Antitrust—The Next One Hundred Years

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ANTITRUST—THE NEXT ONE HUNDRED YEARS

JOHN H. SHENEFIELD

It is a very great honor for me to give the inaugural Lewis Bernstein Memorial Lecture. I am deeply grateful to the Bernstein family, and particularly to Mrs. Elaine Bernstein, and also to you, Dean Hasl, and Professor Cavanaugh and to the entire Faculty of St. John’s University School of Law.

Establishing a lectureship in memory of Lew Bernstein was an inspired idea. The focus that such a lectureship gives to substance, rather than ceremony or form, is very much in keeping with Lew’s own style—he was always the master craftsman who held himself to a standard of excellence on the merits, whether in public service or in private conduct. Lew loved the law and valued its role in improving society. He was the quintessential public servant, who saw clearly the role of government as guarantor of political and economic liberties. Whenever anyone speaks of the role of the government lawyer—or to put it in more aspirational terms, the high calling of an advocate for the public interest—my thoughts go immediately to Lew Bernstein.

And so, I take particular pleasure in delivering this lecture dedicated to the memory of Lewis Bernstein in the hope that, in thinking about the antitrust laws he so ably served, we all may once again commit ourselves to the fundamental objectives of those laws—competition and opportunity.

* A.B. (1960), L.L.B. (1965), Harvard University; former Assistant Attorney General, in charge of the Antitrust Division, United States Department of Justice; partner, Morgan, Lewis & Bockius L.L.P.
The title of this lecture—Antitrust—the Next One Hundred Years—raises the question of the role of the antitrust laws now and in the next century. To think about that question, we must ask what were, and what are the purposes of those laws; and how, if at all, are those purposes to change in the future.

THE OBJECTIVES OF THE ANTITRUST LAWS

Discerning the objectives of the antitrust laws is, surprisingly, no simple matter. The language of the statutes is broad and general—constitutional, as some have described it. Accordingly, it is not immediately obvious what is proscribed or what is permitted, let alone why. The core concepts—“competition,” “restraint of trade” or “monopolization”—are undefined. We must look elsewhere for their inspiration and content.

The philosophical context helps. It features very prominently an ungainly and absent-minded Scot who became in his time one of the most celebrated and sought-after intellects of Europe. Adam Smith in his Wealth of Nations,1 regarded by Thomas Jefferson as the best book then available on political economy,2 described the rational economic man as minding his own business and pursuing his own narrow economic interests, but being led at the same time “by an invisible hand” through the operation of the competitive market to promote the larger interest of society.3

In describing his ideal of the tradesman striving indirectly to discharge the public interest, Adam Smith set his face against powerful cultural forces. There was, first, the civic republican tradition tracing back to the classical Greek suspicion of trade.4 Aristotle himself regarded the “trafficking in goods” as morally

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2 See 1 NATHAN SCHACHNER, THOMAS JEFFERSON A BIOGRAPHY 391 (1951).
3 See SMITH, supra note 1, at 423.
4 Id. at 647.
hazardous for the individual and dangerous to political virtue.\textsuperscript{5} In the *Politics,*\textsuperscript{6} he wrote that “[i]n the city that is most finely governed, the citizens should not live a vulgar or a merchant’s way of life, for this sort of way of life is ignoble and contrary to virtue.”\textsuperscript{7}

No less disapproving was the second cultural barrier Smith confronted: the suspicion toward commerce and profit found in the Christian tradition, reflected in the Gospels’ references to the eye of a needle,\textsuperscript{8} service of God and Mammon,\textsuperscript{9} treasures on earth,\textsuperscript{10} and the love of money being the root of all evils.\textsuperscript{11} When Jesus drove the merchants and moneychangers from the Temple, Matthew reports that he used the term “robbers.”\textsuperscript{12} The medieval Christian liturgy referred to Judas Iscariot as “that most vile of merchants.”

In the face of these two powerful traditions, Adam Smith conceived it to be the role of society to establish institutions pitting the self-interested motives of citizens against each other for the common good.\textsuperscript{13} One such institution was the market. The ambition for economic gain was not to be avoided; instead, it was to be harnessed as the motive force that enabled an otherwise primitive society to move from a collection of solitary individuals of low estate struggling to achieve bare subsistence toward the goal of “universal opulence.”\textsuperscript{14}

It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.\textsuperscript{15}

\textsuperscript{5} See Sir Ernest Barker, *The Political Thought of Plato and Aristotle* 84 (1959) (stating that Aristotle attacked trade as “a species of robbery”).


\textsuperscript{7} Id..

\textsuperscript{8} Matthew 19:24.

\textsuperscript{9} Matthew 6:24.

\textsuperscript{10} Matthew 6:19.

\textsuperscript{11} 1 Timothy 6:10.

\textsuperscript{12} Matthew 21:13.

\textsuperscript{13} See Smith, *supra* note 1, at 423.

\textsuperscript{14} Id. at 11 (“[I]t is the great multiplication of the productions … in consequence of the division of labour, which occasions … that universal opulence which extends itself to the lowest ranks of the people.”).

\textsuperscript{15} Id. at 14.
In one of the earliest references to the concept of a need for law to protect the integrity of the market—what we have come to call the antitrust law—Smith points out that an individual producer will find it beneficial to avoid the risks of competition and to circumvent the competitive market, in an effort to obtain the highest possible price. After all, he observed in an oft-quoted passage, “people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”

We sense in these early writings about the market and the need to safeguard its efficacy a concern not only for the buyer of goods or services—the consumer—but also for the competitive process itself. That process is, after all, the critical means by which society enables its citizens to exchange their labor or the products of their labor for goods they desire, ultimately leading to the creation of greater wealth. Keep the competitive process effective, and the greater good is thereby served. Allow the process to be degraded, or—much worse—manipulated, and the general welfare suffers.

Adam Smith’s philosophical allies in containing the power of government were the great Enlightenment liberals and natural rights theorists, including John Locke and Montesquieu. The free market economy based on enlightened self-interest presupposed the need for safeguards for private property, along with personal liberty and the right of contract. These were ideals that 18th century revolutionaries and 19th century gentry and middle class all could support. The great political documents of the 18th century enshrined the concept that, just as civil liberties require that the government’s power over the individual be limited, private enterprise and the market likewise require that government be forced to respect private property. Undue centralization of power, it was thought, is the enemy of political and economic freedom alike. The organization of a liberal economic society is necessarily linked to the dispersion of political power.

In English courtrooms the common law was evolving into opposition to the royal grant of private monopolies. Sir Edward Coke cited a line of authority allegedly reaching back to the

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16 See id. at 61 (describing monopolists holding back stock to sell at higher rates).
17 Id. at 128.
Magna Carta, but the case decisions were in fact much more recent. One of the best known is *Darcy v. Allein* which taught that a royal grant would be invalid if it created a monopoly. But the rationale of all of the judicial decisions was less a reasoned opposition on economic grounds to monopoly as a concept of inferior economic organization, and was instead more an objection to the arbitrary political power reflected in their grant by the King.

Thus, the Statute of Monopolies of 1624 was by no means an effort by the Parliament to establish the virtues of competition; instead, Parliament was raising a constitutional objection to the political power of the throne reflected in the arbitrary grant of monopoly. Indeed, only private monopoly granted by the King was abolished; traditional monopolies of cities and boroughs, guilds and chartered trading companies retained their privilege, although with gradually weakening force, until abolished over a hundred years later.

Another consistent theme in the evolution of the common law is a growing disapproval of contracts and combinations in restraint of trade. As early as the 15th century, *John Dyer's* case and the *Schoolmaster* case both questioned whether an agreement not to practice a trade was contrary to the common law. In *Mitchel v. Reynolds*, an 18th century King's Bench judge paired the two concepts by reciting that monopoly was against the policy of the law and also that private restraints of trade, when justified by special circumstances, could be reasonable and therefore lawful.

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19 *Id.*
20 *Id.* at 1263-65 (holding grant to plaintiff was void because monopoly is against common law and acts of Parliament).
21 An Act Concerning Monopolies and Dispensations of Penal Laws and the Forfeitures Thereof, 1624, 21 Jam., ch. 3 (Eng.).
26 *Id.* at 349.
27 *Id.* at 350, 352 (holding that, under certain circumstances, private contract in restraint of trade may be reasonable and beneficial to society).
The judges' suspicions of private restraints and public monopoly traveled to the New World together with philosophical precepts they in part reflected. As a result, the colonial legislature of Massachusetts outlawed monopolies except those legitimately granted for significant invention. The Virginia Bill of Rights provided "[t]hat no man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community ...." Jefferson sought a similar provision for the federal Bill of Rights, but despite wide support, no such language was included.

It was not until after the Civil War, however, that momentum began to build in the direction of a search for more effective tools to limit the abuse of monopoly and control restraints of trade. Americans had seemed always to take it for granted that economic and political power would be diffused in a society that remained hospitable to farmers and small tradesmen. But as the small-enterprise economy yielded steadily and irresistibly to an economic life perceived to be dominated by big business and the accompanying threat of monopoly, the demand for legislative action intensified. Anti-monopoly laws were championed by the Grangers and other reformers concerned about unregulated private economic power, particularly of the railroads, banks and the so-called trusts.

But again the objection was as much political as economic: trusts threatened liberty; they corrupted public officials; they destroyed competitors; and they injured consumers by raising prices. The public's mandate was very clear. What were called antitrust laws came into existence first at the state level. And,

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28 See William Letwin, Law and Economic Policy in America 59 (1965). "[T]he colonial legislature of Massachusetts decreed that 'there shall be no monopolies granted or allowed among us but of such new inventions as are profitable to the country, and that for a short time.'" Id. (citing Charters and General Laws of the Colony and Province of Massachusetts Bay 170 (1814)).


30 Letwin, supra note 28, at 59-60. Several states sought such a provision in the federal Bill of Rights by including proposed amendments with their acts of ratification of the Constitution. Id.

31 See Thorelli, supra note 22, at 55-163 (examining how Civil War caused changes in economic and political climates leading to passage of Sherman Act).

32 Id. at 132-43 (establishing that, by end of 1880s, public demand for antitrust legislation was too strong for politicians to ignore).

33 Id. at 155-57 ("Before the enactment of [the Sherman Act], at least 14 states and territories had incorporated prohibitions against monopolies, trusts and similar devices to fix prices or otherwise to restrict competition in their constitutions, and at least 13 [states] had statutory pro-
even Congress was forced to heed the demands of the voters. The alternative was, as Senator Sherman of Ohio put it, that the nation would have to "be ready for the socialist, the communist, and the nihilist. Society is now disturbed by forces never felt before." In a very real sense, then, the agitation for the enactment of antitrust laws was a reaction against the oil, whiskey and sugar trusts not only on economic grounds, but also on fundamental political grounds reflecting the long-standing American hostility toward unchecked concentrations of power, economic or otherwise.

Although economists in general opposed any efforts to prohibit trusts, regarding them as efficient and therefore desirable, the political parties turned up the volume of criticism. With platforms of both parties condemning monopolists, the newly elected President Harrison and a Congress controlled by his fellow Republicans began work in earnest on antitrust legislation in 1889.

Calling his proposal a "bill of rights" and a "charter of liberty," Senator Sherman continually invoked the political analogy:

If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity....

In the end, after vigorous debate, conflicting drafts, committee rivalries and great political pressure, the antitrust bill we have since come to know as the Sherman Act, although it was attributed to him only as a matter of courtesy, was passed by the Senate with only one vote in opposition. The House passed the bill with one amendment about a month later and it was

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35 See Letwin, supra note 28, at 85-87 (explaining that both Democrats and Republicans pandered to public's negative opinion of monopolies hoping to place their respective candidates in presidency).
36 Sloan, supra note 34, at 69.
38 Letwin, supra note 28, at 94.
39 Id. at 95.
40 See id. at 95.
signed into law on July 2, 1890.41

In search of the objectives of antitrust, what are we to make of the legislative history of the Sherman Act, other than that it is complicated, internally inconsistent, highly political and subject to a variety of interpretations? There is no doubt that the legislation built upon the concepts of Adam Smith’s invisible hand of the market and its complementary common law suspicion of monopoly. But beyond that, some have argued that, taken as a whole, the Sherman Act bespeaks a focus on consumer welfare to the exclusion of non-economic values. Others have said that the political impulse behind the Sherman Act—“dividing, diffusing, and checking power and preventing its exercise by a single interest or by a consolidated group of interests at a single center”—took precedence over the economic arguments in favor of the legislation.42 Neither view seems entirely fair: diffusion of concentrated power, both economical and political, through the invisible hand of competition was the objective. The abuses of monopoly and anticompetitive conduct, very much as specified in the common law, were the enemies on political as much as on economic grounds.

As with many congressional debates, this one was neither systematic nor particularly sophisticated. Classical economics, such as it then was, played little role, and the concepts of allocative efficiency or distributive justice were never mentioned.

Such a state of affairs is hardly very satisfying to those who have trumpeted efficiency considerations, reflected in the concern for consumer welfare, as the exclusive purpose of the Sherman Act. Nor does it much please those on the other side of the argument who have contended that any concept of efficiency is entirely absent from the legislative history, and that instead Congress was concerned with economic justice or fairness. Both of these positions seem out of step with historical fact, and seem rather to have been constructed to support some latter-day agenda of antitrust ideology.

With respect to the Sherman Act, the fairest analysis seems to be that the debates, though mixed, did demonstrate fundamental congressional concern about large agglomerations of economic power and the potential harm they portended for

41 Id.
individual consumers. Calling this concern a matter of allocative efficiency or distributive justice, or dispersion of political power does not add much to the underlying reality—private economic power was feared because it engenders economic and political power of a type wholly inconsistent with, first, the entire American ideal of checks and balances, and with, second, the commitment to the preservation of individual opportunity in the face of large firms.

Later antitrust enactments seem even less to support the view that antitrust was motivated exclusively by economic efficiency considerations. The Clayton Act\(^4\) and the Federal Trade Commission Act,\(^4\) enacted in 1914 with their statutory focus on preserving the competitive process and on eliminating unfair methods of competition, bespeak a clearer concern for the protection of small businesses. The Robinson-Patman Act,\(^4\) enacted in 1936, and the Celler-Kefauver amendments\(^4\) to the antimerger provisions of the Clayton Act, enacted in 1950, exhibit congressional policy aimed at the preservation of small business, even at the cost of higher prices to consumers.

How then are these confusing and sometimes conflicting objectives to be reconciled by enforcers and courts, not to speak of businesspersons who seek to plan a lawful course of conduct? There is no doubt that the economic precepts of preserving competition in the interests of consumer welfare must be part of the equation; indeed enforcement decisions and judicial opinions alike have over the years consistently and clearly focused on these considerations.\(^4\)

But the wider range of factors, in addition to consumer welfare, including a nervousness about the excessive concentration of economic power that might lead to anti-democratic political pressure, in turn raising the specter of more intrusive state regulation or control, simply cannot be ignored. To do so would


mean turning away from what was historically, and politically, one of the central motivating factors behind the enactment of the Sherman Act initially, and just as important, behind the enormous public acceptance of those laws over the last one hundred years.

We begin by recognizing that the conflict between the economic and the political objectives of antitrust policy is less serious in practice than in the abstract. I never heard anyone argue in the halls of the Justice Department that admittedly efficient conduct ought to be prosecuted because of a concern for small business. Certainly no court in the last twenty-five years has even suggested such a thing. Nor, usually, is there any need. After all, prevention of the accumulation of monopoly power contributes to consumer welfare by preventing price-gouging; at the same time it meets the socio-political objective of dispersing economic power.

What of those rarer instances when conflicts between the social goals of antitrust policy and its economic objectives occur? During the Great Depression, for example, the Supreme Court allowed some coal producers to eliminate competition among themselves to provide relief to a depressed industry, a social objective with no immediately discernible relationship to economic efficiency.

When social and economic goals conflict, the economic goal must be presumed to have primacy. This emphasis is faithful to Adam Smith's notion that the "invisible hand" of competition should guide the operation of the economy. We believe that competition is, after all, the best means of eliminating excess profits; of allocating resources to their most efficient use; of forcing firms to produce goods of the highest quality at the lowest cost, in amounts consumers want; and of stimulating innovation. All these add to consumer welfare and, at the same time, effectively promote economic growth and prosperity, which is the definition of success for an economy. We also observe that, to the extent that other objectives need to be served, such

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48 See Appalachian Coals, Inc. v. United States, 288 U.S. 344, 361 (1933) (discussing state of economic conditions of coal industry). The Court stated that although "[t]he unfortunate state of the industry would not justify any attempt unduly to restrain competition or to monopolize, ... the existing situation prompted [Appalachian Coals] to make ... an honest effort to remove abuses, to make competition fairer, and thus to promote the essential interests of commerce." Id. at 372.
as small business protection, there are laws other than the anti-trust laws that serve these functions more efficiently and more precisely.\(^4^9\)

But establishing the primacy of economic efficiency as the goal of antitrust policy is often the beginning, not the end, of analysis. The problem of selecting the path to an efficient outcome remains. Should we forego the short-term advantages of a possibly lethal price cut, announced by a dominant firm, in favor of the longer-run efficiencies that flow from maintaining multi-firm rivalry? In short, must we on occasion protect competitors to preserve competition? Such protection may at times be nothing more than the costly coddling of the inefficient, and at other times a step necessary to maintain competition in the long-run. Because economists cannot always provide clear guidance, and because political and social considerations cannot with intellectual honesty be ignored, especially in the face of such uncertainty, enforcers and courts face a sometimes difficult chore. But those cases, experience teaches, are rare. More often, the efficient solution is clear, and not at war with society's non-economic objectives.

There is one sector of the economy that deserves greater emphasis of the non-economic objectives of the antitrust laws—the media. At the outset, let me make two points very clearly. First, I raise this issue only as a theoretical matter—it seems to me that the media industry in this country is at the moment healthy, sufficiently diverse and unconcentrated, so that no actual issue of undue media concentration exists. Second, I am not arguing for a whole separate set of competition rules that apply to the media alone, nor am I suggesting that the First Amendment renders all of the traditional rules of anti-merger enforcement and other competition rules irrelevant.

I am saying instead that with respect to structure and conduct in the media industry, the price of a mistake in protecting competition could be quite high. Our democracy requires a wide diversity of voices in the national conversation on public

policy issues. In general, I believe that objective is now well satisfied, despite A.J. Liebling's aphorism that in this country freedom of the press is reserved to those who own one. But the fact is that in a democracy such as ours, the competition of ideas is even more important than competition in markets. The First Amendment and the Areopagitica intersect with the Sherman Act. Together they raise crucial and sensitive issues, particularly now as huge mergers in this industry are being proposed and consummated.

Imagine, for instance, a media merger that under Merger Guidelines standards is on the borderline of moderate concentration in a relevant market. Enforcement might not be clearly called for on pure efficiency grounds. But non-enforcement might be one more step toward the disappearance of an important voice in the marketplace of ideas. In this circumstance of ambiguity and doubt, without much support from the economic objectives of the antitrust laws but motivated solely by the non-economic objectives, I would argue for enforcement. Fortunately, in a country that in recent years has welcomed an entirely new television network, where cable television is putting traditional broadcast television under enormous pressure, and where the information highway traffic is providing competitive alternatives the potential of which is only beginning to be realized, the problem I describe seems highly theoretical. But with the recent merger activity in the media and communications industry, the framework of analysis is worth examination.

More generally, then, we enter the second hundred years of antitrust, relying on a body of law with both economic and political content. Both are still relevant today to the law's implementation by enforcers and courts alike. Both are also still relevant today to the public support for those laws, without which they will be ineffective. Too much emphasis on the economic aspects will undermine the broad coalition of political support; too little emphasis and markets will suffer, business will complain and consumers will be injured.

To one attempting to think about the future role of anti-
trust, it is instructive to observe the antitrust laws now in operation in other countries. After World War II, the Allied occupation authorities in Germany and Japan surely acted from both economic and political motives when they imposed anti-cartel laws on the defeated Axis powers. It was widely believed that the German industrial combines that had supported National Socialism so enthusiastically would never have existed in that powerful form had some kind of antitrust laws been in place. And so they were put in place, so that it could never happen again. Today Germany’s law is vigorously enforced in some areas, particularly mergers, less so in others, particularly with respect to cooperative associations. Japan’s law reads well, but is only now beginning to realize its potential.

The point is that in both countries the laws were intended to, and do still, play a mixed economic and political role. Now, some fifty years later, in the wake of the collapse of the Soviet empire, and the socialist ideal, antitrust laws have been enacted in country after country, in both the developed and developing world. And the European Union has a highly developed body of antitrust rules in Articles 85 and 86 of the Treaty of Rome, elaborated in forty years of case law. Collectively, these laws are debated, enforced, amended, and sometimes obeyed. Much of the inspiration for the entire enterprise comes from the experience of the United States.

It is surprising, therefore, that from time to time here in the United States it is deemed fashionable to deprecate the competitive system, to criticize the antitrust laws as old-fashioned, and to look to other models of industrial organization as more appropriate in the “post-industrial” world of global competition. This is really nothing new.

America suffered through the Great Depression in the 1930s and was told that the Soviet model of centralized direction of economic affairs should be adopted. Later, after the Second World War, other critics looked to the socialist societies of Brit-

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54 Treaty Establishing the European Economic Community, Mar. 25, 1957, arts. 85 & 86, 1 Treaties Establishing the European Communities 207 (1987 ed.).
ain and Sweden for guides to superior economic performance, or to the dirigisme of France's planned economy. 5

Now we are told that in the new age of global competition, in which technology and information will produce new kinds of competition, traditional concepts of antitrust will be outmoded. For example, it is said that in industries dominated by technologies requiring huge capital investment and mammoth research capabilities, traditional market share analysis will somehow fall short, because only a handful of the largest firms will be able to survive, a concept, so the argument goes, that antitrust cannot coherently contemplate. 6

There really seems less to these critiques than meets the eye. For a hundred years, through all kinds of economic phases, antitrust policy in this country has remained remarkably consistent in condemning the most clearly offensive forms of collusion and monopolization. Admittedly there have occasionally been broad swings: enforcement was probably somewhat over-aggressive, with resulting over-deterrence in the 1950s and 1960s; it was probably too passive, with damaging effects on competition, throughout most of the 1930s and during portions of the 1980s.

Nevertheless, throughout it all, America's economy ground on, producing enormous wealth and distributing it widely, as firms vied with each other to keep costs and prices down, and to discover new products that might appeal to consumers. Some industries managed to avoid tough competition, at least for a time, without necessarily violating the law. The automobile industry and the steel industry in this country became so beguiled by their market shares that they grew inattentive to costs and to the need to innovate. The antitrust laws probably did not reach

6 See Neil W. Hamilton & Anne M. Caufield, The Defense of Natural Monopoly in Sherman Act Monopolization, 33 DePaul L. Rev. 465, 485 (1984) (noting that application of traditional market share analysis to demonstrate monopoly power may lead to incorrect conclusions); George A. Hay, Market Power in Antitrust, 60 Antitrust L.J. 807, 813-14 (1992) (stating that in cases of successful product differentiation firms will have low market shares and thus be safe from antitrust regulation under traditional market share analysis); Lawrence J. Hilton, Antitrust and Foreign Competition: Proposals for a Dynamic Approach to Market Power Analysis, 26 Tex. Int'l L.J. 315, 316 (1991) (arguing that traditional market share analysis based on present market shares creates anomaly in antitrust context where most antitrust analyses attempt to predict economic effect of future transactions).
these quiet oligopolies, and as a result these failures and their anticompetitive effects were costlier and more prolonged than might have been necessary. But new entry eventually arrived. Foreign firms entered our markets—and consumers were offered alternatives that the sleepier domestic firms had not bothered to explore.

Significantly, America's smaller, more competitive companies continued to thrive, and to provide the energy for an enormous growth in jobs. Their ability to enter markets and compete with established firms is guaranteed by the antitrust laws. Once established, many new entrants undoubtedly would have preferred the easier life of the cartelist, but the antitrust laws deprived them of the opportunity to fix prices or merge their way to market dominance.

And what benefits to the economy antitrust has brought. As an example, the case against AT&T probably liberated more entrepreneurial energy than any other antitrust case ever filed, and even it was roundly criticized by those hostile to antitrust enforcement. But the record shows that, since the case was settled, long-distance prices for residential customers have declined sixty-six percent, in real terms; minutes of use have increased dramatically; and there are now literally hundreds of long distance carriers from which to choose. And Americans are choosing. In fact, in 1994 more than 25 million customers changed long distance carriers at least once.


See Basil L. Copeland, Jr. & Alan Severn, Price Theory and Telecommunications Regulation: A Dissenting View, 3 YALE J. ON REG. 53, 58 (1985) (stating that although divestiture of AT&T has been heralded as opportunity to eliminate cross-subsidization static price, theory fails to prove that traditional pricing of telecommunications services distorts allocation of resources); Paul W. McAvoy & Kenneth Robinson, Winning By Losing: The AT&T Settlement and its Impact on Telecommunications, 1 YALE J. ON REG. 1, 30 (1983) (criticizing AT&T divestiture for conveying some natural monopoly advantages on AT&T and arguing that current competition exists only because of regulatory "umbrella" keeping rates up); Irwin M. Stelzer & Richard Schmalensee, Potential Costs and Benefits of Vertical Integration, 52 ANTITRUST L.J. 249, 252 (1983) (stating that whatever beneficial effects on competition disintegration of AT&T may have, transaction costs in related areas may well go up).


Id. (citing ROBERT W. CRANDALL, AFTER THE BREAKUP: U.S. TELECOMMUNICATIONS IN A MORE COMPETITIVE ERA 44 (1991)).

Id. (citing Hall, supra note 59, at 18).

Id. (citing Edmund L. Andrews, No-Holds-Barred Battle for Long-Distance Calls, N.Y. 1996}
So the results of relying on competition as a central organizing principle of the economy, and on antitrust as competition's guarantor, speak for themselves both in economic and political terms. The key, of course, is always to adapt the antitrust laws to new circumstances, still remaining true to their fundamental pro-competition and anti-monopoly principles.\(^3\)

This is done in a variety of ways. Within the broad statutory language, courts are free to vary interpretation as economic learning and competitive circumstances evolve. Legislative amendments to the statutes themselves, for instance clarifying the permissible scope of joint ventures for research and development, or in overseas markets,\(^4\) do help. Guidelines like those relating to specific industries such as health care, or dealing with lawful conduct for firms producing and using intellectual property, can be promulgated. Together, they are all part of a continuing process of evolution and modernizing. But the basic ban on collusive activities and monopolizing behavior remains.

As economic activity becomes more complex, and the arena within which it takes place becomes truly global, further adaptation will undoubtedly take place. But two points are critical. First, domestic markets must always be kept competitive under pressure from antitrust enforcement. Second, where markets are truly international, antitrust analysis must see those facts clearly and realistically: the true dimensions of the competitive problem must be understood and enforcement must take place only in a way that deals with that reality.

Let me say a further word about each of those points. When our firms go forth from our shores to compete in new economic markets that are half a world away, they must do so in the most efficient and innovative ways possible. The critical task of the antitrust laws in this circumstance is to enforce competitive rivalry in domestic markets to ensure that American firms are efficient and effective abroad.

The fact is that firms that are not subject to the rigors of competition at home have little chance of success abroad. Too easily they succumb to the quiet life of the cartelist, where without the goad of competition they are never forced to upgrade

\(^3\) In passing the Sherman Act “Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.” MILTON HANDLER ET AL., supra note 23, at 8.

their performance, or to innovate or to seek more efficient solutions. Consequently, in this country at least, any strategy of creating national champions should be out of the question. There seems likewise little room in an economy as vibrant as ours for suspending competition in order to protect infant industries or to provide breathing space for firms forced to adjust to avoid industry decline.

To focus this general point further, we need to continue to restore the competitiveness of those markets that have over the years been unnecessarily subjected to economic regulation. The reason is so that, quite apart from the obvious consumer benefits, firms in those markets can develop their competitive edge for trial in new markets, even abroad. After a spate of legislative activity in the late 1970s and very early 1980s,65 the political pressure for deregulation seems to have lost its steam. While the United States in comparison with other countries is remarkably unregulated, there are still too many sectors of economic activity where the full play of the forces of competition is unnecessarily muted or altogether suppressed. We need once again to take up the unfinished agenda of economic deregulation. Not only will that redound to the benefit of American consumers, but it will also provide the needed competitive discipline for American firms that wish to position themselves to compete abroad.

Thus, in our domestic markets the work of antitrust is more important than ever. It is no less so in complex high-technology international markets. In those markets, antitrust analysis must, of course, rise to the task of accurately assessing what is going on, of evaluating complex transactions in a global context. But there is really nothing novel in that. If the geographic market within which to assess competitive effect is multi-national, so be it. If tariffs play a greater or lesser role in the movement of goods within markets across international boundaries, those effects can be calibrated and assessed. If intellectual property laws vary in their effectiveness from country to country, then the reasonableness of conduct designed to protect

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such property needs to be analyzed in a highly nuanced way. The point is that new industries with great demands on capital resources producing sophisticated technological products do not repeal the laws of competition, nor do they make antitrust irrelevant. In these markets, calls for the burying of antitrust must be rejected.

Once again, therefore, America's pro-competition policies will survive, despite the occasional critics from academia or the corporate board room or the halls of Congress, and despite the apparent attractiveness of other models. Japan's highly cartelize(d economy seemed for a time so successful that our continued reliance on competition was called into question. But, even before the Japanese economy lapsed into severe recession, it became obvious that Japan's cartels keep prices to consumers at levels that can only be described as extortionate, and depress living standards to an extent that would be unacceptable in this country and soon will be unacceptable even there. Meanwhile, the German model of interrelated financial and industrial firms, working in close partnership with government, lost its temporary appeal when it became apparent that many once-efficient German firms had failed to innovate sufficiently to keep pace with international rivals, and that German industry is now so burdened with social costs as to be uncompetitive in many markets. For these and other reasons, the Japanese and German models, like the centrally directed economies of an earlier era, hardly seem credible alternatives to a competitive economy such as ours.

American industry certainly faces many problems. But an excess of competition should not be included in the roster of villains. Small competitive firms continue to grow and prosper; large industrial behemoths that rest on the laurels of historical market share continue to shrivel. Firms that must be lean and mean to meet domestic competition are and will remain America's best representatives in an international arena. In short, the antitrust laws' preservation of competition has been an es-


essential ingredient in the development of a technologically advanced, high-income, consumer-driven economy that remains today the envy of the world, as it will for the next hundred years, at least.