Antitrust, Vol. 22, No. 3, Summer 2008. © 2008 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Perspectives on the Future Direction of Antitrust

AS PART OF OUR THEME OF ANTITRUST ADVICE FOR THE NEW ADMINISTRATION, we feature brief essays by leaders in the field responding to the following inquiry: ***What is your view of the state of antitrust today, and what changes or developments would you like to see in the future?***

Tom Campbell
Bank of America Dean and Professor of Business,
Haas School of Business, University of California, Berkeley

THE UNIFICATION OF SUBSTANTIVE ANTITRUST LAW between the U.S. and the EU is at a critical stage. There are still disturbing differences in the regimes' treatment of mergers and monopolization.

The proposed merger of GE and Honeywell suggested that Europe would condemn a merger of American firms, when identical market shares and behavior by two European firms would have been approved. In monopolization cases, Europe continues to impose a "code of conduct" on large firms, outlawing practices that America would allow, simply because they were followed by a large firm, and completely divorced from whether the practices exclude competitors. These are not differences of style, they are fundamental differences of antitrust principle.

To what extent should nationality play any role in merger analysis? And to what extent should antitrust authorities impose duties on competitors in otherwise unregulated markets, simply because they are large? Modern U.S. antitrust practice has recognized that monopolization means using a firm's market position to exclude competitors. That approach has allowed for much better coherence and predictability in Sherman Section 2 jurisprudence. For Europe, interpretations of the rule against "abuse of a market dominating position" has led to largely unpredictable admonitions to be "good" or "fair" to consumers—standards that can, and do, change with every new administration of the Competition Directorate General.

The diverging trend between U.S. and European substantive antitrust law, on mergers and monopolization, comes at a time of resurging pan-Europeanism. Individual European nations appear headed to ratify their new EU treaty by parliamentary votes rather than by national referenda, where the treaty had failed a few years ago. European governments, if not their people, are seeking a tighter union. It is not coincidental, in my view, that this comes at a time when America's influence in the councils of European government has been declining. The danger is that Europe might reject progress toward intellectual coherence and predictability in merger and monopolization law simply because the recent thinking and case law has come from America.

Procedural matters are different. I can applaud the recent Competition Directorate's decision that antitrust cases be brought only on behalf of consumers who have actually chosen to be a part of a suit, rather than following the U.S. policy on class actions (you're in unless you take steps to opt out). I also understand Europe's skepticism with America's approach that prevailing plaintiffs, but not prevailing defendants, get attorneys' fees in antitrust. These are procedural rules. They won't have the effect of making illegal in Europe conduct that is legal in America, or, what is more important, making conduct illegal that is procompetitive whether in Europe or in America.

Efficient integration of international markets is in all countries' interest; and increased uniformity of substantive competition policy is an important part of that integration. In Europe, intellectual openness, not anti-Americanism, is needed to see this important process through to completion; and in America, fewer long-arm cases finding American jurisdiction over European conduct would reduce European fears of our economic imperialism.

Aaron S. Edlin
Richard Jennings Chair, Professor of Economics and
Professor of Law, University of California, Berkeley

MY GRANDFATHER PREACHED "MODERATION IN ALL things." Were he alive today, he would despair to see the state of U.S. antitrust.

At the crudest level, moderation would demand that sometimes the plaintiff wins, other times the defendant. Yet, if there be any consistency in today's antitrust it is that "the defendant always wins," criminal price-fixing aside. We have

come a long ways from the days of Potter Stewart's famous quip.

More fundamentally, strong antitrust enforcement has always been thought a good substitute for regulation and government ownership. Simply put, if antitrust ensures competition, then regulation is unnecessary. Yet, in the last three decades we deregulated and privatized substantial portions of the economy and have simultaneously pared back the antitrust laws.

Airlines, trucking, electricity, telephones, and the Internet, have all moved from full regulation or government ownership to a softer regulated competition. Banking too has been substantially deregulated and the walls between banking and insurance have come down.

With so much deregulation, my grandfather would have expected the antitrust courts and enforcement authorities to be extending their reach. Not so.

Sylvania, *Business Electronics*, *Khan*, and now *Leegin*, have made vertical agreements all but per se legal. In theory, tying cases remain per se illegal, but expect that to end soon enough. Section 2 seems vestigial, with no DOJ cases started this century. Predatory pricing cases seem almost unwinnable. And, the intellectually bankrupt reliance on profit sacrifice and price-cost comparisons in predatory pricing has drifted toward becoming the rule for all exclusionary cases.

And, while the substantive antitrust abuses have been cabined, pleading hurdles have been heightened. After *Twombly*, *Nynex*, and *Trinko*, plaintiffs are scrambling even to state a claim, let alone to meet the burden of proving one.

Ironically, because many of the deregulated industries maintain some level of regulation. *Trinko* and *Credit Suisse* provide increased immunity from antitrust violations, even when the (de)regulatory statute seems to disclaim such immunity.

So my grandfather would not be happy.

Sometimes though, the times may call for immoderateness. Could something have changed that justified less regulation *and* less antitrust? Many point to a rationalization with economics and a realization that the U.S. had become far too interventionist by the early 1970s. Indeed, economics does preach the virtues of laissez faire. Economists, however, also recognize that market failures from information or natural monopoly justify intervention. And, ironically, the same three decades that have seen this pullback have seen economists increasingly recognizing the myriad failures of markets.

Perhaps globalization obviates the need for antitrust? Maybe in some markets. But globalization can be easily fit in the framework of traditional antitrust analysis if it means broader geographic markets and more actual or potential competitors. No changes in law are required.

Viewed in isolation many of the changes to antitrust seem to me to be improvements. Together, though, they represent a massive shift whose justification I question. Could antitrust be losing its way?

Bert Foer
President, American Antitrust Institute

THE NEXT ANTITRUST AGENDA WILL BE DETERMINED by identifiable people rather than by the electorate at large. That is to say, the electorate will choose between a relatively laissez-faire Republican economic philosophy and a somewhat more interventionist Democratic regulatory philosophy. In either case, the next President will likely have made few specific commitments with respect to antitrust policy and will therefore have a substantial degree of discretion in making the decisive appointments at the Antitrust Division and the FTC. The appointees will have a large say, though they will be constrained by the staffs they will inherit, their budgets, the White House domestic policy mavens, the Congress, and perhaps most importantly at the current time, the courts.

The American Antitrust Institute, an independent nonprofit education, research, and advocacy organization celebrating its tenth year, has undertaken a major review of the laws and institutions of competition policy in order to compile an uninvited "Transition Report on Competition Policy for the Next President." Our recommendations were discussed at our June 18–19 national conference and we expect to publish both the recommendations and the background elaborations prior to the election.

For those who have followed our activities, it will come as no surprise to learn that we are urging stronger penalties for cartels (and less discounting of penalties for follow-up leniency applicants), additional merger investigations with a greater emphasis on the incipiency aspect of the Clayton Act, a broader role for the FTC Act, more attention to problems relating to monopoly and buyer power, greater sophistication with regard to strategic behavior, including its role in vertical relationships, and a generally post-Chicago attitude that accepts a wider range of economic perspectives than has prevailed in recent years and gives more weight to both consumer choice and innovation as goals of competition policy. We endorse the importance of both private and state enforcement and continue to call attention to the problems created by an absolutist commitment to intellectual property.

We believe that antitrust enforcement should focus more attention on four critical sectors of the economy—health care, energy, food, and the media. In each of these, competition policy should play a stronger role than it now does. In addition, in each of these areas, we need to rethink some of the limitations of current competition policy approaches. In the media sector, for example, we believe antitrust enforcement should focus not just on the impact of media mergers on the price of advertising effects, but more broadly on the important societal interest in diversity of ownership and independent gatekeepers.

We do not know to what extent the next President will pay

attention, but at the least we are presenting a coherent and realistic alternative paradigm for competition policy. If fully implemented, it would not take antitrust backward in time, but would move it forward in accord with a great deal of current economic and legal thinking. Would there be a night and day difference? No. The antitrust battles are still being fought between the forty yard lines, but there is nonetheless a lot of valuable turf at stake.

Eleanor M. Fox
Walter J. Derenberg Professor of Trade Regulation, New York University School of Law

WHAT IS THE STATE OF ANTITRUST TODAY? THE STATE of antitrust is strong. Nearly 100 nations have antitrust laws, and the number is growing. China and India, the two big nations to watch, are preparing to usher in their new antitrust laws. Enforcers around the world are hot on the trails of hard core price-fixers and are continually widening and strengthening their nets for detecting and punishing the culprits. Antitrust authorities, especially European, successfully pursue anticompetitive state action and acts of state-owned enterprises that block markets. Antitrust authorities, especially in Europe and Asia, successfully condemn monopolistic practices by dominant firms that use their power to fence out rivals and thereby fend off the erosion of their market control. Antitrust authorities of the world share perspectives and arrive at common ground and understanding in the largest international economic network ever—the ICN.

But where, in the scheme of things antitrust, is that once stalwart pioneer, the United States? As Bill Kolasky argues in his essay in ANTITRUST (Spring 2008): We now know what happened to the antitrust movement—"it has moved to Europe."

U.S. antitrust—despite worthy exceptions—has grown old and weary, and has ceded ground. What has gone wrong, and how can we fix it?

The big problem is the vision problem. The rhetoric of the new millennium has pulled U.S. antitrust down from its high profile as a key element of American political economy to a technical bureaucratic game that has almost no relevance—apart from the important anti-cartel efforts. For almost a century, American antitrust stood as a bulwark against economic power and its abuses. It does no longer. Today, it blesses large mergers of few remaining competitors in high barrier markets. It turns an indifferent eye to dominant firms' exclusionary strategies that hold no benefits for consumers. We have redefined how to think about antitrust: Trust business, not antitrust.

A new administration will have a chance to correct the narrow, begrudging approach. Here is how we can fix it:

1. Correct the perspective. Antitrust once was and still can be a positive force towards a robust economy that aids consumers and incentivizes market players including innovative challengers. At this point in time, failures to enforce the law against anticompetitive restraints are more important than refusals to intervene against conduct that could possibly be procompetitive.
2. Align presumptions with market realities. Our markets are much stickier than analysts often assume. Potential entry and potential expansion are often no more than mere chimera rather than real checks on power.
3. Restore, and don't shy from, use of presumptions when it makes economic or administrative sense and the party with knowledge of all of the facts gets a full and fair chance to rebut.
4. For monopolistic practices: Rethink the crabbed view of harm to competition. Just because competitors complain does not mean that enforcement would protect competitors' inefficiencies (although it might). Take seriously the problem that a dominant firm's use of leverage to fence out rivals—especially pioneering rivals—from a significant share of the market can degrade the competition, stave off challengers, and hurt consumers and the market.
5. For large-firm mergers: Take seriously the possibility that the market may be limited to an inner circle of competitors intensely focused on one another. In highly concentrated high-barrier markets, take seriously the likelihood that elimination of one of a very few competitors can degrade the quality of competition. Be (or remain) skeptical of claims that the merger will produce great efficiencies that could not otherwise be produced (remember AOL/TimeWarner), and give credence to the claim that more, and more dramatic, innovation will be lost by allowing the merger than by stopping it.
6. Vertical restraints: Recognize the importance to consumers of discounting, including by Internet; recognize the value to efficiency and consumers of distributors' freedom to develop new ways of reaching the consumer. Seriously regard the possibility that vertical restraints can help a manufacturer exploit the consumer.
7. Vertical restraints—resale price maintenance: Take this post-*Leegin* opportunity to develop a structured rule of reason. Take seriously Justice Breyer's query: Although RPM *can* prevent free riders that would otherwise undermine the manufacturer's efficient distribution, how often does this happen? We know that RPM raises consumer prices, but do we know that RPM helps competition? The best transition from *Dr. Miles* is a controlled experiment: Apply a presumption that RPM by other than new entrants (or by firms with market power) harms competition, and shift the burden to the firm to show how using RPM is pro-competitive.
8. To the Federal Trade Commission: Continue the impressive work recognizing market realities and challenging restraints facilitated by the state and strategies abusing intellectual property and standard-setting processes.

With this re-focus, we can shed the begrudging view of antitrust, help our own consumers and markets, and perhaps reclaim our leadership.

Michael D. Hausfeld and Christopher J. Cormier
Cohen, Milstein, Hausfeld & Toll, P.L.L.C.

GLOBALIZATION HAS SPAWNED AN INCREASING number of antitrust violations causing global harm. This reality calls for a framework of global public and private accountability. The hallmarks of such a framework should be uniformity, harmonization, and efficiency.

Uniform laws across different jurisdictions should be enacted to establish procedures for effective public and private competition enforcement. There is an acknowledged need for convergence, coalescence, and cooperation internationally among government and private enforcers to more effectively combat global cartels. Other nations are increasingly recognizing the need for meaningful private enforcement to augment government efforts, particularly those in the European Union. The European Commission recently reported that "[f]acilitating damages claims for breach of antitrust law will not only make it easier for consumers and firms who have suffered damages . . . to recover their losses from an infringer, but also strengthen the enforcement of antitrust law." There is also increasing recognition of the need to create or amend court procedures to permit the grouping of private antitrust claims to provide market-wide restitution for cartel victims.

Harmonization of cross-jurisdictional laws is also necessary, and can be accomplished through consistent enforcement. While price-fixing cartels are banned by approximately 100 nations, most of these laws simply are not enforced. As the deputy head of the EC DG Comp explained, while private enforcement "is a beaten track in the United States, it is still a barely discovered mountain path in the European Union." The lack of private enforcement of competition laws outside the U.S. results in under-deterrence and, thus, harm to all victims, including those in the U.S. When certain victims of a cartel are denied effective recovery comparable to other victims, and the profits gained by the cartel are outweighed by the sanctions imposed, effective deterrence is undermined.

Finally, global antitrust violations should be adjudicated efficiently. Principles of efficiency require an effective mechanism to allow victims of a global cartel to litigate to obtain comparable relief in a single forum. European courts have noted the advantage of having a single court hear the claims of all purchasers affected by a single cartel, whether or not they all reside in the presiding jurisdiction, to prevent "irreconcilable judgments." One court's exercise of jurisdiction over multi-jurisdictional claims produces efficiencies that cannot occur if multiple jurisdictions each must handle identical claims and issues arising from the same anticompetitive conduct. Courts granting foreign parties access to discovery in the U.S. have recognized as much, with Canada's Division Court stating that "[i]f both societies are to maximize the benefits of expanding free trade and open markets, the legal systems of both countries must recognize and facilitate an expeditious, fair and efficient regime for the resolution of litigation that arises from disputes in either one or both countries." In the case of global cartels, overcharge claims will include the same or similar allegations and proofs, and efficiency will be furthered by a single court's consideration of this evidence in a single proceeding with deference to and application of relevant substantive laws.

Hanno Kaiser
Latham & Watkins LLP

ANTITRUST SHOULD BE TRUE TO ITS DUAL HERITAGE, economic democracy and the pursuit of efficiency, by affirmatively promoting open business models. The early antitrust movement was first and foremost a political reaction to the influence that powerful corporations had gained over the federal government since the end of the Civil War. Antitrust policy was animated by ideals of political and economic democracy, fearful of consolidating both private and political power in the same (few) hands. Later, the law and economics revolution revealed that antitrust was ill-suited for the task of redistribution, and identified allocative efficiency as antitrust's sole legitimate concern. Having no power to tax and spend, that is, to slice the economic pie, the proper role of the courts in applying the antitrust laws was to focus on enlarging it. The only significant redistributive concession that lives on in modern antitrust is the built-in preference for consumer welfare, which values a dollar saved by a consumer more highly than a dollar saved by a producer.

Going forward, efficiency should clearly remain the central benchmark for antitrust enforcement, but I think that we will see the return of antitrust's largely forgotten democratic legacy, for example in the context of the "open versus closed business models" debate. Open business models rely on market transactions among a multitude of buyers and sellers with minimal vertical integration. Open platforms embrace interoperability. Closed business models, in contrast, rely on vertical integration through merger or contract. Closed products are often specifically designed to be non-interoperable with third-party products and services.

In the early days, antitrust favored open business models, as seen in its hostility towards tying arrangements, exclusive dealing, and vertical mergers. With the rise of the efficiency paradigm, those concerns waned, as closed business models

proved to be able to reduce transaction costs and generate scale efficiencies. Today, however, the Internet and expanded global markets have cut the costs of external coordination dramatically and have made scale an afterthought in many industries. Even in parts of the traditional bricks and mortar world, globalization has made scale accessible on an outsourcing basis.

Where the elimination of transaction costs and the availability of scale-on-demand have eroded the efficiency benefits to closed systems, antitrust should favor open business models by default. This is not to say that closed systems are inherently suspicious, but rather that an open design should result in a strong presumption of lawfulness. For example, opening a platform to third parties subject only to justifiable certification requirements (e.g., quality assurance, standards compliance), should shield even firms with significant market power from monopolization or tying claims. As open societies depend on open infrastructures, antitrust should not shy away from affirmatively promoting open protocols, business models, and product design. An open infrastructure, done right, marries the ideals of economic and political democracy with the pursuit of efficiency.

Herb Kohl
U.S. Senator (D-Wisconsin); Chairman, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, U.S. Senate Judiciary Committee

In the decade I have served on the Senate Antitrust Subcommittee, there has been a broad bipartisan consensus in support of the strong enforcement of the antitrust laws. There is general agreement on both sides of the aisle that antitrust law is essential to ensure that consumers gain the benefits of a truly free market. Those who are strong believers in our capitalist, free market system—and that certainly includes me—also recognize that antitrust is essential to prevent anticompetitive excesses and monopolies and to ensure the competitive dynamism so essential to our economy. Experience has shown that strong antitrust enforcement ensures consumers have real choices, encourages innovation, and keeps prices low and quality of goods and services high.

I have therefore been greatly disappointed with what appears to be a significant cutback in antitrust enforcement at the Justice Department's Antitrust Division in recent years. At our last antitrust oversight hearing, we documented an alarming decline in the Division's antitrust enforcement efforts across the board, particularly with respect to mergers. We found that, compared to the last four years of the Clinton Administration, the number of merger investigations initiated by the Justice Department had declined by nearly 60 percent, and the numbers of mergers challenged declined by 75 percent. The number of civil non-merger investigations had declined by nearly a third. Previously unthinkable mergers among direct competitors in highly concentrated industries affecting millions of consumers were approved—including the Whirlpool/Maytag deal, AT&T's acquisition of Bell South, and the Monsanto/Delta & Pineland merger (virtually the same deal rejected by the Justice Department a decade ago) to name just three—often over the reported objections of the Department's career staff. Most recent was the Justice Department's approval of the XM/Sirius deal, a clear merger to monopoly in the satellite radio industry. Sometimes it appears that the Justice Department is now more concerned with lessening the burden on merging companies in the merger review process than protecting the American consumer. The unfortunate result of the Division's "hands-off" merger enforcement has been to hasten a dangerous consolidation trend in many key industries, such as agriculture and telecom.

A new administration will take office in January 2009. Whether that administration is Democratic or Republican, it is my strong hope that the proud tradition of vigorous enforcement of our antitrust laws at the Justice Department will be restored. I intend to engage in close oversight of the Antitrust Division to ensure that this occurs.

We also need to strengthen antitrust law by legislation. A string of recent decisions at the Supreme Court have taken a highly restrictive view of antitrust law and significantly raised the bar necessary for consumers to obtain antitrust remedies. The most notorious was the *Leegin* decision, which reversed the ninety-six year-old ban on vertical price fixing. I have serious concerns about the consequences of this decision for consumer discounting, and have introduced legislation to restore the prohibition on vertical price fixing. I intend to pursue other legislative efforts to strengthen antitrust law, including banning the pernicious practice of brand name drug manufacturers paying their generic competitors to stay off the market, ending the wholly unwarranted and obsolete exemption that the freight railroads enjoy from antitrust, and legislation to subject members of the OPEC oil cartel to antitrust lawsuits brought by the Justice Department in order to combat this price fixing cartel.

Now is not the time for the government to take a cramped or limited view of antitrust enforcement. In this era of ever quicker technological change and ever increasing corporate consolidation, the need for vigorous enforcement of our antitrust laws has never been greater. Millions of consumers depend every day on the enforcement of antitrust law to ensure that the economy is sufficiently vibrant to keep prices low and quality high. We in Congress have a responsibility to ensure that these laws are up to the job, and our enforcement agencies are faithfully enforcing them. As long as I am Chairman of the Antitrust Subcommittee, I will do everything I can to protect and strengthen the enforcement of the antitrust laws.

Thomas Leary
Hogan & Hartson and Former Commissioner, Federal Trade Commission

ABOUT THIRTY YEARS AGO, ANTITRUST JURISPRUDENCE began to focus on economics rather than populist slogans. After some initial resistance, this new approach gained wide acceptance. Unfortunately, some courts have not recognized that economics is still an evolving discipline, and have failed to apply William Baxter's admonition that a "sensible antitrust policy" should be "based on whatever it is we know at any particular moment about the economics of industrial organization."

This failure is illustrated by three recent FTC defeats in the federal courts. Each case had special factual issues, but a common thread was the inability of the courts to absorb unfamiliar economic ideas.

The Eleventh Circuit's 2005 *Schering* opinion on litigation settlements between pioneer and generic drug manufacturers was dead wrong on the burden of proof when infringement is disputed and in its application of the substantial evidence standard. But the court also was unable to appreciate the unusual economics of the industry, which enabled generics to profit more from litigation settlement than from outright victory. The usual judicial preference for settlements will simply eviscerate the Hatch-Waxman Act, designed to encourage litigation to judgment in this particular area.

The D.C. District Court in *Whole Foods* (2007) focused on price effects, usually a traditional and sound approach. But price was not the only significant dimension of competition between the merging grocery chains. They were the two largest providers of an innovative and differentiated shopping experience for consumers of premium "organic" foods. Whole Foods was not interested in the Wild Oats stores or its cash flow; it wanted to eliminate a chain that presented a unique competitive threat. We know that because the CEO said so, in unusually candid statements that the court simply ignored.

The D.C. Circuit Court in *Rambus* (2008) ignored factual findings, applied a questionable evidentiary standard, and wrongfully concluded that Rambus might have merely exploited an existing monopoly. It also failed to fully appreciate that demand side distortions (in the "market" for competing technologies) are just as economically harmful as the supply side distortions with which antitrust is usually concerned, and that proof of deception can depend on the reasonable subjective expectations of an audience.

These decisions also indicate that many courts no longer recognize the FTC's special mission to provide purely prospective antitrust guidance. An extensive body of judicial precedent may have undercut the importance of this mission, and private litigation realities diminish prospects for purely prospective guidance. Out of frustration, the FTC may begin to rely more on its Section 5 unfairness authority. This could lessen the risk of retroactive consequences in private litigation but could also awaken concerns about revival of less disciplined agency discretion. More aggressive deployment of Section 5 would not necessarily be a retrograde step, however, so long as the agency remembers that freedom to enter uncharted territory beyond precedent is not the same as freedom to ignore evolving economic principles.

Janet McDavid
Partner, Hogan & Hartson, Past Chair, ABA Section of Antitrust Law, and Co-Chair, ABA Section of Antitrust Law Transition Task Force

ANTITRUST AT THE FEDERAL ANTITRUST AGENCIES IS generally sound, but there are a few areas of concern. One major concern involves a perception in the business community of lax antitrust enforcement in some areas. From a counselor's point of view, client perceptions have real consequences. A perception that federal enforcement is lax (even if not fair) can make it more difficult for counselors to do their job, and counselors are the first, and often the last, line of defense against anticompetitive activity.

Enforcement in the cartel area is obviously sound. The Antitrust Division's record with respect to cartels is truly exemplary, and the Division has successfully led a revolution in cartel enforcement worldwide through its leniency and amnesty programs.

The Merger Guidelines established a very useful framework that allows the agencies, the bar, and the business community to have a common basis for thinking about transactions so there can be effective dialogue and analysis. However, there is an area of concern in the agencies' inability to convince federal courts of the merit of their merger challenges.

The agencies have not been active in the area of vertical restraints, which is probably appropriate given the consensus that anticompetitive effects are rare, and the active litigation by private parties to address any areas of legitimate competitive concern.

An additional area of concern involves Section 2, which should be viewed as a legitimate area for federal enforcement. There is an important role for federal agency enforcement of Section 2 because the federal government acts as an objective analyst and enforcer and acts on behalf of consumers, unlike private cases, which are sometimes brought by competitors who are more concerned about effects on them than on competition. The federal agencies can weigh the merits of the conduct at issue under appropriate standards and, where a problem is identified, determine whether there is an effective, workable remedy that would prevent or constrain the exercise of market power without restricting legitimate competition by the monopolist. The FTC has brought

several Section 2 cases in recent years (although its success in court has been mixed), but the Antitrust Division has not filed a new Section 2 case in several years. Instead, the Division has expressed caution about the risks of excessive Section 2 enforcement and criticized EU enforcement.

In summary, while the state of antitrust is generally good, the perception in the business community of lax antitrust enforcement is a concern. The relative lack of Section 2 enforcement, coupled with the agencies' inability to prevail in their merger challenges, their failure to challenge some controversial transactions, and concerns about the adequacy of some merger remedies have led to a perception in the business community that the antitrust laws are not being aggressively enforced except in the cartel area. That perception makes it more difficult for counselors to have credibility when they advise clients where the lines are because the clients doubt whether the cop is really on the beat.

Kevin McDonald
Partner, Jones Day

FOR THE ANTITRUST LITIGATOR, BEING ASKED TO comment on the state of antitrust law and its future is like being asked to comment on the place of the roller coaster in American culture while riding one. One wonders if he has the proper perspective as things flash by, and questions the wisdom of doing more at the moment than hanging on. Here goes anyway.

Current antitrust doctrine is simultaneously contracting and expanding. The contraction may be found in the seven Supreme Court decisions handed down in 2006–07—all victories for the defendants. Though some regard these decisions as apocalyptic, they were not close cases. Of 62 votes cast, only 9 were dissents. And 4 came in one case on the ground of stare decisis. For the most part, the Court was merely: (1) conforming ancient and flawed holdings to the modern view that antitrust is based on consumer welfare and efficiency (e.g., *Leegin*, *Illinois Tool*); or (2) reversing, usually unanimously, silly holdings by circuit courts, usually the Ninth, which have fundamentally failed to grasp that modern view (e.g., *Dagher*, *Weyerhaeuser*, *Volvo*). This "contraction" was both overdue and welcome, as when a business becomes leaner, returning to its core values and mission.

As the hurtful legacy of Thurman Arnold fades away, we should acknowledge the continuing vindication of—who else?—Oliver Wendell Holmes, Jr. Consider tying. In rejecting the presumption that the existence of a patent confers market power, *Illinois Tool* made clear that the so-called leveraging fallacy—the idea that tying can magically convert one monopoly into two monopolies—is dead. Holmes had skewered the fallacy in *Motion Picture Patents* by pointing out that the seller's market power (or "domination") was simply being used, not expanded: "But the domination is one only to the extent of the desire for the [patented] tea pot or film feeder, and if the owner prefers to keep the pot or feeder unless you will buy his tea or films, I cannot see . . . anything more than an ordinary incidence of ownership." 243 U.S. at 520. Then *Leegin* overruled the per se rule against vertical price fixing of *Dr. Miles*—a rule based on a legal distinction (regarding alienation of property) that elevated contractual form over economic substance. Holmes's lone dissent pointed out the unwisdom of condemning conduct when "by a slight change in the form of the contract the plaintiff can accomplish the result in a way that would be beyond successful attack." 220 U.S. at 411.

Despite these decisions, however, the forces of expansion in antitrust soldier on, and there will be much for the future Court to do. First, the law of monopolization is a standardless mess in the Third, Ninth, and D.C. Circuits, allowing attacks on a seller's unilateral pricing and design decisions that directly contradict the rationale of *Trinko* and (now) *Weyerhaeuser*. Second, a strange notion has lately been advanced that, where government has imposed artificial rivalry through a regulatory scheme (think pharmaceuticals, communications, energy), those who follow the rules to their maximum competitive advantage have somehow "gamed" the system in violation of the Sherman Act. These factors, along with the institutional demands of government and private plaintiffs to find new theories of liability, may combine into a perfect storm of drivel-thinking that will once again convert the possession of monopoly power into a status crime. Thurman Arnold would be proud.

In the meantime, I plan to hold on tight and see how the ride ends. I've a feeling we're headed for Holmes.

George L. Priest
John M. Olin Professor of Law and Economics,
Yale Law School

THE SUPREME COURT'S OPINION IN *LEEGIN*, OVERRULING *Dr. Miles*, removed the last major anomaly in its momentous transformation from the often counterproductive populist interpretation of the antitrust laws of the 1950s and 1960s to the consumer welfare standard initiated in 1978 in *GTE Sylvania*.[1] As the Court has defined it, consumer welfare is the broadest and most expansive measure of benefit to the society. The Court has made maximizing consumer welfare through effective market competition a transcendent value, confirming the Court's (and our society's) aspiration as stated in *Topco*: to make the antitrust laws "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." Countries around the world, and the European Commission in particular, would benefit

their citizens by adopting the U.S. Supreme Court's modern interpretation of the antitrust laws.

For the future, there remain some cleaning up around the edges and one important extension. With respect to the edges, the Supreme Court has not seriously addressed tying arrangements since *Jefferson Parish Hospital* in 1984. There would be benefit if this Court were to bless the D.C. Circuit's masterful discussion of tying and bundling in *Microsoft* just as an earlier Court blessed Learned Hand's now-eclipsed opinion in *Alcoa*. Furthermore, the consumer welfare standard has not been carefully applied to contexts such as exclusive dealing, trade association behavior, and standard setting.

Of far greater significance, neither the Supreme Court nor the courts of appeals has seriously addressed the development of appropriate antitrust concepts for the treatment of practices in the context of network industries. This is regrettable because the greatest economic gains of our modern society have derived and are likely to continue to derive into the future from the expansion of network industries. In recent years, the Justice Department has challenged network-related practices in the *American Airlines*, *Visa/Mastercard*, and *Microsoft* cases, but in none with a coherent view of the conditions under which network competition is possible and where not. The Supreme Court cannot be criticized on this point. There has not been development by the courts of appeals of concepts relating to network competition sufficient to create an issue, not to mention a conflict, for the Supreme Court to resolve. There is certain to be significantly greater antitrust litigation in the future relating to network practices. The Court's opinion in *Trinko* may provide guidance-network competition would benefit if it did-but it is a fragile precedent because of the heavy effect of the existence of FCC regulation of the practices addressed. The most significant extension of antitrust policy in the years ahead will be to practices involving network industries.

[1] The Court's other major antitrust decisions of the last term are relatively unimportant: *Weyerhaeuser*, a routine extension of *Brooke Group*; *Twombly*, an equally routine extension of *Trinko*.

Brad Smith
Senior Vice President and General Counsel,
Microsoft Corporation

Antitrust plays a vital role in promoting greater global economic growth and development. It helps ensure that all modern market economies function properly, and the recent adoption of antitrust laws in countries such as China and India are an important step towards this goal. One challenge for new antitrust authorities as well as existing authorities will be identifying and implementing enforcement policies that promote competition and consumer welfare in an increasingly dynamic and global business environment. These characteristics are particularly evident in high-tech industries where new technologies and business models can quickly present major competitive challenges to longstanding products and business models. The rapid development of software functionality delivered via the Internet and the increasing distribution of music and video over the Internet are examples of this.

One of the reasons antitrust is well-positioned to promote competition and consumer welfare is the increased application of economic analysis in recent years. Economics has provided the framework for ensuring that antitrust laws are applied in a manner that is consistent with how markets function. Reliance on fundamental economic principles helps minimize the risk that antitrust laws will be politicized or used to shield firms from the rigors of competition. Theories of liability and potential remedies can be tested against actual market data. As more and more countries establish competition authorities, an even greater emphasis on economic analysis will be necessary to bridge differences that may arise between jurisdictions.

Convergence is much discussed, and well it should be. I applaud the ICN's work in this area. The ICN has done important work to identify principles that are widely accepted by antitrust scholars, practitioners and regulators around the world. This is particularly true in the areas of merger review and cartels, where the ICN is now focused on ensuring that its recommended practices are implemented. It is critical that the ICN continue the hard work of identifying common principles and recommended practices, especially in the area of abuse of dominance. Greater convergence will help ensure that consumers around the world benefit from efficiencies associated with global business models.

In order to address the challenges ahead, the broader antitrust community should work together to enhance the effectiveness of antitrust law. Deep knowledge of legal, business, economic, and intellectual property issues are necessary for competition authorities and practitioners to do their jobs effectively. Developing such knowledge will be especially important to new agencies that will be hiring hundreds of staff lawyers and economists over the next few years. The sharing of knowledge, whether it is lessons learned or recommended practices, should ultimately move us towards greater convergence, and that will benefit consumers the world over. ■