Media Mergers: First Step in a New Shift of Antitrust Analysis?

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Introduction

In today's information-hungry society, the mass media is a powerful industry that impacts the lives of most people.[1] Almost everyone is exposed to the mass media on a daily basis by reading the newspaper, listening to the radio, or watching television broadcasts. Routinely, the topics of public debate reflect the issues that are addressed by the mass media through its various outlets. When the ownership of media outlets is widely dispersed, the range of new and distinctive ideas is increased. However, this range is greatly restricted when media ownership is highly concentrated.

One problem that occurs with a highly concentrated mass media is that journalists are no longer "watchdogs" for society. Historically, journalists have investigated and exposed incidents of illegality in business. When the media is highly concentrated, critics warn that it will not be able to continue this effective "watchdog" role since the trail of some stories will often lead to their own parent companies.

In addition, throughout American history, the media has played a central role in the political arena. The majority of Americans turn to the mass media for their political information and news, especially during an election period. In the 1992 and 1996 Presidential elections, traditional outlets such as the newspapers and nightly news broadcasts covered each of the candidates; however, the exposure for the candidates also included such outlets as MTV and talk shows. When the media is highly concentrated, scholars warn that media executives will not look for innovations such as this but will remain content with traditional coverage.[2]

Historically, as long as there have been media outlets, there have been critics who have expressed a deep concern over the high concentration of media ownership. An alarming trend towards greater concentration in mass media includes several mergers that have taken place over the last several years. In August 1995, Walt Disney Co. acquired Capital Cities/ABC Inc., completing the largest media merger in history. A month later, Time Warner, Inc. announced its desire to acquire Turner Broadcasting System, Inc., claiming the title of the largest media merger in history. Since the announcements of these two mergers, critics have expressed concern about both and are searching for a mechanism to stop the continuing trend towards concentration.

One possible solution is found in the antitrust statutes, which are in place to promote competition and protect against attempts to monopolize industries. However, under the antitrust doctrine of the past few decades, analysis of media mergers would ignore social or political issues and focus solely on economic concerns. Antitrust law, like other areas of economic law, has always been heavily influenced by political views and consequently, often undergoes changes.[3] When political or economic views have varied, changed, or simply developed over time, the antitrust doctrine of law has changed as well. The changes in doctrine are not sharp swings from one extreme to another, but rather are subtle, slow-moving changes that eventually allow consideration of new ideas and concerns.

Several factors indicate that antitrust law is poised for a change that will directly effect the recent wave of media mergers. This new doctrine should not rely solely on economic concerns but rather should also take into account both social and political issues. Part I of this Note examines the history of media mergers in this country, including the terms and intentions for the most recent combinations, and the fears that accompany mass media concentration. Part II examines the legislative history of the antitrust laws which supports the idea of taking into account social and political issues. Part III examines the recent history of antitrust enforcement including the "hands off" approach and acceptance of the Chicago School of economic theory. Finally, Part IV acknowledges the history of change in antitrust doctrine and proposes a few factors that will allow a new doctrine to be accepted.

I.History of Media Mergers

Over the last few years, mass media ownership became more concentrated into the hands of a few at a rate that even surprised the sharpest critics. Ben Bagdikian wrote *The Media Monopoly* in 1983, in which he argued that fifty corporations control the mass media in America.[4] According to reports, another edition of Bagdikian's book will be released this year and will conclude that now less than twenty corporations control the mass media.[5] Bagdikian argues that media moguls are attempting to control the origination of content as well as delivery systems.[6] "One hundred years later, it's the Information Age that's displacing the Industrial Revolution and you have the same thing happening with the airwaves and cyberspace. You have the barons, whether it be Time Warner or Disney; they're moving in to consolidate ownership," says Larry Grossman, former president of NBC News.[7]

The title of the "largest media merger" has changed hands over time as the power of these media conglomerates continues to grow. In 1979, the Gannett newspaper chain purchased a billboard and television company for over $360 million.[8] In 1988, Walter Annenberg's Triangle Publications sold to Rupert Murdoch *TV Guide* and other magazines for $3 billion.[9] In 1989, Time Inc. and Warner Communications Inc. merged and created a media empire worth over $18 billion.[10] In 1995, Westinghouse Electric Corp. showed that the major television networks were not beyond the reach of media mergers by acquiring CBS Inc. for $5.4 billion.[11] In addition to

the CBS deal, the two largest media mergers in history have taken place in the last two years.

A. Walt Disney Co. Acquired Capital Cities/ABC Inc.

In August 1995, Michael Eisner and Tom Murphy announced the largest media merger in history.[12] The $19 billion Disney-Capital Cities/ABC transaction was the second largest corporate merger of any type in U.S. history.[13] This new media giant will have an annual revenue of $16.5 billion and a market value of nearly $40 billion.[14] It will control a large portion of today's popular culture and entertainment assets including: the nation's top-rated television network, ABC; the Disney theme parks; the cable Disney Channel; ESPN; ESPN 2; ten local television stations, twenty-one radio stations; movie production companies including Miramax, Hollywood Pictures, Touchstone, and Disney; and a film library that includes *Snow White, Dumbo, The Lion King,* and *Toy Story*.[15]

The philosophy behind the deal is synergy, which is taking the media world by storm. The idea is that a media giant will be able to maximize profits by creating products that take advantage of the interaction of its assets.[16] For example, *The Making of Pocahontas*, a television special that heightened anticipation of the film among the Disney Channel subscribers, can now be beamed to nearly every household in America on ABC. With the nation's largest television network now a part of its family, Disney has the perfect forum to present its popular animated films and characters.

> **Disney's sense of synergy is well refined. What other company on earth could have taken a children's movie, *The Mighty Ducks*, parlayed it into a professional hockey team by the same name, broadcast games on its own KCAL-TV and sold Mighty Duck jerseys in more than 400 of its own stores?[17]**

Judson Green, president of Walt Disney Attractions, says, "I think we wrote the book on synergy"[18]

Some experts do not share Disney's belief that synergy is a positive thing for mass media. For example, the television networks realize that their success depends on the ability to acquire and air the highest-quality shows. With their new partnership, ABC can now be assured of getting first choice of Disney's production studios. On the other hand, it will be equally as difficult for an independent production company to outmaneuver a Disney production when battling for a spot on ABC's network television plans. Former FCC Commissioner Nicholas Johnson believes that synergy is actually the "annihilation of competition."[19] Johnson says,

> **[W]hen you contract with an author to write a book and sell it in the stores you own, produce the movie in the studio you own and run it in the theaters you own, make it into a video and distribute it through the stores you own, then put it on the cable system you own and the broadcast stations you own, promote it on the TV network you own, write it up in the entertainment magazine you own, that's pretty tough to compete with.[20]**

B. Time Warner Inc. Acquired Turner Broadcasting System, Inc.

In October 1996, Time Warner shareholders ratified the acquisition of Turner Broadcasting System, Inc. for $7.5 billion in stock, creating the world's largest media empire.[21] The combined company will generate more annual sales-$18.7 billion last year-than the Disney-Capital Cities combination.[22] The assets include the following: HBO, Turner's Cable News Network, WTBS, Turner Network Television, and The Cartoon Network; a film library that includes classic films such as *Casablanca*; two professional sports teams with the Atlanta Braves and Atlanta Hawks; magazines that include *People*, *Time*, and *Sports Illustrated*; Warner Brothers motion pictures studios and Warner Music.[23]

The Time Warner/Turner combination is similar to the Disney deal in that Time Warner's production studios will now have major cable networks for distribution of their film libraries. In addition, Time Warner/Turner

executives also have extensive synergy plans. Recently, they launched the CNN-Sports Illustrated channel on cable. They plan to have their magazine reporters make appearances on CNN, and now Warner Bros. stores will carry products featuring the characters from Turner's Cartoon Network.[24] Howard Stringer, chief executive of Tele-TV, said, "It's a bigger empire than Disney. You wonder why [the media moguls] don't start taking over Third World countries."[25]

C. What Is the Attraction for Mass Media to Merge?

First, several of the recent media mergers have created a relationship between a production source and a distribution outlet. As explained above, the executives of the large media conglomerates pleasantly refer to this as "synergy" while critics warn that it eliminates competition. "One of the reasons Disney wanted ABC was so that it could rerun its vast library of movies and cartoons on network TV rather than on its lower-rated cable channel."[26]

Second, the new media mergers will enable the companies to maximize copyrights. Integrated companies can reap profits by maximizing copyrights. For example, Time Warner profits from its Batman franchise in numerous ways. The 1995 hit movie *Batman Forever* earned more than $175 million worth of ticket sales, bringing the total for the three Batman films to nearly $600 million.[27] In addition to this box office success, Time Warner owns DC Comics, which publishes Batman comics monthly, sells Batman memorabilia in the 124 Warner Bros. stores worldwide, and licenses the Batman characters for an unlimited range of products.[28]

Finally, the media mergers will allow companies to repackage existing properties and create cross-promotions. For example, Ted Turner has successfully concentrated on repackaging and promoting his assets. Turner Broadcasting can show the same James Bond movies, packaged together into seven nights of *OO7*, and receive much higher viewer levels for his cable channels.[29] For an example of a cross-promotion, examine how Viacom created an enormous anticipation for a movie in its exact target audience. In 1995, after weeks of promotion and hype on its cable music channel (MTV), the premiere for the film *Clueless* was held at the MTV Malibu Beach House.[30] Viacom simultaneously reached its target audience for the film and created a production for its cable channel.

D. Fear of Media Concentration

The fear of media giants is by no means a recent discovery, but actually dates back to the founders of the country and the age of the press barons earlier in the century. In Thomas Jefferson's view, the power of a large organization "oppresses the people," and dispersed power centers are more desirable.[31] Bagdikian argues that the power of media corporations is an ominous development and concludes, "[b]ecause we have a dozen or so huge conglomerates whose various arms can do damage or good for a public person, they can boost a person, then harass them with intimidation powers based on their control of so many parts of public communication."[32]

One negative effect of large media companies is that it becomes very difficult for an independent voice to get a message to the public. One source noted that mass media is "a game in which only supergiants can play,"[33] and these giants will not attempt to meet different tastes.[34] "They [media giants] are going to be able to determine what you see and what you don't see. If someone says, `I want to put on a community channel or a state channel,' if one of these people doesn't like it, you'll never see it," said Jeffrey Chester, executive director of the Center for Media Education.[35] Law professor Louis B. Schwartz fears that concentrations of wealth will dominate the government through control of the press, politics, and the legal system.[36]

Another fear is that these large companies will be strictly driven by profits and will begin to cut corners in news coverage. Reporting of local and national news is what most consumers desire; however, covering local events requires a large number of journalists and will be the first place that executives look to lower costs. In fact, during the same press conference that announced the approval of the Time Warner/Turner Broadcasting merger, Ted Turner, new vice chairman of Time Warner, said, "[w]e're going to cut millions of millions of

dollars and, like Superman, we're going up, up and away, in terms of ratings, magazine subscriptions, movie box-office share."[37] The company estimated that 1,000 jobs will be cut after the merger. Independent media outlets consistently have proportionally more journalists than their counterparts who are part of large media organizations. A study showed that independent newspapers had 23% more local and national news than papers owned by large media conglomerates.[38]

As media companies grow larger, the likelihood that a story will lead journalists to their employer's door increases. "One of the problems of supergiants involved in the news is that supergiants always have other interests that get into the news. The question is how they handle issues and events in a way that ignore the fact that they control the news."[39] Many reporters will not feel comfortable covering a story in a manner that portrays their parent company in a negative light for fear of retribution. A survey by the American Society of Newspaper Editors found that 33% of all editors said they would not feel free to print a story that damaged their company.[40]

Scholars suggest that a profit-driven news media will concentrate on more "dumbed-down news and entertainment" rather than reporting and investigating events.[41] "They are all playing to get the audience ratings the advertisers want. This is why the news covers fires murders, and mayhem," according to John Morton, a media analyst with Lynch, Jones & Ryan.[42] Walter Cronkite, legendary anchor of CBS Evening News for eighteen years, recently criticized CBS News for bumping important news stories and relying on more entertaining ones.[43]

Industry experts believe that media mergers should be given special scrutiny even though the industry is still more loosely owned than others, such as auto or steel.[44] Benjamin Compaine, author of *Who Owns the Media*, said, "[t]he difference between [the] media industry and the tin can industry is that the media are the source of our ideas and information."[45] During the last few years, the Clinton Administration addressed the issue of media concentration. "This is an issue that everybody in the Administration, from the Commerce Department and Justice Department to the Vice President and President have all become concerned about," said Larry Irving, assistant secretary of Commerce for Telecommunications.[46] According to Irving, "[I]n a democracy, where the media is how people get information, I don't think any of us want to see all of these outlets owned by one or two people."[47]

Senator Howard Metzenbaum, chairman of the Senate Antitrust Subcommittee, urged the government antitrust enforcers to investigate major media mergers. In a letter to the Justice Department's Antitrust Division and the Federal Trade Commission, Metzenbaum said, "[C]onsumers could be victimized by a handful of telecommunications conglomerates unless the federal antitrust agencies focus and coordinate their efforts to provide rapid and strict scrutiny of every proposed telecommunications deal."[48]

II.Legislative History of Antitrust Statutes

> **Most Americans accept the economic and political power of big business as a natural, inevitable feature of life in what they would describe as a free society. We have trouble imagining desirable alternative forms of economic organization because significant restructuring is assumed to involve unacceptable public intrusion on personal liberty. . . . Americans have not always shared this complacent attitude or subscribed to the ideology that legitimated it. Instead, Americans once believed that large concentrations of privately controlled economic power were dangerous and viewed them with suspicion and hostility.[49]**

These fears were expressed by the opponents of the British monarch and were the roots of this country's revolutionary heritage. The opposition to monopoly power shaped political and economic theory until the last years of the nineteenth century.[50] These fears motivated Congress to pass the antitrust statutes. Several judges have made claims that the antitrust laws were passed to guarantee a balance on economic power in American

society. Judge Learned Hand stated, "[T]hroughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other."[51] Chief Justice Warren claimed, "[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization."[52] In addition, Justice Black stated, "[F]rom this country's beginning there has been an abiding and widespread fear of the evils which flow from monopoly-that is the concentration of economic power in the hands of a few."[53] Justice Black concluded that Congress passed the Sherman Act to prevent further concentration and preserve competition.[54]

"The antitrust laws are among the least precise statutes enacted by Congress."[55] Several terms used in statutes are vague and difficult to define, including: "competition," "unfair methods of competition," "conspiracy in restraint of trade," and "monopolize." "One commentator has observed that antitrust legislation has, perhaps more than any other field, stimulated the courts to consider, as an interpretive aid, the history of the era that gave rise to the legislation."[56]

A. Sherman Act

The Sherman Act[57] followed the Industrial Revolution and was enacted in 1890.[58] Millon claims that the Washington politicians of the day reacted to the public's demand for a rebalancing of economic power by passing a bill that would destroy the great "trusts" of the day.[59]

Pioneered in large measure by John Rockefeller, the trust established a legally enforceable way for member corporations to unify control over the product flows of each participant by fixing market shares and ensuring profit margins.[60] A group of leading producers in an industry formed a trust by exchanging trust certificates for common stock in the different corporations. The trusts exploited their customers and suppliers, which led to the populist movement to pass legislation. At the height of their reign, these trusts possessed the economic power to control the political process and "exclude people from opportunities to seek material success in the market."[61] Eventually, the public organized themselves against the trusts and called for the appropriate legislation. The principal supporters for the Sherman Act were small business people and farmers.[62]

"[The Sherman Act] was concrete recognition of the public's interest in controlling monopoly power, an interest that was not dependent for its vindication on the initiative of private individuals injured directly by the monopolist's conduct."[63] The legislative history of the Sherman Act is full of examples of the fear that several Senators felt from the large trusts. Senator Sherman, sponsor of the bill, equated the trusts' ultimate economic power with political domination:

> **If the concentrated powers of this combination are intrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the State and national authorities. If anything is wrong this is wrong. If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.[64]**

Other senators concentrated on the moral illegitimacy of the trusts' activities, including Senator Jones:

> **The growth of these commercial monsters called trusts in the last few years has become appalling. For a long while they were limited in numbers and applied to but a few articles, and while even then they excited the detestation of good men, they did not exist in such numbers and power as to cause apprehensions for the public safety. Now, however, having been allowed to grow and fatten upon the**

> public, their success is an example of evil that has excited the greed and conscienceless rapacity of commercial sharks until in schools they are to be found now in every branch of trade, preying upon every industry, and by their unholy combinations robbing their victims, the general public, in defiance of every principle of law or morals.[65]

Scholars such as Millon argue that the Act targeted the corporate power that the free market inadequately controlled; therefore, the Act was created to rectify the social and political problems of the day caused by the power of large corporations.[66] Under this view of the Sherman Act's legislative history, it can justifiably be used to curb the increasing power of the media giants in today's society because it is increasingly dependent on the media's supply of information.

B. Clayton Act

In the Senate Judiciary Committee's report, the stated purpose of the Clayton Act[67] was to stop anticompetitive mergers in the early stages or before they happened.[68] "Section 7 of the Clayton Act prevents firms from acquiring rival companies where `the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.'"[69] While Congress was substantially concerned with the economic effects of mergers, it did not disregard the amount of political power that large companies could obtain through such mergers.[70] Representative J.P. Morgan said:

> [A]ll of the power represented by this wealth is lodged in the hands of a few men. Can anyone doubt the danger which such concentration permits? . . . It is useless to say that the power represented will never be used to the detriment of the American people. . . . It is too great a power to be concentrated-it affords too great a temptation to frail humanity.[71]

The House Committee Report expressed its concern stating, that "[t]he concentration of wealth, money, and property in the United States under the control and in the hands of a few individuals or great corporations has grown to such an enormous extent that unless checked it will ultimately threaten the perpetuity of our institutions."[72] The mass media is a very powerful tool in today's society and the concentration of media in a few hands raises the same power-related fears as expressed here.

Scholars that argue for a "multivalued approach" conclude that section 7 was intended to stop mergers that will substantially reduce competition.[73] However, the important distinction is that these scholars do not limit their definition of "competition" to terms such as "prices, costs, and product innovation," but believe that "competition" inherently includes "a strong socio-political connotation."[74] Robert Pitofsky has stated that it would be "bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws."[75] As a result, Pitofsky believes that "despite the inconvenience, lack of predictability, and general mess introduced into the economists' allegedly cohesive and tidy world of exclusively micro-economic analysis,"[76] any antitrust policy that fails to consider such values "would be unresponsive to the will of Congress."[77]

Another key part of the legislative history behind section 7 is that Congress intended to restrict more mergers in any industry that is already highly concentrated.[78] As exemplified by the recent Disney/ABC and Time Warner/Turner Broadcasting mergers, there is definitely a current trend increasing the concentration of the mass media industry. This Congressional intent, combined with the fact that the Clayton Act's legislative history included social and political concerns, leaves the Clayton Act as a viable option in curbing the large media mergers.

C. Celler-Kefauver Amendment

This amendment was the result of Congress' reaction to the Supreme Court's decision in *United States v. Columbia Steel Co.*[79] In 1948, the Court generously construed the language of section 7 of the Clayton Act and protected the freedom to merge in certain situations.[80] The original language of section 7 of the Clayton Act contained a legal loophole by only preventing companies from purchasing the stock of rival companies. It did not take long for companies to realize that they could effectively merge with a competitor, and avoid the Clayton Act, by simply acquiring their competitor's assets rather than their stock.[81] In *Columbia Steel*, the Court stated that such an asset acquisition was not a violation of the Clayton Act, despite the fact that the end result was a merger that might lessen competition. Congress responded by passing the Celler-Kefauver Amendment[82] to the Clayton Act so that the law applied equally to an asset acquisition as it originally had to stock acquisitions.[83]

In addition to the "loophole" motivation, many legislators expressed, during the legislative history of the amendment, their fears of increasing concentrations in certain industries. Members of Congress reiterated many of the same negative effects of concentration that were originally expressed when debating the Sherman Act and Clayton Act.[84] Some warnings drew analogies to the alarming consequences of concentration abroad. Senator Kefauver, sponsor of the Amendment, stated:

> I am not an alarmist, but the history of what has taken place in other nations where mergers and concentrations have placed economic control in the hands of very few people is too clear to pass over easily. A point is eventually reached, and we are rapidly reaching that point in this country, where the public steps in to take over when concentration and monopoly gain too much power. The taking over by the public through its government always follows one or two methods and has one or two political results. It either results in a Fascist state or the nationalization of industries and thereafter a Socialist or Communist state.[85]

Scholars argue that these legislative goals should not be ignored today in favor of "modern economic theory."[86] "However tempting, the legislative history cannot be invoked when convenient and disavowed when problematic, for our antitrust laws represent the `Magna Carta of free enterprise,' guaranteeing to `each and every business, no matter how small,' the freedom to compete."[87] Pitofsky fears that the increasing trend toward mergers could continue until the major industries are controlled by a small number of mega-companies.[88] "That kind of concentration would have a profound effect on political power and the quality of life in this country. Surely Congress did not intend such results when it amended section 7 of the Clayton Act in 1950."[89]

III.Recent History of Enforcement

The application of the antitrust statutes has varied greatly throughout the past few decades. In the 1960s, federal officials applied the antitrust laws aggressively and were "hostile to mergers."[90] Robert Pitofsky concludes that the "[m]erger policies pursued by the Supreme Court, the Department of Justice, and the Federal Trade Commission during the 1960s were, by standards widely embraced today, excessively restrictive."[91] In the 1970s, the federal officials loosened the tight reins they had held on merger activities.[92] Pitofsky argues that the "relaxed" enforcement was the result of the fact that large companies were feeling the pressure to increase efficiency because foreign competitors were extremely efficient and enjoying increased success in the American market.[93]

When the industries that employ members of the society begin to suffer economically, the political pressure grows to aid American businesses.[94] This political pressure can have a direct impact on the administration of the antitrust laws. The public outcry for assistance for American businesses was enthusiastically answered by 1980 Republican presidential candidate Ronald Reagan, who campaigned on the pledge to "reduce the government's role in business."[95]

At a meeting of the Antitrust Policy Institute, it was the consensus that the Reagan and Bush administrations had "minimalized" the antitrust laws.[96] Reagan delivered upon his campaign promises by instituting economic

policies directed by Chicago School economists and laissez-faire capitalists.[97] "Free market law-and-economics scholars provided the theoretical underpinning for the policy of an Administration that promised business to get government `off its back.'"[98]

The antitrust policy of the Reagan administration resulted in "an unprecedented increase in corporate mergers coupled with a dramatic decrease in enforcement activity."[99] A look into the numbers shows that Reagan clearly intended to take government officials out of the business of antitrust enforcement. When Reagan took office in 1980, U.S. corporate mergers for the year totaled $33 billion.[100] After six years under Reagan's economic policies, U.S. corporate mergers for 1986 totaled $190 billion.[101] In 1980, federal officials received 824 premerger transaction reports.[102] This number increased nearly 300 percent when 2406 premerger reports were filed in 1986.[103] The Reagan administration's answer to this increase in merger activity was to decrease the federal government's antitrust law enforcement activities. In the years prior to Reagan taking office, government officials initiated enforcement actions against 2.5 percent of reported mergers.[104] In contrast, government officials from the Reagan administration only initiated actions against 0.7 percent of reported mergers in the years 1982-86.[105]

Some scholars argue that the Reagan administration not only was merger-friendly but actually intended to "revolutionize antitrust."[106] The Administration's doctrine was based largely on the basic ideas of Chicago School economic theory, and its belief in the ability of a free market to self-regulate. The Chicago School of economic theory rests on the premises that preventing inefficient activity should be the only goal of all economically-related law, and that the market punishes inefficiency faster and better than the law.[107] "The Chicago beliefs are compatible with only the most minimal law. In antitrust, the most minimal law, given the existence of the statutes, is law that proscribes only clear cartel agreements and mergers that would create a monopoly in a market that included all perceptible potential competition."[108]

The Chicago School argues that efficiency should be the only goal of the Sherman Act.[109] Robert H. Bork argues that there is "not a scintilla of support" in the Sherman Act's legislative history for "broad social, political, and ethical mandates."[110] The argument is that political and social factors confuse and distort antitrust decisions and are irrelevant and harmful to the analysis.[111] The Chicago School presumes that markets operate most efficiently when left alone and that antitrust enforcement interferes with that process.[112]

Some scholars see the *United States v. General Dynamics Corp.*[113] decision as the initial step that the Supreme Court took in which it embraced an economically-based approach to mergers.[114] Since this decision, the courts have continued to rely on the examination of the "realities" of particular markets in antitrust litigation.[115] A sure sign of courts' reliance on economic theory is the fact that the use of an economist in an antitrust case is seen as a necessity today.[116] According to Stephen E. Nagin, "Economic expertise lends itself to evaluating the potential bases for claims, designing and analyzing discovery, providing a focus on the important issues, preparing exhibits for trial, calculating damages, testifying at trial, and if necessary, assisting on appeal."[117] The combination of the Reagan administration and the Supreme Court's embrace of a purely economic antitrust analysis has left little room for any social or political concerns to be heard.

IV.Antitrust Law Is a Constantly Changing Body of Law

> **Antitrust, like other aspects of economic law, has always been influenced by cohesive as well as ad hoc economic and political theories. Because views have varied, changed, and developed over time, antitrust is infused with tension. It is out of such tension that traditional antitrust law has grown and developed, enriched by insights of both its critics and supporters.[118]**

The developmental process is not one of sharp swings from one extreme view to another. Change begins when federal officials promote a new theory of antitrust law by deciding which proposed mergers to examine. The

next step is case-by-case adaptation to the new ideas, new situations, and new doctrinal theories.

According to scholar Herbert Hovenkamp, AIf one hundred years of federal antitrust policy have taught us anything, it is that antitrust is both political and cyclical. "lmost every political generation has abandoned the policy of its predecessors in favor of something new."[119] The antitrust doctrines have evolved from the common law school,[120] through the rule of reason school,[121] and the liberal school.[122] The evolution has continued through the law and economics, or Chicago School, theory that has dominated recent antitrust policy.[123] Hovenkamp has compared the changes in antitrust policy to the common scientific model.[124]

Initially, the new antitrust theory will only be supported by the few who propose it, and these supporters will be called frauds by those in the accepted school.[125] Next, a court will discount the accepted model and, ultimately, accept the new proposed theory. Eventually, the new model will gain more acceptance, and scholars will conduct the research needed to authenticate the new model.[126] Hovenkamp concludes that the Chicago School of economic theory will ultimately be replaced as the basis for antitrust enforcement.[127] "Today the cutting edge of antitrust scholarship is coming, not from the protagonists of the Chicago School, but rather from its critics . . . .[T]he
Chicago School, just as its predecessors, is mortal."[128]

A. Faults of Chicago School

There is no denying that the Chicago School of economics has dictated the recent history of antitrust law. Under a new theory, courts will not completely eliminate economics from antitrust analysis; however, economics will no longer be the sole rationale or justification for decisions. Hovenkamp believes that the Chicago School's approach has two major flaws.[129] First, the Chicago School's approach dictates that antitrust analysis be restricted to arguments regarding efficiency.[130] Hovenkamp argues that this belief "overstates the ability of the policymaker to apply such a model to real world affairs and understates the complexity of the process."[131] Second, an efficiency model cannot accurately foresee a business's conduct or actions.[132]

Scholar Jean Wegman Burns believes that the Chicago School theory is flawed because it does not consider certain issues that society deems important, and consumers do not believe in its application.[133] Burns argues that this disbelief indicates that the Chicago School theory will be replaced because "[n]o theory . . . will long survive if [it] is not believed and does not suit society's needs."[134] Burns concludes, "The time has now come to move away from theory and consider the real world and societal needs."[135]

B. Recent Court Decisions Have Expressed Distrust with the Chicago School of Economic Theory

As explained above, the Chicago School of economic theory was widely accepted and relied upon by the Reagan and Bush Administrations in their antitrust policies. In addition, the Supreme Court gave credence to the power an economic theory can have in antitrust analysis. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[136] several American companies in the consumer electronics market alleged that their Japanese competitors were involved in a conspiracy to price them out of the market. The Court granted the defendants' motion for summary judgment because the plaintiffs' theory of "predatory pricing" made no practical sense.[137] This decision seemed to solidify the fact that the Court was comfortable relying on economically based arguments in the antitrust arena.

Scholars were surprised by the seeming "about-face" that the Supreme Court did in its decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*[138] In *Eastman Kodak*, a group of independent service organizations alleged that Eastman Kodak violated the antitrust laws through the use of its tying arrangement between sale and service of its products.[139] The Court denied the defendant's motion for summary judgment and, more importantly, expressed its doubt about the ability of an economic theory to predict reality.[140] The Court explained its opinion in *Matsushita* and held that it did not create a right to summary judgment for a defendant simply because it articulates an economic theory that supports its behavior.[141] The Court held that "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored."[142] "In sum, the majority characterized Kodak's argument as `mere conjecture' and questioned `why the Court should accept . . . theory on faith rather than requiring the usual evidence needed to win a summary judgment motion.'"[143]

It should be noted that the *Kodak* decision was not a merger case; however, it is directly related to the trend of media mergers in that it shows the Supreme Court's willingness to criticize the Chicago School of economic theory.[144] This theory was the foundation for the "minimalist" approach to antitrust jurisprudence in the 1980s, and the first step towards a new approach in merger analysis is the acceptance of the weaknesses of the present doctrine. In addition, it shows that the Court may be open to re-address the social and political roots of antitrust law. Scholar Michael S. Jacobs believes that "[t]hough camouflaged by its distinctly economic coloration, the *Kodak* decision turned on the acceptance of assumptions that are essentially political in nature."[145]

C. Robert Pitofsky Is In a Position to Influence a New Doctrine

Section 7 of the Clayton Act governs corporate mergers and acquisitions.[146] Section 11 of Clayton Act grants the Federal Trade Commission (FTC) authority to enforce Section 7.[147] The Chairman of the FTC is a key figure in the administration of an antitrust policy. On April 6, 1995, the Senate confirmed Robert Pitofsky's nomination as Chairman of the FTC.[148] An author of numerous articles on antitrust, Pitofsky routinely criticized the lax antitrust enforcement by the FTC and Justice Department during the Reagan and Bush Administrations.[149] In fact, Pitofsky has concluded that "[t]oo many close calls went in the direction of inaction."[150] He also stated that the FTC during his seven-year term will be willing to bring the close case, where the past administrations backed away.[151]

According to Pitofsky, the FTC should conduct investigative hearings to examine whether the antitrust laws have failed to keep pace with global competition and technological innovation. "The question that I think the FTC ought to address is not what the law is, but what it ought to be," he said.[152] In his scholarly writings, Pitofsky supported the idea that the antitrust laws should be used to protect the "marketplace of ideas."[153] Anne Bingaman, the assistant attorney general for antitrust, agreed to allow Pitofsky and the FTC to review the Time Warner/Turner Broadcasting merger. By fighting for the right to review this enormous media merger, Pitofsky showed that he believes that the antitrust laws can be used to regulate the trend of media mergers. These type of mergers deserve a heightened inquiry because of the media's important role in today's marketplace of ideas.

Pitofsky said, "We always take an especially close look at mergers in an industry where there's a very pronounced trend toward concentration [and] media mergers looks to be quite a pronounced trend."[154] According to Pitofsky, it seems likely that a case dealing with the trend toward media mergers will eventually surface. "Before this merger surge is over," Pitofsky said in a recent interview, "one of these cases is going to go to court, and these questions will be raised."[155] He also announced that media mergers deserve tougher scrutiny than mergers in a different industry. "You might take a tougher stance . . . in the media field because you are concerned that too much power in too few hands will impair freedom of expression."[156]

In his law review article, *The Political Content of Antitrust*,[157] Pitofsky states his views on the importance of including social and political values in antitrust application. "It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws."[158] In addition, "[A]n antitrust policy that failed to take political concerns into account would be unresponsive to the will of Congress and out of touch with the rough political consensus that has supported antitrust enforcement for almost a century."[159]

According to Pitofsky, the Sherman Act should be used to control a group that attempts to control the media in America.[160] On the other hand, Pitofsky does stress that noneconomic concerns should not be the sole rationale for an antitrust analysis.[161] The Chicago School model is fatally flawed because it is only concerned with the ideas of economic efficiency, but Pitofsky does not propose to replace it with a theory that is as equally single-minded. The proper model for antitrust analysis would contain a balance between economic and social/political concerns. "Political concerns ought to be treated as limited factors that influence the way in which prospective rules are designed to accomplish antitrust objectives."[162]

Last summer the FTC staff, led by Pitofsky, conducted an intense review of the Time Warner/Turner merger.[163] Pitofsky said this merger was "one of the biggest and most complicated deals that antitrust officials have reviewed."[164] In the end, the FTC signed a consent order with Time Warner/Turner that permitted the merger to continue.[165] The consent order required TCI to put its Time Warner shares in a separately owned company.[166] Without this requirement, Time Warner/Turner would have combined the largest, TCI, and the second-largest, Time Warner, cable operators in the United States.[167] Together, TCI and Time Warner would have controlled 40% of the cable market.[168] According to Pitofsky, preventing this result was essential to "preserve competition and protect consumers."[169]

In a recent article, Holman W. Jenkins Jr. criticized Pitofsky's intense review of the Time Warner/Turner Broadcasting merger.[170] According to Jenkins, Pitofsky "must now bristle and sound important as he waves through the [merger] after preaching against antidemocratic evils of such mergers when he was merely a law professor."[171] Jenkins claims that the FTC is arbitrarily distributing its favor to this or that competitor. "The antitrust tradition once had intellectual pretensions, but today it's driven by agency staff throwing their weight around on behalf of their future clients beyond the revolving door."[172]

Other critics of Pitofsky's views believe that the inclusion of non-economic factors will lead to problems because such factors are hard to quantify.[173] However, Pitofsky says these critics place too much faith in the ability to compute economic effects.

> **Even if economic theory were clear and consistent, economics provides no system for reliably determining economic effect . . . . There is no reliable way to determine either the pro- or anti-competitive effect of that merger with anything approaching scientific reliability. As a result, antitrust enforcement along economic lines already incorporates large doses of hunch, faith, and intuition.[174]**

Conclusion

Today, there is little question about the enormous impact that mass media has on society. It controls what Americans see, hear, and consider important. Because of this direct impact, ownership in mass media becomes a powerful tool that can easily be abused. With the recent trend towards high concentration in the ownership of mass media, this power is becoming more and more centralized into the hands of a few. Critics of this trend are speaking out and searching for a method to curb the concentration. In his position as chairman of the FTC, Robert Pitofsky has the ability to use the antitrust statutes as one avenue.

Under the antitrust doctrine of the past few decades, the media mergers would be analyzed on a strictly economic basis. The Reagan and Bush Administrations minimally applied the antitrust laws, and the reasoning relied solely on economic theory. However, one must realize that antitrust is a political body of law that has historically undergone changes through the years. While investigating proposed mergers, Pitofsky can shape the next trend by not relying solely on economic terms but rather by taking into account social and political issues. It is important to understand that economic analysis should by no means be eliminated; rather, social and political concerns should join economics as the basis for decisions.

There are strong social and political implications if the mass media continues to become centralized. When the mass media is controlled by large conglomerates, the goal becomes large profits. Reducing the number of journalists is one way that mass media will reduce costs but shortchange its audience. For example, when newspapers decrease their number of journalists, they are forced to reduce the amount of their local news coverage and rely more on nationally syndicated columnists. In addition, the news organizations will focus more on entertainment coverage and less on the expensive type of "hard news" series. When the mass media is controlled by large parent companies, their news departments are also less likely to cover extensively or initiate investigative stories that are detrimental to their parent companies. In regards to the television and motion picture industries, the mass media conglomerates now control both production companies and distribution outlets. This will make it very difficult for an independent production company to reach a mass audience, and the lack of competition for distribution opportunities will ultimately reduce the quality of the final product.

As a scholar, Pitofsky criticized the "hands-off" approach of the past administrations and strongly supported the idea of taking social and political concerns into account in the antitrust analysis. As chairman of the FTC, Pitofsky recognized the potential detrimental effects of Time Warner's recent acquisition of Turner Broadcasting and initiated an extensive review before ultimately approving the merger. Pitofsky did require Time Warner/Turner to reduce its potential 40% ownership of the national cable market. However, the FTC's consent order did not address the problem of Time Warner/Turner owning significant production studios and distribution outlets. In addition, the new media giant will control CNN, a major force in national news coverage. Journalists from CNN should prepare for a reduction in the news staff and pressure from the parent company to favorably cover its actions and products. Pitofsky's consent order in the Time Warner/Turner merger did not address many of the problems with a highly concentrated mass media. The fact that the largest media merger in history was able to win approval from the FTC shows that Pitofsky has quickly learned the art of the compromise. However, the recent trend towards media mergers indicates that he will soon have another opportunity to review such a merger. When Pitofsky is reviewing the next media merger, I challenge him to rely on the ideas for the antitrust statutes that he promoted as a scholar and not fold to the political pressures initiated by big business.

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1. In this Note, the term "mass media" includes such fields as print and broadcast journalism, television network programming, cable channels and programming, the feature film industry, and the music industry.

2. *See* Ben H. Bagdikian, *Conquering Hearts and Minds: The Lords of the Global Village*, The Nation, June 12, 1989, at 805.

3. For example, the Reagan and Bush Administrations relied heavily on economic theory and minimally applied the antitrust laws.

4. James Bock, *Citizen Kane as Conglomerate; Media Concentration: Media Moguls of the William Randolph Hearst Variety are PassJ.*, Balt. Sun, Apr. 3, 1996, at A2.

5. *Id.*

6. *Id*.

7. Alexandra Marks, *Could Antitrust Cops Cuff Media Mergers?*, Christian Science Monitor, Sept. 1, 1995, at 3.

8. Bagdikian, *supra* note 2, at 805.

9. *Id*.

10. *Id*.

11. Jessica Shaw, *Deals: Mergers of Walt Disney Co. and Capital Cities/ABC, Westinghouse Electronic Corp. and CBS Inc.*, Ent. Wkly., Aug. 11, 1995, at 13.

12. Johnnie L. Roberts, *The Men Behind the Megadeals*, Newsweek, Aug. 14, 1995, at 22. Eisner is an executive at Walt Disney, and Murphy is an executive at Capital Cities/ABC.

13. *Id.*; *See* Don L. Boroughs, Dan McGraw & Kevin Whitelaw, *Disney's All Smiles: Michael Eisner Puts the Powerful Mack Kingdom on Top of Entertainment World with His Blockbuster Purchase of ABC*, U.S. News & World Rep., Aug. 14, 1995, at 32. The merger is second only to the $25 billion deal between RJR Nabisco and Kholberg Kravis Roberts.

14. Roberts, *supra* note 12, at 22.

15. *Id*.

16. *See* Boroughs, *supra* note 13, at 33-34.

17. *Id.*

18. *Id.* at 34.

19. Bock, *supra* note 4, at A2.

20. *Id.*

21. Thomas S. Mulligan, *Company Town Turner-Time Warner Merger Approved by Shareholder's Media: Management Says it Will Now Turn its Attention to Trimming Costs and Raising Ratings and Subscriptions*, L. A. Times, Oct. 11, 1996, at D1.

22. Jeff Pelline, *Time Warner Closes Deal For Turner Buyout: Would Create Largest Media Company*, San Fran. Chron., Sept. 23, 1995, at A1.

23. *Id.*

24. *Comment: Big Media Mergers As New Competitors Appear*, News Trib., Oct. 13, 1996, at SL2.

25. Pelline, *supra* note 22, at A1.

26. Warren Cohen & Jack Egan, *Tomorrow's Media Today*, U.S. News & World Rep., Aug. 14, 1995, at 47-48.

27. *Id.*

28. *Id.*

29. Rita Koselka, *Mergermania in Medialand*, Forbes, Oct. 23, 1995, at 252, 254.

30. *Id*.

31. David W. Barnes, *Nonefficiency Goals In The Antitrust Law of Mergers*, 30 Wm. & Mary L. Rev. 787, 810 (1989).

32. Claudia Puig & Brian Lowry, *Star's `Hard Copy' Stand Raises Hard Questions on Conglomerates' Power*, Ariz. Republic, Nov. 5, 1996, at C5.

33. Cynthia Flash, *Microsoft, NBC Launch News Venture*, News Trib., July 14, 1996, at Al.

34. Michelle Quinn, *Media Mergers Raise Troubling Questions*, San Fran. Chron., Sept. 23, 1995, at D1.

35. *Id.*

36. Barnes, *supra* note 31, at 814; *See* Louis B. Schwartz, *The Mind of a Liberal Law Professor: Selections from the Writings of Louis B. Schwartz*, 131 U. Pa. L. Rev. 847, at 867 (1983).

37. Mulligan, *supra* note 21, at D1.

38. Maura Christopher, *How Profits Shape News Companies and the News*, Scholastic Update, Apr. 26, 1985, at 10.

39. Flash, *supra* note 33, at A1, (citing Bagdikian).

40. Christopher, *supra* note 38, at 10.

41. *Comment*, *supra* note 24, at SL2, (citing Bagdikian).

42. Christopher, *supra* note 38, at 10.

43. *Id*.

44. *Id*.

45. *Id.*

46. Jube Shriver Jr., *White House Weighs Moves to Slow Mergers*, L.A. Times, Sept. 15, 1995, at D1.

47. *Id.*

48. *Metzenbaum Is Asking for Closer Scrutiny of Media Mergers*, Wall St. J., Dec. 16, 1993, at A1.

49. David Millon, *The Sherman Act and the Balance of Power*, 61 S. Cal. L. Rev. 1219, 1219 (1988).

50. *Id.*

51. United States v. Aluminum Co. of Am., 148 F.2d 416, 429 (2d Cir. 1945).

52. Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).

53. United States v. Von's Grocery Co., 384 U.S. 270, 274 (1966).

54. *Id.*

55. Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L. J. 65, 81 (1982).

56. *Id.*; *See* Rush H. Limbaugh, *Historic Origins of Anti-trust Legislation*, 18 Mo. L. Rev. 215, 215-17 (1953).

57. Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1982)).

58. Eleanor M. Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window*, 61 N.Y.U. L. Rev. 554, 563 (1986).

59. Millon, *supra* note 49, at 1223-24.

60. Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust-Retrospective and Prospective: Where Are We Coming*

From? Where Are We Going?, 62 N.Y.U. L. Rev. 936, 939 (1987).

61. Millon, _supra_ note 49, at 1224.

62. Fox, _supra_ note 58, at 563-64.

63. Millon, _supra_ note 49, at 1281.

64. 21 Cong. Rec. 2457 (1890) (statement of Sen. Sherman).

65. 20 Cong. Rec. 1457 (1889) (statement of Sen. Jones concerning a proposed bill related to the Sherman Act).

66. Lande, _supra_ note 55, at 106.

67. Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27 (1994)).

68. Lande, _supra_ note 55, at 128; United States v. United Shoe Machinery Co., 264 F. 138, 162 (E.D. Mo. 1920), _aff'd_, 258 U.S. 451 (1921) (_citing_, Senate Judiciary Report).

69. Lande, _supra_ note 55, at 127-28; Clayton Act § 18.

70. Lande, _supra_ note 55, at 129. The economic concerns include the ability to control prices and achieve large profits from the public. _Id._ at 128.

71. Lande, _supra_ note 55, at 129; 51 Cong. Rec. 9186 (1914) (remarks of Rep. Helvering).

72. Lande, _supra_ note 55, at 129; H.R. Rep. No. 627, 63d Cong., at 19 (1914).

73. Wesley A. Cann, Jr., _Section 7 of the Clayton Act and the Pursuit of Economic `Objectivity': Is There Any Role for Social and Political Values in Merger Policy?_, 60 Notre Dame L. Rev. 273, 280 (1985).

74. _Id._

75. Pitofsky, _The Political Content of Antitrust_, 127 U. Pa. L. Rev. 1051, 1051 (1979).

76. _Id._ at 1052.

77. _Id._

78. Robert Pitofsky, _Antitrust in the Decade Ahead: Some Predictions About Merger Enforcement_, 57 Antitrust L.J. 65, 71 (1988).

79. _Columbia_, 334 U.S. 495 (1948).

80. Fox, _supra_ note 58, at 565.

81. _See_ Arrow-Hart Hegeman Elec. Co. v. FTC, 291 U.S. 587 (1934); FTC v. Western Meat Co., 272 U.S. 554 (1926).

82. Celler-Kefauver Amendment, ch. 1184, 64 Stat. 1125 (1950) (codified at 15 U.S.C. § 18 (1994)).

83. Lande, _supra_ note 55, at 130-31; Fox, _supra_ note 58, at 565.

84. See the discussions above about the legislative history of the Sherman Act and Clayton Act, _supra_ at Parts II.A and II.B.

85. Lande, *supra* note 55, at 138; 96 Cong. Rec. 16,452 (1950) (remarks of Sen. Kefauver).

86. Cann, *supra* note 73, at 280.

87. *Id*. (citations omitted).

88. Robert Pitofsky, *Antitrust in the Next 100 Years*, 75 Cal. L. Rev. 817 (1987).

89. *Id.* at 832 (citation omitted).

90. *Id.* at 819.

91. Pitofsky, *supra* note 78, at 65. *See e.g.*, United States v. Von's Grocery Co., 384 U.S. 270 (1966); United States v. Pabst Brewing Co., 384 U.S. 546 (1966); Brown Shoe Co. v. United States 370 U.S. 294 (1962).

92. *See, e.g.*, United States v. Citizens and Southern Nat'l Bank, 422 U.S. 86 (1975); United States v. General Dynamics Corp., 415 U.S. 486 (1974).

93. Pitofsky, *supra* note 88, at 822.

94. Fox & Sullivan, *supra* note 60, at 944-45.

95. *Id.*

96. Eleanor M. Fox & Robert Pitofsky, *Papers Presented at the Airlie House Conference on the Antitrust Alternative-Introduction*, 62 N.Y.U. L. Rev. 931, 931 (1987);

In 1986 Ralph Nader and Frederick Furth called together a group of scholars, practicing lawyers, state enforcers, and policy makers interested in antitrust, the consumer, and the competitive economy. The group that was convened was a diverse group that shared the perception that the antitrust laws are being seriously underenforced by the federal government and that the underenforcement has reached a near crisis point, threatening the American competition system. The group became known as the Antitrust Policy Institute.

***Id.* at 931.**

97. *Id.*

98. *Id.*

99. Pitofsky, *supra* note 78, at 66.

100. *Id.*; *See* Antitrust & Trade Reg. Rep. (BNA) No. 1305, at 451-52 (Mar. 5, 1987).

101. Pitofsky, *supra* note 78, at 66.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Fox & Sullivan, *supra* note 60, at 947.

107. *Id*. at 957.

108. ***Id*****. at 958.**

109. Jayma M. Meyer, ***Relaxation of the Per Se Mantra in the Vertical Price Fixing Arena*****, 68 S. Cal. L. Rev. 73, 86 (1994).**

110. Robert H. Bork, ***Legislative Intent and the Policy of the Sherman Act*****, 9 J.L. & Econ. 7, 10 (1966).**

111. Meyer, ***supra*** **note 109, at 86.**

112. ***See*** **Frank H. Easterbrook,** ***Workable Antitrust Policy*****, 84 Mich. L. Rev. 1696 (1986).**

113. ***General Dynamics*****, 415 U.S. 486 (1974).**

114. Cann, ***supra*** **note 73, at 286.**

115. ***See e.g.*****, United States v. Marine Bancorp., 418 U.S. 602 (1974); United States v. Citizens and Southern Nat'l Bank, 422 U.S. 86 (1975).**

116. Stephen E. Nagin, ***Selection, Use, and Pay of an Economist in an Antitrust Case*****, 35 U. Miami L. Rev. 255, 255-56.**

117. ***Id*****. at 259. The cost for an antitrust economist can range from as little as $300, for a recent graduate, to $2500 for a renowned expert who is a courtroom veteran.** ***Id.***

118. Fox & Sullivan, ***supra*** **note 60, at 936.**

119. Herbert Hovenkamp, ***Antitrust Policy After Chicago*****, 84 Mich. L. Rev. 213 (1985).**

120. ***Id.***

121. ***Id.***

122. ***Id.*** **at 214.**

123. ***Id*****. at 215;** ***See also*** **Richard A. Posner,** ***The Chicago School of Antitrust Analysis*****, 127 U. Pa. L. Rev. 925 (1979).**

124. Hovenkamp, ***supra*** **note 119, at 215.**

125. ***See id.*****;** ***See generally*** **Thomas S. Kuhn, The Structure of Scientific Revolutions (2d ed. 1970); Posner notes that the early Chicago School theories were regarded by outsiders as a "lunatic fringe." Posner,** ***supra*** **note 123, at 931.**

126. ***See*** **Hovenkamp,** ***supra*** **note 119, at 215.**

127. ***Id*****. at 216.**

128. ***Id.*** **at 216-17.**

129. ***Id.*** **at 283-84.**

130. ***Id*****. at 284.**

131. ***Id.***

132. ***Id*****. In some industries, the theory has not accurately identified certain forms of "strategic behavior."** ***Id.***

133. Jean Wegman Burns, *Vertical Restraints, Efficiency, and the Real World*, 62 Fordham L. Rev. 597, 600 (1993).

134. *Id*. at 602.

135. *Id*. at 651.

136. *Matsushita,* 475 U.S. at 574.

137. *Id.* at 588, 593, 595, 597. Predatory pricing is a strategic behavior in which a producer would price their products well below cost over an extended period of time. The rationale is that by doing so the producer will eventually drive his competitors out of the market. By definition, a producer engaging in predatory pricing will sustain losses for a period of time in return for the ability to control the market in the future.

138. Burns, *supra* note 133, at 636-37; *Eastman Kodak*, 504 U.S. 451.

139. *Eastman Kodak,* 504 U.S. at 451.

140. Burns, *supra* note 133, at 637. Kodak based its motion for summary judgment on basic economic efficiency arguments. Kodak argued that since there is competition in the interbrand original equipment market, any restraint it places on its replacement parts and services is "irrelevant" because consumers will weigh this in their decision to buy Kodak original equipment and refuse to purchase from Kodak if the parts and services are too high. *Id.* at 638. Kodak asserted that a tying arrangement that raised prices too much would eventually hurt their original equipment sales and thus be inefficient. For this reason Kodak argued that the plaintiffs' theory was without economic justification and should be dismissed. *Id*.

141. *Eastman Kodak*, 504 U.S. at 468.

142. *Id*. at 466.

143. Burns, *supra* note 133, at 638 (quoting *Eastman Kodak*, 504 U.S. at 480-81 n.29).

144. In *Bon-Ton Stores, Inc. v. May Dep't Stores Co.*, 881 F. Supp. 860 (W.D.N.Y. 1994), a district court relied on the language from *Eastman Kodak* that questioned a total reliance on economic theory. In *Bon-Ton*, a department store owner successfully received an injunction to enjoin a rival's acquisition of another department store. According to the district court, the preliminary injunction was warranted because the acquisition would significantly increase the concentration of an already highly concentrated market. *Id*. at 860-61. "Hypothetical formulas and paradigms are less important in this sphere than concrete economic realities." *Id.* at 869. This is another example that courts are today less likely to blindly follow an economic theory in an antitrust jurisprudence.

145. Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C.L. Rev. 219, 264 (1995).

146. 15 U.S.C. § 18 (1994).

147. *Id*. at § 21.

148. Dominic Bencivenga, *FTC Chairman Pitofsky Seen As Tough Enforcer*, N.Y.L.J., Apr. 13, 1995, at 1.

149. *Id*. at 5.

150. *Id.*

151. *Id*.

152. Karen Donovan, ***Move Over, Ms. Bingaman; New Trustbuster Is In D.C.*****, Nat'l L.J., April 24, 1995, at B1.**

153. Bryan Gruley, ***Pitofsky Will Test Marketplace of Ideas Theory In FTC's Review of Time Warner-Turner Deal*****, Wall St. J., Oct. 9, 1995, at A14.**

154. ***Id.***

155. ***Id.***

156. ***Id.***

157. Pitofsky, ***supra*** **note 75, at 1051. Pitofsky recommends that those who ask about his ideas on media mergers should read this article.**

158. ***Id.***

159. ***Id.*** **at 1052.**

160. ***See id.*** **at 1054.**

161. ***Id.*** **at 1057.**

162. ***Id.*** **at 1067.**

163. Bryan Gruley & Ben Shapiro, ***Time, FTC Staff Agree on Turner Deal*****, Wall St. J., July 18, 1996, at A3.**

164. ***Time Warner Clears Hurdle for Turner*****, Tulsa World, Sept. 13, 1996 [hereinafter** ***Time*****].**

165. Charles Haddad, ***Assembling a $20 Billion Company Merger Details: Winning Regulatory Acceptance Was a Yearlong Project for Turner and Time Warner*****, Atlanta Journal-Constitution, Sept. 13, 1996, at B1.**

166. ***Time Warner Signs FTC Order to Allow Acquisition of Turner*****, Wall St. J., August 15, 1996, at B8.**

167. Jube Shriver Jr., ***White House Weighs Moves to Slow Mergers*****, L.A. Times, Sept. 15, 1995, at D1.**

168. ***Id.***

169. ***Time*****,** ***supra*** **note 164.**

170. Holman W. Jenkins Jr., ***Business World: The Myth of Media Monopolies*****, Wall St. J., July 9, 1996 at A19.**

171. ***Id.***

172. ***Id.***

173. "How do you measure someone's control in that marketplace?" asks Judith Whalley, who teaches antitrust law at Georgetown. "Is it the number of stories? The number of reporters? And when do you start being concerned? Should you have more diversity in media than you would have in making widgets?" Gruley, ***supra*** **note 153, at A14.**

174. Pitofsky, ***supra*** **note 75, at 1065.**