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Introduction: A Retrospective Examination of the Reagan Years

James F. Ponsoldt
University of Georgia School of Law, ponsoldt@uga.edu

Introduction

BY JAMES F. PONSOLDT*

As the 1988 Presidential election approaches, the appropriateness of a retrospective examination of the Reagan Administration's treatment of and effect upon antitrust law and policy has been confirmed by recent events.

Bill Curran, editor of this journal, first tentatively suggested the project to me in the fall of 1986. At that time, megamergers were at their unchallenged zenith; Robert Bork and Richard Posner were likely candidates for the Supreme Court; the "Chicago School" approach had coopted or silenced the majority of mainstream academic antitrusters; the Heritage Foundation was a major pipeline for government appointments; and former law-enforcement moderates and antitrust precedent from the Nixon-Ford-Carter years regularly were castigated as "liberal" or "antibusiness" in the editorial pages of the Wall Street Journal, which had become recognized as the *Izvestia* of the executive branch.

Hearings conducted by the U.S. House Monopolies Subcommittee, chaired by Peter Rodino, became the sole important

* Professor of Law, University of Georgia, Athens.

forum[1] for the few vocal dissenters. Committee members and witnesses argued that controlling inequitable wealth distribution was a legitimate subject of legislation, that free markets required policing, and that, barring a legitimate constitutional challenge, existing laws ought to be enforced, even by an executive branch that disfavors those "inefficient" laws.[2] But the House Monopolies Subcommittee was alone in its opposition to Administration antitrust policy. If a retrospective had been solicited from impartial academics, practitioners, and government officials during 1986, the effect of the Reagan Administration on antitrust would have been described as revolutionary and permanent.[3]

In the intervening months, however, the anti-antitrust climate has changed. The Democrats have won control of the Senate.[4]

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1 Prior to 1986, of course, the existence of a Republican majority in the United States Senate allowed Hon. Strom Thurmond to be named Chairman of the Senate Judiciary Committee. One of Senator Thurmond's first actions as Chairman was to disband the Senate's Monopolies Subcommittee and thereby control antitrust policy from his position as Committee Chairman. The elimination of a subcommittee devoted to antitrust prevented the kind of subcommittee hearings and testimony, critical of executive branch nonenforcement of antitrust legislation, that continued in the House Monopolies Subcommittee.

2 For a recent discussion of whether "inefficient" laws should be applied as intended by Congress, or rewritten by the judiciary, *see Boise Cascade Corp. v. Federal Trade Commission*, 837 F.2d 1127 (D.C. Cir., 1988). As the dissent by Judge Mikva makes clear, 837 F.2d at 1152, the popular view that judges appointed by the Reagan Administration uniformly adhere to a policy of "judicial restraint" is utter nonsense.

3 *See*, for example, the editorial by former Dean Ernest Gellhorn in the January 6, 1983 issue of the Wall Street Journal summarizing the "lasting impact" of William Baxter, the Reagan Administration's first antitrust chief. *See also*, the responses to that editorial in the January 27, 1983 issue of the Journal.

4 With that victory, Hon. Joseph Biden assumed Chairmanship of the Senate Judiciary Committee, reestablished the Monopolies Subcommittee, and allowed Hon. Howard Metzenbaum to become Chairman of that Subcommittee. The Senate Monopolies Subcommittee now pursues its antitrust oversight responsibilities with vigor equal to that of the

The popular resentment toward merger-mania based upon resulting economic trauma and hardship in the Midwest and South has mobilized antimerger policy. The Iran-Contra embroglio has undermined support for Administration policy among moderate legislators and voters.[5] Mainstream antitrust academics regained their courage, common sense and voice at a national conference held in early 1987 at the Airlie House.[6] The state attorneys general, through their national organization, have criticized the Justice Department's noninterventionist vertical restraint and merger guidelines and acted upon their own views of antitrust. The Supreme Court upheld Indiana's antitakeover law,[7] spurring many states to propose similar, or more far-reaching antimerger laws.[8] Insider trading scandals and the October, 1987 stock market crash renewed calls for the policing of corporate takeovers. And Robert Bork will not bring his antitrust views to the Supreme Court.

House Subcommittee. The looming retirement of Chairman Rodino, in fact, suggests that Senate antitrust oversight might become increasingly important.

5 The Administration's foreign policy is symptomatic of its domestic policy: to oppose and decline to enforce democratically created regulation of business on the ground that such regulation is anticapitalist and anti-free market. *See generally*, Ponsoldt, *Cowboys of Capital*, New York Times, editorial page, March 13, 1987, and Ponsoldt, *Antitrust: When Law Clashes With a Truth*, New York Times, editorial page, January 3, 1984.

6 *See generally*, PAPERS PRESENTED AT THE AIRLIE HOUSE CONFERENCE ON THE ANTITRUST ALTERNATIVE, 62 NEW YORK UNIVERSITY LAW REVIEW 927-1172 (1987).

7 *CTS Corp. v. General Dynamics Corp. of America*, 107 S. Ct. 1637 (1987).

8 *See* A Takeover Law Grows in Delaware, The National Law Journal, April 11, 1988, p. 1. *See also*, for example, proposed Georgia Bill S.R. 524, introduced in the 1988 session of the Georgia General Assembly, which would give local governments in Georgia the power to seek Court injunctions to prevent any corporate takeover resulting in a factory shut down and consequent loss of more than 50 jobs in the respective local community.

Reminiscent of Barry Goldwater's 1964 presidential campaign, moderate politicians, traditional antitrust scholars, state law enforcement officials, mainstream economists and disenchanted small business constituencies recognize that "extremism" in defense of economic liberty may indeed be a vice; moderating the goals of free market capitalism with the commands of a democratic political system may indeed be a virtue. We have reached the stage where common sense has begun to overtake and question ideology. In this symposium issue, for example, economist William Shepherd asks "how such an odd idea as [a central hypothesis of Chicago School economics and Reaganomics] could gain any credence, much less widespread assent."[9] Elsewhere, John Flynn and I have questioned how Chicago Schoolers could have persuaded courts to accept the premise that distribution restraints which raise consumer prices and restrict consumer choice nevertheless promote "consumer welfare."[10]

The *Antitrust Bulletin* and its readers are fortunate to receive the views of the distinguished contributors to this two-issue symposium, and to receive those views in 1988, potentially a watershed year in antitrust, rather than several years earlier. Some of the authors focus upon particular antitrust issues, whereas others have chosen to take a broader view of the Reagan Administration's efforts and impact on antitrust. The articles reflect some differences of opinion, of course. The symposium as a whole, however, is marked by the recognition that the most suitable antitrust policy must balance government intervention, on the one hand, with economic libertarianism, on the other.

Perhaps the crucial point to be made about Reagan antitrust policy and Chicago School economic theory is that the policy and theory do not purport to be justified by normative politics. The goal of current economic policy is to maximize aggregate societal

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9 Shepherd, *Three 'Efficiency School' Hypotheses About Market Power*, THE ANTITRUST BULLETIN ____ ( ).

10 Flynn and Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 NEW YORK UNIVERSITY LAW REVIEW 1125 (1987).

wealth by maximizing allocative efficiency; government should not intervene, the policy posits, unless business conduct reduces allocative efficiency, a result which by hypothesis will not happen in the absence of certain forms of competitor collusion.

Thus, the current policy purports to consider only effects on aggregate societal wealth (defined in a peculiarly circumscribed manner) of private business conduct and its regulation, not the distribution of that wealth among voter constituencies. Yet the control of wealth distribution, in our democracy, is a profoundly political question and within Congress' Article I responsibilities.

To the extent that Congress undertook to effect societal wealth distribution, and not simply wealth maximization, when it enacted the Sherman, Clayton, Robinson-Patman, Celler-Kefauver, and other antitrust acts during the last century, it expressly relegated economic "efficiency" policy to a subordinate role.[11] As the Wall Street Journal itself details, the Reagan years have been marked by a growing income inequality between the wealthy and poorer segments of our population and by a relative decline in economic growth and productivity.[12] No legitimately functioning democracy can be expected to ignore significant disparities in wealth distribution among its voters; no democracy can reduce fundamental political choice to purely economic determinants.

The administration's merger policy and criticisms of that policy, which are described by contributors to this symposium, are representative of the continuing antitrust debate. Recurring antiinterventionist themes may be summarized in four categories: (1) Property owners should be allowed to control and dispose of their property as they choose, without government interference, simply as an ideological matter—an attribute of "liberty"; (2) antitrust enforcement should be viewed as "antibusiness" since it impedes efforts to increase capital formation and attract private

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11 *See Boise Cascade, supra* note 2, Mikva, J., dissenting. *See also*, Justice Frankfurter's opinion for the Court in *Standard Oil of California v. United States*, 337 U.S. 293 (1949).

12 *The Outlook*, The Wall Street Journal, March 21, 1988, p. 1.

sector investment; (3) private cooperation and consolidation, by allowing businesses to eliminate "duplicated" labor, distribution and fixed costs, increase operating efficiency and therefore, by increasing the short-term profitability of consolidated businesses, increase, rather than decrease, market competition; and (4) a free "market for corporate control," allowing assets to be sold by rational businessmen to the highest bidder, increases "allocative efficiency" by allowing assets to be put to their "best" use, thereby maximizing aggregate societal wealth.

Each justification for nonintervention reflects a normative political judgment which historically has not been supported by fundamental American democratic choices, at least when invoked during periods of private sector consolidation, cooperation and concentration. Of course, even during the prointerventionist 1960s, government generally recognized that most mergers are competitively neutral and that consolidations can be procompetitive. However, the vast increase in size and number of mergers, joint ventures and other consolidations during the last seven years has been tolerated and reinforced by the current Administration, and an intellectual "victory" has been claimed for neoclassical efficiency analysis.

The following responses to claims of premature "victory" are appropriate:

1. The economic libertarian ideology used to defend an absolutist view of private property rights is common not in "one man, one vote" democracies but in "one dollar, one vote" autocracies. In the United States, libertarian arguments and private property rights are subject to legitimate democratic control, and that majority view has been expressed as law.

2. Antibusiness rhetoric has no relevance in the antimerger context, since significant beneficiaries of antitrust enforcement include independent business. Those smaller business beneficiaries are sources of great comparative growth in productivity and innovation. Antitrust, designed to police and protect the free market, is probusiness not antibusiness. The vast majority of antitrust private plaintiffs are businesses. "Antibusiness" characterizations of traditional anti-

trust enforcement are a symptom of a deference to private market concentration that promotes a bureaucratization of business that is inferior to decentralized markets.

3. Competitor acquisitions and cooperation, by allowing the acquiring or cooperating company to eliminate duplicated workers and facilities, indeed increase operating efficiency and profitability. But those efficiency gains, in comparatively concentrated markets, are not procompetitive and are only short-term. Merger cost-savings often must be used to pay acquisition debt. Alternatively, any savings are often accumulated or distributed to shareholders; savings are not passed to consumers as price reductions. Thus the very merger which created the savings also reduces the competitive spur that reinforces price discounting. Short-term financial manipulation replaces long-term productivity and output gains. Thus, while increased business rivalry promotes efficient markets, "efficient" participants in those markets, if the participant is dominant and the market concentrated, often do not promote market competition or remain efficient.

4. Perhaps the most important claim involves "allocative efficiency." Allocative efficiency is central to free market economies and explains why antitrust policy has been used historically as a weapon to challenge more intrusive government entry licensing and rate regulation. The problem is that the economics concept has been applied beyond its intuitive limits to invalidate democratic control of economic concentration. Thus, the most economically "efficient" society, in theory, could be one in which all wealth eventually is centrally controlled—a politically unacceptable result whether or not that control is in public or private hands. But, within the past ten years, the wealthiest Americans have become wealthier, whereas the poorest have become worse off: wealth concentration has become more inequitable as merger mania has flourished.

Furthermore, the "wealth maximization" claim for corporate consolidation and cooperation is based upon an overly simplistic

accounting definition of "wealth," which assumes that aggregate wealth increases when buyers pay to sellers a higher price for particular assets: that simply by inflating the cost basis of an asset, a transaction will increase or create "wealth." In real value productivity terms, a free market for corporate control may, but does not necessarily, maximize wealth—productivity—in the aggregate. A noninterventionist policy toward mergers has not produced the hypothesized wealth enhancement, except for those in the financial and investment community. Rather, taxpayers, workers, consumers and small business suppliers simply have transferred wealth to investors and financiers.

For many observers, including readers of this symposium, a key question in 1988 is whether the Reagan Administration's economic noninterventionism will have a permanent impact upon American antitrust law and policy. None of the authors in this symposium attempts a definite answer to that question, recognizing the vagaries of politics and the uncertainty of our world economic condition. Some advocates of the laissez faire continue to advance the self-serving claim that the "future is inevitable; as an oxymoron, antitrust is obsolete."[13]

While the hyperbole of argument is limited only by the certainty of the advocate,[14] two facts cannot be disputed. First,

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13 Austin, Book Review of *Issues After a Century of Federal Competition Policy*, ____ THE ANTITRUST BULLETIN ____ ( ). *See*, for a contrary view, *Tougher Antitrust Stance Expected*, The New York Times, April 4, 1988, p. 23: "Enforcement of federal antitrust laws is likely to become significantly more aggressive, particularly regarding mergers, no matter which party wins the White House in November, many lawyers and members of Congress believe . . . . The antitrust policy of the recent Reagan years has been widely disparaged, largely because the Administration has failed to challenge more than a few of the many billion-dollar mergers and takeovers."

14 In *The Tides of Change*, The National Law Journal, April 18, 1988, pp. 1, 21-28, for example, former Antitrust Division head William Baxter, an academic, is quoted as arguing that, "with the exception of a handful of lunatic populists, even liberal Democrats are persuaded that economic soundness is something that we should be seeking," at p. 26. Bruce Fein, another former Justice Department official and now a fellow at the Heritage Foundation, is quoted as saying that, "no one

the Reagan Administration has not succeeded in implementing statutory change in our antitrust jurisprudence. By comparison, the growth of antitrust from the mid-1930s through the late 1960s was marked by two existing statutes—the Robinson-Patman Act and the Celler-Kefauver Act—in which Congress quite clearly codified its intention to promote deconcentration, to disperse economic power and to protect independent business, regardless of short-term efficiency consequences. Second, this growth of antitrust coincided with an immense growth in American productivity, international competitiveness, foreign trade surplus, median per capita income and equitable distribution of wealth. By contrast, the subsequent years have been marked by declines in comparative productivity, international competitiveness, trade superiority and inequitable wealth distribution.

Unlike the growth of antitrust, which was a political response to the laissez faire and economic collapses of the 1880s and 1920s, the recent return of laissez faire has not been responsive to any emergency or popular demand. The likelihood is that if traditional antitrust does not survive, it will be supplanted not by a laissez faire cloaked as efficiency analysis, but by the opposite extreme: industrial policy and more intrusive government control. The Depression of the 1930s brought us not only Thurman Arnold, it must be remembered, but also the most significant increase in federal economic regulation in our history. Much of FDR's New Deal legislation immunized vast segments of our economy from antitrust.

In the event that traditional antitrust becomes obsolete, which none of the authors in this symposium advocate, this democratic government will not leave a vacuum in regulatory policy. If the Reagan Administration's antitrust policy is to have lasting import, it will be as a historical reminder to those who advocate "zero sum" government control or intrusive industrial policy that extremes beget extremes.

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believes economic regulation works anymore," *id.* These statements misconstrue the campaign views of candidates for the 1988 Democratic Presidential nomination. Even George Bush, the likely Republican nominee, while relying upon the support of President Reagan, has not endorsed the libertarian extremism exemplified by Baxter and Fein.