Journal of the National Association of Administrative Law Judiciary

Volume 29 | Issue 2 Article 9

10-15-2009

# Trust Issues: Will President Barack Obama Reconcile the Tenuous Relationship Between Antitrust Enforcement Agencies?

Kelly Everett

# Trust Issues: Will President Barack Obama Reconcile the Tenuous Relationship Between Antitrust Enforcement Agencies?

By Kelly Everett*

Table of Contents

## I. INTRODUCTION

Capitalism benefits consumers when and only when there is competition.[1] Firms compete with each other to provide consumers with choices by lowering prices and improving their respective products or services.[2] Competition is the glue that keeps firms and consumers mutually benefiting each other.[3] Without competition there is no choice and consumers become vulnerable to corporate greed and incompetence.[4] Antitrust law, or competition law, ensures capitalism works for consumers by addressing the temptations of firms to merge with, collude with, or destroy their competitors instead of outperforming them.[5]

---

* J.D. Candidate, 2010, Pepperdine University School of Law. B.A., Economics and a Minor in Business Administration from the University of Southern California, Los Angeles. Special thanks to my parents for their love and support. Thanks also to Pepperdine and all of my professors who have challenged and encouraged me.

1. Barack Obama, President-Elect of the United States, Statement for the American Antitrust Institute (Sept. 27, 2007), *available at* http://www.antitrustinstitute.org/archives/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf.

2. *Id.* Capitalism and consumers reciprocally benefit each other when firms compete with each other to offer the best prices and products to consumers. *Id.* Firms that fail to create innovative or cost effective products or services will not survive in a competitive market, and firms that respond to the needs of customers will. *Id.*

3. When there is only one firm in the market, or when several competing firms collude together to offer the same products at the same prices, the market is not competitive. Without competition, consumers have little or no choice in the products and services they purchase. Without alternatives to choose from, consumers are forced to heed to the will of the dominant firm as to what products or services the firm will supply and at what price. In this system, the dominant firm benefits, but the consumer does not.

4. *Id.* When firms do not properly compete, customers can't choose from which firms they will purchase their goods and services. *Id.* Firms can take advantage of the consumer's lack of choice by raising prices, restricting supply, or offering inferior products and services. *Id.*

5. *Id.* Antitrust is unlike government regulation; it guarantees firms benefit from serving their customers' needs. *Id.* Further, it rewards firms for doing a better job. *Id.* Antitrust therefore makes firms decide what best serves their customers' needs. *Id.* Government regulation, on the other hand, puts that decision

Antitrust law was developed in the United States during the late nineteenth century to protect consumers who were made vulnerable and exploited by monopolistic railroad companies that pushed out competitors to fix rates and drive up rail prices on their respective customers.[6] Congress recognized the need for further regulation and enacted the Sherman Act (Act) in 1890 with its primary goal being to protect the welfare of consumers.[7] The Act and subsequent antitrust laws were passed not to protect the individual competitors from each other, but to protect competition itself.[8]

Despite cooperation between the Federal Trade Commission (FTC) and the Department of Justice Antitrust Division (DOJ) during George H.W. Bush's presidency and Bill Clinton's presidency, relations disintegrated when George W. Bush took office.[9] For the

---

into the hands of bureaucrats, CEOs, and judges. *Id.* Antitrust law protects competition, fuels innovation, and fosters economic growth. *Id.*

6. ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT, 77-82 (1987). The Post Civil War development of the U.S. rail system was the impetus behind the first passage of modern antitrust law with the creation of the Commerce Commission in 1887. *Id.* Railroad firms ruthlessly exploited their customers in territories in which they had monopoly power and used those profits to drive out competitors in other areas by drastically cutting their rates. *Id.* The public finally had enough and lobbied Congress to the Commerce Commission, which had the responsibility of assuring railroad rates were reasonable and assuring there was no price discrimination based on geography. *Id.*

7. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 61 (2d ed. 1993). Judge Bork was the first to coin the term "consumer welfare," which is defined as, "all things good for consumers, such as low prices, innovation, and choice among differing products." *Id.* Judge Bork is an antitrust expert whose opinions now dominant American legal thinking on the issue. DAVID FRUM, HOW WE GOT HERE: THE '70S, at 327 (2000). After reviewing the legislative history of antitrust law in the U.S. he asserts Congress' primary goal of the legislation was to promote consumer welfare. BORK, *supra*, at 61.

8. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962). The Court in *Brown Shoe* held that the goal of the Act was to protect competition, not individual consumers. *Id.*

9. Mark D. Whitener, Editor's Notes: Domestic Divergence, ANTITRUST, Fall 2008, 6, 7; Obama, *supra* note 1. During Bush Senior's Administration and the Clinton Administration, both agencies had differing policies on enforcement. Whitener, ANTITRUST, at 7. But they worked together because they both understood the importance of cooperation, which was providing corporate America with consistent and clear guidelines of what conduct was prohibited under U.S. Antitrust law. *Id.* However, the differences between the FTC and DOJ

next eight years, antitrust enforcement was at a historic low, and today consumers are feeling its effects.[10] Many commentators, including President Obama, accuse the DOJ of putting the interests of big business ahead of the interests of consumers.[11] President Obama was the first president since Franklin D. Roosevelt to voice his concern about antitrust law on the campaign trail. Given the importance President Obama has placed on antitrust law, this comment will address the tenuous relationship between the FTC and the DOJ, and the likelihood the Obama Administration will reconcile it. This comment will first explore the development and purpose of antitrust law in the United States.[12] Second, it will discuss why the FTC and DOJ have a contentious and ineffective relationship.[13] Third, it will address the narrowing effect the Obama Administration is likely to have on antitrust enforcement, despite the downturned economy.[14] Finally, this comment will summarize what circumstances created a climate of under-enforcement and uncertainty, and describe the change the Obama administration will bring to antirust law.[15]

---

exacerbated under the last administration, and cooperation between the two agencies significantly broke down. Dawn Goulet, *Justice Department's Section 2 Report Sparks a Heated Debate in the Antitrust Community*, 21 LOY. CONSUMER L. REV. 268, 273 (2008) (citing *Another Thumb on the Scales*, N.Y. TIMES, Nov. 1, 2008, at A22).

10. Obama, *supra* note 1. The DOJ has failed to bring a single case against a dominant firm for anticompetitive behavior in the past eight years, but instead enthusiastically argues on behalf of dominant firms before the Supreme Court. *Id.* Their leniency towards big business has translated into higher costs for consumers. *Id.* During the last administration, there were four hundred mergers between health care providers and, as a result, now ninety five percent of the market is controlled by a select few firms. *Id.* Consequently, premiums have increased over eighty-seven percent in the past six years. *Id.*

11. *Id.*; Neal R. Stoll & Shepard Goldfein, *President Obama's Centrist Antitrust Enforcement*, 11/18/2008 N.Y.L.J. 3 (col.1), Nov. 18, 2008.

12. *See infra* Part II.

13. *See infra* Part III.

14. *See infra* Part IV.

15. *See infra* Part V.

## II. ANTITRUST LAW DEVELOPS IN THE UNITED STATES AS PRO-CONSUMER LEGISLATION

### *A. Common Law Laid the Foundation of Modern Antitrust Law, but was Ineffective in Responding to the United States' Growing Industry Post World War I.*

The Sherman Act was passed by Congress in 1890 and was a compilation of existing common law, which banned anticompetitive arrangements.[16] However, it went beyond common law's mere refusal to enforce restrictive agreements, and established standards of conduct.[17] By basing the Act on common law principles, Congress created a statute that could evolve with the practical realities of a changing business world and societal understandings of the market and competition.[18]

The development of the rail system in the United States after the Civil War first exposed the inadequacies of common law trade restrictions.[19] A number of railroad firms acting together boosted rates in areas where they shared monopoly power and used those profits to drive out competitors in other areas by drastically cutting rates.[20] This anticompetitive behavior paired with barriers to entry, due to requirements of huge capital investments, barred competitors

---

16. *See* WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 85-99 (1965). Supporters of the Act believed that common law embodied a preference for competition and a disfavor for anticompetitive tactics. *Id.* *See also* 20 Cong. Rec. 1167 (1889) (Senator John Sherman said this statute was derived from common law restraints on trade, which were hostile toward anticompetitive behavior.).

17. The Act needed to go beyond existing common law, which had proved to be too simplistic. *See* James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis*, 50 OHIO ST. L.J. 258, 311-31 (1989).

18. State Oil Co. v. Kahn, 522 U.S. 3, 20-21 (1997); William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 662-63 (1982).

19. Thomas A. Piraino, *The Antitrust Implications of "Going Private" and Other Changes of Corporate Control*, 49 B.C. L. REV 971, 975 (2008); Bork, *supra* note 7, at 19-21.

20. *Id.*

from competing with established railroad companies.[21] In response to the railroads' trade abuses, Congress created the Interstate Commerce Commission in 1887.[22] The Commission had the responsibility of assuring railroad rates were reasonable and assuring there was no price discrimination based on geography.[23] The Commission had limited success, and evidenced to government and consumers the need for something more specific and expansive.

The limits of common law trade restrictions were further exposed when major industries, including oil, sugar, cotton, lead, and whiskey, began forming "trust" agreements in the 1870s to monopolize their respective markets.[24] These trusts used predatory tactics like below cost pricing forcing competitors to sell their businesses or be driven out of business; they defrauded investors, indiscriminately closed down plants, and bribed public officials.[25] This level of greed and exploitation was unprecedented in American history, and shocked the public and undermined their confidence in unregulated markets.[26]

---

21. *Id.*

22. Danya C. Wright, *The Shifting Sands of Property Rights, Federal Railroad Grants, and Economic History: Hash v. United States and the Threat to the Rail – Trial Conversations*, 38 ENVTL. L. REV. 711, 720 (2008).

23. *Id.*

24. *See* SAMUEL P. HAYS, THE RESPONSE TO INDUSTRIALISM 1885-1914, 27-32 (Univ. of Chi. Press 2d. 1995) (1957); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, at 80-85 (1992). "Trusts" enabled stockholders from several different companies to transfer their individual securities to a common trustee, this transfer enabled each stockholder to share of the pooled earnings of all the pooled companies. A trust is now applied to any suspect business combinations. *Id.* These trade restraints constituted unreasonable trade restraints and unlawful monopolies. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 79 (1911).

25. *Id.* Predatory pricing occurs when firms defer short-term profits in order to develop a dominant market position, which will later be used to raise prices and recoup lost profits. Janich Bros. v. American Distilling Co., 570 F.2d 848, 856 (9th Cir. 1977), *cert denied,* 439 U.S. 829 (1978).

26. Higgs, *supra* note 6, at 77-82. By 1888 trusts and railroads were ruthless; they caused severe business cycles and engaged in scandalous business transactions. *Id.*

### *B. Congress Passes the Sherman Act to Evolve with the Changes in Economic Thinking.*

1. The Creation of the Sherman Act and the Struggle to Define its Breadth.

Congress passed the Act in 1890 because the public needed more protection from dominant firms controlling the markets. It was passed with the primary intention of promoting consumer welfare by preserving opportunities for competition, preventing unfair redistributions of wealth, and promoting innovation.[27] It may be the case that the Act had other goals secondary to the promotion of consumer welfare, which were to be evaluated and weighed depending on the market climate at the time. While some criticize the Act for its vague language as to what constitutes anticompetitive conduct, the Act's generality allows courts to reinterpret it as economic understanding of competition evolves–evidencing its goal is in fact the protection of consumer welfare.[28]

The first two sections of the Act are, by far and away, the most frequently applied.[29] The first section addresses improper restrictive

---

27. Bork, *supra* note 7, at 61. Judge Robert Bork, "The legislative history of the Sherman Act . . . displays the clear and exclusive policy intention of promoting consumer welfare". *Id.* Judge Bork defines consumer welfare as the improvement of "allocative efficiency." *Id.* Allocative efficiency is the market condition that occurs when resources are allocated in a way that maximizes the net benefit attained through their use. *See* Eleanor M. Fox, The Modernization of Antitrust: *A New Equilibrium,* 66 CORNELL L. REV. 1140 (1981); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982).

Some authorities believe the Act's creators had several conflicting goals when they passed the Act in 1890. James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis*, 1880-1919, 50 OHIO ST. L.J. 257, 391-94 (1989). Professor May maintains that Congress believed it could achieve its many goals, without compromising any of them. *Id.* This makes sense, as the 51st Congress failed to indicate how courts should weigh tradeoffs among competition goals. *Id.*

28. *Khan*, 522 U.S. at 21 (1997). In *Khan*, the Supreme Court emphasized the adaptability of the Act to changed circumstances and lessons learned from accumulated experiences. Andrew A. Gavil, After Daubert: *Discerning the Increasingly Fine Line Between the Admissibility and Sufficiency of Expert Testimony in Antitrust Litigation*, 65 ANTITRUST L.J. 663, 663-711 (1997).

29. There are two main sections of the Sherman Act:

agreements, and the second addresses the creation or misuse of monopoly power.[30] In the second section, monopolies are not illegal per se; rather, the Act prohibits conspiracies to monopolize and abuses of monopoly power.[31] The Act does not describe in detail what conduct it prohibited. Instead, Congress gave federal judges the responsibility of creating the common law of federal antitrust, consistent with the Act's general goals.[32] For the first time in American history, monopolization could be a federal crime.[33]

After 1890 courts wrestled over how narrowly or broadly the Act should be applied. The Supreme Court first interpreted the Act very narrowly when it tolerated a series of merges in *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).[34] In this case the defendant was an

---

> § 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Violators . . . shall be deemed guilty of a felony.
>
> § 2: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.

15 U.S.C. §§ 1-2 (1890).

30. 15 U.S.C. §§ 1-7. Monopoly power is not a fixed definition, but may be inferred when a firm controls a dominant share of their respective market and barriers to entry. Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1434 (9th Cir.) (1995). A barrier to entry exists when the required costs of producing, distributing, or marketing a product is higher for those firms which seek to enter the market as compared to those firms already established in the market. JOHN J. MCGOWAN, *Mergers for Power or Progress?*, *in* ANTITRUST AND REGULATION: ESSAYS IN MEMORY OF JOHN J. MCGOWAN 134-35 (Franklin M. Fisher ed.) (1985).

31. 15 U.S.C. §§ 1-7.

32. *Id.* An important section of the Act authorizes public bodies, and private parties to enforce the statute. *Id.* The Act uses proscriptive language like, "thou shall not" instead of "thou shall," making the statute very vague in terms of what is illegal conduct. *Id.*

33. *Id.*

34. United States v. E.C. Knight Co., 156 U.S. 1, 41 (1895). The Court's tolerance of this series of mergers and the executive's indifference to the Act helped trigger a wave of mergers, such as American Tobacco, Du Pont, Eastman Kodak, General Electric, International Harvestor, Standard Oil, United Shoe Machinery, and U.S. Steel. William E. Kovacic & Carl Shapiro, *A Century of*

American Sugar Refining Company, which controlled a large majority of the refined sugar manufacturer market.[35] Antitrust issues arose when the defendant purchased stock in four Philadelphia refineries, giving the defendant control over ninety-five percent of the country's sugar refining market.[36] The Court did not find the defendant's action to be within the scope of the Act because the Court reasoned the defendant was engaged in manufacturing, which they reasoned was not a part of commerce, and thus, beyond the Act's reach.[37]

Just two years after the *E.C. Knight Co.* decision, the Court applied an extremely broader interpretation of the Act in *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897).[38] The Supreme Court forbade price fixing agreements reasoning that section 1 of the Act forbade "every agreement," regardless of its intent or reasonableness.[39] The expansive application of the Act in *Trans-Missouri* made all agreements that had the result of restraining trade illegal, whether or not the agreement had innocent intent. The Court softened its position the following year when it limited the Act to prohibit only contracts whose direct and immediate effect is to restrain trade.[40] These two cases show the Court beginning to, but

---

*Economic and Legal Thinking*, 14 J.E.P. 43, 45 (2000). The Court did not change its position on mergers until 1904 when it forbade the combination of Northern Pacific and Great Pacific railroads. *Id.*; Northern Secs. Co. v. United States, 193 U.S. 328, 360 (1904).

35. *E.C. Knight Co.*, 156 U.S. at 5.

36. *Id.*

37. *Id.* at 6. By distinguishing between commerce and manufacturing, the Court found the defendant's conduct did not affect interstate commerce, and thus did not violate the Act. *Id.*

38. United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897). In a 5-4 decision, the Court applied the Act to common carriers by railroad. *Id.* at 291. The Court held a contract restraining trade or commerce is prohibited, even though the contract is entered into by competing railroads only for the purpose of affecting traffic rates. *Id.* The Government is not obliged to show the agreement in question had the intent to restrain trade, but simply that it had that effect. *Id.*

39. *Id.* As literal of an interpretation as this analysis is, the Court did recognized that prohibiting all agreements which restrain trade could endanger beneficial forms of cooperation. Kovacic & Shapiro, *supra* note 34, at 44.

40. Hopkins v. United States, 171 U.S. 578 (1898). Defendants were Kansas residents and members of a voluntary unincorporated association known as the Kansas City Live-Stock Exchange. *Id.* at 578. They were charged with restraining

still struggling with, distinguishing between behavior which had the sole purpose of restraining trade, and behavior which was intended for legitimate business purposes.[41] These cases evidence tension arising between courts that either condemned the mere existence of trade restrictions, courts that banned only unreasonable trade restrictions, and those courts that focused on the intent of the restraint.[42] To resolve this tension, then Sixth Circuit Judge William H. Taft delivered the opinion in the landmark case *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), in 1898 and reasoned that the primary purpose of the trade restraint would determine its legality.[43]

---

interstate commerce by blocking the shipment of livestock to the Kansas City market, unless it was shipped to one of the other defendants. *Id.* at 582. They also compelled livestock shippers from other states to pay off the defendants, otherwise the association's members on the receiving end would prevent their shipments from getting to the Kansas City market. *Id.* at 582-83. The Court affirmed the First Circuit Court's decision to enjoin the defendants from conspiring to combine either by contract, conduct, or words, the conspiring of which would result in the impeding of others to ship, trade, sell, or buy livestock from Kansas City, Missouri and Kansas City, Kansas. *Id.* at 585-86. The defendants were further enjoined from attempting to impose discriminatory fines that in any manner interfered with the freedom of any persons trading or desiring to trade in that market. *Id.*

41. *See* John R. Carter, *From Peckham to White: Economic Welfare and the Rule of Reason*, 25 ANTITRUST BULL 275-95 (1980).

42. May, *supra* note 27, at 391-94. By the late 19th century, courts were unclear whether they should prohibit trade restraints that merely existed, or whether they should evaluate them according to the reasonableness test. *Id.*

43. United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898). In *Addyston Pipe,* six cast-iron pipe manufactures were charged with combination and conspiracy in unlawful restraint of interstate commerce, in violation of the Sherman Act. *Id.* at 272. The six manufacturers acted under an agreement where five of them would overbid for a construction contract, thus guaranteeing the success of the sixth manufacturer, who would bid a lower price. *Id.* at 292. The six manufacturers rotated being the low bidder, and thus all benefited, and fixed the price of cast-iron pipe in 36 different states. *Id.* at 292, 301.

The defendants argue that at common law their association would be valid, and that the Sherman Act was not meant to reach any agreements valid under common law. *Id.* The court distinguished between "naked" trade restraints, where direct competitors agreed to restrict output and raise prices, and reasonable "ancillary" restraints, which encumbered the participants only as much as needed to expand output or to introduce a product that no single participant could offer. Kovacic & Shapiro, *supra* note 34, at 45. Judge Taft concluded that if the competitor's primary purpose was not to restrict trade, but the restriction was merely an encumbrance on the competitor in order to expand output or introduce a

2. The Supreme Court Takes Decisive Action in *Standard Oil* and Lays the Foundation for Modern Interpretations of Antitrust Law.

The public's frustration with the Supreme Court's tolerance of mergers reached a breaking point in 1901. President Theodore Roosevelt shared the public's frustration and voiced it, calling the Court more interested in protecting property rights than human rights.[44] The Court finally succumbed to this pressure in *Northern Securities Co. v. United States*, 193 U.S. 328 (1904), where it prohibited the merger of two dominant railroad companies as unlawful restraint of trade.[45] Roosevelt's popularity soared and he earned the nickname "trust buster". He was re-elected into office 1904 promising more action like that in *Northern Securities*.[46] Under Roosevelt's watch, the Supreme Court broadened the interpretation of the Act to forestall mergers and curb the creation of monopolies.

William H. Taft's administration continued to vigorously challenge monopolies, the most stunning of which was in 1911 when the Department of Justice sued Standard Oil Co. for violating the Act.[47] The Court held that Standard Oil Co., a major oil trust, had

product, the restraint did not violate the Sherman Act, regardless of its reasonableness. *Id.* The court found it not essential that an entire monopoly be created, but that it is sufficient to violate the Act if the agreement deprives the public of the "advantages which flow from free competition". *Addyston Pipe & Steel,* 85 F. 271 at 293. The 6th Circuit found the defendants to be in violation of the Sherman Act by finding that their agreement had the primary purpose of restraining the trade of cast-iron pipe, and it in fact did restrain interstate commerce. *Id.* at 302.

44. Theodore Roosevelt, *Colonel Roosevelt on the Big Stick and the Square Deal*, Idaho Daily Statesman, Feb. 1, 1914, at 2 (continuing his criticisms of the judiciary even though he lost his bid for reelection).

45. Northern Secs. Co. v. United States, 193 U.S. 328, 360 (1904). The Supreme Court in *Northern Securities* ruled in a 5-4 decision that allowing the defendants to combine their two competition railroads into one entity would be an unlawful restraint of trade. *Id.* In this decision the Court evidenced their intolerance to mergers, narrowing the *E.C. Knight* decision. Kovacic & Shapiro, *supra* note 34, at 45.

46. Roosevelt, *supra* note 44, at 2.

47. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 81-82 (1911). Standard Oil of New Jersey and seventy other defendants were charged with engaging in conspiracy to restrain the trade and commerce of petroleum, refined oil, and other petroleum products, among the several States. *Id.* at 31. Standard Oil of Ohio, operated by John D. Rockefeller, organized the Standard Oil

engaged in illegal monopolization and ordered their trust be broken up into thirty-three separate companies.[48] The Court ruled the Act should be applied if contracts are unreasonable and result in the undue restraint of trade in interstate commerce.[49] The Court went further than it ever had before by finding Standard Oil Co.'s ninety percent ownership of the market evidence they were a monopoly power and by finding below cost price fixing to be per se unlawful trade restraints.[50]

The *Standard Oil* decision is the regarded as the most important antitrust case in the Act's history as it established the "rule of reason" standard, which continues to be the basis modern of antitrust analysis.[51] Further, *Standard Oil* evidenced the full force of the Act, in that it could challenge even the most powerful business enterprises and order their divestiture.[52] The decision also created great ambiguity as to what constituted an unreasonable restraint of trade; a question that continues to confuse jurists today.[53]

---

Trust in 1880. *Id.* at 70. They purchased interests and entered into agreements with businesses engaged in purchasing, shipping, refining, and selling petroleum in order to fix the price of crude and refined oil in that market. *Id.* at 32. The Court found the defendants "conduct to be an unreasonable and undue restraint of trade of petroleum, its products moved in interstate commerce, and, therefore, their actions falls within the prohibitions of the Act". *Id.*

48. *Id.*

49. *Standard Oil*, 221 U.S. at 3.

50. *Id.* at 32.

51. Kovacic & Shapiro, *supra* note 34, at 45. For the first time, the Supreme Court attacked the issue of dominant firm action head on, and left four enduring marks on antitrust law. First, the Court determined Standard's ninety percent ownership of the oil refining market proof that it had monopoly power. *Id.* Second, the Court established the rule of reason as the basic method for which courts were to interpret antitrust cases. *Id.* This rule of reason remains the foundation of antitrust analysis to this day. Third, the Court classified specific behavior as unreasonably exclusionary. In the case of *Standard Oil*, the Court determined Standard's selective below-cost price cuts and buyouts of rivals to be unreasonably exclusionary as to maintain the firm's market dominance. Lastly, the Court broke Standard into thirty-four parts, despite Standard's objection reasoning it would cause it to be bankrupt. *Id.*

52. *Id.* Divestiture is a common remedy in antitrust actions, which prevents the accumulation of monopoly power.

53. *Standard Oil*, 221 U.S. at 86-87 (Harlan, J., dissenting). Critics argued the Court's decision actually amended the Act by changing "every" restraint of trade, to only "unreasonable restraints of trade." *Id.* Further criticism of the

### 3. The Executive, the Era of Neglect, and the Collapse of 1929.

The 63rd Congress and newly elected President Woodrow Wilson understood the importance of antitrust law, and recognized the difficulty businesses faced when complying with a law that lacked clarity as to what conduct was prohibited. One year into Woodrow Wilson's presidency, he proposed the Clayton Act (Clayton) to Congress as an expansion of the Act in order to rectify the Act's vague language.[54] Unlike the Act, Clayton prohibited four specific anticompetitive behaviors, and declared these behaviors illegal, but *not* criminal if they had the effect of lessening competition or creating a monopoly.[55] That same year, Congress created the Federal Trade Commission (FTC) and vested in it the responsibility to prevent unfair methods of competition.[56] The FTC could temporarily

---

decision is that if the Court is to ban only unreasonable restraints, they should also find a way to advise firms in advance of what is considered lawful. Kovacic & Shapiro, *supra* note 34, at 46.

54. *See* WOODROW WILSON, *The New Freedom*, 172 (1913). Wilson believed the rule of reason failed to adequately guide business because it did not specify what conduct was unlawful, and that it gave too much discretion to the courts to distort the law. *Id.* Congress shared Wilson's apprehension and passed the Clayton Act in 1914, which specifically prohibited certain anticompetitive conduct. The 63rd Congress conceded that even with the Clayton Act, "it is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this [antitrust] field." H.R. Rep. No. 1142 63rd Cong. (2d Sess. 1914). Congress also created the Federal Trade Commission to create antitrust policy and share antitrust enforcement power with the executive branch. *Id.*

55. 15 U.S.C. §§ 12-27 (1914). The Clayton Act declared the four following acts illegal, but not criminal: (1) price discrimination, which is selling a product at different prices to similarly situation buyers; (2) exclusive dealing contracts, which are sales made on the condition the buyer will not trade with the seller's competitors; (3) corporate mergers, which are acquisitions of competition companies; and (4) interlocking directories, which occurs when there are common board members among competing companies. *Id.*

The first three acts mentioned were deemed illegal only "where the effect . . . may be substantially to lessen competition or tend to create a monopoly in any line of commerce." *Id.* at § 13. This allowed the Clayton Act to prohibit developing threats to competition–this nuance was broader than the Act's reach. However, the Clayton Act was narrower, and more lenient than the Act because it no longer made trade restraints criminal.

56. 15 U.S.C. § 45 (1914). Congress created the Commission by passing the Federal Trade Commission Act. *Id.* at § 5. This Act empowered the Commission to prevent and punish unfair commercial practices and to promulgate trade

enjoin monopolistic behavior, but it was created primarily to improve the implementation of antitrust law.[57] To achieve this end, Congress staffed the FTC with economic experts and instructed them to issue "guidelines" and give speeches to educate businesses on what unlawful anti-competitive conduct was.[58] Together, the Act, Clayton, and the FTC provided the essential framework of antitrust law in the United States. Congress has refrained from defining concepts common to the three to keep them inherently flexible.[59] As a result, courts serve as the chief instruments in defining fundamental concepts of antitrust such as "restraint of trade," "monopolies," and "unfair methods of competition."[60] However, Congress did expect courts to use common law methodology in their implementation of antitrust law.[61]

Despite the flood of new antitrust law in the early 1900s, enforcement actually lulled between 1915 and the 1936.[62] During the

---

regulation rules. *Id.* But the Act provides no criminal penalties, only equitable relief. *Id.* At the urge of Wilson, the Commission encouraged fair competition by investigating and publicizing trade abuses, and advising businesses about the legality of their specific acts. WILSON, *supra* note 54, at 201-02. The Commission would educate businesses on lawful conduct by preparing reports, giving speeches, issuing guidelines, and negotiating settlements before going to ligation. Federal Trade Commission, About the Federal Trade Commission, http://www.ftc.gov/ftc/about.shtm.

Congress created the Commission with two objectives: The first was to ensure that trade abuses would be adjudicated in the manner intended by Congress, and not at the discretion of courts; the second objective was to improve the implementation of antitrust policy. *Id.* To achieve this, the Commission had a regular staff of multidisciplinary expertise, and its own adjudication process subject to review by the appellate courts. *Id.*

57. *Id.*

58. *Id.*

59. Sugar Inst. v. United States, 297 U.S. 553, 600-01 (1936). The Court emphasized the reach of its authority in *Sugar Institute* when Chief Justice Hughes said, "We have said that the Sherman Act, as a charter for freedom, has a generality and adaptability . . . ." *Id.* at 600.

60. *Id.*

61. ERNEST GELLHORN, WILLIAM E. KOVACIC & STEPHEN CALKINS, ANTITRUST LAW AND ECONOMICS: IN A NUTSHELL 40 (5th ed. 2004).

62. Kovacic & Shapiro, *supra* note 34, at 45-46. In *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238-39 (1918), the Court upheld trade restraints on the price of after-hours commodities. The Court conceded that a multi-factored rule of reason test might make their analysis more accurate, but rejected it as too

"era of neglect" for antitrust law, the Executive Branch actually discouraged both the DOJ and the FTC from aggressively prosecuting antitrust abuses.[63] Following the direction of the Executive, courts relied predominately on a complicated reasonableness test in their analysis of anticompetitive behavior and generally exonerated the arguably anticompetitive behavior of big businesses.[64]

This analysis does not overlook the Court's prohibition of certain anticompetitive behavior as evidenced in the *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), decision, but characterizes its treatment as schizophrenic.[65] Here, the Court rejected precedent that all agreements between competitors deserve an expansive analysis. Instead, the Court held that some unadorned agreements between competitors to set prices were so generally pernicious that courts could flatly prohibit them, even if an elaborate rule of reason test might sometimes validate such arrangements.[66] The Supreme Court's decision to flatly prohibit *some* price setting arrangements without an explanation of what qualified them as "pernicious" undoubtedly caused uneasiness in the business community. The

---

costly and time-consuming. *Id.* Instead, the Court implemented a comprehensive inquiry into the business' history, the purpose of the restraint, and the restraint's effect to determine if it was an unlawful restraint on trade. *Id.*

The following year, the Court allowed producers to unilaterally refuse to deal with subsequent firms on the distribution chain that did not comply with the producer's distribution policy. In 1920, the Court absolved the nation's leading steel producers in light of outright collusion. United States v. Colgate Co., 250 U.S. 300, 307 (1919). The Court's leniency echoed through the business world that firms could significantly consolidate before courts would find them to be illegally monopolizing. In 1925, the Court found itself criticized again for its tolerance of suspect anticompetitive conduct when it ruled in the defendant's favor in *Maple Flooring Manufacturers' Ass'n. v. United States*, 268 U.S. 563, 586 (1925). In this case the Court condoned price sharing agreements between competitors. *Id.*

63. Kovacic & Shapiro, *supra* note 34, at 46, 48. The years between 1915 and 1936 were the longest lapse of enforcement of antitrust law. *Id.* The courts often treated suspect behavior permissibly, and the executive branch discouraged the DOJ and FTC from excessively prosecuting antitrust violations. *Id.* at 46.

64. *Id.* at 45-46. The presidents during the "era of neglect" were Wilson, Harding, Coolidge, and Hoover. The Supreme Court's decisions during this time reflect the government's tolerant treatment of firms that colluded with each other affecting interstate commerce. *Id.* at 47.

65. *Id.* (citing United States v. Trenton Potteries Co., 273 U.S. 392 (1927)).

66. *Id.*; *see also* Bd. of Trade of Chicago, 246 U.S. at 231, 238.

Court was generally very tolerant of anti-competitive agreements, but could condemn certain behavior without a set method of analysis or a set hierarchy of goals–a decision based on utter discretion.

Even after the economic collapse of the U.S. economy in 1929, our government remained reluctant to renew zealous antitrust enforcement or re-invigorate its emphasis on beneficial competition.[67] A stunning example of that reluctance occurred in the early 1930s during the depths of the Great Depression, in *Appalachian Coals v. United States*, 288 U.S. 344 (1933), which later became known as a "depression-era aberration."[68] In *Appalachian Coals*, several coal competitors together controlled over seventy-five percent of the U.S. coal market and colluded together to fix the price of coal and restrict its output.[69] The Court dismissed the question of whether this trade restraint eliminated competition between the said competitors. Instead, the Court focused on the nature and the effect of the restraint at issue.[70] It is counterintuitive that, even in the midst of a depression, the Court would allow conspiring firms to exploit consumers by boosting prices and controlling output in the coal market.[71] On the heels of this decision and in a hope to rectify its ills, many business leaders, economists, and government officials

67. Kovacic & Shapiro, *supra* note 34, at 46-47. President Hoover was the first President to urge businesses to cooperate and exchange information with each other and the government through trade associations in order to do away with the wastefulness of competition. Ellis W. Hawley, *Herbert Hoover, the Commerce Secretariat, and the Vision of an "Associative State"* 61 J. AMER. HIST. 116-40 (1974), *available* at http://www.history.ucsb.edu/faculty/furner/166A/downloads/Hawl~Ber.pdf. Hoover and other "associationalists" believed that the corroboration between businesses and the government that took place during World War I would best serve consumers in a competitive economy and should be continued in times of peace. *Id.*

68. Kovacic & Shapiro, *supra* note 34, at 48; Appalachian Coal, Inc. v. United States, 288 U.S. 344 (1933).

69. *Id.* Because the colluding firms were all located on the east coast of the United States, they actually enjoyed a greater monopoly power in their territory than a seventy-five continental market share would imply. *Id.* The defendants made the unsuccessful argument that the collusion was necessary in order to survive hard economic times. *Id.*

70. *Appalachian Coal, Inc.*, 288 U.S. at 377.

71. This decision can be interpreted as the government's waning faith in the free market system. Kovacic & Shapiro, *supra* note 34, at 48.

became advocates of close coordination between businesses and government in the 1930s, and ushered in a new generation of antitrust enforcement involving cooperation and oversight.[72]

4. A Short Analysis from the Mid-1930's Through Modern Antitrust Law.

By the late 1930s, the hope inspired by the New Deal had waned. Franklin D. Roosevelt (FDR) looked to his advisors, who believed that competition was the key to economic restoration, for help to restore the economy.[73] FDR's trust-busting revival began with his pressure on the Justice Department to make ambitious attacks on horizontal collusion and single-firm dominance.[74] The renewed antitrust enforcement in the late 1930s reflected both a heightened suspicion of big business and a search for ways to simplify the government's burden of proof in antitrust cases.[75] The Court made several rulings in the following decades demonstrating this goal.[76]

---

72. *Id.* at 47. In response to the devastation of the economic collapse, the government bolstered its power over businesses and urged cooperation between the two. *Id.* The government expanded its power over business when it designed the National Industrial Recovery Act and the Early New Deal. *Id.* In the mid-1930s, Congress attempted to regulate the transportation industry by passing comprehensive controls on entry and pricing. *Id.* Congress also passed the Robinson-Patman Act of 1936, which prohibited the expansion of a retail store if it was at the expense of another. *Id.*

73. *Id.* at 49.

74. Kovacic & Shapiro, *supra* note 34, at 48. University of Chicago economists like Henry Simons, Jacob Viner, and Frank Knight joined Roosevelt's cause of robust antitrust enforcement, including steps to decentralize American industry. *Id.* Horizontal collusion is collusion among competitors or distributors at the same level of production or distribution to fix prices or control the supply of the goods and services they produce. Single-firm dominance refers to the situation where a monopoly or quasi-monopoly has such economic strength in the industry as to have the ability to prevent effective competition.

75. *Id.* at 49.

76. *Id.* at 50. In United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940), and Interstate Circuit Inc. v. United States, 306 U.S. 208 (1939), the Court ruled unlawful agreements could be proven without direct evidence such as a participant's testimony. *Id.* (citing United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940); and Interstate Circuit Inc. v. United States, 306 U.S. 208 (1939)).

As courts tightened rules for collusion and cooperation, they grew more willing to find dominant firms acted improperly.[77]

By the 1960s, corporate America realized that antitrust law enforcement had dramatically changed from the permissiveness of the 1920s and the early 1930s.[78] By the 1970s, lead authorities like Robert Bork and Rickard Posner were questioning the per se illegality rules.[79] These commentators argued that contrary to popular belief, some conduct, like vertical restraints, was often benign or even pro-competitive.[80] By the mid 1970s, courts began to follow the lead of forward thinkers like Bork and Posner.[81] Most of the Supreme Court decisions from the 1940s through the late 1980s demonstrate a middle-of-the-road interpretation between per se condemnation and an elaborate rule of reason test.[82] During the 1970s and 1990s, despite the large number of cases brought by the FTC and the DOJ, the courts gave dominant firms significant freedom to choose pricing, product development, and promotional strategies.[83]

---

77. Kovacic & Shapiro, *supra* note 34, at 50.

78. *Id.* at 51.

79. *Id.* at 53. Attorneys like Bork, Posner, Frank Easterbrook, and Ernest Gellhorn questioned many of the per se illegal rules courts imposed between 1940 and 1972. *Id.* Around 1972, these authorities became advocates of some pro-competitive conduct that may not have originally survived the per se illegality analysis. *Id.*

80. *Id.*

81. *Id.* at 50. Courts became increasingly sensitive to efficiency arguments for two reasons in the mid 1970s. *Id.* First, President Nixon's appointments to the Supreme Court, most notably, Lewis Powel. *Id.* The second factor in their narrowed preference for antitrust enforcement was the sense that U.S. firms were losing domestic market share to foreign firms. *Id.* The Supreme Court's decision in Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), evidenced the Courts willingness to use economic analysis of the effects of anticompetitive conduct in applying the rule of reason test. *Id.* (citing Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977)).

82. *Id.* at 54. The best example of the Court's reconciliation between per se illegality and a complicated rule of reason test are in Federal Trade Commission v. Indiana Federation of Dentists. Kovacic & Shapiro, *supra* note 34, at 50 (citing Fed. Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986)).

83. The Federal Trade Commission and the Department of Justice are the two federal agencies charged with enforcing U.S. antitrust laws. With the exception of United States v. AT&T Co., 553 F. Supp. 131 (D.C. Cir. 1982), neither

### C. *What is the Goal of the Sherman Act, are There Multiple Goals?*

Judge Robert Bork opined that the goal of antitrust law must be understood before the judiciary can decide antitrust issues.[84] After investigating the Act's legislative history and other antitrust statutes, Bork concluded the overriding goal of antitrust law is to increase consumer welfare.[85] Critics argue that Bork's "original interpretation" neglects the possibility that Congress had more than merely one goal, but acted for a "powerful, widely shared vision of a natural, rights-based political and economic order that simultaneously tended to ensure opportunity, efficiency, prosperity, justice, harmony, and freedom."[86] Modern Supreme Court decisions evidence multiple views concerning the proper goal of antitrust law.

In 1962, the Supreme Court adopted Bork's "original interpretation" view in its decision in *Brown Shoe Co. v. United States*.[87] The Court determined Congress meant to protect

---

enforcement agency had much success overcoming the courts' presumption for favoring dominant firms. *Id.* (citing United States v. AT&T Co., 553 F. Supp. 131 (D.C. Cir. 1982); Maryland v. United States, 260 U.S. 1001 (1983)). 1974 marked the government's first Supreme Court defeat for a case brought under the Celler-Kefauver Act. This act closed a loophole left by the Clayton Act. *Id.* (citing United States v. General Dynamics Corp., 415 U.S. 486 (1974)). During this time, it was clear courts were trimming back antitrust doctrine. *Id.*

84. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 50 (2d ed. 1993).

Judge Robert Bork explained,

> 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 – what are its goals? Everything else follows from the answer we give. Is the antirust judge to be guided by one value or by several? If by several, how is he to decide cases where a conflict in values arises? Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules.

*Id.*

85. *Id.*

86. James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis*, 50 OHIO ST. L.J. 258, 391 (1989). Despite Judge Bork's questionable statement of the Act's original intent, his opinion's apparent simplicity in application does attract federal judges as it leaves them with a reliable method for ranking the statute's goals, and a system of how to resolve conflicts among them. *Id.*

87. *Brown Shoe Co.*, 370 U.S. at 320.

competition, not competitors, and it intended to restrain mergers only to the extent they lessened competition.[88] Fifteen years later, Justice Marshall quoted this reasoning in his unanimous opinion in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).[89] Despite the reference, the Court in *Brunswick* embraced an efficiency orientation, and departed from the Court's former opinion that Congress' intent was to protect competition by protecting small competitors' right to compete.[90]

After World War II and when American firms were dominant, decisions like *Brown Shoe* emphasized non-efficiency goals–like the protection of small competitors.[91] With the introduction of Japanese and Western European industry to the American economy in the 1970s, the judiciary was forced to re-examine its antitrust policy if it was going to protect the competitive position of American firms.[92]

Justice Black's justification for antitrust laws in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958), continues to resonate today. He reasoned antitrust laws were:

---

88. *Id.*

89. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quoting *Brown Shoe*, 370 U.S. at 320). Pueblo Bowl-O-Mat brought this action against Brunswick Corporation claiming that Brunswick's acquisitions of several competing bowling centers might substantially lessen competition or tend to create a monopoly in violation of section 7 of the Clayton Act. *Id.* Justice Warren delivered the Court's opinion and ruled that the respondent must show they sustained an injury that was a result of the petitioner's anticompetitive conduct. *Id.* at 487-88. The majority reasoned,

> If the acquisitions here were unlawful it, is because they brought a "deep pocket" parent into a market of "pygmies." Yet[,] respondents' injury[,] the loss of income that would have accrued had the acquired centers gone bankrupt[,] bears no relationship to the size of either the acquiring company or its competitors. Respondents would have suffered the identical "loss" but no compensable injury had the acquired centers instead obtained refinancing or been purchased by "shallow pocket" parents . . .

*Id.* at 487.

90. *Id.* at 487-88.

91. *See* PHILLIP AREEDA, ANTITRUST LAW AND INDUSTRIAL POLICY, IN ANTITRUST, INNOVATION, AND COMPETIVENESS 34-35 (Thomas J. Teece ed. 1992).

92. GELLHORN ET AL., *supra* note 61, at 48.

> designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. [They] rest[] on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."[93]

It looks like both Justice Black and Bork's original interpretation have won the day, as the DOJ and the FTC assert, antitrust law in America has the primary goal of protecting consumer welfare by protecting competition.[94] They reason that free and open competition ensures lower prices, innovation, and more efficient methods of operation; the end result of which is lower prices and higher quality goods and services for consumers.[95]

## III. THE TENUOUS RELATIONSHIP DEVELOPS BETWEEN THE FEDERAL TRADE COMMISSION AND THE DEPARTMENT OF JUSTICE OVER CONFLICTING ANTITRUST ENFORCEMENT POLICIES.

The DOJ and the FTC are the two agencies responsible for enforcing U.S. antitrust offenses.[96] The DOJ was charged with

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

94. United States Department of Justice, *Antitrust Enforcement and the Consumer*, http://www.usdoj.gov/atr/public/div_stats/211491.htm; Timothy J. Muris, Chairman, Fed. Trade Comm'n, ABA Antitrust Section, Antitrust Enforcement at the Federal Trade Commission: In a Word–Continuity (Aug. 07, 2001), *available at* http://www.ftc.gov/speeches/muris/murisaba.shtm.

95. U.S. Department of Justice, *Antitrust Enforcement and the Consumer*, http://www.usdoj.gov/atr/public/div_stats/211491.htm. In freely competitive markets, competitors try to attract customers by lowering their prices, and increasing the quality of their goods or services. *Id.* Profit motivations, thus, ensure customers' best interests will be served. *Id.* Customers lose out on the benefits of competition when competitors agree to fix prices, agree to divide up business, or agree to restrict supply of a particular good or service. *Id.* Antitrust law prohibits those agreements that threaten to raise prices for consumers or deprive them of new and better goods and services. *Id.*

96. Robert W. Crandall & Clifford Winston, *Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence* 17 J.E.P. 3, 4 n.4 (2003).

enforcing Sections 1 and 2 of the Act in 1890.[97] It is responsible for determining whether a business' conduct is so inherently dangerous that the conduct warrants criminal prosecution.[98] Both the DOJ and the FTC are responsible for enforcing Section 7 of Clayton, which prohibits firms from merging with each other where such a merger could threaten to substantially reduce competition in interstate commerce.[99] Clayton also prohibits "tying" arrangements and prohibits competitors from having the same directors on their respective boards.[100] Further, the FTC has the unique authority to sue firms for "unfair methods of competition" under Section 5 of the FTC (Section 5). This provides an important check on the DOJ's discretion, and usually takes the form of issuing guidelines of proper competitive conduct and giving speeches to educate businesses on what is lawful competitive behavior.[101]

The differences between the FTC and DOJ are important, not only because they provide an important check on each other, but also because together they create an all-encompassing forum for the enforcement of antitrust law.[102] There are at least four assumptions underlying the DOJ's enforcement of antirust that the FTC disagrees with: (1) the DOJ believes that monopoly profits encourage firms to innovate and compete; (2) the risk of over-enforcement is greater than the risk of under-enforcement; (3) the costs of administration are

---

97. *Id.* Section 1 of the Act prohibits contracts, combinations, and conspiracies that restrain trade. *Id.* Section 2 of the Act prohibits attempts to monopolize a business' respective market. *Id.*

98. *Id.* The DOJ may have felt pressure to obtain criminal convictions and, to that end, made some questionable decisions about what it identified as pernicious behavior. *Id.* at 43. Critics charge the Department with failing to provide business managers with fair notice of what acts would be treated as criminal. *Id.*

99. *Id.*

100. *Id.* "Tying" or "bundling" occurs when firms force consumers to buy a second product by packaging it with the product the consumer wants to buy. *Id.* For example, if with the purchase of a razor, the consumer had to also purchase razor blades because the razor blade producer had packaged them together or manufactured the razor to only work with the producer's blade. *Id.*

101. *Id.* For example, the FTC first investigated a claim against Microsoft for bundling its software products under Section 5 of the Federal Trade Commission Act. *Id.* Pressured by the FTC, the DOJ subsequently filed a Section 2 case against Microsoft.

102. *Roundtable Discussion Advise for the New Administration*, ANTITRUST, Summer 2008, at 8, 9.

a factor that should be weighed against enforcement of Section 2 violations; and (4) there is a need for clear and administrable tests, and the court has recognized this need and fashioned bright line tests as a result.[103]

The delicate balance between the two agencies' roles and scope of authority is important; for when this balance is disrupted, problems ensue.[104] Historically, it has been the case that the DOJ challenged more cases than the FTC because the DOJ was initially set up as the more aggressive agency, as it had the authority to enforce stricter penalties for abuses of the set antitrust law.[105] When the DOJ's challenge rate is significantly lower than that of the FTC, it can be argued that enforcement has been curtailed.

### *A. The Tension Begins: The Debate Over what the FTC's Scope of Enforcement Ought to be, and the Development of their Authority to Enforce.*

Congress created the FTC in 1914 to be an administrative agency with antitrust expertise.[106] At its inception, the agency was intended to have the structure and flexibility to identify, analyze, and challenge new forms of unfair methods of competition as they developed.[107] This implies that the FTC had the authority to

103. Goulet, *supra* note 9, at 270-72 (citing Statement of Commissioners Harbour, Leibowitz, and Roesch on the Issuance of the Section 2 Report by the Department of Justice (Sept. 8, 2008), *available at* http://www.ftc.gov/os/2008/09/080908section2stmt.pdf).

104. *Roundtable Discussion Advise for the New Administration*, *supra* note 102, at 9.

105. *Id.*

106. Andy J. Miller, *A Procedural Approach to "Unfair Methods of Competition"* 93 IOWA L. Rev. 1485, 1496 (2008).

107. *Id.* (quoting J. Thomas Rosch, Comm'r Fed. Trade Comm'n, Address Before the National Economic Research Associates 2006 Antitrust and Trade Regulation Seminar 7: Perspectives on Three Recent Votes: The Closing of the Adelphia Communications Investigation, the Issuance of the Valassis Complaint & the Weyerhauser Amicus Breif, (July 6, 2006), *available at* http://www.ftc.gov/speeches/rosch/Rosch-NERA-Speech-July6-2006.pdf).

condemn behavior it believed to be anticompetitive, even if that behavior did not technically violate existing antitrust law.[108]

There are several advantages of the FTC's implementation strategy over that of the DOJ's.[109] Unlike the DOJ's stiff penalties for antitrust violations, like treble damages, attorney's fees, and even criminal liability, the FTC typically enforces antitrust law through consent decrees, cease-and-desist orders, and formal proceedings.[110] A significant advantage of the FTC's enforcement strategy is that it is relatively inexpensive, which benefits not only defendants, but, more importantly, consumers as well.[111]

Congress delegated the authority to condemn "unfair methods of competition" to the FTC, however, it was not immediately clear what that meant.[112] Debate ensued whether or not that meant the FTC could affirmatively enforce the law where the DOJ could not.[113] Courts in the 1920s interpreted the FTC's power narrowly. A prominent example of this was in *Federal Trade Commission v. Eastman Kodac Co.*, 274 U.S. 619 (1927).[114] In *Kodac*, the Supreme

---

108. *Id.* at 1496-97. Broadly interpreting Section 5 makes sense. If it were meant to cover the same territory as the Act, then Congress could have written it in the statute accordingly. *Id.* (citing *In re.* Rambus, Inc., 2006 WL 2330118 (quoting 51 Cong. Rec. 12,151 or 12,154 or 12,454, 12,613 (statement of Sen. Cummins')).

109. Just as the overriding goal of antitrust law is to promote consumer welfare, the enforcement should also be for the consumer welfare.

110. Miller, *supra* note 106, at 1494-95.

111. *Id.* Businesses, many times, do not incur the majority of the harm resulting from litigation; instead, the consumer does because the business is likely to pass on the cost of the litigation to the consumer by raising the price of the products or services of the business. Another advantage of FTC enforcement when compared with DOJ enforcement is that the FTC's actions do not implicate non-mutual collateral estoppel.

112. *Id.* The FTC has the authority to prohibit "unfair methods of competition" as proscribed by Section 5 of the FTC Act. Whitener, ANTITRUST, at 6. This act functions as a catch-all provision that would otherwise not fall under any other antitrust laws, such as invitations to collude. *Id.*

113. *Id.* Several Supreme Court decisions since the 1920s have answered whether or not that meant the FTC could affirmatively enforce the law where the DOJ could not in the affirmative. *Id.*

114. Kovacic & Shapiro, *supra* note 34, at 48. But in the 1920s, before that final affirmation, the FTC hardly made any contribution to antitrust enforcement. *Id.* During the 1920s, the FTC was subject to continuing dismissals of their cases and the "bumptious leadership" of Louis Brandeis. *Id.* The chief author of the

Court ruled the FTC lacked the power under Section 5 to order divesture of firms whose merger produced anticompetitive effects on interstate commerce.[115] This ruling thwarted the FTC's early development; the agency did not regain the authority to enforce Section 5 offenses for another fifty years.[116] In the Court's landmark decision of *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U.S. 223 (1972), in 1972, the Court found the FTC did not have to find the conduct in question to have violated the letter or spirit of the antitrust laws, but that competition could be unfair under Section 5 independently.[117] Reinvigorated, the FTC used their newfound authority to implement over two-dozen industry wide rules between 1971 and 1980.[118]

---

Federal Trade Commission Act called the agency's early commissioners "a stupid administration". *Id.* (quoting AUTHOR S. LINK, WOODROW WILSON AND THE PROGRESSIVE ERA 1910-1917 (Harper Torchbook ed. 1963) (1954)).

115. *Id.*; Fed. Trade Comm'n v. Eastman Kodac Co., 274 U.S. 619 (1927). Had the Court found in favor of the FTC, it may have become the government's predominant enforcement agency for mergers. Kovacic & Shapiro, *supra* note 34, at 48-49.

116. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (1972). The Court in *Sperry* explicitly held that Section 5 authorized the, "FTC to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws . . . [and] . . . to proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition." Miller, *supra* note 106, at 1499 (quoting Sperry at 239).

117. *Section 5 of the Federal Trade Commission Act: The Most Powerful Weapon Against Competitive Threats Before the H. Comm. on Small Business* 110th Cong. 2 (statement of William C. MacLeod) (citing *Fed. Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 223 (1972)). In this case, the Court agreed that "fairness" depended on the following factors:

> (1) "Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law . . . or other established concepts of unfairness;" (2) "whether it is immoral, unethical, or oppressive, or unscrupulous;" and (3) "whether it causes substantial injury to consumers (or competitors or other businessmen)."

*Id.* at 2-3 (quoting *Sperry & Hutchinson Co.*, 405 U.S. at 244).

118. *Id.* at 3. Building on this energy, the FTC passed over two dozen industry-wide rules between 1971 and 1980. *Id.* These rules included prohibiting business from hiring illegal aliens, preventing companies from cheating on their taxes, requiring companies with repeated environmental violations to put an

In the years following, appellate courts attempted to limit the *Sperry* holding. Despite these attempts, the Supreme Court reaffirmed its stance on the issue in 1986 in *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986).[119] There, the Court reconfirmed its position, ruling the FTC had the authority under Section 5 to condemn anticompetitive practices other than those covered by antitrust laws.[120] The debate over Section 5 rests in the light of the last seventy years of unbroken Supreme Court decisions interpreting Section 5 as possessing a wider range of behavior than that covered by existing antitrust laws.[121]

---

environmentalist on their board of directors, and even prohibiting companies from advertising to children. *Id.* Some initial supporters of the FTC's criticized its increased breadth was actually making it harder for small businesses to compete, and harder for consumers to get what they wanted. *Id.* This period can be characterized as the agency trying to find its proper place in antitrust law.

119. *Id.* at 3-4. Appellate courts were skeptical of the FTC's authority after *Sperry* and in their own courts tried to limit the FTC's exercise of authority over matters outside the well-settled limits of antitrust law. *Id.* One court of appeals held that parallel pricing did not arise to an illegal conspiracy under the Act. *Id.* (citing EI du Pont de Nemours & Co. v. Fed. Trade Comm'n, 729 F.2d 128 (2d Cir. 1984)). Another court of appeals overturned the FTC's condemnation of a company who refused to deal with retailers who did not follow the distributors suggested retail price levels. *Section 5 of the Federal Trade Commission Act*, *supra* note 117, at 3-4 (citing Russel Stover Candies v. Fed. Trade Comm'n, 718 F.2d 256 (8th Cir. 1983)). Another significant attempt to check the FTC's exercise of power occurred when one appellate court held the FTC did not have the power to regulate the affairs of dominant firms that had committed no per se illegal acts to achieve their respective positions. *Id.* at 4 (citing Official Airline Guides, Inc. v. Fed. Trade Comm'n, 630 F.2d 920 (2d Cir. 1980)).

In *FTC v. Indiana Federation of Dentists*, the Court made a determinative step to construe the bonds of "unfairness" and the FTC's authority to enforce Section 5 violations. *Id.*

> The Supreme Court . . . found that the standard for "unfairness" under the FTC Act is "by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antirust laws, but also practices that the Commission determines are against public policy for other reasons."

Fed. Trade Comm'n v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986); see also *Sperry & Hutchinson Co.*, 405 U.S. at 242 (holding FTC has authority to constrain, among other things "deception, bad faith, fraud, or oppression"); Kovacic & Shapiro, *supra* note 34, at 48.

120. *Id.*

121. Miller, *supra* note 106 at 1499 (citing *In re.*Rambus, Inc., 2006 WL 2330118 (holding, "Each of these [appellate-court] cases was decided before

While the Court in *Sperry* held the FTC's authority broad enough to handle any threat to a business' freedom to compete, the real challenge for the FTC is to use that authority wisely.[122]

The 1990s were marked with unprecedented inter-agency cooperation between the DOJ and the FTC.[123] Even though the two agencies had distinct theories on enforcement, both agencies recognized the importance of consensus.[124] The most striking difference between the agencies' policies perhaps is the DOJ's disapproval for buyer-up-front consent orders and the FTC's rejection of fix-it-first proposals.[125] Authorities characterized the

---

[*Indiana Federation of Dentists*], with its reliance on *Sperry & Hutchinson's* reiteration of Section 5's breadth.").

122. *Section 5 of the Federal Trade Commission Act*, *supra* note 117, at 4.

123. Whitener, ANTITRUST, at 7. During the administrations of Bush Senior and Clinton, Inter-agency cooperation came in the form of first issuing joint federal guidelines for merger enforcement, intellectual property, health care, international operations and competitions. *Id.*

124. *Id.*

125. Logan M. Breed & David J. Michnal, *Merger Remedies: The DOJ's New Guide to Old Differences with the FTC*, ANTITRUST, Spring 2005, 37 1, 7. A buyer-up-front requirement is one in which the FTC compels the buyer of the asset to be identified and signed before the deal will be approved. *Id.* With this remedy, the FTC seeks to reduce the risk an adequate buyer will not be found, the consequence of which would be the failure of the deal. *Id.* Fix-it-first remedies are structural remedies the parties themselves implement before the merger is completed. *Id.* The DOJ expressly states that merging parties can avoid a second request, if they use fix-it-first remedies. *Id.* A second request is a discovery procedure used by the DOJ and FTC to acquire more information about the potential merging companies. Robert S. Schlossberg & Robert B. Wiggins, *The Devil is in the Details: Second Request Compliance*, ANTITRUST, SUMMER 1998, 6. To emphasize the impact of fix-it-first as a remedy, between June 2001 and July 2003, twelve out of the thirteen merger challenges brought by the DOJ were resolved through fix-it-first divestitures. Breed and Michnal, ANTITRUST, at 3.

The DOJ supports fix-it-first divestiture because it avoids potentially lengthy and complicated negotiations through consent decrees. *Id.* The DOJ continues that it enables parties to alter their merger deal in a way that resolves the agency's competitive concerns. *Id.* Commentators argue that one reason the DOJ allows fit-it-first remedies may be because under the Tunney Act the DOJ is subjected to review by a federal court in relation to the decisions on mergers and acquisitions. *Id.* Fix-it-first remedial measures enable the DOJ to navigate itself around the requirements of the Tunney Act and avoid potential judicial review. *Id.* The *Microsoft* decision is a prime example of how the DOJ avoided judicial review and public scrutiny. *Id.*

1990s as a time where both agencies were searching for a sensible middle ground.[126] During this time, antitrust was taken seriously and cases were brought, but not by indefensible initiatives.[127]

### *B. Tension Between the FTC and the DOJ Mounts Under the Bush Administration.*

There is little debate that enforcement of antitrust abuses in the past two presidential terms was the weakest in the last half-century.[128] Under the Clinton Administration, the FTC and DOJ jointly brought on average more than seventy claims per year against firms whose mergers would likely harm consumer welfare.[129] This number was cut in half during the Bush Administration, which, on average, challenged only thirty-three merger cases per year.[130] Instead, the DOJ under the Bush Administration focused a

---

In contrast, the FTC stated that it disapproves of fix-it-first remedial measures, and much prefers binding consent orders. Logan, ANTITRUST, at 3. Commentators argue that this disapproval might stem from the fact that the FTC is a decentralized and independent agency and the negotiation element of fix-it-first procedures might not be conducive to the FTC's structure. *Id.* Unlike the DOJ, the FTC is a proponent of buyer up front consent decrees. *Id.* at 4. These decrees by the FTC require the merging parties to identify the buyer of any divested assets in advance of the merger. *Id.* The FTC supports its position indicating that if the buyer is identified in advance, the risk that the parties won't be able to find a buyer capable of maintain or restoring competition, thus mitigating the possibility of asset deterioration upon divestiture. *Id.* Experts surmise a more appropriate difference for these differences is due to the structural and procedural differences between the agencies, one being an independent commission and the other an executive agency. *Id.* at 7.

126. *Roundtable Discussion Advise for the New Administration*, *supra* note 102, at 3. Robert Pitofsky of Georgetown University Law Center, stated his opinion of antitrust in the 1990s as a balanced agenda in a discussion with other antitrust experts. *Id.* His statement about the 1900s was made in reaction to the over-enforcement of the Warren Court. *Id.*

127. *Id.* Authorities mark antitrust enforcement in the 1990s as a balanced antitrust agenda, where energy was expensed, and antitrust was taken seriously. *Id.*

128. Obama, *supra* note 1.

129. *Id.*

130. *Id.*; Hogan & Hartson, *Antitrust Update: Antitrust Enforcement in the Obama Administration*, Dec. 2008, at 1 (Dec. 2008). The DOJ contends this statistic reflects the agency's focus on over-deterrence. *Id.*

predominant amount of energy on cartel-oriented investigations.[131] Even more alarming are the statistics showing the DOJ has failed to bring a single case against a dominant firm for anticompetitive behavior in the past eight years, but, instead, enthusiastically argues on behalf of dominant firms before the Supreme Court.[132]

The dangers of under enforcement are readily evident in the health care industry.[133] In the past ten years, there have been over four hundred mergers between health care providers, resulting in ninety-five percent of the market under control of a select few firms.[134] The cost of collusion to consumers has been premium increases of over eighty-seven percent in the past six years, and an increase in the number of uninsured Americans to forty-seven million, or one in seven.[135] This burden on consumers leaves many frustrated and critical of the DOJ's tolerance of big business dominating the heath care market.[136] The FTC has urged that it would save consumers and the federal government billions of dollars annually if pharmaceutical companies were enjoined from colluding with their competitors to keep low-cost generic drugs off the market.[137]

With the exception of cartel enforcement, the DOJ has vastly under prosecuted antitrust claims during the Bush Administration.[138]

---

131. Steven T. Taylor, *Antitrust Groups Get Ready and Get Set to go as Enforcement Efforts Ramp Up*, 28 NO. 2 OF COUN 1, Feb. 2009 1-2.

132. Obama, *supra* note 1; Goulet, *supra* note 9, at 273 (citing *Another Thumb on the Scales*, N.Y. TIMES, Nov. 1, 2008, at A22).

133. Letter from the American Hospital Assoc. to Christine Varney, Chief of the Department of Justice Antitrust Division, (May 11, 2009), http://www.aha.org/aha/letter/2009/09-50-11-ltr-pollack-varney.pdf.

134. *Id.*

135. *Id.*; Letter from the Heath Care for America Now to Christine Varney, Chief, Department of Justice Antitrust Division (May 19, 2009), http://hcfan.3cdn.net/60de4bc8c6929815dc_urm6bhu9z.pdf.

136. *Id.*

137. Joe Leibowitz, Chairman of the Federal Trade Commission, "Pay-for-Delay" Settlements in the Pharmaceutical Industry: How Congress can Stop Anticompetitive Conduct, Protect Consumers' Wallets, and Help Pay for Healthcare Reform (The $35 Billion Solution) (Jun. 23 2009), *available at* http://www.ftc.gov/speeches/leibowitz/090623payfordelayspeech.pdf.

138. *Roundtable Discussion Advise for the New Administration*, *supra* note 102, at 3. Robert Pitofsky asserts that the DOJ's cartel enforcement program, and

Critics agree the DOJ's laissez-faire enforcement puts the interests of big business ahead of the interests of consumers.[139] Many assert the DOJ has been too lenient towards mergers that have the potential to harm consumer welfare.[140] One very controversial decision occurred in 2006 when the DOJ approved the merger of Whirlpool and Maytag, which had the effect of increasing Whirlpool-Maytag market concentration by seventy-five percent.[141]

The DOJ's "hands-off stance" has been criticized as "conspicuous and troubling."[142] Senator Kohl, chairman of the Senate Judiciary Committee's antitrust subcommittee further admonished the DOJ's Maytag decision calling it "an assault on the Sherman Act," and that it represents just "another anti-competition and anti-consumer decision by the Antitrust Division."[143] Assistant

---

notably their leniency program, is a booming success. *Id.* He cites, as support for his assertion, the fact that fines and jail time have increased. *Id.* Cartels are so profitable, Pitofsky argues, that adequate deterrence requires very expensive fines and the possibility of real jail time. *Id.*

139. Stoll & Goldfein, *supra* note 11 (characterizing the DOJ's enforcement policy regarding mergers and dominant firm conduct as laissez-faire); Goulet, *supra* note 9, at 272-73; There is wide spread criticism that the DOJ places the interests of firms that enjoy monopoly to near monopoly power ahead of the interests of consumers and the DOJ released their report, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, in September 2008. *Id.* A New York Times editorial recently called the report "a deregulatory gift aimed at getting pesky antitrust enforcers off the back of big business." *Id.* (quoting *Another Thumb on the Scales*, N.Y. TIMES, Nov. 1, 2008, at A22). The author of this article criticizes the standard of review suggested by the DOJ who asserts that anticompetitive harm is "disproportionately" greater to the precompetitive conduct as it "bends over backward to protect big firms." *Id.*

140. Diana Moss, *Whirlpool, Maytag, the DOJ, and Transparency*, AMERICAN ANTITRUST INSTITUTE, April 24, 2006, *available at* http://www.antitrustinstitute.org/Archives/499.ashx.

141. *Id.*

142. Goulet, *supra* note 9, at 273 (quoting Jonathan B. Baker, *Turning on Itself: How Dueling Agencies in the Bush Administration Made Mincemeat of Antitrust Regulation Policy*, THE NEW REPUBLIC, Sept. 15, 2008, at 1). Baker calls the DOJ's decision not to challenge the Whirlpool-Maytag merger conspicuous and troubling. *Id.*

143. *Id.* (quoting Peter Whoriskey, *Justice's Monopoly Guidelines Assailed*, WASH. POST, Sept. 9, 2008, at D01). Senator Herb Kohl, a democrat from Wisconsin and the chairman of the Senate Judiciary Committee's antitrust subcommittee, berated the DOJ's recent decision to not challenge the potential merger between washing machine giants Whirlpool and Maytag. *Id.*

Attorney General Thomas O. Barnett defends the Whirlpool-Maytag merger, arguing it results in greater economies of scale, which the U.S. market requires if it is going to compete with foreign competitors.[144]

Experts argue that the combined market power of Whirlpool and Maytag would impair the ability of rivals to compete with the new washing machine giant and, consequentially, substantially lessen competition.[145] They further caution that consumers will be harmed by higher prices, fewer alternatives, and reduced innovation.[146] In 2007, the DOJ sparked controversy again when it approved of the merger between satellite radio industry leaders XM Radio and Sirius Satellite Radio.[147] The DOJ instigated another heated debate when it moved to have their consent decree on Microsoft lifted, which is seen by most as a major victory for antitrust and consumer welfare.[148]

FTC Chairman William Kovacic described the relationship between the FTC and the DOJ as "an archipelago of policy makers with [a] very inadequate ferry service between the islands," he noted that in "too many instances when you go visit those islands the inhabitants come out with sticks and torches and try to chase you

---

144. Diana B. Henriques, *U.S. Antitrust Review Backs Whirlpool-Maytag Merger,* N.Y. TIMES, Mar. 30, 2006. Cutting at Barnett's support for the merger, Henriques asserts there are no foreign washing machine companies able to compete with either Maytag or Whirlpool.

145. *Id.*

146. *Id.*

147. Hogan & Hartson, *supra* note 130, at 1.

148. *Id.*; Goulet, *supra* note 9, at 273 (quoting Baker, *supra* note 142). Jonathan Baker calls the DOJ's permissive settlement of the monopolization case against Microsoft as conspicuous and troubling. *Id.* In 2001, the DOJ announced that it would no longer seek a break up of Microsoft, and agreed to commence negotiations to settle the lawsuit. United States v. Microsoft, 231 F. Supp. 2d 144 (D.D.C. 2002). This settlement was intended to loosen the monopolistic hold they had over the software market. *Id.* It prevented Microsoft from participating in exclusive deals that could hurt competitors; required Microsoft to offer uniform contract terms to PC makers; and obliged Microsoft to release some technical information so that other software developers could write programs compatible with Windows. *Id.* Microsoft also had to give manufacturers and customers a way to remove certain Microsoft icons from the Windows desktop. *Id.*

away."[149] The FTC is also an independent agency created by the legislative branch and given relative autonomy. The FTC is more impervious to the Bush administration's agenda because the five commissioners hold staggered seven-year terms, and because the President appointments must vary in their party affiliations.[150]

### *C. Recent Tension Boils Over Barnett's September Report on Single-Firm Conduct.*

The most recent controversy between the two agencies relates to the report Assistant Attorney General Thomas O. Barnet released on September 8th, 2008.[151] After a yearlong corroboration with the FTC to study antitrust enforcement under Section 2 with the intent of creating a cumulative joint report to provide business with consistent and clear guidelines, the DOJ unilaterally issued its own report setting forth the DOJ's policy and guidance on the subject.[152] On the

---

149. Goulet, *supra* note 9, at 273 (quoting David Fischer, *FTC Commissioner Claims DOJ Attorneys Chase Him Away with Torches*, Feb. 1, 2007, *available at* http://www.antitrustreview.com/archives/831).

150. *Id.*

151. John E. Arden, Barnett Resigns as Justice Department Antitrust Chief, Trade Regulation Talk, Nov. 7, 2008, *available at* http://www.traderegulation.blogspot.com/2008/11/barnett-resigns-as-justice-department.html. The Report is entitled, "Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act." Assistant Attorney General Thomas O. Barnett was the Justice Department's Antitrust Chief. *Id.*

152. Goulet, *supra* note 9, at 268-69. In June 2006, the FTC and the DOJ began holding a yearlong series of public hearings to study issues related to enforcement of Section 2. *Id.* At the hearings, over one hundred participants in twenty-nine panels would discuss a wide range of topics over nineteen days. *Id.* Discussions included the specific types of single-firm conduct, such as predatory pricing, bundling, tying, and refusals to deal. *Id.* The study was intended to conclude with the release of a joint report "draw[ing] on the rich body of commentary created during the hearings, judicial precedent, and scholarly research." *Id.* (quoting Press Release, U.S. Department of Justice (Sept. 8, 2008), *available at* http://www.usdoj.gov/atr/public/press_releases/2008/236975.htm). Despite the joint undertaking, the DOJ issued its own two hundred thirteen page report entitled *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act. Id.*

The unilateral report issued by the DOJ discusses whether and when specific types of single-firm conduct violate Section 2 by harming competition and consumer welfare. Arden, *supra* note 151. More specifically, the report identifies day the DOJ released its report, all four of the FTC commissioners issued statements harshly attacking Barnett's report for putting the interest of monopoly power above the interests of consumers and overstating the level of legal and economic agreement regarding Section 2.[153] One commissioner called it a "blueprint for radically

---

and discusses the areas of consensus with the FTC with respect to the proper treatment of single firm conduct. *Id.* The report goes on to confirm the rebuttable presumption that monopoly power exists "[w]hen a firm has maintained a market share in excess of two-thirds for a significant period and its market position would not likely be eroded in the near future." *Id.* (quoting DOJ Press Release: Justice Department Issues Report on Monopoly Law). The DOJ's report continues on that its primary goal is to set forth clear and administrable standards, and they believe the current prohibitions are vague or overly inclusive and likely to undermine economic growth and harm consumers. *Id.* at 270. These and other findings in the report confirm the DOJ's preoccupation with the potential chilling effect on investment and innovation of "over-enforcement" as they would like to call it. *Id.*

The DOJ's report makes the following sweeping conclusions. *Id.* The pre se illegality of tying arrangements should be abandoned, the law's historic hostility to the practice of tying is unjustified, and the hostility is inconsistent with the U.S. Supreme Court's modern decisions. *Id.* Bundling is a common practice and frequently benefits consumers. *Id.* Unilateral and unconditional refusals to deal with rivals should not play a meaningful role in Section 2 enforcement. *Id.* Exclusive-dealing arrangements that foreclose less than twenty percent of existing customers should not be illegal. *Id.* And finally, the last of these conclusions given by the DOJ is that, when a firm has been found to violate Section 2, its remedy should allow it to re-establish the opportunity for competition without unnecessarily chilling competitive practices, or creating disincentives for investment and innovation. *Id.*

153. *Id.*; Goulet, *supra* note 9, at 270-72. Commissioners Pamela Jones Harbour, Jon Leibowitz, and J. James Rosch rejected the DOJ's report by calling it a "blueprint for radically weakened enforcement of Section 2" that "goes beyond the holdings of the Supreme Court cases upon which it relies" and "seriously overstates the level of legal, economic, and academic consensus regarding Section 2." *Id.* (quoting Statement of Commissioners Harbour, Leibowitz, and Roesch on the Issuance of the Section 2 Report by the Department of Justice (Sept. 8, 2008), *available at* http://www.ftc.gov/os/2008/09/080908section2stmt.pdf). The FTC Commissioners' statement further faulted the DOJ for creating broad safe harbors for dominant firms and imposing rigorous burdens of proof on plaintiffs, which are nearly impossible to meet with these safe harbors in place. *Id.* at 271. The Commissioners conclude that the DOJ's report creates a multilayered protective screen for dominant firms with monopoly or near-monopoly power. *Id.* The Commissioners allege this protective screen will allow dominant firms to engage in anticompetitive practices with impunity, regardless of the adverse effects it may have on consumers. *Id.*

weakened enforcement of Section 2" that "goes beyond the holdings of the Supreme Court cases upon which it relies" and "seriously overstates the level of legal, economic, and academic consensus regarding Section 2."[154] The Commissioners argue the DOJ's report downplayed the risks of under-enforcement, and the DOJ's disproportionality test distorts the rule of reason standard.[155] The Commissioners further assert they are wary of the DOJ's reliance on economic theory and heed the DOJ to Justice Breyers' recent warning that while economic theory is an important consideration in applying antitrust law, it is not tantamount to the law itself.[156]

FTC Chairman William E. Kovacic issued a separate statement expressing regret that the laborious hearings had not resulted in a joint document reflecting their shared views for guiding corporate American with clear and consistent guidelines on how to competitively compete.[157] He artfully indicated the DOJ's report lacked historical context.[158] Barnett responded to defend the DOJ's

---

The Commissioners point to four premises they believe the DOJ's report is based on, and to which they disagree. *Id.* First, the DOJ believes that monopoly profits encourage firms to innovate and compete. Goulet, *supra* note 9, at 270-72. Second, the risk of over-enforcement is greater than the risk of under-enforcement. *Id.* Third, the costs of administration are a factor that should be weighed against enforcement of Section 2 violations. *Id.* And finally, there is a need for clear and administrable tests, and the court has recognized this need and fashioned bright line tests as a result. *Id.*

154. *Id.*

155. *Id.* The disproportionality test requires anticompetitive effects to be "disproportionately" greater than precompetitive effects. *Id.* This is an obvious departure from the rule of reason standard implemented in Standard Oil, which courts agree laid the foundation for modern antitrust analysis. Goulet, *supra* note 9, at 270-72; Kovacic & Shapiro, *supra* note 34, at 45.

156. Goulet, *supra* note 9, at 271-72 (citing the Statement of Commissioners Harbour, Liebowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice (Sept. 8, 2008), *available at* http://www.ftc.gov/os/2008/09/080908section2stmt.pdf). The Commissioners rebuke the DOJ's reliance on economic theory as a crutch for under-enforcement by pointing out Justice Breyer's statement to the contrary. *Id.*

157. *Id.* at 272. Chairman Kovacic released his own statement, neither endorsing nor opposing the report. *Id.*

158. *Id.* In his statement, Chairman Kovacic states the DOJ's report lacks "an appreciation for [historical enforcement] trends ought to inspire caution before one embraces the proposition that U.S. antitrust doctrine and policy today expose dominant firms to significant, systematic risks attributable to over-inclusive

report as being pro-consumer.[159] Days after the reports, presidential candidate Barack Obama said the DOJ's position on enforcement highlighted the need for more aggressive antitrust enforcement.[160] Barnett announced his retirement as Chief of the DOJ's Antitrust Division less than a month later.[161] While deregulation was the norm under Barnett, government regulation may again play a crucial role in the protection of competition as the country learns that

---

liability rules." *Id.* (quoting Modern U.S. Competition Law and the Treatment of Dominant Firms: Comments on the Department of Justice and Federal Trade Commission Proceedings Relation to Section 2 of the Sherman Act 1, 2, 4-5, (Sept. 8, 2008) (statement of William E. Kovacic, Chairman, Federal Trade Commission), *available at* http://ftc.gov/os/2008/09/080908section2stmtkovacic.pdf). By his statement, Kovacic adeptly admonished the DOJ's fear of false positives and over-enforcement as unfounded. *Id.*

159. Arden, *supra* note 151. Barnett re-affirmed his position that the article reflected the agencies shared view of antitrust enforcement, and maintained that the report was pro-consumer. *Id.* He stressed the importance of avoiding interference in the "rough and tumble of beneficial competition that drives innovation and economic growth". Goulet, *supra* note 9, at 274 (quoting Press Release, U.S. Department of Justice (Sept. 8, 2008), *available at* Competition Enforcement in an Innovative Economy, http://www.usdoj.gov/atr/public/speeches/234246.htm). Barnett insisted the report was "consistent with the overall framework that has been endorsed by the courts and scholars." *Id.*

Barnett did, however, conceded that the DOJ's report was not based on the testimony given by the panelists or even on the scholarly commentary cited in the report. *Id.* (citing Thomas O. Barnett & Hill B. Wellford, *The DOJ's Single-Firm Conduct Report: Promoting Consumer Welfare Through Clear Standards for Section 2 of the Sherman Act*, GCP, Oct. 2008, at 8, *available at* http://www.usdoj.gov/atr/public/speeches/238599.pdf). He claimed instead the report was based on judicial precedent. *Id.* (citing Barnett, *supra* note 159, at 11). He concluded this response by insisting the report was meant to set clear and articulable standards for Section 2 enforcement and that objective standards were counterproductive and should be abandoned. *Id.* (citing Barnett, *supra* 159, at 15).

160. Goulet, *supra* note 9, at 276-77. Days after the DOJ released their report, Obama's campaign told reporters "the Justice Department's position reflected the need for a more aggressive approach to antitrust enforcement in the next administration." *Id.*

161. *Id.* Barnett's resignation was effective on November 19th, 2008. *Id.* It is customary for the assistant attorney general to resign several days after the election of the next president. Stoll & Goldfein, *supra* note 11.

unrestrained markets are not always self-correcting.[162] Consequentially, the DOJ's report may soon be no more than a footnote in American antitrust jurisprudence.[163]

## IV. Barack Obama is Likely to Bring Peace Between the Federal Trade Commission and the Department of Justice and Bring Upon More Effective Enforcement of Antitrust Laws

### *A. Barack Obama is Expected to Narrow the Rift between the FTC and the DOJ Making for Clearer and More Consistent Antitrust Rules.*

With the Democrats now in control of both Congress and the Executive branch, antitrust enforcement is likely to be ramped up in the new administration.[164] In his September 2007 speech to the American Antirust Institute, President Obama promised he would reinvigorate antitrust enforcement, ensure the benefits of competition flowed to consumers, relieve the barriers to entry in the pharmaceutical industry, prohibit pharmaceutical monopolies from imposing unjustified price increases, and finally he vowed to strengthen the agencies that enforce antitrust abuses.[165] Obama's

---

162. Goulet *supra* note 9, at 267-77. However, the report is issued as guidance and to establish rules that are easy to apply, thus it may influence judges and litigators. *Id.* at 277.

163. *Id.*

164. Taylor, *supra* note 131, at 1, 2. Antitrust activity over the past eight years has been sluggish. *Id.* Paul Novak, chair of the antirust department at New York-based Milberg commented, "I don't think that anyone would characterize the Bush administration, especially during those last couple of years, as being aggressive in terms of enforcement efforts, not at the FTC but particularly not at [the] DOJ." But most people believe the Obama administration will increase antitrust enforcement. *Id.* at 14.

165. Stoll & Goldfein, *supra* note 11 (citing Obama, *supra* note 1). In his September 2007 speech, President Obama spoke about reinvigorating antitrust enforcement by stepping up review of merger activity and curbing those mergers that hurt consumers while quickly clearing those that do not. *Id.* Some experts opine that what Obama meant by "reinvigorate" in his September 2007 speech was that he would clarify enforcement standards and make those standards consistent between the DOJ and the FTC. *Id.* He pledged to give special review to specific industries to ensure the benefits of competition were being passed on to the consumer. *Id.* (citing Obama, *supra* note 1). He took aim at the pharmaceutical

policy towards antitrust is described by some as a more careful, nuanced policy with hard-nosed idealism.[166]

With Obama in office, most of the changes to antitrust enforcement will take place at the DOJ.[167] Obama fulfilled the first step of his promise to ramp up enforcement when he named Christine Varney as the Assistant Attorney General for the DOJ's Antitrust Department.[168] She served former President Bill Clinton as a senior

---

industry and vowed to reduce barriers to entry in this market, while preserving incentives for pharmaceutical companies to innovate and invent life-saving medication. *Id.* He assured he would repeal the antitrust exemption that medical malpractice insurance and drug insurance companies enjoy so they can't continue to abuse their monopoly power through unjustified price increases. *Id.* Lastly, he pledged to strengthen the DOJ and FTC and take action to ensure antitrust law is effective and does not undermine efficiency or significantly interfere with competition to the detriment American consumers or businesses. *Id.* (citing Obama, *supra* note 1).

166. *Id.* Einer Elhauge, a Harvard University law professor and antirust advisor to President Obama, described the President as having a "more careful, nuanced policy . . . [with] a hard-nosed idealism." *Id.* (citing Amy Miller, *The GC's Choice: Obama, Corporate Counsel*, (Jan. 7, 2008) *available at* http://www.law.com/jsp/cc/PubArticleCC.jsp?id=900005499868). Experts describe Obama as a likely champion of American consumers, as well as considerate of American business interests. *Id.*

167. Ronald Fink, *Obama's Pick for Antitrust Boss Signals Tougher Stance on Deals*, FINANCIAL WEEK, Feb. 2, 2009, at 1; Stoll & Goldfien, *supra* note 11. Neal Stoll and Shepard Goldfein base their assertion on Obama's campaign policy statements about the major rifts between the DOJ and FTC. Fink, *supra*, at 1. Under the last administration, the DOJ was focused more on aggressive cartel enforcement and abstained from enforcing mergers and overseeing monopolization threats. *Id.* The DOJ's aggressive cartel enforcement under Mr. Barnett will continue under Varney's leadership, as cartel enforcement is an expressed priority for the new administration. Stoll & Goldfien, *supra* note 11; Sean Gates & Tej Srimushnam, *United States: New Directors in Antitrust Enforcement: Obama Appoints Christine Varney to Head DOJ Antitrust Division*, MORRISON & FOERSTER, January 2009 http://www.mofo.com/news/updates/files/15173.html (last visited Oct. 14, 2009).

168. Caren Bohan, Diane Bratz & Carol Bishopric, *Obama Names Varney to Antitrust Role at Justice*, Jan. 22, 2009, http://www.reuters.com/article/politicsNews/idUSTRE50L7OE20090122 (last viewed Oct. 14, 2009). During her time at the FTC, Varney was a major innovator of market theory analysis in both electronic high technology and biotechnology. Daniel Sokol, *It's Official – Varney to Head DOJ Antitrust*, ANTITRUST & COMPETITION POLICY BLOG, Jan. 22, 2009, http://lawprofessors.typepad.com/antitrustprof_blog/2009/01/its-official--.html (last

White House adviser and was one of five members of the FTC from 1994 to 1997.[169] She had a record at the FTC as an enforcer, and experts believe her record will likely change the agency to be more active in merger challenges and dominant firm investigations.[170] Specifically, Varney is likely to challenge mergers that create barriers to entry, raise competitors' costs, or facilitate price collusions.[171] Moving the DOJ more in line with the present FTC enforcement agenda is likely to have a positive impact on cooperation and consolidation between the FTC and DOJ. The unprecedented appointment of a former FTC Commissioner as Assistant Attorney General of the DOJ Antitrust Division may perhaps be a very important move in reconciling the historical tension between the agencies and make for more clear and consistent rules for lawful competition.

President Obama appointed Joe Leibowitz Chairman of the FTC in March 2009.[172] Chairman Leibowitz was appointed a commissioner of the FTC in 2004, and remains the only Democrat in the Commission. Commissioner Leibowitz is an activist who encourages vigorous condemnation of anticompetitive conduct, which may not fall strictly within the confines of the Act.[173] He has

---

visited Oct. 14, 2009). She also vigorously enforced antitrust laws in the health care industry. *Id.* In her opinion, *In Re International Conference Interpreters*, Varney wrote for the majority and was praised as both practical and innovative. *Id.* Varney has also earned the esteem of the Global Competition Review Chambers U.S.A., and International Who's Who of Competition Lawyers. *Id.*

169. *Id.* This is the first time a former FTC Commissioner will head the DOJ's antitrust division. Fink, *supra* note 167, at 1.

170. Stoll & Goldfein, *supra* note 11; Gates & Srimushnam, *supra* note 167. Specifically, experts believe Varney will take a more aggressive stance on mergers in innovation-focused industries, mergers involving vertical integration, and mergers involving privacy issues. *Id.* She has a reputation of being a fair-minded enforcer. Bracewell & Giuliant, *Antitrust Under President Obama*, Jan. 23, 2009, http://www.bracewellgiuliani.com/index.cfm/fa/news.advisory/item/f4138e67-2ae4-462e-ae09-6b8c68af4682/Antitrust_Under_President_Obama.cfm (last visited Oct. 14, 2009). She voted for the Boeing/McDonald Douglas merger, and may bring to the DOJ the perfect balance required under the current economic conditions. *Id.*

171. Fink, *supra* note 167, at 1.

172. *Id.*

173. Caren Bohan, Diane Bratz & Carol Bishopric, *supra* note 168; Bracewell & Giuliant, *supra* note 170. Like Varney, Leibowitz has a reputation as an

taken a tough stance against collusion in the pharmaceutical industry. According to Chairman Liebowitz, stopping pharmaceutical companies from colluding with their competitors to keep low-cost, generic drugs off the market is one of the FTC's highest priorities.[174]

Obama will have the opportunity to fill the spot of current Commissioner Pamela Jones Harbour.[175] If Obama chooses a Democrat to fill her seat, it will give the Democrats a majority in the FTC.[176] Obama's intent not to deter businesses with overly aggressive enforcement may temper what some commentators believe is the recent zealous enforcement of the FTC.[177] President Obama is expected to be a moderating force between the FTC and

---

enforcer of antitrust law. *Id.* He recently rallied for the increase use of Section 5 of the Act to prohibit anticompetitive conduct, which does strictly fall within the parameters of the Act. *Id.* Leibowitz has also suggested that the judiciary, especially the Supreme Court, is adverse to enforcing antitrust law. *Id.* He also suggests the FTC should seek disgorgement, the forced relinquishment of profits earned from illegal acts, in the pharmaceutical industry. *Id.* He asserts that, "malefactors should not keep the ill-gotten gains of their illegal acts." *Id.*

174. Leibowitz, *supra* note 137.

175. Stoll & Goldfein, *supra* note 11. The executive branch generally exhibits less influence over the FTC because the appointments are seven years long and no more than three of the commissioners can be from the same party. *Id.* This is one reason the FTC remained an aggressive agency under the Bush administration, perhaps it even became overly aggressive in response to the lax enforcement at the DOJ. *Id.*

176. *Id.* There will be an open spot to fill in the fall of 2009, when Commissioner Pamela Jones Harbour completes her seven year term with the FTC.

177. *Id.* Some argue the FTC has become too aggressive. Obama's appointment might help to tamper the FTC's recent aggressive trend. *Id.* The recent trend comes in light of the DOJ's ineffectiveness as an enforcement agency and their sympathy of big business. *Id.* The FTC has evolved itself to catch what the DOJ has let slip through the holes, or even outwardly protected. Goulet, *supra* note 11, at 273. (characterizing the DOJ's enforcement policy as pro big business). However, Varney is likely to ramp up enforcement, lessening the demand for a more aggressive FTC. Stoll & Goldfein, *supra* note 11.

The FTC has made some suspect decisions in regard to procedure that has sparked some to call the agency a "win at all costs" agency. *Id.* One of those decisions, was the FTC's appointment of Commissioner Rosch to serve as administrative law judge for complaints brought by the commission. *Id.* The FTC also imposed a regulation removing federal courts from the process of reviewing initial mergers. *Id.* Both the U.S. Chamber of Commerce and the American Bar Association Antitrust section have filed opposition statements arguing a lack of procedural fairness. *Id.*

DOJ, whom have historically had turf issues.[178] With the appointment of Varney, Liebowitz, and a fifth commissioner, experts are hopeful that the two agencies will have an easier time working together to create more consistent and predictable antitrust policies.[179]

*B. Economic Circumstances May Humble High Expectations.*

While increased attention to antitrust enforcement will be placed on both the DOJ and FTC, there might not be radical change immediately.[180] The Administration's tougher stance on enforcement might be pushed to the backburner as the President has to take care of more pressing issues like our domestic and global financial crisis.[181] Deals are falling apart in these difficult economic times, not because of antitrust agencies, but because money is tight virtually everywhere.[182] Some believe, during tough economic times, antitrust

---

178. Stoll and Goldfein, *supra* note 11, at 4. During the Bush Administration, the DOJ and FTC drifted apart from each other and each closer to an extreme. *Id.* The DOJ moved to be a more hands off agency when it came to mergers and monopolies, and they to a large extent protected large corporations instead of consumers. *Id.* The FTC in turn became the more aggressive agency and may have overcompensated in some cases for the DOJ's ineffectiveness. *Id.* Carl Hittinger, DLA Piper in the Philadelphia office, commented that Varney might have moderating effect on the two agencies that have had turf issues in the past. Fink, *supra* note 167.

179. Fink, *supra* note 167, at 4. Obama's views on Section 2 are more in line with that of the FTC. *Id.* Obama stated his common view with the FTC that the DOJ's lack of enforcement of Section 2 under the Bush administration was a major problem. *Id.* The DOJ's move toward the FTC's line of thinking in terms of mergers and dominant-firm enforcement should foster consensus and cooperation between the two agencies. *Id.* at 5.

180. Stoll & Goldfein, note 11. Neal R. Stoll and Shepard Goldfein opine there would be the kind of radical change the public is expecting. *Id.* Since the Obama administration urges a centrist approach to both agencies, the DOJ's laissez-faire enforcement may move toward a moderately less-aggressive policy more like the one employed at the FTC. *Id.*

181. Bracewell & Giuliant, *supra* note 170.

182. Taylor, *supra* note 131, at 15 (referring to Larry Fullerton, who leads the antitrust department of Chicago's Sidley & Austen). Of course, despite tight times, the consolidation craze continued. *Id*

is the first thing to be cut in terms of regulatory compliance.[183] Most recently, the government's approval of recent banking mergers may indicate regulators are taking a back seat to economic strategists who hope to save jobs by keeping failing companies in business.[184] Therefore, expectations for tougher antitrust enforcement might diminish of the U.S. economy's downward spiral.[185]

Former FTC official Hart Holden urges that, despite differing philosophies, the new administration has about big business, the Obama Administration is unlikely to clamp down on big mergers.[186] He emphasizes that the Executive Branch ultimately has limited influence over the FTC because of the five commissioners, no more

183. Brian Wingfield, *Obama's Antitrust Dilemma,* FORBES.COM, Feb. 2, 2009, http://www.forbes.com/2009/02/01/obama-antitrust-regulation-technology-enterprise_0201_antitrust.html (last visited Oct. 14, 2009). Companies may expect the Obama administration to ease up on antitrust enforcement as the unemployment number rises. *Id.* Franklin D. Roosevelt, although being a zealous proponent of antitrust enforcement, suspended federal antitrust law in 1933 when he enacted the National Industry Recovery Act. *Id.* Further, the U.S. airline industry received a limited antirust break after the September 11th attacks. *Id.*

184. *Id.* Despite Obama's intentions, some experts believe the country is going to see a movement towards industry consolidation in order to keep companies in business and to keep unemployment from sky rocketing. *Id.* Washington insiders, however, "caution not to count you deals until they are approved." *Id.*

185. Caren Bohan, Diane Bratz & Carol Bishopric, *supra* note 168. Antitrust enforcement is generally low during times of economic woes because many of those companies risk bankruptcy if they do not merge. *Id.* Experts believe that given the fragility of the present economy, antitrust enforcement will be a low priority for the Obama administration. *Id.* Albert Foer, President of the American Antitrust Institute, argues that once credit loosens up, companies facing stiff competition will seek to buy up rivals in the still weak economy. *Id.*

186. The Deal.com, Former FTC Official: Fears of Obama Meddling in Mergers Greatly Exaggerated, Nov. 11, 2008, at 1, *available at* http://finance.intomobile.com/intomobile?GUID=7134437&Page=MEDIAVIEWER. Holden was a former official at the FTC for fifteen years before he entered private practice. Id.

than three can be from the same party.[187] The Pfizer-Wyeth deal will likely be an early test for the Obama antitrust team.[188]

Former DOJ Antitrust Division Chief Hew Pate warns that assertions that the new administration will relax antitrust enforcement are "overblown."[189] According to Pate, the antitrust enforcement agencies have the task of determining whether less competition will harm consumers; preventing job loss is never a goal of antirust.[190] In fact, the weak economy may spur regulators to watch even more closely for signs of emerging cartels and efforts to fix prices.[191]

Harsh economic times often encourage competitors to merge or make agreements with one another preserving their cumulated survival. When the economy rebounds and these trusts persist, the consequence is large market power held in the hands of too few. It is a trap for antitrust enforcement agencies to lower the bar on enforcement because businesses claim bankruptcy will ensue, but this not an excuse according to *Standard Oil*.[192] Without a skeptical eye during a weak economy, menacing mergers can fly under the radar of antitrust enforcers, only to resurface years later as dominant firms with monopoly power threatening consumer welfare. Change will

---

187. *Id.* Holden believes that whoever Obama appoints as Assistant Attorney General of the Antitrust Division of the DOJ will likely come to the same conclusions that the Bush administration did. *Id.*

188. Brent Kendall, Pfizer-Wyeth Deal An Early Test For Obama Antitrust Policy, Dow Jones News, Jan. 26, 2009 *available at* http://www.advfn.com/news_Pfizer-Wyeth-Deal-An-Early-Test-For-Obama-Antitrust-Policy_35971605.html. Pfizer proposed a $68 billion deal to acquire their competitor Wyeth. *Id.* This would be the largest pharmaceutical merger since 2000 when Glaxo Wellcome PLC acquired SmithKline Beechman PLC. *Id.* The FTC approved of the Glaxo-SmithKline merger on the condition the companies would agree to divestiture in six product markets where there was overlapping offerings. *Id.*

189. Wingfield, *supra* note 183. Pate responds to some commentators' view that the banking industry was overlooked by antitrust enforcement. *Id.* He properly reasons banking deals, such as the Bank of America and Merrill Lynch merger and the Wells Fargo and Wachovia merger, would have received the government's approval after a lengthy antitrust review because the banking industry is not highly concentrated. *Id.*

190. *Id.*

191. *Id.*

192. *Standard Oil*, 221 U.S. at 74. The Supreme Court ordered the divestiture of Standard Oil, despite the defendants' argument that the order would bankrupt it.

come; however, it will likely be progressive rather than sudden, and moderate rather than revolutionary.[193] Thus, change will likely be seen in those areas that were under-enforced over the last eight years.[194]

Government creates these monopolies when it is too lenient, then prosecutes when these firms become too good, too profitable, and too dominant. This cycle can be broken by heightened scrutiny when the economy is weak. Decisive actions may be harsh in the short term, such as letting firms go bankrupt instead, but these actions will benefit consumers two-fold in decades to come when competition is effectively protected. After all, antitrust is designed to protect competition, not competitors, not employees, and certainly not big business.

## V. CONCLUSION.

This comment began by introducing the background of antitrust law in the United States.[195] It explored why antitrust law was needed to protect consumers from firms that used their domination in the market to fix prices, stall innovation, and restrict supply.[196] Congress passed the Act with the intention of creating a law that would protect consumer welfare and evolve with our economic understanding of the market.[197] Courts, legislators, and the executive have struggled for decades to strike a balance between the interests of dominant firms and the interests of consumers.[198]

The last eight years are evidence this struggle continues. The Bush Administration had the lowest enforcement rate of antitrust offenses in the last century, and it has had a shocking effect on our market.[199] A stunning example is that consumer healthcare costs skyrocketed in response to the high merger rate of the pharmaceutical

---

193. Bracewell & Giuliant, *supra* note 170.

194. Fink, *supra* note 167, at 1.

195. *See supra* Part II; The Deal.com, *supra* note, 186.

196. *See supra* Part II.

197. *See supra* Part B1; BORK, *supra* note 7, at 50.

198. *Id.*

199. Obama, *supra* note 1.

industry.[200] Experts of both political persuasions accuse the Bush Administration's DOJ of being too lenient towards mergers and putting the interests of big business ahead of the interests of consumers.[201] Few defend the DOJ's position that letting big business thrive unfettered is beneficial to the consumer. However, those that do would argue it provides better economies of scale, lower prices, and enables the firm to better compete with foreign industry.[202]

In an attempt to make up for the DOJ's laissez-faire attitude, the FTC arguably has become overly-aggressive in pursuing Section 5 abuses. The FTC was designed to merely fill the gaps in the DOJ's enforcement policy; however, the chasm left by the DOJ forced the FTC to become the more aggressive agency, thus prosecuting where the DOJ refused to. The two agencies have conflicting policies on enforcement and cannot cooperate. Consequentially, corporate America is left with unclear and inconsistent guidelines of how to lawfully compete.

It is vital that there be corroboration and cooperation between the agencies, otherwise, corporate America is left with unclear and inconsistent guidelines of how to lawfully compete. For the first time in history, Varney, a former FTC commissioner, will be the head of the DOJ. Having predicable outcomes will enable firms to compete more efficiently, without the fear of prosecution; efficient competition is always in the best interest of the consumer.

The economic downturn will have an effect on the new administration's ramped up enforcement of antitrust law. That effect, however, should not deter enforcement agencies from effectively

---

200. *Id.*

201. No more than three of the five Commissioners can be from the same political party. Renee M. Jones, "Legitimacy and Corporate Law: The Case for Regulatory Redundancy" 86 WASH. U. L. REV. 1273, 1310 (2009). And all four members; William E. Kovacic, Pamela Jones Harbour, Jon Leibowitz, and J. Thomas Rosch; harshly criticized the DOJ's antitrust policies as too lenient towards mergers and as putting the interests of big business ahead of the interest of consumers. *See supra* notes 160-61.

202. Economies of scale refer to the concept that when a firm increases their production of a certain item, their relative cost per unit decreases. This phenomenon is behind the notion that larger firms are more efficient because the cost it takes to produce one unit of something is less presumable because the larger firm has more resources.

doing their job because, in hard economic times, mergers and dominant firm conduct require even more scrutiny. Laissez-faire enforcement is very dangerous, as it allows firms to collude and consolidate. While these firms may defend their actions as necessary to avoid bankruptcy, they fly under the radar only to resurface as monopolies when the economy has rebounded.