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# The Socio-Political Goals of Antitrust Law

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# **“The Socio-Political Goals of Antitrust Law”**

**Patrick Goold, LL.M. candidate**

## Abstract

The paper attempts to show that antitrust law was created to further three socio-political goals: the protection of democracy, the prevention of unequal wealth distribution, and the preservation of small businessmen. These goals are still relevant to today's antitrust concerns. However, the goals antitrust law pursues are susceptible to the varying ideological beliefs of the presidential administration. Given the importance of political goals in antitrust law, and the power of the presidential administration over these goals, the new Obama administration would do well to enforce an antitrust policy that was aware of the multiple goals that antitrust embodies.

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# Introduction

*"Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law? …Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules"*[1]

The words above are those of Professor Robert Bork, one of the founders of the Chicago School Movement who in the 1970s began pronouncing that economic efficiency was the overarching goal of the antitrust law. However, Professor Bork was certainly not the first to ask the question of what antitrust law was meant to mean and what goals it tried to incorporate. The birth of modern antitrust law began with the Sherman Act[2] which is the United States' first and foremost antitrust legislation. However, even the congress that passed the Sherman Act demonstrated concern for ascertaining what would stand as the law's correct objectives and goals. Mr George in the Senate stated:

> *"We must know what it means, what its legal effect is, if we give force to it as it is written. [The Sherman Act] is somewhat obscure, in some parts ambiguous…In*

[1] Robert H.Bork, "The Antitrust Paradox" , 50, Basic Books Publishers, (1978)

[2] 15 U.S.C. § 1–7 (1890)

*considering analysis of the terms of the bill, Congress must necessarily determine with care what will be its meaning and effect in the courts. This is essential to prevent a result which would be both absurd and highly prejudicial"*[3].

Professor Bork was not the last to discuss this question either. The debate between Professor Bork, who argued that the law was to promote the goal of economic efficiency, and Professor Lande, who has argued that the law was to prevent consumer surplus from being unfairly transferred from the consumer to producer, is well-known to any antitrust student. This article prefers Lande's construction of the law. Accordingly, at times it draws heavily on Lande's work. However, there are still important distinguishing lines between this paper and the views of Professor Lande. These shall be highlighted throughout the article.

Despite this debate, Professor Bork's work was undeniably influential. The arguments of the Chicago School on the focus of antitrust law had a tremendous affect on the direction and shape of US antitrust law. It is now almost universally conceived that antitrust has one major concern and that is the protection of an efficient market economy.

However, as the paper attempts to show, the role of politics in antitrust has a longer tradition in antitrust policy than the Chicago school have given credit. This article contends that, the antitrust legislation was designed largely to further three broad socio-political goals: the protection of democracy; the protection of small businesses; and the redistribution of wealth. These goals can be demonstrated not only by legislative intent but also by the fears and concerns of the population at the time of the passage of the early antitrust laws.

[3] 21 Cong. Rec. 1,765 (1890) (Statement of Sen. George)

The article, as a second matter, tries to demonstrate that the direction of antitrust law, and the goals that the law embodies, has been subject to many changes. Ideological swings have occurred between presidential administrations. As a result, antitrust policy has often been tailored to suit the executive's own political agenda.

In the final section I try to show how the social and political goals of antitrust law are still in fact relevant today. New issues such as concentration in media markets, the downturn in the United States economy between the end of 2008 and early 2009, and the interest in preventing wealth transfers in important areas such as health care and agricultural produce need to be tackled by antitrust law, not because they produce inefficient results, but because of the socio-political threat they pose. Antitrust therefore, should take on a multi-purpose role which recognizes that there will have to be trade offs between the demands of efficiency and socio-political outcome. Since President Obama has taken office in January his administration has demonstrated his concern for similar socio-political values. Therefore, his administration would be well placed to utilize antitrust law to reaffirm certain socio-political goals.

# Part 1: The Objectives of Antitrust Law

## A) The Chicago School's Claim

It seems appropriate to firstly describe what is the dominant view of antitrust law, the Chicago School. The term Chicago School in the field of antitrust law includes a wide range of concepts and ideologies. However, at the heart of the theory lies the belief that antitrust law should be driven primarily and exclusively by concerns for economic efficiency. What does economic efficiency mean? It is arguably a multifaceted concept. It includes firstly, "allocative efficiency" which refers to the allocation of resources to their most valued uses. It also refers to "productive efficiency" which means the production of goods at the lowest possible cost, given the production of other goods. Finally, it encompasses "innovative or dynamic efficiency" which is efficiency benefits to be achieved through research development and innovation. The efficiency concept is typically measured either by the calculation of "total welfare" i.e. the sum of consumer and producer surplus and whether the sum will increase or decrease due to a certain market action; or by "consumer welfare" i.e. the sum of consumer surplus and whether market action will cause it to shrink or increase. "What this means in practice is that if a merger or some form of rivalrous conduct results in a net increase in output, it is to be praised as reflecting increased efficiency even if the financial benefits of that output are exclusively captured by large firms with market power"[4].

[4] The American Antitrust Institute, "The Next Antitrust Agenda: The American Antitrust Institute's Transition Report on Competition Policy to the 44th President of the United States" at 9 (2008)

The 1970s saw an antitrust revolution in which the efficiency based arguments of the likes of Robert Bork and Richard Posner became almost universally accepted. Today, whatever one's own personal thoughts or criticisms lie one cannot deny the prevalence of the Chicago School's thoughts in modern antitrust doctrine. There has "emerged a rough consensus among professional antitrust practitioners…that the competition referred to in our antitrust statutes is not to be interpreted simply as …rivalry among entities. Rather it is best viewed as a process, the outcome of which is welfare"[5]. More clearly stated, this means economic welfare.

The Chicago school's "most important"[6] victory was the reorientation of antitrust towards the economic efficiency goal. It was claimed that this single object approach "permits the consistency and predictability needed to make a deterrence-based policy effective"[7]. The consistency and predictability advantage has been well served by the use of economic theory and models of how markets function. Price Theory emerged as an "appropriate tool"[8] for economic analysis of allegedly illegal conduct. A rough list of basic Chicago School thought was produced by the American Antitrust Institute and included:

• Markets generally work well and their flaws tend to be self-correcting. When markets fail, it is usually because of some form of government intervention.

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[5] Heyer, "Welfare Standards and Merger Analysis: Why Not the Best*?"* 2 Comp. Pol. Intl 29 (2006)
[6] Schmalensee, "Thoughts on the Chicago Legacy in U.S. Antitrust" at p13, in Pitofsky, "How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust", Oxford University Press (2008)
[7] *Id.*
[8] *Id.*

• Concentration of industry doesn't necessarily signal the presence of market power. Concentration generally arises from natural market forces relating to the accomplishment of efficiencies. It therefore has only modest importance in antitrust decision-making.

• Monopoly can be bad for the economy because of the dead-weight loss it entails but it is important to encourage monopolists to compete aggressively, so actions against monopolists should be rare. Some Chicago economists also recognize that monopolization can lead to "x-inefficiency," that is, a kind of lazy resting on laurels, and some see the pursuit of monopoly profits leading to the waste of resources through excessive political lobbying. Some emphasize the desirability of innovation and credit monopoly as both a needed incentive for innovation and a potent resource for innovation.

• Mergers that businesses propose should be encouraged as generally efficient and should usually be permitted to proceed even in highly concentrated markets, unless there is strong structural and nonstructural evidence that post-merger prices are likely to rise in the near term.

• Vertical restraints (such as tying, resale price maintenance, or exclusive dealing) are almost always efficient, hence should rarely be subject to governmental intervention

• Cartels and other forms of collusion among horizontal competitors are almost always harmful and should therefore be the highest priority of enforcement.

• Government is almost always less competent than the private sector or the unassisted functioning of the free market. Hence government should intervene only rarely and minimally.

• Juries cannot be trusted to understand complex antitrust issues, and the courts are very often ill-equipped to manage antitrust cases. Therefore, private antitrust enforcement should be discouraged, significantly restricted, or even eliminated.

• State enforcers, who often have political agendas, should play a minimal role in antitrust enforcement, with authority limited to purely local and criminal anticompetitive activities such as bid rigging.

• Because of the importance of economic analysis and in order to avoid errors of over-enforcement, per se rules of illegality other than for naked price fixing should be replaced by comparatively open-ended rule of reason analysis or rules of per se legality.

• Conspiracy allegations must be made with some specificity beyond mere notice pleading, so as not to put innocent companies at risk of expensive discovery[9].

The impact of this thinking in case law is clear and sharply defined. Section 1 of the Sherman Act makes agreements in restrain of trade unlawful. In the area of horizontal agreements (i.e. agreements between competitors at the same level of the supply chain) the courts moved away

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[9] American Antitrust Institute, *Supra note 4*, at 4-6

from decisions such as *Sealy*[10] and *Topco*[11] in which agreements were struck down despite the absence of power to restrict output. Instead they have moved to making decision such as in *BMI*[12] where "antitrust policy has retreated significantly from per se condemnation"[13]. The same policy can be seen in the case of vertical agreements (i.e. agreements between non-competitors at different levels of the supply chain) that restrain trade where the case law has moved from *Schwinn*[14] and *Dr Miles*[15], where the court held Retail Price Maintenance to be per se illegal, to cases such as *Leegin*[16] and *Kahn*[17], where the courts have evaluated such conduct under an analysis known as the "rule of reason" whereby the court examine the competitive effect of the market action. Mergers also have undergone a radical transformation at the hands of the Chicago School. Law has moved away from the position held in the 60s where *Brown Shoe*[18] asserted that the impact of vertical mergers on competition was that they foreclose "a share of the market otherwise open to competitors"[19] and in which the 1968 Department of Justice Merger Guidelines asserted that vertical mergers would ordinarily be challenged if they involved high market shares. The law now occupies a contrasting position reflected by the 1984 Department of Justice Non Horizontal Merger Guidelines that emphasis how the department will analyze whether any particular vertical merger is likely to raise barriers to entry rather than strict evaluation of market shares. Although, however, a word of caution is here required. Judge Posner in *Hospital Corporation of America* did say that the previous decisions of the 60s had not

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[10] Sealy, Inc., v United State, 388 US 350 (1967)
[11] Topco Associates Inc v United States , 405 US 596 (1979)
[12] Broadcast Music, Inc. v Columbia Broadcasting System, Inc., 441 U.S. 1 (1979)
[13] Schmanlensee *Supra note 6,* at 20
[14] United States v Arnold, Schwinn & Co 388 U.S. 365 (1967)
[15] Dr Miles Medical Co v John D. Park & Sons Co, 220 U.S. 373 (1911)
[16] Leegin Creative Leather Products, Inc v PSK, inc 551 U.S. 877 (2007)
[17] State Oil v Khan, 552 U.S. 3 (1997)
[18] Brown Shoe Co. v United States, 370 US 294 (1962)
[19] *Id.* at p328

been overruled[20]. That includes the Brown Shoe decision. However, it would be hard to accept these decisions as fully observed law when the eminent Professor Bork has called the Brown Shoe decision as "the worst antitrust essay ever written"[21].

However, this paper contends that the original concerns of antitrust law had very little to do with economic efficiency and a lot more to do with the protection of certain socio-political values than this dominant view takes into account.

## B) Who Created the Sherman Act?

It is important to understand why the Sherman Act was passed. This section of the paper hopes to demonstrate that it was not concerns of economic efficiency or legal concerns that stimulated the demand for legislation. Rather the legislation was a reaction to the concerns of the public who had growing fears over trusts and monopolies.

### i) Economists and the Sherman Act

Firstly, many economists of the day saw the combination and collective action between competitors was a healthy process. Governed by Darwinian thought, many believed that "any social change in which they could detect "growth" or "centralization" struck them as

[20] Hospital Corp of America v FTC 807 F.2d 1381 (1986)
[21] Bork, *Supra note 1*, at 210

"neutral""[22]. Particularly, many felt that the role of competition was negative and centralization was away to reduce or correct the "excessive competition and the chaotic economic conditions that they thought it produced"[23]. For example, Clark, "*The Limits of Competition*", argued that:

> *"combinations have their roots in the nature of social industry and are normal in their origin, their development and their practical workings…[they] are the result of evolution and are the happy outcome of a competition so abnormal that the continuance of it would have mean widespread ruin"* [24].

As a practical illustration of this, Wells argued that the successful adoption of the steam driven machinery had made manufacturing so efficient that "industrial overproduction resulted" and "a strenuous effort to sell unwanted goods had led to "excessive competition"[25]. This resulted in a situation in which manufacturing firms were losing money and could only correct the difficulty if they combined to reduce their output. At the same time, as fighting off ruinous competition there was the belief that combination was the most practical way to "get positive advantages of large-scale production"[26]. Nor "did economists attribute such advantages only to combinations: they were adopting a theory which led them too concluded that even outright monopolies, or at least some of them were also inevitable and potentially beneficial"[27].

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[22] Letwin, "Congress and the Sherman Antitrust Law*"*, 23 U.Chi.L.Rev 221. at 237, (1956)
[23] *Id. at* 238
[24] *Id. at* 238; Clark, "The Limits of Competition", reprinted in Clark and Giddens, "The Modern Distributive Process", Gin and Company Publishers, at 11 (1888)

[25] *Id.* at 237-8; Wells, "Recent Economist Changes" 74 (1889)

[26] *Id. at* 238
[27] *Id.* at 238

Many economists were vehement about the ills of free competition and actively favored government regulation. Pattern, *"The Premise of Political Economy"* [1885] believed that "competition had very serious shortcomings as the basis of economic life"[28]. Pattern went on to form a professional society with James, the aim of which was originally "to combat the widespread view that our economic problems…and that our laws and institutions which at present favor individual *instead of collective action* can promote the best utilization of our material resources and secure to each individual the highest development of his faculties"[29]. They suggested that society "should favor positive government intervention in economic life"[30] and that "the doctrine of laissez faire is unsafe in politics and unsound in morals"[31]. On the other hand, many economists "preferred a middle balanced position between liberalism and interventionalism"[32]. Echwan Selgman said that "competition is not in itself bad. It is a neutral force which has already produced immense benefits but, which may under certain conditions, bring in its train sharply defined evils"[33] .

**ii) <u>Economic Efficiency and Legislative Intent</u>**

However, although economists maybe disbelieved that values of competition there is still the possibility that the legislators passed the Sherman Act for economic reasons. Yet, such a view,

[28] *Id.* at 235-6
[29] *Id. at* 236; Ely, "Ground Under Our Feet", Macimillan Company Publishers, 132, at 296, (1938)
[30] *Id.* at 236
[31] *Id.* at 236; Ely, "Report on the Organization of the American Economic Association", 1 Pub Am Econ Ass'n , No 1 p6-7 (1886)
[32] *Id.* at 237
[33] *Id. at* 237; Ely, *Supra note 29,* at 27

does not have much support. Lande argues persuasively that "no evidence has ever been found"[34] that the Sherman Act was passed for efficiency concerns. According to Lande, no commentator could point to "any economic testimony that referred to a concept resembling allocative efficiency"[35]. Further there "is little basis for suggesting the Sherman Act was passed primarily to improve or even preserve productive efficiency, indeed the trusts were viewed as extremely efficient"[36]. Senator Sherman himself appreciated the efficiency gained by large corporations saying that:

> *"experience has shown that they are most useful agencies of modern civilization. They have enabled individual to invite to undertake enterprises only attempted in former times by private governments. The good results of corporate power are shown in the vast development of our railroads and the economic increase of business and production of all kinds"*[37].

Legislators "were unaware that this caused allocative inefficiency. They though that monopolies were relatively efficient producers and that breaking them could decrease productive efficiency. Yet congress enacted the Sherman Act largely to prohibit and condemn them"[38]. Therefore, it would appear that Congress was not greatly concerned with economic efficiency but with other dangers presented by trusts and monopolies.

<u>Bork's Argument</u>

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[34] Lande , "Wealth Transfers as the Original and Primary, Concern of Antitrust: The Efficiency Interpretation Challenged", 34 Hastings L.J. 65 at 88 (1982)
[35] *Id.* at 88-89
[36] *Id. at 88-89*
[37] 21 Cong. Rec. 2457 (1890) (Statement of Sen. Sherman)
[38] Lande, *Supra note 34*, at 93

However, it is far from universally agreed upon that the Congress that enacted the Sherman Act did not have efficiency concerns in mind. Professor Bork argued feverously that the "whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare"[39] and that "it seems clear that income distribution effects of economic activity should be completely excluded from the determination of the antitrust legality of the activity"[40]. Bork reasoned that since we know that the only harm to consumer welfare is allocative inefficiency, congress displeasure with market power can fairly be equated with a concern about allocative inefficiency. He concluded that the antitrust laws embody only a concern for the aggregate economic efficiency of the economy.

In support for his contention he used a variety of statements found in the act's legislative history. He quotes Senator Sherman as saying the bill he drafted was to prevent agreements that "advance the cost to consumers of articles of commerce"[41]. Bork concluded this demonstrated how the "touchstone of illegality is raising prices to consumers"[42]. Members of the Senate Judiciary Committee George, Coke, Vest and Pugh gave "explicit evidence that they agreed with the consumer welfare rationale offered by Sherman"[43]. Elsewhere Senator Sherman is quoted as saying that "the sole object of such a combination is to make competition impossible…it tends to advance price to the consumer of any article produced"[44]. Others in Congress demonstrated a similar concern, Representative Heard was quoted as saying the "object of these giant schemes

[39] Bork, *Supra note 1,* at 91
[40] Bork, *Supra note 1,* at 111
[41] Bork, "Legislative Intent and the Policy of the Sherman Act", 9 J.L.& Econ. 7 at 15 (1966)
[42] 21 Cong. Rec. 2457 (1890) (Statements of Sen. Sherman)
[43] *Id* at 17
[44] 21 Cong. Rec. 2437 (1890) (Statement of Sen. Sherman)

of combined capital is not to increase the volume of supply but rather to repress, reduce and control the volume of every article that they touch so that the cost to consumers is increased"[45].

However, as with the majority of problems that face lawyers, there is the difficulty of interpretation. The evidence that Professor Bork cites could be interpreted to mean one of many things. The evidence of Professor Bork puts forward that Senator Sherman believed that the touchstone of illegality was the raised prices of articles of commerce can perhaps be interpreted as the expression of the need for efficiency. However, to say that does not foreclose the competing construction that higher prices of goods extract money from the consumer and give it the producer in an action that unfairly distributes wealth. Nor in fact does it foreclose the argument that the higher prices that Senator Sherman targeted are not the action that is illegal in themselves but in fact a demonstration or a byproduct of the real acts of illegality. If such an interpretation is argued, then one could hypothesize that the real motivation was the danger of big business and the threat such business practices posed to democratic ideals (that shall be discussed later) and the raising of prices is not the problem per se but the demonstration of the problem, or the tip of the iceberg. This is an argument that gathers support from Senator Sherman himself. Senator Sherman said that "If we would not submit to an emperor we should not submit to an autocrat of trade, with the power to prevent competition and to fix the price of any commodity"[46]. Thus appearing to convey that the problem was not the price of commodities per se but that the *power* that enabled trusts to raise prices.

This is compounded by the questionability of some of Professor Bork's sources. For example, although Professor Bork cites Mr. Heard saying the danger combination is increasing

[45] 21 Cong. Rec. 4101 (1890) (Statement of Rep. Heard)
[46] 21 Cong. Rec. 2457 (1890) (Statement of Sen. Sherman)

the price of goods to consumers, in the same speech to the House of Representative Heard said that "to crush out those unholy and defiant combinations which for the enrichment of a few persons have made paupers of millions of honest and helpless people"[47], clearly demonstrating a concern about inequitable wealth transfers and the distribution of wealth (that this paper shall discuss further below). He also, when talking on the dressed Beef Combine of Chicago and New York, said that this trust:

> *"has within a few years past absolutely prostrated the live-stock interest of the West and impoverished whole states and territories by their infamous operations; and unless congress, …puts forth its hand to stay this wholesale destruction of that great agricultural section, universal ruin will be the portion of its people"*[48].

Mr Heard closes his speech with a paragraph that mentions "acknowledging our duty to the people against who are being robbed…I believe we have the power to uproot and utterly destroy these evils and I know that it is our duty to try it and try it now"[49]. As I will demonstrate further below, Senator Sherman and other Congressmen also made remarks in which they reveal anxiety over the trusts and monopolies for reasons other than economic efficiency.

Bork's thesis also does not fit readily with statements in the legislative history that would appear to recognize the efficiency gains to be gotten through trusts and monopolies. Such as Representative Wilson's quoting of an extract from the '"Baltimore Sun" that says "the world demands abundance of commodities and demands them cheaply, and experience shows that it

[47] 21 Cong. Rec. 4101 (1890) (Statement of Rep. Heard)
[48] 21 Cong. Rec. 4101 (1890) (Statement of Rep. Heard)
[49] 21 Cong. Rec. 4101 (1890) (Statement of Rep. Heard)

can have them only by the employment of great capital on an extensive scale"[50]. Congress acknowledged that these were economic criticisms of the proposed legislation.

One final point is that, in situations where legislative intention is unclear then there must be regard to the context from which the legislation arose. In the case of the Sherman Act we must look to the beliefs of contemporary economists who, as we have seen, opposed competition and did not seem to have the same understanding of efficiency as Professor Bork attributes to them. As Lande says, at the time "if all they had wanted to do was to encourage the form of industrial organization that was then the most productively efficient, they would have praised the trusts, not condemned them in the legislative debates and enacted a law that condemned many of their activities"[51].

Bork also makes that argument that Congress was concerned only with trusts and monopolies that were inefficient. He relies on statements from Sherman such as: "[the bill] aims only at unlawful combinations. It does not in the least affect combinations in aid of production where there is free and fair competition"[52], demonstrate how there was to be a separation of good from bad combinations. Bork makes the claim therefore that the idea of "monopoly by efficiency"[53] is acceptable.

However, once again, this does not foreclose competing interpretations. The distinction made by Senator Sherman revolves around what unlawful combinations produce free and fair competition, not whether the competition is efficient. On the basis of such statements one could conclude that the Sherman Act was in fact designed to protect small businessmen from being

[50] 21 Cong.. Rec.. 4097 (1890) (Statements of Rep. Wilson)
[51] Kirkwood and Lande, "The Chicago School's Foundation is Flawed: Antitrust Protects Consumers, Not Efficiency", in Pitofsky, *Supra note 6*, at 92
[52] 21 Cong Rec 2457 (1890) (Statements of Sen. Sherman)
[53] Bork, *Supra note* 41, at 30

pushed out of the market by more efficient rivals (a concept discussed later) and that *bad* trusts and monopolies were ones that destroyed small businessmen rather than ones which were inefficient.

In sum, Bork provides some examples of legislative history that demonstrates a concern that prices will be higher in an anticompetitive market. However, that does not foreclose competing interpretations that such higher prices were not condemned because they demonstrate economic inefficiency but because of the socio-political effect such high prices were related with. This is compounded by the context of the legislation in which economists did not express the same interest in efficiency gains of competition and legislators appeared to agree with the economists. As we shall see in the next section these same legislators demonstrated concerns for sociopolitical goals in antitrust.

### iii) <u>The Lawyers View</u>

If the professional economists did not promote the idea that market competition was good for society then who did? What about the lawyers of the day? Again, the answer does not seem to lie in the values held by the lawyers. For the most part, lawyers believed that the "common law already prohibited monopolies"[54]. The common law "embodied a spirit unalterably opposed to monopoly and that this spirit…would somehow prevail against the trust it encountered"[55]. Letwin cites that "Some 246 of them thought it [the common law] went for enough"[56]. The American Law Review, commenting on Sherman's Antitrust Bill, said that as the trusts were

[54] Letwin, *Supra note 22,* at 241
[55] Letwin, *Supra note 22*, at 241
[56] Letwin, *Supra note 22,* at 245-246

making war on society, society was bound to make war upon them but concluded that society could carry on its war without enacting criminal statutes, "the common law is good enough, if it were only administered"[57]. Even Senator Sherman said that the Bill "does not announce a new principle of law, but applies old and well recognized principles of the common law" [58].

### iv) <u>The Public Influence</u>

Therefore, neither economists nor lawyers supported the passage of the Sherman Act. Furthermore, it does not appear that the legislators believed that the Sherman Act was enacted for economic or legal reasons. The more realistic situation is that the early antitrust law was a response to the public concerns over the loss of democratic ideals and the danger that economic concern would harm the small independent businessmen and extract wealth from the poor and transfer it to the rich.

One demonstration of this public sentiment is to look at how the major political parties approached the issue. They knew that the public feared the trusts and the parties pandered to that anxiety as part of the usual party political struggle. The Democrats according to Letwin, saw that "the trust issue was essentially useful for appealing to farmers and laborers who might shift their vote to the 3rd party"[59]. The Republican Party had even more compelling need to condemn the trusts. They had, since 1880 achieved the reputation of being the party of the rich and in 1884

[57] Letwin, *Supra note* 22, at 245-246; 22 ALR 926 (1888)
[58] 21 Cong. Rec. 2456 (1890) (Statements of Sen. Sherman)
[59] Letwin, *Supra note 22,* at 248

Ben Butler began calling them the “Party of Monopolists”[60]. This label became “especially current”[61] after their presidential candidate was given a banquet by a group of businessmen which the New York World titled, “The Royal Feast of Belshazzer and the Money Kings” and during which it said that the “Millionaires and Monopolists” sealed their allegiance to the party[62]. These party-politics of the trust question become even more apparent when we look at the legislative history of the Sherman Act. In which Mr Mason accused the Democrat part of using the concept of trusts:

> *“as a bugaboo to frighten the people way from the Republican party into your ranks. That is the reason you do not want the Republican party to strike a blow at trusts to-day. The moment that we strike down trusts in this country that moment there is taken away one of the principal elements of your political talk in seeking to drive the farmers away from the Republican party into the Democratic party”*[63].

By the 19th century “stage was set for the progressive era”[64]. The “predominate attitude among the American people was one of criticisms rather than approval of the combined laissez-fair and anti-competitive gospels preached by many captains of industry and practiced by more”[65]. The public worry over trusts and monopolies was reflected in the content of the contemporary newspapers and magazines. In these periodicals we find a recurrent concern over the trust issue. The “New York Times Index for the first six months of the year 1899 under the same heading [trusts] listed 17 editorials and no less than 245 articles and news items”[66]. During the year of

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[60] Letwin, *Supra note 22,* at 248; Butler, “Address to his Constituents” 8 (Pamphlet of Aug 12, 1884)
[61] Letwin, *Supra note 22,* at 248
[62] Letwin, *Supra note 22* at 248
[63] 21 Cong. Rec. p4100 (1890) (Statement of Rep. Mason)
[64] Thorelli, “The Federal Antitrust Policy: The Origination of an American Tradition” 311, John Hopkins Press, (1955)
[65] *Id.* at 311
[66] *Id.* at 340

1898 “Public Opinion” magazine carried “at least 31 editorials, new items, cartoons and surveys of newspapers materials concerning the trusts and the problems of pubic policy created”[67]. The “Story of a Great Monopoly”[68], that alleged combinations were dominating most “if not all industries in the country”[69], published in 1881 in the Atlantic Monthly had grown so popular that it had to be “reprinted 7 times”[70]. This concern continued even past the enactment of the Sherman Act. During the McKinley years “almost every morning paper was filled with accounts of the new…industrial combinations”[71].

The strength of public feeling over the new antitrust laws was reflected in Congress. Mr. Heard spoke of the “presence of the great demand for legislation upon this subject”[72] and how Congressmen “must remember…the magnitude of the interests to be affected by this legislation, as well as the imperative demand of an outraged people for its enactment[73]”. Similarly, in the House of Representatives debate over the proposed Sherman Act on May 1st 1890 Mr Bland said that “this is a very important bill, and certainly the country would not regard it as fair to rush without proper debate. The bill is one in which the whole country is interested”[74]. Mr Wilson appeared to agree with this statement when he said that the bill was “prepared…by the Judiciary Committee of the Senate, in response to a popular demand for some Congressional legislation against trusts”[75]. Mr Wilson goes on to say there have always been combinations in trade, and

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[67] *Id.* at 340
[68] *Id.* at 134
[69] *Id.* at 134

[70] *Id.* at 134

[71] *Id.* at 339
[72] 21 Cong. Rec. 4101 (1890) (Statements of Rep. Heard)
[73] 21 Cong Rec p4101 (1890) (Statements of Rep. Heard)
[74] 21 Cong. Rec. 4089 (1890) (Statement of Rep. Bland)
[75] 21 Cong. Rec. 4092 (1890) Statement of Rep. Wilson)

"these have awakened the distrust and anger of the people, but never the same uneasiness and resentment as have been kindled by the so called trusts"[76]. The Sherman Act was, in his opinion, "blind legislation, to answer a popular demand that something shall be done about trusts"[77]. Moreover, Senator Vest said the "enormous abuse of trusts and combines which the whole country is properly denouncing"[78] and talks about the "popular indignation"[79]. Finally, Senator George believed that "certainly there is no subject likely to engage the attention are more deeply interested than in the subject of trusts and combinations"[80].

It would appear therefore that the Sherman Act was reactionary legislation. A response to the concerns of the people, rather than a response to the educated concerns of the economists or lawyers of the day. Therefore, examination of the public sentiment will provide students of antitrust with a real understanding of why the antitrust statutes were formulated and, as a result, the goals that it was intended to achieve. When determining the values embedded in the early antitrust law it is important to remember that the legislation was not passed in a vacuum but was a response to the perceived needs of the public.

This public input into antitrust partially explains the American Antitrust Institutes belief that there must be more done today to encourage public debate on antitrust. There must be an "educational effort" so that the public "understand the facts and reasons behind administrative decisions"[81]. Thus allowing public debate on antitrust law, and the public to voice their concerns over what should be the laws focus and targets.

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[76] 21 Cong. Rec. 4095 (1890) (Statement of Rep. Wilson)
[77] 21 Cong. Rec. 4095 (1890) (Statement of Rep. Wilson)
[78] 21 Cong. Rec. 2463 (1890) (Statement of Sen. Vest)
[79] 21 Cong. Rec. 2463 (1890) (Statement of Sen. Vest)
[80] 21 Cong. Rec. 2598 (1890) (Statement of Sen. George).
[81] American Antitrust Institute, *Supra note 4,* at 17

Therefore, when searching for the legislative intent of the early antitrust laws one must look in two places. Not only the legislative history but also at the background to the act and the popular sentiments and beliefs of the time.

Here however, it would seem appropriate to raise one issue of concern. That is the problems of determining the intent of a collective group of people. The question is "whether the legislature, as distinct from individual legislators, can be said to have an intent and, if so, how it is to be understood"[82]? This problem is ubiquitous for a lawyer who attempts to determine the goals of a particular piece of legislation. There are of course, many components to this debate and not enough space in this discussion to do them justice. However, in the absence of any clearly better method, the multiple expressions and remarks made by individual legislators remains the lawyer's best tool in the endeavor to discern the objectives of an area of legislation. This is especially true when coupled with an understanding of the background to the law's enactment.

## C) **Socio-Political Goals In Antitrust Law**

So far the paper has demonstrated what the Chicago School has claimed and what its impact has been. However, the discussion has also demonstrated how there was a lack of concern for economic efficiency demonstrated at the time of creation of modern antitrust. However, there was a great public interest in the trusts and monopoly problem. This section attempts to demonstrate that both the public opinion to the trust problem and the legislative history display

[82] Paulson, in a communication to the University of Wisconsin Press 23 May 1991; cited in MacCallum, "Legislative Intent and Other Essays on Law, Politics ad Morallity", at XXX, University of Wisonsin Press, (1993)

an interest in protecting three socio-political concerns: distribution of wealth, protection of small businesses and protecting democracy.

### i) Wealth Distribution and Poverty

#### a) Wealth Distribution or Wealth Transfers?

Lande argues that when congress passed the antitrust law the primary objectives were of a "distributive rather than of an efficiency nature"[83]. Although Lande does not believe that the Sherman Act was to be a protection of the poor per se, he demonstrates that Congress was principally concerned with "preventing unfair transfers of wealth from consumer to firms with market power"[84]. Congress, in Lande's view, identified certain "transfers of wealth that it considered inequitable"[85]. This paper generally agrees with that statement. However, there is an important distinction to be made here between this article and the views of Professor Lande. Lande makes a distinction between wealth *transfers* and wealth *distribution*. In his opinion the law should be concerned with the former and not the latter.

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[83] Lande, *Supra note 34,* at 68
[84] Lande, *Supra note 34,* at 68
[85] Lande, *Supra note 34,* at 69

He rests this argument on an example of theft. In *"The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency"*[86] Lande and Kirkwood urge the reader to think of a robbery in which a thief steals from a victim[87]. Lande and Kirkwood argue that the respective wealth of the two individuals involved is "not connected to our decision to make theft illegal"[88]. And that the wealth of the parties does not provide a justification for the thief's actions. Therefore:

> *"Stealing is an unfair taking of property, an unfair transfer of wealth. The law properly focuses on the taking, not the distribution of wealth"* [89]

This paper however argues that the concern was one of wealth *distribution.* The concern over wealth *transfers* was because of the distributional effects associated with it. More shall be said on that point below. However, at the outset it is worth stating that the hypothetical provided by Lande and Kirkwood is somewhat puzzling.

Theft is an example of a wealth transfer that has not been consented to by the victim. Antitrust is concerned with consensual property transfers. The distinction is important because society approaches the issue of wealth distribution differently in the two cases. Lande and Kirkwood are right when they say that the relative wealth of the parties is not relevant in the case where the wealth transfer is without one's consent. However, on the other hand, consensual wealth transfers are governed by considerations of wealth distribution. This is quite easy to see when one thinks of the purpose of charity. Many people consensually give charitable donations

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[86] Kirkwood and Lande, "The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency", 84 Notre Dame L. Rev. 191 (2008)
[87] *Id.* at 200
[88] *Id. at* 200
[89] *Id. at* 200

to people worse off than themselves *without expecting something in return.* They do this with the active purpose of distributing wealth more fairly. On the other hand, when dealing with people of a similar level of wealth there must be reciprocity in our transfers. There must be consideration on both sides to make a valid contract. Thus demonstrating that when wealth is distributed more equally, the participants in a transfer of property, want to keep that balance. Therefore, Lande and Kirkwood's reliance on an unconsensual wealth transfer is misplaced in the field of antitrust which is concerned with consensual wealth transfers. Furthermore, the history of the early antitrust law demonstrates a concern for wealth distribution specifically.

**b) <u>Public Opinion and Background</u>**

The Sherman Act was set in a background where "the general problem of poverty"[90] was "a great concern"[91]. Remedies for the low income of farmers "were always being considered" [92]. This problem "was regularly said to be accentuated by the trusts which were accused of dividing the country into two classes: the very rich and the very poor"[93].

The problems of the railroads are a good example of this public concern. The eastern sponsored railroads had used diverse techniques to encourage the western farmers to "invest whatever capitol he could mobilize in railroad shares"[94] but "dividends often failed to materialize"[95]. Furthermore, the farmers taxes "were increased to support the indebtedness frequently incurred by the state, county and town as a result of their investments in the same

[90] Letwin, *Supra note 22,* at 225
[91] Letwin, *Supra note 22,* at 225
[92] Letwin, *Supra note 22,* at 225
[93] Letwin, *Supra note 22,* at 225
[94] Thorelli, *Supra note 64,* at 58
[95] Thorelli, *Supra note 64,* at 58

roads"[96]. The prices charged by the railroads also soon became a cause of concern. Simultaneously, the farmer "was largely dependent upon the roads for the transportation of his produce. But he soon came to their rates as arbitrary and unreasonable"[97].

Due to these concerns for wealth distribution the farmers turned to political means. However, they felt that they were "poorly represented in state and national legislators"[98]. As a result, they found a political mouth through the Granger Movement. This was an organization based on lobbying for famer's social, political and economic rights. The Granger Movement's popularity grew rapidly and by October 1875 the membership totaled 758,767 and more than 19,000 local granges according to Buck, "The Granger Movement" (1913)[99]. The Granger Movement became "the dominant pressure group in many localities. In several instances granger chapters spurred the formation of so called Independent, Reform and Antimonopoly parties"[100]. Furthermore, the Granger Movement had initial success in securing law to "regulate public carriers and sometimes grain elevators. This legislation became popularly referred to as Granger Laws"[101]. These laws had as their focus the limitation of prices and rates in an attempt to prevent an unfair distribution of wealth. Prominent examples of granger laws included Illinois law of 1869, which ordered the railroad "rates be just, reasonable and uniform"[102]. The constitution of Illinois 1870 Act article 11 sec 15 was also passed "to correct abuses and to prevent unjust discrimination and extortion in the rates of freight and passenger tariffs"[103]. Overall the granger laws "sought to establish schedules of maximum rates through commission

[96] Thorelli, *Supra note 64,* at 58
[97] Thorelli, *Supra note 64,* at 58
[98] Thorelli, *Supra note 64,* at 58
[99] Thorelli, *Supra note 64,* at 58
[100] Thorelli, *Supra note 64,* at 59
[101] Thorelli, *Supra note 64,* at 59
[102] Thorelli, *Supra note 64,* at 59
[103]Thorelli, *Supra note 64,* at 59; Constitution of Illinois, 1870, Art. XI, Sec 15

proceedings or by direct legislation, prohibited a greater charge for a short a hawl than for a long one"[104].

Other complaints were lodged against the trusts by the agrarian population. The farmers were also "discontented with the products of agricultural machinery and other manifested goods needed by him"[105]. They believed that tariffs operated to protect manufacturers who "were not passing on to him a fair portion of the economies effected by the new methods of production of the day"[106]. Frequently the anger of the farmers was directed against the local storekeepers and farm implements dealers or agents who "were believed to charge extortionate margins"[107]. Acting through the local granges famers made "concerted efforts to lessen their dependence on manufacturers and middlemen by the formation of producers and consumer cooperatives"[108]. All of these concerns came when the "prices of farm products fell sharply"[109] and "it became increasingly difficult to pay the high interest exacted on loans"[110]. Thorelli points to increased interest rates as high as 15%[111]. The dangerous interest on farmers was quoted by Mr Fithian who quoted figures on the amount of Farm mortgages and interest, then asked the question "what is to become of the agricultural interests of this country if something Is not done, and that speedily, too, for its relief?"[112]. This fact has led some commentators, such as DiLorenzo, to

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[104] Thorelli, *Supra note 64,* at 59
[105] Thorelli, *Supra note 64,* at 60
[106]Thorelli, *Supra note 64,* at 60
[107] Thorelli, *Supra note 64,* at 60
[108] Thorelli, *Supra note 64,* at 60
[109] Thorelli, *Supra note 64,* at 61
[110] Thorelli, *Supra note 64,* at 61
[111] Thorelli, *Supra note 64,* at 61
[112] 21 Cong. Rec. 4103 (1890) (Statement of Sen. Fithian)

exclaim that the Sherman Act was not a response to public concerns but was a response to the private interests of a successful lobbying group, the farmers[113].

However, commentators who say that the Sherman Act was a response to the interests of the farming population seem to miss an important historical point. It was not only the farming population that was interested in seeing income being directed away from the trusts and monopolies. This was an interest that was held by the wider population. Such sentiment was reflected in the popular writings of the day. Particularly, the threat of unequal *distribution* of wealth was present in these materials.

The "most comprehensive, and perhaps most widely read commentary around the turn of the century was the 760 page "Treatise on the Laws of Monopolies and Industrial Trusts" written by Beach in 1898"[114]. The danger portrayed in this was that the trusts were characterized by "their tendency to make the distribution of personal income ever more unequal and to undermine the middle class by absorbing small and medium sized business"[115]. This was "especially deplored"[116]. This sentiment was reflected in the writing of other leading publicists of the time. Hugh H Lusk for example claimed that the trusts were "using dynamite, arson and murder to get rid of competitors" and "enrich the already rich by robbing the poor"[117]. Other writers such as Henry George, in the "*Progress and Poverty*" (1880) believed that it was "an indictment of an economy allowing the ever-increasing concentration of wealth and resource in the hands of a steadily smaller number"[118]. Equally, Lloyd wrote how the "methods by which the Vanderbilts,

[113] DiLorenzo, "The Origins of Antitrust: An Interest Group Perspective", International Review of Law and Economics (1985)
[114] Thorelli, *Supra note 64*, at 327
[115] Thorelli, *Supra note 64*, at 327
[116] Thorelli, *Supra note 64*, at 327
[117] Thorelli, *Supra note 64*, at 333
[118] Thorelli, *Supra note 64*, at 133

Goulds, Fields, Rockerfellers, Mackays, Floods, O'Briends, and the coal and iron and salt pashas are keeping enormous fortunes are methods, not of the creation of wealth but of the redistribution of wealth of the masses into the pockets of the monopolist"[119]. Similarly, the "Greenback and Antimonopoly Parties" in 1884 demonstrated the same concerns. The parties candidate Ben Butler declared "his hostility to monopolies in commerce, industry and land and singled out the railroads that charged excessive rates"[120]. Of course, other political parties picked up on this sentiment. The Democrats believed that:

> *"judged by Democratic principles, the interests of the people are betrayed, when, by unnecessary taxation, trusts and combinations are permitted and fostered, which, while unduly enriching the few that combine, rob the body of our citizens."*[121]

The public were concerned with the division of society between the rich and poor. The sentiment was that wealth should not be allowed to accrue in the hands of some but not others. Therefore, the transfer of wealth from the public to the monopolists was criticized not because it was an *unconsensual transfer* as Lande and Kirkwood would argue, but because such wealth transfers exacerbated the problems of unequal wealth distribution.

### c) Legislative Intent

The legislative history of the Sherman act also demonstrates this concern. Although, arguably the knowledge of how trusts and monopolies could demand higher prices for products was not fully

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[119] Thorelli, *Supra note 64*, at 134; Henry D. Llord, "Lords of Industry", 138 North Am. Rev. (June, 1884), 535-53
[120] Letwin, *Supra note 22*, at 234
[121] Kovaleff, "Business and Government During the Eisenhower Administration: A Study of the Antitrust Policy of the Justice Department", 3-4, Ohio University Press, (1980)

understood until much later, the legislative history demonstrates that Congress was aware that trusts and monopolies should be condemned because they "had enough market powers to raise prices and unfairly extract wealth from consumers turning it into monopoly profits"[122].

Professor Lande has argued that the Sherman Act's motivation was a belief that consumers were entitled to own the "quantity of wealth known today as consumer surplus"[123]. Thus monopolies and trusts were condemned for transferring that surplus from the consumer to the producer. As mentioned above, however, Lande does not frame this as an issue about wealth distribution but as wealth transfers. This paper does agree that there was a concern to prevent such wealth transfers. The legislative history clearly supports this view. Senator Sherman termed monopolistic overcharges "extortion which makes people poor"[124]. Mr. Sherman went on to say this extortion was creating "unfortunate victims"[125]. Furthermore, Coke talked of the "robbery"[126] committed by trusts as did Mr Mason[127], and Heard "stolen untold millions"[128]. Representative Taylor believed complained that the beef trust "robs the farmer on the one hand and the consumer on the other"[129]. Representative Culberson also voiced an opinion that by passing the Sherman Act "the people will be protected from less extortion made possible by such contracts"[130] and that "if this measure becomes a law an end may be put to such practices and the people relieved of extortion which the destruction of competition always produces"[131]. Mr

[122] Lande, *Supra note 34,* at 93
[123] Lande, *Supra note 34,* at 96
[124] 21 Cong. Rec. 2461 (1890) (Statement of Sen. Sherman)

[125] 21 Cong. Rec. 2463 (1890) (Statement of Sen. Sherman)
[126] 21 Cong. Rec. 2461 (1890) (Statement of Sen. Coke)
[127] 21 Cong. Rec. 4100 (1890) (Statement of Rep. Mason)
[128] 21 Cong Rec 2461 (1890) (Statement of Rep. Heard)
[129] 21 Cong. Rec. 4098 (1890) (Statement of Rep. Taylor)
[130] 21 Cong. Rec. 4089 (1890) (Statement of Rep. Culberson)
[131] 21 Cong. Rec. 4090 (1890) (Statement of Rep. Culberson)

Henderson, commenting on that "damnable system"[132], the "Beef Trust" in Chicago, noted that the price of cattle had been steadily reduced yet "at the same time they have been enabled to keep up the price of every beef-steak that is used in this country"[133] allowing further wealth transfers. The words that that these legislators used, i.e. rob, extortion, steal, do give rise to the contention that the Sherman Act was to prevent wealth transfers.

Although this paper agrees with that principle it asks the further question of why wealth transfers were seen as so abominable? The answer reflected in the history is that such wealth transfers exacerbated the unequal distribution of wealth in society and the poverty that comes associated with it.

Senator Sherman believed that reason "all struggles for money or property, must be governed by the universal law that the public good must be the test of all"[134]. Similarly, Sherman believed that the trusts "increase[d] beyond reason the cost of the necessaries of life" and as a result "they aggregate to themselves great, enormous wealth by extortion which make the people poor"[135]. However, perhaps the clearest expression of Senator Sherman's belief that the legislation was designed to prevent unequal wealth *distribution* came when he said that:

> *"The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth and opportunity that has grown within a single generation out of the concentration of capital into vast combinations"*[136]

[132] 21 Cong. Rec. 4091 (1890) (Statement of Rep. Henderson)
[133] 21 Cong. Rec. 4091 (1890) (Statement of Rep. Henderson)
[134] 21 Cong. Rec. 2463 (1890) (Statement of Sen. Sherman)

[135] 21 Cong. Rec. 1768 (1890) (Statement of Sen. Sherman)

[136] 21 Cong. Rec. 2460 (1890) (Statements of Sen. Sherman)

Senator Hoar also demonstrated how the problem of wealth transfers was linked to the problem of wealth distribution when he said described monopoly prices as a:

> "*transaction the direct purpose of which is to extort from the community…wealth which ought to be generally diffused over the whole community"*[137].

One of the reasons laying behind the legislator's fear over wealth transfers was that it would lead to the splitting of society into classes, and thus creating a dichotomy between the rich monopolist on one hand, and the poor working man on the other. Mr Wilson, in talking about the consolidation of land ownership in England, said: "That is the result there of laws establishing privileged classes; just what I am complaining of and arguing against in this country in what I am saying now"[138]. This was a thought concurred with by Mr Fithian who spoke about the farmers that:

> *"see the product of their toil annually taken from them and bestowed upon the favored classes. They begin to think that the government is no longer a government of the masses, but is a government of the classes and is administered upon the good old rule, the simple plan, that they should take who have the power, and they should keep who can"*[139]

Mr Fithian went on to say that the trusts have "taken from our people the wealth that they have produced and placed it in the pockets of the privileged few"[140]. Once again, this demonstrated the danger that wealth transfers would exacerbate the existing problems of wealth distribution.

[137] 21 Cong 2728 (1890) (Statement of Senator Hoare)
[138] 21 Cong. Rec. 4095 (1890) (Statement of Rep. Wilson)
[139] 21 Cong. Rec. 4102 (1890) (Statement of Rep. Fithian)

[140] 21 Cong. Rec. 4102 (1890) (Statement of Rep. Fithian)

Mr Fithian continued this assault against inequal wealth distribution by saying that these privileged few "money-power and blood-sucking vampires [were] tightening their grasp upon the houses"[141]. Whilst the people were engaged in a "desperate struggle to maintain an existence and ward off impending disasters"[142] the combinations "enhance the price of commodities to the people beyond an honest profit"[143]. And as a result the law should put these "swindling combination behind bars"[144].

Not only was this a concern for Congress in the Sherman Act but it was also their concern in other legislation. "The power to arbitrarily control prices and thus exact unjust profits form the people"[145] was clearly expressed in the legislative history of the Clayton act. The returning fear of economic concentration's potential for creating classes between the rich and poor was demonstrated once again. The worry was that the power that the trusts and monopolists had the potential to "divide our people into classes, breed discontent and hatred, and in the end riot, bloodshed and French Revolutions"[146]. Representative Bennet also expressed the desire to "protect the consumers from unfair exploitation"[147] and calls that "the government of the United States has to think about the great group of 140,000,000 consumers and protect them against unjust and exploitation"[148].

Representative Ashurst clearly worried about the lack of equitable distribution and warned against "grabbing and grasping monopolist"[149] who had been allowed "to acquire a

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[141] 21 Cong. Rec. 4102 (1890) (Statement of Rep. Fithian)
[142] 21 Cong. Rec. 4102 (1890) (Statement of Rep. Fithian)
[143] 21 Cong. Rec. 4102 (1890) (Statement of Rep. Fithian)
[144] 21 Cong. Rec. 4102 (1890) (Statement of Rep. Fithian)
[145] 51 Cong. Rec. 9625 (1914) (Statement of Rep Morgan)
[146] 51 Cong. Rec. 15,955 (1914) (Statement of Sen. Baran)
[147] 95 Cong Rec 11,506 (1949) (Rep Bennet)
[148] Hearing before the Subcommittee of the Senate Committee on the Judiciary, 81st Cong, 1st ad 2nd less 140 (1950) at 180.
[149] 51 Cong. Rec. 13,662 (1914) (Statements of Rep. Ashurst)

disproportionate share of the wealth in the Nation"[150] which amounted to "most, if not all, of the property which labor produced"[151]. Mr. Ashurst was clearly concerned about the danger that this caused for the standards of living of the ordinary man:

> "*It is idle merely to say labor has the right to a living and a decent wage unless we supplement that for a living wage. When I use the term living wage, I do not mean a wage which affords bread alone but I mean a wage which will afford proper food, clothing, shelter, some leisure time to devote to the family…"…."for those who with high but baffled ambition invincibly face the isolation and monotony which comes when poverty has deprived life of its sublimity and ideality and reduces it to a remorseless and deadly grind"*[152]

Similar wealth distribution concerns can be seen in the FTC Act 1914 that created the Federal Trade Commission. Congressional motives in "condemning artificially high consumer prices were no different in 1914 then in 1890"[153], as a result "congress's redistributive concerns were paramount"[154]. Thus, the legislative history reveals a concern for the "unfortunate state of the union because fifty men in the US, though interlocking directions, own 40% of the wealth of the country"[155]. Particularly section 5 had as its "overriding goals…the prevention of wealth transfers from consumers relating from unfair methods of competition"[156]. Senator Newlands framed the issue as a concern for "unreasonable and extortionate prices"[157]. Senator Lane identified the danger as "the theft" which robs "the people of this country out of hundreds of

[150] 51 Cong. Rec. 13,662 (1914) (Statements of Rep. Ashurst)
[151] 51 Cong. Rec. 13,662 (1914) (Statements of Rep. Ashurst)

[152] 51 Cong. Rec. 13668 (1914) (Statements of Rep. Ashurst)
[153] Lande, *Suppra note 34,* at *113*
[154] Lande, *Supra note 34,* at 113
[155] Lande, *Supra note 34,* at 119; HRRep No 533 pt 3, 63rd Cong, end Sess 5 (1914) (minority report) (Rep. Lafferty's views)
[156] Lande, *Supra note 34,* at 107
[157] 51 Cong. Rec. 13,233 (1914) (Statements of Sen. Newlands)

millions of dollars each year"[158]. In a similar vein, the Minority Report of the House Committee on Interstate and foreign commerce complained that "the common people and staggering under the burden that they bear as a result of contributing extortionate profits to the trusts and monopolies"[159].

Therefore, it seems clear that the antitrust laws had a strong concern to prevent monopolistic wealth transfers because of their tendency to create an unequal distribution of social wealth.

### ii) <u>Protecting Small Businessmen</u>

#### a) <u>Public Opinion and Background</u>

A related and ancillary concern to the redistribution of wealth was the preservation of "business opportunities for small firms"[160]. Via lowering prices to consumer trusts and monopolies "could financially ruin small business"[161]. The courts have been aware of this concern and occasionally characterized the "congressional interest in protecting small businesses as overriding its consumer–orientated goals"[162]. For example Justice Learned Hand's famous dicta in the Alcoa case that:

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[158] 51 Cong Rec 13,223 (1914) (Statements of Sen. Lane)
[159] Lande, *Supra note 34,* at 114; HRRep No 533 pt 3, 63rd Cong, end Sess 5 (1914) (minority report) (Rep. Lafferty's views)

[160] Lande *Supra note 34,* at 101
[161] Lande, *Supra note 34,* at 102
[162] Lande, *Supra note 34*, at 102-3

*"it is possible, because of its indirect social or moral effect, to prefer a system of small producers…to one in which the great mass of those engaged must accept the direction of a few"*[163].

Similarly, Justice Douglas in *Brown Shoe* who believed that:

*"We cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization"*[164].

Ross described the "revolution in distribution"[165] channels leading up to the passage of the Robinson Patman Act 1936. The rise of the chain store represented a new ways of distributing goods. The chain store "short-circuited the traditional channels through which goods had been distributed"[166]. Retailing was "becoming bigger business with increasing specialization"[167]. The whole process "threatened the smaller, higher-cost retailers…who found themselves bypassed by the new channels[168]. Berger's Statistics indicates that in 1889 about 70% of retail output went through at least a wholesale state, while by 1929 this share had fallen to 60%[169]. Moreover, this statistic "significantly underestimates the decline of independent

[163] United States v Aluminum Co of America, 148 F.2d 416 at 428 (1945)
[164] Brown Shoe Co v United States 370 US 294, 344 [1962]
[165] Ross "Winners and Losers under the RPA", 27:2 Journal of Law and Economics, 243, at 244 (1984)
[166]*Id.*
[167] *Id.* at 245
[168] *Id.* at 245

[169] *Id.* at 245; Harold Berger, "Distribution's Place on the American Economy Since 1868" [1955]

middleman for these figures count manufacturers' warehouses as wholesalers"[170]. On the other hand, Berger explains that the Chain Stores Share of Grocery Store Sales increased from 1899 8.3% to 32.8% in 1929[171]. The effects of the dramatic rise in chain stores were increased sales. For example, the Atlantic and Pacific Tea Company, saw its sales more than quintuple between 1919 and 1929 giving it 11.3% of national grocery and combination store sales[172]. Other large chain stores of the period included J.C.Penny, with 1,452 stores in apparel, Wagreen with 440 stores and L.K.Higger with 549 stores in drugs, F.W.Woolworth with 1,881 stores in Variety and Montgomery Ward with 556 stores in department stores.[173] Trade Groups came to "see the advantages in pushing for legislative relief"[174]. As the 1920s approached these groups "were organized and powerful enough to start a spirited public debate on the chain store problem"[175].

The result was the National Association of Retail Grocers who sought "special taxes for chain stores"[176]. These were enacted in 1927 by Georgia, Maryland and Noah Carolina and "many more soon followed"[177]. The retail Druggists took on the baton of price competition in their industry and lobbied for fair trade laws. "The National Association of Retail Druggists was amazingly successful and "versions of NARD's "model act" were adopted in twenty states; and eventually forty five states passed some sort of fair-trade legislation"[178] until the NRA orders were declared unconstitutional in 1933. After which retailers immediately sought to have their

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[170]*Id. at* 245
[171] *Id.* at 246
[172] *Id.* at 246
[173] *Id.* at 246-7; See FTC Chain Store Report, Growth and Development of Chain Stores, Doc No 100, 72nd Cong, 1st Sess (1932) at 76-77
[174] *Id., at* 246-7
[175] *Id.* at 246-7
[176]*Id.* at 247
[177]*Id. at* 247
[178]*Id.* at 248

protection against chains restored. Representative Wright Patman, who later declared there is no place for Chain Stores in the American system[179], became their champion in Congress.

In sum, during the early part of the 20th century there was a deep concern that small businesses were being threatened. And, specifically before the passage of the Robinson Patman Act, the impetus for the "legislation came from the distributive traders, where a struggle had developed between the old whole-sale-retail-order and the new chain stores systems"[180].

## b) Legislative Intent

Senator Sherman certainly seemed to have an aversion to the loss of the small businessman when he introduced the Sherman Act. He is quoted as saying:

> *"I am not opposed to combinations in and of themselves; I do not care how much men combine for proper objectives; but when they combine with a purpose to prevent competition, so that a humble man starts a business in opposition to them, solitary and alone, in Ohio or anywhere else, they will crowd him down and they will sell their product at a loss or give it away in order to prevent competition…then it is the duty of the courts to intervene and prevent it"*[181].

This sentiment can be found in many places of the legislative history of the Sherman Act. Firstly, the legislative history demonstrates a concern over protecting competition. However, the statements often describe competition in terms of rivalry and protection of competitors. Such as

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[179] *Id.* at 248-9
[180] *Id.* at 243
[181] 21 Cong. Rec. 2569 (1890) (Statement of Sen. Sherman)

Mr. Wilson, who described the Standard Oil trust as being capable of striking "a deadly blow at a rival, which blow might be direct of indirect, by immediate and destructive competition or an unsuspected attack"[182]. Mr. Mason similarly described how the trusts "[had] destroyed legitimate competition and driven honest men from legitimate business enterprises"[183]. Moreover, many statements explicitly demonstrate a concern for *small* businesses. For example, when discussing the "evils" of the trusts, Senator George described how:

> *"it is a sad thought to the philanthropist that the present system of production and of exchange is having that tendency which is sure at some not very distant duty to crush out all small men, all small capitalists, all small enterprises"*[184].

He furthermore stated that, prior to the Sherman Act, "everywhere over our land" we could find the "wrecks of small, independent enterprises"[185].

The provisions of the amendments to the Clayton Act also demonstrate a protection of small businesses. The Celler Kefauver amendment of section 7 of the Clayton Act are "dominated"[186] by concerns of small businessmen. The concerns over economic concentration not only applied to the dangers posed for democracy but posed a danger for every small independent business that their faced being acquired by larger business or being forced out of the market by the larger and more efficient rivals. Furthermore, the Clayton Act prohibits differences

[182] 21 Cong. Rec. 4093 (1890) (Statement of Rep. Wilson)

[183] 21 Cong. Rec. 4100 (1890) (Statement of Rep. Mason)

[184] 21 Cong. Rec. 2598 (1890) (Statement of Sen. George)

[185] 21 Cong. Rec. 2598 (1890) (Statement of Sen. George)

[186] Hovenkamp, "The Robinson Patman Act and Competition: Unfinished Business", 68 Antitrust Law Journal No. 1 at 130 (2000)

in price that might be injurious to competition. According to Ross, this looks, "less like an antitrust measure than like legislated relief for small businesses"[187].

Foer argues that the Clayton Act had another reason for protecting small businesses. During the Great Depression Congress set up the Temporary National Economic Commission. Foer asserts that it was the TNEC's work "that led to the acceptance of the idea that high levels of concentration could be dangerous"[188] because they would allow certain institutions to become "too complexly embedded in the economy"[189] which, if for some reason were to fail, would create large ripple effects throughout the US economy. "And that realization, in 1950, led to modifications of the Clayton Act intended to stop monopolies, or near monopolies, from being formed through mergers".[190] This problem has resurfaced recently and is known as the "Too big to Fail" argument which shall be discussed in the third section of this paper.

The main instrument for the protection of small businessmen however, would appear to be the Robinson Patman Act (RPA). Against the background of the rise of chain stores the RPA was passed into law. The legislative history of this act "makes it clear that its drafters wanted to protect small businesses at the expense of consumers"[191]. It is, therefore, "accepted that the legislative history of the RPA is anticompetitive and excessively concerned with the protection of small business at the expense of more efficient rivals"[192]. This has even been acknowledged recently by Donald S Clark, Secretary of the Federal Trade Commission, saying the RPA act "was to provide some measure of protection to small independent retailers and their independent

[187] Ross, *Supra note 165,* at 243
[188] Foer, "Preserving Competition After the Banking Meltdown" <http://antitrustinstitute.org/archives/files/bank%20meltdown%20article%2012-16-08_121520082145.pdf>
[189] *Id.* at 4
[190] *Id.* at 14
[191] Hovenkamp, *Supra note 186,* at 129
[192] Hovenkamp, *Supra note 186,* at 130

suppliers from what was thought to be unfair competition from vertically integrated, multi-location chain stores"[193].

### iii) Protection of Democracy

#### a) Public Opinion and Background

"Great industrial considerations are inherently undesirable for political as well as economic reasons"[194]. Largely this is because cartels have been seen as "private governments which threaten to subvert and even engulf duly constrained authority"[195].

Prior to the Sherman Act's enactment, work patterns had changed. The traditional independence of entrepreneurs and commercial farmers "gradually changed into interdependence"[196]. As a result "decision making was transferred from traditional power centers to the great industrialists"[197] . There was a popular concern that, as this process of concentration increased and the power of the few men who controlled them followed suit, that there would be

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[193] Clark, Before The Ambit Group Retail Channel Conference for the Computer Industry (1995), <<http://www.ftc.gov/speeches/other/patman.shtm>>

[194]United States v Aluminum Co of America 148 F.2d 416, 428 ( 1945)

[195] Burge, "Cartels: Challenge to a Free World", at 3, Public Affairs Press, 2nd Edition, (1944)
[196] Lande, *Supra note 34,* at 96
[197] Lande, *Supra note 34,* at p100

an overthrow of the democratic regimes. As a result the Sherman Act held "as an end in itself the prevention of accumulation of power by large corporations and the men that controlled them"[198].

The public opinion prior to the passage of the Sherman Act demonstrates this concern. For example, Bryce argued that this process of concentration would "ripen into a new form of tyranny" in which the power of the few monopolists would be so great as to create a totalitarian state[199]. Moreover, Thorelli identifies groups of pre-Sherman Act enactment writers, some of whom he labels "radicals"[200]. In this group, one writer, W.G. Langworthy Taylor, believed that the process of economic concentration "would ultimately result in one giant universal trust"[201] in which men were under the control of commercial dictators. A contemporary radical of his was William Grinell who went even further to claim that the "process of universal consolidation would lead to more imperialism"[202] and eventually, "a great war"[203] when the public resisted the attempts of the trusts and monopolists.

Of course, totalitarianism by *private* interests was not the only threat to the current democratic regime arising out of economic concentrations. Walter Lippmann, cited by Pitofsky[204], argued that governments may respond to the trust problem in an antidemocratic fashion. He said that so much power would "never for long be allowed to rest in private hands"[205] and therefore, such power would require governmental regulation and the end of the

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[198] Lande, *Supra note 34, at* p96

[199] Thorelli, *Supra note 64,* at p54; James Bryce, "The American Commonwealth", vol 2, at 407 (1888)

[200] Thorelli, *Supra note 64,* at 332
[201] Thorelli, *Supra note 64,* at 333
[202] Thorelli, *Supra note 64,* at 333
[203] Thorelli, *Supra note 64,* at 333
[204] Pitofsky, "The Political Content of Antitrust", 127 University of Pennsylvania Law Review 1051 at 1062,(1979)
[205] *Id.*

free market. Therefore, concentration represents "the road to the politically administered economy of socialism"[206]. Such nationalization was a realistic possibility at the time. In fact, some were even advocating it. At the American Antitrust League's second Chicago Conference[207] a "majority of the speakers…declared themselves in favor of government ownership of public utilities"[208]. Therefore, the Sherman Act's "thrust was positive: the maintenance of free competitive markets and a democratic system of industrial control"[209].

Although the danger that the trusts presented to the foundation of democracy, the less worrisome but more realistic danger was that trusts would prevent the optimal functioning of democracy through a process of bribery and influence on politicians and other important officials. Thorelli, points to how the "agents of the railroads bribed the authorities commissioned to regulate rates, and sought to get friendly legislation enacted or "reliable" commissioners appointed"[210]. Thorelli went on to conclude that "by these and similar means the railroads were successful in getting the repeal within a few years after enactment of the Granger Laws in Minnesota and Wisconsin"[211] (discussed further below). Although some believed that "the fault seems to be rather with the legislature and the character of the men whom we, the public send to them, or with our ethical and social standards, than with cooperations as such"[212], the worry that through pressure and bribery the interests represented in democracy would be somewhat skewed was undeniably present.

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[206] *Id.*
[207] Thorelli, *Supra note 64,* at 338
[208] Thorelli, *Supra note 64*, at 338
[209] Burge, *Supra note 195*, at 1-2
[210] Thorelli, *Supra note 64,* at 60
[211] Thorelli, *Supra note 64,* at 60
[212] Thorelli, *Supra note 64,* at 325; Jenks, "The Trust Problem"

Another danger was that the trusts presented a threat to equality between citizens. One of the foundational points of a democratic system is the belief that all who participated will be treated equally. Of course, when the concentration of capitalist interests reaches to such a level that some interests are more noticed in the legislator the equality of people in determining the future of political life is vitiated. The worry that trusts posed to equality was reflected by concerns of the public at the time. "Trusts and monopolies and their defenders stand for special privileges too few and unequal opportunities to the money"[213]. Similarly, the labor leaders at the Chicago Conference (mentioned above) believed that the "trusts denied the individual the right to equal opportunity and freedom of enterprise"[214].

### b) **Legislative Intent**

#### i) Freedom

The legislative history of the Sherman Act is very revealing in its concern for upholding the individual's freedom and preventing political subjugation at the hands of trusts and monopolies. Mr Wilson, quoting from the Baltimore Sun, narrated the danger that if such trusts were allowed to "thrive and become general" the trend would "inevitably lead to the oppression of the people and ultimately to the subversion of their political rights"[215]. Similarly, Mr Heard in the House of Representatives said that he was "animated by a desire to secure for our people relief from the most odious despotism of monopoly" and that "in the absence of legislation of a national

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[213] Thorelli, *Supra note 64*, at 337

[213] Thorelli, *Supra note 64,* at 347; Attorney General EC Crow of Missouri and Govenor Hazen S Pingree of Michigan; Chicago conference on trusts, "Speeches, debates and Resolutions, lists of delegates committees" etc (1990) 464-5;

[214] Thorelli, *Supra note 64,* at 347

[215] 21 Cong. Rec. 4097 (1890) (Statements of Rep. Wilson)

character"[216] there would continue to be the "power to oppress"[217]. The language of "oppression" was used by many other Senators and Representatives during the passage of the Sherman Act. Mr Rogers proclaimed the need to be "freed from the oppression of the trusts"[218]. Representative Culberson also spoke about how the trusts and combinations "are devouring the substance of the people" and how the "country may be effectually suppressed"[219]. Legislation was needed in his opinion so that "the people can be relieved of the outrages inflicted upon them"[220]. Similarly, Mr Wilson, feared the potential "oppression and detriment of the people"[221].

The statements made in Congress at the time of the passage of the Clayton Act, are equally explicit. During the consideration of this act Mr Ashurst, talking on the value of industrial liberty, explained that the Clayton Act's provisions:

> *"demand social justice and industrial liberty for those persons without whose industry, resoluteness, patience, sacrifices…we could never have mastered the mechanical arts and the physical sciences. This bill secures a measure of social justice and industrial freedom for those who amid the thud of the drill and the rising and falling of picks and shovels in the mines dig our copper ore….for the common good of all"*[222]

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[216] 21 Cong. Rec. 4101 (1890) (Statement of Rep. Wilson)

[217] 21 Cong. Rec. 4101 (1890) (Statement of Rep. Wilson)

[218] 21 Cong. Rec. 4102 (1890) (Statement of Rep. Heard)

[219] 21 Cong. Rec. 4091 (1890) (Statement of Rep. Culberson)

[220] 21 Cong Rec. 4091 (1890) (Statement of Rep. Culberson)

[221] 21 Cong. Rec. 4093 (1890) (Statement of Rep Wilson)

[222] 51 Cong. Rec. 13,666 (1914) (Statement of Rep. Ashurst)

Mr Ashurt also stated that "the humanitarian spirit that is pervading our nation and the demand for social justice which has taken hold of the hearts of men and women"[223] was embodied in this legislation. Finally, Congressman Stevens similarly said that when "power has become so concentrated" the result "may be potential source of injury and oppression" [224].

ii) Government

The legislators were also troubled by the threat trusts and monopolies presented to the current form and shape of democratic governance. Pitofsky believes that Congress, in its antitrust laws, demonstrated a "clear concern that an economic order dominated by a few… [would] facilitate the overthrow of democratic institutions"[225]. The result that was feared was the creation of "a totalitarian regime"[226].

Senator Sherman seemed aware that these subversive groups of men could drastically impede the workings of a free government. John Sherman, said that we must "heed [the voters'] appeal or be ready for the socialist, the communist and the nihilist. Society is now disturbed by forces never felt before"[227]. After all, the power of the combinations already was at such a level to allow them to "defy our control"[228]. In a frequently quoted passage Senator Sherman said that:

[223] 51 Cong. Rec. 13,668 (1914) (Statement of Rep. Ashurst)

[224] 51 Cong. Rec. 14,938 (1914) (Statement of Rep. Stevens)
[225] Pitofsky, *Supra note 204,* at 1053-4
[226] *Id.*

[227] 21 Cong. Rec. 2460 (1890) (Statement of Sen. Sherman)
[228] 21 Cong. Rec. 2460 (1890) (Statement of Sen. Sherman)

*"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 the power to prevent competition and to fix the price of any commodity"*[229].

Senator Sherman also quoted from *Richardson v Russell. A Alger*, in which the Supreme Court of the State of Michigan per Sherwood CJ said that:

*"Monopoly in trade, or in any kind of business in this country is odious to our form of government. ... This tendency [is] destructive of free institutions and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the Federal Constitution …Indeed, it is doubtful if free government can long exist in a country where such enormous amounts of money are allowed to be accumulated in the vaults of corporations, to be used at discretion in controlling the property and business of the country against the interests of the public and that of the people the personal gain and aggrandizement of a few individuals…It is always destructive of individual rights and of that free competition which is the life of business, and it revives one of the great evils which it was the object of the framers of our form of government to eradicate and prevent"* [230.]

Continuing this theme, Senator Sherman also cites a case, *Pennsylvania v Carlisle,* in which Judge Gibson, said that:

*"a combination is criminal whether the act to be done has a necessary tendency to prejudice or to oppress individuals by unjustly subjecting them to the power of the*

[229] 21 Cong. Rec. 2457 (1890) (Statements of Sen. Sherman)
[230] 21 Cong. Rec. 2458 (Statement of Sen. Sherman); According to Sen. Sherman this case was filed on Nov 15, 1889

*confederates, and giving effect to the purpose of the latter, whether of extortion or of mischief"*[231].

Senator Sherman's concern was that the trusts had the ability "to dissipate the powers of the government into thin air"[232]. A concern that he reaffirmed when he said that without the power to regulate these combinations and monopolies:

> *"the Government could scarcely deserve the name of a national government and would soon sink into discredit and imbecility. It would stand as a mere shadow of sovereignty to mock our hope and involve us in a common ruin"*[233].

On the point of danger to government, Senator Teller noted the possibility that the trusts may in fact *already* exercise control over the democratically elected governments. In response to a question posed in the House of Representatives that "suppose the trusts control the States?" Mr Teller agreed that:

> *"These combinations have, of course, become very powerful; they have vast sums of money at command and generally a vast army of people engaged in connection with them whose interests are with them, and of course they have become powerful"*[234].(Although Representative George did go on to say that the individual States could still help control the trust problem).

[231] 21 Cong. Rec. 2459 (1890) (Statement of Sen. Sherman)
[232] 21 Cong. Rec. 2461 (1890) (Statement of Sen. Sherman)
[233] 21 Cong. Rec. 2461 (1890) (Statement of Sen. Sherman)
[234] 21 Cong. Rec. 2560 (1890) (Statements of Sen. Teller)

However, it is the Clayton Act, according to Pitofsky that “most clearly”[235] demonstrates the need to protect democracy. This congressional concern can be seen in the amendment of s7 of the Clayton Act in 1950. This section of the Clayton Act outlaws mergers the effect of which “may be substantially to lessen competition, or tend to create a monopoly”. According to Pitofsky, the legislative history of this section demonstrates some of the concern for the political implications found in the amendment. Pitofsky points to comments made by Celler, one of the amendment’s co-sponsers who associated the dangerous trend in industrial combinations with the rise of Hitler and National Socialism in Germany. He alleged that Germany, under Nazism, “built up a series of industrial monopolies in steel, rubber, coals and other material. The monopolies soon got control of Germany, brought Hitler to power and forced virtually the whole world into war”[236].

The alternative threat of socialism was also present in congressional debate. Senator Kefauver, the bills other cosponsor, seemed aware to this danger when he said that:

> *“the concentration of great economic power in a few corporations necessarily leads to the formation of large nation wide unions. The development of the two necessarily lends big bureaus in the government to deal with them”*[237].

He finished by saying that such concentration “either results in a fascist state or the nationalization of industries and thereafter a socialist or communist state”[238].

[235] Pitofsky, *Supra note 204,* at 1053-4
[236] Pitofsky, *Supra note 204,* at 1062
[237] Pitofsky, *Supra note 204,* at 1062
[238] Pitofsky, *Supra note 204,* at 1062

iii) Equality

The Sherman Act's legislative history also points to the need to protect equality of rights and privileges between the citizens. Mr Fithian stated that the present "government is ceasing to be the government of the people, for the people, but is becoming a government of the classes, for the class, and by the class"[239]. He went on to say that there was a need for "equal and exact justice to all"[240]. Quoting a letter from a constituent he talks about the "unjust and unreasonable" privileges of the trusts and which goes on to say that "it looks like a fiction in the land of the free"[241]. As a result he not only states his awareness of the "strong tide setting in favor of home, justice and rights" but decrees the public demand of "special privileges and immunities to none"[242] is a "just and reasonable demand"[243]. Equally Senator Sherman pronounced that:

> "*it is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances. This is industrial liberty and lies at the foundation of the equality of all rights and privilege"*[244].

The need to preserve equality before the law was present in the passage of the Clayton Act 1914 as well. It was felt that the law "was intended to be used to curb monopolies and to preserve

[239] 21 Cong. Rec. 4103 (1890) (Statement of Rep. Fithian)

[240] 21 Cong. Rec. 4103 (1890) (Statement of Rep. Fithian)
[241] 21 Cong. Rec. 4103 (1890) (Statement of Rep. Fithian)
[242] 21 Cong. Rec. 4103 (1890) (Statement of Rep. Fithian)
[243] 21 Cong. Rec. 4103 (1890) (Statement of Rep. Fithian)
[244] 21 Cong. Rec. 2457 (1890) (Statement of Sen. Sherman)

equality of opportunity among the American people"[245]. Mr  Ashurst reaffirmed this ideal by saying that:

> *"I take my stand for the humanitarian policy of dealing equitably and with strict justice towards those whose grime and sweat, blood and toil have built up our splendid civilization"[246].*

Furthermore, the "shining goal"[247] of equality was constantly being "retarded"[248] by an:

> *"aristocracy of blood, insolently assuming the dynastic right of perpetual dominion; [or] sometimes an aristocracy of learning, solemnly averring itself the sum and substance, the beginning and the end of knowledge and wisdom"[249].*

This paper's belief that the concern for democracy is fundamental goal of antitrust is another distinguishing mark from the views of Professor Lande who attributes no real significance to this point.

### iv) Combination with other major political issues

[245] 51Cong. Rec. 13666 (1914) (Statement of Rep. Ashurst)

[246] 51 Cong. Rec. 13668 (1914) (Statement of Rep. Ashurst)
[247] 51 Cong. Rec. 13668 (1914) (Statement of Rep. Ashurst)
[248] 51 Cong. Rec. 13668 (1914) (Statement of Rep. Ashurst)
[249] 51 Cong. Rec. 13,668 (1914) (Statement of Rep. Ashurst)

It is also worthy to note that the political content of early antitrust law was not confined simply to the antitrust laws. The great political problems of a period "are not so easily isolated"[250] and therefore, the "true importance of the monopoly problem in public opinion is more nearly revealed by how much it pervaded the discussion of the leading political questions of those year"[251]. Importantly, the political concerns of over the tariff debate were "regularly infiltrate[d]"[252] by discussion of the trust. For example, when Representative Randall announced that the revenue bill he was introducing would, among other things, set a high duty on steal nails, those who saw in his proposal the hand of the Iron and Steel Association promptly labeled it "an ill for the perpetuation of trusts"[253]. Similarly, Mr. Wilson, on the McKinley tariff, said that said this would allow the trusts more power. On that point Mr. Wilson said that "instead of keeping out the lion, Brother McKinley comes opening the door and says let him in, and then we are going to chase him around and try to get him out again"[254].

Other political questions such as how to improve federal regulation of railroads were largely concerned with whether "pools"[255] should be allowed, and it was repeatedly said that these would produce the same monopolistic combinations so much objected to when they took the form of trusts[256]. Further combination of political issues came in the debate over patents. It was perceived that monopolists and trusts would attempt to extend the patents granted over products by "fake or insignificant improvements"[257] and "thereby perpetuating legal monopolies

[250] Letwin, *Supra note 22,* at 225
[251] Letwin, *Supra note 22,* at 225
[252] Letwin, *Supra note 22,* at 225
[253]; Letwin, *Supra note 22,* at 225; NY Times p5 Col 1 March 6, 1988
[254] 21 Cong. Rec. 4096 (1890) (Senator Rep. Wilson).
[255] Letwn, *Supra note 22,* at 225
[256] Letwin, *Supra note 22,* at 225
[257] Thorelli, *Supra note 64,* at 62

in a manner never intended by the legislator"[258]. The fear was that "principles so old…are being monopolized by letters patent, until a merchant or farmer, if he puts a handle in a hatchet, a hoe or a rake, as changes the arrangement of a harrow, plow, churn or washboard must expect to have a sharp spectacular call upon him for royalty for an infringement upon his patent"[259].

It would appear therefore, that the nature of the trust debate therefore seeped into many other politically sensitive debates of the time. Therefore, today, when interpreting antitrust law, students must be aware of how other non-antitrust, non-efficiency based legal issues are still of concern to antitrust law.

## Part 2: The Impact of the Presidential Administration

### a) Antitrust Policy

So far, this paper has argued that the there have been political factors that have motivated antitrust legislation. However, another factor to consider when exploring the proper goals of antitrust is the importance of the policies of successive political administrations. The federal antitrust enforcement agencies are "led by political officials"[260]. The Antitrust Division is part of the Department of Justice and is headed up by the Assistant Attorney General, who in turn is accountable to the Attorney General. Similarly, the Chairman of the FTC is selected by the President. And finally, the Justices on the Supreme Court are nominated by the President. This

[258] Thorelli, *Supra note 64,* at 62
[259] Thorelli, *Supra note 64,* at 62
[260] McChesney, "Do Politics Corrupt Antitrust? Economics versus Politics in Antitrust", 23 Harv. J.L. & Pub. Pol. 133 (1999)

provides the political administration a lot of control over the direction of antitrust policy. As a result "no serious student of antitrust…is unaware of the periodic, sweeping changes in philosophy and emphasis that have characterized public competition policy over the past century".[261] These "ideological swings"[262] require exploration to demonstrate the affect that the administration can have on the course of antitrust law.

However, at the start it is important to note there are some limitations on the Presidents ability to change the direction of antitrust policy. Largely this is due to the importance of the staff of the Antitrust Division and the Federal Trade Commission. As Weavers discusses, the staff of the federal agencies enjoy a considerable amount of independence and "the lawyers believe they are their own busses when it comes to recommendations about whether the results of an investigation warrant prosecution"[263]. Similarly, it must be noted that the amount of private litigation in antitrust is a limit to the president's power to influence the direction of antitrust law.

Despite these limitations it is clear that the activity of the president can change the substance of antitrust policy and that the goals of antitrust law change with executive.

### b) <u>The First Three Presidents</u>

[261] Kovacic, "Built to Last? The Antitrust Legacy of the Reagan Administration" 35 Fed. B. News & J. 244 at 245 (1988)

[262] Balto, "Antitrust Enfocement in the Clinton Administration" 9 Cornell J.L. & Pub. Pol'y 61 at 62 (1999)

[263] Weavers, "Decisions to Prosecute: Organization and Public Policy in the Antitrust Division", Massachusetts Institute of Technology Press 55 (1977)

The first three Presidents to preside over the Sherman Act and the early antitrust legislation were all "personally rather indifferent"[264] to the trust problem. The goals that were pursued through the law, if any, were vague and undefined.

### i) Harrison

The indifference began with President Benjamin Harrison whose campaign speech contained "no reference to the trust problem, and his inaugural address made only vague references to the abuses of corporate power"[265]. There is "no evidence"[266] that he took any interest in enforcement of the law. His Secretary of State "declared that trusts were mainly private affairs with which neither the President nor other outsiders had any particular right to interfere"[267]. He went on to claim that "congress could not constitutionally dissolve the trusts"[268]. Harrison's treasurer was William Windom who had previously headed one of the "early committees investigating need for federal regulation of the railroads"[269]. But, as Treasurer he "made no attempt to utilize the enforcement of either the interstate commerce of the antitrust before his law"[270].

The Attorney General Miller did originally appear to enforce the law more vigorously than his other cabinet members. Miller is quoted telling "district attorneys to prosecute

[264] Thorelli, *Supra note 64* at 370
[265] Thorelli, *Supra note 64,* at 371
[266] Thorelli, *Supra note 64,* at 371
[267] Thorelli, *Supra note 64,* at 372; Speech in Portland, Maine, Aug 15, 1888 of 5 Public Opinion 425

[268] Thorelli, *Supra note 64,* at 372; "Mr Blaine on Trusts" Speech at Dover, Main.

[269] Thorelli, *Supra note 64,* at 372
[270] Thorelli, *Supra note 64,* at 372

vigorously"[271] because trusts and monopolies "are great abuses, and if the law can be made to reach them, it is the duty of the law officers of government… to punish the wrongdoer"[272]. Still, however, only seven cases were investigated during the 32 months of the Harison administration after the passage of the Sherman Act[273]. Of which only three were concluded during this period[274]. Of those three, "only the Tennessee Coal case…resulted in victory for the government"[275]. The government "made no attempt to take any case to the Supreme Court"[276]. Furthermore, the attention to detail that the administration displayed over the early antitrust litigation demonstrated a low level of concern for the outcome. One example is the Whisky Trust Case where a district attorney in Boston advised Miller that he thought he had a case against the distilling and cattle feeding company. Miller believed him and went as far as to say that "if this was not within the antitrust law then it would be impossible to define what would be a violation of that law"[277]. Despite this and despite "a special agent of the Department" who "spent many weeks hunting up the facts pertaining to the business of this concern"[278] the principal indictment in the case "was quashed for the insufficiency of evidence"[279]. Similarly, the government was confronted with a trust in Chicago within the territorial jurisdiction of the Chicago Court of

[271] Thorelli, *Supra note 64,* at 375
[272] Thorelli, *Supra note 64,* at 375; Letter from Miller to District Attorney Thomas Milchrist in Chicago of July 2 1891
[273] Thorelli, *Supra note 64,* at 376
[274] Thorelli, *Supra note 64*, at 376

[275] Thorelli, *Supra note 64,* at 376; These figures are based on the so called Blue Book i.e. "The Federal Antitrust Laws, with sumery of cases by the United States" complained by the DoJ and the Commerce clearing House and published by the CCH (1949)

[276] Thorelli, *Supra note 64,* at 376
[277] Thorelli, *Supra note 64,* at 376
[278] Thorelli, *Supra note 64,* at 377, "Annual Report of the Attorney General of the United States for te Year 1982" (1982) p19
[279] Thorelli, *Supra note 64,* at 377

Peoria, “where all the archives of the combination were kept and where it had its inception”[280]. However, “rather than brining the case in Chicago, where the construction documents were kept and where [the trust] had its conception, the government went way down to Boston”[281]. Matilda Gresham explained that this was “just another insistence of the almost complete lack of coordination of antitrust enforcement at the time”[282]. Judge Nelson went on to say that the “indictment in this particular is clearly insufficient according to the elementary rules of criminal proceedings”[283]. “Furthermore, in the Sugar Trust Prosecution, President Harrison “was loath to go against the sugar trust” and was “forced” by pressure[284]. Overall, the Harrison administration displayed “a shocking lack of interest”[285] in the enforcement of antitrust policy.

**ii) <u>Cleveland</u>**

President Cleveland’s second term in office demonstrated a similar lack of enthusiasm for antitrust law. After a “brief mention”[286] to antitrust policy in his inaugural address he was “not to give any attention whatever”[287] in public speeches or messages to the legislature until his final

[280] Thorelli, *Supra note 64,* at 377
[281] Thorelli, *Supra note 64,* at 376
[282] Thorelli, *Supra note 64,* at 377; Matilda Gresham, “Life of Walter Quinton Gresham 1832-1895” Vol 2 (1892)

[283] Thorelli, *Supra note 64,* at 376;

[284]Thorelli, *Supra note 64,* at 378; Gresham, *supra note* 282
[285] Thorelli, *Supra note 64,* at 380
[286] Thorelli, *Supra note 64,* at 380
[287] Thorelli, *Supra note 64,* at 380

three months in office. Although he recognized the "widespread and deep seated aversion to trusts"[288], his administration brought "a mere handful of suits"[289] and "all of which related to labor rather than business combinations"[290].

His cabinet also demonstrated a business-friendly roster. Lamount, the Secretary of War was "quite close to business ad financial circles in New York, notably to William C Whitney who had been secretary of the Navy in Cleveland's first administration but who had gained as much or more fame as a large scale manipulator of finance and utilities"[291]. It seems "easy to believe"[292] that if such business influences over the executive would have been able to "counteract any aggressive policy of trust busting had such a policy been contemplated"[293].

More worrying was President's Cleveland's choice of Attorney General, Richard Olney. Olney had previously "made himself known in businesses circles as an extremely able corporation lawyer, especially in the railroad field, and he was unwilling to risk a break in his business connections"[294]. His concern for his links to business can be seen in his letter to Charles Perkins, President of Chicago Burlington and Quincy Railroad, a corporation for whom Olney was serving as counsel, asking where he would "stand with my clients"[295] and if it would "be in the trust interests"[296] if he should accept the Attorney General position. His views on the government's role in business would seem to be even more anti-antitrust. To him, the government "is not paternal in character"[297]. He also viewed that "all ownership of property"[298]

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[288] Thorelli, *Supra note 64,* at 380
[289] Thorelli, *Supra note 64,* at 381
[290] Thorelli, *Supra note 64,* at 381
[291] Thorelli, *Supra note 64,* at 382
[292]Thorelli, *Supra note 64,* at 382
[293] Thorelli, *Supra note 64,* at 382
[294] Thorelli, *Supra note 64,* at 383
[295] Thorelli, *Supra note 64,* at 383
[296] Thorelli, *Supra note 64,* at 383
[297]Thorelli, *Supra note 64,* at 385; Letter Olney to DS Alexander DA of May 1893

is "of itself a monopoly"[299], and that "every business contract or transaction may be viewed as a combination within more or less restraints some part or kind of trade or commerce"[300]. This would appear to suggest a belief that the activities of the trusts and monopolies were normal and not to be condemned for being out of line with common practice. Then Olney went on to state that the railroad trusts, that had been much complained of by the farmers as shown earlier, "were not within the purview"[301] of the Sherman Act. When the government finally came to victory over the labor conspiracy of the workingman's Amalgamated Council Olney remarked how this case could be used in "illustrating the perversion of law"[302] .

In a similar fashion to his predecessor Miller, he "allowed the suit against the Sugar Trust to go to trial in deplorably weak form"[303]. This weak form was compounded by the fact that "District Attorney Ingham did not put in evidence at the trial any testimony or documents proving the purpose of the trust was to dominate the commerce between the state in sugar"[304], for which the "only explanation"[305], according to Gresham, was that the American Sugar Refining Company had pressured the officers of the governments case.

Furthermore, there were "instances of proceedings against combination interrupted before reaching the court stage'[306]. For example, after the prosecution had begun against the Southern Pacific Railroad, Olney "promptly directed dismissal"[307].When the District Attorney in North Carolina began proceedings against the American Tobacco Company, Olney "tried to stall the

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[298] Thorelli, *Supra note 64,* at 385
[299] Thorelli, *Supra note 64,* at 385
[300] Thorelli, *Supra note 64,* at 385; Annual Report of the Attorney General of the US for the Year 1893 (1893) xxvi
[301] Thorelli, *Supra note 64,* at 385
[302] Thorelli, *Supra note 64,* at 386
[303]Thorelli, *Supra note 64,* at 386; Nevins, "Grover Cleveland- A study in Courage" 772
[304] Thorelli, *Supra note 64,* at 387
[305] Thorelli, *Supra note 64,* at 387
[306] Thorelli, *Supra note 64,* at 388
[307] Thorelli, *Supra note 64,* at 387; Cummings and MacFarland, 323, referring to Olney Memorandum in Olney Papers + Department of Justice File 60 192-9

matter as much as possible" and "more than a year was to lapse" before the District Attorney filed suit, still without "any clear cut statement" from Olney[308]. Olney also "dropped the criminal action against the cash registrar trust in November 1984 despite the fact that the court of first instance had already sustained the indictment in part"[309].

**iii) <u>McKinley</u>**

The McKinley administration's "disinterest in enforcement of the antitrust policy"[310] was comparable to his two predecessors but in some ways was "much more remarkable…due to the tremendous increase in the number and size of monopolistic combinations that occurred during the period 1897 to 1901"[311]. Like Grover Cleveland he declared opposition to all combinations in his inaugural address but then followed that up "by a period of almost 3 years in which the President apparently did not even mention these questions in any public address, despite the multiplication of business combinations and the growing popular anxiety"[312].

His cabinet likewise demonstrated a lack of commitment to antitrust law. Although it is true that John Sherman was appointed Secretary of State, he was 74 at the time of appointment and "the signs of senility were showing"[313]. To expect any new antitrust initiative from Sherman

[308] Thorelli, *Supra note 64,* at 388
[309] Thorelli, *Supra note 64,* at 389
[310] Thorelli, *Supra note 64,* at 398
[311] Thorelli, *Supra note 64,* at 398
[312] Thorelli, *Supra note 64,* at 399
[313] Thorelli, *Supra note 64,* at 402

"would clearly be to expect too much"[314]. Moreover, Root was made the secretary of War. Root had previously "represented the defendants in the Whisky Trust Case"[315].

The succession of attorney generals demonstrated a similar connection to the business combinations. Joseph McKenna (who only lasted 10 months in office) equally suffered from a "fundamental indifference"[316]. This was "illustrated by the fact that he was not stirred into action even when a California manufacturer wrote a letter practically amounting to an open confession of having violated the law"[317]. He was succeeded by Griggs who was "later to serve as counsel for the Northern Securities Company"[318]. Some thought that it was "significant"[319] that on his retirement it was "announced that he would form a partnership with the attorneys for the Steel Trust"[320]. Under Griggs "only one antitrust case was initiated, and this in the face of what may have been strongest movement toward economic concentration in American History"[321]. Griggs was then succeeded by Philander Knox where he was "deeply engrossed in the Carnegie Steel Company"[322]. Knox went on to show "little spontaneous inclination to activate antitrust enforcement during his years at Attorney General"[323]. His indifference can be seen by how he left office "without initiating any proceedings under the Sherman Act"[324]. In total, "the most important cases settled during the McKinley period were among those lying over from previous administrations"[325].

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[314] Thorelli, *Supra note 64,* at 402
[315] Thorelli, *Supra note 64,* at 403
[316] Thorelli, *Supra note 64,* at 406
[317] Thorelli, *Supra note 64,* at 406
[318] Thorelli, *Supra note 64,* at 403
[319] Thorelli, *Supra note 64,* at 403
[320] Thorelli, *Supra note 64,* at 403
[321] Thorelli, *Supra note 64,* at 405
[322] Thorelli, *Supra note 64,* at 404
[323] Thorelli, *Supra note 64,* at 405
[324] Thorelli, *Supra note 64,* at 407
[325] Thorelli, *Supra note 64,* at 407

### c) Theodore Roosevelt, Taft and Woodrow Wilson

However, antitrust policy was to take a fundamental change of direction when "an insane hand placed the dynamic liberal, Theodore Roosevelt, in the White House and overnight changed the temper of the national administration"[326]. The new president entered "upon a campaign to make vital to the two statutes under which the government sought to regulate business"[327], namely the Interstate Commerce Act and the Sherman Act.

Roosevelt clearly felt the desire to protect democracy and pursue a socially based antitrust policy. Whilst a younger man, Roosevelt had "discussed the need to purify politics, to substitute education and character for wealth and corruption in public life"[328] with his friend Henry Corbet Lodge at Harvard. He "wanted to elevate the minds of Americans to loftier things than what threatened to become all prevalent thoughts of wealth accumulation and trite materialism"[329]. In 1882 he said that "we as a people are suffering from new dangers; that as our fathers fought with slavery and crushed it, in order that it would not seize and crush them, so we are called on to fight new forces"[330]. As governor of New York in 1899-1900 Roosevelt made a determined effort to elevate the trust problem. On the issue he believed that "there is a very unpleasant side to this overrun of trust development and what I fear is if we do not have some consistent policy to advocate then the multitudes will follow the crank who advocates an absurd policy, but who advocates something"[331]. As governor, Roosevelt was one of the "first persons in

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[326] Clark, "The Federal Antitrust Policy", Oxford University Press 65 (1931)
[327] *Id.*
[328] Thorelli, *Supra note 64,* at 412
[329] Thorelli, *Supra note 64,* at 412
[330] Thorelli, *Supra note 64,* at 412
[331] Thorelli, *Supra note 64,* at 413-14; Letter to Kohlsaat, Aug 7,1899

a position of great public responsibility to emphasize that publicity as such would probably prove an important remedy against monopolistic abuse"[332]. Roosevelt argued that "daylight is a powerful discourager of evil"[333]. For this reason he believed "the state for the protection of the public should exercise the right to inspect, to examine thoroughly all workings of great corporations".[334] Barely two weeks before Roosevelt took office as President he said in a public speech that "more and more it is evident that the State, and if necessary the nation, has got to posses the right of supervision and controls as regards the great corporations"[335].

Once he took office his first annual message was "devoted to trust control"[336] and "railroad rate regulation in that message was considerable"[337]. His "first legislative recommendations called for greater publicity concerning the workings of the great corporations engaged in inter state businesses"[338]. The "era of trust-busting was officially initiated"[339] when the president began proceedings against "the latest in the long series of great combinations, the Northern Securities Company"[340]. Only a few weeks after the attack against the Northern Securities Company news of an action being brought against the infamous Beef Trust[341].

In contrast to previous administrations, where the District Attorneys had to badger and hassle the central government to bring cases against the trusts and monopolies, the central government under Roosevelt took up the obligation of motivating the District Attorneys. In 1902 the Attorney General Knox addressed a circular letter to all the District Attorney's of the US,

[332] Thorelli, *Supra note 64* , at 415
[333]Thorelli, *Supra note 64,* at 430; Address at Providence, Aug 1902
[334] Thorelli, *Supra note 64,* at 415
[335] Thorelli, *Supra note 64,* at 416
[336] Thorelli, *Supra note 64,* at 416
[337] Thorelli, *Supra note 64,* at 418
[338] Thorelli, *Supra note 64,* at 420
[339] Thorelli, *Supra note 64,* at 421
[340] Thorelli, *Supra note 64,* at 421
[341] Thorelli, *Supra note 64,* at 425

submitting a copy of the proposed petition against the packers and directing the attorneys "to institute inquiry in your district and obtain affidavits showing the practice of defendants covered by the allegations of the petition"[342]. This was a "new method of procuring evidence in antitrust cases"[343] and the results were "surprisingly good"[344], "72 attorneys were able to procure affadavits relative to the practices alleged illegal"[345]. The new enthusiasm of Knox towards the antitrust problem was attributable, in Thorelli's view, to the change in administration[346].

What motivated such new emphasis for antitrust enforcement? It would appear that the "primary concern was to get effective and formal recognition of the fact that sovereignty in the land was invested in the government in Washington rather than financial matters in Wall Street"[347], demonstrating a reaffirmation of antitrust political goals. There can be "little doubt that Roosevelt was apprehensive of the tremendous influence of corporations on contemporary politics"[348]. According to Roosevelt himself, the "absolute vital question was whether the government had power to control"[349] the trusts and monopolies.

1903 was the year that "represented the first major milestone in the evolution of Antitrust after the enactment of the Sherman Law"[350]. This was due to Roosevelt's "determined effort to implement the law by central direction and coordination"[351]. Roosevelt secured the "quite substantial"[352] sum of $500,000 from Congress. This led to the creation of "a special antitrust

[342] Thorelli, *Supra note 64,* at 427
[343] Thorelli, *Supra note 64,* at 427
[344] Thorelli, *Supra note 64,* at 427
[345] Thorelli, *Supra note 64,* at 427
[346] Thorelli, *Supra note 64,* at 424
[347] Thorelli, *Supra note 64,* at 423
[348] Thorelli, *Supra note 64,* at 423
[349] Thorelli, *Supra note 64,* at 423
[350] Thorelli, *Supra note 64,* at 560
[351] Thorelli, *Supra note 64,* at 560
[352] Thorelli, *Supra note 64,* at 561

division within the Department of Justice"[353]. Similarly there was the "creation in 1903 of the Bureau of Corporations within the Department off Commerce and Labour"[354]. The Bureau was commissioned to conduct investigations and compile data concerning corporations and to "gather such information as would enable the President to make legislative recommendations in the field"[355]. Underlying this legislation was Roosevelt's recurring belief that "publicity would check the abuse of concerted power"[356].

The Roosevelt administration was also successful in motivating Congress to act on the antitrust laws. For example, when the Expediating Act 1903 was being debated in Congress a bill was introduced by Littlefield that had been "prepared upon the recommendation and to meet the suggestions of the Attorney General contained in a reply to an invitation from Littlebielf to submit the Department's view on needed reforms in the fuels of trust legislation"[357]. Most bills relating to the trust problem introduced in the House of Representatives were referred to the Committee on the Judiciary. Most of this committee stated that their recommendations had been "formulated in response to Knox's suggestions"[358]. The committee also "quoted freely from Roosevelt and Knox Speeches"[359] in support for its propositions. During the discussion of the Nelson Amendment to the Department of Commerce Labor Bill, President Roosevelt persuaded "Nelson to alter the amendment so that only such information as the President might select would be published"[360]. It is no wonder therefore that "the legislation affecting the trust passed at

[353] Thorelli, *Supra note 64,* at 561
[354] Thorelli, *Supra note 64,* at 560
[355] Thorelli, *Supra note 64,* at 560
[356] Thorelli, *Supra note 64,* at 560
[357] Thorelli, *Supra note 64,* at 537
[358] Thorelli, *Supra note 64,* at 541
[359] Thorelli, *Supra note 64,* at 541
[360] Thorelli, *Supra note 64,* at 553

this session of Congress [was] satisfactory to the administration and the prompt response to the President's request [was] greatly gratifying"[361].

The sentiment of trust-busting that Theodore Roosevelt had begun seemed to pass into the next white house administrations of William Howard Taft and Woodrow Wilson. Taft "continued his predecessor's policy"[362] and the "government initiated twice as many anti-trust actions as it had during the previous administrations"[363]. However, despite this it is believed that Taft "did not aim to increase the severity of the Sherman Act; instead he wished to increase its coverage"[364]. In his own words, Taft believed that "a change in the law in the direction of greater severity"[365] would only "frighten capital and business men at a time when business conditions [were] no means satisfactory"[366]. However, he also believed that that if that law remained as it was "it [would] continue to free business from its real burdens"[367]. Yet at the same time, the problem of construction of the statute was also over-inclusive. As Taft said whilst part of the judiciary, "construed literally, this statute could be used to punish combinations of the most useful character, like partnerships and other business arrangements conceded by all to be legitimate and proper"[368]. He was, therefore interested in seeing amendment of the law which in his words would be beneficial in "making clearer the distinction between lawful agreements reasonably restraining trade and those which are pernicious in their effect"[369]. The president soon

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[361] Thorelli, *Supra note 64,* at 554
[362] Kovaleff, *Supra note 121*, at 6
[363] Kovaleff, *Supra note 121,* at 6
[364] Kovaleff, *Supra note 121,* at 5
[365] Taft; "The Anti-Trust Act and the Supreme Court"; Harper & Brothers Publishers, 132 (1914)
[366] *Id.* at 133
[367] *Id*. at 133
[368] Taylor, "The Origin and Growth of the American Constitution", Houghton Miller Publishers, 441, (1911) ; citing Judge Taft from a speech in Bath, Main.
[369] Cobb, "President Taft and the Trusts" p1, in "The Menace to Business of the Sherman Act" [New York], [1910]. *The Making of Modern Law*. Gale. 2009. Gale, Cengage Learning. 20 March 2009
<http://galenet.galegroup.com/servlet/MOML?af=RN&ae=F151159860&srchtp=a&ste=14>

began to "suggest an amendment of the Sherman anti-trust act designed to narrow its scope"[370]. Particularly so that combinations entered into without actual intent to suppress competition would be legal[371]. However, it would not be until the following administration that the law would be clarified by the passing of the Clayton Act of 1914[372]. This allowed more lee-way for what Taft would have seen as legitimate business ventures and began admitting "the first exemptions to the antitrust laws"[373] e.g. agricultural and horticultural organizations instituted for "the purposes of self help" and not being "conducted for profit" were exempt.[374]

However Wilson still forcefully pursued those combinations that were illegal. He spoke out against big business. Again, he focused on the subversive political power that they held. He believed "the masters of the government of the United States are the combined capitalists and manufacturers of the United States"[375] . The law's purpose was therefore to "pull apart, gently but firmly, and persistently dissect"[376]. This was confirmed by his case brining activity which also outstripped Theodor Roosevelt by over "twice" the amount.[377]

### d) **<u>Franklin D. Roosevelt</u>**

Roosevelt ushered in another radical change in federal antitrust policy. To tackle the hardship of the great depression his administration instituted "the New Deal". This constituted a range of

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[370] *Id* at2
[371] *Id* at 2
[372] 15 U.S.C. § 12–27
[373] Kovaleff, *Supra note 121,* at 6
[374] Clayton Act § 6**,** 15 U.S.C. § 17.
[375] Lewis-Beck, "Maintaining Economic Competition: The Consequences and Causes of Antitrust", 41 Journal of Politics 161 at 179 (1979)
[376] *Id.*
[377] *Id.*

economic and financial reforms to aid the ailing economy back on the road to recovery. However, at the centre of New Deal lay a philosophy that seemed to run counter to all that the antitrust laws fought for.

Central to the New Deal law was the National Industrial Recovery Act[378] that set up the National Recovery Administration. This legislation was "based on the belief that the hardship of the depression would have been more tolerable if the available work had been distributed more widely among workers"[379]. It had provisions for providing minimum wages, providing maximum working hours, and to enhance total labor purchasing power. As a result it was expected that business would bear substantially increased costs and therefore business "cooperation was essential"[380] to the success of the NRA. Therefore, businesses were allowed to form trade associations to draft codes of fair competition amongst themselves.

In a manner somewhat similar to the economic thinking of the late 19th century, the President believed that the new order "would rely primarily on cooperation rather than competition"[381]. The trade associations were to effectuate "a new social ethics"[382] in which there would be a "suppression of the ethics of capitalism"[383]. The values extolled by the capitalists were seen to be of economic self interest. It was these ethics that had, according to Johnson (the first to administer the National Recovery Administration) brought the nation close to "collapse and revolution"[384] through its "murderous doctrine of savage and wolfish

[378] 15 U.S.C. sec. 703
[379] Brand, "Corporatism and the Rule of Law", Cornell University Press at 11 (1988)
[380] *Id.*
[381] *Id.* at 81
[382] *Id.* at 93
[383] *Id.* at 93
[384] *Id.* at 99

individualism, looking to dog-eat-dog and devil take the hindmost"[385]. Similarly, his successor Donald Richberg demanded a new social order "based on the democratization of industry"[386]. This would "eliminate unfair competition"[387] and as a result the "businessmen would not be forced by competitive pressures to exploit their employees"[388].

Concern for antitrust however, was subjugated to this new social-economic policy. The President, however, did not seem to show a strong grasp of antitrust doctrine. According to Robert Jackson, Roosevelt "was at his weakest in dealing with economic or business problems"[389]. With his preoccupation about the social ethics of business he was "inclined to think that we were prosecuting a group of businessmen because they had done some moral wrong"[390] and at times seemed to misunderstand the functioning of the antitrust laws. Jackson recounts one situation in which Roosevelt said that:

> "*I don't see any harm in Ford, Chrysler, and General Motors getting together and agreeing on a production schedule that will maintain employment on an even basis over a given period of time*"[391]

To which Jackson explained that that would necessarily lead to setting price and fixing territories for selling and was wholly against the antitrust laws. In sum, it seemed that "the President was not too clear on the difference between"[392] the antitrust law and the objectives of the National Recovery Administration.

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385 *Id.* at 99-100
386 *Id.* at 100
387 *Id.* at 12
388 *Id.* at 12
389 Jackson, "That Man: An Insider's Portrait of Franklin D. Roosevelt", Oxford University of Press at 119 (2003)
390 *Id.*
391 *Id.* at 122
392 *Id.* at 121

The "philosophy of the fanatic trust busters" was declared "wholly inconsistent with the New Deal"[393] by Richberg. As a result, the National Recovery Asministration was "based on a philosophy almost exactly the opposite of that of the antitrust law"[394]. The administration went as far as to encourage price fixing in certain cases[395].

However, the story of the NRA was to be one "of utopian expectations and their inevitable disillusionment"[396]. The "new social discipline"[397] never fully took effect. And the NRA failed "to sustain its new ethics of social responsibility as economic self-interest reasserted itself"[398]. As a result the NRA, before its eventual striking down at the hands of the Supreme Court[399], became a "vehicle for uncontrolled business cartelization"[400]. As the government failed to "distinguish between cartelization and "fair" competition"[401] and was incapable of "developing rational criteria that distinguished emergency situations when price-fixing would not be justified"[402], the NRA eventually became "an impediment to economic recovery"[403]

Perhaps one of the perplexing components of Roosevelt's antitrust policy, however, was the selection of Thurman Arnold as Assistant Attorney General. During his time at the Antitrust Division Arnold "instituted 44 percent of all the proceedings that had ever been undertaken by the Department of Justice"[404]. Yet, despite this trust-busting form, it is arguable that this was an unintended consequence of his appointment. Before being appointed to the position, Arnold had

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[393] *Id.* at 124
[394] *Id.* at 122
[395] Brand, *Supra note 379*, at 106
[396] Brand, *Supra note 379,* at 95
[397] Brand, *Supra note 379,* at 95
[398] Brand, *Supra note 379* at 105
[399] Schechter Poultry Corp. v United States, 295 US 495 (1935)
[400] Brand, *Supra note 379,* at 105
[401] Brand, *Supra note 379*, at 106
[402] Brand, *Supra note 379*, at 106
[403] Brand, *Supra note 379*, at 95
[404] Kovaleff, *Supra note 122,* at 9

written a book in which he regarded the antitrust laws as ceremonial[405]. As a result, "no one expected he would accomplish much"[406] and his elevation to Assistant Attorney General was "widely regarded as a cynical recognition of the futility of antitrust enforcement"[407].

### e) **Eisenhower**

When Eisenhower took up his place in the White House it was believed that his administration would pursue a pro-business approach in which the new government would "be more amenable to the wishes of the business community"[408]. However, those who believed this were about to be surprised. Eisenhower, proved to reinvigorate antitrust enforcement. President Eisenhower "was apparently convinced of the need for a vigorous antitrust enforcement policy"[409]. He personally took an "interest in several important cases"[410] such as the *Kodak* litigation[411].

His administration began by using previously neglected antitrust doctrines in its "efforts to expand the body of law itself"[412]. For example, the administration was praised for taken "the hitherto unused Celler-Kefauver amendment to the Clayton Act and mold[ing] it into a useful statute"[413]. And at the same time, the administration tried to cut back the exemptions that had

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[405] Arnold, "Folklore of Capitalism", Oxford University Press (1938)
[406] Kovaleff, *Supra note 122*, at 9
[407] Corwin Edwards, "Thurman Arnold and the Antitrust Laws" Political Science Quarterly, 58 (Sept 1943) 338
[408] Kovaeff, *Supra note 122*, at 49
[409] Kovaleff, *Supra note 122*,at 55
[410] Kovaleff, *Supra note 122,* at 55
[411] Kovaleff, *Supra note 122,* at 139
[412] Kovaleff, *Supra note 122,*at 155
[413] Kovaleff, *Supra note 122,*at 155

been previously written into the law by Taft initiative. For example, labor unions had been largely immunized under the Clayton Act[414] when it was "acting alone in its own self-interest"[415]. However, the Eisenhower administration prepared an Attorney General's Report[416] under which the administration "instituted a total of 19 cases"[417] of which labor unions were defendants.

What was the reason for this reinvigoration of the antitrust spirit? Kovaleff attributes the new found zeal to a resurgence of the original democratic ideal of antitrust and "the fact that antitrust laws had been for the twentieth-century American an expression of one of the country's goals: economic freedom in a democratic society"[418]. Of the "greatest magnitude"[419] was the "underlying ideology"[420] the "principle of limited power which was not only the cornerstone of the governmental system, but also the foundation of American business"[421]

### f) <u>Kennedy and Johnson</u>

President Kennedy and President Johnson presided over the Third Great Merger Movement between 1951 and 1968[422]. In 1968 alone 2442 corporations disappeared in mergers[423]. As a result markets were becoming increasingly concentrated. By the end of 1968 only 200 of the largest industrial corporations controlled over 60 percent of the total assets held by all

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[414] 29 US.C. 101-115
[415] Kovaleff, *Supra note 122*, at 141
[416] Kovaleff, *Supra note 122*, at 141; *A.G. Report p293-293*
[417] Kovaleff, *Supra note 122*, at 141
[418] Kovaleff, *Supra note 122,* at 156
[419] Kovaleff, *Supra note 122*, at 156
[420] Kovaleff, *Supra note 122, at* 156
[421] Kovaleff, *Supra note 122*, at 156
[422] Williamson, "Federal Antitrust Policy During the Kennedy-Johnson Years", Greenwood Press at 21 (1995)
[423] *Id.*

manufacturing companies in the U.S[424]. In particular there was an "explosive growth of the conglomerate form of merger"[425]. By the end of 1968 conglomerate mergers represented 88.5 per cent of all "large mergers"[426]. In particular Gulf and Western had acquired above 67 companies "with assets exceeding $2.8 billion"[427].

Yet, despite this concentration the Kennedy and Johnson administrations demonstrated another u-turn in antitrust enforcement. During these years the executive provided little impetus for stepping up antitrust regulation. Although the Courts were increasingly active in their response to mergers the government was more concerned with creating growth in the economy. This was to be the "overriding objective"[428] of Kennedy's presidency. Not only was this seen as the way to "overcome the unemployment, idle industrial capacity, and economic recessions of the previous decade"[429] but it was necessary to the securing of foreign policy considerations. In the "Cold War Atmosphere of the time, only a strong growing economy could restore American prestige and combat Soviet military and industrial expansion"[430]. Ancillary to this was the concern that the "nuclear battlefield had resulted in a demand for special-purpose equipment produced in special purpose facilities"[431] which was best achieved by a "shared power between big business and government"[432].

At the same time, the public support, that was so vital to the creation of the early antitrust laws, had reneged somewhat. The "exceptional performance of the national economy since the beginning of World War II and the US leadership since that time, had made big business

[424] *Id.* at 49
[425] *Id.* at 34
[426] *Id.* at 36
[427] *Id.* at 36
[428] *Id.* at 52
[429] *Id.* at 52
[430] *Id.* at 52
[431] *Id.* at 52
[432] *Id.* at 52

palatable to the American public"[433]. As a result Kennedy "could expect little or no public support for a crusade against monopoly power"[434].

Kennedy therefore, tried to "establish a partnership between government and business"[435] in order to work towards economic growth. He repeated this need for growth whilst offering "tax incentives to business to spur investment in plant and facilities"[436]. At the same time he "directed Cabinet officials to cooperate with the [Business advisory Council]"[437] and sent White House aides to "patch up relations"[438] with council members. At the same time, he characterized antitrust as "not anti-business"[439] but being "in the best interests of business"[440].

After President Kennedy's death, President Johnson continued this theme of growth. He stated to businesses that in this goal that: "I need your cooperation, I need it now"[441]. Paul Dixon, who served at the FTC as Chairman said that President Johnson, in one of the first meetings, "sat us all down and said he wanted to make it plain that he didn't want just meddling around with business for the sake of meddling"[442]. The same was the message to the Antitrust Division, William Orrick, one of the Assistant Attorney General's under President Johnson's administration, said that "President Johnson thought of the antitrust laws as a means of

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[433] *Id.* at 52
[434] *Id.* at 52
[435] *Id.* at 53
[436] *Id.* at 53
[437] *Id.* at 50
[438] *Id.* at 50
[439] *Id.* at 54
[440] *Id.* at 54
[441] *Id.* at 55
[442] *Id.* at 56

negotiation with businessmen rather than having any regard for them as laws"[443]. As a result "there were a good many cases that should have been brought but just weren't"[444].

## g) **Reagan**

The results of the 1980 election continued "this evolutionary trend"[445] of antitrust goals. President Reagan's term in office "led to a broad-scale attack on almost every aspect of antitrust enforcement" [446]. Reagan's influence on antitrust law has been perhaps the clearest demonstration that a political official can have on the direction of antitrust objectives. The change that occurred when Reagan took office can be demonstrated in a number of areas, starting with his policy towards judicial appointments.

### i) The Judiciary

The Reagan administration may be one of the most prominent examples of how the policy of the administration can shape the direction of antitrust policy. The Reagan administration had "much success in emphasizing economic efficiency as the goal of antitrust"[447]

One of Reagan's legacies shall be how the administration transformed the judiciary and increased it's "acceptance of a more conservative antitrust jurisprudence"[448]. The overall goal

[443] *Id.* at 56
[444] *Id.* at 56
[445] Correia, "Antitrust Policy after the Reagan Administration" 76 Geo. L.J. 329 (1987)
[446] *Id.*
[447] Cambell, "The Antitrust Record of the First Reagan Administration", 64 Tex. L. Rev. 353 at 355 (1985)

was to "alter the judiciary's ideological perspectives"[449].President Reagan appointed "the Chief justice of the Supreme Court, selected three new members for the Court, and accounted for forty seven percent of all sitting on the federal district courts and court of appeals"[450]. He selected individuals who "were more likely to doubt the efficacy of government intervention in the affairs of business"[451]. As a result "nearly all Regan appointees"[452] brought "conservative policy preferences to the bench"[453]. This "conservative court packing"[454] included the likes of Bork, Posner and Easterbrook.

Kovacic effectively demonstrates the impact that the court packing plan had on the direction taken by the federal judiciary by comparing the behavior of Reagan appointed judges and the judicial appointees of the previous president, Carter. This could be demonstrated empirically by the outcomes of federal antitrust cases. Comparison of all votes cast by President Carter and President Reagan appointees in non-immunity antitrust cases demonstrates that Reagan appointees "adhered to conservative antitrust positions more frequently (82.3 percent of all non-immunity votes versus 29.3 percent) than their Carter counterparts"[455]. This trend can also be seen in the majority opinions authorized by Cater and Reagan appointees in non-immunity cases. In which, in 34.6 percent, Carter appointees issued opinions that embraced liberal doctrines. In the remaining 65.4% of cases Carter appointees adopted positions consistent with a conservative antitrust policy[456]. On the other hand, Reagan authors of majority opinions adhered to the conservative agenda more frequently i.e. in 16.4% percent of cases Reagan

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[448] Kovacic, "Reagan's Judicial Appointees and Antitrust in the 1990s" 60 Fordham L. Rev. 49 at 51 (1991)
[449] *Id.* at 116
[450] *Id.* at 52
[451] *Id.* at 52
[452] *Id.* at 52
[453] *Id.* at 52
[454] *Id.* at 52
[455] *Id* at 73
[456] *Id.* at 73

appointees took liberal positions and in the remaining 83.6%, Reagan appointees endorsed conservative outcomes[457]. In situations where Carter and Reagan appointees sat on the same panel in non-immunity cases, Kovacic could isolate 17 cases in which "Carter appointees and Reagan appointees disagreed…in which no Carter or Reagan appointed voted with a judge appointed by the other president"[458]. In fifteen of those 17 cases Reagan appointed conservative positions whereas Carter's appointees voted with liberal positions. However, the votes cast by Carter and Reagan appointees in immunity cases (such as statutory exemptions of Noerr immunity or state action doctrine) demonstrates a departure from Kovacic's general hypothesis with Carter appointees adopting liberal outcomes 64% and Reagan appointees also adopting liberal outcomes of 64.3%[459].

However, Kovacic's hypothesis holds up when he examines the voting behaviours of the federal judges in specific areas of antitrust. In Predatory Pricing cases Carter judges endorsed liberal outcomes 30.2% and supported conservative outcomes in 69.8%; whereas Reagan judges supported liberal positions in 19.4% and Conservative approaches in 80.6%[460]. Mergers, perhaps one of the most noticeable areas of conservative antitrust policy, demonstrates that Carter appointees supported liberal outcomes in 72% of times and conservative outcomes 27.6 percent; whereas Reagan appointees supported liberal views 31.3% of times but supporting conservative outcomes 68.7% conservative results[461]. In Vertical Restraints excluding tying cases Carter appointees supported liberal positions 27.7% and conservative outcomes 72.3%; whereas Reagan appointees endorsed liberal outcomes in 8% of the time and supporting conservative outcomes in

[457] *Id* .at 73
[458] *Id.* at 73
[459] *Id. at* 76
[460] *Id.* at 78
[461] *Id.* at79

the remaining 92%[462]. Tying cases, however, went against the hypothesis with both Carter and Regan appointees supporting conservative outcomes 74.7% and 77.4% respectively[463]. However, Price discrimination again supports the general hypothesis with Carter appointees supporting liberal outcomes 39.3% and conservative outcomes 60.7%; whereas Reagan has supported liberal results 27.5% and conservative times as 72.4%[464].

It is clear therefore that "the opinions of judges such as Robert Bork, Frank Easterbrook, Richard Posner, and Ralph Winter have proven influential in shaping judicial discourse about the appropriate path for antitrust doctrine"[465]. Kovacic argued that of these the judge who "is said to epitomize effect of conservative court packing in antitrust is Richard Posner"[466] who spearheaded a conservative redirection of judicial decision-making in antitrust matters. In seventeen antitrust cases in which Posner wrote opinions of the majority only one was decided in favor of the antitrust plaintiff[467]. This difference in antitrust judicial decisions "stand out in sharper relief when set against the backdrop of prevailing Supreme Court views"[468] such as Brown Shoe[469] and Topco[470] of the 60s and 70s that this paper discussed earlier. Reagan administration enforcement policies disavow any interest in "returning to doctrinal approaches that characterized many Warren Court decisions of the 1960s"[471]. Furthermore, "judges favoring aggressive antitrust intervention reside almost exclusively within the ranks of Carter

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[462] *Id.* at 80
[463] *Id.* at 80
[464] *Id.* at 81
[465] *Id.* at 83-4
[466] *Id.* at 83
[467] *Id.* at 84
[468] *Id.* at 97
[469] Brown Shoe Co. v United States, 370 US 294 (1962)
[470] Topco Associates Inc v United States , 405 US 596 (1979)
[471] Kovacic, *Supra note 448*, at 99

appointees"[472] whereas "Reagan judicial screening techniques seem to have largely succeeded in eliminating candidates with strong preferences for expansive antitrust intervention"[473].

Judge Bork is similarly worth signaling out for attentions. One of Bork's most significant judgements is *Rothery*[474] which "represents an important effort to shift the boundaries of horizontal restraint doctrine"[475] and how "restraints ancillary to an integration of economic activities are not illegal per se and to be evaluated under the rule of reason"[476]. Bork's opinion concluded that recent Supreme Court decisions had "effectively overruled"[477] *Topco*.

The judges appointed during the Reagan administration have continued the conservative economic trend by successfully reducing the use of the per se classification in antitrust litigation. Campbell notes how this has occurred in five major areas[478]. Firstly, in the field of Horizontal Agreements on Price, the *BMI*[479] decision the Supreme Court ruled "that some horizontal agreements on price were lawful if necessary to create or market a good that otherwise would not exist"[480] and therefore could be pro-competitve and should, in particular circumstances, be analyzed under the rule of reason. Cambell continues to say that "for this reason, in *NCAA*[481] the NCAA's brief was absolutely clear in its pitch: the NCAA is a joint venture stated in the first sentence"[482]. The same trend can be demonstrated in vertical Agreements. The case *Jefferson Parish Hospital District*[483] demonstrates that in the field of tying arrangements, the pre se

[472] Kovacic, *Supra note 448*, at 101
[473] Kovacic, *Supra note 448*, at 106
[474] *Rothery* Storage & Van Co. v. Atlas Van Lines, Inc. 792 F.2d 210 ( 1986)
[475] Kovacic, *Supra note 448,* at 112
[476] Kovacic, *Supra note 448*, at 113
[477] Bork, *Supra note 1*, at 299
[478] Campbell, *Supra note 447*
[479] BMI *v. CBS*, 441 U.S. 1 ( 1979 )
[480] Campbell, *Supra note 447,* at 356
[481] National Collegiate Athletic Ass'n v United States, 263 U.S. 403
[482] Campbell, *Supra note 447,* at 356
[483] Jefferson Parish Hosp. Dist. No. 2 v Hyde, 466 U.S. 2 (1984)

condemnation "is only appropriate if the existence of forcing is probable"[484] and "of course, as a threshold matter there must be substantial potential for impact on competition in order to justify per se condemnation"[485]. In vertical restraints the per se rule does remain the law but, as Campbell says, after the decision in *Monsanto*[486] (that reaffirmed the *Colgate*[487] doctrine that evidence of an agreement had to exclude the possibility that the defendant's action was not independent), the only cases that will be prosecuted under for this conduct will be cases where "the corporate files contain a memo saying "met today with Jones: fixed prices"[488].

Perhaps however, it could be argued that the shift in judicial thinking was more a consequence of the age of individual judges. Arguably being younger, their legal education and experience would be more exposed to the influence of economic thinking than the Carter predecessors. However, it still remains that they were chosen and elevated to their position by the executive. Had the executive wanted to *inhibit* the growth of conservative economic policy in antitrust, surely they could have found other potential judges who were more amenable to the previous approaches taken by the Carter judiciary.

ii) The Federal Agencies

The change in direction within the Antitrust Division and the Federal Trade Commission was also apparent. Kovacic remarked that the choice of Miller and Baxter were "well suited to lead a retrenchment of Federal Antitrust Policy"[489]. Professor Baxter, who according to Bork played a

[484] Campbell, *Supra note 447,* at 358
[485] Campbell, *Supra note 447,* at 358
[486] Monsanto Co v Spray-Rite Service Corp. 465 U.S. 752 (1984)
[487] Colgate & Co v United States, 250 U.S. 300 (1919)
[488] Campbell, *Supra note 447,* at 359
[489] Kovacic, *Supra note 448,* at 49

part in the intellectual underpinnings of Chicago School[490]. The antitrust agencies "accepted the proposition that efficiency enhancing mergers were beneficial, not harmful and thus engaged in more sophisticated effects based analysis of vertical restraints, predation vertical and conglomerate mergers"[491].

Similarly, Baxter and Miller "brought to their posts an abiding skepticism about most of the governments' on-going monopolization and shared monopolization lawsuits"[492]. Together they "led the government out of the monopolization field"[493]. On the same note, Clanton made criticisms of the Federal Trade Commission's enforcement policy over horizontal collusion where the "commission has brought few significant cases challenging price fixing or other horizontal exclusionary conduct"[494]. Clanton demonstrated that this same lax enforcement could be found in vertical restraints where "the hostility to retail price maintenance and the unwillingness of the agencies to even acknowledge the continued application of the per se rule"[495] led to a "strident opposition to treating Retail Price Maintenance as per se illegal"[496]. Kovacic concurred on this point saying that the agencies "declines to enforce existing legal prohibitions against price and non-price vertical restraints"[497]. In the field of price-discrimination the "Federal enforcement of the Robinson Patman Act since 1981 has fallen below the already minimal levels that prevailed in the 1970s"[498]. "Reagan FTC leadership said the commission has not abandoned Robinson Patman enforcement but the government's failure to initiate new enforcement actions during the Reagan administration suggests that firms are virtually

[490] Kocacic, *Supra note 448,* at 50
[491] Correia, *Supra note 447,* at 329
[492] Kovacic, *Supra note 261,* at 245
[493] Kovacic, *Supra note 261*¸at 245
[494] Clanton, "The Reagan Antitrust Legacy: The Contribution of the FTC" 35 Fed. B. News & J. 238 at 240 (1988)
[495] *Id.* at p239
[496] *Id.* at 239
[497] Kovacic, *Supra note 261*, at 245
[498] Kovacic, *Supra note 261,* at 245

immune"[499]. Thus effectively abandoning the legislators attempt to strengthen the position of small businessmen.

According to Starling the federal agencies also changed their minds over intellectual property. There was now recognition that "economic benefits of intellectual property licensing"[500] exist and that "there is no conflict between patent and antitrust law"[501].

One tool for furthering the new economic analysis of antitrust was to be found in the government's use of amicus briefs. "Amicus briefs in several instances have facilitated judicial adoption of reasonableness-oriented approaches for several types of conduct traditionally subject to per se condemnation "[502]. According to Campbell, "the justice department's amicus brief helped ease access to rule of reason analysis"[503].

iii) Statutory Amendments

Persuading Congress to amend the antitrust statutes was "a major aim of the Reagan administration's antitrust leadership"[504]. Ginsburg's priorities were "legislative reform, legislative reform, and legislative reform"[505]. One example of this was the National Cooperative Research Act of 1984[506] that "provided that certain joint research and development ventures are

[499] Kovacic, *Supra note 261,* at 245
[500] Starling, "The Reagan Legacy in Antitrust: The Perspective of the Antitrust Division", 35 Fed. B. News & J. 242 at 243 (1988)
[501] *Id.*
[502] Kovacic, *Supra note 261,* at 246
[503] Campbell, *Supra 447*, at 354
[504] Kovacic, *Supra note* 261, at 245
[505] Kovacic, *Supra note 261,* at 245; 60 Minutes with Douglas H. Ginsburg, Assistant Attorney General, Antitrust Division, 55 antitrust L. J. 255 at 260 (1986)
[506] 98 Stat. 1815 (1984), 15 U.S.C.A. § 4301

to be evaluated under the rule of reason"[507]. Another initiative, but one not passed by Congress, was Reagan's "proposed five-part reform package that included, among other provisions, an amendment to section 7 of the Clayton Act banning only mergers with a significant probability of lessening competition"[508].

### h) Clinton

The Clinton administration saw a "more activist attack on industry consolidation and alleged exclusionary practices"[509]. Whereas Reagan has shifted antitrust towards the Chicago school and Bush Senior followed the trend, there was a "decided shift during the Clinton years toward the so-called post Chicago school"[510]. Pitofsky, believed that the Reagan administration ushered in the most "minimal an antitrust program as can be imagined"[511] and that "enforcement at the federal level was exclusively against cartel behavior and some few horizontal mergers of enormous size accompanied by a rhetorical assault on the value of antitrust"[512]. The new Democratic administration saw that the "enforcement presumption shifted"[513], less attention was provided to efficiency and more attention fell on "false negatives". Clinton's administration demonstrated "less faith in market and greater confidence in the ability of government to correct

[507] Kovacic, *Supra note 261,* at 246
[508] Kovacic, *Supra note 261*, at 245
[509] Garza, "A Comparative Analysis of the Clinton Antitrust Program and Suggestion of Changes to Come", 15-SUM Antitrust 64, (2001)
[510] *Id.*
[511] Pitofsky, "Antitrust Policy in A Clinton Administration", 62 Antitrust L.J. 217 (1993)
[512] *Id.*
[513] Garza, *Supra note 509*

perceived market imperfections"[514]. This ethos "imposed substantial hurdles to efficiency claims" [515] made on behalf of antitrust defendants.

Perhaps, the most prominent difference to come out of Clinton antitrust enforcement was the shift of attention towards the international troubles posed by the domestic antitrust policy. The Clinton antitrust officials- Robert Pitofsky, Anne Bingamen, and Joe Klein – "took an increasingly global view of antitrust. Both Agencies devoted substantial effort to international issues"[516]. This began with the FTC's Global Competition Hearings[517]. Most noticeable was the Clinton administration's decision to tackle and prosecute international cartels. In 1991, only 1 percent of the corporate defendants were foreign based. However, by comparison by 1997 32% of the corporate defendants were foreign based[518]. Clinton's administration "refined a set of procedural tools, making them capable of dealing with sophisticated, cross border criminal issues"[519]. The development of the corporate leniency program proved to be successful with "almost all of the Divisions major cartel cases, including the vitamin cases, have been advanced by the cooperation of a corporate leniency applicant"[520]. Furthermore, the increase of international bilateral agreements also provided much needed cooperation on international antitrust issues[521]. Similarly, "Combating cross-border cartels [was] illustrated by the joint investigation by US and Canadian authorities into a price fixing conspiracy involving thermofax paper"[522].

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[514] Garza, *Supra note 509*
[515] Garza, *Supra note 509*
[516] Patterson, "Antitrust Enforcement in the Clinton Administration" 15-SUM Antitrust 70 (2001)
[517] FTC Staff Report, "*Anticipating the 21st Century: Competition Policy in the New High-Tech Global Marketplace",* May (1996).
[518] Balto, *Supra note 262,* at 68
[519] Balto, *Supra note 262,* at 65
[520] Balto, *Supra note 262, at* 67

[522] Balto, *Supra note 262,* at 67

However, of course, the Clinton Administration was "more aggressive than the prior two administration in the area of non-merger civil enforcement"[523] as well as criminal enforcement. Commentators noted "a significantly more activist application of the antitrust laws on the civil side"[524].

The field of Merger enforcement went under a change from the previous Republican administrations. The Clinton administration saw "devoted increased attention to the unilateral effects analyses"[525] (whereby "firms sell differentiated products or are spatially dispersed, individual seller's compete more directly with some rivals than with others, and a new merger of firms selling particularly close substitutes may enable this merged firm to exercise some degree of market power unilaterally"[526]). Furthermore, antitrust enforcers "paid closer attention to mergers that substantially threaten to reduce competition in the area of research and development"[527]. Also, in 1997 the Department of Justice Merger Guidelines were revised in the aim to accomplish a few goal. Firstly, "they tied efficiencies directly into competitive effects analysis"[528] thereby "recognized that cost reductions might reduce the likelihood of coordinated interaction or the incentive to raise price unilaterally"[529].

### i) George W. Bush

The George W. Bush administration has been characterized largely by the debate over merger policy. The "decision of the Antitrust of the Division of the US Department of Justice not to

[523] Garza, *Supra note 509,* a 67
[524] Garza, *Supra note 509,* at 64
[525] Balto, *Supra note 262,* at 72
[526] Balto, *Supra note 262* at 72
[527] Balto, *Supra note 262,* at 74
[528] Balto, *Supra note 262,* at 88
[529] Balto, *Supra note 262,* at 88-89

challenge transactions, such as XM/SIRIUS and the Whirlpool/Maytag, which appeared to raise significant Antitrust concerns"[530]. Baker and Shapiro described the latter case, Whirlpool/Maytag as a "visible instance of under-enforcement"[531]. Such a "significant drop off in the annual number of requests under the Hart Scott Rodino Act for additional information or documentary material"[532] has raised questions about the level of enforcement within the Federal agencies. Many commentators have therefore, attempted to demonstrate the recent merger trends empirically.

Firstly, Harkrider concluded that an "analysis of…200 mergers reveal that, all else being equal, transactions reviewed by the antitrust division of the Bush administration were approximately 24 percentage points less likely to be challenged than transactions reviewed on FTC during the Clinton administration"[533]. Hovenkamp noted that between 2001 and 2006 the agencies issued 47 second requests in on average per year, which was "less than half of the average issued by the agencies between 1996 and 2000"[534]. He equally argued that this trend could be seen in the number of merger challenges. The ratio of challenges to Hart Scott Rodinio fillings between 1996 to 2006 demonstrates that the number of challenges to clearances falls "significantly from roughly 18% (between 1997 and 2000) to approximately 13% (between 2001 and 2006)"[535]. Similarly "there was a decline in second requests as a fraction of clearances from roughly 27% (1999-2000) to 18% (2001-06) with the decline being more pronounced at the Department of Justice (falling from 37% to 23%)[536]. And although "the agencies challenged a

[530] Harkrider, "Antitrust Enforcement During the Bush Administration", Antitrust, Summer Edition, at 43, (2008)
[531] Baker and Shaprio, "Detecting and Reversing the Decline in Horizontal Merger Enforcement", at 30 22-SUM Antitrust 29 (2008)
[532] *Id. at* 43
[533] Harkrider, *Supra note 530,* at 43
[534] Harkrider, *Supra note 530,* at 44
[535] Harkrider, *Supra note 530,* at 45
[536] Harkrider, *Supra note 530,* at 45

higher percentage of transactions that received a second request between 2001 and 2006 than they did from 1996 to 2000 …. This was accounted for entirely by the FTC, which raised its ratio from 70% between 1996 to 2000 to 82% between 2001 and 2006"[537] whereas the Antitrust Division "reduced its ratio from 6% between 1996 and 2000 to 59% between 2001 to 2006"[538]. Over all the conclusion was that "transactions reviewed by the Antitrust Division during the Bush administration were less likely to be challenged than transactions reviewed by the Antitrust Division during the Clinton administration"[539].

Feinstein agreed with the declining trend of merger enforcement under George W. Bush and went as far as to say that "the federal government has nearly stepped out of the antitrust enforcement business leaving companies to mate as they wish"[540]. He noted that the investigative activity had rapidly fallen away with the number of premerger notifications filed with the agencies falling from a "record high of 4926 in 2000 to only 1,014 in 2004"[541]. The Clinton administration "agencies also have proven to be more active than their Bush counterparts as measured by the proportion of investigated mergers that receive second requests"[542]. Bush agencies challenged only thirty four transactions in 2002 and thirty six in 2003. Even as the number of premerger notifications, clearances granted to investigate and second requests all significantly increased from 2004 to 2005 merger challenges under the Bush agencies continued to decline to only twenty four in 2004 and a mere eighteen in 2005[543]. He concluded that "both the number of the reportable transactions and the level of enforcement activity, including

[537] Harkrider, *Supra note 530,* at 45
[538] Harkrider, *Supra note 530,* at 45
[539] Harkrider, *Supra note 530,* at 45
[540] Feinstein, "Recent trends in US merger enforcement: down but not out" , Antitrust, Vol. 21, No. 3, at 74 (2007)
[541] *Id.*
[542] *Id.* at 75
[543] *Id.* at 75

clearances granted to investigate, second requests, and enforcement actions, have numerically declined during the Bush administration"[544].

Baker and Shapiro took another approach which was to conduct "a survey of twenty experienced antitrust practitioners, taken from a third party list of leading antitrust lawyers in the District of Columbia"[545]. The respondents "perceived changes in merger enforcement occurring at all stages of the merger review process"[546]. From this method the authors concluded there was "compelling evidence that there has been a sharp shift over the past ten years towards a less stringent horizontal merger enforcement policy"[547].

On the other hand the Department of Justice tried to defend their merger policy. Meyer argued that "merger enforcement is one of the [Antitrust Divisions'] highest priority"[548] and is one that is taken "very seriously"[549] and importantly, only a "small minority of our investigations lead to our staff to conclude that a proposed transaction is likely to cause substantial harm"[550]. However, such a statement begs the question of why the number of proposed mergers with the capacity to cause substantial harm is much lower now than it was in the 90s under the Clinton administration.

Although, Meyer does make a serious point, and perhaps it is unfair to characterize the Bush Administration as being unduly lax on merger enforcement. According the US Department of Justice Antitrust Division Update for Spring 2008 the number of Hart-Scott-Rodino transactions rose from 1,768 in 2006 to 2,201 in 2007, which represents the "highest level of

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[544] *Id.* at 76
[545] Baker and Shapiro, *supra note 531*
[546] *Id.*
[547] *Id.*
[548] Meyer, "Merger Enforcement is Alive and Well at the Department of Justice" p1 <http://www.usdoj.gov/atr/public/speeches/227713.htm>
[549] *Id.* at 2
[550] *Id.* at 2

merger enforcement activity since the end of the merger wave in 2001"[551]. Yet, the question remains whether this was a reaction to fierce criticism by academics such as Feinstein, Baker and Shapiro rather than a demonstration that the administration had somewhat had an ideological change.

### j) **The Empirical Evidence**

However, one problem with the hypothesis that the goals of antitrust law are susceptible to change along with the contemporary president is that the empirical evidence so far produced has not shown a strong link between change in regime and change in antitrust goals. As one of the founders of the Chicago school antitrust revolution, Posner took an innovative method of understanding antitrust law. In 1970 he produced "A Statistical Study of Antitrust Enforcement"[552] in which he, in part, examines the "potentially great explanative power [of] politics"[553]. The "identity of the party in the White House"[554] with their "different economic philosophies"[555] could potentially explain for the variations in antitrust enforcement. However, his over all conclusion, like many who followed him, was that "it does not appear that the identity of the party in power has much influence on the quantity or quality of the Justice Department's antitrust activity"[556].

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551 <<http://www.usdoj.gov/atr/public/231424.htm>>
552 Posner, "A Statistical Study of Antitrust Enforcement", 13:2 Journal of Law and Economics, 365 (1970)
553 *Id.* at 411
554 *Id.* at 411
555 *Id.* at 411
556 *Id.* at 413

Looking at data between 1905 and 1970 he calculated that there was a difference in the amount of cases brought between the Democrats (with 979) and Republicans (550). If "their share of the cases were proportional to their occupancy of the White House [58.2%], they would have brought 890 cases"[557], which they had obviously exceeded. However, such a view was too simple in that the Republican party's President's were "bunched in the early part of the period when the level of antitrust activity, regardless of the party in power, was much lower than later"[558]. He then broke down the period into two halves, firstly, the period before F. D. Roosevelt's first term; secondly, the period after Roosevelt's first term. In the earlier part he found that the Democrat party had in fact brought less cases than would be expected if their antitrust case brining activity was brought in proportion to their time in office. In the later second half of the period he found that the Democrat party had brought just slightly higher than their expected quota of cases. Similarly, Professor Posner could find no significant impact of Presidential election years upon the case bringing activity nor could see a substantive difference in the case brining activity of "landmark cases"[559].

However, although Posner's work is certainly helpful to our discussion of the political involvement of antitrust law it is limited in the amount of guidance that it can provide us with. Firstly, the nature of "case brining activity" is arguably not refined enough. As the large majority

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[557] *Id.* at 411
[558] *Id.* at 411
[559] *Id.* at 412

of merger cases are not litigated in court, the number of “cases-brought” forgets an important aspect of federal antitrust activity. Another major limitation for out concerns is that Posner’s study is arguably out of date. Produced in 1970 it fails to include data on how antitrust was changed by the Reagan, Clinton or Bush policies that we have previously looked at. Furthermore, Posner’s article is concerned largely with the difference between which political *party* is the current incumbent . Whereas, the area that this paper has tried to highlight is not as much that there is a difference between the Democrat and Republican parties but that there is a difference between successive individual administrations. Also, Posner classifies the period before 1905 as a period in which antitrust was negligible and therefore does not include the data in his results. However, as I have argued, it was negligible directly because of the presidential administration’s lack of interest in the subject. Therefore, demonstrating the possibility that the administration’s views on the matter were relevant to case bringing activity.

The negative results of Posner however, have been repeated. Lewis-Beck concluded that “neither the party preferences of the president, nor party differences in Congress exhibit a meaningful impact on the number of cases”[560] that the antitrust division files. In his opinion, “clearly, at least at the presidential level, antitrust enforcement is a bipartisan affair”[561], as opposed to demonstrating partisan swings between the two main political parties. Similarly, Cartwright and Kamerschen’s article that examines Posner’s conclusion that presidential

[560] Lewis-Beck, *Supra note 375,* at 181
[561] Lewis-Beck, *Supra note 375,* at 180

administration has little effect on the government's case brining activity supports Posner's work. They "find no evidence which is in conflict with Posner's conclusion"[562] and accordingly conclude that "at least at the Presidential level antitrust enforcement is a bipartisan affair"[563].

However, there has been some small amount empirical evidence that points to the possible variations between political administrations. Ghosal, "Regimes Shift in Antitrust" demonstrates the effect that the Chicago School movement had on the enforcement strategies of the Democrat and Republican parties[564]. Most importantly for our concerns is that their research indicates that since the Chicago School's emergence in the 1970s there has been a change in the role played by politics with the Republicans initiating more (less) criminal (civil) court cases than Democrats and that the estimated quantitative effects are large". The difference between "criminal" cases which include "per se violations such as price fixing" and "civil" component that "includes mergers, monopolization and restraint of trade cases". The ultimate difference found was that in criminal cases the Republicans on average initiate about 17 more per year than the Democrats.

However, Ghosal has also produced an empirical study with Gallo on the behavior of antitrust enforcement activity in the Department of Justice. In determining the causes of antitrust activity at the Department of Justice the authors compare the party of the President and the

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[562] Cartwright and Kamerschen, "Variations in Antitrust Enforcement Activity" 2 Review of Industrial Organisation at 18 (1983)
[563] *Id.*
[564] Ghosal, "Regime Shifts in Antitrust", unpublished, <http://ideas.repec.org/p/pra/mprapa/5460.html>

“Republican versus Democratic composition of the House and Senate” and the effect that this has on the number of cases brought. However, their conclusion is that the results are “not statistically significant”[565] and that they had “difficulty in identifying a clear republican versus democrat political effect”[566].

However, like Posner’s analysis there are limitations to the value that such a study can provide for us. The thrust of the article is trying to spot different trends between the political parties rather than between successive administrations. Also, the number of cases brought is does not account empirically for the number of cases that are not brought. Mergers, in which a large majority of cases are not litigated are not accounted for.

Amacher and Higgens et al seemed to have a little more success in demonstrating the effect that the party of the executive had on case bringing activity within the Federal Trade Commission. The results presented “mild support for the notion that Democrat-dominated Commissions tend to pursue more welfare reducing regulation than commissions dominated by members with other party affiliations”[567]. In particular “a 1 percent increase in the ration of Democrat to non-democrat commissioners leads to a 0.6% increase in the number of complaints

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[565] *Id.* at 43
[566] *Id.* at 46

[567] Amacher and Higgins et al, “The Behaviour of Regulatory Activty over the Business Cycle: An Empirical Test”, 23 Econ. Inq. 7 at 16 (2007)

brought under the RPA"[568]. However, they also found that the party of the Chairman does not appear to influence FTC case output and that politics is not important in explaining "matters other than section 2 complaints"[569]. "Most important[ly]", they found that inclusion "of the political variables does not affect significantly the relationship between macroeconomic activity and FTC output"[570]. In sum, "agnosticism seems the best view of these results"[571] and evidence that FTC output is significantly influenced by political considerations was "mixed"[572].

[568] *Id.*
[569] *Id.*
[570] *Id.*
[571] *Id.*
[572] *Id.*

## Part 3; The Continuing Need For Socio-Political Goals in Modern Antitrust Policy

So far, the paper has discussed who enacted the early antitrust statutes and for what reasons. We have also seen that those goals have changed over time, albeit with some questions posed by the lack of empirical evidence to support this claim. This section is dedicated to looking forward to what relevance socio-political goals play today and why they correspond with the current Obama administration policies. However, first the paper shall examine the claim of the Chicago School that antitrust law should be exclusively dedicated to the pursuit of economic efficiency.

### a) The Uncertainty of Efficiency

According to professor Bork, the "ultimate goal of consumer welfare provides a common denominator by which gains in destruction of monopoly power can be estimated against losses in efficiency, and economic theory provides the means of assessing the probable sizes of the gains and losses"[573]. He argues that such a benefit is not present when "the trade-off is one between values, such as the decision of how much consumer welfare is to be sacrificed for what amount of additional wealth for small dealers and worthy mean"[574]. There is "no common denominator between these values, and there is no economics, no social science, no systematized knowledge

[573] Bork, *Supra note 1*, at 79
[574] Bork, *Supra note 1,* at 79

of any sort that can provide the criteria for making the trade off decision"[575]. He uses this lack of certainty that is involved in multiple-goal antitrust law as a way of justifying his decision that consumer welfare should be an exclusive goal. However, is certainty and coherence in antitrust law better served by focusing totally on economic efficiency rather than the *multiple* goals of the Congress who enacted the law? There are two problems with the claim that the single goal of efficiency will enhance certainty in antitrust law.

Firstly there is a theoretical argument over the relationship between upholding efficiency on one hand and upholding rivalry on the other. Early antitrust law was interpreted to protect rivalry and the process of competition. The judiciary have previously exclaimed this as their interpretation of the antitrust laws. The court stated that:

> *"Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies, but it struck the balance in favor of protecting competition"*[576].

The sentiment of protecting the process of competition over and above efficiency was however, not to be confined to merger policy. For example, Justice Learned Hand seemed to have this concern in his mind when handing down the *Alcoa* decision in which he said that:

> "*Nothing compelled [the defendant] to keep doubling and redoubling its capacity before others entered the field. [The Defendant] insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared*

[575] Bork, *Supra note 1,* at 79
[576] Federal Trade Commission v Proctor and Gamble Co, 386 US 568, at 580 (1967)

*into a great organization, having the advantage of experience, trade connections and the elite of personnel"*[577].

However, today antitrust law enters into a different analysis. As Fox says, modern antitrust courts have "shifted to a different inquiry: will the outcome of a particular merger or conduct be inefficient by inducing the aggregate of all producers to reduce the total amount of goods they produce?"[578]. Fox argues that contemporary antitrust law faces "The Efficiency Paradox". Modern antitrust is "meant to help us reach efficiency"[579]. However, "by trusting dominant firm strategies[580] and leading firm collaborations[581] to produce efficiency modern US antitrust protects monopoly and oligopoly, suppresses innovative challenges, and *stifles* efficiency"[582]. Fox argues that the outcome of this trust in efficiency means that antitrust becomes victim of a "crabbed perspective"[583] that "minimize[s] antitrust law"[584]. By "limiting antitrust to condemning inefficient outcomes"[585] the Chicago School analysis "shrinks antitrust law to its smallest possible scope and in doing so hurts efficiency in the sense of undermining rivalry and forestalling dynamic change"[586]. The result of this is that it makes us all "economically worse off"[587].

Yet on the other hand the protection of the competitive process through the protection of competitors is equally inefficient. This is what Professor Bork labeled the "Antitrust Paradox".

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[577] United States v Aluminum Co of America, 148 F.2d 416, at 431 (1945)
[578] Fox, "The Efficiency Paradox", cited in Pitofsky, *Supra note 6*, at 79
[579] *Id.* at 77
[580] *Id. at 77,* Cites *Verizon Communications Inc v Law Offices of Curtis V Trinko, LLP 540 U.S. 398 (2004)*
[581] *Id. at 77,* Cites *Texaco v Dagher 547 U.S. 1 (2006)*
[582] *Id.* at 78-81
[583] *Id.* at 79
[584] *Id.* at 79
[585] *Id.* at 79
[586] *Id.* at 79
[587] *Id.* at 79

The protection of competitors rather than competition, in Bork's opinion leads to a situation in which the law sacrifices potential consumer savings in order to protect the rivalry process. Ultimately, the paradox is that antitrust laws will undermine the singular goal of efficiency because the intervention to protect rivals elevates consumer prices.

Therefore, even if the protection of economic efficiency is favored, there is a tension as how efficiency is best served. On one hand if antitrust only condemns inefficient results the antitrust law will be minimized, and the competitive process that allows us to take advantage of efficiency will be hurt as inefficient rivals stop competing. On the other hand, if antitrust law protects the competitive process the antitrust law becomes a way of subsidizing inefficiency. Therefore, some balance will have to be made by the courts on where to strike the balance. This however, gives rise to the same difficulty of trade off as Bork predicted in the trade off in values.

Another analytical point from Fox demonstrates the same problem. That is what counts as economic efficiency? In Fox's opinion, "there is no one thing called efficiency…How one applies a goal of efficiency, therefore, depends on what one values and stresses"[588]. She demonstrates this further by looking at recent antitrust cases. For example, in *Brooke Group*[589] the court concluded that there was a need for a non-interventionist rule in price predation cases. Eventually it found that the Defendants had not violated the law because it "was unlikely to recoup its losses by raising prices in the future"[590]. However, Fox points out that an alternative resolution of this case could have also been framed in terms of efficiency. For example a ruling for the plaintiff would have "clear efficiency properties"[591]. A "plaintiff's victory…would have

[588] *Id.* at 81
[589] Brooke Group Ltd. V Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993)
[590] Fox, *Supra note 578*, at 82
[591] Fox, *Supra note 578,* at 82

encouraged competitive challenges to entrenched oligopolies"[592]. The second case that she looks to is *California Dentist Association*[593] where the supreme court ruled that advertising restrictions (to the effect that the members of the association could not advertise price discounts) of a dental association "could be anticompetitive…only if they caused Californian dentists to reduce the quantity of dental services provided in California"[594]. However, as Fox then goes on to question the efficiency of this decision by asking "were the dentists' by laws inefficient by suppressing information consumers wanted and chilling price discounting"[595]?

Therefore, Bork's claim that the certainty of antitrust law would be better served by a single goal seems at least a little questionable. Antitrust "is always characterized by tradeoffs"[596] even when it only has one goal.

### b) <u>Wealth Distribution and Poverty</u>

The National Bureau of Economic Research Working Paper on "Wealth Inequality: Data and Models"[597] found that "the households in the top 1% of the wealth distribution hold one third of the total wealth in the economy"[598]. Focusing more narrowly on financial wealth, the richest 1% of households owned 48% of the total[599]. Similarly those in the top 5% own "more than half"[600];

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[592] Fox, *Supra note 578,* at 82
[593] California Dentistal Ass'n v FTC, 526 U.S. 209 (1993)
[594] Fox, *Supra note 578*, at 83
[595] Fox, *Supra note 578*, at 83
[596] American Antitrust Institute, *Supra note 4,* at 12
[597] NBER Working Paper Series, "Wealth Inequality: Data and Models", September 2006, Marco Cagentti and Mariacristina De Nardi; Working Paper 12550, <http://www.nber.org/papers/w12550 >
[598] *Id.* at 5
[599] Wolf, "Top Heavy: The Increasing Inequality of Wealth in American and What Can be Done About It?" , The New York Press, at 7 (1995)

whereas, more than 10% of households have “little or no assets at all”[601]. Moreover, on comparison with other countries for which statistics are available, “the United States exhibits the highest degree of wealth concentration, with the largest shares of total wealth in the hand of the richest percentiles of the wealth distribution”[602]. Wolf concurred with this conclusion and said that the inequality United States was “high by international standards”[603]. Senator Sherman said that there was a need to protect the “necessaries of life”[604] from rising in cost. Today, set against the backdrop of increasing wealth inequality, the need to protect the consumer from being subject to inequitable wealth transfers over certain “necessities of life” is more important than ever.

i) Health Care

On that note, it is interesting to look at the AAI’s current worry over the “unduly expensive”[605] workings of the health care system which, as a result, “leaves so many underprotected or unprotected from catastrophic loss”[606]. This was reflected in their findings that “health insurance premiums increased by over 87% between 2001 and 2007[607], while a number of uninsured has

[600] *Id.* at 5
[601] *Id.* at 5
[602] *Id.* at 10
[603] *Id.* at 24
[604] 21 Cong. Rec. 1768 (1890) (Statement of Sen. Sherman)
[605] American Antitrust Institute, *Supra note 4*, at 317
[606] American Antitrust Institute, *Supra note 4,* at 317
[607] American Antitrust Institute, *Supra note 4,* at 320; Kaiser Family Foundation, “Employer Health Benefits”, 18 (2007), <http://www.kff.org/insurance/7672/upload/76723.pdf>

increased from 20 million to 47 million, or 1 in 7 Americans"[608]. The AAI therefore recommends "a realignment of priorities for antitrust enforcement"[609].

The Transition Report points to the "high concentration or cartelization in some sectors"[610]. For example, in the area of health insurance, "now practically every metropolitan market is highly concentrated"[611]. This consolidation has given "insurers a greater degree of monopsony power"[612] leading to "a reduced level of health care"[613] in the form of higher prices and fewer choices"[614]. Increased consolidation in this area has given. Similarly, in the past seven years, "over a dozen [Pharmacy Benefit Managers] mergers have occurred, leaving three major PBMs with approximately 80 of the national market"[615].

Equally worrying is the competition for pharmaceuticals. On one hand generic drugs typically sell for "approximately 70% less than their brand name alternatives"[616]. Antitrust enforcement "has so far played a vital role in the past several years in removing obstacles to generic competition, leading to a reduction in health care costs"[617]. However, the exclusionary conduct of brand names drug manufacturers has mitigated that success. Brand names "have paid generics millions of dollars to drop lawsuits challenging patent validity and to refrain from entering the market"[618]. In other cases the brand name company may also "deter any other

[608] American Antitrust Institute, *Supra note 4*, at 320
[609] American Antitrust Institute, *Supra note 4,* at 317
[610] American Antitrust Institute, *Supra note 4,* at 317
[611]American Antitrust Institute, *Supra note 4*, at 322
[612] American Antitrust Institute, *Supra note* 4, at 323
[613] American Antitrust Institute, *Supra note 4,* at 323;
[614] American Antitrust Institute, *Supra note* 4, at 322;
[615] American Antitrust Institute, *Supra note 4,* at 324
[616] American Antitrust Institute, *Supra note 4*, at 329; Generic Pharm. Ass'n, Indus. Statistics, <<http://www.gphaonline.org/Content/NavigationMenu/AboutGenerics/Statistics/default.htm>> .
[617] American Antitrust Institute, *Supra note* 4, at 330
[618] American Antitrust Institute, *Supra note* 4, at 334; *See* Brief for American Antitrust Institute as Amicus Curiae Supporting Petitioners, Joblove v. Barr Labs, Inc. (*In re* Tamoxifen Citrate Antitrust Litigation), 127 S. Ct. 3001 (2007) (No. 06-830).

generic from challenging the patent by stretching out litigation with an initial challenger"[619]. Evidence of such patent challenges can be demonstrated objectively by the drop of in successful patent claims between 1992 to 2000 and 2002 to 2004 where the generic firm successful patent claims fell from 73% to 30% in all cases[620].

Such concentration and subsequent increase in price must necessarily fall under the purview of antitrust. If antitrust is to prevent inequitable transfers of wealth from consumer to producer then surely, in a field such as health care, this goal is at its most important.

President Obama's interest in wealth distribution and poverty is quite clear. The white house agenda includes increasing an effort to expand access to jobs with particular focus on a $1 billion investment on providing transitional jobs and "career pathway programs that implement proven methods of helping low-income Americans succeed in the workforce"[621]. At the same time he has proposed to increase the minimum wage to $9.50 by 2011[622]and to provide tax relief to "all low and middle-income workers"[623].

On the particular point of health care reform, the White House Agenda explicitly makes reference to reforming "the insurance market to increase competition by taking on anticompetitive activities that drives up prices"[624]. This is linked with his social policy in health care which is meant to relieve the problems associated with costs in health care. Under which "everyone who needs it will receive a tax credit for their [insurance] premiums"[625] and aims to make it easier for both small and large businesses to provide health care benefits to their

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[619] American Antitrust Institute, *Supra note 4,* at 334
[620] American Antitrust Institute, Supra note 4, at 335; Paul M. Janicke & LiLan Ren, "Who Wins Patent Infringement Cases?", 34 AIPLA Q.J. 1, 20 (2006).
[621] <http://www.whitehouse.gov/agenda/poverty/>
[622] *Id.*
[623] *Id.*
[624] <http://www.whitehouse.gov/agenda/health_care/>
[625] *Id.*

employees, whilst at the same time "lowering drug costs" by imports of medicine from developing countries and increasing use of generic drugs in public programs.

ii) Food Prices, Farmers and Ranchers

This example of inequitable wealth transfers occurs out of increased monoposomy power, or buying power, through a process of consolidation. The American Antitrust Institute points to farmers and ranchers are caught in an "economic vise"[626] in which "concentrated buying market power creates the incentives and capacity for such buyers to exploit producers by imposing lower prices and other burdens"[627]. At the same time the increased concentration has "undoubtedly contributed to the increased cost of food"[628] to the general public.

The report cites examples of this happening firstly in the pork industry where the merger of Farmland Food's Pork and Premium Standard Brands in 2007 means that the only two major processors serving the southeastern US have consolidated. As a result, "hogs in the Southeast were often priced as much as 10% below the price for comparable hogs in the Midwest"[629]. Equally, concentration in the Beef industry means that 85% of steer and heifer slaughter capacity will be held by the top three competitors. There is "significant evidence"[630] that this has "caused a substantial drop in the price of cattle"[631]. The AAI conclude the same has occurred in the dairy

[626] American Antitrust Institute, *Supra note 4*, at 281
[627] *Id.*
[628] *Id.*
[629] American Antitrust Institute, *Supra note 4,* at 292
[630] American Antitrust Institute, *Supra note 4,* at 296
[631] *Id.*

industry to the effect that "anticompetitve practices rife in the industry has resulted in serious losses of income and coercion of farmers"[632].

Therefore, just as we saw at the birth of the modern antitrust law, there is a concern of inequitable transfers of wealth away from the US's agricultural population. Once again, it is antitrust's role to deal with such wealth redistribution. Furthermore, the Obama administration has already taken an interest in this particular area and its links to wealth redistribution concerns. The white house agenda includes "preventing anticompetitive behavior against family farms"[633]. In doing so the administration aims to "strengthen anti-monopoly laws and strengthen producer protections to ensure independent farmers have fair access to markets, control over their production decisions, and transparency in prices"[634]. This goes hand in hand with his scheme to encourage young people become farmers, and the attempt to "train the next generation of farmers"[635] by providing "tax incentives to make it easier for new farmers to afford their first farm"[636].

### c) <u>Protection of Small Businessmen</u>

The current economic troubles, rooted in the financial crisis, itself caused by the subprime mortgage and subsequent decline in housing prices, has spread through the USA and "is now

[632] American Antitrust Institute, *Supra note 4,* at 303
[633] <http://www.whitehouse.gov/agenda/rural/>
[634] *Id.*
[635] *Id.*
[636] *Id.*

contributing to negative economic trends in nearly all sectors of the US economy"[637]. Unemployment, according to the Bureau of Labor Statics, in January 2009 has reached 7.6%, which is the highest since June 1992 where it reached 7.8%[638]. In 2008, the average monthly job loss was 43,000[639]. According to the House Committee on Small Businesses, Small businesses are "hurting in all sectors"[640] and the financial market has "crippled"[641] their expansion.

During this downturn, it has been said by Boies[642] that "preserving jobs and economic stability will be perceived as more important than preserving competition"[643]. It is claimed that whereas antitrust theory "is theoretical, losing Jobs and plants is real"[644]. For that reason it will not be politically palatable to kill deals that could save some jobs. According to this viewpoint, Merger policy will have to be subordinated to the protection of jobs. However, there is a question over whether such a merger policy would help ease the economic problems.

In the past "small business have helped stem the effects of this kind of crisis"[645]. "Following the recession of the early 1990's, for example, startups helped usher in an era of tremendous prosperity. They did this by creating 3.8 million jobs, a figure that surpassed big business expansion by nearly 500,000"[646]. The power of small businesses in the United States economy is perhaps unsurprising considering that "small firms employ half of the nation's

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[637] House of Representatives Committee on Small Business, "Small Business Economic Outlook: Assessing Current Conditions and Challenges to Growth", 1, (2008), << http://www.house.gov/smbiz/Reports/Small%20Business%20Economic%20Outlook%20-%20Report%20by%20House%20Small%20Business%20Committee.pdf>>

[638] <<http://data.bls.gov/PDQ/servlet/SurveyOutputServlet >>

[639] House of Representatives Committee on Small Businesses, *Supra note 642,* at 2

[640] House of Representatives Committee on Small Businesses, *Supra note 642,* at 2

[641] House of Representatives Committee on Small Businesses, *Supra note 642,* at 2

[642] Sorkin, "Why Obama May Assent to Deals", November 10th (2008), <http://www.nytimes.com/2008/11/11/business/11sorkin.html?_r=1&scp=4&sq=sorkin%20obama%20deals&st=cse>

[643] *Id.*

[644] *Id.*

[645] House of Representatives Committee on Small Business, *Supra note 642,* at 1

[646] House of Representatives Committee on Small Business, *Supra note 642,* at 1

workforce and comprise 99.7% of American enterprise"[647]. For that reason, small business men and women are "likely to play a critical role in the recovery process"[648].

The House Committee on the Small Businesses has said that small businesses create 80% of all new jobs and hence, Chairwoman Ms Velazquez, has said that "prosperity beings with Main Street" and "if we are going to bring our economy back on tract, we're going to need to promote innovation and job creation for our nation's small businesses"[649]. What is required to aid the economy, in the view of Ms Velazquez is "growth and job creation"[650], "two areas in which small businesses excel"[651]. Therefore, small business can act as an "economic catalyst"[652]. In the same open forum the committee heard from numerous small business representatives who demonstrated the potential for small businesses to accommodate job creation and economic growth. For example, Mr Robert Therrien, President of the Melanson Company Inc, on behalf of the National Roofing Contractors Association testified that by accelerating demand for green roofing systems the government would create 40,000 new jobs and add $1 billion in revenue to the economy[653]. Similarly Mr Steve Massie, CEO of Jack Massie Contracto Inc, on behalf of Associated General Contractors of America, testified that a $1 billion investment in

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[647] House of Representatives Committee on Small Business, *Supra note 642,* at 1

[648] House of Representatives Committee on Small Business, *Supra note 642,* at 1

[649] House of Representatives Committee on Small Businesses, "Committee Explores Role of Small Business in Economic Recovery", Press Release, January 14th (2009), <http://www.house.gov/smbiz/PressReleases/2009/pr-1-14-09-open-forum-economy.html>

[650] House Committee on Small Businesses, "Open Forum on the state of Small Business Economy", Opening Remarks by Chairwoman Nydia Velazquez, Jan 14th (2009) <http://www.youtube.com/view_play_list?p=EFDB4C531798AB70>

[651] *Id.*

[652] *Id.*

[653] *Id.*

infrastructure would create over 28,500 jobs , ad $3.4 billion to the Gross Domestic Product and $1.1 billion to personal earnings[654].

There are some signs that the American Antitrust Institute has also taken this point to heart. In an AAI press release Jonathan L. Rubin discusses "the need for increased enforcement of section 2 of the Sherman Antitrust Act to discourage dominant firms from engaging in strategies that maintain monopolies and potentially harm small businesses"[655]. Rubin was quoted in the press release as saying that "the preservation of our nation as the "Land of Opportunity" is, and should continue to be, an important foundational goal of antitrust" and as a result "US antitrust policy must protect small businesses and entrepreneurs from many kinds of anticompetitive conduct, specifically by recognizing the need to enforce section 2 and addressing the concept of vertical market power"[656].

President Obama has affirmed the importance of protecting the competitiveness of small businesses. He explicitly has said that the US has an interest in "expanding broadband lines across America, so that a small business in a rural town can connect and compete with their counterparts anywhere in the world"[657]. Similarly, the White House has announced the elimination of capital gains for small businesses[658]. More over, The Economic Recovery and

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[654] *Id.*
[655] American Antitrust Institute, "American Antirust Institute to Testify before House Committee on Competition Policy's impact on American Entrepreneurs", September 23rd (2008), <http://www.antitrustinstitute.org/archives/files/House%20Small%20Biz%20Committee%20Testimony%20Press%20Release_092320081203.pdf>
[656] *Id.*

[657] Remarks of President-Elect Barack Oabama as Prepared for Delivery American Recovery and Reinvestment, January 8th (2009) , <http://www.whitehouse.gov/agenda/economy/>

[658] <<http://www.whitehouse.gov/agenda/taxes/>>

Reinvestment Act 2009 has been warmly received by the Chairwoman of the House Committee on Small Businesses, Representative Velzquez[659]. This legislation will provide the nation's small businesses with $13 billion in new lending and investment and provide $30 billion in targeted tax relief. Therefore, this "legislation will help cash-strapped businesses that will spend the money now and spur economic recovery in the short term" according to Representative Velazquez[660].

Therefore, contrary to Mr Boies's view, we can clearly see that the protection of small businesses will in fact stimulate economic recovery. However, the need to protect small businesses through fiscal policy and tax reforms, must be supplemented by antitrust. The law must enable these businessmen to compete with larger businesses. The presidential administrations of Franklin Roosevelt, Kennedy and Johnson have demonstrated that antitrust has in the past been subjugated to the needs of a macroeconomic policy that aims to encourage growth. However, as we have seen in this section it would be prudent not to take such an approach now. Antitrust's concern for protecting small businessmen is one way in which growth can be encouraged and therefore, keeping small businesses competitive in the market appears to be a desirable ancillary point to the macroeconomic policy.

i) Too Big To Fail

[659] House Committee on Small Businesses, Press Release,"Velázquez Hails Passage of Economic Recovery Package", January 29th (2009), <http://www.house.gov/smbiz/PressReleases/2009/pr-1-28-09-economic-recovery-package.html>

[660] *Id.*

As mentioned earlier, the Clayton Act aimed to protect small businesses because consolidation could lead to an economically unstable position. The statement “the bigger they are, the heavier they fall” sums up the too big to fail argument. The more concentrated an industry is, the more that the nation stands to lose if the actors in the industry become defunct.

Foer argues that this has occurred recently with the “Great Banking Meltdown of 2008”[661]. Foer argues that the 2008 financial crisis has led us to a situation in which “we seem to be moving at warp speed toward a highly concentrated system of capital allocation dominated by conglomerated financial services”[662]. It is true that now:

> *“Merrill Lynch and Countrywide Financial are now part of the Bank of America; Bear Stearns and Washington Mutual are now part of JPMorgan Chase and Wachovia is now part of Wells Fargo. Goldman Sachs, Morgan Stanley and American Express have become bank holding companies. Who knows what comes next?”*

These are now “megabanks” which are not only large in size in one concentrated area but span the originally separate areas of commercial banking, investment banking and insurance provision. The “failure of a megabank in multiple financial areas would have huge, unpredictable ripple effects throughout the economy”[663]. The blame for this situation lies in part at the door of merger policy. Lax regulation of mergers “have permitted the consolidation of the financial industry”[664]. “Unlimited growth”[665] has been allowed “so long as the effect of a merger or acquisition is not likely to be an increase in prices in the near term”[666]. As a result “there is no

[661] Foer, *Supra note 188,* at 2
[662] Foer, *Supra note 188,* at 2
[663] Foer, *Supra note 188,* at 4-5
[664]Foer, *Supra note 188,* at 6
[665] Foer, *Supra note 188,* at 6
[666] Foer, *Supra note 188,* at 6

control over conglomerate mergers"[667] and "vertical mergers are almost never halted or restructured"[668]. These are now "keystone"[669] of the economy and accordingly "too big to fail".

What should be done about this situation? In Foer's opinion "Congress should consider legislation that will give the government an opportunity to stop the formation of new organizations that are too big to fail"[670]. Specifically, either the Antitrust Division or the FTC should be empowered to declare a merger or acquisition that it has investigated pursuant to the Pre-Merger Notification Act as "potentially creating or exacerbating an unreasonable systemic risk"[671].

In sum, small businessmen should be protected because when one goes through financial difficulties they do not cause large-scale economic crisis. Unlike big businesses for which this is a realistic possibility.

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[667] Foer, *Supra note 188,* at 6
[668] Foer, *Supra note 188,* at 6
[669] Foer, *Supra note 188,* at 8
[670] Statement of Albert Foer, President American Antitrust Institute, Before the US House of Representatives Judiciary Committee Subcomittee on Courts and Competition, Re "Too Big to Fail? The Role of US Antitrust Law in Government Funded Consolidation in the Banking Industry" March 17 2009, at 6, <http://www.antitrustinstitute.org/Archives/housetesttoobigtofail.ashx >
[671] *Id.* at 7

## d) **Protection of Democracy**

Let us now look to some specific concerns of the modern world that arguably antitrust has an interest in regulating, not because they are based on economic efficiency but because they an have anti-democratic effect.

### i) Media Outlets

A good example of this is the current growth in concentration in the media. It is almost certain that the framers of the Constitution did not envision the rise of the internet, or the large array of media producers that the nation now homes. However, the principles behind the first amendment are still clearly applicable to these modern phenomenon. Yet, today these mediums are under the threat of anti-competitive business practices.

The particulars concern is that “growing media consolidation has the potential…for an inordinate amount of control over products of culture that help to shape public life”[672]. President Barrack Obama would appear to understand the problems faced by the United States in the wake of mass media consolidation. The American Antitrust Institute Transition Report’s includes an interview with President Obama on the topic. In this interview President Obama explicitly stated that there “is a clear need in this country for the reinvigoration of antitrust enforcement”[673].

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672 Morrison, “Bridgeport Redux: Digital Sampling and Audience Recoding”, 19 Fordham Intell. Prop. Media & Ent. L.J. 75 (2008)

673 American Antitrust Institute, “Perspective on Antitrust : Comparison Between McCain and Obama” at 3, September 2nd (2008), <http://www.antitrustinstitute.org/archives/files/AAI%27s%20McCain%20Obama%20Comparison_090220080953.pdf>

There is a "need to step up review of merger activity"[674]. Later in the article the President says that he "strongly favor[s] diversity of ownership of outlets and protection against the excessive concentration of power in the hands of any one corporation"[675]. He "strongly believe[s] that all citizens should be able to receive information from the broadest range of sources" and equally believes that "media consolidation during the Bush administration has had the effect of eliminating a lot of the diversity of information sources available to persons who have to rely on more traditional information sources, such as radio and television broadcasts and newspapers"[676]. The "media market is dominated by a handful of firms"[677] and the "ill effects"[678] are "well documented"[679] and he cites the "less diversity of opinion, less local news coverage, [and] replication of same stories across multiple outlets"[680].

The American Antitrust Institute has given it support to the damnation of media concentration. In a press release, the AAI states that a survey of "prominent newspapers" found that not one published independent reporting of the comments of the then Senator Obama's concerns over media concentration[681]. In their transition reports the AAI devoted an entire chapter to this current danger. This points to two main problems in media concentration. Firstly, the fear that media monopolies may "raise prices to consumers"[682] and secondly, a belief that "society's political and cultural health is fostered by numerous, independent media, and

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[674] *Id.*
[675] *Id*
[676]*Id.* at 9
[677] *Id.* at 9
[678] *Id.* at 9
[679] *Id.* at 9
[680] *Id.* at 9
[681] American Antitrust Institute, Press Release, "American Antitrust Institute Notes Comments by Senator Obama on media Concentration", May 22nd 2008, <http://www.antitrustinstitute.org/Archives/release_obama_media.ashx>
[682] American Antitrust Institute, *Supra note 4,* at 247

excessive media concentration may threaten the public's access to important information or viewpoints"[683].

The AAI recognize the need for a diverse number of outputs of information in a democratic society. The transition reports point out the not only a "marketplace of ideas"[684] plays an "important role in our democracy"[685] but that in particular it is a "competitive market place"[686] that is in fact required. Of course, antitrust has previously acknowledged its role in the area of helping preserving competition in the market place of ideas. The Supreme Court's *AT & T*[687] decision recognized the goal of "promoting diversity in sources of information"[688] and that the "values underlying the First Amendment coincide with the policy of antitrust laws"[689]. The transition report acknowledges how a competitive media, increases political accountability and reduces corruption. Whereas on the other hand:

> "*concentrated communicative power creates demagogic dangers of a democracy, reduces the number of owners who can choose to engage in watchdog roles, may reduce the variety in perspectives among the smaller group of people who hold ultimate power to choose specific (varying) watchdog projects, and multiplies the probable conflicts of interest that can muzzle those watchdogs"*[690].

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[683] American Antitrust Institute, *Supra note 4,* at 247
[684] American Antitrust Institute, *Supra note* 4¸ at249
[685] American Antitrust Institute, *Supra note 4,* at 249
[686] American Antitrust Institute, *Supra note 4,* at 249
[687] United States v. AT&T Corp., 552 F. Supp. 131, 176 ( 1982)
[688] *Id.*
[689] *Id.*
[690]Baker, "Media Concentration and Democracy: Why ownership Matters", Cambridge University Press, at 120-121, (2006)

To that end, the report recommends that antitrust enforcement “promote, or at least not diminish, the media’s contribution to the market place of ideas”[691]. Moreover, merger policy should “provide some of the necessary legal framework for a vibrant market place of ideas”[692].

This is maybe not a surprising result for the AAI to reach after it previously had voiced its disapproval of the merger between XM Radio Inc and Sirius Satellite Radio Inc (the only two suppliers of satellite radio in the US)[693]. In the AAI’s mind the parties did not demonstrate that the merger was in the public interest. Rather, they concluded that “conventional merger analysis indicates that the merger poses a significant risk of anticompetitive effects, including higher prices, reduced quality, and reduced consumer choice”[694].

ii) Net Neutrality

A related concern is the emerging debate over “net neutrality”. Net neutrality “forbids preferential treatment of specific content, services, applications”[695] on the internet. It is a principle that helps “ensure that telecommunication infrastructures remain “dumb” by delivering content and services equally in a best-effort manner that treats data/content equitably”[696]. Such a system means that “network operators do not decide what content users can access”[697] furthermore, operators “cannot impede the flow of or give preferential treatment to particular

[691] American Antitrust Institute, *Supra note 4*, at 248
[692] American Antitrust Institute, *Supra note 4,* at 248
[693] American Antitrust Institute, Official Submissions, “Comments of the American Antitrust Institute in Opposition to Transfer Application”, May 6th (2007), at 3, <<http://www.antitrustinstitute.org/Archives/xm.ashx>>
[694] *Id.*
[695] Meinrath and Pickhard, “Transcending Net Neutrality: 10 Steps towards an Open Internet” 12 No. 6 J. Internet L. 1, at 11, (2008)
[696] *Id.* at 12
[697] *Id.* at 12

kinds of content"[698]. However, commentators believe that the Supreme Court's *Brand X*[699] decision, in which ruled that cable broadband was an "information service" rather than a "telecommunications service" and therefore meaning cable companies are exempt from common carriage laws, is damaging to this principle. As a result cable providers do not have to "share their infrastructure with competitors"[700]. This decision, in the eyes of some, "removed safeguards and created the potential for access restrictions to non-preferred content"[701]. As a result, democracy's promotion of the free market of ideas is arguably being harmed. Mehran and Pickard, have proposed a series of points that "we believe will better enable the internet to reach its democratic and participatory potentials"[702]. Their research works on the assumption that net "neutrality is not just a technical specification; it also facilitates a social contract that supports equity and justice through data communications. Given the shortcomings of the neutral networking conceptualizations, this approach envisions a more democratic network infrastructure"[703]. Their proposals include the requirement of a common carriage, safeguards on privacy, and fosters application neutrality.

Other commentators have highlighted other present dangers to net-neutrality. Newmann points to the "attempts by service providers such as AT&T to charge some companies more for better "traffic""[704]. Going further, the author notes that "if the network service providers charge content providers for better treatment of traffic, larger companies can afford to purchase more "lanes", making connections to their sites quicker, and slowing down access to websites run by

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[698] *Id.* at 12
[699] National Cables & Telecomunications Assn v Brand x Internet Services, 545 U.S. 967 (2005)
[700] Meinrath and Pickhard, *Supra note 695,* at 13
[701] Meinrath and Pickhard, *Supra note 695,* at 13
[702] Meinrath and Pickhard, *Supra note 695,* at 18
[703] Meinrath and Pickhard, *Supra note 695,* at 18
[704] Newmann, "Keeping the Internet Neutral: Net Neutrality and its Role in Protecting Political Expression on the Internet", 31 Hastings Comm. & Ent L.J. 153 at 162, (2008)

smaller companies and individuals"[705] leading to the situation where "it will not only become more expensive (if not unaffordable) for citizens journalists and bloggers to post articles on the Internet, but power will be put in the hands of a few corporate-owned media outlets"[706].

It would appear that President Obama is also aware of these concern. An AAI document comparing the antitrust policy of then Senator Obama and Senator McCain, notes that "Barrack Obama strongly supports the principle of network neutrality to preserve the benefits of open competition on the Internet"[707]. The document notes the then Senator's concern that current "guarantees are not enough to prevent network providers from discriminating in ways that limit the freedom of expression on the internet"[708]. President Obama noted the danger that because most Americans usually have a limited choice of only one or two broadband carriers, those "carriers are tempted to impose a toll charge on content and services, discriminating against websites that are unwilling to pay for equal treatment"[709]. Moreover, "it would also threaten the equality of speech through which the internet has begun to transform American political and cultural discourse"[710]. Therefore President Obama "supports the basic principle that network providers should not be allowed to charge fees to privilege the content or applications of some web sites and Internet applications over others"[711].

These concerns are the concerns for antitrust enforcers. When it comes to interpret antitrust law and formulate antitrust policy in these issues, consideration should be given to the importance that antitrust subscribes to democracy.

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[705] *Id.* at 170
[706] *Id.* at 170
[707] American Antitrust Institute, *Supra note 678,* at 3
[708] American Antitrust Institute, *Supra note 678,* at 3
[709] American Antitrust Institute, *Supra note 678,* at 3
[710] American Antitrust Institute, *Supra note 678,* at 4
[711] American Antitrust Institute, *Supra note 678,* at 4

iii) Antitrust Distortion

There is also a claim that antitrust policy has become corrupted by exactly the same forces that it was intended to restrain. McChesney points to the Microsoft antitrust litigation to demonstrate how the private interests involved dictates the outcomes of antitrust cases. For example, Senator Gorton of Washington was reported as defending Microsoft, while Senator Hatch of Utah was attacking Microsoft[712]. The motives behind this become clear when it is appreciated that Microsoft is located in Washington while competing firms like Novell are located in Utah.[713] Similarly McChesney notes that there were reports of "Microsoft spending more and more money, month by month, to win friends and influence politicians are everywhere"[714]. For this proposition, McChesney cites evidence that Microsoft gave $20,000 to the State Republican Party of South Carolina and shortly after the Attorney General dropped his support for the antitrust case against Microsoft.[715] This demonstrates the prevalence of very corruption and influence that the original antitrust statutes were passed to prevent.

iv) Too Big To Fail

This argument has already been discussed under the subsection on protecting small businessmen. However, according to Foer, the problems of "Megabanks" spread beyond their economic effects. These megabanks "have substantial political as well as economic clout"[716]. Arguably "these mega financial service companies we're in the process of creating are going to be able to

[712] McChesney, *Supra note 260*, at 134
[713] McChesney, *Supra note 260,* at 134
[714] McChesney, *Supra note 260*, at 134
[715] McChesney, *Supra note 260,* at footnote 4
[716] Foer, *Supra note 188,* at 2

demand from Congress, quite persuasively, whatever it is they say they need, using threat of failure"[717]. Furtherore, would any attempt to reshape the existing financial structure be blocked by the already politically powerful megabanks? Or as Foer frames the question would the "political might of the mega-financials be able to withstand a legislative effort to reshape the sector"[718]?

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[717] Foer, *Supra note 188,* at 5
[718] Foer, *Supra note 188,* at 9

# Conclusion

During the Sherman Act's passage through the House of Representatives, Representative George said: "nothing will be brought within [the Sherman Act] which is outside of its plain words. Enlargement by construction will not be allowed. "[719]. However, the Chicago school has done just that. Construction of antitrust law has changed from what it was originally intended to cover, namely, protection of democracy, preventing inequitable wealth distribution and preservation of the small businessman, to a tool for promoting economic efficiency.

This paper presents the case that these socio-political goals were the motivating factors behind antitrust law. Successive political administrations however, have swung back and forth in their treatment of these goals. Despite this, however, there is still a need for antitrust to be concerned with these goals and the paper has pointed to some practical examples of this concern. It is still, as Pitofsky argues, "bad history, bad policy and bad law" to exclude socio-political values in interpreting antitrust law"[720].

The Obama administration, with its correlating interest in protecting socio-political concerns, is well placed to administer the changes required to reassign antitrust law's purpose and recognize once again that there is more to the law than efficiency.

[719] 21 Cong. Rec. 1,765 (Statement of Sen. George)
[720] Pitofsky, *Supra note 204*, at 1051

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