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Antitrust Excitement in the New Millennium: Microsoft, Mergers, and More

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ANTITRUST EXCITEMENT IN THE NEW MILLENNIUM: MICROSOFT, MERGERS, AND MORE

CAROL B. SWANSON*

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I. Introduction

[T]he worst thing we can do is weaken the incentives to be the successful frog.¹

Antitrust law, the protector of frogs and other competitors in the American pond, has long been a storied feature of our culture. Since its inception in 1890, this "characteristically American" institution² has undergone a considerable evolution, ebbing and flowing through banner years of exuberant enforcement and milder times of reticent retreat. Although antitrust law has declined from its most popular period,³ it has retaken center stage in recent years largely because of the regulatory woes plaguing Microsoft,⁴ which has been caught up in antitrust allegations for more than ten years.⁵ The intense publicity surrounding Microsoft's dilemma, coupled with the past decade's remarkable merger wave,⁶ has illuminated numerous important antitrust issues, including: the continued vitality of the antitrust regulatory framework; the impact of changing political forces on current prosecutorial trends; the difficulties presented by deregulation, worldwide competition, and a high-technology commercial environment; and the future of antitrust law in light of all these factors. Accordingly, the new millennium provides an exciting context for examining this quintessential American doctrine.⁷ Just how will antitrust law regulate competitive frogs in this

1. Russ Mitchell & Marianne Lavelle, *Road Runner v. Coyote: As Microsoft Case Shows, Markets Move Faster than Justice*, U.S. NEWS & WORLD REP., Dec. 15, 1997, at 58, 59 (quoting William F. Baxter, the Assistant Attorney General who was instrumental in the AT&T investigation and the IBM dismissal).

2. Richard Hofstadter, *What Happened to the Antitrust Movement?*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 188, 195 (1965) (describing the political and social movement driving the Sherman Act as "characteristically American"); see also Gary Minda, *Antitrust at Century's End*, 48 SMU L. REV. 1749, 1757 (1995) ("Antitrust, after all, has been a peculiar American institution which historically has been as American as 'apple pie' and the 'fourth of July.'").

3. See Minda, *supra* note 2, at 1755 (noting that "antitrust law peaked during the Warren Court era and has steadily declined ever since").

4. The Microsoft case is widely considered to be the most significant antitrust litigation since the IBM and AT&T cases. See Albert A. Foer, *The Importance of the Microsoft Case*, 31 CONN. L. REV. 1275, 1284 n.23 (1999) (stating that the Microsoft case has given antitrust "a salience not achieved since the AT&T breakup and possibly since the election of 1912"); Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1189 (1999) (calling the Microsoft litigation "the most consequential antitrust case prosecuted by the federal government since the IBM and AT&T cases"); Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 99 (2001) (calling Microsoft "the U.S. government's most significant monopolization case since the breakup of the Bell System in 1982 and the first major antitrust case concerning the 'New Economy' created by the phenomenal growth of the Internet"); Richard M. Steuer, *Browsing the Microsoft Case*, 13 ANTITRUST 5 (Summer 1999) ("Whatever one thinks of the *Microsoft* case, it has enlivened popular interest in antitrust law like nothing else.").

5. In 1990, the Federal Trade Commission (FTC) began investigating Microsoft. See *infra* note 211 and accompanying text.

6. Richard G. Parker & David A. Balto, *The Merger Wave: Trends in Merger Enforcement and Litigation*, 55 BUS. LAW. 351, 351 (1999) (stating the "United States is in the midst of an unprecedented merger wave").

7. Robert Pitofsky, *Challenges of the New Economy: Issues at the Intersection of Antitrust and*
<https://digitalcommons.law.ou.edu/olr/vol54/iss2/3>

unusually challenging era?

At its core, antitrust law presents a rather basic concept, although its contours are undoubtedly elusive.⁸ Antitrust is all about competition; it is primarily concerned with cartels and with the acquisition or maintenance of monopoly power by impermissible means.⁹ The statutory structure is somewhat sparse,¹⁰ leaving the construction of competition protection to government regulation and judicial interpretation. As a result, antitrust law has been a fluid — and often controversial — concept since its birth in the late nineteenth century's industrial age. Its substantive application has shifted radically over time due to changes in the economy, the political climate, popular views of "big business," and developments in economic theory.

The highly publicized battle between Microsoft and the Antitrust Division of the Department of Justice sharply focused public attention on antitrust law, a sleepy substantive area that had been dormant for years. In the 1980s, antitrust enforcement was uncontroversial because it largely disappeared;¹¹ some even speculated that competition no longer needed protection. In stark contrast, the past ten years witnessed antitrust's resuscitation. Regulators have begun looking upon antitrust targets with renewed interest; at the same time, innovative technologies in the so-called "new economy"¹² are arguably rendering traditional competition regulation obsolete. Microsoft's antitrust woes have personalized and heightened the arguments concerning the vitality of current antitrust regulations in the modern high-tech landscape. The protracted "big case" nature of the Microsoft litigation only underscores these regulatory concerns. Today, with a new President and new policies finally in place,¹³ significant changes may be in the works. Antitrust law has taken

Intellectual Property, 68 ANTITRUST L.J. 913, 913 (2001) (noting "wide agreement that the last decade or so has presented an unusually lively and challenging period for antitrust analysis"). Robert Pitofsky is chairman of the U.S. Federal Trade Commission.

8. Judge Bork once eloquently described the elusive nature of antitrust law in the following fashion:

Improbable as the statement may seem, antitrust today is almost an unknown policy. It is ubiquitous: Antitrust constitutes one of the most elaborate deployments of governmental force in areas of life still thought committed primarily to private choice and initiative. It is popular: There is some intellectual but almost no political opposition to its main features. And it is even exportable Yet few people know what the law really commands, how its doctrines have evolved, or the nature of its ultimate impact upon our national well-being. Even among the specialized and elite corps of lawyers who operate the antitrust system there is remarkably little critical understanding of the policy.

ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 3 (1978).

9. See Pitofsky, *supra* note 7, at 914 (discussing "core principles of antitrust").

10. The Sherman Act is notoriously lean in content. See *infra* notes 34-36 and accompanying text.

11. See *infra* notes 75-77 and accompanying text.

12. The new economy encompasses high-technology industries driven by the fluid exchange of ideas. See *infra* notes 132-34 and accompanying text.

13. George W. Bush endured a bizarre and difficult election odyssey into the White House, losing the popular vote, but winning the electoral tally by the most minute margin thirty-four days after the vote. See Bryan Smith, *The Wacky, Tacky Race for President; Nation Was Swept Up as Court Fights Kept Raging*, CHI. SUN-TIMES, Dec. 15, 2000, at 8 (providing a colorful narrative of the relevant events);

center stage, and its relevance and application demand serious review.¹⁴

This article responds to the fundamental issues surrounding antitrust regulation in the new millennium as punctuated by Microsoft's ongoing enforcement battle. As a threshold matter, antitrust law may be old, but it is not outdated. Although the marketplace for competitive frogs has certainly dramatically changed, the need for competition protection has not. In fact, in important respects, antitrust regulations are more necessary now than they have ever been in the past, and they will be effective so long as the regulations are applied efficaciously. After all, as the economy becomes more dynamic, the competitive framework becomes more fragile and different market leaders constantly vie for position. Similarly, as business expands worldwide through merger combinations, antitrust regulation becomes crucial to fair and effective competition. As they have in the past, antitrust case authority and economic theories will evolve to accommodate the new economy and fluid market conditions. The Microsoft scenario only underscores these conclusions. Win or lose, Microsoft's antitrust dilemma graphically demonstrates the challenges faced by competitors in a high-tech, dynamic marketplace. Microsoft's "big case" context catches attention, but in reality does not differ greatly from the struggles endured by other high-tech business goliaths in earlier times.¹⁵ In the end, the true significance of the Microsoft antitrust litigation may be its role in awakening a renewed emphasis on competition regulation, rather than its specific legal holding. With this fresh awakening, antitrust enforcement in the twenty-first century indeed holds exciting possibilities.

To evaluate the future of antitrust enforcement, this article begins with an overview of the law's development and application, including the cyclical nature of and the economic explanations for antitrust regulation. Part II describes the special challenges facing antitrust law in today's dynamic marketplace, given the new economy's features and the competition pressures imposed by mergers and globalization. Building upon an appreciation of both the historical context and the modern dilemmas, Part III presents the Microsoft story, which weaves together the relevant issues underlying antitrust enforcement and highlights the tensions concerning its future. As a backdrop for the Microsoft experience, the article also provides summaries of the AT&T and IBM antitrust investigations, which provide startling similarities under comparable circumstances. Finally, Part IV evaluates the future of antitrust enforcement, in light of the changing political climate and the rapidly evolving, high-tech economy. Part IV concludes that frogs will compete very nicely

see also Bush v. Gore, 531 U.S. 98 (2000) (largely resolving the election outcome).

14. In fact, House Judiciary Committee Chairman Sensenbrenner announced in March 2001 that he was preparing a bill that could lead to the first major revision of American antitrust laws in nearly a century. The bill would create an antitrust modernization commission to make recommendations about whether the Sherman Act and Clayton Act should be updated. *Sensenbrenner: Antitrust Overhaul Due*, CONGRESS DAILY AM, Mar. 22, 2001, 2001 WL 5046960 (describing Sensenbrenner's proposed commission, which would examine three areas: intellectual property's role in antitrust law, the global economy's effect on antitrust enforcement, and the regulatory role of state attorneys general).

15. AT&T and IBM faced remarkably similar antitrust difficulties in their eras. *See infra* Parts IV.B.2 & IV.B.3.

in the new millennium pond under the current regulatory regime, if this regime is properly applied.

II. Antitrust Enforcement: The Long Roller Coaster Ride

A. Policies and Politics

Although the history of this distinctly American enterprise¹⁶ presents equivocal foundations,¹⁷ scholars virtually all agree that antitrust's principal purpose is to preserve and foster competition.¹⁸ Antitrust enforcement embodies a "fundamental national economic policy,"¹⁹ and federal interest in enforcement is substantial.²⁰ By protecting competition,²¹ this regulation seeks to preserve economic freedom and our free enterprise system.²²

The major interpretive issue is how to construe competition protection, and critical policy tensions underlie this construction. One primary view is that antitrust regulation must work hand-in-hand with market forces; in other words, markets generally work well when left alone, and government regulators should be restrained

16. For helpful historical perspectives on antitrust law, see Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 CORNELL J.L. & PUB. POL'Y 239 (1999).

17. Construing what has happened so long ago can be a most difficult challenge:

What we all "know" is wrong. We are working from an intellectual base that does not exist. What is true is that our ideas are old; they carry whatever credentials time alone can confer. The years 1890 to 1914 witnessed the origin of every major theory that drives and directs the evolution of antitrust doctrine to this day. What the court, the Congress, and the enforcement agencies have wrought since is little more than the working out of the implications of those early hypotheses. If modern results often appear sensational, that is less because anything fundamentally new has occurred than because we are diverted by new vocabulary from seeing continuity in superficial diversity and, more importantly, because we never really understood the sweeping implications of the old ideas.

BORK, *supra* note 8, at 15.

18. See Jay Dratler, Jr., *Microsoft as an Antitrust Target: IBM in Software?*, 25 SW. U. L. REV. 671, 682 (1996) (summarizing the entire body of antitrust law in one word: competition). Antitrust regulation has largely emphasized the possession of monopoly power, which is the ability to "exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). When determining whether particular conduct unfairly restrains trade, the "true test of legality is whether the restraint imposed is such as . . . may suppress or even destroy competition." *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

19. *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 218 (1966).

20. See *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 350 (1987) (stating that there is substantial federal interest in such enforcement).

21. It is important to note that antitrust laws protect the competitive process, not individual competitors. *E.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (noting that federal antitrust laws do not protect one competitor from another's malice); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990) (stating that antitrust laws do not shield competitors from nonpredatory price competition); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (stating that antitrust laws protect "competition, not competitors"); Dratler, *supra* note 18, at 684 (describing this notion and saying that it "lies at the heart of the antitrust dilemma").

22. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) (calling the Sherman Act the "Magna Carta of free enterprise").

in their efforts.²³ On the other hand, some contend that the marketplace alone cannot preserve fair competition if some participants engage in activities that unnaturally coerce or suppress the consumers' options. Antitrust enforcement involves the delicate balance of these two competing perspectives.

Since antitrust regulation's inception, federal enforcement²⁴ has substantially increased²⁵ and has displayed cyclical tendencies. Prior to the end of the twentieth century, most Sherman Act antitrust regulation occurred during two principal periods: 1890-1914 and 1937-82.²⁶ The explanation for this cyclical behavior is unclear. Some contend that enforcement activity peaks roughly when public distrust of large corporate enterprises is greatest.²⁷ Many have attempted to attribute this record to interest-group politics. This argument has been quite successful in other regulatory contexts,²⁸ but less so in the antitrust area²⁹ because the evidence just does not

23. One commentator described the appropriate relationship between regulators and market forces: Markets usually work. At least, they usually work better than the institutions of antitrust in servicing the interests of consumers. When there is good reason to believe that a market has failed, that antitrust can intervene to improve matters, and that it will do so more quickly than would the market left alone, then it should intervene, and only to the extent necessary. What enforcers and judges need, therefore, is a sense of humility.

John E. Lopatka, *United States v. IBM: A Monument to Arrogance*, 68 ANTITRUST L.J. 145, 162 (2000).

24. Antitrust enforcement occurs through various mechanisms, including federal action, state action, and treble damages suits by private parties.

25. Between 1890 and 1925, for example, the Department of Justice brought an average of only eight cases each year. From 1926 to 1937, the average rose to about eleven per year, and through 1950, the annual average rose again to about fifty. MILTON HANDLER ET AL., *TRADE REGULATION: CASES AND MATERIALS* 104 (4th ed. 1997) (describing nature and scope of federal agencies' antitrust enforcement efforts). Since 1950, civil enforcement has fluctuated, with its lowest levels occurring during the Reagan era of the 1980s. *Id.* at 104-05 (citing figures from the Annual Hearings Before the Subcommittee of the House Committee on Appropriations and the Annual Reports of the Attorney General). Some complained that the Reagan enforcement activity pursued only "commercial pygmies," ignoring the major players. *See id.* at 105 (noting that Reagan nonmerger enforcement activity shifted heavily to smaller firms).

26. *See* William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1112 (1989) (breaking the three eras of deconcentration initiatives into the following periods: 1904-20, 1937-56, and 1969-82).

27. The impact of public perceptions on antitrust enforcement and other regulatory activity is discussed in LOUIS GALAMBOS, *THE PUBLIC IMAGE OF BIG BUSINESS IN AMERICA: 1880-1940*, at 253-69 (1974), discussing empirical data reflecting shifts in public opinion regarding corporations, and Hofstadter, *supra* note 2, at 188-237, describing timing of popular antitrust movement and enforcement efforts. One way to gauge public attitudes is to consider the timing of antitrust legislation. Antitrust activism also appears to coincide with congressional activity in the area. *See* Kovacic, *supra* note 26, at 1124 (discussing the significance of congressional activity as a gauge of public perceptions).

28. Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 942 (2001) (noting that "interest-group politics" is "an approach that has worked for a number of government agencies and programs").

29. *See, e.g.*, Malcolm B. Coate et al., *Bureaucracy and Politics in FTC Merger Challenges*, in *THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE* 213 (Fred S. McChesney & William F. Shughart II eds., 1995) (same); Posner, *supra* note 28, at 942 (noting that efforts to explain antitrust enforcement in terms of politics have not been successful); George J. Stigler, *The Origin of the Sherman Act*, 14 J. LEGAL STUD. 1 (1985) (concluding that antitrust enforcement is generally not politically motivated). *But see* Roger L. Faith et al., *Antitrust Pork Barrel*, 25 J.L. & ECON. 329 (1982) (concluding that the FTC was unduly influenced in the 1960s by the parochial interests of Congress

support the conclusion that government collusion or incompetence has affected regulatory cycles.³⁰ Federal judges are arguably protected from political pressures by their secure tenure,³¹ and agencies are subject to potentially greater controls and restrictions than the courts.³² Certainly, economics have a direct impact on cyclical antitrust enforcement.³³

B. Cycles of Antitrust Enforcement

1. In the Beginning

In 1890 President Benjamin Harrison signed Bill S.I., which later became known as the Sherman Act,³⁴ and federal antitrust regulation began. The Act contains two simple prohibitions: section 1 declares that all agreements, combinations, and conspiracies in restraint of trade are unlawful; section 2 makes unlawful the monopolization or attempted monopolization of trade or commerce. The Act left courts to further define these broad and general restrictions. In short order, the courts concluded that only unreasonable trade restraints were illegal,³⁵ although the demarcation line between reasonable and unreasonable restraints remains a hotly contested issue today.³⁶

members overseeing the Commission).

30. See, e.g., ALAN STONE, *WRONG NUMBER: THE BREAKUP OF AT&T 10-13 (1989)* (discussing the view that, despite instances of capture, corruption, and incompetence in regulatory agencies, "theoretical and practical considerations militate against generalizing this view"). In fact, the lawyers populating the antitrust agencies ultimately want private-sector jobs, and that desire motivates a high level of professionalism. See Posner, *supra* note 28, at 942 (describing how government lawyers seek to "land good berths in the private practice of law" and must accordingly "demonstrate their professionalism").

31. See Posner, *supra* note 28, at 942 (stating that federal judges "are largely insulated from the interest-group pressures that play on the other branches of government").

32. See STONE, *supra* note 30, at 11-12 (describing rigid constraints imposed on regulatory agencies).

33. In fact, Richard Posner has advanced the explanation that antitrust doctrine has fluctuated in tandem with changes in economic theory. Posner, *supra* note 28, at 942 ("Looking over the entire history of U.S. antitrust law, I conclude that the most powerful explanatory variable is simply the state of economic opinion.").

34. 15 U.S.C. §§ 1-7 (2000). The Sherman Act has been called the "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *N. Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958); see also *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 610 (1972) (stating that the Sherman Act is "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms").

35. See *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911) (adopting the reasonableness standard in antitrust enforcement and stating that the Sherman Act inevitably calls for the exercise of judgment).

36. How and where to draw the "reasonableness" line has been a controversial topic since the beginning:

The courts quickly determined that [section 1] did not really make illegal all concerted action in restraint of trade but only concerted action in "unreasonable" restraint of trade. How and where to draw the line between reasonable and unreasonable restraints of trade was hotly debated at the turn of the nineteenth century and remains so as we now begin the twenty-first century. Teddy Roosevelt popularized the notion that the second

After populist sentiment put Woodrow Wilson in the White House, Congress enacted two new statutes in 1914.³⁷ The Federal Trade Commission Act created the Federal Trade Commission (FTC), an independent administrative agency with the purpose of preventing all unfair methods of competition.³⁸ The Clayton Act rendered unlawful all corporate mergers and stock acquisitions that "may" have the effect of substantially "lessen[ing] competition or tend[ing] to create a monopoly in any line of commerce."³⁹

In the very early years of antitrust enforcement, regulators were largely concerned with the dangers associated with industrial giants.⁴⁰ By 1912, Woodrow Wilson and Louis Brandeis captured public sentiment with their attacks on "the curse of bigness."⁴¹ Within two years, Congress had enacted the Federal Trade Commission Act⁴² and the Clayton Act⁴³ as additional tools for protecting local entrepreneurs from the tyranny and predations of massive national rivals.

Although regulation was extremely prolific during this early era,⁴⁴ World War I reduced the country's enthusiasm for antitrust enforcement.⁴⁵ A decade of "big-business-booster Republican rule"⁴⁶ followed in the 1920s. After the stock market crash of 1929, the country slipped into the Great Depression, a time of devastating economic misery that undercut the population's faith in the free-enterprise system⁴⁷ and resulted in a quiet period for antitrust enforcement.

prohibition did not make illegal all monopolies but only "bad" ones. Again, how to distinguish between good and bad monopolies remains a lively debate spanning the turn of two centuries.

Skitol, *supra* note 16, at 241.

37. *Id.* (describing antitrust attitudes in Wilson's era).

38. The Federal Trade Commission Act is now codified at 15 U.S.C. §§ 41-57 (2000).

39. The Clayton Act is now codified at 15 U.S.C. §§ 12-26 (2000).

40. The prevailing national mood was a suspicion of big business. See generally RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION* 327-36 (1948); THOMAS K. MCCRAW, *PROPHETS OF REGULATION* 94-114 (1984).

41. See Skitol, *supra* note 16, at 241 (discussing Wilson and Brandeis at a time when "[t]he fault lines were clear").

42. 38 Stat. 719 (1914) (codified as amended at 15 U.S.C. § 45).

43. 38 Stat. 730 (1914) (codified as amended in scattered sections of 15 U.S.C.).

44. See Hofstadter, *supra* note 2, at 193 (describing the 1890-1914 period as the "Progressive era" when the antitrust movement was in "high gear"); Kovacic, *supra* note 26, at 1112 (stating that "[t]he earliest period of Sherman Act deconcentration activity was also the most prolific").

45. See Hofstadter, *supra* note 2, at 193 (calling this period the "era of neglect").

46. See Skitol, *supra* note 16, at 242 (describing the antitrust enforcement attitudes during the 1920s and 1930s); see also Robert S. Marx, *New Interpretations of the Anti-trust Law as Applied to Business, Trade, Farm and Labor Associations*, 2 U. CIN. L. REV. 211, 222-23 (1928) (proclaiming that "[t]his is the day of big business . . . The day of the blatant trust-buster is definitely over.").

47. See ARTHUR SCHLESINGER, *THE CRISIS OF THE OLD ORDER 1919-1933*, at 155-203 (1957) (discussing how the 1929 crash eliminated the respect American business institutions enjoyed in the 1920s).

2. FDR Reinigorates Competition Regulation

During the 1930s, mass merchandising began to emerge, and the discounted prices resulting from this mass merchandising threatened mom-and-pop operations across the country.⁴⁸ To protect small businesses from the large chain stores, Congress enacted the Robinson-Patman Act in 1936⁴⁹ and the Miller-Tydings Act in 1937.⁵⁰

By the decade's end, President Roosevelt declared war on cartels and monopolies across the economy, focusing on "naked" trade restraints.⁵¹ At the same time, the Supreme Court strengthened and extended prior holdings that such agreements were illegal per se.⁵² As the country mobilized for World War II, merger activity sparked an alarming rise in industrial concentration. Congress responded by enacting the Celler-Kefauver Act⁵³ in 1950, closing major loopholes in the 1914 Clayton Act's coverage of mergers. This inaugurated a period of aggressive merger regulation over the next two decades.⁵⁴

During the Eisenhower years, the Justice Department initiated a series of spectacular criminal price-fixing conspiracy cases against General Electric Company, Westinghouse Corporation, and several smaller electrical equipment manufacturers.⁵⁵ This sent the message that antitrust compliance was critically important. Corporations began doing "business with one eye constantly cast over their shoulders at the Antitrust Division."⁵⁶

48. Chain stores created new competitive pressures for small businesses:

One new form of competition that emerged in those Depression years was discounting through newly-emerging giant mass merchandisers. These vast chains leaned on manufacturers for far better prices than mom-and-pop stores paid for their goods, and the chains passed the benefit onto their customers. While their lower prices were a boon to consumers, they were a threat to the survival of mom-and-pops. Huey Long sought to champion the cause of mom-and-pops everywhere with his declaration that he "would rather have thieves and gangsters than chain stores in Louisiana."

Skitol, *supra* note 16, at 232 (quoting THEODORE N. BECKMAN & HERMAN C. NOLAN, *THE CHAIN STORE PROBLEM* 336-37 (1938) (quoting Huey Long)).

49. The 1936 Robinson-Patman Act broadened prohibitions on price discrimination, actually encouraging cartel pricing in many industries.

50. The Miller-Tydings Act authorized states to enact Fair Trade Laws allowing manufacturers to enforce price-maintenance agreements on resellers. *See generally* Skitol, *supra* note 16, at 242-43 (discussing how these acts assisted mom-and-pop businesses).

51. FDR appointed Thurman Arnold as Chief of the Antitrust Division of the Justice Department. Arnold's staff and budget tripled in his first three years in office. *See* Skitol, *supra* note 16, at 243 (describing the "renewed commitment" to antitrust enforcement during this period).

52. *See, e.g.*, *Am. Tobacco Co. v. United States*, 328 U.S. 781, 813 (1946); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940).

53. 64 Stat. 1125 (1950) (codified as amended at 15 U.S.C. § 18 (1982)).

54. *See* Skitol, *supra* note 16, at 243-44 (discussing merger activity and the enactment of the Celler-Kefauver Act).

55. Several high-level executives went to prison as a result, and the plaintiffs' antitrust bar followed up with a burst of treble damages actions on behalf of electric utilities and other equipment buyers. *See id.* at 244.

56. Hofstadter, *supra* note 2, at 192-93 (describing how antitrust enforcement was affecting the business community).

The 1960s represented a high water mark in antitrust enforcement; the government "challenged everything."⁵⁷ Ironically, this extremely active era occurred even as public mistrust of "big business" diminished.⁵⁸ The Warren Supreme Court condemned numerous mergers and joint ventures,⁵⁹ and dissenting Justice Potter Stewart complained that the only consistency in these merger cases was that "the Government always wins."⁶⁰ On the final day of President Johnson's administration, the government initiated its suit against IBM.⁶¹ During this period, the Court also expansively construed section 2 of the Sherman Act and the Robinson-Patman Act to impose liability under relatively vague notions of exclusionary conduct and predatory pricing.⁶² The 1970s reflected a continued period of aggressive enforcement⁶³ and a new spurt of antitrust legislation.⁶⁴ Congress strengthened the government's antimerger enforcement methods, and congressional oversight committees pressed for more government suits.⁶⁵

3. Into the 1980s: Antitrust Goes Dormant

Beginning in 1977, the Court cut back on the proliferation of private antitrust litigation. First, the Court held that certain restraints were no longer illegal per se — that certain arrangements could actually be efficient and procompetitive.⁶⁶ The Court also established new criteria for antitrust standing and barred indirect purchasers from antitrust relief.⁶⁷

Thus, although the government's antitrust regulation remained vigorous through the 1970s, the Supreme Court took a much more cautious stance. Scholars generally attribute this judicial change to the enhanced popularity of the Chicago School's antitrust analysis,⁶⁸ a scholarly movement centered at the University of Chicago and joined by antitrust critics at law schools and economics departments of universities

57. See Skitol, *supra* note 16, at 264 (quoting Antitrust Division Chief Joel Klein).

58. See Hofstadter, *supra* note 2, at 194 (describing this revival period as ironic, given that public respect for large corporations had increased).

59. See, e.g., *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964); *United States v. Phila. Nat'l Bank*, 374 U.S. 321 (1963).

60. *Von's Grocery Co.*, 384 U.S. at 301.

61. See *infra* Part IV.B.3.

62. Some prominent scholars opposed this expansion. One vocal critic was Alan Greenspan, who later came to lead the Federal Reserve. See Skitol, *supra* note 16, at 245 n.24 (discussing Greenspan's views).

63. See Kovacic, *supra* note 26, at 1106-09 (detailing aggressive activities through the mid-1970s).

64. See *id.* at 1126 (stating that the 1970s "marked another period of legislative activism").

65. See *id.* (discussing congressional antitrust-related activities during the 1970s).

66. See *Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 19-20 (1979) (form of horizontal price fixing was a necessary part of collaboration with significant efficiency-enhancing potential); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54 (1977) (enhancement of interbrand competition outweighed elimination of intrabrand competition).

67. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489-90 (1977) (limits on standing); *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 746-47 (1977) (indirect purchasers).

68. See Skitol, *supra* note 16, at 248 (describing the Chicago School's impact on the Supreme Court).

across the country.⁶⁹ The philosophy presented consumer welfare as antitrust law's sole legitimate objective. Under the Chicago School's approach, consumer welfare meant an economy-wide allocative efficiency without regard for populist concerns, including political, social, or wealth-redistribution matters.⁷⁰ Although this growing economic philosophy had its critics,⁷¹ the national consciousness was more attuned to economic efficiency than to alternative enforcement rationales.⁷²

In the 1980s, the Reagan administration wholly endorsed the Chicago School's approach.⁷³ President Reagan appointed William Baxter as his first Chief of the Antitrust Division. Baxter settled the AT&T case and abandoned the IBM prosecution on the same day in 1982.⁷⁴ Federal enforcement during this period tended to focus on small-scale targets,⁷⁵ and the overall activity levels even fell below those of the 1930s, when the Sherman Act's future seemed in doubt.⁷⁶ During the 1980s, the Supreme Court handed down antitrust cases with differing results, tightening antitrust standards in some respects but loosening them in others.⁷⁷

69. In the mid-1970s, Robert Bork became the Chicago School's most prominent spokesman. He captured the essence of this movement's philosophy in his seminal book entitled *The Antitrust Paradox: A Policy at War with Itself*. See BORK, *supra* note 8. Richard A. Posner and Frank Easterbrook also shaped the Chicago School of antitrust economics. See, e.g., RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976); RICHARD POSNER & FRANK H. EASTERBROOK, *ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS* (2d ed. 1981).

70. See, e.g., Oliver Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoff*, 58 AM. ECON. REV. 18 (1968) (presenting the Chicago School's position).

71. See, e.g., Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979) (arguing that political values are essential to antitrust analysis).

72. After all, at the end of the 1970s, inflation and unemployment were at record highs, and Ronald Reagan called to "get the government off the backs of business." Skitol, *supra* note 16, at 249 (describing the economic climate in the late 1970s).

73. President Reagan placed Chicago School scholars in the courts and in enforcement agencies. See *id.* at 250 (stating that Reagan installed "true believers").

74. See *infra* note 177 and accompanying text.

75. The Antitrust Division prosecuted conspiracies among local cement producers, milk distributors, and wholesale bakeries, while the FTC concentrated upon codes of conduct within small business and professional associations. See Skitol, *supra* note 16, at 252 (discussing federal enforcement during the 1980s).

76. See Minda, *supra* note 2, at 1755 (describing nonenforcement during the 1980s); Kovacic, *supra* note 26, at 1148-49 (discussing low levels of enforcement during the 1980s, but predicting the Sherman Act's return); Robert Pitofsky, *Antitrust in the Next 100 Years*, 75 CAL. L. REV. 817, 821 (1987) (noting the movement toward a "minimalist" policy of nonenforcement during the 1980s).

77. For example, the Court toughened evidentiary requirements for inferring concerted action in section 1 cases. See, e.g., *Bus. Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 724 (1988); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582-83 (1986). During the same period, the Court reaffirmed the *per se* rule in certain contexts. See, e.g., *Monsanto Co. v. Spray-Rite Servs. Corp.*, 465 U.S. 752, 760 (1984).

4. Antitrust Enforcement on the Move Again

By 1988, current events had convinced most people that the country needed more serious antitrust enforcement.⁷⁸ President George Bush came into office appointing antitrust enforcers who reflected mainstream antitrust policy.⁷⁹ The subsequent revival of federal antitrust enforcement won broad bipartisan support.⁸⁰

The 1990s brought a "new federalism" of cooperative activity between federal and state antitrust enforcers.⁸¹ Another trend was the internationalization of antitrust enforcement.⁸² During this period, the Chicago School's economic approach began to lose its luster; the post-Chicago School crowd discarded allocative efficiency in favor of competition protection to the extent such protection unambiguously benefitted consumers.⁸³ President Clinton's presidential terms involved numerous important antitrust issues, including the following: the Microsoft case; enhanced

78. Thoughtful commentators believed a change in enforcement policy was necessary for many reasons:

[A]ntitrust permissiveness and indeed the more general "deregulation" of big business had gone too far. The nation suffered through a stock market crash, the S&L debacle and other disasters with their roots in anything-goes cowboy capitalism. By the time of George Bush's inauguration, there was a consensus even among most segments of the Republican Party that the country again needed serious antitrust cops on the beat.

Skitol, *supra* note 16, at 253.

79. President Bush appointed James Rill to be the new Antitrust Division Chief and Janet Steiger as the new Chair of the FTC. *See id.*

80. *See id.* (describing this revival of federal antitrust enforcement policy).

81. *See id.* (describing the common ground enjoyed by federal enforcers and state attorneys general). Merger regulation was a major focus of this cooperation. *See id.*

82. This internationalization initiative had several dimensions. Under the Bush Administration, antitrust enforcement policy targeted European and Asian firms, pushing the frontiers of U.S. laws' extraterritorial reach. *See id.* at 254-55 (describing the globalization initiative). International antitrust enforcement also became increasingly cooperative, especially as antitrust policy became a significant feature of the European Economic Community. *See id.*

83. *See generally* Lawrence A. Sullivan, *Post-Chicago Economics: Economists, Lawyers, Judges and Enforcement Officials in a Less Determinate Theoretical World*, 63 ANTITRUST L.J. 669, 677, 681 (1995) (describing post-Chicago School economics as a more complex analysis than the Chicago School's deductive theoretical approach). This post-Chicago approach used a "consumer welfare" standard, but defined it to mean

preservation of competition for the unambiguous benefit of consumers rather than unfettered freedom of producers to undertake whatever might be rationalized in the name of maximizing allocative efficiency. They brought insights from business management and "game theory" scholars about certain kinds of "strategic" conduct that could enable dominant firms in concentrated industries to raise entry barriers and raise rivals' costs in ways that this school considered appropriate targets of antitrust enforcement.

Skitol, *supra* note 16, at 255; *see also* Michael S. Jacobs, *The New Sophistication in Antitrust*, 79 MINN. L. REV. 1, 53 (1994) (stating that the post-Chicago School's "atheoretical complexity" will pose serious practical problems); Minda, *supra* note 2, at 1753 n.19 (describing the "post-Chicago" School as offering "new theories of market behavior and strategic decision making developed from particularized studies of real markets to challenge the ideological orientation of the Chicago School"); *Symposium on Post-Chicago Economics*, 63 ANTITRUST L.J. 445 (1995).

merger enforcement activity;⁸⁴ FTC Chairman Robert Pitofsky's broad-ranging reassessment of antitrust policy;⁸⁵ stepped-up international regulation; the acknowledgement of innovation competition (as opposed to price competition) as the main focus of antitrust attention;⁸⁶ and the growing competition concerns flowing from the rapidly changing health-care sector.⁸⁷

During this same period, the Supreme Court took an eclectic path, marching "to its own unique drummer in its evolution of antitrust jurisprudence."⁸⁸ In some ways, the Court construed antitrust laws generously and caused the laws to reach new heights;⁸⁹ in other respects, the Court imposed important limits on specific types of enforcement actions.⁹⁰

III. Antitrust Law in 2001

A. New Politics, New Policies?

Many of these same antitrust issues remain on current President George W. Bush's plate. Bush campaigned on a "compassionate conservative" platform, but the candidate did not say much about his competition philosophy.⁹¹ In general, President Bush indicates a preference for deregulation, but does support government intervention to break up monopolies.⁹²

With respect to the changing political scene, some suggest that we have achieved an "antitrust mainstream" with broad bipartisan support, making the President's politics superfluous.⁹³ If President Bush makes changes in antitrust enforcement,

84. See *infra* Part III.B.

85. For this reassessment, Pitofsky conducted three months of public hearings to obtain input from all quarters of the antitrust community. Ultimately, the FTC published a report entitled "Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace." See Skitol, *supra* note 16, at 256-57 (describing the report).

86. See *infra* notes 140-44 and accompanying text.

87. See Skitol, *supra* note 16, at 257-58 (describing antitrust challenges under the Clinton administration); see also Janet L. McDavid & Robert F. Leibenluft, *What Impact Will Bush Have?*, NAT'L L.J., Feb. 5, 2001, at B8 (stating that Clinton's high-profile initiatives made antitrust law front-page news).

88. Skitol, *supra* note 16, at 258.

89. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (endorsing expansive application of extraterritorial jurisdiction over foreign antitrust conduct); *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451 (1992) (permitting antitrust claims against high-technology equipment manufacturers who attempted to suppress competition for after-sale service by independent service providers); *FTC v. Tico Title Ins. Co.*, 504 U.S. 621 (1992) (narrowing the antitrust exemption for government-approved anticompetitive conduct).

90. See, e.g., *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (applying a permissive rule of reason analysis to resale price maintenance); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (limiting circumstances for predatory pricing liability); *Spectrum Sports v. McQuillan*, 506 U.S. 447 (1993) (tightening requirements for attempted monopolization liability).

91. See Neal R. Stoll & Shepard Goldfein, *Bush Administration: Passionate Conservative Antitrust?*, N.Y. L.J., Feb. 20, 2001, at 7 (concluding that, for the short term, antitrust enforcement is likely to be "business as usual").

92. See Brody Mullins & Neil Munro, *Clues to Bush's High Tech Plans*, NAT'L J., Jan. 20, 2001, at 192 (describing Bush's general stance).

93. This "antitrust mainstream" is premised upon the following principles:

such changes will likely be marginal, giving a slight nod to self-correcting markets based on a reluctance to overregulate.⁹⁴ In February 2001, Bush nominated Charles A. James, a moderate-to-conservative practitioner who is well known among the national antitrust bar, to run the Antitrust Division of the Justice Department.⁹⁵ The following month, President Bush named conservative Timothy J. Muris to become the next FTC chairman.⁹⁶ Both appointees will likely follow a centrist path in antitrust enforcement.⁹⁷

President Bush will face at least two unusual developments when applying antitrust law in the twenty-first century. First, through the 1990s, United States business activity exploded abroad while mergers occurred at a record-breaking pace domestically and internationally. Second, high-technology companies have begun participating in uniquely innovative markets that arguably transform the very nature of competition.

B. Merger Mania

Through the century's end, an unprecedented merger explosion⁹⁸ embraced the

The goal of antitrust enforcement is to enhance consumer welfare and to allow consumers the widest choice of the best products at the lowest prices. Naked price fixing conspiracies merit tough criminal prosecution. Economic analysis must play a critical role in antitrust enforcement. Antitrust enforcement is particularly important for industries that have not historically relied on competitive forces, largely as a result of regulation, such as utilities, transportation, telecommunications and health care. Many recent mergers have been strategic transactions involving direct competitors, firms that have vertical relationships or firms seeking access to new technologies, markets or skills. These transactions have a greater potential for anticompetitive effects than many mergers in previous years, and they must be reviewed carefully. Nonetheless, mergers are generally either efficient or competitively neutral, merger analysis must take efficiencies into account, and big is not necessarily bad. Anticompetitive effects are often hard to predict, and misguided enforcement can deter innovation or prevent efficiencies. The likely alternative to antitrust enforcement is regulation. There is a need for continued or even enhanced coordination with foreign antitrust authorities. Through close working relationships, the FTC and DOJ and their foreign counterparts have achieved some convergence on many issues.

McDavid & Leibenluft, *supra* note 87, at B8 (noting that this "antitrust mainstream" will likely endure in the new Bush administration).

94. See generally *id.* (setting forth potential policy changes under a Bush team).

95. See James V. Grimaldi, *Skilled in the Ways of Antitrust: Nominee Charles James to Face Key Cases*, WASH. POST, Feb. 16, 2001, at E1 (describing the nominee's background and credentials).

96. Muris worked as a low-level FTC staffer in the mid-1970s, then returned as a senior staff appointee under the Reagan Administration. If confirmed, some believe Muris will follow a centrist course on competition regulation. See Caroline E. Mayer & James V. Grimaldi, *Bush Pick for FTC Was on '80s Staff*, WASH. POST, Mar. 22, 2001, at E10 (stating that both critics and supporters call Muris "very very bright," a "policy wonk," "approachable," and "dazzlingly conservative"). Others predict major policy changes when the FTC changes hands. See John R. Wilke, *Muris to Usher in FTC Changes on Antitrust, Web-Privacy Policy*, WALL ST. J., Mar. 22, 2001, at A4 (describing the "sweeping changes" expected in federal antitrust enforcement under the Bush administration).

97. See generally *supra* note 93.

98. This wave is unprecedented both in terms of numbers and dollar values. See Parker & Balto, *supra* note 6, at 351 (stating that the United States "is in the midst of an unprecedented merger wave"

country and reshaped the face of corporate America.⁹⁹ Merger waves are certainly not a new phenomenon. In the modern era, merger activity has surged in the 1960s, the 1980s, and from 1993 to the present.¹⁰⁰ Although strong merger activity is not itself unique, the current merger wave's impact on antitrust enforcement and policy has been significant. The same factors¹⁰¹ driving today's heightened merger levels will also affect antitrust law's direction in the new millennium.

The first factor pushing mergers forward is deregulation, which had some effect in the 1980s,¹⁰² but which has played a more prominent role in recent times. Deregulatory changes have subsequently occurred in many more industries,¹⁰³ permitting firms to acquire either new economies of scale or broader economies of scope. Although deregulation successfully freed industries to combine with less restraint, deregulation also created transition problems because formerly heavily regulated businesses suddenly exploded into the free market.¹⁰⁴

The current merger wave is international in nature;¹⁰⁵ in fact, international merger activity is one of globalization's most visible and significant results.¹⁰⁶ American

and providing 1998 statistics). In 1991, enforcement agencies reviewed 1529 mergers; by 1998, that figure rose to 4728. The dollar value of U.S. mergers consummated in 1998 exceeded \$1.2 trillion, nearly one-seventh of our gross domestic economy. See Skitol, *supra* note 16, at 264 n.74. One year later, U.S. mergers totaled a record \$1.8 trillion. See Bernard S. Black, *The First International Merger Wave (and the Fifth and Last U.S. Wave)*, 54 U. MIAMI L. REV. 799, 799 (2000) (citing 1999 statistics). In 2000, mergers achieved a value of \$1.75 trillion. See McDavid & Leibenluft, *supra* note 87, at B8 (noting the unprecedented merger wave and the activity in 2000). See generally Joseph H. Flom, *Mergers & Acquisitions: The Decade in Review*, 54 U. MIAMI L. REV. 753 (2000) (briefly reviewing merger activity through the 1990s).

99. See Leslie Wayne, *Wave of Mergers Is Recasting Pace of Business in U.S.*, N.Y. TIMES, Jan. 19, 1998, at A1 (stating that today's merger wave is reshaping corporate America).

100. For an overview of takeover waves since 1960, see Carol B. Swanson, *The Turn in Takeovers: A Study in Public Appeasement and Unstoppable Capitalism*, 30 GA. L. REV. 943, 958-81 (1996); see also Black, *supra* note 98, at 800 (describing five merger waves since the Sherman Act was enacted in 1890).

101. See generally Black, *supra* note 98, at 807-11 (detailing fourteen factors supporting the most recent surge in mergers); Flom, *supra* note 98, at 774-75 (setting forth twenty-one factors favoring merger growth); Swanson, *supra* note 100, at 989 (discussing the factors propelling the surge of takeovers in the 1990s); Bloomberg Business News, *At Record Pace, Firms Say, "I Do" to Corporate Marriages*, STAR TRIB. (Minneapolis), Sept. 30, 1995, at D1 (describing important factors affecting the merger pace).

102. In the 1980s, the FTC reviewed a substantial number of mergers in the deregulated natural gas and airlines industries. See Parker & Balto, *supra* note 6, at 354.

103. These industries include telecommunications, electricity, interstate banking, and railroads. See *id.* at 354 (describing deregulatory changes); Swanson, *supra* note 100, at 990 n.198 (discussing the new rules eliminating merger barriers in various industries).

104. See Pitofsky, *supra* note 7, at 913 (citing the telecommunications industry and utilities as "leading examples" of transitional problems).

105. See Black, *supra* note 98, at 799 (calling current merger activity the "fifth U.S. merger wave" and the "first-ever international merger wave"). The 1990s witnessed the continued liberalization of government restrictions, the easing of cross-border cash access, and technological advances, all facilitating substantial growth in international transactions, which rose from \$61.1 billion in deals in 1991 to \$814.3 billion in 1999. See Flom, *supra* note 98, at 763 (describing cross-border activity).

106. See Joseph J. Norton & Christopher D. Olive, *A By-Product of the Globalization Process: The*

consumers' product markets are more global in scope, causing mergers and takeovers to increasingly cut across national boundaries. Mergers involving only U.S. companies comprise a shrinking percentage of the worldwide totals.¹⁰⁷ Approximately half of the FTC's full merger investigations involve a foreign party, or assets or information located abroad.¹⁰⁸ From a policy perspective, this internationalization through business mergers benefits the consumer because it creates procompetitive results.¹⁰⁹ Market globalization also imposes competitive pressures on domestic businesses to become bigger, better, and more efficient through mergers.¹¹⁰

Technological changes also drive mergers. In this technological era, businesses combine in order to facilitate the acquisition of new technology to create greater research capabilities¹¹¹ or simply to enhance competitiveness in a fast-moving market.

Finally, the economy significantly affects merger activity. Low interest rates create a favorable commercial climate for investing in corporate marriages.¹¹² In addition, the robust stock market over the past decade has made stock exchange transactions a popular means for business combinations.¹¹³ More recently, however, the stock market has been in retreat, and the frenzied merger activity has cooled.¹¹⁴

Rise of Cross-Border Bank Mergers and Acquisitions — The U.S. Regulatory Framework, 56 BUS. LAW. 591, 591-92 (2001) (declaring that bank mergers with substantial international implications provide "visible and significant dimensions of the ongoing 'globalization'") (footnote omitted).

107. In 1999, for example, U.S.-only takeovers constituted only about 40% of the worldwide total measured in dollars and only 30% in terms of number of transactions. See Black, *supra* note 98, at 799 (providing 1999 statistics).

108. In addition, approximately 25% of all mergers reported to the federal government involve parties from different countries. See Parker & Balto, *supra* note 6, at 354 (citing statistics regarding merger globalization).

109. *Id.* ("Many mergers directly associated with the globalization phenomenon are procompetitive. A merger may enhance a firm's ability to compete in foreign markets by providing rapid access to an established distribution system, knowledge of local markets, economies of scale, and complementary products.").

110. Because of these competitive pressures, companies engage in downsizing and consolidation to become more efficient. See generally *id.* at 355 (discussing downsizing and consolidation as prominent forces driving mergers); Steve Lipin, *Merger Wave Gathers Force as Strategies Demand Buying or Being Bought*, WALL ST. J., Feb. 26, 1997, at A1 (stating that businesses are increasingly concerned about being number one or two in their markets).

111. See David A. Balto & James Mongoven, *Antitrust Enforcement in Pharmaceutical Industry Mergers*, 54 FOOD & DRUG L.J. 255 (1999) (describing merger impact on research development capabilities).

112. See Parker & Balto, *supra* note 6, at 356 (stating that "low interest rates and low inflation have produced a favorable climate for investment").

113. See generally *id.* (noting the impact of a "booming stock market" on the merger climate).

114. In fact, in February 2001, only 162 mergers and acquisitions totaling \$4.8 billion were announced, making it the slowest month for deals since May 1997. See *Amazon Shares Fall; No Wal-Mart Deal*, USA TODAY, Mar. 7, 2001 (citing Thomson Financial Securities Data); see also Stephen Gandel, *Economic Chill*, CRAIN'S N.Y. BUS., Mar. 19, 2001, at 1 (stating that the "weak stock market has long cooled such investment banking businesses as equity underwriting and mergers-and-acquisitions advisory work"); Randall Smith, *Deals & Deal Makers: Morgan Stanley, Lehman, Bear Stearns Saw Net Income Slump in First Quarter*, WALL ST. J., Mar. 22, 2001, at C18 (noting significant decrease in

Government merger enforcement is also at record-high levels,¹¹⁵ although the reasons for this heightened activity are unclear.¹¹⁶ Some suggest that the increased regulation results from two trends: the increasingly strategic nature of today's mergers¹¹⁷ and the enforcement agencies' greater unwillingness to settle.¹¹⁸ In some respects, the merger movement has been engaged in an intricate ballet with antitrust enforcement through the modern era.¹¹⁹ There is some sense that, at least with respect to this country's earlier industrial history, tougher antitrust regulation cycled after periods of permissiveness or indifference.¹²⁰

C. Interpreting Competition in the Modern Marketplace

1. Software, Not Smokestacks

Just as business combinations and enforcement activity have moved cyclically over time, the look of competition itself has also been transformed. Because antitrust law revolves around competition,¹²¹ the central question becomes how to measure competitive impact in a dramatically changing "new economy."¹²² Many regard

announced merger volumes). *But see Diminished Risk of Penalty Brightening the M&A Climate*, AM. BANKER, Mar. 12, 2001, 2001 WL 3910083 (stating that "some look at what the bear market has done to bank stocks as clearing the way for acquisition-minded banks to start shopping again"); Flom, *supra* note 98, at 774 (urging an outlook of even stronger merger growth in the near future).

115. *Merger Wave Spurs a New Scrutiny*, N.Y. TIMES, Dec. 13, 1992 (Magazine), at 38 (discussing merger litigation trends). Despite this increase in enforcement, FTC and Antitrust Division staffing has remained essentially unchanged. Parker & Balto, *supra* note 6, at 352 (presenting enforcement statistics and noting "virtually constant" staffing levels).

116. As two commentators recently observed:

Why is there an increasing level of litigation? Have the enforcement agencies raised the standards? Are they reinterpreting the law or pushing the envelope in an effort to develop new law? Although the number and size of litigated cases have changed, there is no dramatic change in the law or enforcement policy. The agencies continue to enforce the law as written and as interpreted by the courts. Almost unique in federal law enforcement, the antitrust agencies set out in the *Merger Guidelines* their detailed mode of analysis. There are no preconceptions of how any particular market operates. Rather, with each new case, the staff of the agencies must roll up their sleeves and search for the facts that will guide their understanding of the market.

Parker & Balto, *supra* note 6, at 357.

117. In contrast to the hostile takeovers of the 1980s, business combinations in the 1990s were more likely to be cooperative affairs involving strategic, rather than financial, bidders. *See generally* Swanson, *supra* note 100, at 990, 994 (describing the difference between financial and strategic bidders).

118. This unwillingness arguably results from the recognition that a settlement that does not effectively restore competition is simply not worth adopting. *See* Parker & Balto, *supra* note 6, at 358 (discussing how the government has reached the conclusion that settlements provide inadequate relief).

119. *See* Kovacic, *supra* note 26, at 1112 (arguing that the pattern regulation tends to follow is "a wave of consolidation by acquisition and merger").

120. This tendency is much less clear during the modern eras of mergers, beginning in the 1960s, when heavy merger activity coincided with aggressive antitrust enforcement. *See id.* at 1120-22 (describing this cyclical tendency and noting that the "most recent deconcentration era is explained less easily as a reaction to lax antitrust policy").

121. *See supra* notes 18-23 and accompanying text.

122. Richard Posner describes the modern context as a "new economy" encompassing three distinct industries: "the manufacture of computer software; the Internet-based businesses (Internet access

consumer welfare as the all-important measure. The Chicago School evaluates consumer welfare in terms of allocative and productive efficiency,¹²³ while others prefer the perspective of individual customers or other competitors.¹²⁴ Regardless of one's chosen definition of consumer welfare, antitrust enforcement either becomes superfluous or must be substantially altered if competition no longer operates as traditionally expected, that is, if market dominance no longer has an adverse effect on the consumer.¹²⁵

Without question, the face of competition today dramatically differs from commerce a hundred years ago.¹²⁶ At the turn of the nineteenth century, horse-drawn plows and belching smokestacks characterized the American economy.¹²⁷ Capital was inextricably tied to superstructures made of concrete and steel; the bigger the factories, the better.¹²⁸ In addition, the competitive arenas were much more local and finite in nature. Because markets did not extensively overlap, competing firms could not move fluidly among geographic areas.¹²⁹ In sum, when antitrust law came into being, commercial production involved the creation of "real stuff" made from "real stuff" at a "real cost," and the law of diminishing returns logically limited output.¹³⁰

providers, Internet service providers, Internet content providers), such as AOL and Amazon; and the communications services and equipment designed to support the first two markets." Posner, *supra* note 28, at 925.

123. The consumer-welfare approach suggests the primary goals of wealth maximization and efficient production. Michael P. Kenny & William H. Jordan, *United States v. Microsoft: Into the Antitrust Regulatory Vacuum Missteps the Department of Justice*, 47 EMORY L.J. 1351, 1364-65 (1998) (discussing the consumer-welfare goal as supported by Robert Bork and Professors Areeda and Hovenkamp); *see also, e.g.*, BORK, *supra* note 8, at 405 (stating that the "only goal that should guide interpretation of the antitrust laws is the welfare of consumers" and that "the single most important factor contributing to that welfare" is productive efficiency). *See generally supra* notes 69-73 and accompanying text.

124. *See supra* note 71 and accompanying text.

125. Traditionally, it has been assumed that market dominance adversely affects competition by artificially raising prices, restricting output, or both.

126. *See generally* RICHARD B. MCKENZIE, *TRUST ON TRIAL: HOW THE MICROSOFT CASE IS REFRAMING THE RULES OF COMPETITION* 2-8 (2000) (describing the fundamental differences in a section entitled "From Smokestacks to Microchips").

127. The plows represented the shrinking agricultural sector, and the smokestacks stood for the expanding industrial market. *See id.* at 2-3 (describing the "advanced economies" of the U.S. during that era).

128. *See id.* at 3 (describing the "real capital" in this earlier era).

129. One commentator described this phenomenon in the following way:

Competition was restricted by many mundane factors, not the least of which was the cost of firms changing their product mixes and shifting their locations. Geography may have been the more pressing restriction on production, given the expense of transporting products by road, rail, and ship. For much of the first half of the twentieth century, business gurus could smartly repeat what was widely believed to be the three most important factors in doing business — "Location, location, location" — implying that physical position in markets was crucial to earning above-competitive rates of return.

Id.

130. "The creation of real stuff" refers to the process of manufacturing palpable necessities, such as making clothing from fabric and housing from wood and brick. *See id.* (describing "real stuff" in the earlier era).

Commerce today stands in stark contrast to the plows-and-smokestacks era. The market has changed in terms of what is produced, how it is produced, and where it is sold. Production time has often collapsed into weeks or months, rather than years. Services have displaced products to a surprising degree, and value now correlates to service, rather than cost of materials. In a real sense, goods have lost relevance,¹³¹ and many firms' principal sources of capital are now brainpower and information. Due to the highly mobile nature of these types of capital, well-established economic norms may no longer remain true in this new environment.

2. Analyzing Dynamic Competition

Commentators generally agree that the current commercial markets are more mobile, fluid, and amorphous than commercial markets of the past. These qualities arguably render markets more responsive and more able to correct problems associated with coercive competitive power.¹³² In fact, some suggest that the modern marketplace is so dynamic that monopoly power can only be ephemeral,¹³³ and competition accordingly no longer needs protection. This approach assumes basic structural differences in today's market economy, and assumes that because of those changes, commercial forces alone can more effectively address entrenched market power than can the government's behemoth regulatory structure.¹³⁴ If true, the transactional costs associated with antitrust enforcement would make the modern regulatory system appear inherently outdated.

Economists utilize two different models to describe market structure and performance in this new economy: network competition and innovation-based competition.¹³⁵ The network-externality or "network-effect" model teaches that a

131. Business management guru Tom Peters made this point by noting at one of his seminars, "Welcome to a world where . . . 'If you can touch it, it's not real.'" *Id.* at 5.

132. *See id.* at 7 (raising the question of whether enhanced market fluidity should render antitrust enforcement more cautious).

133. *See* Pitofsky, *supra* note 7, at 915-16 (presenting "durability of market power" as one explanation).

134. The logical corollary would be that government bureaucrats are, by comparison, more prone to mistakes that would easily outlive the impact of changing market forces on competition. *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15 (1984) (stating that the "economic system corrects monopoly more readily" than mistaken judicial opinions); Pitofsky, *supra* note 7, at 915 (noting the argument that market forces act more efficiently than bureaucratic regulation).

135. Innovation-based competition is sometimes called "Schumpeterian Rivalry" after noted economist Joseph Schumpeter. He coined the phrase "creative destruction" to describe the pursuit of market power as a creative and dynamic force that constantly destroys and revolutionizes the old economic structure. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 83 (1942) (describing the "creative destruction" concept). *See generally* Shelanski & Sidak, *supra* note 4, at 5-15 (article section discussing "Schumpeterian Rivalry"). Although Schumpeter's doctrine originated more than half a century ago, scholars still embrace it today as a meaningful framework within which to discuss competition in computer software markets. *See, e.g.*, Richard Schmalensee, *Antitrust Issues in Schumpeterian Industries*, 90 AM. ECON. REV. PAPERS & PROC. 192, 193 (May 2000) (stating that the Schumpeterian approach measures fragility in the software industry); Shelanski & Sidak, *supra* note 4, at 5-15; David J. Teece & Mary Coleman, *The Meaning of Monopoly: Antitrust Analysis in High-Technology Industries*, 43 ANTITRUST BULL. 801, 820-22 (1998) (describing the relevance of Schum-

product's value increases as the network grows.¹³⁶ Observers generally agree that the network-effects model characterizes the current market for computer operating systems.¹³⁷ As the benefits grow, it becomes more expensive for consumers to look elsewhere, giving competition a winner-take-all flavor that makes early market penetration a crucial competitive strategy. New entry requires either a better product or a cost advantage that justifies the consumer's switching costs. To avoid falling behind, businesses would have great incentive to take the early lead and hold it through continuous product development.¹³⁸ Thus, the market leader sets the technological standard, even if other approaches are superior. This may push subsequent market innovation down the less-than-optimal path started by the market leader.¹³⁹

Innovation-based competition, on the other hand, views a technologically driven market quite differently. Under this approach, subsequent innovation constantly challenges and displaces market dominance. Firms compete for temporary market leadership through creative destruction, giving competition an all-or-nothing flavor in this organic, ongoing process.¹⁴⁰ In such a market, periodic dominance by one or just a few firms can reflect healthy, innovation-based competition and can be subject to displacement even when network externalities are involved.¹⁴¹ Similarly, higher pricing may be necessary to induce the investment required for

peterian concepts in high-technology markets).

136. This network effect benefits society as well as individual consumers. The seminal work on network effect is Jeffrey Rohlfs, *A Theory of Interdependent Demand for a Communications Service*, 5 BELL J. ECON. & MGMT. SCI. 16 (1974). For more current contributions in network externalities literature, see Stanley M. Besen & Joseph Farrell, *Choosing How to Compete: Strategies and Tactics in Standardization*, 8 J. ECON. PERSP. 117 (1994); Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSP. 93 (1994); and Shelanski & Sidak, *supra* note 4, at 4-6.

137. See John E. Lopatka & William H. Page, *Antitrust on Internet Time: Microsoft and the Law and Economics of Exclusion*, 7 SUP. CT. ECON. REV. 157, 168 (1999) (stating that "[m]ost observers seem to agree that network effects characterize the market for operating systems"). The most often-cited historical example is the telephone system, which becomes more valuable to any one subscriber as others subscribe and become part of the communications network. See Shelanski & Sidak, *supra* note 4, at 5 (describing the telephone system as the "typical example" of network effect).

138. See Shelanski & Sidak, *supra* note 4, at 9 (discussing the danger of competitors who might "leapfrog" the incumbent lead position).

139. Of course, path dependency and lock-in can occur for reasons other than network externalities. See *id.* at 10 (giving as an example the costs of learning to use a competing product).

140. Joseph Schumpeter, the distinguished creator of the creative destruction notion, once said:

[S]ince we are dealing with an organic process, analysis of what happens in any particular part of it — say, in an individual concern or industry — may indeed clarify details of mechanism but is inconclusive beyond that. Every piece of business strategy acquires its true significance only against the background of that process and within the situation created by it. It must be seen in its role in the perennial gale of creative destruction; it cannot be understood irrespective of it or, in fact, on the hypothesis that there is a perennial lull.

SCHUMPETER, *supra* note 135, at 83; see also Shelanski & Sidak, *supra* note 4, at 11 (describing this passage as "the most famous passage of Schumpeter's classic discussion on creative destruction").

141. See Shelanski & Sidak, *supra* note 4, at 12 (stating that innovation-based competition anticipates "periodic dominance by one firm or a few firms" and that in a healthy market "even goods with network externalities are at issue").

developing new technology.¹⁴² Thus, companies participating in the new economy understandably conclude that their only options are to monopolize the market or lose it entirely.¹⁴³ Concerns exist that antitrust regulation of the new economic marketplace would dangerously squelch high-tech creativity. Regulatory proponents respond by pointing to antitrust law's long-standing posture of avoiding unnecessary interference with incentives to innovate.¹⁴⁴

These two approaches suggest very different results regarding competition protection in the new economy. The "network effects" view paints market domination as especially dangerous, given its tendency to support inferior technology over preferable alternatives. Innovation-based competition, on the other hand, suggests the contrary — that market domination may be essential to success in the modern marketplace.

3. *New Entry and the New Economy*

Defining competitive injury also involves the assessment of entry barriers. Most conclude that companies wishing to enter today's high-tech industry face lowered entry barriers;¹⁴⁵ after all, successful entry largely depends upon possessing new ideas rather than constructing a huge industrial plant. On the other hand, a powerful competitor can use intellectual property protections such as patents and copyrights to prevent entry by new rivals. Indeed, intellectual property is the principal barrier new entrants must overcome in high-tech sectors.¹⁴⁶

142. See *id.* (noting that in Schumpeterian competition, "pricing at a level higher than that found under the theoretically simplistic case of perfect competition is not only legitimate, but also necessary to induce investment in developing and deploying new technology"). In other words, to what extent could IBM and Microsoft maintain market dominance without being displaced in their fast-paced markets? As two commentators only recently noted:

It would ignore recent economic history to presume that Microsoft is immune from being leapfrogged and displaced from its dominant market position. In hindsight it may seem hard to understand how the Justice Department could have allowed itself to become a latter day Captain Ahab, spending thirteen years in pursuit of a whale named IBM. Though IBM was the undisputed market leader in mainframe computers in the 1960s, by the time the government dropped its antitrust case in 1982, the mainframe had already been harpooned by the personal computer. And in that market, despite its brand name and experience, IBM emerged as just one of several strong competitors. In a competitive economy, Schumpeter observed, businesses will be enticed to compete vigorously for "spectacular prizes" despite the fact that "they receive in return only modest compensation." In the analogous context of designing efficient regulatory regimes (as opposed to efficient remedial regimes under antitrust law), the "most important" caveat for policymakers is that "static models cannot be confidently relied on for quantitative guidance in the real, dynamic world."

Id. (footnotes omitted).

143. See Dick Satran, *Life After Microsoft: Do 20th-Century Laws Work in the 21st-Century Economy?*, SMART BUS., Oct. 2000, at 124 (concluding that "Microsoft's model for moving into a sector of the Internet, though contentious and unfair, may also have been inevitable and necessary").

144. See Pitofsky, *supra* note 7, at 917-18 (describing how "antitrust has historically struck the balance in favor of innovation").

145. See, e.g., *id.* at 916 (stating the "basic point that it is easier to become an applications programmer and grow from that base than to design, finance, and construct a steel factory").

146. In fact, there is ongoing concern whether the balance between antitrust regulation and
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In addition, the previously described "network effect" also imposes a barrier to entry.¹⁴⁷ A successful, early high-tech mover can threaten to become the only supplier of certain products or services because of compatibility advantages that stem from being part of the established network. Consumers become increasingly committed to this mover because of their sunk costs, and suppliers of complementary products become similarly trapped within the network. Thus, the growing impact of network effects makes market penetration especially difficult for new entrants.¹⁴⁸

Thus, although commentators tend to agree that entry barriers, overall, may be lower in the high-tech field, important barriers nonetheless do exist. It is, therefore, difficult to predict to what extent modern market forces alone could regulate monopolistic conduct. The changing face of competition pushes both directions with respect to market entry barriers, both lowering and raising the bar in differing respects.

IV. Microsoft Madness and the Big-Case Dilemma

A. The Big-Case, New-Technology Context

Antitrust enforcement is definitely on the move. The massive antitrust investigations and litigation of the present day not only reveal regulation in its most public sense, but also magnify every aspect of its application. The "big cases" have always been part of antitrust law in that antitrust cases are typically large in terms of size, duration, and complexity. Both government and private actions commonly extend ten years or beyond, requiring massive amounts of discovery.

The "big-case" problem has several significant implications. For example, such cases provide the focus for important debate on antitrust law, its underlying policies, its application, and the resources being devoted to enforcement. Additionally, as "big cases" span large time periods, they naturally spawn consideration of whether shifting technology (and markets) over that period support continued enforcement or whether changing market forces themselves provide better protection than government regulators.

*Microsoft*¹⁴⁹ is the most recent of these mega-cases. It is certainly significant to the extent it has reawakened interest in the antitrust field. The Microsoft case study may also inform the complex issues surrounding antitrust application in the new millennium. Comparing the Microsoft experience with comparable antitrust matters, especially cases reflecting "new technology" in their respective eras, may be especially instructive in demonstrating whether *Microsoft* represents new frailties in antitrust enforcement or simply represents another refrain in an old tune.

intellectual property protection has been properly struck. *See id.* at 919-23.

147. *See supra* notes 135-39 and accompanying text.

148. Antitrust Division Chief Joel Klein has described the strong presence of network effects as a most novel phenomenon warranting increased antitrust concern. *See Skitol, supra* note 16, at 263 (quoting Joel Klein's discussion of this "opportunity for abuse").

149. *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000), *vacated and remanded*, 253 F.3d 34 (D.C. Cir. 2001), *cert. denied*, 530 U.S. 1301 (2001).

B. Blast from the Past

1. Same Old, Same Old

Mega antitrust cases implicating the latest technology are not new. When the government challenges America's biggest businesses, the public tends to react with ambivalence; after all, it's one thing to champion competition, but quite another to change a cherished institution.

The most ambitious antitrust divestiture of its era was the government's breakup of Standard Oil in 1911.¹⁵⁰ In that case, the Supreme Court itself observed that the record was "inordinately voluminous, consisting of twenty-three volumes of printed matter, aggregating about 12,000 pages, containing a vast amount of confusing and conflicting testimony relating to innumerable, complex, and varied business transactions, extending over a period of nearly forty years."¹⁵¹

The public's reaction to the Standard Oil prosecution was understandably mixed. On the one hand, many were aghast that antitrust laws would undercut the most successful and innovative enterprise of its time.¹⁵² On the other hand, more people feared the enormous power that Standard Oil wielded and supported the government's action.¹⁵³

2. The AT&T Divestiture

The AT&T antitrust investigation was the next "big case" in the public eye. By the time the Bell System was broken up in 1984,¹⁵⁴ consumers were bewildered.¹⁵⁵ After all, the public had grown less fearful of big business, and at

150. See generally *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

151. *Id.* at 30-31.

152. After all, Standard Oil was the company that had brought kerosene light into homes and had developed the world-changing petroleum industry. See Skitol, *supra* note 16, at 260 (stating that "part of the public was aghast at the notion that the antitrust laws would attack" this most prominent company).

153. See *id.* (noting that a larger part of the public "cheered the Government on").

154. Assistant Attorney General William F. Baxter was the architect of the AT&T divestiture. See generally FRED W. HENCK & BERNARD STRASSBURG, *A SLIPPERY SLOPE: THE LONG ROAD TO THE BREAKUP OF AT&T 223* (1988) (calling Baxter "Mr. Justice Department where AT&T issues were concerned"); Richard L. Schmalensee, *Bill Baxter in the Antitrust Arena: An Economist's Appreciation*, 51 *STAN. L. REV.* 1317, 1324-27 (1999) (noting Baxter's emphasis on pursuing only those cases reflecting a "plausible and coherent consumer benefit rationale"). He came to Washington to fight monopolies in 1981, then returned to teaching at Stanford University three years later. See Shelanski & Sidak, *supra* note 4, at 1 (summarizing Baxter's involvement and economic views).

155. When the breakup occurred, the world changed:

A large part of the public found the drastic changes in the way they obtain telephone service to be sudden and bewildering. More than a few have echoed the words of the general manager of a National Basketball Association team. His club was widely reported, on the eve of the annual draft of college players, to be negotiating a trade to improve its position in the selection process. At the last minute, the deal fell apart. Asked why, he said, "It all goes back to the breakup of the phone company. Nothing has worked right since then."

HENCK & STRASSBURG, *supra* note 154, at ix (1988); see also STONE, *supra* note 30, at 9 (most of the public did not support the divestiture).

the time Bell was an unparalleled giant in our national economic history.¹⁵⁶ It enjoyed a worldwide reputation of success in operating a model telephone system.¹⁵⁷ By January 1, 1984, 70% of Bell's assets had been divested, making the divestiture the most colossal breakup of a corporate institution in American history.¹⁵⁸

The antitrust charges against AT&T occurred over three related sets of proceedings.¹⁵⁹ The most well-known case was the decision responsible for the separation of local and long-distance phone service.¹⁶⁰ The interconnection and computer proceedings gave consumers the right to lease or own their own equipment, while the MCI action led to the development of competition for long-distance telephone service.¹⁶¹

The Justice Department filed its antitrust suit in 1974, but that litigation's roots extend back to the telephone's invention in 1876.¹⁶² The government argued that AT&T had violated section 2 of the Sherman Act by monopolizing the markets for long-distance telecommunications and telephone equipment. The Justice Department contended that AT&T had systematically refused interconnection to its long-distance competitors,¹⁶³ had engaged in predatory long-distance pricing,¹⁶⁴ and had protected its monopoly position by abusing the regulatory process.¹⁶⁵

The AT&T suit ended with a consent decree, known as the Modification of Final Judgment (MFJ),¹⁶⁶ finalized in 1984.¹⁶⁷ The principal structural remedy

156. Bell was an impressive colossus that dominated telecommunications:

Through its nationwide holding company, the American Telephone & Telegraph Company, it owned or controlled the principal telephone company in each of the forty-eight contiguous states, providing local and long distance services in their respective territories. It handled almost all interstate long distance calls through the AT&T Long Lines Department. Its manufacturing company, Western Electric, made most of the country's telephone equipment and acted as the purchasing agent for items it did not itself produce. Its parts included the leading U.S. industrial laboratory, the Bell Telephone Laboratories. In short, it was the dominant technological and operating force in the nation's telecommunications infrastructure.

HENCK & STRASSBURG, *supra* note 154, at x. By most measures, AT&T operated as the world's biggest private corporation, having the most employees and often the highest gross revenues and net income. See STONE, *supra* note 30, at 3 (calling AT&T "the largest corporation of any kind ever created"); HENCK & STRASSBURG, *supra* note 154, at x.

157. See STONE, *supra* note 30, at 4 ("Few would deny that at the time of divestiture the American telecommunications network developed under AT&T's leadership was the best in the world."); cf. PETER TEMIN & LOUIS GALAMBOS, *THE FALL OF THE BELL SYSTEM: A STUDY IN PRICES AND POLITICS 5* (1987) (noting systems failures in the late 1960s that had tarnished Bell's reputation as the best telecommunications network in the world).

158. See HENCK & STRASSBURG, *supra* note 154, at x.

159. See STONE, *supra* note 30, at 5 (describing the three sets of proceedings).

160. *United States v. AT&T*, 524 F. Supp. 1336 (D.D.C. 1981).

161. See STONE, *supra* note 30, at 5.

162. The telephone was invented amidst a bitter patent controversy. *Id.* at 7 (describing the alleged patent fraud, but concluding that "the Bell patent was a deserved one").

163. *AT&T*, 524 F. Supp. at 1353-54.

164. *Id.* at 1356-57.

165. *Id.* at 1356.

166. The Modification of Final Judgment (MFJ) was a consent decree in *United States v. AT&T Co.*,

was a massive vertical divestiture requiring AT&T to spin off seven new regional Bell operating companies from the company's local exchange operations.¹⁶⁸

The complex divestiture process took two years to complete and had an initially negative effect on consumers.¹⁶⁹ Some contend that divestiture did not achieve its primary aim — to separate the monopoly and competitive parts of telecommunications.¹⁷⁰ Even those who were optimistic about the remedy's ultimate wisdom conceded that the change created "an awful short-term problem."¹⁷¹

The MFJ is often credited with increasing competition in long-distance services.¹⁷² In fact, residential long-distance rates have fallen from thirty-five or forty cents per minute in 1984 to discounted prices today of about five cents; overall, long-distance service prices have averaged at least a 50% drop.¹⁷³ In addition, competition among long-distance providers did spur the rapid deployment of fiberoptic cable, which later formed the infrastructure for handling the Internet's data traffic.¹⁷⁴ On the other hand, one could argue that these benefits might have occurred notwithstanding the divestiture.¹⁷⁵ The debate regarding the consequen-

552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). The consent decree modified a 1956 decree between the government and AT&T. *AT&T*, 524 F. Supp. at 135-38 (describing the modification); *see also* United States v. W. Elec. Co., 1956 Trade Cases (CCH) ¶¶ 68, 246 (D.N.Y. 1956) (original consent decree).

167. *See AT&T*, 552 F. Supp. at 131 (Modification of Final Judgment).

168. Before divestiture, AT&T had three main parts: the local exchange companies providing about 80% of local telephone service; AT&T Long Lines, providing virtually all U.S. long-distance service; and Western Electric, including Bell Laboratories, doing research and manufacturing almost all of AT&T's equipment. After divestiture, AT&T had to spin off its local exchange operations, creating seven new regional Bell operating companies: Ameritech, Bell Atlantic, BellSouth, NYNEX, Pacific Telesis, Southwestern Bell, and U.S. West. Shelanski & Sidak, *supra* note 4, at 92-93 (describing the AT&T divestiture).

169. TEMIN & GALAMBOS, *supra* note 157, at xi (describing difficulties in obtaining repairs and a rise in rates).

170. *See id.* at 354 (discussing the failure to create a "bright line" between monopoly and the competitive portions of telecommunications).

171. *See* Linda Grant, *Through a Glass Brightly: Consumers and the New Tomorrow*, in DISCONNECTING BELL: THE IMPACT OF THE AT&T DIVESTITURE 132, 133 (Harry M. Shooshan III ed., 1984) (quoting Professor Harry Trebing, director of the Institute of Public Utilities at Michigan State University).

172. Shelanski & Sidak, *supra* note 4, at 94 ("The decree is often credited with furthering the growth of competition in long-distance services.").

173. *See id.* (citing statistics flowing from divestiture).

174. *See id.* (discussing how competition drove rapid deployment of fiberoptic cable).

175. One could explain these developments as follows:

Fiber deployment, for example, began prior to the MFJ. Although it would likely have proceeded more slowly absent the decree's equal access rule that opened up long-distance markets, the "fiber revolution" was under way prior to the decision to break up the Bell System. For another example, the decline in long-distance prices is at least partly attributable to regulatory decisions by the FCC relating to subsidy flows from long-distance to local service. The FCC "rebalanced" local and long-distance rates by creating a "subscriber line charge" ("SLC") on consumers' local bills to replace subsidies taken from long-distance revenues. The effect of the SLC was to raise the customer's monthly bill for exchange access and enable long-distance carriers to reduce rates accordingly. . . .

ces of the AT&T divestiture remains substantial and unresolved. The MFJ may well have produced net benefits; in any event, it did produce very high, unexpected costs.¹⁷⁶

3. The IBM Debacle

Ironically, on the same day the Justice Department announced the AT&T divestiture, it also terminated the government's other major monopolization case against "America's second titan of information technologies, IBM."¹⁷⁷ *United States v. IBM*¹⁷⁸ was one of the most significant single-firm monopoly cases of all time.¹⁷⁹ Like *Microsoft*, IBM involved one of the era's key technologically progressive companies.¹⁸⁰

The IBM investigation began in 1967 after competitors complained of misconduct.¹⁸¹ The Justice Department brought suit during the Johnson administration's final hours in January 1969; the case finally went to trial in 1975. In essence, the government's case focused on IBM's marketing of an immensely popular family of mainframe computers.¹⁸² Contending that IBM held about 74% of the market, the government charged that the company maintained its monopoly power through anticompetitive acts.¹⁸³ The principle claims were predatory pricing; illegally

Indeed, the FCC imposed price caps on the Bell operating companies in their sale of access to interexchange carriers transporting interstate toll calls.

Id. at 94-95 (footnotes omitted).

176. Two commentators recently described the dangers associated with divestiture in technologically dynamic industries in the following way:

[E]ven if the MFJ did produce net benefits, it also entailed very high, unanticipated costs. The AT&T case shows not only that the predictions of antitrust litigants and judges about the future of a technologically dynamic industry are often wrong, but also that enforcing and interpreting a complex decree can be administratively costly and potentially harmful to consumer welfare. The prospect of such costs counsels more caution than comfort in adopting a structural remedy, and requires that a compelling case be made for the benefits that society can expect from such relief.

Id. at 91.

177. See *id.* at 1 (describing the timing as appropriate, given Baxter's philosophy regarding antitrust remedies); see also Ernest Holsendolph, *U.S. Settles Phone Suit, Drops I.B.M. Case: A.T.&T. to Split Up, Transforming Industry*, N.Y. TIMES, Jan. 9, 1982, at A1.

178. *United States v. Int. Bus. Mach. Corp.*, No. 69 Civ. 200 (S.D.N.Y. complaint filed Jan. 17, 1969).

179. FRANKLIN M. FISHER ET AL., FOLDED, SPINDLED, AND MUTILATED: ECONOMIC ANALYSIS AND U.S. V. IBM I (1983) (calling this case "one of the great single-firm monopoly cases of all time"). Franklin Fisher testified as an expert witness for IBM at trial.

180. See *id.* at 1 (describing IBM as the best-known and largest company in the computer industry, which was "perhaps the most technologically progressive industry in the U.S. economy"). In fact, there are many parallels between the Microsoft and IBM antitrust cases. See, e.g., Eliot G. Disner, *Microsoft: IBM Redux?*, 8 BUS. L. TODAY 8, 11-12 (Sept./Oct. 1998); Dratler, *supra* note 18, at 677-81; Lopatka, *supra* note 23, at 161.

181. See FISHER ET AL., *supra* note 179, at 11 (discussing the investigation's initiation); see also Lopatka, *supra* note 23, at 146 (stating that IBM's competitors "egged on" the government).

182. This was the System/360 family of mainframe computers. See Lopatka, *supra* note 23, at 146-47. For a description of the System/360's development, see Bob O. Evans, *System/360: A Retrospective View*, 8 ANNALS HIST. COMPUTING 155 (1986).

183. Interestingly, some argue that the Antitrust Division chose to focus on the company's monopoly

bundling hardware, software, and support services; prematurely announcing new products in order to injure competitors; and excluding peripheral equipment manufacturers from the market.¹⁸⁴

The liability segment¹⁸⁵ of the massive trial¹⁸⁶ lasted more than six years at an enormous cost.¹⁸⁷ The case turned on proof of monopoly power and exclusionary conduct. Both aspects were arguably flawed.¹⁸⁸ For example, the market share statistics were distorted; at the very least, they did not accurately reflect the narrowly defined market of firms manufacturing complete systems of general-purpose computers.¹⁸⁹ In the end, the Antitrust Division dismissed the case, stipulating that it was "without merit."¹⁹⁰ The IBM experience has been described as a grotesque waste of resources, offering valuable lessons largely unlearned.¹⁹¹ Even at that time, some suggested that antitrust laws were out of touch with the "modern" economy.¹⁹² Instead of anticompetitive, IBM's conduct may have actually been efficient¹⁹³ in an innovative, high-technology market.¹⁹⁴

maintenance rather than IBM's acquisition of monopoly power because the government believed that proving unlawful acquisition would simply have taken too long. See, e.g., Lewis Bernstein, *Big Blue: A Personal Reaction*, ANTITRUST, Winter 1988, at 40.

184. See Lopatka, *supra* note 23, at 147 (summarizing major claims against IBM).

185. The remedy phase was never tried.

186. The trial transcript was more than 104,400 pages long and thousands of documents were admitted into evidence. See FISHER ET AL., *supra* note 179, at 1; see also Lopatka, *supra* note 23, at 145 (stating that the numbers surrounding the IBM investigation and trial "astound"). The case spanned five presidents, nine attorneys general, and seven antitrust division chiefs. Only five of IBM's twenty-four board directors remained at the end. See Donald I. Baker, *Government Enforcement of § 2*, 61 NOTRE DAME L. REV. 898, 899 n.13 (1986) (describing the enormity of the IBM investigation and trial).

187. The United States spent approximately \$16.8 million, not including expert witness fees, litigating the case, and IBM estimated the total annual cost to all parties as \$50 million to \$100 million. See *Post-Mortem on IBM Case Provides Forum for Conflicting Perspectives*, 42 ANTITRUST & TRADE REG. REP. (BNA) 310, 311 (Feb. 11, 1982) (detailing litigation-related costs).

188. See Lopatka, *supra* note 23, at 147-48 (stating that "both parts of the government's case were flawed" and flowed from a "big-is-bad" mentality).

189. See FISHER ET AL., *supra* note 179, at 44-97, 121-30 (discussing the government's market share arguments).

190. See *id.* at 368-69 (setting forth the stipulation of dismissal in the appendix). So ended the "Antitrust Division's Vietnam." ROBERT H. BORK, *THE ANTITRUST PARADOX* 432 (rev. ed. 1993). Not surprisingly, some members of the Antitrust Division criticized the dismissal, contending that the government's prosecution was sound. See, e.g., RICHARD T. DELAMARTER, *BIG BLUE* 331, 336 (1986) (author was a staff economist).

191. One commentator recently opined that the IBM case reflected the arrogant belief that antitrust regulation can always improve upon market outcomes:

United States v. IBM is the greatest waste of resources in the history of antitrust enforcement. Yet perhaps, in the larger order of things, something good has to come from something so grotesque. And, in truth, *IBM* offers valuable lessons. Some of them seem to have been learned. But, above all, the case reflected an arrogance toward the market, a conviction that antitrust institutions are fully capable of improving on market outcomes wherever imperfections can be alleged. An appropriate respect for the market, or equivalently a healthy distrust of the capacity of antitrust, has proven elusive.

Lopatka, *supra* note 23, at 146.

192. See FISHER ET AL., *supra* note 179, at 1 (citing Lester Thurow in the *New York Times*).

193. As one commentator recently noted:

Some contend that the government's failure in the IBM case led to long-term demoralization inhibiting regulation of concentrated industries.¹⁹⁵ As for IBM itself, its fortunes declined during the dozen years of fighting.¹⁹⁶ Over the same period, IBM also lost dominance because it abandoned the cutting edge of innovative activity.¹⁹⁷

C. *Microsoft Madness*

1. *In the Public Spotlight*

Microsoft's legal entanglements with the Justice Department have captured the public's imagination¹⁹⁸ more than any other antitrust controversy in recent times.¹⁹⁹ In some respects, the government's initiative was even more ambitious

[T]he practices were, in general, efficient responses to consumer demand and the actions of competitors. They were, unquestionably, undertaken by IBM to retain its leading position in the marketplace, but there is nothing wrong with that. And to the extent that IBM also sought to exploit any market power it had lawfully obtained, there is nothing wrong with that either. As Robert Bork observed, "There was no sensible explanation for IBM's dominance in the computer industry at the time other than superior efficiency" Lopatka, *supra* note 23, at 148 (footnote omitted).

194. When the government sued IBM in 1969, the computer industry presented a "textbook example of an innovative market." *See id.* at 154-55 (describing computer innovations throughout the relevant period).

195. *See, e.g.*, Kovacic, *supra* note 26, at 1105 (providing the history of the IBM case and detailing the subsequent demoralization of efforts to deal with concentrated industries).

196. *See* CHARLES FERGUSON & CHARLES MORRIS, *COMPUTER WARS* (1993) (calling the IBM case a "devouring monster"); THOMAS J. WATSON, JR., *FATHER, SON & CO.: MY LIFE AT IBM AND BEYOND* (1990) (describing how the antitrust case colored everything the company's management did); William J. Cook, *Antitrust Crippled Big Blue in the 1970s*, U.S. NEWS & WORLD REP., June 1, 1998, at 42 (stating that "the world's most successful computer company lost its way" during the antitrust suit).

197. *See* Dratler, *supra* note 18, at 674 n.12 (declaring that IBM became a "stagnant noncompetitor" and "allowed the P.C. industry to emerge at its feet, and it turned itself from a paragon of financial reliability into a company that for several years was losing money at a frightening rate"); Lopatka, *supra* note 23, at 158 (concluding that "[w]hen IBM failed to embrace the movement toward distributed computing and personal computers . . . it lost its position").

198. In a fitting twist, the public has had extensive Internet access to the case. Testimony, filings, orders, and other information are available at http://www.usdoj.gov/atr/cases/ms_index.htm (last visited Aug. 6, 2001) (Antitrust Division) and <http://www.microsoft.com/presspass/trial/default.htm> (last visited Aug. 6, 2001).

199. Richard Steuer, the editorial chair of *Antitrust*, described the furor as follows:

In the court of public opinion antitrust law is judged on the basis of its big cases, and in this era the case is *Microsoft*.

Whatever one thinks of the *Microsoft* case, it has enlivened popular interest in antitrust law like nothing else. Today, antitrust is being discussed and debated in board rooms, classrooms, and courtrooms across America. It has been the subject of unprecedented press coverage and commentary. *Microsoft* is the story of the day

Steuer, *supra* note 4, at 5; *see also* JOEL BRINKLEY & STEVE LOHR, *U.S. v. MICROSOFT: THE INSIDE STORY OF THE LANDMARK CASE* xiii (2001) ("*The New York Times* viewed the *Microsoft* case as a touchstone millennial event that signaled a transition from business-as-usual at the end of the 20th century to seemingly limitless global markets at the beginning of the 21st."); Lopatka & Page, *supra* note 137, at 159 ("After decades of obscurity, antitrust has returned to the headlines.").

here than in the IBM and AT&T cases because the government filed the latter actions when the public had a strong faith in antitrust enforcement.²⁰⁰ The Microsoft controversy is an area in which neutrality is practically impossible. Everyone has an opinion about the company's state of grace, and that opinion is likely to be given long and loud.²⁰¹

The personality of Microsoft's former CEO Bill Gates has further polarized these views.²⁰² Gates, an author himself,²⁰³ has been revered for his godlike business sense²⁰⁴ and ridiculed for his nerdish and egotistical personal traits.²⁰⁵ Simul-

200. One commentator has compared the relevant antitrust enforcement climates in the following fashion:

The government's May 1998 antitrust filing against Microsoft represents the most ambitious antitrust initiative in a generation, easily comparable to the IBM and AT&T cases. Indeed, the case against Microsoft is more ambitious. The Department of Justice (DOJ) filed the IBM and AT&T cases when faith in antitrust was strong, when breaking up General Motors and major oil firms represented serious policy options. In recent years, however, activist trust-busting has fallen into disrepute, and the large-firm monopolization case has become a rarity. Thus, DOJ's case against Microsoft represents a potential shift in policy, a possible return to the antitrust activism of the 1960s and 1970s, especially in light of DOJ's April 2000 brief urging Judge Thomas Penfield Jackson to impose divestiture on Microsoft.

George Bittlingmayer, *U.S. v. Microsoft: Cui Bono?*, 9 CORNELL J.L. & PUB. POL'Y 9, 9 (1999) (footnotes omitted).

201. See generally Shelanski & Sidak, *supra* note 4, at 1 (describing Microsoft as "a post-industrial giant that has been alternately lionized, vilified, and, ultimately, investigated and prosecuted by the Antitrust Division"); Robert Reno, *Pick a Side, Any Side, in the Microsoft Fight*, STAR TRIB. (Minneapolis), May 9, 2000, at A11 (stating that the "best minds" can't decide which side to take in the Microsoft case). But see Paul Krugman, *The Case Against Anti-Microsoft: Punitive Action Will Be Worse — It Will Create a Climate of Fear*, STAR TRIB. (Minneapolis), Apr. 11, 2000, at A11 (noting that no one outside Seattle is pro-Microsoft, but that "a lot of us are, at least mildly, anti-anti-Microsoft"). Angry rivals have debased Microsoft's undeniable successes through the years with colorful nicknames:

Godzilla, snake, bear, jackal, eight-hundred-pound gorilla, the Beast of Redmond, Don Corleone, the Great Satan, the Borg, the Leviathan, the Antichrist, the Prince of Darkness, the Dorsal Fin, a twenty-first-century Robber Baron, the "Leona Helmsley of technology," the Chinese Army, Darth Vader, the Evil Empire, the Death Star

DAVID A. KAPLAN, *THE SILICON BOYS AND THEIR VALLEY OF DREAMS* 255-56 (1999).

202. In January 2000, Bill Gates promoted Steve Ballmer, long known as Microsoft's chief salesman, to CEO. Gates remains with Microsoft as chairman and chief software architect. See Elizabeth Corcoran, *No More Mr. Bad Guy*, FORBES, Mar. 5, 2001, at 130 (describing management changes at Microsoft); Michael Cusumano, *Gates-Ballmer Shuffle Is a Boost for Microsoft*, COMPUTERWORLD, Jan. 31, 2000, 2000 WL 2175652 (stating that "Gates remains the technology guru and strategy genius" after Ballmer became CEO); Andrew Zajac & Matt Rosenberg, *Ballmer's Windows Seat May Get Hot: New Microsoft CEO Faces Curse of Gates*, CHI. TRIB., Jan. 23, 2000, 2000 WL 3629322 (contrasting styles of Gates and Ballmer).

203. See, e.g., BILL GATES & COLLINS HEMINGWAY, *BUSINESS @ THE SPEED OF THOUGHT: USING A DIGITAL NERVOUS SYSTEM* (1999); BILL GATES ET AL., *THE ROAD AHEAD* (rev. ed. 1996).

204. See, e.g., SIMON CHARNAN, *BILL GATES: HELPING PEOPLE USE COMPUTERS* (1997) (children's book in "Community Builders" series); DES DEARLOVE, *BUSINESS THE BILL GATES WAY: 10 SECRETS OF THE WORLD'S RICHEST BUSINESS LEADER* (1999); JOAN D. DICKINSON, *BILL GATES: BILLIONAIRE COMPUTER GENIUS* (1997); STEVEN FERRY, *THE STORY OF MICROSOFT* (2000) (part of the "Spirit of Success" series); ROBERT HELLER, *BILL GATES* (2000) (part of "Business Masterminds" series); RAMA D. JAGER, *IN THE COMPANY OF GIANTS: CANDID CONVERSATIONS WITH THE VISIONARIES OF THE*

taneously hated and adored,²⁰⁶ he has been the focus of numerous biographical treatments describing his Microsoft journey.²⁰⁷ His company's antitrust woes have also increasingly been the subject of popular works.²⁰⁸

DIGITAL WORLD (1997); DANIEL ICHBIAH & SUSAN L. KNEPPER, *THE MAKING OF MICROSOFT: HOW BILL GATES AND HIS TEAM CREATED THE WORLD'S MOST SUCCESSFUL SOFTWARE COMPANY* (1991) (originally published in 1989 under the title *NEW MAGICIANS*); GENE N. LANDRUM, *PROFILES OF GENIUS: THIRTEEN CREATIVE MEN WHO CHANGED THE WORLD* (1993) (describing William Gates III as one of thirteen geniuses); JANET C. LOWE, *BILL GATES SPEAKS: INSIGHT FROM THE WORLD'S GREATEST ENTREPRENEUR* (1998).

205. As for Bill Gates' enormous ego, the following joke makes the point:

Al Gore, Bill Clinton, and Bill Gates find themselves in Heaven standing before God, who is sitting in a beautiful white throne. And God asks Gore, "What do you believe in?"

"I believe that CFCs are killing the Earth, and that until this is corrected, the ozone layer depletion and greenhouse effect imperils all of humanity."

And God says, "Okay, you can sit at my feet."

God then asks Clinton, "What do you believe in?"

"I believe that all people are equal and everyone should be able to live their lives as they see fit. I believe in empowerment to the people and freedom for all."

And God says, "Okay, you can also sit at my feet."

God then asks Bill Gates, "And what do you believe in?"

Bill Gates replies, "I believe you're sitting in my chair."

GARY RIVLIN, *THE PLOT TO GET BILL GATES: AN IRREVERENT INVESTIGATION OF THE WORLD'S RICHEST MAN . . . AND THE PEOPLE WHO HATE HIM* 336 (1999) (appendix contains "A Compendium of Bill Gates and Microsoft Jokes"); *see also* HENRY BEARD, JOHN BOSWELL & RON BARRETT, *BILL GATES' PERSONAL SUPER SECRET PRIVATE LAPTOP: A MICROPOOF* (1998); ROBERT X. CRINGELY, *ACCIDENTAL EMPIRES: HOW THE BOYS OF SILICON VALLEY MAKE THEIR MILLIONS, BATTLE FOREIGN COMPETITION, AND STILL CAN'T GET A DATE* (1992) (including a chapter on "Chairman Bill"); BILL G., *THE SECRET DIARY OF BILL GATES: A PARODY* (1998).

206. *E.g.*, Paul Farhi, *Bill Gates Brought Us What We Secretly Adore*, STAR TRIB. (Minneapolis), Nov. 10, 1999, at A21 (stating that Bill Gates is a "great American" and "a capitalist pig").

207. *See, e.g.*, PAUL ANDREWS, *HOW THE WEB WAS WON: MICROSOFT FROM WINDOWS TO THE WEB: THE INSIDE STORY OF HOW BILL GATES AND HIS BAND OF INTERNET IDEALISTS TRANSFORMED A SOFTWARE EMPIRE* (1999); AARON BOYD, *SMART MONEY: THE STORY OF BILL GATES* (1995); JONATHAN GATLIN, *BILL GATES: THE PATH TO THE FUTURE* (1999); DAVID A. KAPLAN, *THE SILICON BOYS AND THEIR VALLEY OF DREAMS* (1999) (described on jacket sleeve as a "riotous romp through the history and culture of [Silicon] Valley"); JEANNE M. LESINSKI, *BILL GATES* (2000); STEPHEN MANES & PAUL ANDREWS, *GATES: HOW MICROSOFT'S MOGUL REINVENTED AN INDUSTRY — AND MADE HIMSELF THE RICHEST MAN IN AMERICA* (1992); RANDALL E. STROSS, *THE MICROSOFT WAY: THE REAL STORY OF HOW THE COMPANY OUTSMARTS ITS COMPETITION* (1996); JAMES WALLACE, *OVERDRIVE: BILL GATES AND THE RACE TO CONTROL CYBERSPACE* (1997); JAMES WALLACE & JIM ERICKSON, *HARD DRIVE: BILL GATES AND THE MAKING OF THE MICROSOFT EMPIRE* (1992).

208. DOMINICK T. ARMENTANO, *ANTITRUST: THE CASE FOR REPEAL* (1999); *COMPETITION, INNOVATION AND THE MICROSOFT MONOPOLY: ANTITRUST, in THE DIGITAL MARKETPLACE* (Jeffrey A. Eisenach & Thomas M. Lenard eds., 1999); KEN AULETTA, *WORLD WAR 3.0: MICROSOFT AND ITS ENEMIES* (2001); BRINKLEY & LOHR, *supra* note 199; JOHN HEILEMANN, *PRIDE BEFORE THE FALL: THE TRIALS OF BILL GATES AND THE END OF THE MICROSOFT ERA* (2001); DAVID B. KOPEL, *ANTITRUST AFTER MICROSOFT: THE OBSOLESCENCE OF ANTITRUST IN THE DIGITAL ERA* (2000); STANLEY J. LIEBOWITZ & STEPHEN E. MARGOLIS, *WINNERS, LOSERS & MICROSOFT: COMPETITION AND ANTITRUST IN HIGH TECHNOLOGY* (1999); MCKENZIE, *supra* note 126.

2. The Investigation Begins

Microsoft's antitrust problems began eleven years ago when the FTC started an investigation of Microsoft's business practices.²⁰⁹ In 1993, the FTC dropped its inquiry after the commissioners deadlocked 2-2 on filing charges.²¹⁰ The Department of Justice, however, decided to take up its own investigation.²¹¹ The Justice Department and Microsoft signed a consent decree in 1994,²¹² but Judge Stanley Sporkin threw out the decree the following year, finding the arrangement to be too lenient on Microsoft.²¹³ Two months later, the parties went back to court when the Justice Department sued Microsoft to block its proposed \$1.5 billion acquisition of Intuit, the developer of the leading personal finance program, Quicken.²¹⁴ Microsoft quickly dropped its plans to acquire Intuit.²¹⁵ In June 1995, the Court of Appeals for the D.C. Circuit reversed Judge Sporkin's rejection of the consent decree and removed him from the case;²¹⁶ Judge Thomas Penfield Jackson subsequently approved the consent decree.²¹⁷

In September 1996, the Justice Department initiated an investigation into Microsoft's bundling of Internet Explorer with Windows 95, viewing it as a

209. On May 30, 1990, the FTC started investigating Microsoft's possible collusion with IBM in the development of OS/2, its Windows pricing policy, and its competitive advantage in Windows applications. See generally Jim Erickson, *When Microsoft Plays Hardball: Fair or Foul? Federal Probe Shines Spotlight on Computer Giant*, SEATTLE POST-INTELLIGENCER, Mar. 16, 1991, at A1 (discussing the FTC investigation). For a helpful chronology of key events in the Microsoft antitrust saga, see MCKENZIE, *supra* note 126, at 231-33 (Appendix I).

210. See generally *FTC Still Split on Microsoft: No Antitrust Ruling Issued, but Firm Says Probe Is Continuing*, SEATTLE POST-INTELLIGENCER, July 22, 1993, at A1 (stating that a deadlocked FTC declined to issue an antitrust complaint against Microsoft).

211. See T.R. Reid & Brit Hume, *Antitrust Case Hardball Issue for Microsoft*, SEATTLE POST-INTELLIGENCER, Aug. 14, 1993, at B3 (describing how the FTC "handed the matter off to the Justice Department").

212. See G. Pascal Zachary, *A Winning Deal: Microsoft Will Remain Dominant Despite Pact in Antitrust Dispute*, WALL ST. J., July 18, 1994, at A1 (describing the settlement).

213. See Christopher Hanson & Jim Erickson, *Microsoft Antitrust Pact Rejected: Justice Settlement Isn't in "Public Interest," Judge Rules*, SEATTLE POST-INTELLIGENCER, Feb. 15, 1995, at A1 (calling the holding a "stunning decision").

214. Since Microsoft already owned Money, Quicken's principal competitor, the Justice Department charged that Microsoft would have a monopoly in the personal finance software market.

215. See G. Christian Hill et al., *Undone Deal: Microsoft Drops Bid for Intuit*, WALL ST. J., May 22, 1995, at A1 (describing this "Round Two" victory for the Justice Department).

216. See Christopher Hanson, *Court Backs Microsoft Settlement: Judge Sporkin Is Rebuked for Rejecting Antitrust Pact*, SEATTLE POST-INTELLIGENCER, June 17, 1995 (calling this a major victory for Microsoft).

217. See Jim Erickson, *Microsoft Antitrust Decree Is Finally OK'd: Justice Department Approved Deal 13 Months Ago*, SEATTLE POST-INTELLIGENCER, Aug. 22, 1995, at A1 (describing approval of the "controversial agreement"). Many criticized this consent decree as too weak. See Norman W. Hawker, *Consistently Wrong: The Single Product Issue and the Tying Claims Against Microsoft*, 35 CAL. W. L. REV. 1, 2 (1998) (noting that "the consent decree was widely criticized as too weak"). See generally Kenneth C. Baseman et al., *Microsoft Plays Hardball: The Use of Exclusionary Pricing and Technical Incompatibility to Maintain Monopoly Power in Markets for Operating System Software*, 40 ANTITRUST BULL. 265, 299 (1995) (describing consent decree remedies as likely inadequate).

possible extension of Microsoft's monopoly in the operating system market into the browser market. The following August, the federal government expanded its inquiry to include Microsoft's extensive investment in Apple Computers and in three firms providing video and sound over the Internet. The Justice Department brought suit against Microsoft for bundling Internet Explorer with Windows in violation of the 1995 consent decree.²¹⁸ On December 11, 1997, Judge Jackson issued a preliminary injunction preventing Microsoft from requiring personal computer manufacturers to install Internet Explorer as a condition for using Windows 95.²¹⁹ While appealing the injunction, Microsoft offered two versions of Windows 95, one with and one without Internet Explorer. The Justice Department sought to have Microsoft held in contempt for violating Judge Jackson's order.

Microsoft and the Justice Department, in January 1998, signed an agreement under which personal computer manufacturers would not have to place the Internet Explorer icon on the Windows 95 desktop.²²⁰ Despite Judge Jackson's injunction, the Court of Appeals for the D.C. Circuit concluded that Microsoft's launch of Windows 98, in June 1998, could go forward with its integrated Internet Explorer browser because Windows 98 fell outside the district court order.²²¹

3. *The Instant District Court Action*

On May 18, 1998, the U.S. Justice Department announced a new suit against Microsoft²²² for using its monopoly power in the operating system market to stifle competition in the Internet browser market. Twenty state attorneys general and the District of Columbia also sued Microsoft, asserting federal antitrust law violations, as well as violations of the states' respective antitrust regulations.²²³ Upon

218. See Bryan Gruley et al., *U.S. Sues Microsoft Over PC Browser*, WALL ST. J., Oct. 21, 1997, at A3 (stating that the Justice Department filed a complaint "aiming squarely at the heart of the software giant's strategy for dominance").

219. See John R. Wilke & Don Clark, *Microsoft Is Dealt a Blow on Internet Plans*, WALL ST. J., Dec. 12, 1997, at A3 (describing the judge's decision as "at least a temporary blow to the software giant's plans").

220. See David Bank & John R. Wilke, *Browser Bruiser: Microsoft and Justice End a Skirmish, Yet War Could Escalate*, WALL ST. J., Jan. 23, 1998, at A1 (explaining that Microsoft agreed to unbundle Internet software to settle the legal skirmish).

221. This was a stunning development. For many, Microsoft's claim that Windows 95 and Internet Explorer constituted a single integrated product was obviously unsupported. See, e.g., James Gleick, *Justice Delayed*, N.Y. TIMES, Nov. 23, 1997, at 40 (Magazine) (calling Microsoft's position "transparently untrue"); Walt Mossberg, *Knowing the ABCs of the Antitrust Case Against Microsoft*, WALL ST. J., Oct. 30, 1997, at B1 (concluding that Internet Explorer was not an integrated feature of Windows 95).

222. Complaint, *United States v. Microsoft Corp.*, Civil Action No. 98-1232 (D.D.C. filed May 18, 1998) [hereinafter U.S. Complaint]. See generally John R. Wilke, *U.S. Sues Microsoft on Antitrust Grounds*, WALL ST. J., May 19, 1998, at A3 (stating that the suit "goes to the heart of Microsoft's way of doing business"). Assistant Attorney General Joel Klein was the moving force in bringing suit. Although his motivations in pursuing Microsoft have sometimes been questioned, Klein generally garners considerable respect. See BRINKLEY & LOHR, *supra* note 199, at 29-31 (containing a segment entitled "Joel Klein: At the Helm").

223. Complaint, *New York v. Microsoft Corp.*, Civil Action No. 98-1233 (D.D.C. filed May 18,

Microsoft's motion,²²⁴ Judge Jackson²²⁵ consolidated the state and federal actions.²²⁶ On June 23, the federal appellate court overturned that judge's December 11 order enjoining Microsoft from requiring computer manufacturers to couple Internet Explorer with Windows 95.

In essence, the Department of Justice and the States contended that Microsoft had purposefully engaged in improper conduct involving competitors, distributors of Internet browsers, and computer manufacturers to preserve Microsoft's dominance in the personal computer operating systems²²⁷ market and to extend that monopoly to the Internet browser market.²²⁸ In violation of section 1 of the Sherman Act, Microsoft allegedly entered into certain exclusive dealing and tying arrangements.²²⁹ In violation of section 2, Microsoft purportedly engaged in this same and other behavior to maintain its monopoly power in the operating systems market and to attempt monopoly status in the Internet browser market.²³⁰

The government based its case on the contention that Microsoft enjoyed monopoly power in the operating systems market for Intel-based personal

1998). The twenty states participating with the District of Columbia were California, Connecticut, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, North Carolina, New Mexico, New York, Ohio, South Carolina, Utah, West Virginia, and Wisconsin. On July 17, 1998, these plaintiffs submitted a revised complaint. Revised Complaint, *New York v. Microsoft Corp.*, Civil Action No. 98-1233 (D.D.C. filed July 17, 1998) [hereinafter *State Complaint*]. South Carolina withdrew on December 7, 1998. See Shelanski & Sidak, *supra* note 4, at n.230 (mentioning the State's withdrawal). Some contend that the presence of so many attorneys general bolstered the Justice Department's decision to bring its action and maintain an aggressive stance. See Sensenbrenner: *Antitrust Overhaul Due*, *supra* note 14 (stating House Judiciary Committee Chairman Sensenbrenner's belief that "the Justice Department and Microsoft were within a few words of reaching a settlement until the state attorneys general came in and said, 'No deal'"); Foer, *supra* note 4, at 1284 (noting that some observers hold this same view); Robert M. Langer, *Should the Antitrust Division, the FTC, and State Attorneys General Formally Allocate the Market for Antitrust Enforcement?*, ANTI-TRUST REP., Oct. 1998, at 2 (discussing the relationship between state and federal enforcement efforts).

224. See Motion of Defendant Microsoft Corporation to Consolidate, *United States v. Microsoft Corp.*, Civil Action No. 98-1232 (D.D.C. filed May 21, 1998).

225. Judge Jackson has achieved an intriguing infamy as a result of handling this matter. See, e.g., BRINKLEY & LOHR, *supra* note 199, at 17-21 (containing a segment entitled "Thomas Penfield Jackson: A Judge from Central Casting").

226. See *United States v. Microsoft Corp.*, Civil Action No. 98-1232, slip op. at 1 (D.D.C. May 22, 1998). In this order, Judge Jackson also invoked the long-standing acceleration provisions of Federal Rule of Civil Procedure 65(a)(2) to advance the date of full trial and consolidate it with a hearing on the government's motion for a preliminary injunction. See Andrew I. Gavil, *The End of Antitrust Trench Warfare?: An Analysis of Some Procedural Aspects of the Microsoft Trial*, 13 ANTI-TRUST 7, 7 (Summer 1999) (describing the ramifications flowing from Judge Jackson's May 22 order). See generally 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2950 (1995) (describing the operation of FRCP 65(a)(2)).

227. As the United States explained in its complaint, an operating system coordinates the interactions between a personal computer's central processing functions and its hardware components, as well as providing a platform for software applications. See U.S. Complaint, *supra* note 222, ¶¶ 54, 66.

228. See *id.* ¶¶ 1-38, 53-123; *State Complaint*, *supra* note 223, ¶¶ 9-78.

229. See U.S. Complaint, *supra* note 222, ¶¶ 130-37; *State Complaint*, *supra* note 223, ¶¶ 93-97.

230. See U.S. Complaint, *supra* note 222, ¶¶ 138-41; *State Complaint*, *supra* note 223, ¶¶ 85-90.

computers, the most widely used personal computers in the United States.²³¹ According to the United States, Microsoft retained monopoly power because original equipment manufacturers had no commercially viable alternative to Microsoft's Windows. No reasonable alternative was available, the government urged, because the operating systems market had high entry barriers resulting from network effects and economies of scale in software production.²³²

After rejecting Microsoft's motion to dismiss, the infamous Microsoft trial began before Judge Jackson on October 19, 1998, and continued for seventy-six days. From the moment the Microsoft case was filed, Judge Jackson faced the challenge of avoiding the protracted proceedings that had mired prior government monopolization actions such as *IBM* and *AT&T*.²³³ The deposition testimony alone in *Microsoft* ran into the tens of thousands of pages.²³⁴

4. Judge Jackson's Rulings

On November 5, 1999, Judge Jackson issued his findings of fact,²³⁵ overwhelmingly endorsing the government's position. The judge found that Microsoft held monopoly power in the Intel-compatible personal computer operating systems product market,²³⁶ and that Microsoft demonstrated this power through its pricing policies for Windows.²³⁷ As for Microsoft's conduct over the past decade, Judge Jackson concluded that these actions gave Microsoft an advantage only "if they operated to reinforce monopoly power."²³⁸ Although some procompetitive benefits flowed from these acts, the judge agreed with the government that, on balance, the conduct harmed consumers by inhibiting competition and innovation in the computer industry.²³⁹

231. See U.S. Complaint, *supra* note 222, ¶¶ 1-6, 57-60. Microsoft's Windows product was the operating system in over 80% of existing Intel-based personal computers and was going into more than 90% of new personal computers. See *id.* ¶ 2.

232. The Department of Justice explained that a successful operating system had to support numerous desirable software applications and that software writers, in turn, would create new applications to run on well-received operating systems. The more widely used the operating system, the more desirable the system would become to consumers. See *id.* ¶¶ 2-3, 57-60, 66-68. The presence of network externalities and increasing returns to scale in the software industry had been acknowledged in prior litigation involving the Department of Justice and Microsoft. See *United States v. Microsoft*, 147 F.3d 935, 939 (D.C. Cir. 1998) (describing the software industry as possessing such attributes); *United States v. Microsoft*, 56 F.3d 1448, 1452 (D.C. Cir. 1995) ("It is undisputed that the software market is characterized by 'increasing returns,' resulting in natural barriers to entry.")

233. See Gavil, *supra* note 226 (exploring the procedural devices used to move the case from filing to judgment in far less time than might have been expected).

234. See Joel Brinkley, *Read All About It: Testimony Omitted from Microsoft Trial*, N.Y. TIMES, Apr. 9, 1999, at C6.

235. *United States v. Microsoft Corp.* 84 F. Supp. 2d 9 (D.D.C. 1999).

236. See *id.* at 18-66.

237. Judge Jackson concluded that Microsoft wielded monopoly power because it could charge higher than competitive prices for Windows, and that the company could do so for a sustained period without losing a significant number of customers. See *id.* at 19, ¶ 33.

238. See *id.* at 28, ¶ 67.

239. See *id.* at 110-12, ¶¶ 408-12.

On April 3, 2000, Judge Jackson issued his conclusions of law.²⁴⁰ He concluded that Microsoft violated section 1 of the Sherman Act by tying its web browser to its operating system and that the company violated section 2 when it "maintained its monopoly power by anticompetitive means and attempted to monopolize the Web browser market."²⁴¹

As for the tying arrangement, Judge Jackson decided that "Microsoft's combination of Windows and Internet Explorer by contractual and technological artifices constitute[d] unlawful tying to the extent that those actions forced Microsoft's customers and consumers to take Internet Explorer as a condition of obtaining Windows."²⁴² Even though Microsoft essentially priced Internet Explorer at "zero," the judge concluded that "consumers were forced to pay, one way or another, for the browser along with Windows."²⁴³

With respect to section 2, Judge Jackson concluded that Microsoft failed to rebut the presumption of monopoly power created under the facts.²⁴⁴ The court emphasized that "there are currently no products — and that there are not likely to be any in the near future — that a significant percentage of computer users worldwide could substitute for Intel-compatible PC operating systems without incurring substantial costs."²⁴⁵ The judge noted that the plaintiffs had proved Microsoft's dominant, persistent, and increasing share of the relevant market, which exceeded 95% of the worldwide market.²⁴⁶

With monopoly power established, Judge Jackson focused on Microsoft's use of anticompetitive methods to achieve or maintain its position, deciding as a threshold question whether defendant's conduct was "exclusionary."²⁴⁷ The judge examined Microsoft's conduct with respect to middleware technologies²⁴⁸ and concluded that the company strove for years to prevent these technologies "from fostering the development of enough full-featured, cross-platform applications to erode the applications barrier."²⁴⁹ In sum, the judge deemed Microsoft's campaign illegally anticompetitive because the campaign prevented the middleware technologies from

240. See *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000).

241. See *id.* at 35. Judge Jackson did, however, find in Microsoft's favor with respect to the government's allegation of illegal exclusive dealing arrangements. See *id.*

242. *Id.* at 47.

243. *Id.* at 50.

244. *Id.* at 36-37. Microsoft "attempted to rebut the presumption of monopoly power with evidence of both putative constraints on its ability to exercise such power and behavior of its own that [was] supposedly inconsistent with the possession of monopoly power." *Id.* at 37. The court concluded, however, that the purported constraints did not actually deprive Microsoft of its monopoly power and that the company's conduct (technical innovation and reasonable pricing behavior) was not inconsistent with its possession of monopoly power. See *id.*

245. *Id.* at 36.

246. See *id.*

247. By "exclusionary," Judge Jackson meant whether the conduct had "restricted significantly the ability of other firms to compete." *Id.* at 37.

248. Judge Jackson focused on Netscape's Navigator Web browser and Sun's implementation of Java technology — "the two incarnations of middleware that posed the greatest threat." *Id.* at 39.

249. *Id.* at 38.

fulfilling their potential on the open market without procompetitive justification.²⁵⁰ In so concluding, Judge Jackson emphasized the importance of viewing Microsoft's conduct in totality:

Microsoft's campaign to protect the applications barrier from erosion by network-centric middleware can be broken down into discrete categories of activity, several of which on their own independently satisfy the second element of a § 2 monopoly maintenance claim. But only when the separate categories of conduct are viewed, as they should be, as a single, well-coordinated course of action does the full extent of the violence that Microsoft has done to the competitive process reveal itself. In essence, Microsoft mounted a deliberate assault upon entrepreneurial efforts that, left to rise or fall on their own merits, could well have enabled the introduction of competition into the market for Intel-compatible PC operating systems.²⁵¹

According to the court, the surrounding context only reinforced its conclusion that Microsoft's conduct was "predacious."²⁵² Using the same evidence, Judge Jackson also found that Microsoft had violated section 2 by attempting to monopolize a second market — the Internet browser market.²⁵³ Once Judge Jackson had completed the trial's liability phase,²⁵⁴ the district court considered the appropriate remedy. The government sought a structural injunction requiring vertical divestiture of Microsoft into two separate companies — one to handle the operating systems business and one engaged in applications.²⁵⁵ Microsoft responded with a proposal for behavioral restrictions.²⁵⁶ After a brief hearing, Judge Jackson ordered Microsoft to submit a proposed plan dividing the company vertically into two firms.²⁵⁷

5. *The Appeal and Microsoft's Legacy*

The court of appeals heard oral argument in the Microsoft matter at the end of February, and will likely issue a decision later this year.²⁵⁸ Judge Jackson himself

250. *See id.* at 39.

251. *Id.* at 44 (citations omitted).

252. *Id.*

253. *See id.* at 45-46.

254. Judge Jackson had bifurcated the case into separate liability and remedies phases shortly after the complaints were filed. *See Shelanski & Sidak, supra* note 4, at 73.

255. *See* Plaintiff's Revised Proposed Final Judgment, *United States v. Microsoft Corp.*, Civil Action No. 98-1232, 2 (D.D.C. filed May 26, 2000).

256. *See* Microsoft Corporation's Proposed Final Judgment, *United States v. Microsoft Corp.*, Civil Action No. 98-1232 (D.D.C. filed May 10, 2000).

257. *See United States v. Microsoft Corp.*, 97 F. Supp. 2d 59, 63 (D.D.C. 2000) (stating "Microsoft shall submit to the Court and the Plaintiffs a proposed plan of divestiture").

258. This article reflects research through March 2001. On June 28, the court of appeals issued its decision, partly affirming and partly reversing Judge Jackson. Upholding Microsoft's monopolization liability, the appellate court found no illegal attempted monopolization and remanded for a determination of whether the tying claim constitutes a violation under a rule-of-reason analysis. Rebuking Judge Jackson for his public comments, the court disqualified him from hearing the remand. *See United States*

became an issue before the appellate court.²⁵⁹ The seven-judge appeals court harshly questioned the government's position²⁶⁰ and launched a blistering attack on Judge Jackson's public statements about Microsoft as a breach of judicial decorum and perhaps even judicial ethics.²⁶¹ Given the oral argument's tenor, many concluded that Microsoft had a good chance of prevailing on at least some aspects of its appeal.²⁶² Some believe that George W. Bush, who stands "on the side of innovation, not litigation,"²⁶³ will drop the Justice Department's antitrust suit against Microsoft, should the company prevail on this appeal.²⁶⁴

Those who strongly dispute the government's case in *United States v. Microsoft* do so on several grounds. One popular complaint is that Microsoft does not and cannot maintain monopoly market leadership because of the extraordinarily competitive market within which it operates.²⁶⁵ This argument closely relates to the overall

v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

259. Justice Jackson said of his own findings, "Virtually everything I did may be vulnerable on appeal . . ." Peter Spiegel, *Microsoft Judge Defends Himself Against Charges of Misconduct: Software Giant Appeals Judge's Breakup Judgment*, FIN. TIMES 4 (Oct. 7, 2000); Michael A. Cusumano, *An Angry Judge Won't Help Teach Microsoft the Law*, WASH. POST, Nov. 28, 1999, at B4 (taking position that Judge Jackson's "findings of fact" were one-sided and revealing of his anger toward Microsoft).

260. In order to prevail, the government has to win on at least one of three legal theories: illegal tying of the Internet browser to the Windows operating system; attempted monopolization of the browser market; or the monopoly maintenance claim. After February's oral arguments, antitrust commentators believe the first two claims "don't have a chance," and the third may be doubtful. See, e.g., Dan Carney et al., *Reversal of Misfortune?*, BUS. WK., Mar. 12, 2001, at 48, available at 2001 WL 2205855 (describing the reactions of antitrust experts to the oral argument). It has been suggested that the Bush administration helped sink the government's case on appeal by ousting Douglas Malemed, acting head of the Antitrust Division, shortly before oral argument. See Dan Carney, *Did Microsoft Catch a Break?*, BUS. WK., Mar. 12, 2001, at 14, available at 2001 WL 2205834 (stating that ill-prepared Department of Justice lawyers could not answer basic questions and confused important precedents).

261. David Greising, *Insider's Take on Microsoft Meltdown: An Intriguing Look at Plot to Get "Beast,"* CHI. TRIB., Mar. 11, 2001, at 1 (declaring that Judge Jackson "was beaten to a pulp before dozens of shocked witnesses" and that Jackson's public statement rendered the proceedings a "sham"); Adam Rogers, *It's Still Alive! The Company's Appeal Focuses on the Trial Judge's Missteps*, NEWSWEEK, Mar. 12, 2001, at 68, 2001 WL 7292924 (stating that the appellate court "got hottest" over the speeches and interviews Jackson gave regarding the trial). In a subsequent proceeding in an unrelated matter, Judge Jackson proclaimed that any appearance of personal bias directly resulted from Microsoft's misconduct. See John R. Wilke, *Judge Jackson Issues Blast at Microsoft As He Pulls Out of Discrimination Case*, WALL ST. J., Mar. 14, 2001, at B5 (describing Judge Jackson's "blistering attack" on Microsoft).

262. See Rogers, *supra* note 261 (stating that "Microsoft could possibly win it all"); Carney et al., *supra* note 260, at 48 (predicting that there is now a reasonable prospect that Microsoft will prevail); Greising, *supra* note 261 (noting that Judge Jackson's lower ruling would likely see major revisions before the appellate court).

263. George W. Bush made this comment during a 2000 campaign appearance in Washington, home of Microsoft's headquarters. Donald Lambro, *Bush Said Unlikely to Pursue Microsoft*, WASH. TIMES, Dec. 17, 2000, at C1.

264. See, e.g., *id.* An unnamed "key Bush advisor" said, "President-elect George W. Bush will drop the Justice Department's antitrust suit against Microsoft if it wins its appeal in the U.S. Circuit Court next year." *Id.*

265. See, e.g., MCKENZIE, *supra* note 126, at xi (noting that the government's claim that there was "no commercially viable competitor" to Microsoft's operating system did not make a lot of economic

concern that existing antitrust regulations are too outdated to apply in the modern economy.²⁶⁶ Critics of the government also urge that the prosecution has more to do with pressure by vindictive market rivals than with Microsoft's so-called monopoly practices.²⁶⁷ For Microsoft sympathizers, the antitrust investigation has been a misguided and wrongheaded attack promoted by jealous competitors' conspiratorial efforts.²⁶⁸ On a more cynical note, some contend that the antitrust investigation is either driven by misdirected bureaucrats²⁶⁹ or pure mean-spiritedness, viciousness, greed, envy, and retribution for not "coughing up contributions for a host of political campaigns."²⁷⁰ Some commentators simply undercut the government's and Judge Jackson's views in their entirety, concluding the district court's findings were wrong on the facts, wrong on the law, and tainted by procedural errors.²⁷¹

On the other hand, many prominent members of the antitrust community support the government's position in the Microsoft litigation, urging this case as an appropriate application of antitrust laws in the digital economy.²⁷² Other supporters have been political.²⁷³ Some concluded that the result was an obvious one, given the enormity of Microsoft's presence in the computer marketplace.²⁷⁴

sense); Charles T. Munger, *A Perverse Use of Antitrust Law*, WASH. POST, Sept. 1, 2000, at A27 (concluding that if Judge Jackson's decision is upheld, "virtually every dominant high-tech business in the United States will be forced to retreat from what is standard competitive practice"); Lawrence J. Siskind, *The Case Against Microsoft Is Behind the Curve of Technology*, LEGAL TIMES, Jan. 5, 1998, at 21 (stating that the Justice Department suffers from institutional myopia and mistakenly views the technology market as static).

266. See *supra* Part II.C.1.

267. See MCKENZIE, *supra* note 126, at xi-xii (concluding that Microsoft's rivals formed a consortium to pressure the government into throttling Microsoft's competitive advance through antitrust enforcement). *But see* William H. Page, *Microsoft and the Public Choice Critique of Antitrust*, ANTITRUST BULL. 5, 46-54 (Spring 1999) (presenting and rejecting the idea that the Microsoft litigation was merely driven by competitors).

268. See MCKENZIE, *supra* note 126 (concluding that Microsoft's rivals politicized the process and that the government essentially did the bidding of these disgruntled competitors).

269. See, e.g., Kenny & Jordan, *supra* note 123, at 1351 (opening with statement, "Bureaucratic mission creep can be an insidious process.").

270. MCKENZIE, *supra* note 126, at 14-16 (attempting to explain the government's motivations for assaulting Microsoft).

271. See, e.g., Robert A. Levy & Alan Reynolds, *Microsoft's Appealing Case*, CATO INST. POL'Y ANALYSIS no. 385, at 1 (Nov. 9, 2000) (contending that "[t]he Justice Department's case will crumble as a result of procedural errors, flawed fact-finding, wrongheaded legal conclusions, and Jackson's preposterous plan to break up the software company").

272. These prominent individuals include

none other than Chicago School Champion Robert Bork who in his role as consultant to a coalition of Microsoft antagonists has been a forceful supporter of the Government's Microsoft case. Others responding in like manner are (a) David Boies, distinguished defense counsel for IBM against the Government's monopolization charges throughout the 1970s but more recently lead counsel for the Government in the Microsoft suit; and (b) Franklin Fisher, distinguished economist and star expert witness in IBM's defense 25 years ago more recently now star expert witness for the Government in the Microsoft suit.

Skitol, *supra* note 16, at 262 (emphasis added) (footnote omitted).

273. See *id.* at 262 (citing Senator Orrin Hatch as "strong supporter of the prosecution").

274. See, e.g., Michael A. Hamilton, *Power Corrupts: Microsoft Findings Reflect Framers' Fear*

Regardless of one's position on the merits of the antitrust claim, one principal source of concern has been the nature of the proposed antitrust remedy: the breakup of Microsoft. Both implicitly and explicitly, the proposed divestiture used the Bell breakup as a blueprint,²⁷⁵ although many contend that the analogy between these two divestitures does not fit.²⁷⁶ One concern regarding the proposed remedy is that consumers would lose in the event of divestiture.²⁷⁷ Some commentators have understandably lacked confidence that the Justice Department and the courts could fashion an outcome that would actually improve the high-tech markets.²⁷⁸ Others have expressed concern that the district court did not adequately evaluate the economic ramifications flowing from the divestiture option.²⁷⁹ In contrast, those supporting the government's position endorse the breakup remedy as an appropriate solution to Microsoft's misconduct.²⁸⁰

of Monopoly, 158 N.J.L.J. 959, 959 (1999) (stating that Judge Jackson simply "stated the obvious" when he declared Microsoft a monopolist).

275. See Shelanski & Sidak, *supra* note 4, at 90 (stating that "the Bell breakup has been touted as the blueprint for Microsoft, so much so that pieces resulting from the company's proposed divestiture have been dubbed 'Baby Bills' after the 'Baby Bells'"); see also, e.g., Editorial, *Open Windows*, L.A. TIMES, Jan. 11, 1999, at B4 (using "Baby Bills" terminology).

276. The differences between the two breakups would include: AT&T, unlike Microsoft, already had fairly autonomous divisions at the time of divestiture; unlike AT&T, the Microsoft situation is "metaphysical," presenting the challenge of separating intellectual property and breaking up company interests in cyberspace; and Microsoft's software is much more readily duplicated than was AT&T's phone network. Kalpana Srinivasan, *Breakup 101: AT&T Can Offer Lessons*, STAR TRIB. (Minneapolis), June 10, 2000, at D1, D3 (describing how Microsoft and its customers might benefit from AT&T's mistakes).

277. Steve Chapman, *The Real Cost of the Microsoft Verdict*, CHI. TRIB., Apr. 6, 2000, at 14, available at 2000 WL 3653209 ("You have to wonder if maybe, when the government punishes [Microsoft], it is putting technological progress and consumer welfare at risk"); Cliff Edwards, *Breakup of Microsoft May Mean Trouble for Consumers*, STAR TRIB. (Minneapolis), June 3, 2000, at D1, D3 (describing possible industry turmoil and resulting inconvenience to consumers). See generally Lee Gomes, *Economists Debate Merits of Microsoft Breakup Plan*, WALL ST. J., May 1, 2000, at A8 (two economists debate appropriateness of proposed breakup, but agree that prices for consumers will likely go up following separation).

278. MCKENZIE, *supra* note 126, at 8 (stating, "I take an even dimmer view of the Justice Department's ability to fashion remedies" that will improve consumer welfare); see also Lopatka, *supra* note 23, at 160 (stating that structural relief is almost always disproportionate to the offense when monopolization is grounded on predatory behavior).

279. See, e.g., Lucian Arye Bebchuk & David I. Walker, *The Overlooked Corporate Finance Problems of a Microsoft Breakup*, 56 BUS. LAW. 459, 462-65 (2001) (highlighting significant breakup issues that have been overlooked, including the breakup's financial complexities); Shelanski & Sidak, *supra* note 4, at 90 (concluding in an "Economic Welfare and Divestiture in Microsoft" section that "neither the absolute nor comparative economic welfare effects of the remedy it adopted, or of any other remedy before the court, has been sufficiently assessed").

280. One commentator described the remedy as "curiously appropriate," saying:

One could even argue that this old-fashioned remedy is peculiarly fleet and modern. The alternative, leaving Microsoft intact but under intense government supervision, would require an army of regulators and an ability to write "conduct orders" covering every possible development in the software business. That's an impossible handicap in such a fast-changing industry. Jackson's remedy, by contrast, creates two rivals that will police each other — with help from other companies — through simple forces of competition.

Many diverse potential legal ramifications flow from the *Microsoft* decision. Because Judge Jackson condemned the act of technological integration as an illegal tying arrangement, high-tech firms naturally fear the risks attendant to "technological tying."²⁸¹ Because innovation in many technology markets often follows a model similar to the Microsoft story, and the legal outcome on this tying issue could ultimately transform how high-tech companies develop and market their products.²⁸²

Regardless of the ultimate holding, commentators agree that the Microsoft case will undoubtedly have a lasting impact²⁸³ and that the price tag has been hefty.²⁸⁴ As for Microsoft itself, the antitrust saga is far from over, regardless of whether it wins or loses its current appeal. The company continues to make bold statements eliciting responses from antitrust regulators.²⁸⁵

V. Old Problems, New Challenges: Meeting the Next Thousand Years

A. Relevance of Antitrust Regulation in the New Millennium

Modern commentators moan and groan that old-fashioned antitrust approaches have lost relevance in the "new economy."²⁸⁶ In essence, antitrust experts complain

Editorial, *Breaking Up Microsoft: A Curiously Appropriate Remedy*, STAR TRIB. (Minneapolis), June 11, 2000, at A18 [hereinafter Editorial, *Breaking Up Microsoft*].

281. M. Sean Royall, *Coping with the Antitrust Risks of Technological Integration*, 68 ANTITRUST L.J. 1023, 1023 (2001). Royall concludes that Judge Jackson's approach poses a materially greater risk that technological integration decisions will be increasingly scrutinized as antitrust tying claims. *Id.* at 1050.

282. *Id.* at 1023 (noting that technological integration often is the essence of what makes high-tech products better).

283. As two commentators recently noted:

Appeals courts may or may not uphold Judge Jackson's findings of fact or his conclusions of law. The penalties, or "remedies," he handed down may or may not ever actually be imposed on the company. But even now it is clear that the very fact of the trial, the months of unflattering scrutiny of this industry giant, have already changed the rules for Microsoft and for much of the computer industry.

BRINKLEY & LOHR, *supra* note 199, at xiv; *see also* J. Bradford De Long, *Is Big Bad?*, L.A. TIMES, Apr. 9, 2000, at M1 (noting that the Microsoft decision could "wind up as a footnote," but that it should represent "a big step down the path of applying antitrust principles more than a century old to the new economy").

284. Through September 2000, the expenses associated with the Microsoft matter included an estimated \$35 million spent by the Justice Department and at least \$100 billion lost by Microsoft shareholders. *See* Mark Schmidt, *Who Picks Up the Legal Tab?*, WASH. TIMES, Sept. 1, 2000, at A17 (complaining about the legal fees demanded by the nineteen state attorneys general who joined the suit by the Justice Department).

285. In March 2001, Microsoft unveiled "HailStorm," an ambitious new array of Internet services, including a massive database that will help consumers manage and share personal information online. This announcement raised new regulatory concerns among antitrust enforcers and industry groups. Rebecca Buckman, *Microsoft Unveils "HailStorm" Internet Initiative*, WALL ST. J., Mar. 20, 2001, at B7 (quoting the attorney general of Connecticut, who said that Microsoft's announcement "appears to raise serious questions"); Alec Klein, *Microsoft Strategy Focuses on Web*, WASH. POST, Mar. 20, 2001, at E1 (noting the concern among government regulators and Microsoft's rivals "that the software giant is again testing antitrust laws").

286. *See, e.g.*, Posner, *supra* note 28, at 925 (concluding that antitrust doctrine is "supple enough" <https://digitalcommons.law.ou.edu/olr/vol54/iss2/3>)

that the century-old Sherman Act cannot address the dynamic market developments of the new millennium.²⁸⁷ Of course, the age of a particular regulation alone is not particularly meaningful.²⁸⁸ In fact, in its most basic form, competitive misconduct seems constant over time.²⁸⁹

These oft-stated concerns regarding old-fashioned antitrust laws miss the mark. The real obsolescence issue is whether antitrust law's core principles remain viable in today's fast-changing commercial context. Although some contend that the world has fundamentally changed in ways that demand a wholly new framework for antitrust enforcement,²⁹⁰ there is no need to overhaul the statutory foundation because the statutes are fluid enough to protect competition, the essence of antitrust doctrine. The Sherman Act and its companion regulations are beautiful in their sparse simplicity.²⁹¹ The interpretation of competition protection has largely been left in the hands of judges and regulators, who have relied over time on economists' analyses of how competition operates in particular markets and, correspondingly, on popular perceptions of what competition protection means. When economic theory defined competition protection almost exclusively in terms of allocative efficiency, antitrust enforcement retreated to let market forces naturally regulate competitive pressures.²⁹² When the courts moved to define consumer welfare more broadly, judicial decisions and regulatory trends adjusted accordingly.²⁹³

to apply in the new economy, but that the enforcement agencies and the courts are not flexible enough to cope).

287. Last year, a *New York Times* editorial succinctly presented the problem this way: "Can, and should, laws designed to manage the emergence of industrial and natural resource monopolies in the late 19th and early 20th Centuries be applied to the technology and intellectual property giants of the 21st Century?" Editorial, *The Remedy for Microsoft*, N.Y. TIMES, Apr. 28, 2000, at A22; see also Pitofsky, *supra* note 7, at 913 (describing increasing concerns about the Sherman Act being unable to "keep up"); Posner, *supra* note 28, at 925 (noting the argument that doctrines "developed to deal with competition and monopoly in smokestack industries" cannot deal with "the dynamic economy of the 21st century").

288. After all, the First Amendment is not "too old-fashioned" to address modern Internet and cable television means of communication, which vary so dramatically from the distribution of Federalist pamphlets hundreds of years ago. See Pitofsky, *supra* note 7, at 913-14 (noting the First Amendment analogy as support for the position that age should not undercut the Sherman Act).

289. In the Microsoft context, it has been argued that even high-tech misconduct is the same as smokestack era bullying:

During the course of the long Microsoft trial it was often said that federal antitrust law is obsolete, that statutes drawn up in the smokestack era are irrelevant in the digital age. But the old-fashioned remedy approved last week by Judge Thomas Penfield Jackson seems curiously appropriate — both to Microsoft's bullying tactics in recent years and to enforcement of healthy competition in the future. . . . Although Microsoft competes in a business as new as tomorrow, it was accused of activities that are as old as capitalism itself.

Editorial, *Breaking Up Microsoft*, *supra* note 280, at A18.

290. See, e.g., Minda, *supra* note 2, at 1776 ("Antitrust law needs a new framework and justification for responding to the political, social, and economic conditions that are now shaping the emerging postindustrial marketplace.")

291. See *supra* notes 34-36 and accompanying text.

292. See *supra* notes 69-77 and accompanying text.

293. See *supra* notes 83-87 and accompanying text.

The marketplace has changed dramatically since antitrust law's birth. Thus, antitrust policy that focuses upon the market as a static concept would misconstrue the practical reality of how it functions, thereby hurting consumers in the long run. To the extent today's network industries reflect rapid innovation, the economic analyses of network externalities and creative destruction both have valid application, but would yield very different results.²⁹⁴ This does not mean that either approach is incorrect; instead, modern antitrust analysis must take into account the logical application of both perspectives. Moreover, the world's marketplace today does not consist solely of high-tech industries; it consists of a blended mix of industries moving steadily toward informational services, but mundane products have not been left behind. As different market contexts demand varying definitions of competition and consumer welfare, the flexible application of antitrust regulation should recognize and accommodate these differences. In the end, the relationship between market structure and high-tech innovation is important and extremely difficult to analyze. One takes a significant first step by acknowledging that static concepts will not adequately explain a dynamic market.²⁹⁵ Over time, intellectual attitudes toward what constitutes market concentration has changed, and antitrust enforcement and case authorities attempt to mirror these changes.²⁹⁶ At the very least, prominent members of the antitrust community urge heightened antitrust scrutiny for modern industries to ensure that private market power does not compromise economic growth,²⁹⁷ and Congress may very well accept that suggestion.²⁹⁸

294. Two commentators have recently described the significance of this interaction in the following way:

The adoption of one or the other of those frameworks can be of great practical consequence. High profit margins might appear to be the benign and necessary recovery of legitimate investment returns in [an innovation-based] framework, but they might represent exploitation of customer lock-in and monopoly power when viewed through the lens of network economics. Market dominance in the former case is likely to be temporary, but in the latter to become entrenched. The issue is particularly complex because, in network industries characterized by rapid innovation, both forces may be operating and can be difficult to isolate. Neither the [innovation-based] nor the network externalities framework justifies anticompetitive behavior, but each might yield different conclusions about what constitutes evidence of such behavior and what the likely consequences of such behavior will be. These factors are, in turn, directly relevant to the choice of an appropriate remedy where antitrust violations have occurred.

Shelanski & Sidak, *supra* note 4, at 6-7. It is also important to note that innovation-based economic theories originated more than half a century ago, long before Microsoft ever appeared on the scene.

295. *Id.* at 29 ("For current purposes . . . the important fact is that such a debate exists, as does consensus that the relationship is likely to depend heavily on firm — and industry — specific factors.").

296. See Kovacic, *supra* note 26 (analyzing historic changes in intellectual attitudes).

297. FTC Chairman Robert Pitofsky and a staff colleague have described this need for heightened antitrust scrutiny. See David Balto & Robert Pitofsky, *Antitrust and High Tech Industries: The New Challenge*, ANTITRUST BULL. 583, 583-85 (1998) (noting that high-tech industries make competition different, and that the differences require more antitrust intervention).

298. A serious review of the current regulatory structure may be in the offing. House Judiciary Committee Chairman Sensenbrenner announced last March that he was preparing a bill that would create an antitrust modernization commission to study whether the Sherman Act and the Clayton Act should be updated. The major focus areas would be the effects of globalization, intellectual property, and state

B. Protracted Litigation and Big-Case Management

The current antitrust debate frequently centers on the special problems surrounding massive litigation. It is undisputed that antitrust cases, by their very nature, are often complex, necessarily implicating extensive discovery and years of detailed economic and regulatory analysis. The "big-case" problem has at least two components. First, the sheer size of such actions results in a meaningful draw on resources with very significant transactional costs. Second, the protracted nature of such investigations in a fast-changing competitive environment makes antitrust enforcement problematic at best.

On the first point, complex litigation is certainly not unique to antitrust. Although it is unfortunate that large, sophisticated matters drain regulatory and judicial resources, one cannot abandon legitimate enforcement efforts for that reason. Moreover, big antitrust cases are certainly not confined to the Microsoft experience; all-consuming enforcement actions date back to the days of *Standard Oil*.²⁹⁹

As for the protracted nature of antitrust enforcement, the government and the courts undoubtedly lack adequate technical resources and clearly move too slowly to effectively handle today's rapidly evolving markets.³⁰⁰ The complexities of high-tech inventions exacerbate this institutional slowness,³⁰¹ jurists and the legal system adapt only slowly to new technology.³⁰² Time's passage may render any pending antitrust litigation obsolete.³⁰³ At the very least, such delays can adversely affect business planning and make investment riskier.³⁰⁴ In addition, antitrust litigation's

intervention. *Sensenbrenner: Antitrust Overhaul Due*, *supra* note 14 (describing proposed bill).

299. See *supra* notes 150-53 and accompanying text.

300. In fact, this is the conclusion reached by Richard Posner. Posner, *supra* note 28, at 925 (concluding that the "real problem lies on the institutional side").

301. Richard Posner calls this "mismatch between law time and new-economy real time" troubling, saying:

[A]n antitrust case involving a new-economy firm may drag on for so long relative to the changing conditions of the industry as to become irrelevant, ineffectual. That was a problem even in the old economy. One recalls, for example, that by the time the monopolization case against Alcoa completed its journey through the courts, Alcoa had lost its monopoly for reasons unrelated to the litigation; as a result, the decree finally entered against Alcoa offered little more than nominal relief (the divestiture of Alcoa's Canadian subsidiary, a substantial producer but one which U.S. tariffs prevented from having a big impact on the U.S. market). This type of problem is likely to be more frequent in the new economy.

Id. at 939 (footnote omitted).

302. Dratler, *supra* note 18, at 671-72 (noting that "analogies are the gold out of which the common law must be refined" when applying antitrust principles to high-tech competitors because the marketplace moves much faster than courts and cases).

303. This concern has special emphasis with respect to the largest antitrust investigations. See *supra* Part IV.

304. Posner, *supra* note 28, at 939 (reasoning that pending of lengthy antitrust litigation "may cast a pall over parties to and affected by the litigation").

tendency to spawn multiple suits can make a bad situation even worse.³⁰⁵

Delay is inefficient, but it certainly does not debilitate the effective application of antitrust enforcement, especially given the complex nature of market analysis and the interpretation of competition protection. For one thing, time gives the courts and agencies the opportunity to absorb, analyze, and digest changes in markets and technology rather than jumping to hasty, inappropriate conclusions. In a dynamic environment, it is better to encourage regulatory systems to make well-reasoned evaluations. To the extent an evolving market environment changes an antitrust defendant's market status, as was apparently the case with IBM, the government and the court can properly adjust the enforcement action to take those changes into account. The very slowness of the process in a rapidly changing environment enables the regulatory system to correct itself before issuing a final assessment.

Comparing the Microsoft, IBM, and AT&T experiences instructs antitrust analyses in several respects. On one level, the comparison demonstrates that today's high-tech field is not *sui generis*; in fact, the AT&T breakup has been cited as an example of how innovation will thrive when competition is present in a high-tech context.³⁰⁶ Both AT&T and IBM mirror *Microsoft* in significant ways in terms of underlying antitrust issues and the investigations' size, complexity, and duration. Although substantial debate remains regarding the effect of the AT&T divestiture, most agree that the divestiture has yielded a procompetitive effect.³⁰⁷ As for IBM, the ultimate dismissal was the appropriate result and demonstrates that government regulators can, in the end, acknowledge changing economic conditions and market analyses. The IBM debacle did drain significant resources; yet, the antitrust target raised dangerous possibilities at the time the government brought the investigation, and then its changed market position warranted the suit's discontinuance by the time of dismissal.

Microsoft, in contrast, has provided a relatively efficient example of antitrust litigation; ironically, its key legacy may be procedural.³⁰⁸ Despite Judge Jackson's other frailties,³⁰⁹ the *Microsoft* litigation has been viewed as relatively punctual — establishing a new paradigm for complex antitrust litigation.³¹⁰

305. Richard Posner calls this the "cluster-bomb effect":

No sooner does the Antitrust Division bring a case, but the states, and now the European Union, are likely to join the fray, followed at a distance by the antitrust plaintiffs' class-action bar. The effect is to lengthen the original lawsuit, complicate settlement, magnify and protract the uncertainty engendered by the litigation, and increase litigation costs.

Id. at 940.

306. See Pitofsky, *supra* note 7, at 918-19 (giving the AT&T breakup as an example demonstrating a meaningful link between innovation and competition).

307. See *supra* notes 169-76 and accompanying text.

308. Gavil, *supra* note 226, at 13 (noting that in "the final analysis, *Microsoft's* procedural course may be among its most enduring legacies").

309. See *supra* notes 259-61 and accompanying text.

310. One commentator describes the district court's handling as "remarkable" to the extent that it "took full advantage of a century of procedural innovations to sidestep the dreary option of protracted litigation." Gavil, *supra* note 226, at 13 (also commenting that Judge Jackson's measures were "antidotes to unstructured, unruly, costly, and prolonged trench warfare"); see also Lopatka, *supra* note 23, at 161

In any event, many possible strategies exist to address the institutional difficulties inherent in bringing complex antitrust investigations and suits. These include creating a specialized court to handle technical matters,³¹¹ limiting the states' rights to bring antitrust suits,³¹² and exclusively empowering the Department of Justice to bring antitrust suits for damages to be distributed among private victims (thereby preempting subsequent state and/or private suits).³¹³ On a less ambitious level, the institutional problems could be ameliorated simply through better resources and training, although these improvements create separate issues.³¹⁴ Although room for improvement always exists in any regulatory area, the Microsoft case appears to demonstrate that antitrust enforcement functions relatively well in a dynamic market and that the big-case context does not harmfully distract from the core principles of antitrust law.

C. What the Future Holds: Antitrust Excitement in the Next Thousand Years

Fifteen years ago, no one would have linked "antitrust" and "excitement" in the same sentence. Today, largely as a result of the focus afforded by the Microsoft case and by increased merger and enforcement levels, antitrust law is on the move and presents exciting possibilities in the new millennium.

It is naturally difficult to predict with certainty the future direction of competition protection. Antitrust law has ebbed and flowed over the years, and there is nothing surprising about witnessing a natural movement in the fortunes of a substantive legal area. Indeed, corporate law generally maintains a relatively stable equilibrium, regardless of the underlying pressures in the surrounding legal contexts.³¹⁵ In order

(noting that the Antitrust Division and the judge avoided the lengthy *IBM* "travesty" in *Microsoft*).

311. Some criticize this suggestion on the grounds that any technical training would likely become out of date fairly quickly "unless we are to have a system in which the regulation of the new economy is entrusted to twenty-five-year-old judges, lawyers, and engineers." Posner, *supra* note 28, at 940 (characterizing the suggestion as "distinctly unpromising").

312. *Id.* at 940-41 (criticizing the ability of state attorneys general to bring adequate resources and skills to antitrust inquiries).

313. *Id.* at 941 (describing this "possible, partial solution to the delay and cluster-bomb problems"). Certain government agencies, such as the Department of Labor and the Equal Employment Opportunities Commission, already enjoy such power. *Id.* at 941-42.

314. As one commentator has noted:

As minor palliatives, I would like to see greater use of neutral experts . . . and I would also like the Antitrust Division and the Federal Trade Commission to be given the necessary appropriations to enable each of these agencies to hire a competent technical staff. That won't be easy, given the salaries that competent new-economy scientists and engineers command in the private market. But there is a more serious problem, and that is the rapid obsolescence of technical knowledge, which, combined with tenure practices in government agencies, may prevent the agencies from maintaining a technical staff that is actually abreast of current technology.

Id. at 940 (footnote omitted).

315. For an overview of how the changing forces in securities law, mergers regulation, and management's fiduciary obligations tend to achieve a workable balance in corporate governance, see Carol B. Swanson, *Corporate Governance: Sliding Seamlessly into the Twenty-First Century*, 21 J. CORP. L. 417, 454-55 (1996) (concluding that despite the "actions and reactions across the diverse legal contexts over the past decade, an equilibrium should balance effective governance" and that "corporate governance

to ascertain how antitrust enforcement will evolve in the coming years, one must appreciate what forces have moved competition regulation since the very beginning.

Commentators cannot clearly articulate the factors that govern antitrust's fortunes. Some believe that the controlling factors are largely political.³¹⁶ More likely, the economy, economic theory, and popular perceptions of competition protection control antitrust enforcement levels. With respect to the economy, its relevance is obvious. When the national economy is crippled — as during the Great Depression — antitrust enforcement takes a back seat to other considerations. Competition is beside the point when business survival is at stake. Today, "It's the economy, stupid," and the country is currently in the grips of an economic slowdown, if not a major economic downturn.³¹⁷ As the economy fluctuates domestically and abroad, it affects merger activity³¹⁸ and can directly affect the need for antitrust regulation.

Even more important, antitrust enforcement trends turn on how economists evaluate the operation of competitive markets. During the first half of the twentieth century, there was little meaningful economic analysis of market operations. With the growth of the Chicago School, however, courts and regulators increasingly turned to allocative efficiency arguments when construing competition protection.³¹⁹ As a result, the legal and economic communities made a philosophical determination that market forces could most often control competition problems except in the most extreme circumstances; this approach naturally yielded very limited enforcement levels.³²⁰ Through the 1990s, the courts and regulators have started to construe the consumer-welfare purpose of antitrust more broadly than allocative efficiency, and this has generated higher levels of antitrust activity.

Finally, as for the popular conception of antitrust enforcement, current views appear rather centrist in approach. Rather than running from the evils of "big business" or wholly embracing the regenerative powers of an unfettered marketplace, antitrust regulation today appears to fall somewhere in the middle. George W. Bush's nominations for antitrust regulators are consistent with this centrist approach,³²¹ and future trends will likely continue in a similar vein. Thus, in important respects, antitrust law is not just getting older — it's getting better, reflecting a more sophisticated and balanced approach to competition analysis and regulation.

is working").

316. See generally *supra* notes 27-32 and accompanying text.

317. "It's the economy, stupid" was the four-word "mantra" used by Bill Clinton to take the presidency from George Bush, Sr., in 1992. Steven Pearlstein, *Downturn a Surprise for New Economy*, WASH. POST, Dec. 24, 2000, at A1 (describing Clinton's campaign slogan and discussing George W. Bush's current economic difficulties).

318. The financial crises abroad in the late 1990s put a damper on globalization. Tim Smart, *Globalization Goes Awry; Hurt by Economic Turmoil, Multinationals Retreat*, WASH. POST, Oct. 9, 1998, at G1 (describing the peril of globalization in an economic downturn).

319. See *supra* notes 67-78 and accompanying text.

320. See *supra* notes 67-78 and accompanying text.

321. See *supra* notes 91-97 and accompanying text.

VI. Conclusion

After many years of dormancy, antitrust law is back in fashion. The Microsoft controversy has prodded antitrust enforcement from sleepy complacency. Now 110 years old, antitrust doctrines designed to protect the industrial revolution marketplace from unfair competition may be an anachronism in the computer age. Thus, the hard questions are being asked.

At the beginning of this article, a quote likened market competitors to frogs.³²² The pond has changed remarkably since 1890; still, the basics driving competition remain the same in fundamental respects. Consumers want fair choices, and business rivals want to operate in a competitively appropriate environment. Antitrust law provides a relatively simplistic statutory structure that will flexibly accommodate various judicial and regulatory constructions as the world's marketplaces change over time. The economic framework for analyzing fair competition may vary over time. That moving analytical structure helps to assure that antitrust enforcement will stay current even as the pond waters shift and surge in surprising ways.

Microsoft's big case context only underscores these conclusions. In important ways, the Microsoft experience highlights the greatest challenges in modern antitrust enforcement. The controversy presents an enormously successful frog, swimming in a dynamic, high-tech environment. Microsoft's marketing demonstrates technological tying of the sort that could well provide the blueprint for comparable software designers and manufacturers. At the same time, the relevant market's network effects are undeniable. The relevant definition of competition protection in this setting paves the way for antitrust's future in the new millennium.

On balance, antitrust law will become even more important in years to come. Enforcement levels will fluctuate, largely to accommodate the changing fortunes of the world's economies. Globalization will similarly continue in fits and starts, with international mergers and the growth of cross-national competition regulation as prominent features. In this stimulating environment, the need for competition protection is stronger than ever; the fragile, fluctuating economy simply does not support the conclusion that dynamic market forces alone can police unreasonable trade restraints. That being the case, antitrust regulation flexibly protects competition now even better than before, although the application can be unwieldy and difficult. Antitrust excitement is accordingly here to stay, motivating competitive frogs to new heights in the twenty-first century.

322. See *supra* note 1 and accompanying text.

