel, *High Court Nominee Has Left Conservative Trail On Economy Despite Few Footprints Elsewhere*, Wall St. J., Nov. 5, 1987, at 68, col. 1.

Kennedy is a lawyer-judge without antitrust experience. Commentators suggest that the new Justice is not a "doctrinaire follower of the school of legal thought known as 'law and economics'"¹⁹² and that he "doesn't try to fit every case into a grand scheme."¹⁹³

Kennedy's antitrust opinions are succinct and address the issue. Unlike Bork, he does not sprinkle his opinions with ideological gratuities nor does he use footnotes for preaching. Nevertheless, Justice Kennedy's decisions are clearly within the mainstream of Chicago School doctrine. For example, his vertical distributorship decisions track *GTE Sylvania's* efficiency rationale: "Judicial deference to the manufacturer's business judgment is grounded in large part on the assumption that the manufacturer's interest in minimum distribution costs will benefit the consumer."¹⁹⁴ He is inclined to favor a rule of reason analysis, intimated by his short concurring opinion to Judge Sneed's rejection of *per se* in *Arizona v. Maricopa County Medical Society*.¹⁹⁵

Kennedy is cautious and will not have the impact of a persuasive ideologue like Bork.¹⁹⁶ As someone on the periphery of the Chicago movement, it is unlikely that he would be a factor in espousing the revolution in Court conferences. He is, however, a Reagan conservative with a probusiness and free market perspective. Kennedy is a sure bet to join the antitrust conservatives.¹⁹⁷

C. *The Obsolescence Factor*

Despite aggressive support from liberal-populists and a resilient tradition, antitrust, and particularly Clayton 7, are destined to become what Richard Hofstadter once called a "faded passion."¹⁹⁸ A progeny of smokestack "heavy" industry and a manufacturing system that followed a predictable growth pattern, antitrust doctrine faces obsolescence from external changes.

Globalization of markets and international competition, rejected by anti-trust traditionalists, is a fact of life for all firms, including those in the small to medium range.¹⁹⁹ As a result, conventional assumptions involving domestic market concentration and the consequences of "market power" are questionable, if not irrelevant to the world market. More importantly, in a global capital-

192. Wermiel & Hume, *Judge Kennedy's Conservative Rulings on Business Often Debated by High Court*, Wall St. J., Nov. 13, 1987, at 56, col. 1.

193. Dewyer, *Business Can't Bank on Judge Kennedy's Vote*, BUS. WEEK, Nov. 30, 1987, at 33.

194. A.H. Cox & Co. v. Star Mach. Co., 653 F.2d 1302, 1306 (9th Cir. 1981).

195. 643 F.2d 553, 560 (9th Cir. 1980), *rev'd*, 457 U.S. 332 (1982).

196. "He has a much greater respect for precedent [than Bork] . . ." Gallagher, *Here Comes The Judge*, NAT'L REV., Dec. 18, 1987, at 33.

197. "Judge Kennedy's opinions, like those of retired Justice Lewis Powell whom he would replace, portray a conservative who doesn't believe in applying antitrust laws too stringently or to business situations for which he believes they weren't intended." Wermiel & Hume, *supra* note 192, at 56, col. 1-2.

198. R. HOFSTADTER, *WHAT HAPPENED TO THE ANTITRUST MOVEMENT* 188 (1967).

199. "So suddenly that it almost defies belief, the U.S. has seized the lead in the race for global competitiveness. Many of its industries have become the world's low-cost producers." Nasar, *America's Competitive Revival*, FORTUNE, Jan. 4, 1988, at 44. A global market also exists for mergers and acquisitions. Rosen, *The Explosion in International Merger and Acquisitions*, A.B.A. J., May 1985, at 70.

ist market antitrust is an American provincialism, a legacy of a frontier smokestack mentality. Post-World War II efforts to colonize Japan and Europe with antitrust have failed.²⁰⁰ Extraterritorial jurisdiction is, at best, an impotent gesture and, at worst, a challenge for retaliation.²⁰¹ Within this environment, antitrust and Clayton 7 are alien and an added cost to American firms. Professor Thurow summarizes: "In markets where international trade exists or could exist, national antitrust laws no longer make sense. If they do anything, they only serve to hinder U.S. competitors who must live by a code that their foreign competitors can ignore."²⁰² Another major critical factor signalling the demise of antitrust is that segments of the global economy in the developed countries are "postindustrial."²⁰³ Postindustrial industries are composed of service and technology-oriented firms. They compete in creating and then reducing the life span of technology. Information, not steel, is the "strategic resource."²⁰⁴ The "creative destruction" time span of high tech products is so ephemeral that market power could not survive the length of an antitrust suit. Sophisticated customers in the postindustrial economy "will be more aware of the competitive alternatives . . . and more able, and willing, to shift to such alternatives should their existing supplier increase his prices or fail to keep up in improving his products."²⁰⁵

Exponential leap-frogging in new technology inhibits fact-finding within the adversarial process.²⁰⁶ The government's unsuccessful monopolization suit against IBM confirms the inability of the "faded passion" to deal with modern technology. The "unarticulated premise underlying the IBM dismissal . . . is the sense that antitrust is not the proper vehicle to use in order to resolve the huge, highly complex and often intractable issues raised in these cases."²⁰⁷

200. "Under United States leadership the victorious allied powers moved to break up Japanese and German industrial and financial combines and impose antitrust laws on the American model to prevent the re-emergence of international cartels." Martin, *The Evolution of Industrial Policies: A World Perspective*, in *ISSUES AFTER A CENTURY OF FEDERAL COMPETITION POLICY* 115, 121 (1987).

201. The British have a "claw-back" statute which allows British firms to recover two-thirds of any treble damage award. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. OF INT'L L. 257 (1981).

202. L. THUROW, *THE ZERO-SUM SOCIETY* 146 (1980).

203. See D. BELL, *THE COMING OF POST-INDUSTRIAL SOCIETY* (1973); J. NAISBITT, *MEGA-TRENDS* (1982); A. TOFFLER, *FUTURE SHOCK* (1970). For a more specialized view, see T. FOR-ESTER, *HIGH-TECH SOCIETY: THE STORY OF THE INFORMATION TECHNOLOGY REVOLUTION* (1987).

204. J. NAISBITT, *supra* note 203, at 15; see D. BRANDIN & M. HARRISON, *THE TECHNOLOGY WAR: A CASE FOR COMPETITIVENESS* (1987); F. MACHLUP, *THE PRODUCTION AND DISTRIBUTION OF KNOWLEDGE IN THE UNITED STATES* (1962); *Information Power*, *BUS. WEEK*, Oct. 14, 1985, at 108.

205. *Pretrial Brief For Defendant* at 230, *United States v. I.B.M.*, 69 Civ. 200-Div. (No. 72-344) (D.N.E.).

206. See Yellin, *High Technology and the Courts: Nuclear Power And The Need for Institutional Reform*, 94 HARV. L. REV. 489 (1981). The inability of jurors to comprehend complex antitrust litigation has been documented. A. AUSTIN, *COMPLEX LITIGATION CONFRONTS THE JURY SYSTEM* (1984).

207. Goodale, *AT&T and IBM: Do U.S. Actions Compute?* N.Y.L.J., Jan. 14, 1982, at 4, col. 3; see F. FISHER, J. MCGOWAN & J. GREENWOOD, *FOLDED, SPINDLED, AND MUTILATED: ECONOMIC ANALYSIS AND UNITED STATES v. IBM* (1983).

Like the demise of the law of bailments, antitrust doctrine is succumbing to new business relationships. Technology creates organizational configurations that do not fit the accepted merger characterizations and do not generate traditional types of "market power." For example, the trend for domestic firms is to create "dynamic networks." These firms are "vertically disaggregated"; relying on other companies for manufacturing and many crucial business functions."²⁰⁸ The corporation is being "reinvented" into a network of subsidiaries.²⁰⁹ These firms are dedicated to the efficiency ideal, and as a result, the competition is in creating products that perform at higher efficiency levels. This form of behavior is hardly a target for Clayton 7 or other antitrust provisions.

In seeking to collect public, governmental, and judicial support for an antimerger reaction, the counterrevolutionaries are competing with states that have been enacting antitakeover laws. State action is a sharp contrast with the conglomerate era, when Clayton 7 was the primary weapon against merger activity. State antitakeover laws make it more difficult and costly for hostile raiders to complete acquisitions. "The political motivation behind state antitakeover laws is obvious—us vs. them."²¹⁰ They reflect a state's interest in preventing loss of industry, curbing unemployment, and checkmating other cultural and social dislocations.²¹¹ A political reaction by state legislatures deflates the antimerger rhetoric by counterrevolutionaries. Constituencies, such as entrenched management, union, and local interests, who would otherwise demand antitrust reaction, are now placated by state action.

VIII. CONCLUSION: THE CHICAGO REVOLUTION WINS

After sifting through cases, enforcement performance, and rhetoric, one must conclude that Chicago is very close to accomplishing de facto repeal of Clayton 7, if not antitrust. Getting political control of the government and the enforcement system is obviously of critical importance to a counterrevolution. Control would supply a forum and enforcement leverage, but would not assure success. The counterrevolution must still confront the "new" Supreme Court, overcome the pervasive legacy of Chicago, and counter dynamic changes in the new market environment.

208. Special Report, *And Now, the Post-Industrial Corporation*, BUS. WEEK, Mar. 3, 1986, at 64.

209. Naisbitt and Aburdene project the emergence of "small work groups where communication is quicker and more effective, and where the increasing number of baby boomers are experiencing the 'small is beautiful' entrepreneurial environment that is consistent with their values . . ." J. NAISBITT & P. ABURDENE, RE-INVENTING THE CORPORATION 37 (1986).

210. Bartlett, *Beware Of State Takeover Laws*, FORTUNE, Nov. 9, 1987, at 179. Under the leadership of T. Boone Pickens, raiders "are pressing Congress for legislation that would preempt the state laws and thereby avoid what they warn would be the 'balkanization' of the securities markets through the proliferation of state antitakeover statutes." Victor, *Taking On Takeovers*, Nat'l L.J., Jan. 9, 1988, at 79.

211. Ironically, while takeover laws contribute to the demise of Clayton 7 enforcement, they are inconsistent with Chicago economics. "States have a very different view of major corporations than free market economists. All the economist see are the raider, management, and shareholders. The states see customers, vendors, employees, and taxes; the unions see jobs." Bartlett, *supra* note 210, at 182. For Chicago's criticism of management's resistance to takeover, see Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981).

Whether antitrust “fades” or not, it will never be the same. In the practical world of law professor and practitioner, the choices are evident—switch to new fields or rely on the populist-liberal counterrevolution for revival. The latter leads to the tarpits.