

*Can the new administration overcome the Chicago and Harvard schools' reservations?*

# Obama's Antitrust Agenda

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Antitrust law is back in vogue. After years in the wilderness, antitrust enforcement has reemerged as a hot topic in Washington and in the legal academy. In one heady week in May of 2009, a front-page story in the *New York Times* reported the dramatic decision of Christine Varney — the Obama administration's new Antitrust Division head — to jettison the entire report on monopolization offenses released by the Bush Justice Department just eight months earlier. In a speech before the Center for American Progress, Varney announced that the Justice Department is “committed to aggressively pursuing enforcement of Section 2 of the Sherman Act.” As if to prove that “shock and awe” enforcement against monopolists is still possible, two days later the European Commission released its decision fining Intel nearly \$1.5 billion for beating up on AMD in the microprocessor market. Suddenly, the antitrust community felt an electric current that it had not felt in years.

At least five related forces are contributing to this apparent resurgence of antitrust sentiment. First, the conventional view is that U.S. antitrust law has largely been in the grips of a *laissez faire* “Chicago school” perspective for the last quarter century. If history is a reliable teacher, antitrust enforcement is cyclical — enforcement comes and goes. The Chicago school may simply have run its cycle and the time inevitably come for a more interventionist antitrust regime.

Second, much of the antitrust scholarship in the academy over the last decade has taken a post-Chicago tilt, calling into question Chicago's anti-interventionist assumptions. A recent collection of essays written by prominent economists and law professors and edited by Bob Pitofsky, Bill Clinton's Federal Trade Commission chair, announces that the Chicago

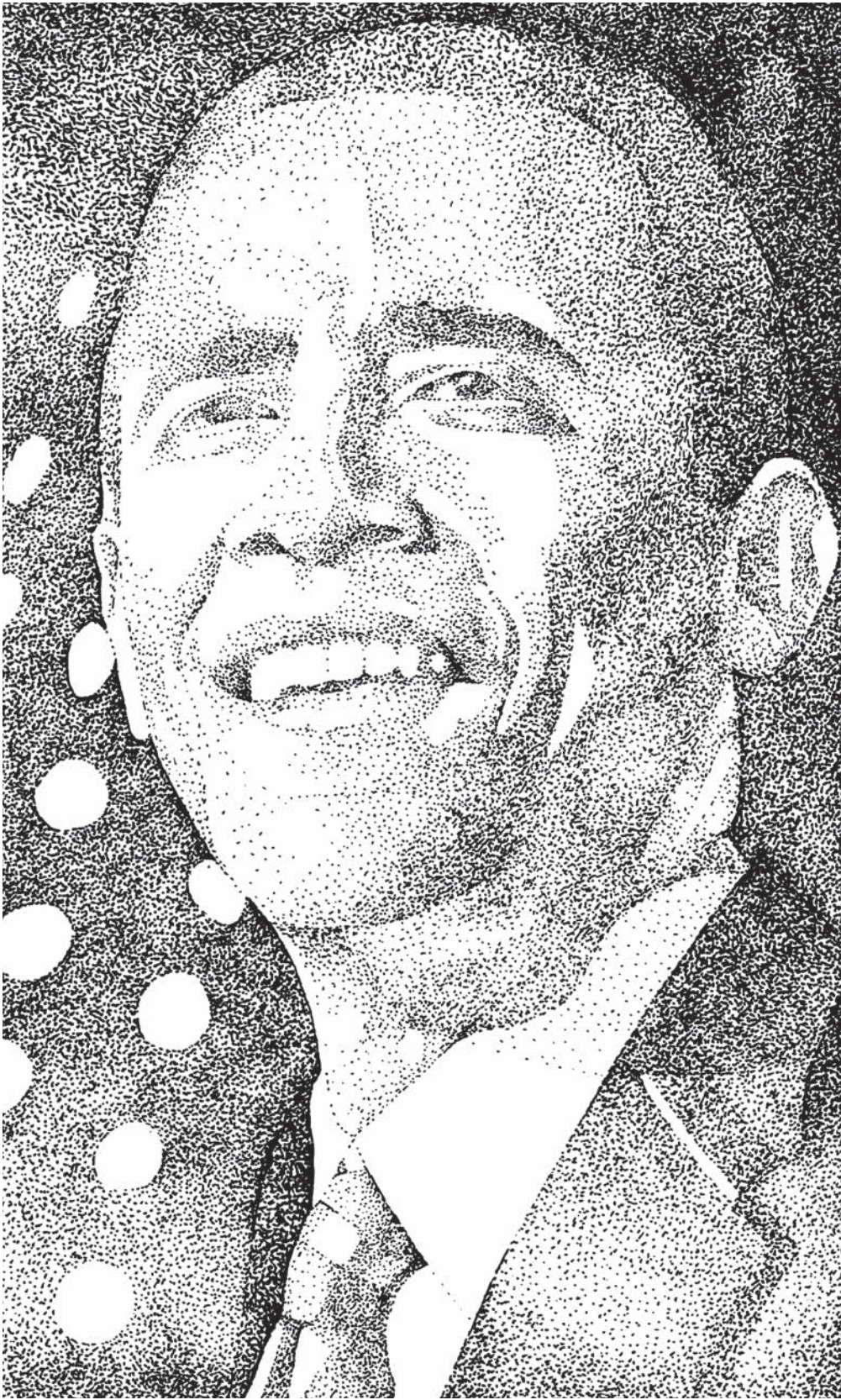
school “overshot the mark” and steered antitrust law in a “profoundly wrong direction.” (See “The Trustbusters' Revival Misfires,” p. 50.) Academic sentiment tends to foreshadow enforcement trends and judicial sentiment. The Chicago critique of the preexisting regime began in the 1950s, several decades before Chicago became dominant in the courts and antitrust agencies. So it is natural that the increasing barrage of post-Chicago literature in the academy is beginning to bear fruit in the real world of antitrust enforcement.

Third, for the first time in many years, a president has actually shown some interest in antitrust enforcement. On the campaign trail, then-Senator Obama actually gave speeches dedicated to antitrust. He announced that he would appoint “an antitrust division in the Justice Department that actually believes in antitrust law” and pledged increased enforcement in the pharmaceutical, media, energy, and insurance sectors. President Obama's choices of Jon Leibowitz for chair of the FTC and Varney to head the Antitrust Division give a nod to significantly enhanced enforcement. In addition to repealing the monopolization report, the agencies are reportedly investigating complaints by Verizon and AT&T that major cable operators like Cablevision and Comcast refuse to sell them Cablevision- or Comcast-produced sports shows, contemplating an enforcement action against Google over its deal to make more books available online exclusively with Google, and calling for reinvigorated enforcement against branded pharmaceutical companies that supposedly pay off generics makers to not bring competing drugs to market.

Fourth, the economic crisis has dealt a sharp blow to *laissez faire* ideology and reinvigorated political support for regulatory solutions. When prominent free marketers like Alan Greenspan and Richard Posner publicly blame the crisis on insufficient regulation, the *laissez faire* ideological commitments that undergird the Chicago School are obviously in considerable danger. Varney has gone so far as to sug-

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gest that the economic crisis is partly attributable to lax antitrust enforcement.

Finally, antitrust enforcement is growing exponentially around the world. The European Commission is ever more assertive in antitrust cases. As new antitrust regimes come online in Asia and South America, they are increasingly invok-

Federal Trade Commission. For many decades now, private antitrust enforcement has been far more significant in numerical terms than public enforcement. There are about ten private cases for every public one. Those private cases net billions of dollars in judgments or settlements annually and spur the development of antitrust norms in the courts. Even if the

ing the interventionist European model rather than the more conservative U.S. model. In some circles, there is a sense that to be relevant to the exponential growth of antitrust law around the world and stop losing intellectual market share to the Europeans, the U.S. must be more aggressive in enforcing its own antitrust law. Even apart from this competition for influence with the Europeans, there is the fact that in the last two years new antitrust regimes have begun in significant economies like China and India, and other significant economies like Brazil and South Korea have grown increasingly assertive in the enforcement of their antitrust laws.

Despite all of the pro-enforcement sentiment, there are good reasons to believe that reports of an antitrust revival may be exaggerated. For one, revival must follow retrenchment, and antitrust was never nearly so retrenched as many believe. Second, the Obama administration faces major obstacles to any effort to dramatically increase the level of enforcement.

#### **ANTITRUST'S DEATH?**

The conventional wisdom that antitrust died during Ronald Reagan's administration, enjoyed a brief revival during the Clinton administration, and was knocked out again during the George W. Bush years is considerably off the mark. For starters, that perspective looks only at enforcement actions by the Department of Justice or



antitrust agencies chose not to engage in much antitrust enforcement, that has a relatively small effect on the overall level of antitrust enforcement because private cases do not depend on the filing of public cases.

Further, it is not the case that recent Republican administrations have stopped enforcing the antitrust laws. In a recent study, I showed that Department of Justice antitrust case filings, adjusted for GDP, were roughly constant during the Ford, Carter, Reagan, George H.W. Bush, and Clinton administrations. The George W. Bush administration did bring somewhat fewer cases, adjusted for GDP, than recent administrations, but the decline was not significant enough to declare, as Obama did on the campaign trail, that the administration had forgotten about the existence of the antitrust law.

What did change from administration to administration was the kind of case that the agencies brought. In recent decades, Republican administrations have prioritized fighting price-fixing cartels. The George W. Bush administration actually scored record or near-record levels of criminal anti-cartel enforcement measured by number of jail days sentenced, average jail sentences, jail sentences on foreign conspirators, aggregate criminal fines imposed, and number of grand jury investigations. Given the consensus that cartels represent the most pernicious sort of anticompetitive behavior, the Bush administration's cartel program should count as a major success.

Besides cartel cases, the other two major categories of antitrust actions are merger reviews and monopolization cases. The Bush antitrust agencies brought fewer merger lawsuits than the Clinton administration, but the number of lawsuits filed is a relatively small part of the story. Because of the Hart-Scott-Rodino Act's pre-merger notification requirement and the agencies' power to significantly delay merger closing by issuing "second requests" for documents, very few controversial mergers get litigated. Most are resolved informally through behind-the-scenes negotiations with the agencies. To be sure, in recent decades it has been on average easier to get a merger cleared in a Republican administration than in a Democratic one, but it is far from true that Republican administrations have simply abandoned merger enforcement.

Perhaps the major difference between recent Democratic and Republican administrations is that the Republican administrations have been less likely to bring monopolization cases like the Microsoft matter initiated by the Clinton Justice Department, the Intel/AMD matter already adjudicated in the European Union and under consideration at the FTC, or the Google books deal under investigation at the Justice Department. But there is a good reason that the government does not have to be overly assertive about monopolization. Unlike cartel cases that are often concealed until brought to light through criminal investigation techniques and leniency tools, or merger cases where the harm is widely dispersed over many consumers without much of an interest in suing, monopolization cases have ready and willing champions in the private sector. Aggrieved competitors and the private bar do

not hesitate to bring monopolization cases. There is less of a need for government involvement since there are already so many private monopolization cases.

There is no doubt that the Obama administration is trying to up the tempo of antitrust enforcement. There is more doubt as to whether the tempo was ever down.

### BEYOND CHICAGO

Assuming that the tempo of antitrust enforcement was down in recent years, there is a question as to the cause. Even if the agencies were not bringing many actions, there were certainly many private lawsuits. But those actions faced obstacles in the courts.

A conventional account of U.S. antitrust jurisprudence views U.S. courts as captured by a Chicago school ideology that is committed to laissez faire principles and hence seeks to roll back antitrust enforcement. The real story is considerably more complicated. Modern U.S. antitrust law can be understood as the product of two different schools — the Chicago school of Richard Posner, Frank Easterbrook, Robert Bork, Anthony Scalia et al., and the Harvard school of Philip Areeda, Donald Turner, Herbert Hovenkamp, and Stephen Breyer — who often leads the Supreme Court's four liberal Justices in antitrust cases. Both schools deeply mistrust many of the institutional actors in the antitrust system. Although the two schools also mistrust each other, more often than not they reach common ground on outcomes.

The Chicago school tends to view antitrust enforcement as only necessary to correct egregious market failures that occur relatively rarely. It argues that many business practices — such as tying arrangements, vertical integration, and aggressive discounting practices — are competitively benign and pro-consumer. It views markets as quickly correcting most instances of competitive abuse. On the flip side, Chicago distrusts many of the institutional aspects of antitrust enforcement — particularly competitor plaintiffs, plaintiffs' lawyers, juries, and treble damages. It believes that, given the antitrust system, the costs of falsely condemning pro-competitive behavior are usually greater than the costs of falsely exculpating anticompetitive behavior.

The Harvard school is considerably less trusting of markets and more trusting of regulatory solutions. But this affinity for regulatory solutions does not often translate into an affinity for antitrust enforcement. Rather, Harvard sees regulation by technocratic experts as the key to policing market failures. Like Chicago, Harvard distrusts private antitrust enforcers, generalist judges, and juries. In particular, the Harvard school argues that antitrust intervention should be kept to a minimum when there is an expert regulatory body that could police the relevant market problem.

When the Chicago and Harvard schools line up — which is the majority of the time these days, given the number of markets that could be policed by regulators — the result is almost always a defeat for antitrust enforcement. Consider the Supreme Court's recent decision in *Pacific Bell v. linkLine*, which rejected a "price squeeze" theory of antitrust liability — i.e., that a vertically integrated firm sold at high wholesale

prices to a retail competitor and then charged a low retail price. The majority opinion, written by Justice Roberts and joined by the four other conservative justices, argued that price squeezes are simply a combination of lawful refusals to deal and lawful above-cost price cutting. The concurring opinion, written by Justice Breyer and joined by the three more liberal justices, argued that price squeezes might be anticompetitive, but that the Federal Communications Commission had regulatory authority to deter and remedy the anticompetitive harm and hence that a private lawsuit might cause more harm than good. Chicago and Harvard thus lined up on the outcome, albeit for quite different reasons. This pattern has repeated itself many times in recent antitrust decisions.

Curiously, many members of the antitrust community — that is to say, the community of present or former enforcement officials, practicing lawyers, economists, and academics — continue to believe that the key to reinvigorated antitrust

administration in office. The best example (although there are many others) is the early New Deal, when the Roosevelt administration virtually suspended antitrust law in favor of governmentally mediated industry cartelization in a misguided effort to fight the Depression. Although antitrust enjoyed a brief revival between 1936 and 1940, with the outbreak of World War II antitrust enforcement came once again to a grinding halt.

Even if economic crises in general and the current crisis in particular bring about greater political demand for regulation, the resulting regulation has not been greater antitrust enforcement. Antitrust has been treated as a luxury for times of relative peace and prosperity. History suggests that Obama's antitrust enforcers will find it difficult to ride the current wave of pro-regulatory sentiment.

Although Obama's Antitrust Division has pledged not to repeat FDR's errors in responding to the Depression, histo-

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enforcement is convincing the courts that the balance has tipped too far in favor of dominant firms and that certain business practices really do harm consumers. On a number of occasions, I have heard senior antitrust enforcement officials (former and present) comment that no progress can be made until the composition of the Supreme Court changes. But in the current context, antitrust is not like abortion, where a one- or two-justice shift could radically alter the balance. Modern antitrust law represents the alliance — albeit mutually suspicious — of Chicago and Harvard. Since Breyer joined the Court in 1994, the Supreme Court has decided 14 antitrust cases. In those cases, there have been 108 votes for the majority position and only 14 votes in dissent. Breyer has only been on the losing side twice, as often as Clarence Thomas. Many of the decisions most reviled by the pro-enforcement camp have been unanimous or nearly so. Even if the antitrust views of Supreme Court nominees mattered to presidents — and they do not — it would take decades to break the Chicago-Harvard “double helix,” as former FTC chair Bill Kovacic has called it.

### **ANTITRUST DURING CRISES**

Obama's antitrust enforcers may find the courts inhospitable to any efforts to alter significantly the status quo of antitrust enforcement, but they may also find resistance from forces within the administration itself. As I have chronicled elsewhere, since the passage of the Sherman Act in 1890, major economic crises and wars have usually resulted in a substantial diminution of antitrust enforcement, regardless of the

ry suggests that the task will not be easy. Already there are small signs that history may be repeating itself. In July, the Department of Transportation approved Continental Airlines' request for antitrust immunity for its joining of the Star Alliance. Varney objected to the request, arguing that it could lead to rate increases of 6–15 percent. The inter-agency disagreement reportedly became so heated that Larry Summers, director of the White House Economic Council, was called in to mediate, but at the end of the day Transportation got its way, with a few small concessions to the Justice Department.

Further, even through it is unlikely that the current crisis will result in the complete suspension of antitrust enforcement, it is almost inevitable that by the time the economy gets back on its feet, many markets will have experienced a significant increase in concentration because of the exit of firms through bankruptcy. The administration can pledge to enforce the antitrust laws as vigorously as it likes, but there is nothing illegal about a firm finding its market position enhanced by the financial failure of its rivals. Obama's antitrust enforcers may find themselves watching helplessly as markets drift toward oligopoly.

### **HAS POST-CHICAGO MADE ITS CASE?**

Assuming that the Obama administration overcomes the Chicago and Harvard schools' institutional reservations and the dulling effects of the economic crisis, it will still face at least one additional obstacle to Obama's articulated goals of enhanced antitrust enforcement: the intellectual case for a sig-

nificantly more aggressive approach to antitrust enforcement still needs to be made.

For many years now, there has been talk in academic circles about a “post-Chicago” approach that will reverse the supposedly laissez-faire ideology of the federal courts and antitrust agencies and reinvigorate a robust antitrust jurisprudence and enforcement agenda. There are many “post-Chicago” articles in the legal and economic literature. Some of this scholarship makes a convincing case that aspects of claims by some Chicago scholars were overstated. But the post-Chicago literature fails to offer a comprehensive and coherent case for a significant departure from the status quo.

There are at least two significant drawbacks to founding an antitrust revolution on the post-Chicago literature. First,

post-Chicago scholars often criticize Chicagoans for being overly theoretical and inattentive to real world facts, but post-Chicago scholars are just as vulnerable to that criticism. Indeed, many of post-Chicago’s central contributions have been in game theory and behavioral accounts of market behavior. While many of their models are plausible, plausibility is not a strong enough justification for displacing the status quo. One would like to know whether the models conform to the sorts of cases that routinely arise in the real world and whether the prescribed remedies are capable of improving consumer welfare.

In order to displace the dominant Chicago paradigm, post-Chicago theorists need to go beyond poking technical holes in Chicago school arguments and presenting counter-

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the flavor of most of the literature is not to dispute Chicago’s claims altogether but rather to say that those claims were overbroad. For example, it now seems clear that the “monopoly leverage fallacy” — the Chicago school claim that leveraging market power in one market to a second market would be unprofitable since the exercise of monopoly power in the second market would encroach on the monopoly profits in the first — was too broadly stated by some Chicago scholars. Post-Chicago scholars have pointed out circumstances under which monopoly leverage would be profitable. But they generally have not disputed Chicago’s central argument that leveraging often would reduce the profitability of the first monopoly and therefore be unappealing to the monopolist. Most post-Chicago scholars recognize that the older, simplistic monopoly leverage ideas that Chicago displaced were misguided and that Chicago made vast improvements in monopolization theory.

So much of the post-Chicago literature seeks to refine and qualify the Chicago school arguments rather than to displace them. Virtually no one wants to return to the pre-Chicago world where horizontal mergers between small players were condemned, aggressive price cutting was viewed with suspicion, merger efficiencies were a reason to condemn mergers rather than to bless them, and vertical integration was frowned on. Most post-Chicagoans want to tweak Chicago’s arguments rather than to displace them. This is not the foundation of an antitrust revolution, but of incremental adaptations to an ongoing program of economic research.

A second obstacle to using the post-Chicago literature as the springboard for broad antitrust reform is that post-Chicago has done little to demonstrate empirically a need for more rigorous antitrust enforcement. There is an irony here:

theories. They need to offer an empirical case that the status quo is failing the American consumer, and they need to craft an affirmative agenda for antitrust enforcement. They also need to justify the new agenda in light of the error costs of over- and under-enforcement, including a consideration of the institutional concerns previously discussed. Post-Chicago has a long way to go to make that case.

President Obama’s antitrust ambitions face significant obstacles in the courts, in Congress, in other regulatory agencies, and in the market itself. The good news for the administration is that Obama’s senior appointments in both the FTC and Department of Justice have been superb. Still, it will take more than talent to bring about the sort of antitrust revival that the administration seems to be promoting. It will take attention to the institutionalist concerns that animate the Chicago-Harvard alliance in the courts, a helping hand from a rebounding economy, and a robust analytical framework for making the case that greater levels of antitrust enforcement in merger and monopolization cases would advance consumer welfare. **R**

### Readings

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