IN SEARCH OF CONGRUENCE BETWEEN LEGISLATIVE PURPOSE AND ADMINISTRATIVE POLICY

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I am honored to be here in the company of such distinguished scholars and public servants as Judge Easterbrook, Chairman Muris, and acting Assistant Attorney General Pate. I have every reason to be modest alongside them. If, however, I have any credential to offer to be worthy of their company, it is that I had the good fortune to learn antitrust law as one of Professor Handler's students.

Milton Handler had a profound effect on me as he did on all his students. He inspired me to devote my career to antitrust law. He stressed to us the importance of effective markets to a well-ordered society. And he preached that the key to understanding any antitrust issue was mastery of the facts. He taught us that it was our privilege as antitrust practitioners to be able to wade knee-deep through boxcars of documents in order to absorb the intricate fact patterns that would later be marshaled to reveal the correct outcome.

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Handler always took a long view of the role of antitrust. He instilled in us a deep suspicion of formulaic jurisprudence. This was a view he maintained throughout his long career as a teacher. In a 1991 letter to the editors of the N.Y.U. Law Review, Handler wrote: "[t]here's no one way of teaching Trade Regulation, and eternal verity cannot, in an ever-changing world, be ascribed to any one school."[1] He steadfastly believed that markets should be permitted to function free of inappropriate or excessive government regulation. But he also understood history. History taught him (and he taught his students) that antitrust was more than mathematics; it was both economic and social legislation—a mixture of mathematics and morals—and that vigorous and prophylactic antitrust enforcement was needed to protect markets from cartels, monopolies, and barriers to innovation.

Above all, Handler was suspicious of overly simplistic approaches and over-broad per se rules, whether such rules condemned or exonerated conduct. For this reason, Handler welcomed the publication by the Antitrust Division of the 1982 Merger Guidelines,[2] which he viewed as adopting a "functional" view of section 7 of the Clayton Act ("section 7").[3]

Handler was, among other achievements, a skilled appellate advocate who had high regard for the role of the judiciary in defining and applying the law. Although he welcomed the Antitrust Division's new Guidelines, Handler cautioned the Division to seek change in the law by instituting litigation so that the courts could reaffirm their long-held views or, if the positions of the Division were viewed as sound, "correct their past errors."[4]

We are now looking back on twenty years since the adoption of the 1982 Guidelines, and many have used the

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[1] Milton Handler, *Letter to the Editor: Antitrust Exchange*, 66 N.Y.U. L. REV. 1257, 1257 (1991).

[2] U.S. Department of Justice Merger Guidelines (1982), 4 Trade Reg. Rep. (CCH) 13, 102 (June 14, 1982) [hereinafter 1982 Guidelines].

[3] Milton Handler, *Reforming the Antitrust Laws*, 82 COLUM. L. REV. 1287, 1315 (1982) [hereinafter *Reforming the Antitrust Laws*].

[4] *Id.* at 1318.

occasion to review the effect that the 1982 Guidelines have had on our merger jurisprudence. I would like to focus on the themes Professor Handler deemed important and especially on the effect that the 1982 Guidelines may be having on the balance and interrelationship between the antitrust agencies and the courts today.

In this regard, it is particularly interesting that during this same 20-year period, we have also witnessed the growth of merger control in a number of foreign capitals, and especially in Brussels. This affords us a comparison between our own approach to merger control and, more generally, to antitrust enforcement and that of other advanced economies.

As we meet here today, the European Commission is reacting to the severe spanking it has received[5] with the reversal of three recent merger decisions in the European Court of First Instance ("CFI")—*Airtours*,[6] *Schneider/Legrand*,[7] and *Tetra Laval/Sidel*.[8] Currently, there are a number of proposals being considered in the European Parliament and elsewhere to streamline appeals to the CFI, or even to establish a new court to supervise more closely the previously unchecked power of the European Commission to block mergers.[9]

By comparison, in this country, of course, our enforcement agencies are powerless to enjoin a merger over the objection of the merging parties without independent

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[5] Philip Shishkin, *EU Ruling Has Mixed Message On Vetting of Corporate Mergers*, WALL ST. J., Oct. 28, 2002, at A17.

[6] Case T-342/99, Airtours plc v. Commission, case T-342/99 2002 E.C.R. 783.

[7] Cases T-310/01 and T-77/02, Schneider Electric SA v. Commission, 2002 E.C.R.

[8] Cases T-5/02 and T-80/02, Tetra Laval BV v. Commission, 2002 E.C.R., *appeal filed*.

[9] *See* Alec Burnside, *Mario Monti Should Not Be Judge and Jury*, FIN. TIMES, Oct. 21, 2002, at 29 (remarking that the European Parliament called for merger decisions to be "subject to a preview by an independent body"). The European Commission itself said that it "will continue to push for speedy review by the Courts of appeals in merger cases." *See* Press Release, Commission Adopts Comprehensive Reform of EU Merger Control (Dec. 11, 2002).

confirmation from an Article III court. It is my thesis that the relatively high level of public approval for our antitrust review of mergers and the low level of public support in the E.U. can largely be ascribed to this key procedural difference. I believe that the process of presenting a case to a neutral, non-political court not only results in better legal doctrine, but also gives the public and their elected representatives a sense of fair play. No system that fails to give the merging parties an effective opportunity to test the prosecutor's theory in a neutral forum can command public support for very long.[10]

The European experience demonstrates the importance of maintaining public support for the merger control regime and just how quickly that support can evaporate if the public and their representatives perceive that the merger control authorities are not playing within the white lines defined by common consensus and applicable law. And, like unchecked over-zealous merger enforcement, a pattern of studied non-enforcement, which also cannot be tested for fairness, may just as quickly lead to the same erosion of public support that we now see in the E.U. If the precedents of the courts are not followed, or correction sought through judicial or legislative process, public pressure will build for Congress to impose more intrusive merger controls at the expense of the free and unregulated markets most of us would prefer.

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[10] Lack of judicial oversight is not the sole reason that the E.U. is suffering a significant loss of public support. Other factors include the more liberal use of its power to halt mergers, the lack of published merger guidelines spelling out its methodology, and the perception that some of Brussels' decisions, such as *Boeing/McDonnell Douglas* and *GE/Honeywell* were result-oriented and protectionist in nature. *See Boeing-McDonnell Douglas Merger Receives Formal Blessing from EC*, 73 Antitrust & Trade Reg. Rep. (BNA) No. 1823, at 155 (Aug. 7, 1997); Boeing/McDonnell-Douglas, 1997 O.J. (L336) 16-47); Commission Decision: Case No. Comp/M.2220, General Electric/Honeywell (Mar. 7, 2001), *at* http://europa.eu.int/comm/competition/mergers/cases/decisions/m2220_en.pdf. However, the perception of excessive or improper discretion is particularly difficult to overcome where there is no effective, external check on the Commission, like that provided by judicial review.

With this in mind, let us look at how the 1982 Guidelines have affected the way in which mergers are reviewed in this country in terms of this critical balance between the role of the agencies and the courts. I submit that the 1982 Guidelines and the way in which they were administered have greatly improved our understanding of how mergers alter important economic forces and affect competition. However, the 1982 Guidelines have also contributed to a basic and, I submit, intentional shift in the balance between the enforcement agencies and the courts.

To be sure, the merger case law of the pre-1982 Guidelines era was in need of serious repair from what had become a somewhat undisciplined amalgam of populist social concerns and rudimentary economics, based on the express goals of Congress in amending section 7 in 1950. Although on their face the 1982 Guidelines were merely supposed to inform the Antitrust Division's lawyers and the bar of the methodology that the government would apply in analyzing mergers, it was not long before a number of lower courts accepted the government's invitation to apply the 1982 Guidelines in deciding cases.[11] Over time, this had the largely healthy effect of pushing merger analysis towards a far more disciplined economic approach based on the Chicago School's economic insights. As Bill Baxter himself succinctly stated in his 1982 Texas Law Review article, defending the approach of the 1982 Guidelines, "[i]n my view, the only legitimate objective that can be distilled from the fundamental congressional goals of antitrust law is the enhancement of consumer welfare through increased market

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[11] *See, e.g.*, FTC v. Bass Bros. Enterprises, Inc., 1984-1 Trade Cas. (CCH) ¶66,041 (N.D. Ohio 1984) (relying on the Justice Department's Guidelines in decision awarding a preliminary injunction to the FTC); *see also* United States v. LTV Corp., 1984-2 Trade Cas. (CCH) ¶66,133 (D.D.C. 1984) (approving after a Tunney Act hearing a controversial divestiture remedy partly because "[a]s restructured, the merger HHI Indices would not be increased significantly above the minimum levels at which the DOJ would, under the 1982 guidelines, be 'more likely than not' to challenge a merger.").

and firm efficiency."[12] This was a clear and unambiguous break from the approach taken by the Supreme Court in a spate of cases such as *Brown Shoe*[13] and *Von's Grocery*,[14] which had grounded merger analysis in the legislative goals of the 1950 amendments to section 7. These cases specifically acknowledged that the amended section 7 was designed by Congress to reverse what it saw as a troubling transfer of power and wealth from consumers to producers through the consolidation of the American industrial landscape in the post-World War II era. Today, these cases seem almost quaint and clearly out-of-step with the role of business formations in a global competitive arena and our lack of discomfort with the large multinational corporation per se.

As we all know, during the Warren Court, the Supreme Court vigorously employed the concept of "incipiency," which Congress had embedded in section 7, to halt mergers well before any adverse economic effects could be discerned through econometrics or other empirical techniques. Baxter and his supporters believed this doctrine was incorrect as a matter of economics even if it was the manifest intention of

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[12] William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust*, 60 TEX. L. REV. 661, 693 (1982).

[13] As the Supreme Court observed in *Brown Shoe Co. v. United States*, a "keystone [of the congressional plan to stem] the rising tide of economic concentration was [the Act's] provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its onset and before it gathered momentum." 379 U.S. 294, 317-18 (1962) (footnotes omitted).

[14] In *United States v. Von's Grocery Co.*, the Court added the notion that the purpose of the amendment to section 7 was to protect the small businessman from competitive pressures exerted by firms that had grown large through mergers: "[l]ike the Sherman Act in 1890 and the Clayton Act in 1914, the basic purpose of the 1950 Cellar-Kefauver Act was to prevent economic concentration in the American economy by keeping a large number of small competitors in business." 384 U.S. 270, 275 (1966).

the Congress that adopted it in 1950.[15] But proper respect for the legislative and judicial branches requires that officials in the executive branch who hold different views should either appeal to the courts for change within the limits permitted by judicial interpretation of the statute, or to Congress for a change in the law. In this case, it is undeniable that the Congress that adopted the 1950 Cellar-Kefauver amendment to section 7 had an unambiguous and clearly articulated objective of using the "incipiency" concept to protect wealth transfers from consumers to producers through what some might call the "Norman Rockwell" or "Horatio Alger" model of plural and independent American entrepreneurship.[16]

Thus, Baxter's approach to merger law was startling because it was such a departure from the existing legal precedents. This approach provoked, amongst others, Professor Handler. Identifying what he termed "a separation of powers problem," Handler observed that "[b]y failing to carry out [existing] precedents, the Department, as the principal enforcer of the antirust laws, threatens in effect to overrule those Supreme Court cases . . . [and] thus may be acting in derogation of the constitutional separation of powers."[17]

In the years that followed, in a succession of cases most often brought by the federal antitrust agencies, the circuit and district courts have, in fact, dramatically altered the

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[15] William F. Baxter, *1982 Merger Guidelines: Responding to the Reaction: The Draftsman's View*, 71 CAL. L. REV. 618, 620-21 (1983) (recognizing that the legislative history of amended section 7 "contains several statements suggesting that at least some members of Congress believed the Clayton Act would serve objectives in addition to that of the protection and enhancement of economic efficiency," but concluding that nonefficiency goals are intractable because "there is no objective measure for valuing social and political costs and benefits").

[16] *See generally* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982).

[17] Handler, *supra* note 3, at 1317.

legal landscape as common law courts often do.[18] Today, the approach of the 1982 Guidelines has been well received in important respects, although we have not yet reached the point where the courts have fully accepted Baxter's notion that the sole goal of antitrust is the achievement of consumer welfare through the promotion of economic efficiency.

In many significant ways, the 1982 Guidelines were an enormous improvement over the prior state of merger law. Before the advent of the 1982 Guidelines, the all-important task of market definition was ad hoc and undisciplined. The 1982 Guidelines introduced a methodology grounded in conceptually coherent economic theory,[19] which is much more transparent and reliable, and probably no more difficult to apply than the *Brown Shoe* test that preceded it. The 1982 Guidelines' approach may convey a sense of scientific precision and certainty beyond that which realistically can be attained in the real world. That, however, is not too high a price to pay for clarity in this all-important step in the determination of any merger case.

However, in practice, the 1982 Guidelines, together with the Hart-Scott-Rodino Act ("HSR"),[20] have altered the balance between government enforcement agencies and the courts. When the Reagan administration arrived in 1981, the HSR process was still in its infancy. In the fall of 1978, mergers were first required to be reported under HSR.[21] In those early years prior to the adoption of the 1982 Guidelines, a typical second request rarely required more than a few boxes of materials. But the 1982 Guidelines' much more data-centric approach caused a rapid expansion of the HSR process. The 1984 *Texaco-Getty* case, in which I happened to be involved on behalf of Texaco, was the world's largest merger until that time, and it broke all records by requiring production of 100

[18] *See, e.g.*, United States v. Baker Hughes, Inc., 908 F.2d 981, 986-87 (D.C. Cir. 1990) (affording weight to historically shifting market shares); United States v. Waste Management, Inc., 743 F.2d 976, 981-84 (2d Cir. 1984) (affording weight to ease of entry).

[19] 1982 Guidelines, *supra* note 2, Part II.

[20] 15 U.S.C. § 18a (2000).

[21] *See* 43 Fed. Reg. 33,537 (July 31, 1978).

boxes of documents and interrogatory responses.[22] It took only about twenty days to comply with that second request!

Needless to say, second requests have expanded astronomically since then, largely because of the much more economically and factually specific analysis required under the 1982 Guidelines. While such factual analysis is now widely appreciated as necessary and beneficial, the inevitable effect has been that the parties and government confront the issues in government conference rooms rather than in court rooms. This usually leads to negotiated settlements, which create what is essentially private law. For example, in the supermarket industry, in a long series of negotiated settlements over a twenty-year period, the FTC administrative staff has never accepted the market definition in the FTC's *Grand Union* decision.[23] *Grand Union* included convenience and specialty stores in the same product market as supermarkets. In subsequent negotiated settlements, the staff has narrowly defined supermarket product markets to exclude convenience and specialty stores. Only recently, the staff has modified this definition to include box and club stores in the market with supermarkets, all without the benefit of any judicial control.[24]

As Baxter's speeches and articles made clear, it was the intention of the administration, in adopting the new Guidelines, to act unilaterally to alter the enforcement of the antitrust law in ways that would not be consistent with the rulings of the courts up until that time.[25] In practice, this meant that the Antitrust Division would not be seeking judicial approval for its new approach to merger policy. In introducing the 1982 Guidelines, Baxter explained that mergers, even those that produced uncommonly large

[22] *In re* Texaco Inc. and Getty Oil Co., 49 Fed. Reg. 8550 (March 7, 1984).

[23] *In re* Grand Union Co., 57 F.T.C. 382 (1960), *aff'd sub nom.* Grand Union Co. v. FTC, 300 F.2d 92 (1962).

[24] *In re* Wal-Mart Stores, Inc., and Supermercados Amigo, Inc., FTC File No. 021 0090, Docket No. C-4066 (Nov. 21, 2002).

[25] Baxter, *supra* note 12, at 694-97.

enterprises, were not inherently bad and, indeed, might even be beneficial to commerce and consumers.[26] Likewise, the 1982 Guidelines' treatment of non-horizontal mergers sent a signal that vertical and conglomerate combinations, previously popular subjects of litigation, would rarely, if ever, raise concerns at the Antitrust Division.[27] By contrast, the Supreme Court's decisions had displayed such hostility to mergers that Justice Stewart was moved to say in his dissent in *Von's Grocery* that the only consistency he could find in the Supreme Court's merger decisions was that the government always won.[28]

And Bill Baxter was not bashful when it came to announcing the departure from prior methodology he wanted to accomplish. In the fall of 1982, just shortly after the 1982 Guidelines were issued, Baxter came to Columbia Law School and spoke about the 1982 Guidelines and the larger implications of his antitrust philosophy. He prefaced his remarks by saying that, in his view, social concerns about the welfare of small businesses had no place in merger analysis, or elsewhere in antitrust. Then, only half in jest, he told the students that he looked forward to the day when there would be only two employees in the entire Antitrust Division—the Assistant Attorney General and a secretary whose job it would be to say that the Assistant Attorney General was out to lunch. It goes without saying that in such an "ideal" world, there would be little opportunity for the courts to rule on whether this new laissez-faire approach squared with the applicable law.

In the intervening twenty-year period, the government has for the most part worked for positive change of the law in the administrative process and, to a lesser extent, in the courts. Both the Antitrust Division and the FTC have sought

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[26] *Id.* at 696 (noting that the "early case law did not seriously consider the possible procompetitive effects of mergers").

[27] 1982 Guidelines, *supra* note 2, Part IV (Horizontal Effect from Non-Horizontal Mergers).

[28] United States v. Von's Grocery Co., 384 U.S. 275, 301 (1966) ("The sole consistency that I can find is that in litigation under 7, the Government always wins.") (Stewart, J. dissenting).

the assistance of the courts to halt mergers perceived to be anticompetitive, although they have been reluctant to rely on the precedents of the Warren era.[29] And, although the Reagan Justice Department supported a bill to replace the incipiency standard of section 7 with a higher threshold,[30] Congress has not modified the wording of section 7 since the amendments of 1980, which extended the reach of the statute to any "activity affecting commerce."[31]

Of course, in the absence of prosecutions by the enforcement agencies, the courts are powerless to act on their own. There have been some state attorneys general who have challenged mergers after federal clearance. For example, the State of California sued to block the merger of the first and fourth largest supermarket chains in that state even after the parties had settled with the FTC by agreeing to divest several stores.[32] New York unsuccessfully sued to enjoin General Food's acquisition of Nabisco's ready-to-eat cereal assets after the FTC passed on the deal.[33] And more recently, California failed to convince a court to stop the merger of two East Bay hospitals after the FTC again stayed

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[29] For example, the FTC's refusal to rely on *Brown Shoe*, *Von's Grocery*, or any Supreme Court merger decision of the 1960's other than *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), led Judge Richard Posner to comment, "[t]he Commission's detailed analysis of [the probable effects of these acquisitions] fills most of a 117-page opinion that, whatever its substantive merits or demerits, is a model of lucidity. The Commission may have made its task harder (and opinion longer) than strictly necessary, however, by studiously avoiding reliance on any of the Supreme Court's section 7 decisions from the 1960s . . . None of these decisions has been overruled." Hospital Corp. v. F.T.C., 807 F.2d 1381, 1385 (7th Cir. 1986).

[30] *See* Merger Modernization Act of 1986, H.R. 4247 § 2(a); S. 2160 § 2(a) (proposing to replace the incipiency language of section 7 with a standard requiring a "significant probability that such acquisition will substantially increase the ability to exercise market power").

[31] Pub. L. No. 96-349. § 6(a), 94 Stat. 1157 (1980) (amending 15 U.S.C. § 18 (1979)).

[32] California v. American Stores Co., 697 F. Supp. 1125 (C.D. Cal. 1988), *modified,* 872 F.2d 837 (9th Cir. 1989), *modified,* 495 U.S. 271 (1990).

[33] New York v. Kraft Gen. Foods, 926 F. Supp. 321 (S.D.N.Y. 1995).

its hand.[34] But the states' abilities to enforce section 7 in accordance with their views is limited due to resource constraints and the lack of the notice, discovery, and waiting period protections of the HSR, which are only available to the federal agencies. Private plaintiffs are, for the most part, also prevented from bringing such cases for reasons of standing.[35]

Perhaps another reason fewer cases are brought under the 1982 Guidelines is the sheer complexity of analysis that the 1982 Guidelines require. The effort to simplify even such reasonably objective determinations as "the small but significant and non-transitory increase in price" test ("the SSNIP test")[36] often leads to ever deeper layers of analysis which are mind-boggling in their complexity but sometimes not overly enlightening to a trier of fact. No less an authority than George Stigler commented, "[the 1982 Guidelines' market definition test] has one, wholly decisive defect: it is completely nonoperational. No method of investigation of data is presented, and no data . . . are specified that will allow the market to be determined empirically."[37] While the situation is not invariably that bleak, it is probably true that, in most difficult cases, we are left at the end of the process no more certain that we have settled on the right market than we were before any of us heard of the SSNIP test.

Typically, merger decisions are made against tremendous time pressures where billions of dollars are at stake. These are not ideal conditions for the invocation of the judicial process. Witness, for example, the recent Sungard/Comdisco merger litigation, which I had the privilege of trying before Judge Huvelle a year ago. After listening to highly competent economists for each side who thoroughly

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[34] California v. Sutter Health Sys., 130 F. Supp. 2d 1109 (N.D. Cal. 2001).

[35] *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977); Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986).

[36] 1982 Guidelines, *supra* note 2, Part II n.6.

[37] George Stigler and Robert Sherwin, *The Extent of the Market*, 28 J.L. & ECON. 555, 582 (1985).

disagreed about how the Guidelines' test should be applied to define the market, the court found it was unable to reach a conclusion as to the appropriate contours of the market and therefore denied the injunction.[38] Because of the exigencies of the bankruptcy and the HSR processes, the entire time period from the HSR filing through the denial of the government's appeal from the trial court's decision denying an injunction took less than four months.

To be sure, the judiciary faces a host of challenges in managing merger litigation and balancing competing economic forces that must be harmonized to create a sound merger policy. The analysis is difficult, the facts and documents can be overwhelming, and delay can kill a transaction. However, the recent European experience is a reminder that the alternative of total administrative control over merger policy, while attractive as a short run measure, suffers from even greater infirmities. At this late date, it should no longer be open to serious question that the courts declare what the law is and that it is the responsibility of those who enforce the law to work for the changes they believe are necessary within the system.

The effort to remove merger enforcement from judicial scrutiny was, I believe, part of a larger and unhealthy trend affecting a number of areas beyond antitrust, which has not yet fully run its course. For generations, the fundament of our common law system has been public trust in neutral and non-political generalist judges to decide controversial and complex questions of law and public policy in a pragmatic fashion through individualized examination of the facts of each case. Indeed, the evolution of antitrust law has been one of the greatest examples of the beneficial effects of the common law process.[39]

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[38] United States v. Sungard Data Sys., Inc., 172 F. Supp. 2d 172 (D.D.C. 2001).

[39] *See* Standard Oil Co. v. United States, 221 U.S. 1, 55-60 (1911) (observing that antitrust law changes as our economic understanding progresses).

Perhaps, Watergate eroded confidence in public figures in a way that our country had never previously experienced—though for the most part judges were among the few groups that performed well and seemed to actually increase in prestige during that era. Perhaps, it was a reaction to the civil rights cases, *Roe v. Wade*,[40] some of the other Warren-era Supreme Court decisions concerning privacy or religious issues, or even *Von's Grocery*, which stirred such profound disagreements between liberals and conservatives. But, whatever the explanation, what was happening in antitrust was part of a larger jurisprudential trend.

To give just one example, at about the same time Baxter was wrestling with how to review mergers, Congress was passing the 1984 Comprehensive Crime Control Act,[41] which established the United States Sentencing Commission and prescribed the use of Sentencing Guidelines. As everyone now knows, the purpose and effect of that law, as ultimately implemented by the Sentencing Commission and approved by Congress in 1987,[42] was to significantly narrow the discretion of sentencing judges by, among other things, prohibiting them from considering many of the individual characteristics of the offenders in the hope of providing greater uniformity in sentencing.

Over the last twenty five years or so, there has been great scholarly and intellectual interest in narrowing the scope of discretion for the federal judiciary generally, but nowhere more so than in the field of antitrust. Robert Bork's landmark 1978 book, *The Antitrust Paradox*, strongly advocated severe limitations on antitrust enforcement by creating a number of categories of de facto per se legality. With respect to mergers, Bork proposed that section 7 be "interpreted as making presumptively lawful all horizontal mergers up to market shares that would allow for other

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[40] Roe v. Wade, 410 U.S. 113 (1973).

[41] 28 U.S.C. § 991 (2000).

[42] United States Sentencing Comm'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements (1987); 28 U.S.C. § 994(p) (2000).

mergers of similar size in the industry and still leave three significant competitors."[43] This boiled down to a rule protecting mergers in otherwise fragmented markets up to shares of "about forty percent."[44]

Others joined in. For example, Judge Easterbrook weighed in with a provocative and still controversial 1984 article in the Texas Law Review calling for a series of "filters" that ought to be overcome before a court could condemn a business practice.[45] Although this article did not focus on merger law specifically, it clearly argued against having courts interfere with a wide variety of practices that had previously been thought to raise serious antitrust issues. Some of the suggested filters, such as the requirements of market power and effect on output, seem particularly aimed at restricting the ability of courts to enjoin mergers not meeting those high thresholds notwithstanding the incipiency principle of section 7.

To summarize, twenty years ago there was a tectonic shift in the way we looked at antitrust merger enforcement and the role of the judiciary in the process. Prior to that time, the task of setting antitrust merger policy was shared by the courts and the agencies. But, the standards were loose, and enforcement was based on unarticulated premises and intuited economic presumptions. Baxter was overwhelmingly successful in his mission to change that approach to one driven by economic discipline, unconcerned by the expressed will of Congress in amending section 7, but instead informed by the insights gained from the new economic learning. But to accomplish these objectives, it was necessary to side-step the judiciary, and side-step it he did.

During these last twenty years, "Chicago theory" has been challenged, rethought, and refined. Today, antitrust economists both in and out of government routinely apply

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[43] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF, 221-22 (Free Press, 2d ed. 1993).

[44] *Id.* at 222.

[45] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX L. REV. 1, 23-37 (1984).

econometric tools and techniques that were unavailable in 1982.[46] Likewise, post-Chicago economists using game theory or other methods now inquire about how transactions shift incentives and opportunities to engage in strategic predation, or how acquisitions of even minority interests might lead to anticompetitive behavior. Because of these innovations in economic thinking, there is a growing recognition that some of the simplified analytical models of the now old "new learning" may produce some short-sighted or misleading results.

Today it is fashionable to maintain that merger enforcement at the agencies is non-political in nature and does not vary much, regardless of the party in power. FTC Commissioner Leary has recently spoken of what he termed "the essential stability of merger policy" over roughly the last two decades.[47] That is a worthy objective, and it ought to be true. However, it is also true that the agencies are not bound by the views of the prior administration and are vested with discretion when it comes to the selection of cases and the theories, arguments, and proposals for law reform that they decide to pursue. While all administrations since 1982 have endorsed the basic principles of 1982 Guidelines, the extent to which each agency has been willing to stretch the analysis from administration to administration is well-known.

However, in practice, it is increasingly the case that the government's merger analysis is focused on an economic demonstration that the merger will (not may) result in a rise in price of the product or service in question. Although other concerns are occasionally mentioned, there is significantly less concern for innovation, diversity of choice, or other non-price considerations, which elude numerical measurement, and a total avoidance of the "incipiency" standard specifically placed in the statute by Congress. If Professor Handler were

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[46] *See, e.g.*, F.T.C. v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997) (discussing competing econometric studies).

[47] Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L. J. 105, 105 (2002).

here, I think he would object and argue for closer fidelity to the statutory mandate with its consideration of all aspects of competition and its emphasis on the "incipiency" concept, which requires far less certainty of economic harm than does current practice. Handler viewed this as a matter of constitutional separation of powers. Ironically, it is often those who are most devoted to "strict construction" of statutes who choose deliberately to ignore the plain meaning of section 7, which, after all, is aimed at mergers that may tend to lessen "competition," a term broad enough to encompass all of these considerations and more. I claim that we do so at our long-term peril.

What concerns me is that under our present system, with the number of cases that are negotiated during the HSR process and the cases that are not pursued without reasons being stated, there lurks the danger that a "hot house" atmosphere will overtake the staffs, the agencies, and the bar, and merger control will end up as a game of inside baseball. In this regard I am pleased to commend the FTC for taking the welcome step of setting forth the underlying bases for some of its most important recent merger actions, such as the recent 3-2 decision not to pursue Carnival and Royal Caribbean's dueling bids for Princess Cruises[48] and the decision not to challenge the vertical combination of Synopsys and Avant!.[49] Although not judicial decisions, and therefore not subject to the crucible of the adversary process, these materials comprise an extremely detailed and informative exegesis of important cases. I would hope that both agencies continue this practice so that we all would have a better understanding of their thinking.

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[48] Statement of the Federal Trade Commission Concerning Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc, FTC File No. 021 0041), *available at* http://www.ftc.gov/os/caselist/0210041.htm (Oct. 4, 2002).

[49] *See* Commissioners Sheila F. Anthony, Mozelle W. Thompson, and Thomas B. Leary, Remarks Concerning the Matter of Synopsys, Inc./Avant! Corporation, (July 26, 2002), FTC File No. 021 0049, *available at* http://www.ftc.gov/os/caselist/0210049.htm.

Perhaps I could sum up my view by reference to the proverbial bell curve. There are mergers that clearly present no difficulties or difficulties that can be easily resolved. Today, *Von's Grocery* would be such a case. Then there are mergers that nearly everyone would agree should not be permitted to proceed, no matter who makes the decision. These are the easy cases. And finally there are mergers that could go either way—where the decision is a close call, the analysis of competitive effects is subject to conflicting interpretations or, for some other reason, the issues are difficult and whether to sue depends on your basic beliefs about the wisdom of allowing firms to combine when the risks and benefits seem roughly even. These are the cases I care about, and where common law courts make their greatest contribution to reconciling the will of Congress and the changing circumstances that Congress may not have been able to consider. These are the cases where the views of Congress—that the law should take a stand—are entitled to deference.

While the government cannot be expected to initiate challenges it believes are misguided, it can be expected to follow the law. Because merger analysis is a predictive enterprise, there will always be some uncertainty surrounding difficult enforcement decisions. How to weigh these uncertainties in deciding which cases to bring is the essence of the function committed to the agencies under our system. These agencies have been equipped with the extraordinary discovery powers and procedural protections of HSR, as well as the incipiency standard of section 7, by a Congress that anticipated that these powers would be used to separate those mergers that adversely affect consumers from those that may, in the long run, benefit them. I do not suggest that this is an easy task. Indeed, it is for that very reason that the best and brightest minds in the field have been recruited to make these decisions. I merely suggest, most respectfully, that in making these decisions, it is essential that deference be paid both to the settled law and, where the law is believed to be misguided, to straightforward efforts to cause changes in the law.

As an antitrust litigator, I confess to a bias that there is no substitute for the judicial process when it comes to resolving difficult and controversial opposing views. Not only do we all learn a lot from a well-tried and well-argued merger case, but we contribute both to the development of the law and to the continuing public support for the merger review process as it currently exists in this country. As I said at the outset, if the public begins to discern that, notwithstanding the best intentions, the end result of in-depth agency evaluation turns out to be that the only consistency that now can be found is that the merging parties always win, I fear that we might just see the mirror image of the phenomenon currently blazing away in Europe, that is, demands for stronger and more procrustean merger control in this country, which could end up interfering with market performance.

Professor Handler was not an easy grader. It was hard to earn one of his A's. The lesson he taught us long ago was that the antitrust laws were public property, competition was a dynamic concept best examined and understood carefully one case at a time, and it was the government's business to turn to the courts and advocate for changes that would keep the antitrust laws relevant and vigorous in protecting markets. For the sake of our system, it is my sincere hope that today's antitrust enforcement agencies will earn one of those rare A's.