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Did We Avoid Historical Failures of Antitrust Enforcement During the 2008-09 Financial Crisis?

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Abstract

This introductory essay for a symposium on antitrust enforcement during economic crises provides a brief historical overview of the failures of antitrust enforcement during major economic crises and wars in the first half of the twentieth century. It then considers the reasons that historical narrative breaks off in the second half of the twentieth century and asks whether there is evidence of its revival during the recent economic crisis.

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I have been asked to open this Symposium with an overview of the history of U.S. antitrust enforcement during economic crises. Having previously written an essay about the history of antitrust enforcement during wars and economic downturns,[1] I will keep this historical narrative brief. I will also add to the narrative some observations that were not available to me a year and a half ago. I wrote the original essay in the fall of 2008, with the din of Lehman's collapse still ringing in my ears, and therefore could only conjecture as to the likely performance of antitrust institutions during the then-unwinding crisis. Now we have a few preliminary data points that allow some modest observations about how things went his time around.

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[1] Daniel A. Crane, *Antitrust Enforcement Duing National Crises: An Unhappy History*, Global Competition Policy (Dec. 2008, Release One).

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I. HISTORY'S LESSONS

This symposium is about antitrust enforcement during economic crises, but, in the historical narrative, it is too confining to separate economic crises and wars. In both of those moments of severe national anxiety, antitrust has taken a back seat to other political and regulatory objectives. Antitrust enforcement has historically been a political luxury good, consumed only during periods of relative peace and prosperity.

In 1890, the Sherman Act's adoption kicked off the era of national antitrust enforcement. Barely three years later, the panic of 1893 provided the first major test to the national appetite for antitrust enforcement. Speculative overexpansion in the railroad industry was to blame for the crisis—a steep recession—and the Robber Barons quickly rose to fix the problem. Financier J.P. Morgan and his chief rival, the Kuhn, Loeb finance house, snapped up bankrupt railroads out of receivership.[2] By the turn of the century, the nation's railroads had been consolidated into six large systems, primarily controlled by the houses of Morgan and Kuhn, Loeb.[3]

Perhaps 1893 shouldn't be included in the story, since antitrust was still young and it wasn't even clear that the Sherman Act applied to mergers. However, by Teddy Roosevelt's "trustbusting" days in the first decade of the twentieth century, the reach of the Sherman Act to exactly the kind of railroad mergers the 1893 crisis enabled had become clear.[4] So the panic of 1907—the bursting of another financial bubble—would provide a fair test case for antitrust's mettle in the face of political pressures to allow consolidation. There was no central bank yet—except at the House of Morgan—and J.P. used the crisis to extend his control over the banking system. Roosevelt watched impotently as Morgan consolidated the banks, but was forced to a point of decision when Morgan proposed to rescue the Moore & Schley brokerage house by having U.S. Steel buy up a large interest in Tennessee Coal and Iron.[5] Now Morgan would control both banking and steel. Eager to avoid a "general industrial smashup," Roosevelt approved the deal within twenty minutes, assuring Morgan that he would enjoy antitrust immunity for the deal.[6]

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[2] RON CHERNOW, THE HOUSE OF MORGAN 67 (1990).
[3] *Id.* at 68.
[4] *See* Northern Secs. Co. v. U.S., 193 U.S. 197 (1904).
[5] Edmund Morris, Theodore Rex 499 (2001).
[6] *Id.*

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The three-way 1912 election in which antitrust was one of the defining issues, and the election of Woodrow Wilson, saw a period of reinvigorated antitrust enforcement. 1914 brought the Clayton and FTC Acts, steered in large part by Louis Brandeis, Wilson's regulatory braintrust and the author of *The Curse of Bigness*. But U.S. entry in to World War I brought the Progressive experiment with antitrust enforcement to a dramatic end. In 1918, Attorney Geneal Thomas Gregory opined that antitrust law would be an impediment to the war effort and most major antitrust cases were suspended until the end of the war.[7]

The Republican administrations of the Roaring Twenties continued the "the era of [antitrust] neglect,"[8] but Franklin Roosevelt's election created hopes for a change in direction. Here is the part of the historical narrative that has most entered recent discussions. Instead of reinvigorating antitrust enforcement, during the first half of the New Deal, from 1933-35, Roosevelt suspended antitrust law through the National Industrial Recovery Act and put in its place a system of industry-sponsored codes and controls on prices and output levels.[9] The NIRA probably prolonged the Depression.[10]

After the Supreme Court's invalidated key portions of NIRA in 1935 and sentiment within the New Deal coalition turned against the NIRA system, the Roosevelt Administration abruptly turned toward renewed antitrust enforcement.[11] The antitrust divisions of Robert

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[7] *See* Richard M. Steuer & Peter A. Barile, *Antitrust in Wartime*, 16-SPC Antitrust 71, 71-72 (2002); Ellis W. Hawley, *Herbert Hoover and the Sherman Act, 1921-1933: An Early Phase of a Continuing Issue*, 74 Iowa L. Rev. 1067, 1068 (1989); Thomas K. Fisher, *Antitrust During National Emergencies*, 40 Mich. L. Rev. 969, 996 (1942).

[8] Richard Hofstadter, *What Happened to the Antitrust Movement?*, in THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 188, 193 (1965).

[9] *See generally* ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE (1966). Between 1933 and 1935, roughly the dates of the NIRA experiment, GDP increased about 28% and unemployment dropped by about 2 million. *Id.* at 131. Although these figures show improvement in the national economy compared to the preexisting state of affairs, the experiment was roundly considered a failure, particularly in light of the fact that "[o]ver ten and a half million workers were still unemployed, approximately twenty million people were still dependent upon relief, basic industries were still operating at little more than half their capacity, and the real income of the average family was still thirteen percent below that of 1929." *Id.* at 131-32,

[10] Hawley, *New Deal*, *supra* note xxx, at 72-90.

[11] *See* Daniel A. Crane, *The Story of United States v. Socony-Vacuum: Hot Oil and Antitrust in the Two New Deals*, in ANTITRUST STORES 91 (Eleanor M. Fox & Daniel A. Crane, eds. Foundation Press 2007).

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Jackson and Thurman Arnold greatly reinvigorated antitrust activity between the late 1930s and 1940, but the revival was short-lived.

In 1940, while head of the Antitrust Division, Thurman Arnold published *The Bottlenecks of Business*,[12] a book that defended reinvigorated antitrust enforcement. He entitled Chapter IV *A Free Market in Times of National Emergency or War*. Arnold wrote that "[t]he antitrust laws must constantly defend the ideal of industrial democracy against all sorts of pressures."[13] With the prospect of war on his horizon, Arnold observed that "these pressures increase when the government is suddenly forced to buy huge quantities of defense materials from closely controlled sources of supply."[14] He further noted that "[t]he temptation to exploit consumers and the government through domination of a suddenly expanding market is almost irresistible, and usually prevails unless it is curbed."[15]

Arnold turned out to be writing his own political obituary. He soon began to face the "wholesale repeal or practical nullification of antitrust in the face of the war planning and production leading up to the U.S. entry into World War II."[16] Consistent with the themes laid out in *Bottlenecks*, Arnold continued to push aggressive antitrust enforcement as an aid rather than obstacle to the war effort. But the handwriting was on the wall. In 1942, when Arnold tried to indict Averell Harriman, the chairman of the Union Pacific railroad, for price-fixing he was quietly forced out of the Justice Department and onto a seat on the federal court of appeals for the D.C. Circuit. Thereafter, the Roosevelt administration implemented formal policies allowing immunization from antitrust prosecution, issued guidelines for industry collaborations, permitted pooling of small firms, and gave the secretaries of war and the navy the power to toll antitrust cases until the termination of the war.[17] Over thirty cases were tolled.[18]

A clear pattern emerges in the historical narrative from the promulgation of the Sherman Act until at least the end of World War II. Antitrust enforcement consistently gave way to greater political forces in the face of large-scale war or economic crises.

Carl Shapiro has characterized my historical narrative as "gloomy" and taken consolation from the fact that "much of Crane's

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[12] THURMAN ARNOLD, THE BOTTLENECKS OF BUSINESS (1940).
[13] *Id.* at 60.
[14] *Id.*
[15] *Id.*
[16] SPENCER WEBER WALLER, THURMAN ARNOLD: A BIOGRAPHY 106 (2005).
[17] Steuer & Barile, *supra* n. xxx at 72-73.
[18] *Id.*

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discussion relates to reduced antitrust enforcement during times of war rather than economic distress."[19] I'm not so sure that consolation is justified. Excluding the 1893 panic as an aberration during antitrust's primordial era, from 1890 until the end of World War II we have antitrust recessions during an equal number of wars and economic crises—the two World Wars and the 1907 panic and Great Depression. More significantly, with the exception of Robert Jackson and Thurman Arnold's relatively short-lived and ultimately unsuccessful efforts to revive and sustain antitrust enforcement at the tail of the Depression and beginning of the war, we have no counterexamples of antitrust institutions standing up to political pressures for antitrust retrenchment.

Perhaps we can take consolation from the fact that the historical narrative breaks off with the revival and then normalization of antitrust enforcement following World War II. In my earlier essay, I offered some very limited evidence of pressures for antitrust retrenchment during the Korean and Vietnam wars,[20] but there is no pattern of overall antitrust retrenchment during those conflicts or in the more recent Persian Gulf, Afghan, or Iraqi wars. Then again, those wars did not cause nearly the domestic economic dislocations of the two world wars. In their peak years, World War I and World War II consumed 13.6% and 35.8% of GDP respectively.[21] No war in the second half of the twentieth century or early twenty-first century consumed more than 5% of GDP in its peak year and most were closer to 2% or less.[22] Whatever their human, social, political, and moral tolls, the post-World War II wars did not rise nearly to the economic level of the great wars or economic crises and hence would not likely have exerted political pressures on arcane areas of regulation like antitrust.

Of course, there were also economic crises of various sorts in the second half of the twentieth century, and no correlative pattern of antitrust laxity. But, like the wars of the same period, the economic dislocations were probably just too small to count. The 1981-82 recession, 1987 stock market crash, and 1997 Asian financial crisis did not resemble the 1907 panic or the Great Depression, which were (or felt like at the time) existential threats to the economic order. The run-away inflation of the late 1970s certainly occasioned political

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[19] Carl Shapiro, *Competition Policy in Distressed Industries*, May 13, 2009, http://www.justice.gov/atr/public/speeches/245857.htm.
[20] Crane, *supra* n. xxx at 8.
[21] Congressional Research Service, Costs of Major U.S. Wars, July 24, 2008, available at http://www.justice.gov/atr/public/speeches/245857.htm.
[22] *Id.*

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pressures on antitrust enforcement, but in the opposite direction from depressions or panics. President Carter vowed to use *more strenuous* antitrust enforcement to fight inflationary pressures.[23]

The tight historical narrative of inevitable antitrust retrenchment during depresionary crises and wars fades away during the second half of the twentieth century, but arguably because the United States did not experience any triggering events of sufficient magnitude. Until recently, that is. Given the general consensus that the 2008-09 crisis was the deepest since the Depression, we may now ask whether history recurred or was overcome by modern conditions.

II. AND HOW DID WE DO THIS TIME AROUND?

I will begin by cheating and saying that it's just too early to tell. There is a noble tradition of writing history as it unwinds, but I will resist the impulse to join it. Richard Posner wrote *A Failure of Capitalism* in late 2008, announcing that, whatever else others might call it, we were in the middle of a depression.[24] He observed that "[s]ome might think it premature to write about a depression before it ends and indeed before it has reached bottom . . .[b]ut when it ends, hindsight will rewrite history."[25] Barely a year later, with the stock market having rallied 20%, unemployment apparently leveled off around 10%, and GDP growing 5.7 % in the fourth quarter of 2009, it seems like the howls that might have prompted the "D" word a year ago have abated without the appearance of the monster. At the risk of rewriting history, I will wait until there is a sufficient time cushion from the recent events to declare what actually happened.

One reason that it is premature to disagnose whether antitrust retrenchment occured during the recent crisis is that antitrust enforcement has changed in one important particular since 1945—today, most antitrust enforcement is private. There are roughly ten private cases for every government case. Hence, total antitrust enforcement is less directly responsive to political pressures during an economic crisis than it was in the days in which a private deal between Teddy Roosevelt and J.P. Morgan meant effective antitrust immunity for a several large industries or a tolling decision by the Secretary of War meant that the cases would largely go away.

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[23] President Jimmy Carter, The State of the Union Address Delivered Before a Joint Session of the Congress (Jan. 23, 1979), available at http://www.presidency.ucsb.edu/ws/index.php?pid=32657.

[24] RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION x-xi (2009).

[25] *Id.* at xvi.

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Private antitrust may be responsive to economic crises in several conflicting ways. One empirical study suggests that private antitrust enforcement may be counter-cyclical, with shocks to inflation, output, and consumption having a positive effect (in varying degrees) on antitrust enforcement.[26] The economic crisis could actually cause an increase in private litigation. On the other hand, judges are responsive to external political and economic conditions, as the Supreme Court clearly was in its 1933 *Appalachian Coals* decision, immunizing a coal cartel from antitrust liability during the Depression.[27] Even if it takes more time for the judiciary to put the brakes on antitrust enforcement, private plaintiffs may calculate that the expected value of their lawsuits has gone down if they anticipate increasing conservatism (in the sense of a greater reluctance to apply antitrust law) by judges in response to desperate economic circumstances.

For now, we can only speculate about the effects of the recent crisis on private antitrust enforcement. As of this writing, the most recent data from the Administrative Office of the U.S. Courts are for the period ending March of 2009,[28] and don't tell much of a story. There were 1,165 federal civil antitrust cases filed April 2006-March 2007, 1,063 filed April 2007-March 2008, and 1,062 filed April 2008-March 2009. Assuming that the roughly 9% reduction from the earlier period to the two later periods has any significance, it probably has as much to do with the Supreme Court's decision in *Twombly*[29] as with early recessionary pressures.

And what about public antitrust enforcement? Thus far, we have seen little indication of the renewal of vigorous antitrust enforcement that President Obama trumpeted on the campaign trail and Christine Varney promised when she became Assistant Attorney General. Apart from the Justice Department's intervention in Google Books[30]—a case that the DoJ did not originate—there have not been major, headline-grabbing antitrust filings from the Justice Division. Further, there are possible signs that more senior administration officials are containing the Antitrust Division's activities until the economy improves. In July 2009, Ms. Varney publicly opposed

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[26] *See* Lance Bachmeier, et al, *The Volume of Federal Litigation and the Macroeconomy*, 24 Int'l Rev. L & Econ. 191 (2004).
[27] Appalachian Coals v. U.S., 288 U.S. 344 (1933).
[28] http://www.uscourts.gov/caseload2009/contents.html.
[29] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).
[30] Author's Guild v. Google, Inc., Statement of Interest of the United States of America Regarding Proposed Class Settlement, September 18, 2009, available at http://www.justice.gov/atr/cases/authorsguild.htm.

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Continental's joining the Star Alliance, a measure that the Department of Transportation approved. A *New York Times* story reported that the dispute between the Antitrust Division and DOT became so heated that White House Economic Council director Larry Summers had to mediate, with DOT getting much of what it wanted.[31] The article further reported that some senior administration officials "fear that the crackdown is coming at a bad time, as corporate America reels from recession,"[32] and hinted that the White House may be muzzling the Antitrust Division's efforts at an antitrust revival.

It is still far too early to tell whether the Justice Department's eagerness to get back into the game of vigorous trustbusting has been suppressed by higher political forces until the economy improves or whether the Antitrust Division is just taking its time to develop a suite of big cases. On the other hand, economic conditions have not deterred the FTC from bringing a blockbuster case against Intel.[33] But, even there, the story is still unfolding. As an independent agency, the FTC is perhaps less quickly responsive to external political forces than the Antitrust Division,[34] but who knows how the affair will end? Many of the markers of antitrust retrenchment during previous crises were cases that were filed but then tolled, abandoned, or rejected by the courts.

Let me conclude my non-committal review of the present by circling back to the question of what counts as a sufficiently grave economic downturn or war to trigger the previously observed retrenchment impulses. It may turn out that the 08-09 crisis did not last long enough to have a discernable effects on antitrust enforcement. With hindsight, any apparent antitrust retrenchment may seem like nothing other than the tail end of a political administration that had little appetite for blockbuster antitrust cases and the transition months of a more aggressive administration that needed time to develop its big cases. A deep but short recession in

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[31] Stephen Labaton, *Cracking Down, Antitrust Chief Hits Resistence*, New York Times July 26, 2009, Section A.

[32] *Id.*

[33] In re Intel Corp., No. 9341, Complaint Filed December 16, 2009.

[34] The FTC is undoubtedly responsive to external political will, particularly of Congress. *See* William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement: A Historical Perspective*, in PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION 63(Robert J. Mackay, James C. Miller III, & Bruce Yandle, eds. 1987). But its response time may be slower than that of the Antitrust Division, which is more immediately accountable to the elected branches of government (particularly the executive).

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the middle of that narrative may turn out to be a footnote to the broader antitrust story. Time will tell.

CONCLUSION

In her first major speech as the new Assistant Attorney General in May of 2009, Christine Varney vowed that the new administration would not forget the lessons of history.[35] She identified those lessons as follows: "First, there is no adequate substitute for a competitive market, particularly during times of economic distress. Second, vigorous antitrust enforcement must play a significant role in the Government's response to economic crises to ensure that markets remain competitive."[36]

Are those really the lessons of history? "History" doesn't speak directly. It is up to us to draw out the "lessons," if lessons are to be drawn. Although everyone loves to quote Santayana's observation that "[t]hose who cannot remember the past are condemned to repeat it,"[37] there is some danger in trying to extrapolate specific morals from history. Historian David Hackett Fischer warns against a "didactic fallacy" of attempting "to extract specific 'lessons' from history, and to apply them literally as policies to present problems, without regard for intervening changes."[38] Given that the richest evidence of antitrust abdication occurred during a fifty-some year period that ended sixty-some years ago, Fisher's admonition is particularly pertinent.

Assuming that we are to draw lessons, it is far from clear what they should be. On the one hand, a repeated pattern of antitrust failures during major economic crises could lead to the normative conclusion that antitrust institutions must steel their nerves and make a more vigorous stand in the face of countervailing political pressures. But one could draw a very different historical lesson. Perhaps antitrust retreat during major crises is inevitable and standing up in the brave tradition of Thurman Arnold, only to be sent packing, is a noble but futile gesture. Perhaps antitrust officials should quietly ride out the political-economic storms, doing incremental work at the

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[35] Christine A. Varney, *Vigorous Antitrust Enforcement in this Challenging Era*, May 11, 2009, available at http://www.justice.gov/atr/public/speeches/245711.htm

[36] *Id.*

[37] GEORGE SANTAYANA, THE LIFE OF REASON: REASON IN COMMON SENSE 284 (1905).

[38] DAVID HACKETT FISHER, HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT 157 (1970).

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margins of the public eye, preserving capital so that they can move in quickly to clean up the wreckage once the storm subsides.

I am not ready to commit to either of these morals as the true lesson of history. In a few years, we will be able to look back at the recent crisis and undertake a more objective evaluation with the benefit of distance and data. In the meantime, we have a number of very interesting theoretical papers to consider in this symposium.

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