

1997

The Proper Goals on Antitrust: When Public and Private Interests Collide

William T. Gotfryd

Ralph Nader

PIRGS, Coalition for Universities in the Public Interest

Richard A. Epstein

Prof., University of Chicago School of Law, Chicago, IL.

Eleanor Fox

Prof., New York University School of Law, New York, NY

Follow this and additional works at: <http://lawcommons.luc.edu/lclr>



Part of the [Antitrust and Trade Regulation Commons](#)

Recommended Citation

William T. Gotfryd , Ralph Nader , Richard A. Epstein & Eleanor Fox *The Proper Goals on Antitrust: When Public and Private Interests Collide*, 9 Loy. Consumer L. Rev. 113 (1997).

Available at: <http://lawcommons.luc.edu/lclr/vol9/iss2/14>

This Presentation is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola Consumer Law Review by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

INTRODUCTION

The Proper Goals of Antitrust: *When Public and Private Interests Collide*

Introduction by William T. Gotfryd

It is a pleasure to welcome you here today to Chicago for the Hubert L. Will Conference. The Institute for Consumer Antitrust Studies is an institute with a focus on consumer interests. As part of our mission, we are hosting this conference on policies relating to antitrust law and enforcement.

Antitrust is a prime topic in today's world. When there is a change of political scene, a change of political doctrine, or just change in the economy, trade policy has to adjust and so too does our antitrust policy. Inevitably, this stirs a continuing debate about what the antitrust laws are all about, where they came from and where they are going.

In 1936, Mr. Justice Charles Evan Hughes remarked in an address to the American Law Institute that, "The history of scholarship is a record of disagreements. When we deal with questions relating to principles of law and its application, we do not suddenly rise into the stratosphere of icy certainty." The history of antitrust law is marked by theory overtaking theory and philosophy under attack by competing philosophy. There is hardly any other area of the law that so regularly tests our national character as the regulation of fair trade.

The history of the Sherman and Clayton Acts has seen many different attempts to expand and

constrain the ability of the government, particularly the courts, to limit economic excess. This, of course, is not very remarkable considering that the field of economic and trade regulation is a slightly more difficult subject to grasp in its application to the public good than preventing the direct picking of your neighbor's pocket. As a result, antitrust policy has a tendency, unfortunate at times, to reflect the dominant national theme, be it expansionism, wartime pragmatism, laissez-faire capitalism, or any of the other notions which may guide the public imagination.

Unfortunately, I think, you may or may not agree, it also meant that good sense is sometimes trampled in the search of politically attractive theories. Thus, while it's true that history has demonstrated some overactive regulation of mergers and acquisitions, it is also true that some very recent enforcement policies have been a little Victorian and Social Darwinist in their approach. That is, let the stronger survive.

Recently in the Wall Street Journal, a commentator noted that he thought it was outrageous that the Justice Department could be allowed to levy huge fines against Archer Daniels Midland for conduct that most people would consider blatant price fixing. He argued, in part, that the legal restraints against exchanges of pricing information were fanciful—I use his word: "fanci-

ful.” The commentator supported his position by arguing that collusion is a good thing and there are efficiencies that result from collusion. Well, there’s something to what he said. The lynch mob is more efficient than the courthouse; and in that regard, I suppose one could say that there are efficiencies in collusion. Those sorts of efficiencies are not necessarily for the public good.

Judge Will, in whose name we are gathered today, had occasion to remark at a high school reunion in Milwaukee to a group of newspaper representatives what he thought a decent democratic society is about. One of the things he said was that a decent democratic society is one which is open for new ideas. “Indeed,” he said, “I think the heart of a democracy is that new ideas shall have a full opportunity to be expressed and explored, an opportunity for ideas to survive in the marketplace, that they be presented, considered, and determined on the basis of their merits after full consideration.” We are here, in part, to give life to Judge Will’s vision of a decent democratic society, and it’s a job I’m gladly going to hand over to all of today’s speakers starting with this particular panel.

The panel has been asked to address the fundamental issue out of which all else, I think, falls,

and that is, “what are the proper purposes of the antitrust laws, and who are they meant to benefit?” Here this morning to take on the thorny issue are three people of such prominence that, other than by throwing this party, I would not be up on this stage with them.

In speaking order, they are Mr. Ralph Nader, the internationally recognized consumer advocate and father of the great nation of the consumer rights organizations in the United States; Professor Richard Epstein, James Parker Hall Distinguished Service Professor of Law at the University of Chicago; and Professor Eleanor Fox, Walter Derenberg Professor of Trade Regulation at the New York University School of Law.

We are all familiar with their respective backgrounds and accomplishments. Even their resumes make interesting reading. So, to make it simple, let me just summarize: Mr. Nader has said everything; Professor Epstein has taught everything; Professor Fox has written everything, and that way we keep them all straight. We are going to ask Mr. Nader to speak first, Professor Epstein to speak second, and Professor Fox to speak third, give each of the speakers time to respond to each other’s position, and Mr. Nader then will take questions from the floor.

CONFERENCE PRESENTATION

Presentation by Mr. Nader:

Any discussion of antitrust law and enforcement is necessarily a discussion about the distribution of political power in our country. The antitrust laws are the quintessential common law of economic behavior in the marketplace. These laws, the Sherman Act, the Clayton Act, and subsequent amendments, are very generally written and are susceptible to being overwhelmed by judge-made law.

In dealing with judge-made law, we have to take into account the guidelines the antitrust division of the Federal Trade Commission periodically issues, the political climate, and the nature of the judicial selection process itself. As a result, it is not surprising we have had large fluctuations in the way the antitrust laws are interpreted in the last hundred years. The more recent cycle reflects the consolidation of power by corporations and their political allies represented by the Reagan, Bush, and Clinton administrations. This consolidation has resulted in a very homogenized judiciary whose members periodically go to seminars sponsored by Chicago school of economics professors and instructors.

These seminars have instructed already predisposed judges to a view of antitrust that very much restricts its initiation to purposes of efficiency or allocative efficiency and "consumer welfare," which are defined as almost tautologically and empirically starved. That does not mean that occasionally a case like Kodak

(*Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992)), which could be read broadly, begins to raise different horizons. It does mean that, for all practical purposes, except for collusive price fixing, one must be very optimistic to predict any change in corporate economic behavior due to the antitrust laws as presently interpreted and enforced.

The dominance of the Chicago school, which now has some of its professors as federal judges and as associate justices of the Supreme Court, is itself a rather bizarre intellectual episode, and part of it deals with the kind of research that is rewarded in terms of status, money, and promotion. The research then is replayed through prominent business publications, like the Wall Street Journal, Forbes, and Fortune, and meshes very nicely with what modern day corporations want the antitrust laws to mean and to not mean. The sequence of this school of thought is a reward system, a publicity system, and a connection with corporate power and its ability to in-

Ralph Nader is an internationally recognized advocate for consumer rights. He has started several groups including public interest research groups (PIRGS) which operate in more than 20 states, the Center for Auto Safety, Public Citizen, and the Coalition for Universities in the Public Interest. He has written several books in consumer education including Unsafe at Any Speed which led to many federal and state laws establishing life-saving standards for vehicle safety. Mr. Nader earned his LL.B. from Harvard University School of Law and his B.A. in Economics from Princeton University.

creasingly determine the nature of elections through its financing of campaigns. Now this is political reality, and anybody who thinks that a discussion of these factors is not relevant to the more arcane parsing of the antitrust laws and their legislative history and their present interpretation and the nature of market power conduct and share is living in a dream world.

The questions of antitrust are made more complex by technological change, globalization, the ferocious expansion of intellectual property arrangements, and the expansion of joint ventures. But almost every new development is given as a reason for not applying the antitrust laws. Market share is no longer just domestic market share and its microcosm; it is global market share and potential entry by global competitors who are not entering the market at the present time.

Intellectual property is now shaped (or misshaped) by the General Agreement on Tariffs and Trade (GATT), which places compulsory licensing laws of signatory countries at a grave disadvantage and the 20-year patent monopoly of the U.S. at a great advantage in terms of that agreement. That is very critical in terms of the cost of medicine and the price of seeds. And it was really quite interesting to see a million farmers demonstrating in India two years ago against the GATT agreement because the agreement provided for intellectual property in [the form of] seeds and the payment of royalties, something the farmers found a bit uncongenial both to their 2000 years of knowledge about these seeds and their custom of handing seeds from one farmer to another without having to sign a royalty transfer agreement.

First, the antitrust division and the FTC, apart from their will to enforce these laws, are grossly understaffed, in numbers and in certain techni-

cal areas. The antitrust division has been trying to get up to speed with the modern computer industry, and you can see they have still got a ways to go here to catch up with what Microsoft and others are doing. The laborious process of gathering data, pursuant to an enforcement process or to issuing civil investigative demands in an intelligent manner, is far beyond the capability of these relatively modest legal and economic staffs.

The antitrust division and the Federal Trade Commission and its economists together are smaller than the law firm of Jones, Day, not to mention Skadden, Arps. Not enough is made of that. Limited staff limits active initiation of cases. Very often the Antitrust Division just waits for a complaint to come in from a competitor and follows up on it. Well, that led to some nice price-fixing convictions and consent decrees in the past, like the General Electric, Westinghouse, and Allis-Chalmers one in 1960. That is not enough. You have to have an initiatory and a research capability. Take the example of the joint venture, for instance. If twenty-five years ago someone suggested that General Motors and Toyota would engage in a joint production venture in California, it would have been a subject of mockery, instead it was allowed in the 1980s.

Now take a look at that joint venture. Here are the two largest auto companies in the world, presumably they are head-on competitors. Do you think that our government has any idea of what kind of exchange of information and what kind of cueing and restraints are going on in that joint venture? As far as I can determine, they are not even monitoring it anymore. This has been part of a massive expansion of the joint ventures between U.S., European, and Japanese auto companies, joint venturers, part owners, resulting in

all kinds of interlocking relationships.

I suppose it is not surprising that since that process started, innovation in the auto companies has almost come to a halt, except for production and automated innovation, which has its own motivation and imperative. But what was once a challenge to the stagnant technology of Detroit by the European and Japanese auto companies in the areas of safety, fuel efficiency, emission control, is gone. They now speak with one voice. Of course, this only mimics an earlier massive overlap between the oil companies and their production, exploration, and refining joint ventures. Now we have two or three oil companies saying they would like to combine your gas stations and not a whimper from the public, or the press, or the antitrust division yet on that.

Then we see the joint ventures, cross-licensing agreements and other aspects of the computer industry. Does anybody really believe that those are given fair scrutiny by any official agency? They are coming out with such an enormous speed and complexity that the staff of the antitrust division can hardly even shuffle the papers much less examine or understand them.

The health mergers are another issue. Over two years ago, the division issued health industry merger guidelines that basically said, the way we read them, if the merging partners declare efficiencies, we will accept it unless someone can disprove it in the industry. Now, Columbia HCA owns over 300 hospitals. And what is the definition of efficiency? Presumably efficiency is to give consumers a competitive price, to give consumers the best price available in a workable competitive market (quality aside).

It is hard really to even talk about consumer choice here in a managed care oligopoly where the president of one of these giant conglomer-

ates boldly stated that he wanted to control the markets in 14 cities in the United States, and, again, nothing happened from Washington. We all know what he meant because he spells out what he meant in terms of the control of the market—massive market share domination up and across. The definition of efficiency in the health care area could be not market forces and market power that restrict treatment, diagnosis, and rehabilitation.

It could not be market power that issues gag orders to doctors which, in effect, limit consumer choice by requiring doctors not to tell patients of treatments that they could have but were not within the protocol of the HMO to provide. The same holds true for bonuses paid to doctors based on withholding care from patients, including reducing their referrals to specialists. Whether there have been under- or over-referrals to specialists, to have basically an employment-determinative bonus in terms of compliance based on withholding care is not just to compromise the efforts of a supposedly independent profession, but also to enforce it in one direction only by the profit-maximization model of the conglomerate.

In the telecommunications area we have, after many mergers and acquisitions, two cable companies that possess 40 percent of the nation's households—TCI and Time Warner—and following the Telecommunications Act, a massive consolidation is underway. Disney buying ABC has interesting preferential treatment potentials that might worry some antitrust advocates. We have Westinghouse buying CBS, so it stands on a parity with General Electric, which long ago bought RCA and NBC. We have Rupert Murdoch; Time Warner buying the Turner conglomerate. Now how is that to be judged by antitrust?

In terms of their legislative history, the anti-trust laws had the concentration of economic and, therefore, political power very foremost in the minds of the legislators. They did not give any specific criteria of that, but if you read the debates, that was quite clearly a very primary concern. It was not just whether there be adequate competition, strictly speaking, but whether this country's going to be dominated by a few giant trusts or a few giant corporations. They were also concerned that competition be enforced by anti-trust in order to head off the then growing socialist and communist movements on the European continent. They did look at antitrust as an alternative to *laissez-faire*, but not as an alternative to regulation, which they saw as a collaborative way for government to improve the health, safety, and economic performance of the marketplace. They were concerned about different tactics that the companies had been using to force out their competitors through predatory practices, to buy them out in order to restrain or eliminate competition, or to engage in collusive behavior. 'If you can't beat them, join them.'

What is interesting about the telecommunications issue is that the concept of efficiency, if determined by the monetized mind, becomes a self-satire. The industry claims that cable rates have been going down with each succeeding merger, but this is a rather difficult proposition to demonstrate. The essence of evaluating the telecommunications system is not only diversity, but quality, and that may not lend itself to the quantitative pseudomathematics of the Chicago school. But quality and diversity are clearly factors that any common sense person would want to ask in terms of evaluating how an industry is behaving. Now we have further complications, including the demonstration of the inefficiencies

of collusion and mergers by the companies themselves. What did ITT do after it gobbled up 200 companies in the 60s and early 70s? They spent the next 15 years divesting. The breakup of AT&T by the antitrust division, which was opposed by more than a few conservative economists—how did that work out?

One might say that worked out pretty well in terms of innovation and different applications for consumer choice and consumer price efficiency. I doubt whether AT&T would have broken itself up voluntarily. Although having been given the idea once, AT&T seems to be saying that is not a bad idea. Let's shed Lucent and let's shed NCR, which are examples of mergers that were disasters by all criteria.

Of course, there is the argument that the market eventually works. Yes, just like Keynes said, "people will be dead in the long run." It took three decades for "the market" to work for the technical stagnation that was bred by the steel oligopoly in our country, one of the most classic cases of concentrated economic power leading to huge layoffs, devastating communities, surrender of part of our market, like the auto company oligopoly surrendered to foreign companies, in terms of the dislocations that were involved.

We have to put a calendar on the consequences here, and not simply say in the long run everything will work out. These self-propelled divestitures do give us some empirical insight as to how antitrust enforcers should look at these mergers. The question is whether they should look at the mergers and acquisitions and demand a level of empirical evidence *ex ante* or whether they should conditionally approve them. The latter approach seems to be the policy of the FTC at the present time with the pharmaceutical drug

management companies being bought up by the pharmaceutical companies. The FTC has rendered conditional approval, but we all know in reality they do not have the staff or the will power to deal with these mergers.

Let's take another look five or ten years from now. The FTC will not have the power or resources to prevent companies from reshuffling their assets and corporate organizations. These companies can make their acquisitions in such a way that any distinct entity will disappear from an objective reassessment by the Federal Trade Commission.

The Defense Department also complicates antitrust enforcement. National security is always a consideration in whether mergers are to be approved or disapproved, and national security can be a very qualitative variable. And it is interesting to note that national security is accepted by the Chicago school as a criteria and that they will concede the issue because of national security. Now take the Martin-Lockheed merger. Here were two competitors, two for the Pentagon business. They decided to merge. They went to the Defense Department last year, and they cut a deal. They said we think that we will be more efficient in handling Pentagon business as one company than two. Now the Defense Department did not say, "Is that because you have excess capacity? Is that because, as giant companies, you cannot retain the requisite specialists in order to make competing bids? What is the purpose? Is it because you are too top-heavy managerially and you want to prune away the lard?"

The Pentagon's position was that it is more efficient to deal with one large company that has the capabilities of both of the former two companies. For that, we are going to spend up to \$1.5 billion of taxpayer money facilitating the merger,

including about \$30 million which is heading toward executive bonuses for less than ten men at the top of the merged companies.

Now where is the antitrust division? First, they are always on the defensive when it comes to national security arguments. The assertion of taxpayer efficiency is something that invites a re-description of the tooth fairy when it comes to the defense industry, and the bonuses, of course, had nothing to do with what actually facilitated the merger. The Defense Department has always been a thorn in the side of antitrust enforcement agencies, but they have taken this now to new lows in terms of reallocating taxpayer dollars to facilitate a merger that presumably is made on the basis of intra-corporate efficiency goals. They think they are going to save so much money. Why do they have to have a corporate welfare subsidy to top it off? There are not many antitrust chiefs who can take on the Pentagon in a situation like that to begin with.

If you look at the staff allocation in the IBM case in the antitrust division, you can see that they can take on very, very few cases. The corporations and their corporate counsel know this, and they know that there is a real staff allocation problem in the division. They know that the division is going to jump up and down, maybe, and put out a few probes, but to take it all the way with credibility to a trial is just not going to happen, quite apart from the way they read the judiciary at the present time.

Now what kind of resurgence could antitrust have and on what theories? One area would be the antitrust aspects involved in raising someone else's costs. That is an approach that has gotten some interest in the literature recently, and the raising of someone's costs describes how rivals can be harmed even in the absence of tradi-

tional price predation. For instance, in the Detroit Auto Dealer's case (*In re Detroit Auto Dealers Assoc., v. Federal Trade Commission*, 955 F.2d 457 (6th Cir., 1992); *petition for rehearing denied*, 1992 U.S. App. LEXIS 11691 (May 22, 1992); *cert. denied*, 506 U.S. 973 (1992)), auto dealers agreed to restrict their hours of operation. This raised the cost of third parties in related markets in an anti-competitive fashion. For instance, it increased consumer search costs and made consumers less likely to shop vigorously for the best price, because they are at work. When you limit the hours, you limit the discretionary time of people to shop around.

The second approach is a wealth transfer as a goal of antitrust. Historically, the antitrust laws were supposed to serve certain social, political and fairness objectives, but now that has been replaced with this narrow definition of efficiency as the original and only legitimate concern of antitrust. The law's main thrust was to give consumers, not cartels or monopolies, the fruits of competitive capitalism, and under a wealth transfer approach, you can see that, whether involving price discrimination cases, horizontal or vertical restraint cases, a different level of initiative can be generated.

The third aspect of antitrust is the effect of imperfect information. This issue seems to become more and more prominent with the increased complexity of the marketplace. Here is where the *Eastman Kodak* case, if read broadly, might have interesting affects. The *Kodak* case holds that anti-competitive concerns can arise despite the absence of traditional market share-based market power. The case holds that there are now two ways to exploit consumers, one through traditional market share-based market power and the other through imperfect informa-

tion that substitutes for traditional market share.

Imperfect information can make a market that appears structurally competitive to behave anti-competitively. This is where we get into some very interesting empirical studies of how consumers behave in the marketplace up against different market structures. In many instances, consumers were behaving not to maximize their own utility, but in a very coerced or inefficient fashion because of the imperfect information that is available to them. I think your *Reporter* here at the law school has a good deal of documentation about what happens to consumers in an imperfectly-informed marketplace.

We need to give antitrust a fair shake in this country with facilities to organize consumers so to make it more easy for them to band together with their full-time staff of experts so they can begin generating some new realities in the marketplace. This would facilitate an improved situation in terms of straight-out bargaining, negotiating, as well as monitoring the enforcement or lack of enforcement of consumer protection, which includes the antitrust laws. Here in Illinois a prime example of this facility has been operating with some success, and that is the Illinois Citizens Utility Board.

The theory behind these groups is that where the companies have a legal monopoly or are guaranteed or subsidized, it is a proper function of the regulatory agency to facilitate representation by consumers in a coherent and independent manner. This protection is already in place for the companies, where the regulatory agencies have permitted the transfer of costs such as attorneys fees, propaganda, and advertising, incurred by the electric, telephone, and gas companies, into the rate base. The effect of this is to charge the consumers for the advocacy of their

own opponents or adversaries.

Just in terms of those kinds of reciprocities, Illinois passed a law in the early 1980s requiring an insert, at no expense to the utility company, to be put periodically in the billing envelope of electric, telephone, and gas companies. Then along came the most bizarre Supreme Court decision this century for extending the concept of “the person” to a corporation. In a 5-3 decision with Rehnquist in vigorous dissent, Lewis Powell, a former Utilities attorney, reversed the California Supreme Court and ruled that this regulation and all regulations like it were unconstitutional (*Pacific Gas & Electric v. Public Utilities Commission of California*, 475 U.S. 1 (1986)). Powell ruled that the plaintiff electric company had its right to remain silent violated and, therefore, its first amendment right violated by being required to carry this insert at no expense to itself, no extra postage. The consumer group pays for this charter under the Illinois law.

The people in Illinois passed another law requiring state government agencies to place an insert like this in the motor vehicle registration envelopes. The Illinois Citizens Utility Board continues this project with 200,000 members to develop a more informed and assertive consumer constituency for matters relating to utility monopolies. Now this information aspect is not gen-

erally included in discussions of antitrust. But unless there is a different kind of infrastructure, antitrust law will continue to bend under this power that I have just described that goes all the way through to the judiciary.

Just to reverse it a bit, what do you think the state of the antitrust laws would be if there were no professors writing the new learning, no corporate funded seminars for the judges, no corporate cash in campaigns, no right-wing politicians being elected, no corporate power prevailing on the Justice Department and the FTC? Where do you think antitrust would be today? So they know what an infrastructure is? They know what a political context is to advance their interpretation of this extremely valuable common law of antitrust.

It is time the consumer perspective realized that as well. It's time the consumer advocates begin developing their own infrastructure, their own process to countervail the corruption of cash in campaigns and other non-meritorious sequences. There needs to be a view of antitrust that would be more faithful to the legislative history, writ large, and more wholesomely reflective of the connection between deconcentrated corporate power and a functioning workable democracy. Thank you.

CONFERENCE PRESENTATION

Presentation by Professor Epstein:

The Narrow Province of the Antitrust Laws, Or, Doing a Few Things Well

I would like to thank Mr. Nader for his kind introduction. I am the University of Chicago representative on this panel. So, by virtue of status alone, I suppose I count as the right-wing voice on the proposed topics for discussion. And to some at least, I might represent a strand retrograde thinking that is best banished from polite discussion. But, I take a far more positive view of my affiliation and think that there are some messages that should be heard today even if they have not been heard, or heeded, before. So on one point, at least, I actually disagree with Hubert Will. I think the essence of a democracy does not lie solely in the willingness to entertain new ideas, although that is surely part of it. But sometimes it is critical to reach back to some very old ideas, which might with profit be reinvigorated and reasserted in some modern academic setting—not just as a talking point, but as a blueprint for serious reform.

I give this brief introduction to make clear I want to respond more pointedly to some of Mr. Nader's observations, so we can openly debate the place of antitrust law in the context of larger issues of social and political organization. I do this not because I am a representative of corporate America. In fact, much of what I believe would make some titans of industry tremble in their boots, at least if they thought that it had some reasonable chance of

passage. But, I am not here to denounce corporations either. The topic for consideration is neither the glorification nor the damnation of "corporate America," standing alone, or in its relationship to ordinary individuals. Our real question is what exactly are the strategies and techniques of corporate regulation that we should adopt to advance some sensible measure of social welfare. This inquiry is not unidimensional, but should take into account the interests and the desires of consumers, individual workers, and even shareholders, all of whom have roles to play in any long-term social investment.

Legislative buying and selling

It was very instructive that Mr. Nader began the discussion with the connection between political power, which corporations can exert, and its relevance to antitrust law. I think that this con-

Richard A. Epstein is the James Parker Hall Distinguished Service Professor of Law at the University of Chicago, where he has taught since 1972. He has written several books and numerous articles on a wide range of legal and interdisciplinary subjects. He has taught courses in regulated industries, communications, contracts, criminal law and policy, real estate development, taxation, and torts. Professor Epstein earned his LL.B. from Yale Law School cum laude, a B.A. (Juris.) from Oxford University with First Class Honors and a B.A. from Columbia College summa cum laude.

nection is a useful place to begin, but I put a very different spin on the topic. There are two ways to make a political deal: first, you have to have somebody who is prepared to buy, for cash or other considerations; and secondly, someone who has something to sell.

The sellers in this context are the legislators. The reason they have a great deal to sell is that the structure of American Constitutionalism, particularly since 1937, has been read to say that huge portions of the economic pie are always up for sale depending upon who can get to Congress first. This rise in political influence is a necessary consequence of a regime in which property rights are weak and is subject to redefinition by legislative whim at any and all times. A consequence of the 1937 revolution, shall we say, was that a new depository of goodies can now be disposed of through re-legislation, not only once but repeatedly. Once the legal rule protects individuals who are capable of selling, it is very easy to find individuals who are willing to buy. It is commonplace in communications, banking, insurance, construction and countless other industries large and small to witness all sorts of transactions in which fortunes can be made or lost by receipt of a permit, a license, or a franchise.

This legislative buying and selling does not take place only at the federal level with respect to international trade and similar subjects; it also takes place at the local level where, in fact, the ability to obtain a zoning permit, variance, conditional use permit or something of this sort, can literally change the value of a piece of land from ten dollars to ten million dollars at the whim of a single board or bureaucrat. My own view about the subject, borne out by recent political revelations, is that when these economic rents loom so large, and the property system remains so desta-

bilized, the patterns of influence and abuse cannot be halted by altering campaign finance regulation or by trying to insulate political actors for external influences. The stakes are too high. The promise of gain too great. Water will seek its own level.

Turning the guns inward

Now how do these insights apply to antitrust law? During the consolidation of the New Deal after 1940, it was common to hear the following observation: in determining the appropriate form of industrial policy in the United States, it is not a question of whether we prefer competition or cartels. It is rather all a matter for Congress to decide in accordance with its vastly expanded powers under the Commerce Clause of the U.S. Constitution. Therefore, what typically happens is the antitrust laws represent only a very particularistic view that under certain circumstances, at certain times, competition is the preferred mode of industrial organization. I think the utter inability to constitutionalize the protection for competition as against some of its rivals has led to many of the enormous abuses Mr. Nader described. If you want to talk about what is truly wrong with America, you have to ask the question, "What about legislation that takes markets that by all rights should be competitive, and turns them into private business monopolies sanctified by law, shielded from competition from abroad so that they can continue to operate without interference for long periods of time?" The antidumping laws, for example, essentially operate on a theory that low-priced competition from abroad is a form of predation or unfair competition; and this is at a time when the entire theory of predatory pricing is wholly, and rightly, dis-

credited, under the antitrust laws.

Often the protection to domestic companies takes a far more specific form. To give you but one example of this, I was called a couple of years ago by some desperate and forlorn lawyer who represented those companies that wanted to import sugar at the world price into the United States. He said every time they wanted to do so they had to deal with quotas set up by the Department of Agriculture that were designed to protect the production of domestic beet sugar. Their cozy arrangement was that importation was always restricted to the residual, or leftover, only after domestic firms reached their protected production targets. Those residuals continued to wither away in the face of expanded domestic production above the world price. The justification for this grotesque scheme is that it has no direct implications for the federal budget because all the transfers were disguised and in-kind, and, thus, shielded from the glare of unfavorable publicity that attaches to explicit cash subsidies of domestic industries.

There is no conceivable way that a private cartel of beet sugar producers could have produced this long-term result. It took the combined exercise of power from the agriculture department, the state department, the commerce department and countless others to make sure that competition would never reach these shores. So I think the first task of antitrust law is basically to turn the guns around, not look at corporate America, but blast away at the United States government which supports a series of disgraceful and partisan practices that do violence to everything that the antitrust laws stand for.

Now with those moderate words, I suggest to you, that an alteration in antitrust policy does not start with the way in which private organizations

try to put together their business arrangements. Rather, it starts with the true colossus in this area, the one legal monopolist who all too often confers its power upon individuals who have no business whatsoever in getting them. Now I would like to think this was just an isolated area, but we have a government which is much more adept than that. We have an entire system of antidumping laws which never ask the question of whether or not foreign importation works for the *benefit* of American consumers. Rather, our energies are designed to figure out why someone else is able to sell for less than domestic firms and to eliminate those competitors which seem to have a fair measure of success. We would do so much better if we ignored the question of why the prices were low and simply purchased goods on favorable terms.

To see why, let us suppose that some foreign government is silly enough to decide to subsidize the production of its goods for export. If they are willing to share the subsidy with us, we as a nation ought to say "thank you" and consume as much of the subsidized goods supplied from abroad as makes sense at the price. Consequently, when we "bankrupt" them by virtue of their own silliness, they will soon think twice about subsidizing American consumers. Instead, the antidumping laws invite major American law firms and their corporate clients actively to support these dubious policies.

It is an area of law whose internal difficulties I do not begin to understand. In a sense, I am proud of my ignorance about the implementation of a scheme which should never be, even though it enjoys the backing of powerful American corporations. Before we worry about antitrust enforcement against private monopolies, we need a thorough renovation of our government

system to make sure that it does not become the covert agent of monopoly power.

The Supreme Court's lack of direction

The next question is, "Should we expect any leadership on these issues from the Supreme Court?" I think the answer generally speaking is no. Let me just mention two reasons as to why the leadership on this issue will not come from that quarter. The first point returns to the inner tension between the antitrust laws and state sovereignty which took place in the aftermath of the legitimation of the New Deal in a case called *Parker v. Brown* (317 U.S. 341 (1943)). Essentially, the raisin growers in California managed to get the state legislature to prop up its cartel. This was not a great inconvenience to California consumers because over 90 percent of its raisins were sold out of state. What the Supreme Court held in effect is that if ordinary businesses just want to organize a private cartel, which is likely to disintegrate over time given the multiplicity of sellers, they will be hit with treble damages. If, however, these businesses can persuade California legislators to prop up the cartel so that consumers in Massachusetts pay the price, this exercise by state sovereignty requires judicial genuflection that stays the enforcement of the antitrust laws.

What happens is that this legal regime marks a complete inversion of the proper approach. State-sponsored cartels in the aftermath of the New Deal legitimation are more permanent and more dangerous than privately-operated ones, but they are given complete immunity from the antitrust act. This is not the way we want the system to operate.

The second point relates to the utter weakness

the Supreme Court has shown in the protection of property rights in relation to trade issues. Thus, it is commonplace for statutes to impose line-of-business restrictions on firms so that, for example, banks cannot sell stocks. Yet, the court will not treat this deliberate interference with advantageous relationships as a taking (of the right of disposition inherent in most forms of property) for which no compensation is required. Indeed, the thrust of Supreme Court jurisprudence on property rights is to protect Mrs. Loretto (*Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419 (1982)), where the cable-company wanted to install a small box on the roof of her apartment house, but to remain utterly impassive in the face of restrictions that prevent new firms from entering into competition with established companies. I would dearly love to see the Supreme Court rethink its jurisprudence and to conclude that deference to a legislative intrigue on economic matters is not entitled to high levels of constitutional deference.

Maximizing consumer welfare is not preferred

Now, the remaining question is what should the antitrust laws do after they have completed their first task, which is getting the government out of the business of propping up cartels. Here I disagree somewhat with Mr. Nader and indeed somewhat with the stated premise of the Consumer Antitrust Institute at Loyola University. Let me see if I can explain the source of my disagreement by trying to persuade you that the narrow-minded, economic approach, often associated with the University of Chicago, is intellectually rigorous, at least when pruned of the excesses of its most ardent devotees. This ap-

proach turns out to have a surprising subtlety in its application which leads to results that are neither counter-intuitive nor improbable.

The first question is what should the legal system try to maximize. Here, Mr. Nader and I are certainly in agreement that you cannot have any coherent policy that leaves some potential gain untapped. You have to seek to maximize *something*, for otherwise you are willing to settle for second-best. To the extent that the law looks to get a little bit of everything, it opens up the system to so much slippage in the joints that the upshot is the confused mush that passes for American trade policy. It is just that tentative type of thinking that leads to the excess of deference in American constitutional and administrative law. Deference allows the legislative operators to take their slice of the action at the expense of the public they are supposed to serve.

The willingness to stand firm behind a single value has a strong therapeutic effect. It cuts out the illusion that there are no right and wrong answers in trade policy, or for that matter anywhere else, and forces everyone to think hard about what should be done and why. It, therefore, becomes very critical to ask the question, "What is it that antitrust law should try to maximize?" And the answer is not consumer welfare. This would be a terrible mistake for antitrust law.

Consumer welfare as the ultimate standard is selective and partisan. It means that you look solely at the welfare of one segment of the population to the exclusion of all other segments of the population. If you are quite literal in the application of the rule, it follows that if consumers gain ten and employees lose a hundred and shareholders lose a thousand you have maximized consumer welfare. It means you may seek a localized gain notwithstanding the enormous glo-

bal loss borne, of course, by other individuals.

Nor does this approach work to the advantage of any group of people. In looking at some particular transaction, every person occupies one and only one role. When we start to look at an economy, however, the roles begin to flip over, overlap and conjoin. I may well be a consumer in one transaction, but, to the extent that I am an employee with a pension fund, I am now a shareholder in the next. I do not think it particularly wise for somebody to tell me that I will gain one unit through a policy as a consumer if it means that the value of my total portfolio will go down five units. Indeed, if all consumers have pension plans, then this global trade turns out to be a form of mutual hari-kari. Therefore, we want to avoid defining our universe so narrowly that certain kinds of losses from antitrust or regulatory policy can be ignored. Rather, we want to define the legal universe so that all gains and losses to all individuals in all roles over all periods of time are taken into account, no matter how many times this game is played. Now, this ambition is difficult to translate into comprehensive policy because the more constraints in the relevant system, the more difficult it is to understand how it operates, or so it appears.

But in one sense this inquiry is a bit easier that it sounds, at least if we put aside for the moment some of the exotic complications about human behavior, and ask how to design an antitrust policy that maximizes the sum of consumer and producer surplus, where the "producer" under these circumstances turns out to be a whole amalgam of individuals that includes shareholders—some of whom are poor, some of whom are on pensions—as well as employees of firms within the particular industry. We do not want to take a state of mind such that every time a con-

sumer group loses an antitrust suit for any reason we have a political or intellectual crisis.

The second reason we have to be extremely careful about a proposition of consumer welfare is that it tempts us to engage in a certain degree of demonology in evaluating business. For example, one of my favorite questions in contracts class is to ask the students to outline a discussion of consumer fraud. It contains two topics. The first topic deals with fraud by producers against consumers; the second topic fraud by consumers against producers. If you are actually worrying about the relative magnitudes of these two risks, my guess is that fraud *by* consumers outstrips in importance fraud *on* consumers.

I recall a recent piece in the New York Times that indicated that many retailers had to fundamentally re-examine their return policies for goods sold to combat consumer practices that were little better than shoplifting, which was also a serious problem. Consumers would wear outfits for the season, wear them out or damage them, and return the garments saying they changed their mind on the wisdom of their purchase; or consumers would receive merchandise from one store and return it to from which they had not purchased it, and simply claimed they had lost the receipt. My attitude is when a store starts getting tough on a return policy, it benefits me as a consumer because it spares me the burden of having to pay for such dubious consequences.

In thinking about policies, we cannot therefore idealize any group of the population. We have to remember the Adam Smith injunction that producers who are left to their own devices may conspire to fix prices, but qualify it by noting that consumers left alone in a changing room may walk off with the goods. Once rid of any

optimistic idealization, we can start to think more soberly about antitrust law. To give a more concrete illustration of the way in which this particular process works, consider, for example, the charge of a tie-in against the firm which insists that in order to sell a certain piece of equipment to a consumer, it is going to also require the consumer to purchase their installation services so that goods and services are tied in the original arrangement. One could easily think of all sorts of theories about leverage and extension of market power from one area to another area to which the traditional Chicago answer says that leverage is not needed to exploit monopolies. The monopolist can just raise the price on the key product and sell the remainder at the competitive level. This may not be the entire truth, but certainly covers a large number of cases.

By the same token, there may be anti-fraud reasons to use tie-in arrangements. Let a product be installed by (A) after it is manufactured by (B), and when something goes wrong with the finished product, who decides the blame against (A) or (B) when each points a finger at the other. The tie-in device helps make sure that when one firm is responsible for the whole process by testing the goods after installation. The issue is not only important when both (A) and (B) are firms; it also matters when (A) is the purchaser of the good, for it will not do to allow (A) to recover for defective merchandise if he (or his children) are responsible for the product damage, only to claim a defect in installation. The connection between consumer fraud and tie-in arrangements suggests that tie-in policies need not retrograde and need not be designed to hurt consumers. One useful function they serve is to protect consumers who are well-behaved from having to pay for the misconduct of their fellows.

A more focused antitrust policy

From this particular case, it is instructive to think about the general structure of the antitrust laws. Here, as everywhere else, resources are limited. We have to organize this body of law so every available dollar is spent upon those areas where the antitrust payoff is going to be the largest. We should not spend large sums on exotic issues of great interest to the lawyers who bring them, but of little value to the society that underwrites them. Lawyers must not be as bad as doctors sometimes are. Lawyers should not spend their money of the kinds of heroics that are analogous to end of life heroics, when it is better spent on routine nutrition that increases the health of the general population. Lawyers find easy cases boring, but they are also indispensable for the smooth operation of a social system in which initiative better comes from other quarters.

The dissipation of energy is possible in antitrust. Mr. Nader referred to the spate of failed conglomerate mergers, including the ITT deal. When those transactions surfaced in the 1960s, I remember my University of Southern California Law Center Colleague, Michael Levine, telling me that these acquisitions would not last because they offered no synergy. Left alone conglomerate mergers will simply wither of their own accord, for the unification of three unrelated businesses leaves when all is said and done three unrelated businesses. There was at that time a kind of a corporate conceit, which I hope has been lost today, which says good managers can run anything without knowing much about the business being managed. You just had to have people skills, personnel skills, regulatory skills and so forth. We have discovered, in the wave of divestitures that have taken place afterwards, this

maxim was a misplaced piece of optimism and hubris. Most managers actually have to know something about their core competencies in order to operate them. A business that has lost its focus is like an academic who tries to master everything instead of keeping focused on one or two areas.

Since these types of mergers will wither of their own accord, the antitrust lawyers should ignore them and focus instead on those particular practices which are likely to persist because they yield net benefits for the firms involved that hurt the firms involved. Under those circumstances, some selection of targets is essential. The antitrust law should go after horizontal price-fixing restraints that are devoid of any changes in underlying corporate structure. Even horizontal mergers are trickier than simple price-fixing arrangements because mergers do generate efficiencies. It is not just Chicago economists who say that happens. If you put two oil companies together, there may well be synergies in production if one has the technology for extraction and the reserves on which that technology can be turned loose. Mergers in industries that are unquestionably competitive, both before and after the acquisition, can see the combined stock price shoot up to take part in their synergies. I do not see any of those gains coming out of a straight cartel price-fixing arrangement, or (with a little more caution) explicit territorial divisions. My recommendation is that the antitrust division, for the most part, try to concentrate its efforts with respect to those areas in which it turns out diligent enforcement will yield the highest level of social gain.

The question we then have to ask is whether the antitrust law should be devoted exclusively to maintaining perfect competition among au-

tonomous firms over a wide range of products and services. Unfortunately, that objective is not always obtainable, so we have start thinking about other forms of regulation as well. How well does antitrust enforcement work in a world in which there are extensive forms of direct regulation? This is, in fact, an exceedingly important question. It was one of the critical questions with respect to the enforcement of the Interstate Commerce Act and the period before World War I. It is coming up currently in an extremely complicated fashion, with potential for missteps in dealing with the Telecommunications Act, to which I will return to momentarily.

Generally speaking, firms can compete in two ways. First, firms compete by going out in the marketplace separately to purchase inputs, which are then combined, repackaged, and resold. The production function of one firm is independent of the production function of any other. In these settings rivals need not trade with each other. Bloomingdales has no reason to buy goods from Magnin's to reach its customers. We have a world without networks and interconnections. But with huge portions of the American infrastructure some level of interconnection and cooperation between competitors becomes essential.

It is of course possible to build two railroad systems that run side-by-side, but, generally speaking, the capital cost of parallel investment is very high. What one wants is a series of standardized rails over which competitors can effectively ship their cargo from one line to another line. The tracks are common and the cars are separate. The question is, "How will that operate?"

Back in the early days of the antitrust enforcement, *United States v. Terminal Railroad Association* (224 U.S. 383 (1912)), laid down "the

essential facilities doctrine" in order to respond to this problem. St. Louis, being located on the Mississippi River, lies at a junction of rail traffic going east and west. It therefore was the natural point to switch freight and passenger cars from one railroad to another. Those switches could not be accomplished sensibly unless all carriers had access to the same terminals. The price of exclusion for any given carrier was separation from the rail network, and with it financial ruin. Everybody instinctively understood, and Mr. Nader knows, that when you are dealing with bottleneck problems, you cannot simply use the old model of autonomous firms and perfect competition.

In these settings the only sensible response is to develop a set rules that requires all carriers to be served at the common terminal, and to be charged a reasonable price rather than one that the traffic could bear, that is, a monopoly price. The price may arguably be set by regulation, or at least reviewed by regulation. The hope is that sensible bargaining will take place in the shadow of that constraint. But even my devotion to laissez-faire capitalism is not enough to persuade me (any more than it was able to persuade the laissez-faire judges of the earlier era) that you could do without some level of government regulation. Indeed the judges of the earlier time were able to respond to this well-defined risk in a brisk and responsible fashion because they were not distracted by all the false visions about the reach and the scope of the antitrust law.

One can go back to the 17th century and read Sir Matthew Hale talking about the carriage of goods by sea. He makes exactly the same point about how the special rules that are used to regulate Crown monopolies. The monopolist must take all comers at a reasonable price and could

not charge what the market would otherwise bear. That, in turn, was then incorporated into the English common law under the doctrine of "things affected with the public interest" in a case called *Allnut v. Inglis* (12 East 525, 104 Eng. Rep. 206 (1810)), which was decided by another very learned judge, Lord Ellenborough, who knew that some price regulation for monopolies was a necessary deviation from the usual rule that allowed all sellers to charge whatever price they chose in a market.

The phrase "affected with the public interest," which had its origins in English common law, became transmuted into American constitutional law in *Munn v. Illinois* (94 U.S. 113 (1876)). The case involved price regulation in the grain elevator business and may well have been misguided on its facts, for it was not clear that the regulated grain elevators held any kind of monopoly position. But the particular facts are not the concern here. What is important is to recognize that the entire field of rate regulation throughout the last part of the nineteenth century grew up in response to the difficulties of dealing with the new monopolies that obtained dominance in the railroad business and in such fields as electricity and power and in telephone and telegraph communications. In these last cases, where the network elements are strong, as they were with the railroads, it will not do to break them up into autonomous competitive firms.

Telecommunications and antitrust

When it comes to telecommunications, I cannot go through the long and sorry history of how this industry has been regulated. [For one account see MICHAEL K. KELLOGG, ET. AL., FEDERAL COM-

MUNICATIONS LAW ch. 1 (1992).] Suffice it to say that in the early days, AT&T did not get its position merely through accreditation. It did not get its position solely by market superiority. It got its position through a government deal when the formulation of the Federal Radio Commission agreed to divest itself of all of its radio stations—it was in the broadcast business at the time—in exchange for a cradle-to-grave regulated monopoly with respect to telecommunications, which was assiduously enforced by the FCC from around 1930 until the 1960s, until it was undercut by the new entry of MCI and other specialized carriers. Matters came to a head first with the breakup of the Bell System into seven Regional Bell Operating Companies, each with local monopolies, and a competitive long distance market. (For the decree, see *United States v. American Tel. & Tel.*, 552 F. Supp. 131 (D.D.C. 1982).)

There is no question today that removing the legal monopoly status of the local exchange carriers introduces many new complexities. One problem arises because the government had previously used the local monopoly rents as a source of subsidy for residential phone users, especially those with low incomes. Yet, I can see no reason to subsidize rural or residential telephones generally, given the high costs for the limited benefits. Likewise, I see no reason to preserve restrictions on the lines of business that the deregulated firms can enter. Why should the phone companies not be allowed to enter, for example, into the alarm business? (See Telecommunications Act of 1996 § 275(a).) If you look at the Telecommunications Act of 1996, you see a Christmas tree for special interests in addition to some fairly sensible structural reforms located at its core. However, one of the reasons we continue

to have monopoly prices is because we have universal service obligations. One of the great dangers under the 1996 Act is that those universal service obligations might expand so that the competitive nature of the industry would be heavily impeded by the taxes that it will take to fund it. (*Id.* § 254). I predict that AT&T and the regional Bells may become friends again when the issue becomes what is the size of the universal service obligation under which they will labor.

Another point to consider is, "What do you need government regulation for?" It is very clear you need it to forge the interconnections on the networks just the way you needed it in dealing with railroad termination and transfer. If you look at the statute, however, the FCC does not keep its eye on the ball. They have two sets of provisions in there, one of which they need and one of which they can get rid of. The first, and needed, set of rules are those that require the sale of unbundled network elements in order to make sure that the network forces will have duties to interconnect. (*Id.* § 251(c)(3)). Those things seem to be appropriate for either the FCC or for the state commission enforcement. But when the statute addresses the resale of vertical services, that is, what bells and whistles you put on the system, it crosses over into territory where there is no need for regulation at all. (*Id.* § 251(c)(4)). Rather than requiring resale of these elements at prices different from those of unbundled network elements, and so forth, they should have said anything that you could buy in a competitive market you cannot claim as being directly from a local exchange carrier.

Why do we want this distribution of rights and duties? Because it turns out that allowing these forced sales in a competitive market gives the

buying company an enormous strategic advantage. If the prices set by the FCC are too low, the buyers will gobble up the services; if those prices are set too high, then prospective purchasers will simply venture into the marketplace to acquire them from some independent third-party provider. So the outsider can win but cannot lose. By forcing transactions between individuals over services that are not necessarily tied into the network, the law introduces a costly, mandated pricing system that can only do worse than the market.

On many points, therefore, the 1996 Telecommunications Act has the wrong system design both on resale of retail services and on the creation of a universal service obligation. On this point, it is best to remember that the function of regulation, like the function of the antitrust laws is to curb the uses of monopoly power. There are very few things that an antitrust law can do well. We should strive, therefore, not to fall prey to the syndrome whereby we treat the antitrust law as an all-purpose screwdriver that does a thousand tasks, none of them very well. Let us sharpen the focus and limit the direction to the preservation of competition where competition is possible—that is, deal firmly at the very least with horizontal price-fixing in competitive industries. Where pure competition between autonomous firms is not possible, we should require the minimum, but only the minimum, connections to keep the network intact. Once these goals are accomplished, we can take comfort in the old Hippocratic maxim that says the primary goal of medicine, and the first principle about law, is "primum, non nocere," or "first, do no harm." That should be the prescription for the antitrust laws as well.

CONFERENCE PRESENTATION

Presentation by Professor Fox:

Antitrust and Values: Where Liberals and Libertarians Meet

I am going to say a few words about the purposes of the U.S. antitrust laws; what they have been, into what they have evolved. I am then going to shift to Eastern Europe to speak about what competition policy might do if we are starting from scratch in a new free enterprise economy. Finally, I will say a word about whether or not we should move to an international system and, if so, to what principles might we look forward.

Why do we have antitrust?

To begin, two weeks ago I attended an American Bar Association Antitrust Section program in Washington, D.C. It was designed to reflect on the FTC hearings that Professor Pitofsky, now Chairman of the Federal Trade Commission, organized to investigate the forces of world competition and what they might imply about possible revisions in antitrust. Professor Pitofsky has been concerned, among other things, about whether our merger law should have an efficiencies defense and whether the lack of such a defense has handicapped American firms in world competition.

The first two panels of the program addressed competitiveness and efficiency. In the first panel, Professor

Steve Salop, who is a professor of economics as well as an advisor to Professor Pitofsky, demonstrated how an efficiencies defense can work. He began with the paradigm that competition law is only about producing efficiencies and, therefore, we should prohibit only that which is inefficient. To understand what is inefficient, we must look only at those transactions that are output limiting and raise prices. Starting with output limitation, then, as the one and only harm of antitrust, Professor Salop showed how an efficiencies defense would work. He said that when a merger occurs, if the merger is anti-competitive, you must examine the extent of the inefficiency caused by the merger, and then examine the efficiency gains.

What are the efficiency gains? One such gain may be management cost savings. Another may

Eleanor Fox is the Walter Derenberg Professor of Trade Regulation at New York University School of Law where she teaches antitrust, European Union Law, international and comparative competition and trade policy, and torts. She is a co-author of case books on European Community law, antitrust law, and the competition policy of the Central and Eastern European countries and has written numerous articles on antitrust, economics and values, and on trade and competition under the auspices of the WTO. Professor Fox earned her LL.B. from New York University School of Law and her B.A. from Vassar College.

be that by having three firms instead of four, redundancies have been eliminated and costs of downsizing have been saved. As Professor Salop spoke about what gains would be taken into account, he said the only question in antitrust today is whether the purpose of antitrust law is to maximize consumer welfare or to maximize total welfare. Both involve looking at the efficiency outcomes of particular transactions. Salop prefers consumer welfare.

Professor Epstein states that the only question is whether, like Salop, one believes that antitrust should be governed by consumer welfare or total welfare. One who has read *The Antitrust Paradox* knows that Professor Bork, like Professor Epstein, defines total welfare by looking at producer and consumer gains. What is left out? The workers, of course, among others, are left out.

Is this truly what antitrust has come to? Must we define what it is that we are going to maximize? Must we prevent only those transactions that result in harm to either consumer welfare or to consumer and producer surplus? Is summing up the welfare outcomes of every single transaction equivalent to protecting the competition that antitrust protects?

In the United States, consumer welfare is the widely-accepted model or focus for antitrust today. The model prohibits relatively little. Proponents believe in letting firms, even big firms, do what they choose unless this conduct is cartel conduct or has this effect.

Antitrust scholars and historians know that this is not how antitrust began. Competition as efficiency may be seen as the “flip side of the coin” from the original design. Antitrust began as an attempt to limit producers’ power and to protect entrepreneurs’ freedom to compete. Much of our case law is dynamic. If you read the cases one

hundred years old or so, you will see that the goals were to keep markets open, to keep them free from being artificially clogged, and to disperse power as a check against governmental power and, thus, to prevent totalitarianism in the United States. When it comes to the choice between competition and efficiency, the Supreme Court said, ‘Congress has not given us the discretion to choose, and Congress chose competition.’

After all of these years of antitrust with the freedom component, the autonomy component, and the dispersion component, came great changes. Global competition entered markets. In the late 1970s and early 1980s, there was a call for cutting back the antitrust laws on the theory that antitrust had lost its roots and was interfering with the competitiveness of business in the economy. Our trade barriers were lowered, our foreign competitors became much stronger, and United States firms that once had power became honed down by the foreign competition.

How did we get to the consumer welfare model of today? In my view, by the roundabout theory of antitrust freedom. Antitrust is about freedom of enterprise. It is akin to free speech—the freedom of the speaker to speak and the freedom of the listener to hear. It is about the freedom of the producer-entrepreneur to compete on the merits and the freedom of the customers to get what they demand.

Freedom has been used in different ways through the years. If you are a buff of *Dr. Miles* and Oliver Wendell Holmes, you know that Justice Holmes thought that the antitrust laws ought to uphold the freedom of firms, even large firms, to compete without government interference. However, if you happen to be more akin to the spirit of Justices Black and Douglas, and more

recently Justice Stevens, you may think of anti-trust as freedom of entrepreneurs not to be fenced out of markets on the merits; freedom of people not to be exploited by those in power.

During the global competition revolution beginning in the late 1970s, there was a need to modulate, to resolve the tension between these two visions of freedom. There was a need to determine which freedom we wanted to preserve. The view favoring nearly unbridled freedom of even powerful firms overwhelmed the "free trader" vision. Consumer welfare became a proxy to limit government intervention in the marketplace.

The United States has done fairly well under this new requirement. We have rationalized antitrust and thrown out the so-called baggage of the 1960s. Our democracy, our markets, and our free enterprise system are very strong. But at the expense of the less well established business, the "little guy."

Eastern Europe: *Laboratory and lessons*

In looking only at the United States, however, one may forget the truly great freedom aspects of antitrust. Therefore, let us look at Eastern Europe. In 1989 and 1990 in Central and Eastern Europe, there was a spectacular democracy revolution. This revolution brought a change from communism to democracy, from command and control, with inefficient monopolies growing top down, to free enterprise. As a part of this change, the countries involved saw the wisdom of free enterprise facilitated by antitrust.

In these countries before the velvet revolutions, people did not have economic rights to choose what field they wanted to pursue. They could be put in jail for profit-making. Suddenly,

as a result of the revolution, these individuals gained freedom of enterprise. Freedom of enterprise has become so important to these countries that it is now recognized in their competition laws. What do these countries need most from their competition laws?

My answer is: the Central and Eastern European countries most need competition laws to anchor their free enterprise. To do so, the laws must prevent monopolistic firms from using strategies to block markets. Further, these laws must be used to prevent cartels by prohibiting the firms from collaborating, from acting like one large firm, from going back to old habits. They need to have a competition system that will be a strong voice in the government so that enterprise can be free and begin to make inroads without the danger of being taken over and compromised by the government.

That is what I believe the competition laws should do. In reality, however, this is not the focus of the law. Many may remember when the Justice Department and the Federal Trade Commission, as well as the European Commission, sent many individuals to help the new agencies and to impart knowledge on a grass-roots basis. Simultaneously, there was an ideological battle. Many United States antitrust experts felt, after working through antitrust for collectively a hundred years, that they had found the right way to do things. They had discovered, they thought, how wrong it was to include fairness as a value in antitrust. They felt that fairness must be removed from antitrust to promote strong, hard competition law. They tried to "sell" this point of view to the Central and Eastern European policy makers.

The European Union had an advantage from the beginning. The countries involved wanted to

join the EU. The EU's competition law concentrates on the abuse of dominance and the power relationships between firms. It prohibits a great deal more than the United States law does; it includes an element of fairness while keeping an eye on the opportunities of small and middle-sized businesses. It was clear from the start which model the Central and Eastern European countries would choose.

In my view, even without the prospect of joining the EU, these countries would not choose U.S. law. The Central and Eastern European countries wanted a model of competition law which provides fair rules of the marketplace. They felt a need for competition laws to prevent abuses by firms, to assure fairness in the marketplace, and to foster the growth of small and middle size business. Price controls had just been lifted, and large monopolies had the power to overcharge and abuse.

The Central and Eastern European competition authorities might be best advised to concentrate their efforts with a view towards market-wide effects, eliminating roadblocks to entry on the merits. They do look for such cases, but mostly, they apply their law to protect smaller market entities against what they regard as abuses by dominant firms. A common abuse is imposition of a one-sided bargain. Dominance is found at low levels; e.g., 30 percent of the market. Somewhere between 40 and 70 percent of the agencies' resources are devoted to cases of abuse of dominance where a bargaining relationship is unequal and the agency steps in to "level" the advantage.

My problem is not that the countries wish to rectify unfairness. My problem is that agency focus on fairness takes resources away from the cases that ought to matter the most, cases of real

market impact.

I turn now to an issue outside of the traditional field of antitrust, yet pertinent to Eastern Europe and to the remarks of Professor Epstein. One of the most important conditions for competition and free enterprise in Eastern Europe is establishing rules of law capable of being understood, and safeguarding both property and contract rights.

This is a very difficult challenge, as the countries are beginning to understand. It is hard for people to move to free enterprise and rule of law from a system where property rights were nonexistent and profit-making was a crime. For contract and property rights to be protected, institutions must be established and due process guaranteed. Decision-making must be transparent and accountable.

To the extent that free enterprise works, there will be many decision-makers and a dispersion of power. At some point, we may hope, the economic system will become so deeply rooted that the political system will have a hard time back-sliding into communism or command and control.

This is what is at stake currently in Eastern Europe. Some of the countries are back-sliding into new post-communist coalitions. With respect to Poland itself, Anna Fornalczyk was the head of the competition office for five years. She represented a very powerful voice for competition. She sat at the table with the Council of Ministers and tried, where she could, to limit government regulation. Fornalczyk resigned after five years when the post-communist peasant coalition came into power. The new head of competition expanded the anti-monopoly office to include consumer protection. However, Poland does not have a "Ralph Nader type" of consumer protection,

and there is some question about the level of enthusiasm of competition.

Eastern Europe provides a wonderful lesson because it brings us back to the roots of competition law, and as well, it tempers our own vision. It tempers an imperialistic view of the consumer welfare or total welfare model. It shows the importance of focusing on market dynamics and protecting opportunity for entry and growth, rather than outcomes. It should humble U.S. authorities as they propose the one right answer and model for competition law.

Overlapping circles: Antitrust and civil rights, antitrust and trade

I want to talk briefly about what I see as two overlaps over time: antitrust and civil rights. Envision them as two circles. There was a large overlap of these two circles in the 1960s. The idea was that the underdog should not be deprived of a fair chance on the merits, and the established person should not get all the goodies based upon its status. Antitrust and civil rights admonished us to spread the net further. Let the underdog compete, creating and preserving economic opportunities on the merits.

In the 1970s and 1980s, antitrust law shrank for two reasons. First, foreign competitors were gaining strength and U.S. firms had much less power. Second, the law itself was viewed as too expansive. There was a third interesting overlap in the 1970s and 1980s, and that was what I call the overlap of the liberals and libertarians. Both argued for a rule of law that would constrain government action. Cases I would cite include the *Goldfarb* (*Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975)) case and the *Bates* case (*Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)).

Bates challenged the rule that lawyers could not advertise. If lawyers cannot advertise, the poor and middle class people cannot get services they need. When lawyers can advertise, prices will go down; a new and needy portion of the population will be served by the market. Therefore, both liberals and libertarians want to remove restraints that block people from entering markets and from providing people with market information.

In the year 2000, what will be the overlap in questions regarding trade and antitrust? In the first decade, I believe that market access is going to be the area for overlap. Firms from one country should be free to sell on the merits into another country, the United States/Japan problem sits in the background.

Antitrust law and trade law are not identical, but both promote the freedom to get into markets on the merits. Sometimes trade restraints are anticompetitive, but not always. For example, if you have a cartel of glass producers in Japan with a boycott against U.S. glass, we know that this is anticompetitive. Sometimes vertical exclusive dealing is anticompetitive, but not always. However, there is a large overlap between trade law's protection of market access through bans on government barriers and antitrust promotion of market access through bans on anticompetitive restraints.

Now we return to Professor Epstein and this discussion of Anti-Dumping, because in actuality, the application of Anti-Dumping laws is a restraint of market access. It is a restraint of firms' selling into someone else's market on the merits. Even you believe that the Anti-Dumping laws are handicapping the free enterprise system, you will learn that, regardless of your desire to change the law, such a change will be extremely diffi-

cult to orchestrate, at home and in the world. We need world conversation and bargaining in order to get nations to ratchet down their Anti-Dumping laws or at least to make them more consumer-friendly.

Trade and competition laws interact with the freedom to compete; the freedom of market access on the merits. I propose a principle to be

adopted at the world level. There shall be no unreasonable limitations of market access, public or private. Nations must undertake to implement the principle in a credible way, by whatever formulation they choose. This, then, is my prediction for the zero zeros—market access in the world is the frontier for antitrust.

Rebuttal by Mr. Nader:

Thank you very much. A number of points, responding mostly to Professor Epstein. In our book *Monopoly Makers*, which came out about 23 years ago, we made the case that there are very few government-sponsored or protected cartels that are not almost entirely initiated by corporations, in order to legitimize what would be illegal or suspect under the antitrust laws. So I am not inconsonant with Professor Epstein's heavy focus on the government as the culprit. But he did mention that the corporations were involved—the truth is that they are completely involved. The corporate law firm of Covington and Burling drafted the Civil Aeronautic Board's statute on behalf of the airline industry in the late 1930s in order to establish cartel pricing, an allocation scheme which lasted until the late 1970s.

In looking at the book we put together 23 years ago, I noticed that there have been quite a few eliminations of these cartels. The Interstate Commerce Commission is no more. Cartels got together in Washington hotel rooms to set the tariff pricing for trucking and railroad rates under the imprimatur of the ICC. The airline cartel is over with, and we have different problems now. Surprisingly, we even have a tighter oligopoly. The top seven airlines now control an even larger share of the market. So the reassertion of oligopoly after a breakup of any cartel always has to be a concern.

Some people think the telephone oligopoly is now coming back together, not under the domination of AT&T, but certainly it is not as deconcentrated as it was after the breakup. Tele-

communication rates were subject to monopoly pricing cartel determinations, which are considerably weaker now and on the way out. The international cartels, like the commodity cartels, are really resistant and have been operating for years officially.

I do not think we can discuss the antitrust laws without discussing the international criminal cartels and the massive expansion of criminal capitalization. In Eastern Europe, the former Soviet Union, and Mainland China, these criminal cartels are not teaching our capitalists new lessons. The problem is that they are not restricted by rules of law, independent judiciaries, and exposure to litigation by grieved parties. These cartels are increasingly taking control of larger and larger shares of world economic activity. Under a kind of Gresham's law, bad or criminal business practices tend to drive out good business practices if the former are not curbed by either countervailing forces, such as trade unions, or by regulation and criminal prosecution.

Secondly, Professor Epstein counseled us on the Anti-Dumping laws, but that is a very easy thing to hypothetically condemn. So as Milton Friedman says, why turn down a bargain from abroad? But the belief is that this Anti-Dumping will bankrupt the dumper eventually—thus, just give them enough rope and their silliness will hang them. The facility of cross-subsidization is pretty enduring as we have seen over the years. It is not that easy simply to wait them out.

Dictatorships overseas keep production costs artificially-depressed by encouraging or condon-

ing the smashing of any kind of worker rights or worker organizations. They allow the huge expansion of child labor, which is indentured servitude at a few pennies a day under brutalized working conditions. Seven and eight year olds in India and Pakistan are producing medical devices, carpets, soccer balls, and other products. These products are coming into this country. How are we supposed to treat that?

Child labor is illegal in this country. The human rights issue in our country was given supremacy over the cost reduction issue decades ago. How are we going to deal with that? Under GATT, child labor is legal. In fact, when Senator Tom Harkin proposed a law prohibiting the importation of products made from certified child labor production facilities abroad, the Clinton White House and U.S. Trade Representative Mickey Kantor said, 'Forget it, Tom. Such a law would be illegal under GATT. We will be taken to Geneva before the closed tribunal and we will lose, because under GATT you cannot restrict imports based upon process standards, with one exception, which is prisoner slave labor.' So it is not that easy to make a blanket Friedman-type assertion.

The next point I want to address is the product-fixing health and safety aspects of antitrust. There is a great deal of talk about price in antitrust. There is also a great deal of talk about innovation, which may challenge and destabilize price mechanisms. Back in the 1960s, I came across evidence that the auto companies were colluding to restrain the innovation, development, and marketing of smog control devices. The California Air Resources Control Board began to wonder why no auto company would come forth and say that their engineers had found a way to reduce emissions. They all spoke with

one voice, which presented the same stagnant polluting technology.

During the Johnson Administration, I made a presentation to the officials of the antitrust division proposing that they bring a case against the automobile manufacturers on product-fixing grounds, and they did, to my astonishment. The case was settled by a consent decree, but the allocation was that the major U.S. auto producers enter into an agreement requiring all members to grant royalty-free patent licenses to each other and to only take patent licenses from outsiders if all members could obtain the same license under the same terms.

The effect of this agreement was to eliminate rivalry and pollution abatement innovation. Since no one manufacturer had to fear being left behind, the spur to innovate was blunted, and they settled into inaction. This issue deals heavily with respiratory diseases and other ailments coming from higher or lower levels of air pollution, and I think we ought to pay more attention to the anti-competitive practices, the tie-in arrangements, the collusive practices, and the suppression of innovation that damage health and safety rights of human beings, the environment, and the biosphere.

You can imagine how producers of ozone-depleting chemicals can be destabilized by vigorous competition, whether stimulated by regulation or just by the competitive thrust of an innovation-oriented economy. It would be nice to see more scholarship in the area of the health and safety consequences of different types of antitrust or competition policies. By the way, in listening to Professor Epstein, I recall reading the writings of George Stigler and Henry Simons and even Hayeck. These authors were extremely articulate about how allowing concentrations of

business power affect the deterioration of democratic rights and human liberties.

In addition, we have to ask how trade policy is having anti-competitive effects and how trade policies that prohibit subsidies are being widely violated. One of the interesting aspects of GATT is how many of its provisions are now just routinely violated because the major signatory nations want it both ways. Multinational companies want the benefits of GATT, which allows them to escape the stronger health and safety standards promoted by individual countries under a mandate called harmonization of standards. The harmonization committees which arrive at these standards are secret, and the standards cannot be challenged in our U.S. courts. On the other hand, these companies also do not want the embarrassment of having their precious subsidies challenged as a non-tariff trade barrier under GATT.

These countries believe that other nations' health and safety standards violate GATT—as they interpret that agreement. The nations are trying to circle one another to see how they can develop maneuvers and bargaining chips in lieu of taking a formal case to the World Trade Organization's tribunal. The WTO tribunal, by the way, allows no citizens, no press, no public transcript, and no independent appeal and has no conflict of interest standards for its judges. And if we lose in Geneva, as we already have to Mexico (tuna-dolphin) and Venezuela (reformulated gasoline), we have to either repeal our regulation or pay perpetual trade fines to the winning countries.

This is the problem of acceding to a model of juridical resolution that would not be allowed in this country: to have courts that keep the press out and to deny outsiders a public transcript and

an independent appeal.

The next point Professor Epstein made is that consumers are also shareholders, and you cannot just focus on consumer welfare to the exclusion of all other segments of the population; he made much of pension plans. This is the first of two points he made, the other one being much more serious—consumer defrauding of business. This is a really astonishing statement. This is why I plead to him and his colleagues that they do bring some quantitative assessment to such Draconian judgments.

Before we really talk about the tens of millions of people who are shareholders, examine the numbers. The bottom 80 percent of the income ladder in the United States, take all of them, including their pension funds—they own 1.8 percent of the stocks in the United States, 1.8 percent. The top 5 percent own 77 percent. As far as consumers defrauding and setting aside a kind of self-help, they are regularly defrauded, in their opinion, so they want to get their licks in too. I once had a talk with the head of GEICO insurance company and he was telling me about how consumers defraud their auto insurance policy, and I said, "Well, do you know a lot of people, when they have \$200, \$300, \$400, or \$500 claims, do not file with your company and other companies because they think they are going to be surcharged or they think their policy is going to be canceled?" Does he have any data on that? He said, "No, we do not collect data on this."

As for consumers abusing return policies—hardly a big thing, very easily controlled by management, check out the price club for one of the standards on how to control spoilage, as it is called. Also though, some of these return policies are too liberal. They are just too open-ended. They work for awhile then they get abused and

then they tighten them up. No big deal. Who is in charge here? It is not the consumer in charge. The policy is set by the company.

Another point I want to make is that subsidies, both direct and indirect, are interfering with market competition in the same way that government-sponsored cartels, which have been eliminated or reduced, used to interfere. It is remarkable how rarely other companies challenge this unfair competition proceeding from these subsidies. It is almost as if they say, "Our competitors are getting theirs and we are going to keep quiet because some day we want to get ours." This is true for the forgiveness of utilities, debt to Uncle Sam for billions of dollars work in uranium enrichment services, inflated government contracts that are directed to companies that they think are a little bit in trouble, such as McDonnell-Douglas a few years ago by the Pentagon.

Another point regarding antitrust problems that occurred to me, listening to Professor Epstein, is that the damage that results while these problems are being resolved. Yes, AT&T did shed all of these companies, and it did wither of its own accord, but a lot of people were hurt in the meantime. A lot of communities lost their plants. There is a lot of dislocation in the 30-year period after Harold Geneen's belief that if you are a good manager you can manage anything no matter what company or what industry. Now we ought to keep in mind the in-the-meantime damage before the self-correcting mechanisms, which do *not* always occur, turn the situation around.

As far as tie-in arrangements go, I think that Professor Epstein's dismissal was too quick in terms of dealing with secondary installment practices. I would just like you to read briefly why the antitrust division was upset with Microsoft

here before a very modest consent decree concluded. It did not seem to change the realities that much. The complaint by the Antitrust Division alleges:

Microsoft gained a dominant position in the market by marketing operating systems the public clearly wanted, but as in *Pilkington*, Microsoft then chose to employ various unlawful practices, cement its dominance for innovation and, in particular the Microsoft complaint challenges a combination of provisions used by Microsoft in its license agreements with PC manufacturers, per processor royalties that tax competing operating systems, licensing terms, huge minimum commitments strictly enforced that had the effect of locking competing operating systems out of the market while impeding competitors' access to the PC manufacturing channel. *See PPG Industries v. Pilkington, PLC*, 825 F. Supp. 1465 (D. Ariz. 1993); *affd*, 1994 U.S. App. LEXIS 14427 (9th Cir., June 10, 1994) (Ralph Nader, quoting Department of Justice complaint; *see generally, U.S. v. Microsoft Corp.*, 56 F.3d 1448, (D.C. Cir., 1995); *U.S. v. Microsoft Corp.*, 159 F.R.D. 318, (D.D. Cir. 1995); *U.S. v. Microsoft Corp.*, 1995 WL 505998, (D.D. Cir., Aug. 21, 1995); *U.S. v. Microsoft Corp.*, 1995 WL 121107, (D.D. Cir., Mar. 14, 1995).

The complaint further alleges that Microsoft tried to get developers of application programs to sign nondisclosure agreements that would have had the affect of preventing them from writing programs for those competing operating systems. I know that was just an allegation, but many in

the industry thought that just reflected market practice.

Let me end on this note. I think it is very important to recognize that contracts of adhesion have become a real menace to competitive practices. Recently, some American corporate attorneys advised the Bulgarian government to establish legislative standards that prohibit certain provisions in contracts of adhesion, including provisions like confession of judgment, in other words, where their consumer confesses before

anything ever happens. If we look at the latest generation of contracts of adhesion, companies like Columbia/HCA, Bank of America and others, banks are imposing unilateral compulsory arbitration clauses. So you cannot go across the street. When people lose their bargaining and negotiating power, that means they lose the ability to generate selective choice and rejection in the marketplace. That is another dimension that maybe should get some attention. Thank you.

Rebuttal by Professor Epstein:

I think that there is more agreement here than meets the eye, both with Professor Fox and with Mr. Nader. Let me explain. At the most abstract level, the function of the antitrust laws is to maximize the sum of consumer and producer surplus. That definition does not make the focal point of concern rich shareholders, to the exclusion of everyone else. The definition also includes employees and suppliers as well as consumers.

Yet by the same token, it hardly follows that their interests can only be protected by allowing them to intervene in any lawsuit which might impinge on their economic well-being. To take that course of action is to invite a form of administrative chaos, as so many items will be on the table that full participation becomes an obstacle to the implementation of sound legal rules. The public choice dimension should never be forgotten, and the simplicity that I favor will in many cases work well with the objectives that Professor Fox set out in her talk. We want an antitrust law that meets threats to competition, and we want a general political system that is hostile to the creation of subsidies that also distort compensation. In taking this position, I do not regard myself as either pro- or anti-business. Often times there will be business firms on both side of the dispute, and our task is to figure out which of the private claims is better aligned with the social interests.

It is also clear that it is easier to attack monopoly than it is to attack subsidy. Within the basic structures of modern federalism, it is difficult for states to impose barriers to entry from

outsiders and difficult for them to use differential or discriminatory taxes to achieve that result. But it is all too easy for them to generate internal subsidies that lure businesses into their grasp. The competition to create subsidies for one locale within a state imposes costs on citizens in other locales, so much so that it very difficult to track and correct the internal transfers that are created by this form of interstate competition. Professor Fox is correct when she says that some simple broad rules are needed to contain that form of discretion. But at some level, that requires a revolution that goes far beyond the antitrust laws. It is necessary to take a big bite out of the current system that permits states to collect taxes and dispense favors, which they are clearly allowed to do under the current constitutional order. But never forget that limited governments have fewer favors to dispense.

It is also important to recognize that free trade and open borders make it more difficult to respond to certain problems (if they are problems). To take one example, child labor laws are nonexistent or weakly enforced overseas. And we are quite content to buy products from these countries at prices cheaper than they can be produced domestically. There is much agitation to shut down these dealings unless foreign countries comply with standards that are closer to our own if not identical with them. An antitrust policy cannot achieve that objective, assuming it is worth achieving. And there is some question as to whether it is worth achieving. While we may do without the cheap goods from abroad, what

happens to the individuals who are protected by our conceptions of the child labor laws? Some may continue to find work, albeit for diminished hours. But others will be cast onto the street into begging or prostitution or worse. So maybe we are right to bite our lips and to wait until the general improvement in prosperity makes these practices unpalatable to families whose parents can now earn enough to support their children. The horror stories could easily be more damaging than the ban on child labor which could prevent any long-term increases in productivity.

Mr. Nader also talked about interim losses, such as those that arose from the conglomerate craze of the late 1960s. But that hardly assures us of the wisdom of the antitrust laws. It could well be that the tax structure induced mergers to take advantage of loss-carryovers or some similar tax objective. It hardly follows in a world of extensive regulation that the only firms that will survive are those which can cut the mustard competitively. The rest of the regulatory structure outside the antitrust laws must be fully analyzed as well, industry by industry if necessary.

In the end, there is no shortcut to taking on each piece of mischief in its own terms. If there are some vices in given industries, then by all means attack them head on. But do not pretend that the antitrust laws can cure these problems by indirection, no matter what the source of the mischief. The objective of tax neutrality, for example, helps combat subsidies for given firms or sectors and could lead to modifications of the tax code in areas where the antitrust laws have no reach or relevance at all. Pick the right arena

in which to fight, and don't confuse a tax loophole with an antitrust violation, for if you do, then the upshot will be more confusion that will in time create more loopholes that contribute in their own way to the maldistribution of wealth to which Mr. Nader constantly refers.

The advice here is tread carefully, for often the efforts to stop maldistribution of wealth are hijacked into service of that very cause. It is hard to combat maldistribution of wealth without conferring great powers on certain key political individuals. And that power can over time be turned against the very people it is intended to help. Legislation is a mixed bag that includes in its output Anti-Dumping laws, sugar quotas and sweetheart licenses for riverboat gambling. Those outcomes often find protective cover in reformers' efforts. So again, first do no harm becomes the operative rule of the day.

To get the right culture, it is necessary to switch the source of populist wrath from large corporations to large governments, which are capable of funneling favors to large corporations through the political process. The antitrust laws have never stopped airline regulation or agricultural price supports. We should not put our hopes that the world will be transformed in the future. Competition works better with small government, and that should be our objective—not an overgrown antitrust law. “Covert tools are bad tools,” Karl Llewellyn said a long time ago. That is true today. Even those people who agree that Mr. Nader has identified the ills of American society should be deeply skeptical that he has found a broad spectrum antibiotic for our social ills in the antitrust laws.

QUESTION & ANSWER

Mr. Gotfryd: Questions from the audience?

Q: Professor Fox's comments about Eastern Europe were quite interesting. They were even more interesting if you compare them with what is going on in Thailand, Malaysia, and Indonesia, where the Chicago school is as successful there as it is in Eastern Europe and then try to account for any kind of pattern. It is a complex question, but I want to ask [the panel] to address the point Professor Epstein closed on, that is, what is and what should be the role of antitrust law and policy concerning distribution of wealth in America?

Professor Fox: I think the distributive issue has been misstated with respect to U.S. antitrust laws. I think that what antitrust does and can do relates to distribution of economic opportunities. Of course, it can do something relating to distribution of wealth when it takes money out of the pockets of the cartel and puts money into the pockets of consumers. I do not think that if you ask the direct question 'what can and should antitrust do for distribution of wealth,' you will get the right answer because antitrust is not the right tool to redistribute wealth. I think the distribution of economic opportunity is very important, and many countries have a law which the United States does not seem to have today which says that people should not be

blocked out of the market on the merits by artificial restraint. This is easily reversing the equation and saying that if there is a significant foreclosure by a firm with market power over somebody trying to get in, then that is illegal. You could say that unless it is efficiency justified, that kind of principle which we have in our law does help the distribution in any law of economic opportunity and does not protect the inefficiencies of small competitors. That is one of the areas that I would concentrate on. Otherwise, I do not think one should think of antitrust and redistribution.

Professor Epstein: My view about it is that you cannot do it. Most of the time what happens when you introduce redistributive trade practices is that the wrong people control the ship. If you are going to adopt these objectives at all, the best tool, and it is not a very good tool, is a progressive tax. However, there are multiple difficulties with taxation. The chief one is that people who do not have any income at all get no benefits from those who do unless you introduce some negative tax. I tend to think that an effort to have cohesive solutions to this generally tends to be too costly. My own attitude is that you are better off to give up trying before the entire enterprise misfires. I think the arguments about diminishing marginal utility of wealth offer a very accurate statement about why redistribution is generally desirable. But by the same token, the use of a coercive mechanism puts

us on a collision course with the realities of public choice, that is, self-interest in politics, which in turn limits the things objectively attainable through government. The law must have a very simple and clear objective, otherwise every program will in time be hijacked by the wrong guys. The first principle is still "primum, non nocere"—"first do no harm." Follow it consistently, and some good starts to emerge independent of government effort.

Mr. Nader: First of all, the imposition of costless health care due to lack of competitive innovation for smog control devices is a function of the antitrust laws—

Professor Epstein: No, it is not.

Mr. Nader: —to prevent product fixing, which imposes coerced costs on people, such as health care costs or safety costs, like fatalities in automobile crashes. This is not technologically redistricting. The second area is overcharging, the old traditional price fixing et cetera, where you basically deplete the dollars that consumers already have. And the third is — I do not know if any of you believe that with the increased concern over distribution of wealth problems since 1970, the redistribution problem is worse. The rich have gotten richer and the lower 80% of the workers have lost ground. I agree with the conclusion; what concerns me is that since 1970, it is not like there has been a progressive wave underway. Since 1970, progressive taxation on the rich and corporate has declined and the problem of maldistribution of wealth and income has increased.

Professor Epstein: A couple of comments regarding overcharging. We all agree the cartels are not a problem. The problem with pollution is not an antitrust problem. The problem is having ill-defined property rights with respect to externalities. What you need to impose is a pollution tax on automobiles, measured by the harm caused, and all of these companies would scramble for the best suitable technology. Corporations were making two claims, not one. They were saying "do not regulate the pollution" and "do not require us to innovate." But if the law gets the right control on externalities through class actions, taxation, or direct regulation, then everything on the antitrust side will flip itself over. With respect to redistribution, let me just give you one number, which is utterly stunning. If you measure the relative income of a person age thirty-five compared to one of age seventy in the United States, basically, in 1970, the person age thirty-five had about 140 percent of the income of a person aged 70. Since that time, the ratio has shifted to 70 percent or so. The over seventy-year-old set has seen growth in Medicare, in Social Security, and in the aggressive (and unconstitutional!) application of the age discrimination in employment laws. We have witnessed the single largest program of wealth transfer that has taken place in the United States, and it goes against personal income. You check out pension—how much money do you need at age sixty-five relative to age thirty-five? The answer is sixty-five to seventy percent of the earlier income now that the house is paid for and the children are on their own. That was the ratio we had twenty-five years ago. It is not the ratio we have today. And so the reason I say that there is a preoccupation with redistribution is because this is not redistribution based upon need. Too many

modern calls for redistribution take from the have-nots and gives to the haves. We often cloak the transfers under the guise of “rights” as with the age discrimination laws. But without even knowing what we do, we have unleashed powerful interest groups into the fray. You might guess that the American Association of Retired Persons is not my favorite association. I am proud not to be a member of the AARP. You are not a member either, are you?

Mr. Nader: What do you care?

Professor Epstein: It is a very destructive social organization. What it does, in effect, is transfer from the poor to the rich. That is why I am opposed to it. I think being a member of an organization like that is an antisocial activity.

Mr. Nader: Look at distribution of wealth in a different slice. You look at it horizontally: people versus people; look at it in vertical terms of the richest and the rest of America, and see the concentration. Now, it is more unequal than in Western Europe when in the 1960s we were far less disparate.

Professor Epstein: I do not think you could say that. It is discretion, which has created massive political uncertainty over private savings and which has had a large impact on private pension plans. The current system promises more to the current generation than it can provide over a long period of time and, thus, ushers in a Ponzi scheme that will crash in the next generation. It does not take conserva-

tives to stress this message. The same can be heard from Martin Feldstein on Social Security or from the Trustees in charge of administering the Medicare plan, which is likely to experience insolvency or severe distress within the next five or so years. Yet when that distress comes, none of its intended beneficiaries will be prepared to meet the consequences. One has to look not only at the gains from redistribution, but also at its political risk. Yet no matter how these issues are to be resolved, they are not antitrust issues. They involve questions of system design and overutilization which flow from the inferior incentives set up under government programs. We would be far better off allowing markets to take hold. The result would be for more managed care, but in time its mistakes will be corrected. Gag rules, for example, are not likely to survive even in the absence of regulation. The voters of California and Oregon understood that it was not possible to dismantle these systems because of the occasional grievance. From the *ex ante* perspective, plan enrollees did better with the HMO than with other, more expensive forms of health care.

Mr. Nader: Nobody is defending the traditional fee-for-service. We are talking about going to other extremes. The conglomerate managed care incentives are all going to the other extremes, and the nurses were out-spent twenty to one. They still got forty percent of the vote. That is not bad for the first round in California. The other thing is pollution tax. You see, you are always shifting tools. I am just saying that when it comes to any antitrust and product fixing due to these kinds of corporate agreements that the antitrust division has encountered, people have

costs imposed upon them because they get sick and they get hurt.

Professor Epstein: I agree.

Mr. Nader: It is not enough to say we should do it by the tax mechanism. I am just saying it can be done by antitrust, and I am not impressed by where pollution taxes started in the Ruhr Valley. It is very easy to develop mismeasurements of those kinds of taxes, pollution taxes, et cetera.

Mr. Epstein: You are wrong. The antitrust law will not cure all our social ills. It will not give us the right tax system. It will not design the right rules to deal with pollution, such as those which facilitate exchanges within a bubble. My only lea on pollution is that once the law designs a solid system of property rights, the question of innovation will take care of itself. If we know how to tax automobile emissions, we can get the right level of turnover for older vehicles. Yet today, the U.S. government does not put heavy license taxes on old automobiles. If you look at sources of pollution, a huge percentage of its comes from the small fraction of cars seven or eight years old or more. Change those license fees, and pollution will be better contained. Yet, the major political parties have no willingness to impose these charges because of their fear of the cost on the poor. Whether that is right or wrong, the antitrust laws will not address that particular problem.

Mr. Nader: By allowing a person to get to work on the mass transit system, which is not available, they will not have to have cars.

Professor Epstein: You cannot have it both ways.

Mr. Nader: You are trying to have it both ways.

Professor Epstein: I would say you control the externalities.

Mr. Nader: What are you going to do when poor people cannot get to work?

Professor Epstein: That depends on whether some subsidies should be given based on wealth, which could then be spent on automobiles or on other forms of transportation. But it is not possible to address the pollution issue unless the primary sources of pollution are attacked. And on wealth redistribution, it would help if the working poor did not have to pay as much as they do for Medicare and Social Security for others who are better endowed than they are.

Mr. Nader: It is much easier to break up a product fixing scheme than to make pollution tax on corporations work.

Professor Epstein: You will not get as much social gain from it.

Mr. Nader: You are trying to use public policy in an area of tremendous maldistribution of power, never mind wealth.

Professor Epstein: I am trying to stop—

Mr. Nader: The law cannot bend power to its dictate if it is up against that kind of maldistribution of power, including global corporations who have great maneuverability against our domestic jurisdictions.

Mr. Gotfryd: Well, maybe it is time to move on to another question. At this point, I think we are covering the same ground again. Although it is a very interesting part, it is for another day. Do we have another question before we have to break for lunch?

Q: I guess I would like to hear Professor Epstein's view on what the proper role of government should be in utility deregulation.

Professor Epstein: I can give it. This is an area that I have worked extensively on. Are you talking about telecommunication or the stranded cost debate with respect to electrical power?

Q: Electrical power.

Professor Epstein: Electrical power. The task from an economic power point of view is to allow consumers at any point on the network to buy from producers anywhere on the network. The difficulty with that program is a very serious one which is not found, as best I can tell, in telecommunications. The physical integrity of the entire system has to be assured

in order to prevent the massive outages that occurred recently in the western states, outages that I have been told were attributable to interference from trees that some small operators did not trim. Some form of supervision of system elements has to be imposed on every member of the grid, be it by government or private parties.

The second question to do battle with is the stranded cost question. Public utilities have invested enormous sums of money on the promise that they collect certain rates so long as they met certain public service obligations. Now after these investments have been mandated, the law changes the legal regime. The question is whether or not they can recover the money because they are open to competition and have to be paid for their investments in some other way. There will be no easy way to solve this particular problem. I think it is fair to say there is ample authority going both ways. The truth about the matter is that the best solution is for the government to buy back, as it were, the monopoly powers and turn to competitive pricing, but you will never get the political will to impose the taxes needed to fund those obligations. I think the way it will eventually play out is the way it is playing out now—that there will be a surcharge on some of the services that go over the wheel which will then go to reimburse the companies for some, if not all, of their stranded costs. Transitions always create a terrible problem; as disasters go, this solution is better than most, although it leaves a lot of play in the joints. I do not think we are heading down any kind of precipitous bad road on this question—yet. I think there are many problems, both technical and distributive, that have to be faced. Legal transitions are always hard to deal with. You have previous mistakes that should

be corrected and limited ways to work the correction. A somewhat pragmatic approach is required in light of the passions on all sides of the issue. Theory may tell you the direction in which the law should move, but that destination will be reached only if certain unprincipled compromises

are made. Notwithstanding my outspoken views on questions of first principle, I tend to switch gears and work more incrementally on transitional matters. So we can end on a note of moderation.

THE DETECTION AND PUNISHMENT OF TACIT COLLUSION

Recent cases hint at a growing subtlety by competitors in coordinating pricing activities. Do we need new tools to identify collusion in oligopoly markets, or are the old medicines still the best medicines?

Introduction:

Mr. Michael Freed

Presenters:

Professor William E. Kovacic

Ms. M. J. Moltenbrey

Mr. Nathan Eimer