

Introduction

A Manifesto for Competition

If we want to avoid the alternative dangers of over-regulation and anticompetitive abuse, competition policy is a critically important tool of government. In fact, antitrust may well be the single greatest American contribution to the field of political economy.

Most of the major issues in the 2008 election are the outward manifestation of a still more important one: the maintenance of a competitive economy.

We worry about high prices and inflation. Competition keeps prices close to costs and impels producers and distributors alike to find ways to reduce their costs. It is a powerful force for the efficient use of our limited resources.

We want our firms to do well in international markets. Competition at home forces companies to hone their edges so that they can compete successfully abroad.

We want to preserve an America that is a land of opportunity. Competition on a level playing field provides businesses and entrepreneurs the arena in which they can win—or lose—on the merits.

We have no doubt that innovation is the key to our future. Competitive pressure is what spurs enterprises to develop new ideas and generate the capital that enables ideas to become inventions and inventions to become market offerings.

We are committed to a constitutional political structure based on separation of powers, checks and balances, and the sovereignty of the individual. A competitive economy reflects and maintains these fundamental values.

Where there is adequate competition, consumers are offered a satisfying range of choices and can exercise a high degree of control over day-to-day life decisions. Experience in making choices builds a politically competent citizenry.

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Where there is adequate competition, economic power remains decentralized and is therefore more difficult to translate into centralized political power.

An economy in which dominant firms can stifle innovation or adopt strategies for destroying rivals is one that grows more slowly than is necessary to provide full employment. An economy in which new challengers find themselves faced with anticompetitive barriers is one in which entrenched power, wealth, and social position are immune to upwardly thrusting newcomers.

The centrality of competition in our everyday lives, in our economy, and in our national values is unquestioned. Competition policy should therefore be of central concern to the electorate. Yet, with rare exceptions, these are not the topics that campaigns emphasize.

On the Resilience of Antitrust

Throughout American history, the status of antitrust has ebbed and flowed. During World War I, antitrust was largely replaced by centralized administration. After that war, various experiments at home and abroad attempted to institutionalize cooperation among government, management, and labor instead of emphasizing competition. The early New Deal relied on trade associations to accomplish this type of cooperative regime. But the cooperative approach failed at home (and often served fascist dictators abroad)—and under the leadership of Franklin Roosevelt's Assistant Attorney General for Antitrust, Thurman Arnold, antitrust made a comeback. Strong in the 1960s, perhaps even too strong, antitrust was cut back in the 1980s as part of the conservative movement to shrink government. More actively employed by the Bush I administration and the Clinton administration, antitrust sank back into a reduced position during the Bush II administration.

Why has the status of antitrust varied so frequently and why has antitrust ultimately proven to be so resilient over the years? The answer is that antitrust is not so much a philosophical position as a pragmatic response to the ongoing tension between regulation and laissez faire, nurtured by evolving economic knowledge and modulating political values. Regulation is sometimes viewed as the government's strongest tool to assure that the private sector serves the public interest. Laissez faire is sometimes viewed as the private sector's strongest protection from the heavy hand of government. Both views will

always have their advocates, and their respective influence can be expected to fluctuate over time.

Both regulation and *laissez faire* automatically generate opposition because they create winners and losers. When regulation becomes overbearing, the coalition of forces seeking relief gains strength, as occurred in the late 1970s. But when excessive freedom for the market leads to widespread concern that big business is too influential, the forces seeking to bend the market toward a perceived public interest gain strength and demand a response from the polity. We believe that this is what is happening in 2008—the pendulum is swinging back from excessive faith in free markets to a more moderate equilibrium.

Antitrust stands at the center of a spectrum of relations between the state and the private sector, between *laissez faire* and populist regulation. It is a form of relatively light-handed oversight, operating after the fact, and relying on common law with a flexible statutory framework. It neither sanctions everything that corporations do nor does it tell corporations in any detail what they must do. Rather, it sets out some fairly general rules and allows private decisionmakers to rely, in the first instance, on their own judgment of what is appropriate strategy. Antitrust also constitutes a very useful way to prevent the emergence of direct heavy-handed government regulation. Even antitrust's fiercest *laissez faire* critics almost always prefer the light “regulation” provided by antitrust to other forms of government regulation.

Politicians are rarely elected on the basis of their antitrust philosophy—assuming they even have such a philosophy. Instead, typically candidates signal the public whether they will rely more or less on activist government, whether their administration will provide more or less freedom to corporations. Antitrust policy is a logical consequence of that signaling. When an administration is elected on an overall centrist platform, it can be expected to adopt the type of centrist economic policy in which antitrust flourishes. The consumer-based competition policy set forth in this Report presents a centrist vision in which antitrust is vigorously and creatively employed as a middle ground policy between *laissez faire* and regulation.

The Prevailing View

It is easy although not completely correct to refer to the prevailing antitrust policy as that of the “Chicago school.” In fact, the economic and political views ascribed to the University of Chicago have varied over time and have been refined by scholars who were not associated with Chicago. Many who identify themselves as “post-Chicago” have been clearly influenced by Chicago thinking. Likewise, many who think of themselves as Chicago school accept elements of the post-Chicago critique.

As a generalization, however, we can say that the Chicago school perspective came into power with the Reagan administration in 1981. Its fundamental principles relating to antitrust policy in the areas of economics and the role of government and law may be summarized as follows, recognizing that some advocates of the Chicago school are likely not to agree with each and every one of these generalizations:

- The basic framework for viewing competition is set by neoclassical economics, especially microeconomic price theory models of perfect competition and monopoly. The key concern of antitrust is reduced output directly caused by anticompetitive behavior.
- Markets generally work well and their flaws tend to be self-correcting. When markets fail, it is usually because of some form of government intervention.
- Concentration of industry doesn't necessarily signal the presence of market power. Concentration generally arises from natural market forces relating to the accomplishment of efficiencies. It therefore has only modest importance in antitrust decisionmaking.
- Monopoly can be bad for the economy because of the dead-weight loss it entails but it is important to encourage monopolists to compete aggressively, so actions against monopolists should be rare. Some Chicago economists also recognize that monopolization can lead to “x-inefficiency,” that is, a kind of lazy resting on laurels, and some see the pursuit of monopoly profits leading to the waste of resources through excessive political lobbying. Some emphasize the desirability

of innovation and credit monopoly as both a needed incentive for innovation and a potent resource for innovation.

- Mergers that businesses propose should be encouraged as generally efficient and should usually be permitted to proceed even in highly concentrated markets, unless there is strong structural and nonstructural evidence that post-merger prices are likely to rise in the near term.
- Vertical restraints (such as tying, resale price maintenance, or exclusive dealing) are almost always efficient, hence should rarely be subject to governmental intervention.
- Cartels and other forms of collusion among horizontal competitors (“naked” collusion) are almost always harmful and should therefore be the highest priority of enforcement.
- Government is almost always less competent than the private sector or the unassisted functioning of the free market. Hence government should intervene only rarely and minimally.
- Juries cannot be trusted to understand complex antitrust issues, and the courts are very often ill-equipped to manage antitrust cases. Therefore, private antitrust enforcement should be discouraged, significantly restricted, or even eliminated.
- State enforcers, who often have political agendas, should play a minimal role in antitrust enforcement, with authority limited to purely local and criminal anticompetitive activities such as bid rigging.
- Because of the importance of economic analysis and in order to avoid errors of over-enforcement, per se rules of illegality other than for naked price fixing should be replaced by comparatively open-ended rule of reason analysis or rules of per se legality.

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- Conspiracy allegations must be made with some specificity beyond mere notice pleading, so as not to put innocent companies at risk of expensive discovery. Joint and several liability rules and contribution rules among cartel members often are unfair to defendants.

Again, not all advocates of the Chicago school would agree with all of these policy positions, but they represent the general operating consensus that has driven U.S. competition policy for the past generation. They therefore present the starting point for an alternative paradigm.

An Alternative Post-Chicago, Consumer-Based Paradigm

The American Antitrust Institute (AAI) questions aspects of each of these principles, with the exception of the recognition of the importance of deterring horizontal collusion. In general, we believe that economics (but not merely neoclassical economics) provides most of the tools for carrying out the legislative intent with respect to antitrust. However, the AAI perspective diverges in a number of respects from Chicago school doctrine. We believe:

- Market failures are more common than the Chicago school assumes, and markets are frequently not self-correcting within an acceptable timeframe.
- High levels of concentration and the misuse of market power should be of great concern, at times giving rise to presumptions that certain structures or patterns of conduct are anticompetitive. A more aggressive policy of government intervention is needed with respect to monopolies and to mergers that generate or exacerbate highly concentrated market conditions.
- Government is often capable of advancing the public interest in a competent manner and can play a positive role in maintaining competitive markets.
- Vertical restraints need to be scrutinized because they sometimes pose the potential for anticompetitive effects, especially the exclusion of new entrants.

- State and private enforcement are essential features of a viable American antitrust regime.
- Over-reliance on the microeconomic price theory models of perfect competition and monopoly tends to ignore strategic behavior, network effects, and system effects present in oligopoly markets, all of which must be considered by antitrust policy.
- Competitive prices are only one of the goals of antitrust. Sometimes freedom of choice for consumers and conditions facilitating innovation are more important.

These themes will be reflected throughout this Transition Report. In the next section, to provide background for what is to come, we elaborate on several propositions on which there is a general consensus within the AAI.

The Economic Goals of Competition Policy

We will frequently be speaking about “antitrust” and “competition policy.” Competition policy is a term that elsewhere in the world is used more commonly than “antitrust,” but more or less synonymously. It can also take on a larger meaning, referring to the wide range of governmental policies that influence the degree or nature of competitiveness within various sectors of the economy. We use it in this broader sense. It includes, as perhaps the most important element, the antitrust laws—specifically, the Sherman Act, the Clayton Act, the Federal Trade Commission Act, the Robinson-Patman Act, and similar state laws. However, competition policy also implicates sectoral regulation (e.g., the Federal Communications Commission regulates competition in the telecommunications sector), intellectual property laws, tax laws, trade policy, corporate governance, and a variety of additional laws, rules, and policies. An ideal competition policy would align these various components in a consistent manner. Nowhere does such an ideal alignment exist. More often, specialization among attorneys, academics, agencies, and legislative committees results in a variety of players affecting competitive outcomes, without coordination or even a common vision.

The foregoing significantly affects the institutional environment for competition, often conferring advantages or disadvantages on various categories of economic actors.

Because of this, it is frequently useful to think beyond the immediate regime of antitrust laws in order to understand the underpinnings of competition. There is also a sufficiently large overlap in expertise between antitrust and other aspects of competition policy to warrant an advisory role for antitrust experts (whether internal or external) in the development and application of these other policy areas, to the extent that they affect competition.

Some Chicago school theorists argue that all of the laws that govern competition in general or in particular sectors of the economy should be consistently driven by neoclassical economic principles. We reject such an argument as being incompatible with the institutions of democracy. One school of economics should not carry a portfolio to run the government to the exclusion of other values. Although economic learning should strongly influence government, governmental policies must flow from democratic processes. “The people,” including lobbyists both for special interests and for the public interest, have the right to push for laws that place competing values above the values of the market. That being said, we are not endorsing any particular exemptions or even the desirability of any exemptions from antitrust, and we emphasize reliance upon competition as a fundamental principle of governance whenever it is compatible with legislated goals.

In the following sections, we set forth the major areas of debate between the Chicago school approach to antitrust and the AAI approach.

The Debate Over Whose Welfare Is To Be Served

Much has been said about the goals of antitrust, going back to the enactment of the first federal antitrust law, the Sherman Act, in 1890. At present, the dominant Chicago school has unilaterally declared victory for the advocates of “consumer welfare” as the single goal of antitrust. It is necessary to parse what this means, because it can and often does mean something quite different from the best interests of actual consumers and intermediate buyers. Under the Chicago school interpretation, “consumer welfare” has little to do with the welfare of consumers. It is better understood as “total economic efficiency” or “total (or aggregate) welfare” because it includes the welfare of both consumers and producers, even if these producers are cartels or monopolies. It justifies policies that theoretically maximize welfare for society as a whole, even when consumer interests may be adversely affected.

What this means in practice is that if a merger or some form of rivalrous conduct results in a net increase in output, it is to be praised as reflecting increased efficiency even if the financial benefits of that output are exclusively captured by large firms with market power. It was Robert Bork, a chief exponent of the Chicago school, who popularized the misleading term “consumer welfare” in 1978, thereby attempting (with a high degree of success) to capture the new consumer constituency which was emerging at that period.

A more acceptable standard would focus on the welfare of actual consumers (what economists refer to as “consumer surplus”). This welfare standard would insist that efficiency justifications for questionable competitive conduct demonstrate that a substantial portion of the anticipated efficiency gain flows directly to purchasers of the products or services in question, including both business and consumer purchasers. It would not be acceptable to allow mergers or other practices that lead to higher prices but also benefit monopolies or cartels in the short run, in the hope that initial benefits to the monopolies or cartels will eventually trickle down to consumers. We endorse a version of “consumer welfare” that benefits consumers because of our belief that antitrust cannot sustain political support over the long haul unless it is employed and publicly recognized fundamentally as a consumer protection policy.

Because every citizen is a consumer, there is an advantage in basing antitrust on the idea that it should directly benefit consumers. This does not mean that citizens-as-consumers should be the only constituency for antitrust or that the sole goal of antitrust should be low prices for consumers. For example, businesses-as-consumers also should have the right to buy or sell in competitive markets. In fact, we believe that antitrust should be viewed as having *the primary goal of preserving the competitive process*, thereby preserving a broad array of price and nonprice options in the short run and robust incentives for innovation in the long run.

Having the right objective is important, but we frequently lack the information as to how to produce an efficient, dynamic, progressive, consumer-benefiting economy and society, and the question is often what to do under these conditions of uncertainty. Trusting openness, access, and diversity is a better guiding principle than withholding antitrust intervention absent lower aggregate consumer surplus or total surplus. When in doubt, we should favor preserving the competitive process.

How Efficiency and Innovation Fit In

In the hands of the Chicago school, consumer welfare means that efficiency is the be-all and end-all of antitrust policy. Even if this is accepted, efficiency itself has a variety of meanings: it can refer to productive efficiency, allocative efficiency, or dynamic efficiency. The first two, which have tended to receive the highest value by government antitrust policies, are static. That is, they ask, how can society get the most out of its current resources? This is valuable because resources are limited and waste means there is less output to distribute within society.

Dynamic efficiency, on the other hand, asks how the society can grow or get more from its existing resources through innovation. Dynamic efficiency is valuable because increased resources mean there is more to distribute: everyone can be better off without redistributing away from targeted groups. A growing economy is more likely, therefore, to be associated with mutual toleration in a diverse society. Similarly important is our nation's need to rely increasingly on innovation as the key to enduring economic success in the face of such profound and developing challenges as energy shortages and global climate change.

Our view is that all three of these types of efficiency are important objectives that can and should be fostered by antitrust policies. To the extent that they conflict, we would place well-informed and persuasive dynamic efficiency arguments on a higher pedestal than static efficiency arguments.

In this we agree with economist Joseph Schumpeter that the more important leaps forward for society are produced by innovations rather than by marginal improvements in static efficiency. We also agree that resource growth should be a primary social, as well as economic, goal for the U.S. economy. However, we depart from Schumpeter in his assertion that monopoly is the most fertile industrial structure for generating innovation. We believe that innovation is most likely in most markets when diverse rivals pursue different strategies. We do not suggest that a monopolist will never innovate, but that a monopolist's innovation will be close-minded and channeled into directions that are most profitable for the monopolist. When there are multiple contenders, however, and some do not have the types of investments in place that encumber the monopolist, the innovation may come sooner and be more beneficial to society.

We also note our disagreement with advocates of extreme versions of intellectual property rights (IPRs). Free competition should be the baseline not only for the patent regime, but for copyright, trademark, and trade secret protection as well. By emphasizing the private property aspect of intellectual property, IPR extremists give to patents and copyrights a status that ignores their essential purpose: to foster innovation, not to protect innovators. Too absolute a protection for holders of IPRs may generate unnecessarily powerful monopolies and may also impede later innovation by others. In recent years, the realm of IPR has grown broader and stronger. We believe there is now a pressing need for a more thoughtful balance between IPR and competition policy concerns.

The Importance of Distributional Effects and Indirect Goals of Competition Policy

Among the antitrust issues that separate the Chicago school from the approach advocated here is the question of why monopoly should be seen as detrimental to competition and consumers. The Chicago school focuses exclusively on the efficiency effects of monopoly. For example, a monopolist that restricts quantity below the competitive level and, therefore, raises price above the competitive level creates “dead weight loss.” In other words, from existing resources, less is produced for society—an inefficient result.

The AAI believes that there are additional reasons to object to monopoly. First, when a monopolist raises its price above the competitive level, money is taken out of the pocket of the consumer and placed into the pocket of the monopolist (or its shareholders). This distributional effect—a transfer from the consumer to the producer—is inequitable, a form of theft if the monopolist has gained or maintained its market power through anticompetitive means. Second, as noted earlier, a monopolist often innovates less, or with less social benefit, because it does not face the pressure to innovate that comes from a competitive market, or it channels innovation in ways that do not promote a truly dynamic economy. Third, a monopolist is likely to display what has been called organizational slack or x-inefficiency—the lack of hunger that causes one to try hard. We don’t want an economy in which powerful companies are able to live the quiet life. And fourth, monopoly artificially restricts consumer choice. We believe that supporting a competitive array of choices, as well as low prices, is an appropriate objective of competition policy.

Why the Oligopoly Model Doesn't Fit With Neoclassical Predictions

We recognize that “big” is not necessarily bad and that certain industries will by their nature be able to sustain only a small number of efficient companies. Indeed, many of our key industries are already moderately or highly concentrated oligopolies. Current trends in consolidation suggest there will be fewer and fewer industries in which more than three significant firms compete. Herein lies a major disconnect between neoclassical economics and the current state of industry structures: predictions of the neoclassical model are based on an increasingly atypical market structure—i.e., pure competition.

The more typical market structure is now oligopoly. There is no clear line that separates competitive from insufficiently competitive markets based strictly on the number or relative size of firms. But at higher levels of concentration, as concentration increases, the likelihood of interdependent behavior that in many respects mirrors the effects of collusion (tacit collusion) increases, as does the probability of successful actual collusion. Because either result is, moreover, extraordinarily difficult to prove, AAI also supports the use of presumptions of anticompetitiveness to govern mergers in these highly concentrated industries.

Under- and Over-Enforcement

A system of antitrust that is based on multiple goals is arguably messier than one founded solely on the neoclassical economic model. But the antitrust enterprise is always characterized by trade-offs and balances. One such trade-off is between workability and accuracy. Antitrust necessarily involves prediction. Will X enter this market within a reasonable time if merged company Y-Z raises its price by 5%? What will be the effect of enjoining such-and-such behavior? And so on. It should also go without saying that decisions to do nothing also rest on such predictions.

Where predictions are made, mistakes will also be made. Thus, it is appropriate to employ a public strategy that weighs the costs and benefits of rules aimed at reducing the risk of error. Since the Chicago school gained ascendancy in antitrust, there has been disproportionate concern about the risks associated with over-enforcement and too little concern about the risk of under-enforcement. We believe that, as a generalization, today's government bends over backward to avoid making an intervention that might turn out to be mistaken, at the price of creating a system in which there is too little enforcement. That tilt against enforcement is especially hard to justify since recent mergers have

already made markets so much more concentrated and the risks of anticompetitive outcomes therefore greater. The Chicago school's quest for complete fairness for defendants has resulted in neglect of the interests of victims and potential victims.

The pendulum must now swing back in the direction of increased enforcement.

Other Priorities for Competition Policy

An economy that heavily features innovation operates on the assumption that change is valued highly by society. But *constant* change results in an anxious society. For a market system to be based on the idea of change, the political system must also offer an anxiety-reducing program, just as free trade demands a program for providing adjustment assistance to those whose jobs disappear as a result of trade. The market—whether domestic or international—produces winners, but it also necessarily and properly *but not inconsequentially* produces losers. To sustain popular support for a market economy, then, the government must maintain a well-perceived “safety net.” This safety net provides assurance that if the average citizen should temporarily become a loser, there will be income, food, health care, retraining, and counseling, for example, so that he or she can be relatively protected against catastrophic personal loss. Antitrust can be viewed as part of the safety net, to the extent that it keeps prices low and prevents wealth transfers from consumers to firms exercising market power, but the overall thrust of antitrust is dynamic, and it is more likely to be supported as a fundamental institution over time if there are also significant institutions of compassion that are respected parts of the system.

Antitrust can play a useful role in maintaining competitive prices, but we do not assert that the only goal of antitrust should be to keep prices low for consumers. The public also expects a competitive economy to provide a reasonable range of choice for consumers and producers and economic growth for society. A competitive market process can provide all three: price, choice, and innovation (a proxy for growth). Moreover, it can satisfy the demand for justice and equity within the economy, by fostering fair opportunities for efficient businesses to compete on the merits.

It may be helpful, in talking to the public about competition policy, to advocate “a level playing field” as an objective that a sports-loving citizenry can intuitively grasp. This is not a formula for protection of inefficient competitors, but rather a recognition that the economy should not be a lawless jungle, operating without regard for justice. The

marketplace is a political construct in which notions of fairness (as in the Federal Trade Commission Act's prohibition of "unfair methods of competition") have a meaning that is not necessarily synonymous with "efficiency."

Historically, antitrust has also recognized some so-called noneconomic goals, such as avoiding the political dangers of excessive concentration and protection of small and independent businesses. We do not advocate an eighteenth-century rural economy or an economy in which every industry is composed of a large number of vigorously competing small companies: market structure is itself the result of economic forces. We do not advocate a populist antitrust platform, which could leave antitrust decisions to political whim. We rely on economics as the driving analytical force of modern antitrust. However, we do not limit "economics" to that which is practiced by any one flavor of the Chicago school, or is limited to the consideration of prices and quantities in a partial equilibrium analysis. Strategic entry-detering behavior can hold market concentration above the level that would obtain if rivalry were directed at satisfying consumers rather than handicapping competitors.

Indeed, the difference between what is taught about competition to future managers in business schools and to future economists in neoclassical economics courses is very significant. For example, the Chicago school model assumes pure competition, complete information, rational behavior, and profit maximization. In the strategic management and marketing departments of business schools, the assumptions are that companies will have choices not dictated by market competition, that information is never complete, behavior is often irrational, and sustained competitive advantage rather than profit maximization is the accepted goal. When management thinking and economic theory are so out of alignment, it is time for adjustment.

Antitrust and the Legal System

Changing Standards

One aspect of the Chicago school's drive to eliminate the risk of over-enforcement has been the systematic abolition of per se rules without the creation of a new structure for rule of reason cases. Unstructured rule of reason litigation opens the door for very large, complex cases, characterized by voluminous discovery, battles between economics experts, and resource-swallowing litigation costs that are major barriers to recovery for victims and major expenses for defendants. Moreover, the system produces very little

guidance for businesses trying *ex ante* to follow strategies that will avoid legal trouble. Oddly, some Chicago school advocates complain about juries and courts not being able to deal with the complexity of antitrust—while working ferociously to make it more complicated. One solution, of course, is to make various strategies *per se legal*, and the Chicago school has frequently taken that direction. Our direction would be to encourage the Federal Trade Commission (FTC) and the courts to set out rules incorporating presumptions and burden shifting for the various types of antitrust cases, based in experience, logic, administrability, and a realistic assessment of who is most likely to have the relevant data. Rule of reason should not necessarily mean—as it now does—that the defendant virtually always wins.

Capture of Agencies and Courts

Underlying much of the motivation for deregulation has been the accurate observation that government agencies can be captured by the interests they were originally set up to regulate. We agree that this is sometimes problematic, and we also generally approve of the deregulation that occurred in the 1970s and 1980s. In most cases, such reforms resulted in lower prices and an increased pace of innovation, although there have been instances (the deregulation of electricity being one) of too much faith being placed in the potential of a transition from regulation to workable competition. There exist models for the regulatory phase and for the competition phase, but not for the transition phase, and it is often necessary to creatively mix regulatory and competitive elements for an extended period. In these situations, antitrust can make a contribution, but should not be given more weight than it can actually carry.

Many important improvements in antitrust analysis occurred at the FTC and Justice Department (DOJ) during the late 1970s, 1980s and years since. However, with the Chicago school in power for so much of this period, one can reasonably argue that the DOJ and the federal courts and, to a lesser extent, the FTC, have in effect been captured by defense-oriented free market activists. This ideological capture is different from the traditional capture theory that the regulated special interests are running the government to their advantage. Despite the perseverance of many excellent career civil servants who are able and politically neutral professionals, far too often the chief beneficiaries of the ideology of the Chicago school are our largest corporations rather than consumers.

Another example of ideological capture is the growing conservatism embedded in enforcement policies. DOJ amicus briefs in antitrust cases have in recent years consistently supported the defense side, and the Supreme Court's recent conservative activism in the antitrust field has unfortunately adopted DOJ's arguments. With procedural barriers to antitrust cases being raised by the courts at all judicial levels, the cost-benefit analysis of initiating antitrust litigation has changed in a way that decisively favors potential defendants. Moreover, there has been no offsetting growth in federal or state enforcement resources devoted to antitrust. We believe that appointment of more enforcement-oriented management-level officials should be a high priority, as should corresponding budgetary support to facilitate enhanced enforcement commitments.

Private and State Enforcement

It is usually estimated that 90% or more of antitrust cases are filed by alleged victims in private enforcement actions. The role of private enforcement, therefore, is crucial in terms of deterrence of future violations as well as compensation of victims of antitrust violations. For this reason, we are disturbed by the judicial trend since the early 1980s making it increasingly difficult for victims to recover damages. This has occurred as a result of rulings, often sought by the DOJ, that make it more difficult to obtain standing, to obtain class certification, or to survive early dismissal motions and thus take a case to the jury.

Critics have called attention to large legal fees for plaintiffs' attorneys in class actions and to instances of remedies that seem to provide small benefit to the injured class. We recognize that these problems do sometimes occur, but we strongly dispute that they occur with the frequency or degree of harm that is sometimes alleged. We have seen no systematic evidence that these problems are widespread. Nor have we seen evidence of "strike suits" launched without basis in the hopes of achieving a quick and lucrative settlement. The plaintiffs' attorneys' cost-benefit calculus for initiating a contingent fee antitrust case makes this unlikely. In fact, our own empirical research demonstrates that huge sums are returned to victims through antitrust class actions. We believe that a workable class action process is absolutely necessary if antitrust is to serve its consumer protection function and that such a process can be managed competently by experienced courts. We also believe that a contingent fee financing mechanism is both appropriate and necessary. Further, in evaluating attorney fees, it is proper to consider the large risk undertaken by class counsel, whose return has to reflect cases that do not succeed, as well

as those in which they win. We believe that the contingent fee class action system can and must be improved, but that it should be viewed as a positive feature of the American antitrust system.

Critics have also focused on the role of the states. Almost every state has its own antitrust laws, usually very similar to the federal laws, but with very limited personnel resources. We believe not only that state enforcement is especially important for detecting and prosecuting small and localized cartels, but that the states, often in coordinated fashion, should also play a role in controlling mergers and other activities that have both local and national or regional impact.

Although one starting from scratch might invent a unitary system of enforcement, the history of competition policy in America demonstrates that it is useful to have multiple enforcement agencies and channels. We believe that the mix of federal, state, and private enforcement serves the public well, assuring that more than one view can be heard, that more violations can be detected and prosecuted, and that the effect of political swings on competition policy can be moderated.

Transparency and Education

To an unacceptable degree, the field of antitrust has become an esoteric enclave that is not visited, much less appreciated, by the population at large. The AAI has made efforts to educate the American public on how competition works for the consumer and businesses.¹ Much more needs to be done at a broader level because without a popular understanding of and appreciation for competition policy, political support will be weak, leaving the well-resourced, intensely motivated, defendant-oriented business community free to set the tone for enforcement.

One aspect of an educational effort must be to increase the amount of transparency in the antitrust enforcement process. Much lip service is given to this objective, but it is still too difficult for the public to understand the facts and reasoning behind administrative decisions, including the decision not to prosecute in conspicuous cases.

¹ Our award-winning educational video and various enrichment materials can be found at www.fairfightfilm.org.

We recognize that agencies such as the FTC and DOJ have sharply constrained resources and that both education and transparency are objectives that would require a shift away from something else, most likely litigation. Our view is that litigation should be one very important part of a rounded strategy aimed at maintaining competitive markets that function well for consumers and firms, but it is only one tool in the bag which also contains educational and research tools. A better balance of strategies is needed.

International Competition Policy

Global markets and international competition do not render antitrust less relevant. We look upon the rapid spread of competition policy around the world, especially since 1989, with favor but also with some concerns. There is currently a real risk of countries applying competition policies in ways that are inconsistent not only with one another but perhaps even with the ideals of antitrust as we understand them. We do not advocate uniformity of laws as the solution. We recognize that each country is sovereign and has its own culture, history, institutions, and polity that must be reflected in its competition laws.

Nonetheless, with global anticompetitive problems (such as global cartels and global oligopolies), there is urgency in improving cooperation among nations to keep global markets free, competitive, and open to all. We support the movement toward informal harmonization through regular conversation and the development of best practices documents by the International Competition Network (ICN). We applaud recent administrations for their commitment to the ICN. On the other hand, we do not support the type of heavy-handed insistence that it is “our way or the highway” that has from time to time characterized administration commentaries on European or other foreign developments.

We believe in minimizing the barriers to entry that reduce trade between nations, but recognize that political realities may require a degree of flexibility with respect to such factors as labor and environmental issues. While purity of free trade is not necessary, it is important to resist political pressures that can restrict or reverse the great benefits that trade has brought not only to the American consumer but to consumers around the world.

From Generalizations to Specifics

In the chapters that follow, we put legal and economic flesh on this somewhat philosophical skeleton. Although we report in limited fashion on past and current administrations, our emphasis will be on the future. We offer recommendations for law enforcement priorities and legislative action, often commenting positively or negatively on recommendations by the Antitrust Modernization Commission, which published a major report in April, 2007. Our major recommendations are summarized at the beginning of each chapter. The remainder of each chapter will provide background information and justification for the recommendations.

