

THE POLITICAL HAND IN AMERICAN ANTITRUST— INVISIBLE, INSPIRATIONAL, OR IMAGINARY?

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What role does politics play in contemporary American antitrust? That was the central question addressed at the Chair's Showcase program, which took place at the ABA Section of Antitrust Law's 2013 Spring Meeting. To some, this might seem like a simple question with an obvious answer: Politics infuses any role that Congress defines by statute or that the President directs by his leadership appointments to the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission.

In the essays that follow, some of our panelists have expressed differing views on this question. James Rill and Stacey Turner give a thorough overview of some of the more interesting White House interventions into antitrust enforcement, mostly from the Theodore Roosevelt through the Ronald Reagan administrations. Their point is that sometimes such intervention may "be not only appropriate, but desirable," but only if it is transparent.¹ Steven Salop generally agrees with the Rill and Turner essay and provides a statistical and analytical basis for his theory that "[d]ifferent individuals within the courts and agencies bring different ideological views to bear on antitrust enforcement."² Marina Lao provides insight into the uncertainty of economic theory, especially in monopoly cases. Her view is that a political divergence between liberal and conservative ideology has permeated the thinking in Section 2 enforcement, but without an "honest conversation" about whether either ideology is "good policy."³ Finally, William Kovacic explains that there may be a political influence on antitrust enforcement; although that influence is quite

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¹ James F. Rill & Stacy L. Turner, *Presidents Practicing Antitrust: Where to Draw the Line?*, *infra* this issue, 79 ANTITRUST L.J. 577, 599 (2014).

² Steven C. Salop, *What Consensus? Why Ideology and Elections Still Matter to Antitrust*, *infra* this issue, 79 ANTITRUST L.J. 601, 602 (2014).

³ Marina Lao, *Ideology Matters in the Antitrust Debate*, *infra* this issue, 79 ANTITRUST L.J. 649, 685 (2014).

complex. He also examines “destructive political influence” and how the agencies might have more healthy interactions with the political process.⁴

From my perspective, partisan politics plays little role in the actual enforcement of the antitrust laws. Rather, the engines that drive the law forward are the common law framework, the paramount role of judges, the powerful impact of economic analysis, and the overlapping enforcement roles of the Antitrust Division, the FTC, and state and private attorneys general. These forces have produced a broad consensus on the large majority of antitrust policies and principles, at least within the United States.⁵

I. ANTITRUST SURROUNDED BY POLITICS?

The 1890 federal Sherman Act⁶—antitrust’s organic statute—was, by definition, the product of politics in at least one sense of the word. Over the 122 years that have passed since enactment there has been no legal impediment to Congress revising that statute anytime it chooses and in any way that seems fitting.

In fact Congress has repeatedly passed antitrust legislation that has fattened Title 15 of the U.S. Code with measures that have alternately expanded,⁷ contracted,⁸ and in various other ways reshaped the contours of U.S. antitrust

⁴ William E. Kovacic, *Politics and Partisanship in U.S. Federal Antitrust Enforcement*, *infra* this issue, 79 ANTITRUST L.J. 687, 710 (2014).

⁵ The Report and Recommendations of the bipartisan Antitrust Modernization Commission to Congress and the President confirmed this view. Their April 2007 Report was “the product of a truly bipartisan effort” and “the Commission was able to reach a remarkable degree of consensus on a number of important principles and recommendations.” ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS, at i (2007). A similarly robust consensus was reached in 2013 by the ABA Antitrust Section’s Transition Report Task Force, whose 20 members represented “the broad political spectrum” and whose report was the product of “often vibrant and spirited debate.” ABA SECTION OF ANTITRUST LAW, PRESIDENTIAL TRANSITION REPORT: THE STATE OF ANTITRUST ENFORCEMENT 2012, at 1 (2013). All Task Force members endorsed the Report. *Id.*

⁶ 15 U.S.C. §§ 1–7.

⁷ For example, Congress expanded antitrust enforcement in 1914 by creating the FTC and giving the agency supplementary powers to prevent “unfair methods of competition” (15 U.S.C. §§ 41–58) and again in 1936 by passing the Robinson-Patman Act barring certain types of price discrimination (15 U.S.C. §§ 13–13b, 21a).

⁸ There are more than 20 examples of statutory exemptions from antitrust law enacted by Congress to limit or eliminate the reach of antitrust into numerous industries and commercial sectors, including insurance, agriculture, shipping, national defense, professional sports, and many other areas. *See* ABA SECTION OF ANTITRUST LAW, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW 319 tbl.1 (2007).

law.⁹ Today, numerous congressional committees exercise jurisdiction that touches on one or another aspect of antitrust law and policy.¹⁰

Then there is the President, who exercises the power to appoint the top officials of the two federal antitrust enforcement agencies—the Assistant Attorney General (AAG) in charge of the Antitrust Division, and all five FTC Commissioners¹¹—subject to Senate confirmation. Though a somewhat arcane field, antitrust occasionally becomes electrically charged during a presidential campaign. This happened in 2008 when then-Senator Obama sought to attract voters by promising more aggressive enforcement of the antitrust laws.¹² Following the election, President Obama’s newly appointed AAG for antitrust sought to gain public support for the new administration by proclaiming that she could help mitigate the severe financial crisis of 2008–09 through more aggressive antitrust enforcement:

I believe that these extreme conditions require a recalibration of economic and legal analysis and theories, and a clearer plan for action. As antitrust enforcers, we cannot sit on the sidelines any longer—both in terms of enforcing the antitrust laws and contributing to sound competition policy as part of our nation’s economic strategy.¹³

So how could I doubt that politics in all its various manifestations plays at least an active and possibly a leading role in antitrust?

Let me explain.

II. ANTITRUST SEPARATED FROM POLITICS

From the Sherman Act’s earliest days, there has been a broad consensus—widely shared among the courts, Congress, and academe—that the principal responsibility for developing antitrust law should be exercised by the federal courts and therefore outside the sphere of politics. This consensus is rooted in four basic factors that, in combination and over a century of doctrinal devel-

⁹ See, e.g., Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976); Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661 (2004).

¹⁰ See Jim O’Connell, *Antitrust and the 2010 Mid-Term Elections*, ANTITRUST, Spring 2011, at 49, 51 (“Congress also has broad oversight and investigatory powers and regularly summons agency officials to appear before its various committees and subcommittees to provide testimony on antitrust policy, enforcement priorities, and other topics of interest or concern to members and their constituents.”).

¹¹ Politics also allocates the five FTC appointments; under the FTC Act no more than three Commissioners can be from the same political party. 15 U.S.C. § 41.

¹² See Senator Barack H. Obama, Statement of Senator Barack Obama for the American Antitrust Institute (Sept. 27, 2007), available at www.antitrustinstitute.org/node/10883.

¹³ Christine A. Varney, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Remarks for the United States Chamber of Commerce: Vigorous Antitrust Enforcement in this Challenging Era 5 (May 12, 2009), available at www.justice.gov/atr/public/speeches/245777.pdf.

opment, have produced a modern antitrust culture that for the most part (yet with some notable exceptions) has become relatively politics-agnostic.

First, in 1890 Congress intentionally chose a common law model for its new antitrust law, opting for broad, open-ended, and even somewhat amorphous words of prohibition and leaving it to the courts to sort out what those words would mean in real-world applications.¹⁴ Thus Sections 1 and 2 of the Sherman Act barred “restraint[s] of trade” and “monopoliz[ation],” respectively.¹⁵ The 1890 Congress provided no statutory definition for either term and no subsequent Congress has done so either. Instead, as Senator Sherman remarked while his bill was under consideration: “I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case.”¹⁶

After more than a century those two key terms remain intact. What has been added are thousands of court rulings interpreting and applying the terms in a myriad of fact situations so that we now have a vast court-made antitrust jurisprudence. By deferring to the courts and to the common law method for defining the scope and meaning of antitrust law, and by then largely maintaining a “hands-off” policy of non-intervention as the judge-made law developed over the years, Congress allowed “core” antitrust to evolve largely free from political interference. More than a century later the U.S. Supreme Court confirmed that this fundamental principle still applies:

Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act’s prohibition on “restraint[s] of trade” evolve to meet the dynamics of present economic conditions. The case-by-case adjudication contemplated by the rule of reason has implemented this common-law approach.¹⁷

Indeed, the Supreme Court has gone so far as to suggest that the Sherman Act’s common-law heritage gives the statute a quasi-constitutional stature that would almost seem to place the law beyond the reach of normal legislative prerogatives.¹⁸ The Court has even called the Sherman Act the “Magna Carta

¹⁴ See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (“From the beginning the Court has treated the Sherman Act as a common-law statute.”); William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, J. ECON. PERSP., Winter 2000, at 43 (“By these open-ended commands, Congress gave federal judges extraordinary power to draw lines between acceptable cooperation and illegal collusion, between vigorous competition and unlawful monopolization.”).

¹⁵ 15 U.S.C. §§ 1–2.

¹⁶ 21 CONG. REC. 2454, 2460 (1890) (statement of Sen. John Sherman)

¹⁷ *Leegin*, 551 U.S. at 899.

¹⁸ See *Sugar Inst., Inc. v. United States*, 297 U.S. 553, 600 (1936) (“We have said that the Sherman Anti-Trust Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions.”).

of free enterprise.”¹⁹ Statements of this kind do not mean that Congress lacks *power* to change antitrust law. Nevertheless, these grand sounding pronouncements have probably had a sobering or inhibiting effect on occasions when some members of Congress may have felt the urge to change competition policy directly, and have thereby served to protect antitrust from the tug and pull of temporal political currents.

Second, the decision to give the federal judiciary primacy of place in defining the scope and meaning of antitrust law and charting the law’s path as the nation’s economic and commercial circumstances evolved plainly expressed Congress’s determination that antitrust should be kept free from political interference. Federal judges are bound to decide cases without regard to political interest. As Professor Thomas Kauper has stated, for courts to “make political decisions” would be a “perversion of their role.”²⁰ That is the reason lifetime rather than periodic appointments were given to federal judges—because the latter, in the words of Federalist 78, would be “fatal to their necessary independence.”²¹

A third factor has emerged in recent years that has further widened the gap between antitrust and politics. This is the rapid ascendancy of economics thinking as an indispensable analytical tool for applying antitrust law principles to the modern economy. Before the 1970s it was hard to find a serious discussion of economic theory in any antitrust ruling issued by the Supreme Court. But along came the seminal writings of Robert Bork,²² the “Chicago School” of antitrust economic theory, and the “Harvard School” of antitrust scholarship. These writings heavily informed a long series of Supreme Court decisions, beginning with *Continental TV, Inc. v. GTE Sylvania*, 433 U.S. 36 (1977), overturning use of the *per se* rule in cases involving non-price vertical

¹⁹ *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972).

²⁰ See Thomas E. Kauper, *Influence of Conservative Economic Analysis on the Development of the Law of Antitrust*, in *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK* 40, 49 (Robert Pitofsky ed., 2008) [hereinafter *OVERSHOT THE MARK*].

²¹ *THE FEDERALIST* NO. 78 (Alexander Hamilton); see also Code of Conduct for United States Judges, Canon 5:

- (A) *General Prohibitions*. A judge should not:
- (1) act as a leader or hold any office in a political organization;
 - (2) make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office; or
 - (3) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate.
- (B) *Resignation upon Candidacy*. A judge should resign the judicial office if the judge becomes a candidate in a primary or general election for any office.
- (C) *Other Political Activity*. A judge should not engage in any other political activity.

This provision does not prevent a judge from engaging in activities described in Canon 4.

²² See, e.g., ROBERT BORK, *THE ANTITRUST PARADOX* (1978).

restraints.²³ Over the three-and-a-half intervening decades since *GTE Sylvania*, economics analysis has taken a central place in the antitrust thinking of the U.S. Supreme Court as well as the lower courts.²⁴

Although no one would argue that economics is absolutely politics-neutral, it is certainly fair to say that economics and its companion, empiricism, have largely displaced many of antitrust's more familiar populist themes from prior years.²⁵ In merger analysis, for example, the once familiar fear of the dangers from "excessive concentration of economic power"²⁶ have been largely displaced by the more nuanced tools and language of econometrics, unilateral and coordinated effects, diversion ratios, value of diverted sales, critical loss analysis, and upward pricing pressure.²⁷ In conduct cases, it has long been well-settled that the antitrust laws were enacted "for the protection of competition, not competitors."²⁸

²³ See Kovacic & Shapiro, *supra* note 14, at 53 (citing *GTE Sylvania* as the "pivotal event" whereby the "Chicago School efficiency perspectives" came to "enter antitrust's doctrinal mainstream.").

²⁴ See HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 10 (2005) ("Antitrust is an economic, not a moral, enterprise."); Douglas H. Ginsburg & Derek W. Moore, *The Future of Behavioral Economics in Antitrust Jurisprudence*, *COMPETITION POL'Y INT'L*, Spring 2010, Vol. 6, No. 1, at 89, 92 ("There is now broad and non-partisan agreement in academia, the bar, and the courts regarding the importance of price theory in antitrust decision-making."); Max Huffman, *Marrying Neo-Chicago with Behavioral Antitrust*, 78 *ANTITRUST L.J.* 105, 108 (2012) ("Serious debate ended long ago whether U.S. antitrust policy should be informed by economics—scholars of otherwise massively divergent views appear to agree on that proposition."); Kovacic & Shapiro, *supra* note 14, at 58 ("Today, the links between economics and law have been institutionalized with increasing presence of an economic perspective in law schools, extensive and explicit judicial reliance on economic theory, and with substantial presence of economists in the government antitrust agencies.").

²⁵ As Professor Joshua Wright noted: "Despite disagreements on many issues, antitrust commentators of all stripes agree that antitrust doctrine is economically rational on the whole, and, at a minimum, is more economically coherent than prior to the integration of the Chicago School's price theory teachings." Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 *ANTITRUST L.J.* 241, 246 (2012).

²⁶ Robert Pitofsky, *The Political Content of Antitrust*, 127 *U. PA. L. REV.* 1051, 1075 (1979). Pitofsky discerned the political goals of antitrust that were assertedly being under-served by then-current economics thinking. *Id.* ("[T]he trend toward use of an exclusively economic approach to antitrust analysis excludes important political considerations that have in the past been seen as relevant by Congress and the courts. Such considerations as the fear that excessive concentration of economic power will foster antidemocratic political pressures, the desire to reduce the range of private discretion by a few in order to enhance individual freedom, and the fear that increased governmental intrusion will become necessary if the economy is dominated by the few, can and should be feasibly incorporated into the antitrust equation.").

²⁷ See U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (2010), available at www.justice.gov/atr/public/guidelines/hmg-2010.pdf; see also Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 *ANTITRUST L.J.* 49, 50–51 (2010) ("[T]he 1968 Guidelines were based on one big idea: horizontal mergers that increase market concentration inherently are likely to lessen competition. By today's standards, the 1968 Guidelines are rather shocking.").

²⁸ See *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) (internal quotation marks omitted).

The final operative factor is the multiple redundancies that have been built into antitrust enforcement. Thus, there are four overlapping enforcement mechanisms for American antitrust—the DOJ, the FTC, the 50 state attorneys general, and the untold numbers of antitrust “private attorneys general” who file treble damages actions.²⁹ The Antitrust Division and FTC share responsibility over the full range of federal civil³⁰ antitrust enforcement, providing some degree of assurance that if political influence were to lead one agency to relax its efforts in any particular area of enforcement the other could step in to fill the gap.³¹ The states also provide a supplementary enforcement capacity in most areas of antitrust, including areas of the law that the federal agencies in recent years have largely neglected, such as resale price maintenance.³² Lastly, there is the vast array of antitrust plaintiff’s lawyers and their aggrieved clients who—lured by the incentives of treble damages, attorneys’ fees, and pre-judgment interest that Section 4 of the Clayton Act³³ confers on prevailing plaintiffs—serve as “private attorneys general.”³⁴ The Supreme Court has recognized that “[t]he treble-damages provision wielded by the private litigant is

²⁹ See, e.g., Katherine Mason Jones, *Federalism and Concurrent Jurisdiction in Global Markets: Why a Combination of National and State Antitrust Enforcement Is a Model for Effective Economic Regulation*, 30 Nw. J. INT’L L. & BUS. 285, 292–93 (2010) (“The statutory scheme governing federal antitrust law in the United States is unusual in the extent to which it relies on multiple means of enforcement. In addition to the Antitrust Division of the Department of Justice (‘DOJ’) and the FTC, fifty states and the District of Columbia are authorized to enforce federal antitrust laws as *parens patriae*. Recognizing the difficulty of detecting anticompetitive private business conduct, Congress also took the step of authorizing private individuals injured by antitrust violations to sue for treble damages as ‘private attorneys general.’”).

³⁰ Only the Antitrust Division possesses authority over *criminal* prosecution of hard core antitrust offenses. Redundancy is less important in this sphere, however, because there has long been a bipartisan consensus supporting vigorous imposition of criminal sanctions against unlawful cartels. See, e.g., William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 421 (2003) (“By the early 1990s, the fact of routine prosecution and severe punishment had become accepted elements of the nation’s competition policy.”).

³¹ See, e.g., *FTC v. Cement Inst.*, 333 U.S. 683, 693–94 (1948) (“Far from being regarded as a rival of the Justice Department and the District Courts in dissolving combinations in restraint of trade, the new Commission was envisioned as an aid to them and was specifically authorized to assist them in the drafting of appropriate decrees in antitrust litigation.”).

³² For example, California and New York have continued to pursue enforcement actions against companies suspected of engaging in resale price maintenance. See, e.g., *People v. Dermquest, Inc.*, No. RG 10497526, 2010-1 Trade Cas. (CCH) ¶ 76,922 (Cal. Super. Ct. Alameda Cnty. Feb. 23, 2010) (requiring manufacturer-defendant to inform resellers that defendant disavows “all parts of . . . distributor or resale agreement . . . that purportedly obligated you to maintain certain resale prices”); *Stipulated Final Judgment and Consent Decree, New York v. Herman Miller, Inc.*, No. 1:08-cv-02977 (S.D.N.Y. Mar. 25, 2008) (post-*Leegin* challenge to minimum RPM agreement under federal, New York, Michigan, and Illinois law).

³³ 15 U.S.C. § 15.

³⁴ *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 (1972) (“Instead, Congress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation. By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as ‘private attorneys general.’”).

a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators.”³⁵

III. ANTITRUST CHANGES WHEN ADMINISTRATIONS TURN OVER

One would suppose that if, contrary to the four broad factors summarized above, politics were still to play a consequential role in antitrust, this phenomenon would be most noticeable when the presidency changes hands from one political party to the other. There were three such turnovers in the last three decades during which economics thinking has reigned supreme in antitrust: 1993, when President Bill Clinton succeeded George H.W. Bush; 2001, when President George W. Bush took over from Clinton; and 2009, when President Barack Obama replaced George W. Bush. There is probably no settled consensus on the net political impact on antitrust of any one, far less all, of these transitions. But it is interesting to consider how a number of respected antitrust commentators have described these transitions:

Bill Clinton succeeds George H.W. Bush. Participating in a panel discussion on *The Antitrust Legacy of the Rehnquist-O'Connor Court*, Professor Robert Pitofsky opined that the transition to the Clinton administration had brought little change to antitrust enforcement:

It has been a remarkable 30 or 40 years in U.S. antitrust development, in the sense of convergence between left and right, avoidance of over-aggressive/under-aggressive, antitrust enforcement. The question that I would address is: How did we get to this middle ground where, as I have said previously, the enforcement program of the Clinton FTC and DOJ really from a distance looks very similar to the enforcement policies of the first Bush FTC and DOJ?³⁶

George W. Bush succeeds Bill Clinton. During George W. Bush's administration, particularly during the build-up to the 2008 presidential campaign, some commentators asserted that the administration was too “conservative” in its antitrust enforcement and advocated for a more interventionist approach.³⁷ Other commentators have disagreed and observed greater consistency across administrations, finding that “the core of antitrust enforcement has been practiced in a relatively nonideological and nonpartisan way over the last several

³⁵ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985); see also *California v. Am. Stores Co.*, 495 U.S. 271, 272 (1990) (the Clayton Act's “statutory scheme . . . favors private enforcement[.]”); *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 575 (7th Cir. 1999) (“Congress made private enforcement ‘an integral part of the congressional plan for protecting competition.’” (citing *American Stores*, 495 U.S. at 284–85)).

³⁶ *Roundtable Discussion: The Antitrust Legacy of the Rehnquist-O'Connor Court*, ANTI-TRUST, Summer 2006, at 8, 11.

³⁷ See, e.g., *OVERSHOT THE MARK*, *supra* note 20 (Robert Pitofsky's 2008 collection of essays on the topic).

decades.”³⁸ Of course, one can legitimately ask whether the commentary on both sides of this debate were themselves motivated by partisan political considerations.

Importantly, however, even in the context of this debate, there remains a remarkable degree of consensus on the economic framework that underlies antitrust analysis and even on its application to many areas. Nobody disputes, for example, that mergers and alleged monopolization conduct should be assessed based on their potential harm to the competitive process (as opposed to competitors) or that cartel enforcement is an appropriate agency priority. Indeed, even those who criticized antitrust enforcement during the administration of George W. Bush acknowledge that “U.S. antitrust enforcement, as a result of conservative economic analysis, is *better* today than it was during the Warren years[.]”³⁹

Barack Obama succeeds George W. Bush. As noted above, the inauguration of President Obama and the arrival of new leadership at the Antitrust Division brought promises of more aggressive antitrust enforcement. Withdrawal of the former Antitrust Division’s Section 2 Report seemed to presage a new determination to bring more Section 2 cases challenging dominant firm misconduct.⁴⁰ Again, there likely is no consensus on whether the Obama administration has so far “made good” on the President’s promise to reinvigorate antitrust. While some would point to a significant number of merger challenges, others would observe that those challenges have been based principally on horizontal theories that would fall comfortably within the approach of prior administrations. Nor has there been a significant increase in the number of monopolization cases. As University of Michigan law professor Daniel Crane commented in a July 18, 2012 posting on the President’s much-anticipated reinvigoration plans:

For better or worse, the Administration’s enforcement record does not bear out this impression. With only a few exceptions, current enforcement looks much like enforcement under the Bush Administration. Antitrust enforcement in the modern era is a technical and technocratic enterprise. Although there will be tweaks at the margin from administration to administration, the

³⁸ Daniel A. Crane, *Has the Obama Administration Reinvigorated Antitrust Enforcement?*, 65 STAN. L. REV. ONLINE 13 (2012), www.stanfordlawreview.org/online/obama-antitrust-enforcement; see also Ronan P. Harty et al., *Merger Enforcement Across Political Administrations in the United States*, CONCURRENCES, May 2012, available at www.davispolk.com/lawyers/ronan-harty/ (go to Publications, then follow View more).

³⁹ Robert Pitofsky, *Introduction: Setting the Stage*, in *OVERSHOT THE MARK*, *supra* note 20, at 3, 5.

⁴⁰ Press Release, U.S. Dep’t of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), available at www.justice.gov/opa/pr/2009/May/09-at-459.html.

core of antitrust enforcement has been practiced in a relatively nonideological and nonpartisan way over the last several decades.⁴¹

IV. ISSUES CONSIDERED BY THE SYMPOSIUM AUTHORS

The common law origins of the Sherman Act, the leading role judges play in giving meaning to the statute, the relentless ascendancy of economics as the principal tool for interpreting and applying antitrust law in the modern era, and the multiple means of antitrust enforcement have not rendered antitrust immune to politics. Indeed, unmistakable signs of political friction began to emerge shortly after *GTE Sylvania* was decided.⁴² Some have expressed concern that antitrust enforcement slackened during the administration of President Ronald Reagan based on political factors⁴³ or even ideology.⁴⁴

⁴¹ Crane, *supra* note 38, at 13. It should be noted that not everyone has agreed with Professor Crane's assessment, at least as respects merger enforcement. See, e.g., Jonathan B. Baker & Carl Shapiro, *Evaluating Merger Enforcement During the Obama Administration*, 65 STAN. L. REV. ONLINE 28 (Aug. 21, 2012), www.stanfordlawreview.org/merger-enforcement-obama-administration.

⁴² See, e.g., Pitofsky, *supra* note 26.

⁴³ See Pitofsky, *supra* note 39, at 5:

Those concerned about the excesses of the Warren Court and in favor of the ascendance of economics were handed an enormous political boost when President Ronald Reagan announced "government was the problem and not the solution." It is unlikely President Reagan had antitrust in mind, but aggressive antitrust enforcement fell squarely in the crosshairs of that approach, with the result that in the 1980s, antitrust enforcement virtually disappeared.

⁴⁴ See Joshua D. Wright, *Overshot the Mark? A Simple Explanation of the Chicago School's Influence on Antitrust*, COMPETITION POL'Y INT'L, Spring 2009, Vol. 5, No. 1, at 12–13. Wright opines that "the Chicago School's preference for theory and ideology rather than empirical evidence has led to antitrust policy that is too lenient compared to policy informed by the more predictive Post-Chicago economic theories." *Id.*

Of course, the word "ideology" has changed from its original, neutral meaning ("the science of ideas[.]" OXFORD ENGLISH DICTIONARY (2d ed. 1989)) to its contemporary usage and current pejorative connotations as a rigid quasi-religious belief system. Professor Stephen Martin collects the following definitions of ideology in the context of modern antitrust economics:

[A] general and coherent *Weltanschauung*, felt passionately and defended unscrupulously. It contains *sacred propositions* of a factual sort. In the face of contrary evidence, the words in these propositions will be redefined, or the philosophical status of the propositions will even be changed A special methodology and vocabulary will also grow up, the use of which confines the devotees to problems and approaches that cannot threaten the sacred propositions. (quoting Peter Wiles, *Ideology, Methodology, and Neoclassical Economics*, in WHY ECONOMICS IS NOT YET A SCIENCE 61–62 (Alfred S. Eichner ed., 1983))

[I]deologies are not simply lies; they are truthful statements about what a man thinks he sees. (quoting Joseph A. Schumpeter, *Science and Ideology*, 39 AM. ECON. REV. 346, 349 (1949).

Stephen Martin, Remembrance of Things Past: Antitrust, Ideology, and the Development of Industrial Economics 29–30 (Dec. 2005) (unpublished manuscript), available at www.krannert.purdue.edu/faculty/smartin/vita/remembrance1205a.pdf.

The objective of this essay is to sketch out the subject's general landscape and identify some main features that will be addressed in the following articles in this symposium. This essay began with the simple question "What role does politics play in American antitrust?" It might be useful to consider three alternative ways to portray how politics may influence contemporary antitrust. Does politics serve as: (a) an "invisible hand"⁴⁵ which guides the thoughts and actions of judges and agency heads by stimulating their *ideological* inclinations (what Wiles termed their "sacred propositions");⁴⁶ or (b) the inspiration provided by a crowd of local spectators, whose combined cheering hopefully provides a "12th man" helping the home team to victory;⁴⁷ or (c) an imagined myth or artifact from a bygone era, readily invoked by politically engaged individuals, especially candidates on the campaign trail, but then all-too-quickly immobilized once quotidian business realities greet antitrust enforcers in real-world market settings.

As they endeavored to address these questions, the authors in this symposium discussed five contexts in the post-*GTE Sylvania* era where partisan politics seemingly intruded on antitrust: (1) the filing and ultimate disposition of key Section 2 enforcement actions under different administrations; (2) the withdrawal of antitrust guidelines issued by predecessor administrations; (3) key Supreme Court decisions that have either lent support to or tended to disprove the hypothesis that the Justices' political predispositions drive their antitrust rulings; (4) instances where outside political forces appear to have arrayed against an antitrust enforcement agency proceeding or initiative; and (5) the play of politics in academe as multiple, contending "Schools" of antitrust economics thought compete for supremacy.

⁴⁵ Cf. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 184 (University Press 1827) (1776) ("By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain; and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention.").

⁴⁶ Compare Daniel A. Crane, *Chicago, Post-Chicago, and Neo-Chicago*, 76 U. CHI. L. REV. 1911, 1914 (2009) (reviewing *How the Chicago School Overshot the Mark* and noting: "Many of the chapter authors darkly hint that lurking behind the Chicago School arguments is not so much objective economics as right-wing political ideology."), with J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Remarks Before the Vienna Competition Conference: Behavioral Economics: Observations Regarding Issues that Lie Ahead (June 9, 2010), available at www.ftc.gov/sites/default/files/documents/public_statements/behavioral-economics-observations-regarding-issues-lie-ahead/100609viennaremarks.pdf ("Of course, it may be the case that the concern with behavioral economics is less that regulators are imperfect and more that they are subject to political biases and that behavioral economics is simply liberalism masquerading as economic thinking.").

⁴⁷ *12th Man (Football)*, WIKIPEDIA, [en.wikipedia.org/wiki/12th_man_\(football\)](http://en.wikipedia.org/wiki/12th_man_(football)).

A. THE ANTITRUST DIVISION'S HANDLING OF THREE KEY SECTION 2
CASES THROUGH CHANGES OF ADMINISTRATION

In 1969 the Nixon administration DOJ filed suit against IBM, charging the then-giant computer hardware company with unlawful monopolization of the computer mainframe market in violation of Section 2 of the Sherman Act. This massive lawsuit would last for 13 years, through subsequent Republican (Ford) and Democratic (Carter) administrations. Finally, in 1982, the Reagan DOJ under the leadership of AAG William Baxter voluntarily dismissed the suit before trial.

Five years into the IBM case, the Nixon Administration, on November 20, 1974, filed a second massive monopolization case, this time against the telephone giant, American Telephone & Telegraph Company. Like the IBM case, the AT&T lawsuit was pursued by successive Republican and Democratic administrations, but in this instance the AT&T case was settled by a consent decree reached in 1982, the same year that the IBM case ended. The AT&T decree brought about a breakup of the company through divestiture of its seven Bell Operating Companies.

In 1998, during the Clinton administration, Assistant Attorney General Joel Klein filed a civil action against Microsoft charging the company with violations of Section 1 (tying/bundling) and Section 2 (unlawful monopolization and attempt to monopolize) of the Sherman Act based on the company's conduct in allegedly bundling its Internet Explorer web browser with its Windows operating system and other alleged exclusionary practices associated with the company's operating system software. The matter went to trial before Judge Thomas Penfield Jackson of the U.S. District Court for the District of Columbia, who ruled in 1999 that Microsoft's practices were unlawful and should be remedied by the break-up of the company's operating system business from its other software operations. The company appealed, and on June 28, 2001, the D.C. Circuit rejected a part of the lower court's liability analysis and remanded the case for reconsideration of some of the liability issues and the break-up remedy.⁴⁸ The circuit court also determined that the trial judge should be removed from the case. With a less-than-promising remand of the government's case by the court of appeals, the case was settled by the new Republican administration and a Final Judgment was entered on November 12, 2002.⁴⁹

⁴⁸ *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

⁴⁹ Final Judgment, *United States v. Microsoft Corp.*, No. 98-1232 (D.D.C. Nov. 12, 2002), available at www.justice.gov/atr/cases/f200400/200457.pdf.

There have been no milestone Section 2 cases comparable to *IBM*, *AT&T*, and *Microsoft* over the past decade covering both Republican and Democratic administrations.

B. ANTITRUST DIVISION'S HANDLING OF ENFORCEMENT GUIDELINES
ISSUED BY A PRIOR ADMINISTRATION

In the early 1980s, during the Reagan Administration, the DOJ filed an amicus brief in the case of *Monsanto* urging the U.S. Supreme Court to overturn the per se rule governing price-related vertical restraints under the 1911 *Dr. Miles* decision⁵⁰ in favor of the rule of reason.⁵¹ After the filing of the brief, Congress intervened and prohibited the DOJ from defending this position at oral argument.⁵² The Supreme Court declined the government's invitation and the per se rule remained in place.⁵³

In another example, the Reagan Antitrust Division issued a set of Vertical Restraints Guidelines in 1985 addressing non-price vertical restraints.⁵⁴ Some members of Congress called on the DOJ to withdraw the Vertical Guidelines,⁵⁵ but the Guidelines remained the official statement of government enforcement policy for the remainder of the terms of Republican Presidents Reagan and George H.W. Bush. In 1993, however, under the administration of Democratic President Bill Clinton, the DOJ, through the new Assistant Attorney General for Antitrust, Anne Bingaman, promptly withdrew the Vertical Guidelines as one of her first acts in office.⁵⁶ Ms. Bingaman noted at the time: "These Guidelines seem so thoroughly to discount the anti-competitive potential of vertical intrabrand restraints and so easily to assume their efficiency-enhancing potential as to predetermine the conclusion against enforcement

⁵⁰ *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

⁵¹ See ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 133 n.746 (6th ed. 2007).

⁵² See Pub. L. No. 98-166, § 510, 97 Stat. 1071, 1102 (1983) (Section 510 of the Departments of Commerce, Justice, State, the Judiciary and Related Agencies Appropriations Act).

⁵³ *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 769 (1984) (Brennan, J., concurring). In 1997, however, the Court replaced the per se rule with the rule of reason for evaluating *maximum* resale price maintenance in *State Oil Co. v. Khan*, 522 U.S. 3, 7 (1997), and did the same for *minimum* resale price maintenance in its 2007 *Leegin* decision. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889 (2007).

⁵⁴ The guidelines expressly did not address resale price maintenance.

⁵⁵ Pub. L. No. 99-180, 99 Stat. 1170 (1985), available at www16.us.archive.org/stream/UnitedStatesStatutesAtLarge/TXT/0000%20-%2000056.txt.

⁵⁶ Anne K. Bingaman, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Address to ABA Section of Antitrust Law: Antitrust Enforcement, Some Initial Thoughts and Actions (Aug. 10, 1993), available at www.justice.gov/atr/public/speeches/0867.pdf.

action in almost every case. I am simply not willing to sign on to that balance.”⁵⁷

Despite the 1993 withdrawal of the Vertical Guidelines and the uncertainty that the withdrawal created over the new administration’s enforcement intentions in this area, it does not appear that the DOJ or the FTC at any time during the Clinton administration identified enforcement against vertical non-price restraints as a high priority.

In 2006, the Antitrust Division and FTC had undertaken the task of creating a joint report to advance the dialogue on enforcement of Section 2 of the Sherman Act. Public hearings began in June 2006 and lasted a year. The agencies thereafter attempted to prepare a joint report. Consensus subsequently turned out to be beyond their reach, however, and the Antitrust Division went forward alone, issuing its own separate Section 2 Report in September 2008.⁵⁸ In response, three FTC Commissioners released a public statement criticizing the report for not endorsing more interventionist standards for Section 2 enforcement, but without explaining what standards they would propose.⁵⁹ On May 11, 2009, in one of her first acts, the newly confirmed Assistant Attorney General in charge of the Antitrust Division announced the withdrawal of the Section 2 Report that had been issued by her predecessor only nine months before. In doing so, she promised to increase enforcement against single firm conduct.⁶⁰ Tellingly, however, there have been no milestone Section 2 case filings comparable to *IBM*, *AT&T*, and *Microsoft* since 2002. The Obama administration did file a Section 2 enforcement action against United Regional Healthcare system of Wichita Falls, but that case did not garner major attention and ended quickly in a consent decree. As Professor Daniel Crane described the case:

One wonders why this needed to be a federal case at all. In any event, the monopolization theory—that United had a 90% market share in acute inpatient services and used exclusive dealing contracts with insurance companies to stifle competitors—would fit comfortably within the Bush Administration’s monopolization report that the Obama Administration jettisoned.⁶¹

⁵⁷ *Id.* As it would later turn out, however, rulings by the U.S. Supreme Court would trump the DOJ’s enforcement policy.

⁵⁸ U.S. DEP’T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), available at www.justice.gov/atr/public/reports/236681.pdf. As of May 2009, the Section 2 Report was withdrawn. See Press Release, *supra* note 40.

⁵⁹ See Press Release, Fed. Trade Comm’n, Statement of Commissioners Harbour, Leibowitz, and Rosch on the Issuance of the Section 2 Report by the Department of Justice (Sept. 8, 2008), available at www.ftc.gov/sites/default/files/attachments/press-releases/ftc-commissioners-react-department-justice-report-competition-monopoly-single-firm-conduct-under/080908section2stmt.pdf.

⁶⁰ See Press Release, *supra* note 40.

⁶¹ Crane, *supra* note 38.

For its part, during the Obama administration, the FTC filed a single-firm conduct case against Intel, which also ended in a consent decree.⁶² This case, while significant, does not seem to indicate a major shift, particularly given that several dominance cases were filed during the administration of George W. Bush.⁶³ Indeed, it is interesting to note in this regard that Google was forced to back down in the face of an antitrust challenge from the Bush administration while the Obama administration recently declined to bring an enforcement action against Google.⁶⁴

C. DO SUPREME COURT ANTITRUST RULINGS REFLECT POLITICAL IMPULSES OR AFFILIATIONS?

From 1991 to 2007, the U.S. Supreme Court issued 12 antitrust rulings favoring defendants, in which no partisan divisions or even a barely discernible political impulse was revealed. Though the Court was considered to be sharply split along political lines during this period in many other areas of the law, there was remarkable cohesion among the Justices in their antitrust rulings, all of which garnered either unanimous votes (or decisions without a dissent),⁶⁵ or super-majority votes.⁶⁶ As noted by Leah Brannon and Judge

⁶² See Press Release, Fed. Trade Comm'n, FTC Settles Charges of Anticompetitive Conduct Against Intel (Aug. 4, 2010), available at www.ftc.gov/news-events/press-releases/2010/08/ftc-settles-charges-anticompetitive-conduct-against-intel.

⁶³ See, e.g., Opinion of the Commission, Union Oil Co. of Cal., FTC Docket No. 9305 (July 7, 2004), available at www.ftc.gov/sites/default/files/documents/cases/2004/07/040706commission_opinion.pdf; Press Release, Fed. Trade Comm'n, FTC Issues Complaint Against Rambus, Inc. (June 19, 2002), available at www.ftc.gov/news-events/press-releases/2002/06/ftc-issues-complaint-against-rambus-inc; Press Release, U.S. Dep't of Justice, Justice Department Files Antitrust Lawsuit Against Daily Gazette Company and MediaNews Group (May 22, 2007), available at www.justice.gov/atr/public/press_releases/2007/223466.pdf; Press Release, U.S. Dep't of Justice, Justice Department Files Antitrust Lawsuit Against Microsemi Corporation (Dec. 18, 2008), available at www.justice.gov/atr/public/press_releases/2008/240549.pdf.

⁶⁴ Compare Press Release, U.S. Dep't of Justice, Yahoo! Inc. and Google Inc. Abandon Their Advertising Agreement (Nov. 5, 2008), available at www.justice.gov/atr/public/press_releases/2008/239167.pdf, with Press Release, Fed. Trade Comm'n, Google Agrees to Change Its Business Practices to Resolves FTC Competition Concerns in the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search (Jan. 3, 2013), available at www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc.

⁶⁵ See *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007) (predatory bidding); *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006) (whether patents confer market power); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006) (horizontal restraints imposed by joint ventures); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (refusal to deal); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998) (group boycotts); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (maximum resale price maintenance); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993) (attempted monopolization).

⁶⁶ See *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007) (6-1-1 vote, implied antitrust immunity); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (7-2 vote, insufficiency of allegations of "agreement" under Section 1); *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006) (7-2 vote, secondary-line price discrimination); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (6-3 vote, predatory pricing); *City of*

Douglas H. Ginsburg writing in 2007: “By several measures, the degree of consensus among the Justices hearing antitrust cases has been increasing over the past four decades.”⁶⁷

That pattern seemed to come to an abrupt end in 2007, however, when the Supreme Court issued its decision in the *Leegin* case,⁶⁸ ending the century-old *Dr. Miles* rule that vertical minimum resale price maintenance was a per se violation of the antitrust laws. Because *Leegin* was a 5-4 decision with the Supreme Court’s five consistently conservative-leaning Justices arrayed against their four liberal-leaning colleagues, some have characterized the decision as a product of the Court’s politically polarized makeup.⁶⁹ But was *Leegin* truly an exemplar of *political* attitudes of the nine Supreme Court Justices on matters of antitrust law? This view would be hard to square with even a cursory review of the many important Supreme Court antitrust decisions that had been delivered by unanimous or near-unanimous votes during the prior two decades, and two more recent unanimous Court decisions for antitrust plaintiffs.⁷⁰

Moreover, Justice Breyer, the author of the dissenting opinion in *Leegin*, could not fairly be described as an antitrust *liberal*. William Kovacic, writing in 2007, described an experiment he performed in the late 1980s and early 1990s to try to discern whether judges appointed by Presidents Ronald Reagan and George H.W. Bush voted more “conservatively” than Carter appointees in antitrust cases. He found that they did indeed, but then he observed:

Yet no judge voted more consistently for defendants or authored opinions with greater impact in narrowing the zone of antitrust liability than Stephen Breyer, a Carter appointee and former colleague of Areeda and Turner at Harvard. As a court of appeals judge, Justice Breyer was instrumental in setting doctrinal trends often ascribed to the influence of the Chicago School.⁷¹

Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365 (1991) (6-3 vote, sham exception to *Noerr* immunity). Notably, the Supreme Court also decided another antitrust case during this period in favor of the plaintiff, but also by a super-majority vote. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992) (6-3 vote, tying and monopolization claims).

⁶⁷ Leah Brannon & Douglas H. Ginsburg, *Antitrust Decisions of the U.S. Supreme Court, 1967–2007*, COMPETITION POL’Y INT’L, Autumn 2007, Vol. 3, No. 2, at 20.

⁶⁸ *Leegin Creative Leather Prods. Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

⁶⁹ *See, e.g.*, Eleanor M. Fox, *The Efficiency Paradox*, in *OVERSHOT THE MARK*, *supra* note 20, at 77, 86 (“Did efficiency drive the outcome in *Leegin*? No; it was conservative economics-based theory rather than fact.”).

⁷⁰ *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013) (unanimous decision favoring FTC); *Am. Needle v. Nat’l Football League*, 560 U.S. 183 (2010) (unanimous decision favoring private plaintiff).

⁷¹ William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 8 (footnotes omitted).

Could it be that the particular issue of resale price maintenance (RPM) decided in *Leegin* laid bare an important *political* divide among the Justices or even an ideological cleavage separating the conservatives and the liberals on the Supreme Court? That, too, seems highly unlikely when one considers that only 10 years before *Leegin*, nearly the same group of Justices had ruled unanimously in *State Oil Co. v. Khan*⁷² that maximum RPM should be decided by the antitrust rule of reason rather than be prohibited as a per se violation of law despite nearly as long a period of Supreme Court precedent to the contrary as was the case in *Leegin*. If there were a political sensitivity to RPM, shouldn't it have surfaced first in *Khan*? Perhaps other, *non-antitrust* politics was at play in 2007 when the *Leegin* decision was issued.⁷³

D. INTRA-GOVERNMENTAL POLITICS

It is certainly possible for the encroachment of political interference on the antitrust enforcement agencies to come from Congress, other executive departments, or even from the President himself. There are several recent examples of pressure coming from Congress. In September 2011, 15 Democratic members of Congress wrote to President Obama asking him to order the Justice Department to drop its then pending case challenging the proposed merger of AT&T and T-Mobile.⁷⁴ It does not appear that any action was taken by the White House, however, and the case was eventually dropped when AT&T and T-Mobile abandoned their proposed merger. In October 2012 a Democratic congressman impliedly threatened the FTC with loss of funding if it continued to press its investigation against Google.⁷⁵ On November 19, 2012, two additional Democratic legislators sent the FTC a similar letter of objection to the Google investigation, also complaining of leaks to the press

⁷² 522 U.S. 3 (1997)

⁷³ Professor Einer Elhauge questioned in a 2007 paper on the *Leegin* decision why Justice Breyer, "one of the world's most sophisticated antitrust justices," would have dissented in a case in which "under standard Harvard School principles, the majority was right to overrule the per se rule against vertical minimum price-fixing." Elhauge's tentative explanation was politics, but of a type that was far more provocative than the antitrust kind:

But the fact that Breyer's dissent referred no less than six times to the stare decisis considerations that were cited in a case about restrictions on issue-advocacy ads by a right-to-life group made one wonder whether the *Leegin* case had gotten mixed up with larger political disputes about abortion and campaign finance regulation.

Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent U.S. Supreme Court Decisions?*, COMPETITION POL'Y INT'L, Autumn 2007, Vol. 3, No. 2, at 59, 65–66.

⁷⁴ Thomas Catan, *Echoes of Nixon's Order on ITT Deal in Democrats' Letter to Obama on AT&T*, WALL ST. J./WASHINGTON WIRE (Sept. 15, 2011), blogs.wsj.com/washwire/2011/09/15/echoes-of-nixons-order-on-itt-deal-in-democrats-letter-to-obama-on-att/.

⁷⁵ Cade Thompson, *Congressman to FTC: Mess with Google, You Mess with Us*, CNBC TECHNOLOGY (Oct. 16, 2012), www.cnbc.com/id/49431429/Congressman_to_FTC_Mess_With_Google_You_Mess_With_Us.

about the agency's internal deliberations.⁷⁶ A few days earlier, a group of 10 Republican Senators had written to the Chairman of the FTC expressing their concern "about the apparent eagerness of the Commission under your leadership to expand Section 5 actions without a clear indication of authority or a limiting principle."⁷⁷

An example of pressure from another executive department occurred in 2009, when the AAG for Antitrust publicly opposed an effort by Continental Airlines to join the Star Alliance. Her view was at odds with the Department of Transportation, however, resulting in the need for mediation by the director of the White House Economic Policy Council.⁷⁸

Finally, there are at least two reported incidents of an attempt by the White House to intercede directly in a specific antitrust enforcement matter, once each during the administrations of Presidents Lyndon B. Johnson and Richard M. Nixon. While there is not necessarily any prohibition on the White House participating in antitrust enforcement decisions (indeed, President Roosevelt was instrumental in bringing the *Northern Securities* case), each of these instances allegedly involved a quid pro quo that would have been improper.

The Johnson episode occurred in late 1963 and early 1964 at a time when the Antitrust Division and the Comptroller of the Currency were reviewing a proposed merger between Houston's National Bank of Commerce and the Texas Bank of Commerce. President Johnson reportedly offered to ensure the Division's and Comptroller's approval, then much in doubt, in exchange for an agreement in writing by the owner of the Houston bank, who also owned the *Texas Chronicle*, to commit his newspaper's support to Johnson for the remainder of his presidency. The episode is described in the latest volume of Robert Caro's biography of Lyndon B. Johnson based on transcripts of the President's telephone conversations and documents preserved in the LBJ Library.⁷⁹

The Nixon episode involved a 1971 decision by the DOJ's Deputy Attorney General, Richard D. Kleindienst, to settle an antitrust case against the Interna-

⁷⁶ Letter from Representatives Anna G. Eshoo & Zoe Lofgren, to Jon Leibowitz, Chairman, Fed. Trade Comm'n (Nov. 19, 2012), available at www.scribd.com/doc/113826319/Eshoo-Lofgren-Letter-to-Chairman-Leibowitz.

⁷⁷ Letter from Senators Jim DeMint et al., to Jon Leibowitz (Nov. 15, 2012), available at www.scribd.com/doc/113408976/GOP-letter-to-FTC-on-Google.

⁷⁸ See Daniel A. Crane, *Did We Avoid Historical Failures of Antitrust Enforcement During the 2008–2009 Financial Crisis?*, 77 ANTITRUST L.J. 219, 226 (2010) ("The article further reported that some senior administration officials 'fear that the crackdown is coming at a bad time, as corporate America reels from the recession,' and hinted that the White House may be muzzling the Antitrust Division's efforts at an antitrust revival." (quoting Stephen Labaton, *Cracking Down, Antitrust Chief Hits Resistance*, N.Y. TIMES, July 26, 2009, at A1)).

⁷⁹ See ROBERT A. CARO, THE PASSAGE OF POWER 523–27 (2012).

tional Telephone & Telegraph Corporation.⁸⁰ This action was alleged to have been linked to a \$400,000 contribution the company made to help fund the 1972 Republican National Convention, based on an internal ITT memo prepared by a company lobbyist named Dita Beard.⁸¹ Kleindienst, who soon thereafter became Attorney General, later resigned from that position and subsequently pleaded guilty to a misdemeanor charge of failure to testify accurately before Congress based on his denial during confirmation hearings that any White House influence had been brought to bear on him in the ITT case.⁸²

The rarity of direct White House involvement in the decisions of the antitrust agencies may be explainable, at least in part, by a practical consideration of antitrust enforcement—the stabilizing influence of the non-political professional staff that carries out the agencies’ day-to-day agenda. Michael Bobelian, a business reporter for *Forbes Magazine*, commented on this stabilizing force in an article comparing the Obama administration’s promises to escalate antitrust enforcement to its actual performance record:

The other challenge for Obama’s team resides in the enforcement bodies themselves. The entrenched bureaucracies—those officials not appointed by incoming presidents—at the DOJ and the FTC have become inured to the restrictive contours of modern antitrust law. So regardless of whether a Democratic or Republican is barking orders from the White House, this bureaucracy nudges incrementally.⁸³

E. IS POLITICS AN IMPORTANT FACTOR WITHIN THE ANTITRUST ACADEMY?

Finally, there has been a long-brewing controversy with distinct political overtones rolling through Academe concerning which school of antitrust economics best serves the consumer welfare goal of antitrust. This *Journal* published a Symposium analyzing the various root and emerging schools of thought in 2012 under the heading “Neo-Chicago Antitrust.”⁸⁴ The nine Symposium papers distinguished at least five separate variants of the contending Chicago and Harvard schools of antitrust thought: Paleo-Chicago, Paleo-Harvard, Neo-Chicago, Post-Chicago, and Neo-Harvard. One noteworthy in-

⁸⁰ See David Stout, *Richard G. Kleindienst, Figure in Watergate Era, Dies at 76*, N.Y. TIMES, Feb. 4, 2000, at A27.

⁸¹ See CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT’S MEN* 252, 254–57 (1974).

⁸² See Timothy Robinson, *Refused to Testify Accurately: Kleindienst Enters Guilty Plea*, WASH. POST, May 17, 1974, at A1; *The Nation: Reopening ITT*, TIME, Nov. 12, 1973, at 51, available at content.time.com/time/magazine/article/0,9171,944655,00.html; see also *Context of ‘May 13, 1971: Nixon Orders ITT Deal—No Prosecution in Return for Campaign Donations,’* HISTORY COMMONS, www.historycommons.org/context.jsp?item=a051371ittdeal.

⁸³ Michael Bobelian, *Uptick in Antitrust Enforcement Falls Short of Obama’s Promises*, FORBES (Feb. 14, 2012, 2:43 PM), www.forbes.com/sites/michaelbobelian/2012/02/14/uptick-in-antitrust-enforcement-falls-short-of-obamas-promises/2/.

⁸⁴ See Symposium, *Neo-Chicago Antitrust*, 78 ANTITRUST L.J. 37 (2012).

sight was offered by Professor Herbert Hovenkamp in his contribution: “It has become commonplace to say that the Harvard School has gradually moved to the right and the Chicago School to the left, and that the two are now almost indistinguishable on many issues, and there is certainly much truth to such statements.”⁸⁵ Hovenkamp’s comment echoed the same point made by Richard Posner two decades earlier: “Changes of mind within both the Chicago school and its principal rival, which I have called the Harvard school, have produced a steady trend toward convergence. Differences remain, but increasingly they are technical rather than ideological.”⁸⁶

V. CONCLUSION

Speaking for myself, my clear takeaway from the brief overview provided above is that the main currents and emphases of modern antitrust law and enforcement policy are not materially impacted by politics or affected in any lasting way by the political debates that swirl about from time to time, most often in conjunction with political campaigns and changes of administration. Rather, the basic dynamics of antitrust—the engines that drive the law forward—including the common law framework, the paramount role of judges, the powerful impact of economic thinking, and the existence of redundant enforcement mechanisms operate in combination to yield a body of widely accepted law that is largely impervious to political intrusion. That means that within the antitrust community far more of antitrust law is held to be well-established as a matter of broad consensus by comparison to what remains unsettled and open to legitimate disagreement.

I am not pronouncing “the end of antitrust.” There will always be room for disagreement about the law’s application in the particular case, and new technologies and industries will continuously arise and produce new challenges. There certainly are many intriguing antitrust issues left to debate, and great thinkers will continue to generate more as the common law of antitrust continues to evolve. But we will find, I believe, that those issues increasingly arise at the outer boundaries of a vast domain of consensus antitrust.

⁸⁵ Herbert Hovenkamp, *Antitrust and the Costs of Movement*, 78 ANTITRUST L.J. 67, 75–76 (2012).

⁸⁶ Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 948 (1979).