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FOREWORD: ANTITRUST AS PUBLIC INTEREST LAW*

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I. INTRODUCTION

The year 1990 marks the one-hundredth anniversary of the Sherman Act,[1] American antitrust law's "charter of economic liberty."[2] Inspired by the anti-monopoly and anti-cartel sentiments of the Progressive Era, the Act has withstood cycles of uneven enforcement by successive presidential administrations, shifting interpretation by the federal courts, and wavering public support. This record, in significant part, has been the result of recurrent controversy over the public interests to be served.

Although these public interests have always been associated with competition policy, this consensus has settled very little about antitrust law because competition policy has meant too many things to too many interpreters.[3] In seeking to understand the kinds of public interests implicated in competition policy, judges, practitioners, government policy makers, and scholars have often looked outside legal discourse to the disciplines of history and economics. Over the last century, each discipline has offered various formulations of the public interests to be associated with antitrust law and competition policy.

New York Law School invited a group of scholars, government officials, and practitioners to address the question of public interest as it

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1. Ch. 647, §§ 1-7, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1988)).

2. Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958).

3. I have taken the position that competition policy has never provided the sole normative ground for antitrust. I have written elsewhere that antitrust has been produced by a tension between competition policy and private property rights, two rhetorics whose historical forms can be understood in terms of internal conflicts between commitments to the values of liberty and equality. *See* R. PERITZ, REFORMING ANTITRUST LAW: COMPETITION POLICY AND PROPERTY RIGHTS IN CONFLICT (forthcoming from Oxford University Press); Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 285-300 [hereinafter Peritz, *Counter-History*]; Peritz, *The "Rule of Reason" in Antitrust Law: Property Logic in Restraint of Competition*, 40 HASTINGS L.J. 285, 287 (1989) [hereinafter Peritz, *"Rule of Reason"*]; Peritz, *The Predicament of Antitrust Jurisprudence: Economics and the Monopolization of Price Discrimination Argument*, 1984 DUKE L.J. 1205, 1212 [hereinafter Peritz, *Antitrust Jurisprudence*].

relates to antitrust law, at a conference held at the law school on November 16, 1990.[4] This symposium issue marking the Sherman Act centennial developed out of that conference.

This foreword proceeds in four parts: part II offers three observations about the historical relationship between competition policy and public interests associated with antitrust. Part III reviews the four articles in this issue that examine antitrust history. Part IV comments on the four pieces that address antitrust economics. Part V considers the four essays that treat government activity to serve the public interest. A brief concluding section discusses three important issues raised in both the conference proceedings and the symposium articles.

II. THREE OBSERVATIONS ABOUT THE HISTORICAL RELATIONSHIP BETWEEN COMPETITION POLICY AND PUBLIC INTEREST IN ANTITRUST

Though statutory in origin, antitrust history has been characterized in common-law terms, terms nicely reflected in the early writing of Oliver Wendell Holmes, Jr.: "When ancient rules maintain themselves . . . new reasons more fitted to the time have been found for them, and . . . they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted."[5] If antitrust is imagined as a series of "ancient rules" in varying stages of (re)formation, then the following observations can be understood as directing attention to three "grounds" supporting the body of rules and the possibility of change in antitrust.

The first observation relates to a recent change in the way we talk about competition policy—the shift to an exclusionary discourse of

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4. The conference consisted of three panel discussions. The first panel was entitled "Using Historical Analysis to Formulate the Public Interest." The members of this panel included Professors Daniel R. Ernst, Georgetown University Law Center; William P. LaPiana, New York Law School; James P. May, Washington College of Law, American University; and Martin Sklar, Department of History, Bucknell University. Professor Edward A. Purcell, Jr., New York Law School, served as moderator.

The second panel discussion was entitled "Using Economic Analysis to Formulate the Public Interest." The participants included Professors Eleanor M. Fox, New York University School of Law; Robert H. Lande, University of Baltimore School of Law; and William G. Shepherd, Department of Economics, University of Massachusetts. This discussion was moderated by Professor John J. Flynn, University of Utah College of Law.

I served as the moderator of the third and final panel discussion of the conference, entitled "Government Action to Represent the Public Interest." The speakers on this third panel were Messrs. Taylor Briggs of LeBoeuf, Lamb, Leiby & MacRae; Lloyd Constantine, Chief of the Antitrust Bureau, New York State Department of Law; William J. Curran III, Editor-in-Chief, *Antitrust Bulletin*; and Ms. Judy Whalley, Deputy Assistant Attorney General, Antitrust Division, United States Department of Justice.

5. O.W. HOLMES, THE COMMON LAW 36 (1881).

neoclassical economics. The second unpacks the familiar notion of "free competition"—a dilemma at work in antitrust policy since the Sherman Act's passage. The third observation finds "ancient rules" firmly imbedded in unacknowledged antitrust policy grounds—the venerable institution of private property rights.

A. *Public Interest and the Bulbous Flora of Turkey*

In considering the kinds of public interests associated with modern antitrust and reconsidering the lack of public opposition to the Reagan decade of antitrust neglect,[6] I was reminded of the technical economics discourse that monopolizes current antitrust policy analysis: we speak of the Herfindahl index and "small but significant and nontransitory" increases in price, of "deadweight welfare loss" and "contestability" theory. To citizens, lawyers, judges, policy makers, and scholars who do not work with the "new economic learning,"[7] antitrust policy analysis must seem as foreign as a dissertation on the bulbous flora of Turkey.[8]

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6. *See generally* Potts, *'Toothless' FTC Gets Its Bite Back: Steiger Invigorates Enforcement Role*, Wash. Post, June 9, 1991, at H1, col. 1 (stating that Reagan administration ignored non-merger antitrust violations); Lewis, *The Reagan Revolution in Antitrust*, N.Y.L.J., Sept. 21, 1989, at 1, col. 2 (arguing that Reagan administration's neglect of antitrust law spurred the "merger-mania" of the 1980s).

7. For a discussion of the New Learning doctrine, see Adams & Brock, *The Antitrust Vision and Its Revisionist Critics*, 35 N.Y.L. SCH. L. REV. 939, 941-46 (1990), and sources cited therein.

8. My source for the reference to bulbous flora of Turkey is a personal experience. Late one afternoon in January of 1990, I was aboard a commercial airliner, on my way to a conference in North Carolina. As we taxied up to the queue of planes waiting to depart LaGuardia Airport, the passenger beside me asked if I was headed for Durham. "Yes," I answered, "to a conference."

"Really! I'm also going to a conference—the Southeast Regional Meeting of the American Rock Gardening Club. Are you a rock gardener?"

"Rock gardener?" I asked. "No. I'm going to another meeting. What happens at your conferences? Do you look at slides?" (A rather witless question, I realized, as the words were leaving my mouth.)

"Sometimes we do," she said. "Rock gardens are popular in and around New York City. Slide shows are quite common there. But we do lots of other things at regional meetings, too. If the weather is nice, we take rock garden tours. There are always speeches. Sometimes there are panel discussions. In recent years, the speeches have tended to be technical—like efficient seed germination procedures for Long Island North Shore gardeners. Stuff like that."

When I asked whether there was something in particular that had attracted her to the conference in Durham, she responded: "Yes. The chief horticulturist of Tivoli Gardens in Copenhagen will be the featured speaker. His talk is entitled *The Bulbous Flora of Turkey*. I wonder whether he is serious about the topic or whether he intends to parody the technical

Just recall for a moment the traditional language of antitrust policy analysis. In 1933, Chief Justice Charles Evans Hughes wrote for the Court: "As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions."[9] In 1958, Justice Hugo Black characterized the Sherman Act as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[10] In his oft-cited opinion for the Court in the 1962 *Brown Shoe* merger case,[11] Chief Justice Earl Warren declared: "We cannot fail to recognize Congress' desire 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."[12]

Compare, for example, the current Justice Department Merger Guidelines,[13] which embody the public interest served in evaluating mergers such as those between Texaco and Getty, or Chevron and Gulf—four multi-billion dollar oil companies. The following language led antitrust enforcement agencies to find that these 1983 mergers threatened no "substantial lessening of competition":

> A market is defined as a product or group of products and a geographic area in which it is sold such that a hypothetical, profit-

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talks that have become so common these days." In response to my question about the point of such a parody, she continued: "Tivoli is, after all, a public park, and there are important questions to be answered about park design, public access, fund expenditures—especially questions about who should represent the public's interest when those decisions are made. Is he going to parody the way these questions have come to be treated as technical questions? Or is he really going to talk about the bulbous flora of Turkey?"

My fellow traveler then asked about the conference I planned to attend. I replied that I had been invited to give a talk on antitrust law. "Oh," she wondered. "Antitrust law?"

In retrospect, I should not have been surprised that her reaction to antitrust paralleled mine to rock gardening—after all, the distinguished historian Richard Hofstadter chronicled antitrust's disappearance from public concern more than twenty-five years ago. *See* R. HOFSTADTER, *What Happened to the Antitrust Movement?*, in THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 188, 189 (1965) (stating that historians and the public ignore antitrust because it has become "complex, difficult, and boring"). Still, I had assumed that Hofstadter spoke too soon. There was, after all, an antitrust revival that began after the original 1959 publication of his essay.

9. Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933).

10. Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958).

11. Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

12. *Id.* at 344 (discussing the 1950 Celler-Kevauver amendments to the Clayton Act).

13. Antitrust Div., U.S. Dep't of Justice, Revised Merger Guidelines, 49 Fed. Reg. 26,823 (1984).

> maximizing firm that was the only present and future seller of those products in that area would impose a "small but significant and nontransitory" increase in price above prevailing or likely future levels.[14]

There has been a shift in policy analysis—a shift from political economy to economics, from judgments about values to assessments of abstract technicalities, from concern over economic power in its multiple forms to concern over market power of a particular form.

Although it is not self-evident that economics must produce antitrust policy defined in technical jargon, during the Reagan decade of the 1980s the Justice Department's and Federal Trade Commission's embrace of a price-theory model for antitrust analysis coincided with a broader rhetorical shift in antitrust since the late 1970s, a shift from political or normative discourse to technical talk.[15] Perhaps with some irony, antitrust policy has concurrently become much simpler. Sometimes shrouded in the obscure language of neoclassical economics and othertimes advertised under the trademarks of efficiency or (anti-Naderite) "consumer welfare,"[16] the goal of price-theory proponents has been to reinstate laissez-faire, to get government out of the business of regulating commercial markets.[17] The traditional array of goals associated with competition has been shoved into the archives of antitrust history—goals such as the abatement of unfair

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14. *Id.* § 2.

15. *See* Peritz, *Counter-History*, *supra* note 3, at 300-11. My references to the Reagan administration are meant to include not only administrative but also judicial appointments. The clearest example of a judicial appointment consistent with the economic ideology of laissez-faire is Justice Antonin Scalia. For an illustration of how this ideology can lead to new antitrust doctrine, see Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988). For a criticism, see Peritz, *A Genealogy of Vertical Restraints Doctrine*, 40 HASTINGS L.J. 511, 550-54 (1989) [hereinafter Peritz, *Genealogy*].

16. Since the phrase "consumer welfare"

> shares semantic elements with the Ralph Nader consumerism movement, there has been a feeling that Robert Bork, Richard Posner, and other price theorists share the Naderites' concerns for consumers. Nothing could be farther from the truth, we have learned. Where Naderites call for commercial firms to take social responsibility for their products, services, and effects on society, price theorists believe that firms only have a responsibility to shareholders to maximize earnings.

Peritz, *Counter-History*, *supra* note 3, at 311.

17. Two recent books assess the effects of this laissez-faire policy in recent years. *See* R. KUTTNER, THE END OF LAISSEZ-FAIRE: NATIONAL PURPOSE AND THE GLOBAL ECONOMY AFTER THE COLD WAR (1991) (offering an historical framework for U.S. international economic and political policy since the Bretton Woods accords following World War II); K. PHILLIPS, THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH (1990) (focusing on domestic policy).

competition, a strong preference for individual entrepreneurs, the disfavor of monopoly profits, a distrust of firms with great economic power, and a recognition of competition as a process with social, economic, and political returns.

But what sense does it make to talk about "public interest" when the language of policy analysis is not public?[18] Is the "public interest" best served by "experts" whose discourse is inaccessible? Should we presume that price theorists simply manipulate neutral principles? We, of course, learned long ago that normative choices and expert judgments cannot be separated so neatly. Nor is the relationship between theory and policy clear: it is arguable that price theory both clung to the coattails of the "Reagan revolution" and provided intellectual capital for a laissez-faire ideology already at the heart of the Reagan era's brand of "consumer welfare."

B. *Public Interest and "Free Competition"*

Certainly, laissez-faire is not a newcomer to the antitrust policy agenda. The Bush administration's re-invigorated Antitrust Division[19] reminds us, moreover, that antitrust enforcement seems to run in cycles. The periodic (dis)appearance of laissez-faire can be understood in terms of an old dilemma reflected in the familiar notion of "free competition."

As I have written elsewhere, calls for free competition raise a question about the nature of competition's restraint.[20] From which tyranny do we want to free competition? From governmental power? Or private market power? If we want to eliminate governmental interference with markets, then, for example, FTC intervention to enjoin unfair competition is bad. If, however, we want to diminish private market power, then FTC intervention can be good when it succeeds. More realistically, how do we formulate doctrine that reflects distrust of both kinds of power?

The dilemma of free competition embodies some sort of tension lodged in competition policy. My historical research provides the basis for representing the tension in terms of a conflict between commitments to

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18. *See generally* J. HABERMAS, TOWARD A RATIONAL SOCIETY: STUDENT PROTEST, SCIENCE, AND POLITICS 62-80 (1970) (arguing that there must be a translation of scientific terms employed in policy analysis in order for the public to develop meaningful opinions). For a more in-depth treatment of this subject by Habermas, see J. HABERMAS, THEORY AND PRACTICE 1-41, 253-82 (1973).

19. *See generally* Johnston, *In Justice Dept. of the 90's, Focus Shifts from Rights*, N.Y. Times, Mar. 26, 1991, at A1, col. 1 (discussing changes at Antitrust Division, including increased enforcement activity, since Bush took office).

20. *See* Peritz, *Counter-History*, *supra* note 3, at 264; Peritz, *"Rule of Reason"*, *supra* note 3, at 296, 337.

liberty and equality.[21] A primary commitment to liberty supports competition free of government intervention—laissez-faire. As Chief Justice Edward White wrote for the Court in the formative era, the plain intent of the Sherman Act was to protect the "freedom to contract," which he viewed as "the essence of freedom from undue restraint" of trade.[22] A primary commitment to equality, however, underwrites competition free of private market power—the ideal of perfect competition and the pragmatics of workable competition. Justice Rufus Peckham's earlier majority opinion stated that "[t]he public is not entitled to free and unrestricted competition, but to fair and healthy competition" because trusts and cartels were driving "out of business the small dealers and worthy men whose lives have been spent therein. . . . Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class . . . of small but independent dealers."[23]

Currently, references to free competition are taken to reflect primary commitments to liberty. Nonetheless, concern about dominant firms—about excessive economic power—remains. Our distrust of all discretionary power remains, as does the challenge of fashioning doctrine to reflect our twin concerns.

C. *Public Interest and Private Property Rights*

Since the Sherman Act debates, private property rights have played a leading role in the formulation of antitrust doctrine. In short, competition policy has never provided the sole normative basis for antitrust.[24] That may seem obvious, given our view that competition policy presupposes private property rights—without them, competitive markets as we know them are not possible. But there is another side to the complex relationship between competition policy and private property rights: they are not only complementary but also in conflict. Each defines the limit of the other.

Horizontal merger doctrine provides a good example of this tension. On one side, competition policy calls for the arrest of mergers that result in dominant firms. On the other, preventing owners from selling their business interferes with their fundamental right to sell their property. The well-known case of *Northern Securities Co. v. United States*,[25] with its splintered majority, concurring, and twin dissenting opinions, dramatizes one early battle in an unrelenting conflict between two logics, two sets of

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21. *See* Peritz, *Counter-History*, *supra* note 3, at 264.

22. Standard Oil Co. v. United States, 221 U.S. 1, 62 (1911).

23. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323 (1897).

24. *See* Peritz, *Counter-History*, *supra* note 3, at 264; Peritz, *"Rule of Reason"*, *supra* note 3, at 296, 337; Peritz, *Antitrust Jurisprudence*, *supra* note 3, at 1212.

25. 193 U.S. 197 (1904).

assumptions and beliefs about antitrust.[26] Almost a century later, antitrust doctrine still displays conflicting commitments to competition policy and private property rights.[27] Our understanding of modern antitrust, including the current attraction to price theory's rhetorics of "efficiency" and "consumer welfare," would profit from recognizing the social force of private property rights.

D. *Public Interest in Antitrust Today*

Each of these three observations about the historical relationship between competition policy and antitrust has something to say about the genealogy of "public interest" as we understand it today. First, price theory's rhetorics of "efficiency" and "consumer welfare" are not proxies for competition policy, which has traditionally embodied a bundle of social values. Plucking efficiency out of the bundle reflects a political judgment that requires open debate, justification, and legitimate political action. Second, the Reagan administration's neglect of antitrust enforcement,[28] founded in a laissez-faire ideology, represents only one side of the dilemma of "free competition." The other side, founded in concern over excessive market power, calls for antitrust enforcement to maintain or reinstate the market conditions necessary for workable competition. Several articles in this symposium offer elegant analyses of these two points.[29] Third, the mainstream view of antitrust does not hold; despite its open-endedness, competition policy has never provided the sole normative ground for antitrust doctrine. Instead, it has been a Hundred Years' War between competition policy and private property rights that has produced antitrust law—not only Rufus Peckham's concern for the plight of "small dealers and worthy men,"[30] but also Robert Bork's laissez-faire surrogate of "consumer welfare."[31] Understanding antitrust doctrine and its relation

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26. For a discussion of this case, see Peritz, *"Rule of Reason", supra* note 3, at 321-26.

27. *See* Peritz, *Genealogy, supra* note 15 (describing tensions between private property rights and competition policy within the context of vertical restraints doctrines).

28. *See* Potts, *supra* note 6.

29. *See* Adams & Brock, *supra* note 7; Levy, *Analyzing Anticompetitive Behavior in Retail Markets: Things Are Not Always as Simple As They May Appear*, 35 N.Y.L. SCH. L. REV. 969 (1990); Shepherd, *Economic Analysis to Guide Antitrust Enforcement: Prospects for Section 2*, 35 N.Y.L. SCH. L. REV. 917 (1990).

My views are developed more fully in works cited *supra* note 3. In my view, the dilemma of free competition reflects the working of a tension within the rhetoric of competition, a tension between commitments to liberty and equality. My work also shows how the same tension has produced different kinds of private property rights rhetorics in antitrust.

30. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323 (1897).

31. *See, e.g.*, R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 51

to historical forms of "public interest" requires attention to "public" values associated with competition policy and economic egalitarianism as well as acknowledgment of "private" values associated with private property rights and economic liberty.

It appears that the wheel of antitrust history continues to turn. After a decade of dominating the market for antitrust policy, price theory is in decline. This decline is displayed in four events. First, on the demand side, the Bush administration's Justice Department Antitrust Division and Federal Trade Commission have not followed their predecessors' dogmatic pursuit of price theory's goal of laissez-faire, insofar as they have already adopted more aggressive enforcement policies than their Reagan forerunners.[32] Next, state attorneys general never fully bought into price theory, having enforced the antitrust laws more and more vigorously in the 1980s.

On the supply side, moreover, there is dynamic competition from two sources. First, many mainstream economists are producing sharp criticisms and alternative visions. Second, a group of legal historians is putting antitrust into historical contexts that call into question price theory's claims about efficiency as antitrust's unrivaled social policy.[33]

This symposium is in large part a collection of work by such scholars, as well as others who share a deep skepticism about the legitimacy or the efficacy of current antitrust policy analysis—whether price-theory economics or reductionist historiography—which seeks to avoid or forget antitrust's socio-political proportions. This collection of articles observes the Sherman Act centennial by exploring the historical richness and economic legacy of antitrust as public interest law.

III. USING HISTORICAL ANALYSIS TO FORMULATE THE PUBLIC INTEREST

The first group of articles divides nicely into two categories. On the one hand, the contributions by Martin Sklar and William LaPiana present

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(1978) (stating that the "only legitimate goal" of antitrust law is "consumer welfare"); Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 675, 739-48 (1966) (advocating consumer welfare principles).

32. *See* Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance*, 35 N.Y.L. SCH. L. REV. 1047, 1066 (1990).

33. *See, e.g.*, Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259 (1988); Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981); Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985); May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495 (1987); Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219 (1988).

two distinctive historical studies of public interest formulation during antitrust's early years.[34] On the other, those by James May and Daniel Ernst represent meta-historical analyses of the ways various antitrust historians have approached the task of recovering the public interests associated with antitrust policy over the last century.[35]

As part of Professor Sklar's larger study of the progressive era's corporate reconstruction of American capitalism,[36] his article, *Sherman Antitrust Act Jurisprudence and Federal Policy-Making in the Formative Period, 1890-1914*, describes and analyzes the "adaptation of the legal order to corporate capitalism."[37] The research suggests that the Supreme Court's "rule of reason," announced in the well-known *Standard Oil* opinion,[38] reflected the legal domain's accommodation to an economic shift from competition among small producers to one of "corporate administration of the market."[39] Sklar observes that this accommodation "was an outcome of political contention stretching over twenty-five years (and beyond) . . . . It was, finally, an outcome of the great social movement for corporate capitalism that rejected a statist for a liberal form."[40] An interesting bit of irony in this characterization is the portrayal of Justice Rufus Peckham as statist, notwithstanding his repeated commitments to individual liberty written into both his antitrust and constitutional law opinions, perhaps best remembered in his praise of "small dealers and worthy men."[41] Indeed, Peckham appears statist precisely at the moment he called for government imposition of competition to trump private agreements between corporate competitors. While Peckham understood this commitment in terms of protecting industrial liberty, Sklar points out that it legitimized political power over economic matters—public policy over individual interests.[42]

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34. *See* LaPiana, *The Legal Culture of the Formative Period in Sherman Antitrust Act Jurisprudence*, 35 N.Y.L. SCH. L. REV. 827 (1990); Sklar, *Sherman Antitrust Act Jurisprudence and Federal Policy-Making in the Formative Period, 1890-1914*, 35 N.Y.L. SCH. L. REV. 791 (1990).

35. *See* Ernst, *The New Antitrust History*, 35 N.Y.L. SCH. L. REV. 879 (1990); May, *Historical Analysis in Antitrust Law*, 35 N.Y.L. SCH. L. REV. 857 (1990).

36. For a more comprehensive study of this subject by Sklar, see M. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW, AND POLITICS (1988) (co-recipient of Willard J. Hurst prize for legal history in 1989).

37. Sklar, *supra* note 34, at 826.

38. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

39. Sklar, *supra* note 34, at 820.

40. *Id.* at 826.

41. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323 (1897).

42. *See* Sklar, *supra* note 34, at 821.

As a complement to Sklar's sociocultural and political-economic approach to legal history, Professor LaPiana paints an intellectual history of the formative era by drawing on the views of the nature of law held by lawyers arguing major antitrust cases and Justices writing major antitrust opinions in that era. LaPiana's *The Legal Culture of the Formative Period in Sherman Act Jurisprudence* illustrates the value of this approach by illuminating "the relationship between antitrust jurisprudence and visions of the public good."[43] For example, Justice Peckham's interpretation of the Sherman Act, which proscribed all contracts in restraint of trade—all agreements between independent entrepreneurs to manage competition—makes better sense when considered in light of his belief, as explained by LaPiana, that well-functioning markets require first and foremost "virtuous individual[s],"[44] and his view that "saw America as fulfilling a millennial dream, as a sort of Protestant utopia, challenged by baleful economic change."[45] In sharp contrast, Justice Edward White, whose notoriously opaque "rule of reason" opinion[46] framed a category of reasonable trusts, was "concerned with the application of 'general principles of law' and 'elementary principles of justice.'"[47] White was intent upon "defend[ing] the common law"[48] which preceded the Sherman Act, a common law which "embodied the essence of Anglo-American liberty."[49] It is not at all surprising, then, that White resolutely wrote "rule of reason" dissents from 1897 through 1911, defending "the liberty of contract" against Peckham's assaults. In 1911, the majority of the Court finally adopted White's view in the *Standard Oil* opinion.[50] What is surprising in this context, however, is Peckham's abandonment of his literalist (or statist) jurisprudence to join the *Standard Oil* majority's "rule of reason" opinion.[51]

In his *Historical Analysis in Antitrust Law*, James May raises a series of questions about "the uses of history . . . in perceptions of the public interest in antitrust law."[52] He asks: "To what extent might we usefully see [the disfavor of nonefficiency-focused views of the public interest after the 1960s] as an indication of the weakness of later twentieth-century

43. LaPiana, *supra* note 34, at 827.

44. *Id.* at 832.

45. *Id.* at 850.

46. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

47. LaPiana, *supra* note 34, at 832.

48. *Id.* at 839.

49. *Id.* at 835.

50. *Standard Oil*, 221 U.S. at 1.

51. *Id.*

52. May, *supra* note 35, at 857.

theory in general, unable to provide more compelling theoretical means to incorporate systematically a broader range of values and concerns?"[53] After giving an insightful survey of the changing pattern of antitrust-history scholarship, May turns to the work of constitutional historians for instruction and perhaps for the compelling theoretical means he finds lacking.

At the very least, better history, May writes, can "help us to see more accurately the diversity as well as the commonalities present in the thought and activity of particular prior time periods."[54] Moreover, it can "help us to appreciate more fully the extent and sources of both continuities and discontinuities in antitrust experience over the course of the Sherman Act's first century."[55] To drive these points home, May reminds us of an important insight derived from his own historical research:

> For a great many Americans [in the years between the Civil War and the First World War], antitrust law seemed the essential logical complement to laissez-faire constitutionalism. While the latter sought to protect the key rights of labor, property, and exchange from the potential threats posed by the leading governmental innovations of the era, the former sought to protect these same core rights from the threats thought to be posed by the most profoundly disturbing private innovations of the time.[56]

In *The New Antitrust History*, Daniel Ernst commends recent changes in the writing of antitrust history.[57] "Five years ago," Ernst writes, "the antitrust lawyer looking for accounts of the formative era would be unlikely to find one premised on discontinuity between the past and the present."[58] For Ernst, traditional lawyers' history is wrongheaded because it presents history as continuous: "Driven by canons of common-law, statutory, or constitutional reasoning, the professional paradigm assumes that the legal past speaks authoritatively to the legal present."[59] Pointing to the early work of Oliver Wendell Holmes, Jr. as the model for a more austere view of history, Ernst writes that "Holmes saw history as a vehicle for recognizing contingency in the legal system."[60] In contrast to Robert

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53. *Id.* at 863.

54. *Id.* at 870.

55. *Id.*

56. *Id.* at 873.

57. *See* Ernst, *supra* note 35.

58. *Id.* at 881.

59. *Id.* at 879.

60. *Id.* at 889 (discussing O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL

Bork's historical study in *The Antitrust Paradox*,[61] which is "only the most brazen and anachronistic resort to the authority of the past in a contemporary debate over antitrust policy,"[62] "the new antitrust historians tried to learn from the [formative era] debate as a whole, and to take it on its own terms, to ask why it ran the course it did, who pushed it along, who opposed it, and what structures guided the participants' perceptions of their needs and interests."[63]

Ernst praises the work of several "new historians," including Martin Sklar, whose "great contribution . . . [is] his convincing specification of the mediating structures or mechanism between social and cultural change and developments in the law of antitrust."[64] "To date," Ernst continues, "most antitrust historians have been content to point out simultaneous developments in 'law' and distinct economic, social, and cultural spheres, and to assert rather than demonstrate a causal connection between the two."[65] For Ernst, this approach is inadequate because it "gives the impression that legal change is the result of an essentially consensual and functional swapping of one paradigm for another, rather than the product of human agency or a social movement."[66] Thus, human agency as the mechanism of historical change is important for Ernst, who also believes that the "corporate reconstruction of American capitalism was the conflict-laden project of a group of self-conscious, struggling individuals who shared a common social outlook—no less than the revolution in gender roles in the 1960s was the project of the women's movement."[67]

IV. USING ECONOMIC ANALYSIS TO FORMULATE THE PUBLIC INTEREST

Much like their counterparts in the preceding section, the four authors that address the use of economic analysis to formulate the public interest proceed from two levels. John Flynn has written a methodological and ethical criticism of price-theory analysis and of several recent Supreme Court decisions.[68] David Levy, on the other hand, takes what initially

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PAPERS (1920)). Of course, Holmes also wrote that "a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

61. R. BORK, *supra* note 31.

62. Ernst, *supra* note 35, at 882.

63. *Id.* at 883.

64. *Id.* at 888.

65. *Id.*

66. *Id.*

67. *Id.*

68. *See* Flynn, *Antitrust Policy and the Concept of a Competitive Process*, 35 N.Y.L.

appears as a narrow focus—an economic analysis of submarkets in retailing—to identify some profound limitations in the Department of Justice Merger Guidelines and in the "New Learning" regarding market definition more generally.[69] William Shepherd, as well as Walter Adams and James Brock, presents criticisms coupled with alternative economic approaches, approaches founded in the mainstream social-scientific practices of empirical study.[70]

In *Antitrust Policy and the Concept of a Competitive Process*, John Flynn brings legal realism to bear on the formalist approaches of price-theoretical work and of recent Supreme Court antitrust doctrine.[71] Flynn writes: "Paradoxically, one must master concepts to understand and organize reality, yet escape them at the same time in order to use concepts functionally in the creative resolution of disputes."[72] Price theorists are imprisoned in the realm of theory because they identify "the public interest in antitrust enforcement with the concept of 'competition,' the meaning of which is too often confined to the definitions provided by a static and abstract form of economic analysis."[73] Flynn recommends a two-step escape. First, "it is essential to antitrust policy that the concept of 'competition' be understood as 'competition as a process' . . . and that the deeper normative meaning of the concept be properly understood and inductively employed."[74] Second, the process view of competition calls for "rules designed to ensure the control of economic power that is incompatible with the social and political values of a just community, the integrity of individualism in that community, and the ideal of equality of economic opportunity."[75] Flynn concludes by calling for "creative and constructive empirical social science research. This includes economic research aware of its own assumptions . . . ."[76]

In *Economic Analysis to Guide Antitrust Enforcement: Prospects for Section 2*, William Shepherd reveals with shining clarity the differences between mainstream and price-theoretical approaches to economics, in the process identifying price theory's tight constraints, constraints which do not reflect real market conditions.[77] Moreover, Shepherd asserts and then

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SCH. L. REV. 893 (1990).

69. *See* Levy, *supra* note 29.

70. *See* Adams & Brock, *supra* note 7; Shepherd, *supra* note 29.

71. *See* Flynn, *supra* note 68.

72. *Id.* at 393-94.

73. *Id.* at 894.

74. *Id.* at 896.

75. *Id.* at 897.

76. *Id.* at 910.

77. *See* Shepherd, *supra* note 29, at 925-27.

documents the claims that "Chicago-UCLA and contestability theories contain logical inconsistencies and lack a convincing empirical basis."[78] He determines that the "issues remain largely as they stood before the onset of Chicago-UCLA . . . . The profit yields of market share may reflect market power and/or efficiency, in varying degrees. Only through careful, direct research can we hope to determine the actual proportions."[79] Turning to the problem of market power, Shepherd offers a researched list of possible candidates for treatment as dominant firms under a revitalized section 2 of the Sherman Act. This list includes printed news media, an industry in which

> [t]he impact of monopoly on news content and the diversity of views may far exceed the price-raising effects in, for example, detergents and film. Yet policies have done nothing to reverse the trend toward dominance in this industry. Rather, policies embody an acceptance of the newspapers' claims that dominance reflects technical economies of scale. . . . Yet the underlying 'economies' may actually be much smaller . . . .[80]

In short, Shepherd and Flynn both believe that helpful economics calls for less abstraction and more empirical research.

In *The Antitrust Vision and Its Revisionist Critics*, Walter Adams and James Brock begin by reminding us that "[t]he central challenge to a free society is to construct an organizational framework—a governance structure—to deal with both political and economic power."[81] "The governance system imposed by the competitive market, of course, is neither natural nor immutable. Like any human artifact, it must be nurtured and protected from erosion and subversion. And that is the role of antitrust."[82] The Chicago-School revision of this view, the authors say, is "[f]abricated from tautological constructs . . . [and] begs the core questions of economic power and antitrust."[83] Adams and Brock look to the American automobile industry as "an appropriate case study for empirically testing the New Learning's claims."[84] They find that the automobile industry wielded enough power to acquire and dismantle urban transportation systems in several major cities (particularly Los Angeles),

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78. *Id.*
79. *Id.* at 929-30.
80. *Id.* at 936.
81. Adams & Brock, *supra* note 7, at 939.
82. *Id.* at 941.
83. *Id.* at 943.
84. *Id.* at 946.

to withhold fuel-efficient small cars for years, to deny consumers automotive safety equipment until government regulation required the equipment, and to lobby forcefully against automotive pollution control.[85] Also taking into account import restrictions and joint ventures to blunt foreign competition, the authors'

> empirical analysis highlights the central flaws of the New Learning. It shows that market power includes the discretionary power to control the choices from which consumers are permitted to select, and the power to thereby control the allocation of society's scarce resources in accordance with producers—rather than consumers—preferences.[86]

Adams and Brock conclude with the following observation:

> Massive empirical evidence indicates that a decentralized power structure—the root principle of antitrust—does not have to be sacrificed to attain either allocative efficiency, . . . or a 'Pareto-optimal' maximization of consumer welfare. If that be so, what justification remains for the toleration of concentrated economic power or for a policy of untrammeled laissez-faire which would insulate such power from antitrust challenge?[87]

In *Analyzing Anticompetitive Behavior in Retail Markets: Things Are Not Always As Simple As They May Appear*, David Levy studies the effects of market power in strictly local markets.[88] Responding to the call for more realism and less abstraction in antitrust economics, Levy writes: "In real world situations, competition may occur along a number of different dimensions, such as quality, physical space, or design. When the separate firms compete along these different dimensions, then each potential source of competition must be considered."[89] One important implication of this observation is that when

> competition is localized, it may be relatively easier to detect and punish cheaters and, therefore, substantial gains may accrue from forming cartels with nearby firms. . . . When measured in terms

85. *Id.* at 946-60.

86. *Id.* at 959.

87. *Id.* at 967.

88. *See* Levy, *supra* note 29.

89. *Id.* at 990. Levy also shows that the Merger Guidelines' definition of price can yield perverse results, and then presents an alternative formulation that is both thoughtful and straightforward. *See id.* at 972-77.

> of all close competitors in a close chain of substitutes, concentration may be a severely limited indicator of anticompetitive behavior.... Collusion may occur among a subset of firms. Even in the absence of collusion, merging firms may be able to raise prices through joint action.[90]

Levy further points out that "[w]hen competition is localized, predatory pricing may be more effectively targeted at rivals" and firms competing in localized markets "may be more likely to deter entry than firms in markets producing relatively homogeneous products."[91] He concludes that

> [a]nalysis of such a merger's anticompetitive impact should focus principally on: (1) whether there are advantages to location, (2) whether there are sunk-cost investments tied to the firm's location such that entry and relocation are difficult, and (3) the magnitude and extent of potential price effects under different behavioral possibilities.[92]

The four articles engaging in antitrust economics are both striking and refreshing in their dedication to empirical research and their conviction that economic power remains an antitrust concern.

V. GOVERNMENT ACTION TO REPRESENT THE PUBLIC INTEREST

While historians, economists, and legal scholars write about the public interest, it is government action that ultimately represents it. The process of representation is, of course, double. First, there is the familiar institutional process of governmental politics: presidential and congressional elections constitute the legitimate means of representation on the federal level. Presidents make appointments to the Justice Department, the Federal Trade Commission, and the federal bench, reflecting in some perhaps pallid or distorted fashion an electoral mandate. Similarly, Congress legislates. From this combination, government antitrust policy emerges, representing something called the "public['s] interest." There is, however, a second process of representation as well: an interpretive mechanism that processes history, economics, and other cultural texts, a mechanism that re-presents those texts in the form of antitrust policy and

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90. *Id.* at 985. This observation leads to a very narrow view of the currently popular notion of "contestability theory," particularly when read within the context of William Shepherd's penetrating critique. *See* Shepherd, *supra* note 29, at 925-27.

91. Levy, *supra* note 29, at 988-89.

92. *Id.* at 990-91.

doctrine. This process can be understood as one of interdisciplinary translation—as a neutral policy analysis that assures good legal doctrine. It can also be understood as an ethical operation—as a moral reasoning process that assures good legal doctrine. Though separable for analytic purposes, the doubled process of representing the public interest works in tandem, each aspect both pulling and pushing the other.

Each article discussed in this section takes up one aspect of the twin process of representing the public interest. William Curran understands wealth-maximizing economics as a pernicious idealism that privileges the private interests of a few over the public interest, as a representation whose ethical vision is blind to the anti-democratic direction antitrust has taken.[93] In contrast, Robert Lande attends to the political-institutional aspect of representing the public interest.[94] Finding the Bush administration more amenable to antitrust enforcement and more willing to cooperate with state antitrust officials, he develops a set of federalism guidelines to enhance and clarify the cooperation already under way. Mark Glick and Andrew Abere comment on recent antitrust policy by taking issue with the way a recent book, *Dangerous Pursuits*,[95] interprets empirical evidence to criticize the Reagan administration's laissez-faire approach to the merger and acquisition frenzy of the 1980s.[96] Walter Adams and James Brock, the book's authors, respond in brief.[97]

In *After 100 Years: A Disquieting Discourse of Poverty and Wealth*, William Curran writes that "the Supreme Court seems to equate democracy with capitalism, and liberty and freedom with economic independence."[98] This confusion, or perhaps a cooption of the political sphere by the economic, produces undesirable policy in both spheres. Taking a cue from Kenneth Phillips' influential book, *The Politics of Rich and Poor*,[99] Curran observes that "wealth has become antitrust's new reality and guiding principle" and then asks why "[w]e fail to recognize poverty as the sustenance of wealth."[100] With the public interest imagined as free

93. *See* Curran, *After 100 Years: A Disquieting Discourse of Poverty and Wealth*, 35 N.Y.L. SCH. L. REV. 1031 (1990).

94. *See* Lande, *supra* note 32.

95. W. ADAMS & J. BROCK, DANGEROUS PURSUITS: MERGERS AND ACQUISITIONS IN THE AGE OF WALL STREET (1989).

96. *See* Glick & Abere, *Mergers and Acquisitions in the Age of Wall Street: An Assessment*, 35 N.Y.L. SCH. L. REV. 1095 (1990).

97. *See* Adams & Brock, Dangerous Pursuits *v. Dr. Pangloss & Associates*, 35 N.Y.L. SCH. L. REV. 1109 (1990).

98. Curran, *supra* note 93, at 1031 n.3.

99. K. PHILLIPS, *supra* note 17.

100. Curran, *supra* note 93, at 1033, 1034.

competition, "[t]he Court's narrow idealism . . . reduces democracy to the free pursuit of efficiency."[101] He concludes: "Democracy is far too fragile to survive the Supreme Court's insensitive antitrust interpretations based on its ahistorical belief in wealth and efficiency as social guarantors of universal welfare."[102]

Robert Lande proposes a "series of merger 'Federalism Guidelines'" whose "main purpose is to establish federalism principles in a way that both federal and state enforcers, as well as the business community, would regard as a step" toward "the correct balance of federal, state, and business concerns."[103] *When Should States Challenge Mergers: A Proposed Federal/State Balance* begins by stating that, although the "antitrust laws' legislative histories indicate the congressional purpose to supplement, not supplant, state activity,"[104] the proposed Guidelines would "start with the premise of general federal supremacy in merger enforcement and from this promulgate an explicit division of responsibility."[105] In response to fears that "states could enact antimerger statutes with different substantive goals"[106] or that the "state attorneys general often have parochial or political motives,"[107] Lande points out that "the NAAG and DOJ [merger] guidelines use virtually the same structural parameters and have many other features in common."[108] Based in part on "the EEC Merger Regulations that will go into effect in 1992," Lande's Federalism Guidelines propose a category of large national mergers to be handled at the federal level, a category of mergers that do not "disproportionately affect a state," and a category of mergers that "primarily affect" only a state.[109] State scrutiny would be limited to the third category. This scheme would avoid the danger of Balkanization, Lande suggests, that the European Community has averted with its 1992 guidelines.[110]

Although the 1980s are only a few moments of history behind us, much has already been written about the merger and acquisition rapture of the last decade. In their review essay, entitled *Mergers and Acquisitions in the Age of Wall Street: An Assessment*, Mark Glick and Andrew Abere take issue with the characterization of the merger boom presented in

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101. *Id.* at 1040.

102. *Id.* at 1043.

103. Lande, *supra* note 32, at 1048, 1091.

104. *Id.* at 1049.

105. *Id.* at 1048.

106. *Id.* at 1066.

107. *Id.* at 1065.

108. *Id.* at 1060 n.50.

109. *Id.* at 1082, 1086.

110. *See id.* at 1047-48.

Dangerous Pursuits,[111] a recent book written by Walter Adams and James Brock.[112] Adams and Brock criticize the laissez-faire program of Reagan administration enforcers because, they believe, corporate takeovers in the 1980s were a game that involved "an exchange of wealth, . . . a trading of ownership titles instead of investment in the future."[113] Adams and Brock associate mergers with the following economic difficulties: loss of markets to foreign competition, persistent trade deficits, inadequate capital formation, lagging research and development, declining productivity, and debt-laden balance sheets.[114] In addition to more committed antitrust enforcement, they call for a broad range of governmental action to regulate the takeover game: elimination of the interest deduction for debt, tougher financial regulations on deal making, a sales tax on securities transfers, and the prevention of unproductive mergers.[115]

Glick and Abere offer an alternative view of the 1980s merger boom. They argue that the Reagan administration's enforcement program is underappreciated insofar as "many mergers were abandoned or restructured by the parties following an enforcement authority request for additional information, but before a court case or administrative complaint could be filed."[116] Referring to several studies finding positive economic effects of mergers in the 1980s, Glick and Abere conclude that "'[s]ome takeovers enhance economic efficiency, some degrade it, and the balance of effects, though not fully known, is most likely a close one.'"[117]

In Dangerous Pursuits *v. Dr. Pangloss & Associates*, Adams and Brock respond to Glick and Abere's review by presenting more evidence of the merger boom's wake of debt-laden corporations at or over the brink of bankruptcy, by surveying the opportunity costs of "a trillion dollars spent on corporate deals, . . . a trillion dollars *not* directly spent on new plants, new products, new production technologies, and new research and development,"[118] and by renewing their call for merger guidelines that require an affirmative showing that the deal is "likely to promote

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111. W. ADAMS & J. BROCK, *supra* note 95.

112. *See* Glick & Abere, *supra* note 96.

113. W. ADAMS & J. BROCK, *supra* note 95, at 182. This theme has appeared in numerous studies, including B. BLUESTONE & B. HARRISON, THE DEINDUSTRIALIZATION OF AMERICA (1982); S. MELMAN, PROFITS WITHOUT PRODUCTION (1983).

114. W. ADAMS & J. BROCK, *supra* note 95, at 177-82.

115. *Id.*

116. Glick & Abere, *supra* note 96, at 1097.

117. *Id.* at 1104 (quoting Scherer, *Corporate Takeovers: The Efficiency Arguments*, 2 J. ECON. PERSP. 69, 69 (1988)).

118. Adams & Brock, *supra* note 97, at 1112.

production efficiency, innovation efficiency, and international competitiveness."[119] In short, each pair of authors takes issue with the other's representations of the public interests to be served, the effects of the merger boom, and the effects of the Reagan administration's antitrust enforcement in the 1980s.

VI. CONCLUDING REMARKS

Of the many questions raised in the symposium articles and at New York Law School's antitrust centennial conference, three issues seem to resonate, to reverberate throughout the papers and commentaries and colloquy. Each issue raises important methodological and ethical questions about the directions antitrust policy making and analysis should take.

First, the articles discussed in part IV of this foreword—those discussing the use of economic analysis to formulate the public interest—all have something to say about the importance of empirical research. Given the spiraling abstraction of antitrust economics, this experimental turn is a welcome change. What is interesting about this turn to the traditional methodology of the sciences, both social and physical, is that it is accompanied by a heightened awareness of the ethical implications of current antitrust economics. This combination of empirical and ethical dimensions is in sharp contrast to price theory, which typically ignores both traditional kinds of economics: data gathering and analysis to test the descriptive value of economic theories, and political economic analysis to examine the prescriptive content of economic theories. The contributions to this symposium serve as a powerful reminder of the value of mainstream economic analysis and the huge gaps in price-theoretical work that underlies much of current antitrust policy making.

Second, several conference sessions, especially the talk given by Lloyd Constantine (who was then head of antitrust enforcement for the State of New York), as well as the symposium contributions by Robert Lande and David Levy, corroborate the importance of antitrust enforcement by the several states, both individually and through the National Association of Attorneys General. Not only local injuries caused by anti-competitive conduct but also the local nature of competition in many industries necessitate state enforcement of the public's interests. There is, of course, a tradition of state antitrust enforcement that precedes the Sherman Act.[120]

Third, the conference session on using historical analysis to formulate the public interest concluded with a wide-ranging debate about the use and abuse of history in antitrust and in law more generally. Provoked by Daniel

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119. *Id.* at 1119.

120. *See* May, *supra* note 35, at 872-75.

Ernst's "young Holmesian" view that "saw history as a vehicle for recognizing contingency in the legal system,"[121] numerous participants joined issue on the legitimate uses of history in lawyerly argument and textual interpretation. In short, what can we claim to learn from the past? Is law history, in the sense that the rule of law calls for adherence to the past—to precedent and legislative intent? Or, is the past radically different from the present? Is history properly imagined as discontinuous, and accordingly, is the past abused when it is called upon as authority in argument about the present?

Certainly, intense debates over the nature of historical change have held center stage for well over a century. One axis of dispute has been the question of (dis)continuity.

The continuity side is more familiar to lawyers and other nonhistorians. Here are a few examples of "continuous" historiographies founded in beliefs about the direction history has taken, about the progress history has made in reaching some end or purpose. First, historian William LaPiana points to one progressive view of history when he describes Justice White's Victorian sense of the "[g]lorification of the common law as the embodiment of English liberty."[122] Next, otherwise opposed economic historians can nonetheless agree that the engine of historical change is both progressive and economic. Those, such as Robert Clark, who argue that the common law (or other law) is efficient, write progressive histories.[123] Marxists also tend to write progressive histories—reports of struggles between capital and labor, accounts of accommodations to changing means of production and relations to those means. The differences among these progressive historians are teleological; the telos is Clark's transactional efficiency or White's English liberty or Marx's triumph of the working class. The commonality is a belief that history is a motivated unfurling of events. There are, of course, other motivations that have been understood to drive history along some continuous path.

The discontinuity side of the debate is more familiar to historians than lawyers. There are, however, two well-known icons of discontinuity revered by legal scholars. First, there is Oliver Wendell Holmes, Jr., whose early writings have inspired many thoughtful historical studies, including Daniel Ernst's contribution to this symposium. Second, the work of philosopher of science Thomas Kuhn[124] has influenced legal historians

121. Ernst, *supra* note 35, at 889.

122. LaPiana, *supra* note 34, at 839.

123. *See, e.g.*, Clark, *The Interdisciplinary Study of Legal Evolution*, 90 YALE L.J. 1238, 1256-60 (1981) (suggesting a "seven-step method" for the construction and validation of full, formal study and explanation of a line of legal evolution).

124. *See* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

and other legal scholars for the last twenty years. Kuhn characterized paradigm shifts in scientific communities as revolutions, as political events precipitated by rhetorical struggles over the relative merits of competing research programs in the various physical sciences. His purpose was to argue against the then prevailing view of scientific advance, the view that science evolved continuously. In contemporary cultural criticism and in social science histories, many post-modernist and post-structuralist historians take a Holmesian position of radical discontinuity, refusing moreover to posit identifiable mechanisms for social change.[125]

How do we judge the relative merits of various historiographies? How do we choose a particular approach? In writing history, we may not think about it at all; perhaps we proceed on unexamined assumptions about the way history "unfurls." We experience the process of writing history as first immersing ourselves in the facts and finally emerging with a sense of how they fit together. If we do think about the relative merits of various approaches, then the choice is poetic: we examine alternative assumptions and then make a complex series of judgments about the relationship between the present and the past, judgments that cannot be proved in some logical or otherwise final sense. Though poetic judgments cannot be verified in some rigorous sense, they can be the result of defensible and criticizable reasoning.

In my view, the criterion for judging the relative merits of alternative approaches is whether a particular one illuminates the legal-historical field that needs to be considered today. Given the anti-empirical and ahistorical form of economics dominating antitrust today, historical analysis of the relationship between antitrust and economics is called for. The approach that I have chosen for my historical work is genealogical—an approach which has been described as "a painstaking rediscovery of struggles together with the rude memory of their conflicts."[126] With the notion of difference as the guiding thread (rather than one pole of a continuity-discontinuity reduction), this history of the present can be understood as a two-step process: we begin at the present and move backward in time until we locate a difference. Then, we work forward, tracing the transformation, taking care to preserve both discontinuities and connections in the historical line.[127] A genealogy is, in my view, preferable because

125. The two are not logically related. Ernst, for example, understands history as discontinuous, yet praises Sklar for explaining the mechanism of historical change chronicled in his article. *See* Ernst, *supra* note 35, at 889. The mechanism is characterized as social movements and individual struggles for change. *See* Sklar, *supra* note 34, at 826.

126. M. FOUCAULT, *Two Lectures*, in POWER/KNOWLEDGE 83 (1980).

127. *See* F. NIETZSCHE, THE USE AND ABUSE OF HISTORY (A. Collins trans. 2d ed. 1957).

it "allows us to establish a historical knowledge of struggles,"[128] to see current antitrust economics as the product of social and political conflict, and finally, to understand that efficiency is a controversial social and political choice, not a scientific or logical necessity.

128. M. FOUCAULT, *supra* note 126, at 83.