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Rediscovering Antitrust's Lost Values

Thomas J. Horton

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Rediscovering Antitrust's Lost Values

THOMAS J. HORTON*

ABSTRACT

This Article traces Congress's consistent balancing and blending of social, political, moral, and economic values and objectives over the course of nearly 120 years of antitrust legislation. As a starting point, a plethora of outstanding and insightful scholarship analyzing Congress's objectives in passing the Sherman, Clayton, and FTC Acts already exists. Less studied, however, has been Congress's more recent legislation, including the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), and the National Cooperative Production Amendments of 1993 and 2004, to the National Cooperative Research Act of 1984 (NCRPA). By analyzing the legislative histories of such antitrust legislation in detail, the author seeks to show that Congress has never identified any single economic value such as consumer welfare or allocative efficiency, as the sole guiding lodestar for American antitrust. Rather, since 1890, Congress has successfully sought to blend and balance a complex set of social, political, moral, and economic ideals, values, and objectives in our antitrust laws.

The author believes that it is time to deal with the real social, political, moral, and economic values conflicts in antitrust, instead of relying on neoconservative economic proxies that unilaterally declare the values debates to be scientifically and theoretically resolved. Based on nearly 120 years of legislative history, the author concludes that we need to return to an antitrust regulatory system that better reflects Congress's dynamic historical balancing and blending of multiple fundamental American social, political, moral, and economic values. To do so, we must begin rediscovering antitrust's lost values, and recommence our historic pursuit of an ethical, moral, and fair free-enterprise system truly devoted to the long-term economic and social welfare of all Americans.

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* Professor of Law and Heidepriem Trial Advocacy Fellow, University of South Dakota School of Law. The author wishes to thank Tom Geu, Maurice Stucke, Bob Lande, Bert Foer, Spencer Waller, Harry First, Eleanor Fox, Jeffrey Harrison, James Brock, Peter Carstensen, Darren Bush, Ken Davidson, Hays Gorey, Diana Moss, Jesse Markham, and Chris Sagers for their continuing inspiration; and Britni Summers, Julia Wessel, and Emily Posthumus for their able and assiduous efforts. The author wishes to additionally thank Dean Geu and the University of South Dakota School of Law for their summer research grant.

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I. INTRODUCTION

It has become fashionable to boldly proclaim that American antitrust is edging closer and closer to a state of economic purity. Antitrust, it is argued, is largely free today from the “pollution and dilution” caused by our historical

consideration of political, social, and moral values in earlier antitrust analyses.¹ Such heady proclamations are based on the rapid ascendance over the last 40 years of neoclassical economics, which largely rule American antitrust today.² In this theoretically pure economic world, American antitrust

¹ See, e.g., Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 *FORDHAM L. REV.* 2405, 2406–07 (2013) (arguing that the “promotion of economic welfare as the lodestar of antitrust law—to the exclusion of social, political, and protectionist goals—[has] transformed the state of . . . [antitrust] law”); Theodore Voorhees, Jr., *The Political Hand in American Antitrust—Invisible, Inspirational, or Imaginary?*, 79 *ANTITRUST L.J.* 557, 576 (2014) (arguing that “the powerful impact of economic thinking” in conjunction with other legal developments has yielded a body of economically-driven antitrust law that “is largely impervious to political intrusion”); *Id.* at 562 (arguing that “it is certainly fair to say that economics and its companion, empiricism, have largely displaced many of antitrust’s more familiar populist themes from prior years”); Maurice E. Stucke, *Reconsidering Antitrust’s Goals*, 53 *B.C. L. REV.* 551, 556 (2012) [hereinafter Stucke I] (discussing how, in recent years, some antitrust scholars and enforcers have “viewed antitrust’s more salient, political, social, and moral goals as somehow diluting antitrust policy”); Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of Competition Policy*, 2003 *COLUM. BUS. L. REV.* 359, 388 (2003) (arguing that limiting antitrust to economic goals and values frees antitrust analyses from normative judgments); William F. Baxter, *Responding to the Reaction: The Draftsman’s View*, 71 *CAL. L. REV.* 618, 619 (1983) (“[W]here there is conflict, social and political goals should yield to economic considerations”); Darren Bush, *Too Big to Bail*, 77(1) *ANTITRUST L. J.* 277, 279 (2010) (describing efficiency as the “king” of antitrust); R. Hewitt Pate, Assistant Att’y Gen., U.S. Dep’t of Justice, *Remarks at the International Conference on Competition: Competition and Politics*, at 6 (June 6, 2005) <https://www.justice.gov/atr/speech/competition-and-politics> [<https://perma.cc/8739-DJYH>] (arguing that incorporating “extraneous social and political values” into antitrust will lead to outcomes that “will be polluted by values . . . that just do not belong in sound competition analysis”); *Chesapeake & Ohio Ry. Co. v. United States*, 704 F.2d 373, 376 (7th Cir. 1983) (“The allocative-efficiency or consumer-welfare concept of competition dominates current thinking, judicial and academic, in the antitrust field.”).

² See, e.g., RICHARD A. POSNER, *ANTITRUST LAW* ix (2d ed. 2001) [hereinafter POSNER I] (“Almost everyone professionally involved in antitrust today—whether as litigator, prosecutor, judge, academic or informed observer—not only agrees that the only goal of the antitrust laws should be to promote economic welfare, but also agrees on the essential tenets of economic theory”); Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 *ANTITRUST L.J.* 471, 473 (2012) (arguing that the goals of antitrust must be “understood by economic analysis”); Harry First & Spencer Weber Waller, *Antitrust’s Democracy Deficit*, 81 *FORDHAM L. REV.* 2543, 2559 (2013) [hereinafter First & Waller] (discussing how the American judiciary “has made antitrust overly technical and overly dependent on economics”); Jeffrey L. Harrison, *A Socio-Economic Approach to Antitrust: Unpacking Competition, Consumer Surplus, and Allocative Efficiency*, 49 *AKRON L. REV.* 409, 409 (2016) (“American antitrust law may be particularly

is now singularly dedicated to maximizing “consumer welfare” through an intense focus on promoting “allocative efficiency.”³ “Discussions of modern antitrust often emphasize its evolution, over the last several decades, into a rigorous economic discipline that is largely technocratic and apolitical.”⁴

All is not well, however, in American antitrust’s neoclassical paradise. Ominously, there are rumblings that we may begin rediscovering our historical non-economic social, political, and moral antitrust values as we undertake future antitrust analyses. One leading antitrust textbook warns:

representative of intellectual inertia. For over 40 years, it has teetered between strict reliance on neoclassical economics and a deeply conservative political philosophy characterized, at its most benign, by a distrust of government.”); Thomas J. Horton, *Fairness and Antitrust Reconsidered: An Evolutionary Perspective*, 44 MCGEORGE L. REV. 823, 825 (2013) [hereinafter Horton I] (arguing that “[e]conomics rules antitrust today”); Stucke I, *supra* note 1 at 563–66 (discussing the ascendance of Chicago School’s neoclassical economic theories in American jurisprudence since the late 1970s).

³ See, e.g., ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 91 (1978) [hereinafter BORK I] (arguing that antitrust must be unified around the singular economic goal of “improve[ing] allocative efficiency “without impairing productive efficiency so greatly as to produce either no net gain or loss in consumer welfare”); POSNER I, *supra* note 2, at vii–ix (“[T]he disputants are in complete agreement . . . that considerations of allocative efficiency alone should guide antitrust policy.” (internal quotations omitted) (second alteration in original)); Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (“Congress designed the Sherman [Antitrust] Act as a ‘consumer welfare prescription.’”); *Chesapeake & Ohio Ry. Co.*, 704 F.2d at 376; Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 266 n.11 (1981) (arguing that “the antitrust laws should be treated as if they served no goal other than economic efficiency”); Albert Foer, *On the Inefficiencies of Efficiency as the Single-Minded Goal of Antitrust*, 60(2) ANTITRUST BULL. 103, 106 (2015) (arguing that the ascendance of “a single-minded drive for ‘efficiency’ masks losses of other types of economic values, resulting in a skewing of economic analysis and policy outcomes”); Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 798 (1987) (“The economic goal of [antitrust] policy is to promote consumer welfare through the efficient use and allocation of resources . . .”).

⁴ Marina Lao, *Ideology Matters in the Antitrust Debate*, 79 ANTITRUST L.J. 649, 649 (2014); see also Frank H. Easterbrook, *Allocating Antitrust Decisionmaking Tasks*, 76 GEO. L.J. 305, 305 (1987) (“Antitrust has become . . . a branch of economics.”); First & Waller, *supra* note 2, at 2544 (describing the evolution of “an antitrust system captured by lawyers and economists advancing their own [technocratic] self-referential goals, free of political control and economic accountability”; which places “too much control in the hands of technical experts”); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 948 (1979) [hereinafter Posner II] (“Differences remain, but increasingly they are technical rather than ideological.”).

The U.S. and other nations sometimes have used antitrust to promote non-economic goals . . . such as fairness, protection of small firms, social justice, equity, and political stability. These goals are 'non-economic' in the sense that they are concerned with values other than the well-being of consumers or the economy as a whole.⁵

The textbook's authors urge us to keep antitrust pure by continuing to "focus solely on economic goals—preventing the acquisition, maintenance, or exercise of market power."⁶

In a similar vein, an International Competition Policy Group, formed at the invitation of the U.S. Chamber of Commerce, released a Report on March 14, 2017, warning that the use of antitrust law to achieve any objectives other than "sound, economics-based" goals "would interject harmful uncertainty into antitrust enforcement, detract from economic welfare, potentially be in tension with the rule of law, and, importantly, undermine longstanding U.S. efforts to advocate the consumer welfare approach overseas."⁷ The Report expresses a deep fear of the growing interest in rediscovering antitrust's lost

⁵ ANDREW I. GAVIL WILLIAM E. KOVACIC, JONATHON B. BAKER & JOSHUA D. WRIGHT, *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 35 (3d ed. 2017). The authors add, "[d]efenders of an economic approach to antitrust assert that antitrust rules and exemptions guided by non-economic values are usually inconsistent with economic interests and impose significant aggregate costs on consumers. They also assert that such rules tend to be inflexible and prone to over-deterrence." *Id.* at 39.

⁶ *Id.* at 40. The authors additionally observe:

Although courts sometimes have articulated non-economic goals for U.S. antitrust law, their reliance on such goals as a source of useful guidance for deciding particular cases has waned since the early 1970s. Non-economic goals frequently conflict with economic aims, provide too little guidance for antitrust decision makers, and arguably are ill-suited to decision-making processes that rely on adjudication and the adversary system. It is equally important to appreciate that this was not always the case in the United States, may still not be the case in some isolated circumstances, and may not be the case universally in the world today.

Id. at 40–41.

⁷ *International Competition Policy Expert Group: Report and Recommendations*, U.S. CHAMBER COM. (Mar. 14, 2017), at 18, https://www.uschamber.com/sites/default/files/icpeg_recommendations_and_report.pdf [<https://perma.cc/L65H-HSNW>].

social, political, and moral values,⁸ sinisterly noting, “[p]roblematically, in some matters, competition authorities (including those in the United States) appear to have pursued investigations well beyond the point where objective review would indicate either that the suspected conduct did not occur as initially anticipated, or that such conduct poses no substantial threat to competition.”⁹ The Report worrisomely concludes that “the United States confronts a situation in which many jurisdictions fall far short of employing an economics-based, consumer welfare-oriented approach to competition law enforcement focused on preserving a vigorous competitive process.”¹⁰

⁸ *Id.* at 21 (“While a number of jurisdictions have begun to speak seriously about the merits of an economics-based consumer welfare approach, those principles are not embraced by many other jurisdictions.”). The Report solemnly adds:

In addition, even where there is some positive recognition of the [economic] approach, it is not applied consistently in case law and agency decision-making. Too few jurisdictions have prominent roles for economists trained to understand problems of industrial organization. Even jurisdictions regarded as mature, like the European Union, have created important roles for economists only recently, and the impact of economic analysis on the resolution of specific matters remains unclear. . . . Without the discipline of close review by expert economists and other officials empowered and motivated to apply rigorous scrutiny to proposed enforcement initiatives, competition authorities often become comfortable with an unjustifiably more interventionist view of enforcement. . . . Where this occurs, competition authorities can tend to discount the costs and disruption that their enforcement activities impose on legitimate business conduct, give too little weight [to] the costs of wrongfully condemning conduct that is procompetitive, and exaggerate the likelihood and consequences of wrongfully exonerating conduct that might have anticompetitive impact.

Id. at 21–22.

⁹ *Id.*

¹⁰ *Id.* at 23. It is important to note that in a “Separate Statement” appended to the Report, Professor Eleanor Fox observed:

I do not believe that the United States has the one right mold for antitrust rules and standards or for the antitrust/intellectual property interface, although much wisdom can be found in U.S. law. In my view we should respect different views and different circumstances and thus recognize the legitimacy of other approaches as long as they are applied with transparency, proportionality, due process, and non-discrimination.

Id. at 33.

The U.S. Chamber of Commerce and other supporters of neoconservative American antitrust economics have good reason to be alarmed. Progressive antitrust scholars increasingly have begun challenging neoconservatives' ongoing attempts to excise our supposedly "non-economic" historic social, political, and moral values and goals from our antitrust analyses and regulations. Professor Marina Lao observes that "some antitrust scholars would preserve a limited role for other values¹¹ [while] others challenge the central role of economics more frontally."¹² Distinguished antitrust Professor Eleanor Fox, for example, has argued that "[i]f pressed to take account of harms beyond output restraint . . . , jurists may find that they *can* advance values of antitrust law—diversity, opportunity, fair process, choice, and fairer distribution—without also raising the costs of goods and services to consumers."¹³ Professor and former Federal Trade Commission Chairman Robert Pitofsky similarly adds, "[i]t is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws."¹⁴ Suggesting

¹¹ Lao, *supra* note 4, at 649–50 (citing Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051–52 (1979)) (agreeing that economic considerations should be paramount in antitrust analyses, but arguing that non-economic political values also must be considered).

¹² *Id.* at 650 (citing Maurice E. Stucke, *Should Competition Policy Promote Happiness?* 81 FORDHAM L. REV. 2575, 3578 (2013) [hereinafter Stucke II]); Stucke I, *supra* note 1; Bush, *supra* note 1, at 281–85; First & Waller, *supra* note 2, at 2543. This author similarly has argued at length for a less neoclassical economics-oriented approach to antitrust. *See, e.g.*, Horton I, *supra* note 2; Thomas J. Horton, *Restoring American Antitrust's Moral Arc*, 62 S.D. L. REV. 11 (2017) [hereinafter Horton II]; Thomas J. Horton, *The Coming Extinction of Homo Economicus and the Eclipse of the Chicago School of Antitrust: Applying Evolutionary Biology to Structural and Behavioral Analyses*, 42 LOY. U. CHI. L.J. 469 (2011) [hereinafter Horton III]; Thomas J. Horton, *Unraveling the Chicago/Harvard Antitrust Double Helix: Applying Evolutionary Theory to Guard Competitors and Revive Antitrust Jury Trials*, 41 U. BALT. L. REV. 615 (2012) [hereinafter Horton IV].

¹³ Eleanor M. Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window*, 61 N.Y.U. L. REV. 554, 584 (1986) (emphasis in original).

¹⁴ Pitofsky, *supra* note 11, at 1051. Professor Pitofsky explains:

By "political values," I mean, first, a fear that excessive concentration of economic power will breed antidemocratic political pressures, and second, a desire to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all. A third and overriding political concern is that if the free-market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs.

that “economics and empiricism do not provide answers to all questions arising in antitrust law,”¹⁵ Professor Lao insightfully suggests that it is time for a discourse that “bring[s] to the fore the ideological underpinnings of the conservative and liberal divide, and to have a normative conversation based on the [various] value[s] differences rather than rely on economic theories as proxies for discussion.”¹⁶

The purpose of this Article is to further Professor Lao’s recommended discourse by tracing Congress’s consistent balancing of social, political, moral, and economic values and objectives over the course of more than a century of antitrust legislation. This Article will examine Congress’s balancing of diverse fundamental values between the passage of: 1) the Sherman Antitrust Act in 1890;¹⁷ 2) the Clayton and Federal Trade Commission (FTC) Acts in 1914;¹⁸ 3) the Hart-Scott-Rodino Act of 1976 (HSR Act);¹⁹ 4) the National Cooperative Research Act of 1984 (NCRA);²⁰ and 5) the National Cooperative Production Amendments of 1993 and 2004,²¹ which amended the NCRA to create the National Cooperative Research and Production Act (NCRPA).

As a starting point, a plethora of outstanding and insightful scholarship analyzing Congress’s objectives in passing the Sherman, Clayton, and FTC Acts already exists. Less studied, however, has been Congress’s more recent antitrust legislation, including the HSR Act and the NCRA. By analyzing such legislation, the author seeks to show that from Congress’s long-term perspective, political, social, moral, and economic values are not viewed as emanating from distinct and rigid ideological spheres. Rather they derive from interdependent and overlapping fundamental long-term core and shorter-term

Id.

¹⁵ Lao, *supra* note 4, at 684.

¹⁶ *Id.* at 685; *see also* Harrison, *supra* note 2, at 431 (observing that “the primary function of socio-economics is to ask questions and broaden the discussion”).

¹⁷ Sherman Antitrust Act of 1890, Pub. L. No. 51-647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1–7 (2012)).

¹⁸ Clayton Antitrust Act of 1914, Pub. L. No. 63-212, 38 Stat. 730 (codified as amended at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53 (2012)); Federal Trade Commission Act of 1914, ch. 311, 38 Stat. 717 (codified as amended at 15 U.S.C. § 41–58 (2012)); *see also* Celler-Kefauver Act of 1950, Pub. L. No. 81-899, 64 Stat. 1125 (codified as amended at 15 U.S.C. § 18) (amending 38 Stat. 209).

¹⁹ Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390, (codified as amended at 15 U.S.C. § 18a).

²⁰ National Cooperative Research Act of 1984, Pub. L. No. 98-462, 98 Stat. 1815 (codified as amended at 15 U.S.C. §§ 4301–4306 (2012)).

²¹ Standards Development Organization Advancement Act of 2004, Pub. L. No. 108-237, Title I, §§ 101–108, 118 Stat. 661, 661–65 (codified as amended at 15 U.S.C. §§ 4301–4306); National Cooperative Production Amendments of 1993, Pub. L. No. 103-42, 107 Stat. 117 (codified as amended at 15 U.S.C. §§ 4301–4306).

flexible American values. It will be seen that Congress has never identified any single economic value, such as consumer welfare or allocative efficiency, as the sole guiding lodestar for American antitrust. Instead, for more than 100 years, Congress has sought to balance a complex set of democratic ideals, values, and objectives in our antitrust laws.

Part II of this Article discusses Congress's historical balancing and blending of fundamental political, social, moral, and economic values to create a constitutional-like set of flexible laws that can be adapted to unforeseen and changing economic and political circumstances.²² Part II.A. briefly reviews some of the extensive scholarship addressing Congress's balancing of values and objectives in its core antitrust laws including the Sherman, Clayton, and FTC Acts. Parts II.B. and C. explore the less-studied balancing of political, social, moral, and economic values and objectives in more recent antitrust legislation.²³ Part II.B. specifically examines the legislative debates undergirding the passage of the HSR Act.²⁴ Part II.C. then turns to the debates and discourse that led to the passage of the NCRA in 1984 and the subsequent National Cooperative Production Amendments of 1993 and 2004.²⁵

Part III compares Congress's balancing of social, political, moral and economic values, goals, and objectives between 1890 and 2004 to show how our antitrust laws were never intended to identify or pursue any single set of so-called economic values.²⁶ This Article therefore disputes the currently in vogue assertions of Judges Posner, Bork, and Easterbrook that "although noneconomic objectives are frequently mentioned in the legislative histories, it seems that the dominant legislative intent has been to promote some

²² See *infra* Part II (discussing congressional intent of historical antitrust legislation).

²³ See *infra* Part II.A. (highlighting scholarship on congressional balancing of values regarding antitrust legislation).

²⁴ See *infra* Part II.B. (detailing congressional debates surrounding HSR Antitrust Improvements Act of 1976).

²⁵ See *infra* Part II.C. (describing legislative history of NCRA and its subsequent amendments).

²⁶ See *infra* Part III. This section builds upon an impressive array of antitrust scholarship discussing Congress's blending and balancing of political, moral, social, and economic values to pursue multiple competition objectives. See, e.g., RICHARD HOFSTADTER, *THE AGE OF REFORM* 227–45 (1955) [hereinafter HOFSTADTER I]; RICHARD HOFSTADTER, *THE PARANOID STYLE IN AMERICAN POLITICS* 195 (Vintage Books 1st ed. 2008) [hereinafter Hofstadter II]; HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 120, 165 (1955); Franklin D. Jones, *Historical Development of the Law of Business Competition*, 36 *YALE L.J.* 207, 216–24 (1927); Steven C. Salop, *What Consensus? Why Ideology and Elections Still Matter to Antitrust*, 79 *ANTITRUST L.J.* 601, 602–07 (2014); Fox, *supra* note 13, at 578; Pitofsky, *supra* note 11, at 1051–60; Stucke I, *supra* note 1, at 559–68; Stucke II, *supra* note 12, at 2637–44.

approximation to the economist's idea of competition viewed as a means toward the end of maximizing efficiency."²⁷

Part III argues that in promulgating antitrust legislation, Congress historically has carefully and judiciously balanced a diverse array of potentially conflicting fundamental American values.²⁸ In so doing, Congress has sought to create and bolster an enlightened system of capitalism dedicated to supporting and encouraging economic growth within a competitive economic system designed to also protect such sacred American values as equality of opportunity, diversity, and economic ethics and morality. Congress has never been concerned that paying homage and deference to our sacred social, moral, and political values in antitrust legislation would somehow pollute or dilute America's economic agenda or values. Rather, Congress has recognized that a careful balancing and blending of our diverse fundamental values, goals, and objectives would best protect and promote America's economic, political, and social welfare.

Part IV then addresses the issue of whether so-called economic values such as efficiency and consumer welfare truly are distinct and separable from our social, political, and moral values.²⁹ Tracing the history and growth of such economic values and objectives, Part IV describes how they actually are socio-economic derivatives of nineteenth-century social Darwinism and its attendant *laissez-faire* economic philosophies. These ideas are as much about social, political, and moral philosophies as they are about pure economics. Recognizing this, Congress has never adopted explicitly or implicitly in its antitrust regulations the misguided social, political, moral, or economic philosophies and values of social Darwinism or *laissez-faire*.³⁰

²⁷ RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 20 (1976) [hereinafter POSNER III]; see also Robert H. Bork, *Legislative History and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 26 (1966) [hereinafter Bork II] (concluding that the legislative history of the Sherman Act showed that Congress was primarily concerned with enhancing economic efficiency); Frank Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1703 (1986) [hereinafter Easterbrook] ("However you slice the legislative history, the dominant theme is the protection of consumers from overcharges. This turns out to be the same program as one based on 'efficiency.'").

²⁸ See *infra* Part III.

²⁹ See *infra* Part IV (comparing economic values with social, political, and moral values).

³⁰ *But see* First & Waller, *supra* note 2, at 2548-49, 2558 (recognizing that "[t]he modern Supreme Court has come to be unmoored from any sense of legislative direction of judicial decision making, when it comes to interpreting the antitrust laws," but arguing "that Congress has acquiesced in its own marginalization"); Harrison, *supra* note 2, at 422 ("The guiding principle of today's antitrust approach of the Supreme Court is much more aligned with doing nothing In the end, it reflects a deep-seated distrust of government involvement in economic affairs.").

II. LEGISLATIVE HISTORY AND THE VALUES REFLECTED IN OUR ANTITRUST LAWS

For nearly 100 years, numerous brilliant and accomplished antitrust scholars have fiercely debated Congress's antitrust objectives as expressed in the early antitrust statutes' legislative histories. This is neither surprising nor troubling, since America has never been "a nation placidly evolving without serious disagreements."³¹ Much of this scholarship seeks to shed light upon the "complex and diverse intellectual influences"³² emanating from a variety of "implicit or explicit community values."³³

The difficulty in interpreting Congress's legislative intent is exacerbated by several key factors. First, antitrust law inevitably "encounters contradictory attitudes by those affected by it."³⁴ Second, economic decision-making invariably requires normative values judgments.³⁵ And third, different

³¹ ERIC FONER, *Introduction* to RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* xxv (Beacon Press ed., 1992) [hereinafter HOFSTADTER III (Beacon Press ed., 1992)]. See generally RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* (1944) [hereinafter HOFSTADTER III].

³² William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 11 (2007) (observing that current antitrust policy debates "incorrectly attribute[] antitrust perspectives to a single source when they instead stemmed from more complex and diverse intellectual influences").

³³ Allen Fels, *A Model of Antitrust Regulatory Structure*, 41 LOY. U. CHI. L.J. 489, 498 (2010) (observing that "[t]he community is the ultimate arbiter of public value" and that "[i]ts preferences are expressed through legislation, rules and other directives . . . as well as many implicit or explicit community values.").

³⁴ *Id.* at 499.

³⁵ See, e.g., FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* xiii (1995) (arguing that economics "is grounded in social life and cannot be understood separately from the larger question of how modern societies organize themselves"); Walter Adams & James Brock, *Antitrust, Ideology and the Arabesques of Economic Theory*, 66 U. COLO. L. REV. 257, 327 [hereinafter Adams & Brock I] (arguing that "resolving antitrust issues calls for judgment. And that judgment is—and must be—informed as much by sociopolitical values as it is by economic facts and theory"); Jennifer K. Alexander, *The Concept of Efficiency: An Historical Analysis*, in *PHILOSOPHY OF TECHNOLOGY AND ENGINEERING SCIENCES*, vol. 9, 1007–08 (Anthonie Meijers ed., 2009) ("[E]fficiency in this common sense generally denotes approval: better efficient than not."); Oliver Goodenough, *Values, Mechanism Design, and Fairness*, in *MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY* 228 (Paul J. Zak, ed., 2008) ("Economic theorists have generally underestimated values as critical elements in human choice and behavior."); Foer, *supra* note 3, at 116 (arguing that "economics is a social science, not a natural science and definitely not a subdiscipline of mathematics"); Fox, *supra* note 13, at 576 (arguing that "the economic analyst called upon to aid in the solution of legal problems is forced to make judgments that economics does not and cannot provide"); Lao, *supra*

individuals “bring different ideological views to bear on antitrust enforcement.”³⁶ Consequently, it is hardly surprising or troubling that there are so many conflicting scholarly interpretations of the legislative histories of America’s core antitrust statutes.

A. America’s Early Antitrust Laws

Given the diverse array of excellent scholarship addressing the legislative histories of Congress’s early antitrust legislation, including the Sherman, Clayton, and FTC Acts, a full review is beyond the scope of this Article. However, a brief review of that scholarship will be useful for demonstrating how Congress historically has balanced a diverse array of often conflicting fundamental implicit and explicit American communal and market values in seeking to regulate American economic competition.

Turning first to scholarship focusing on Congress’s economic objectives, neoconservatives today frequently proclaim that a broad consensus has congealed around their view that Congress crafted its early antitrust statutes as consumer welfare prescriptions designed to maximize consumer welfare and allocative efficiency.³⁷ In the words of Judge Robert Bork, “[t]he only legitimate goal of American antitrust law is the maximization of consumer welfare.”³⁸ Indeed, neoconservative scholars have been outspoken in proclaiming that Congress was necessarily focused on increasing economic efficiency.³⁹

note 4, at 666 (arguing that “it is almost inevitable that consciously or unconsciously, ideology will come into play in one’s approach to exclusionary conduct”); Stucke I, *supra* note 1, at 604 (“Even if antitrust technocrats, for normative reasons, limit antitrust to economic goals, they cannot avoid noneconomic values”).

³⁶ Salop, *supra* note 26 at 602; *see also* Lao, *supra* note 4, at 666 (discussing how ideology and values impact one’s “perspectives on the proper role of antitrust”).

³⁷ *See* sources cited *supra* notes 3 and 27; *see also* 4 P. AREEDA & D. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 149 n.2 (1980); P. AREEDA, L. KAPLOW & A. EDLIN, ANTITRUST ANALYSIS: PROBLEMS, TEXT AND CASES 486 (6th ed. 2004) (discussing the arguments that “the noneconomic motives for [antitrust] legislation are less important than serving the economic function or that pursuing competitive prices and efficiency actually serves the broader objectives to the extent Congress intended;” and that “the difficulty of formulating standards to serve the broader objectives may leave the courts, by default, with those of the economic model of competition: allocative efficiency, innovation, and consumer welfare”); Bork II, *supra* note 27, at 7.

³⁸ BORK I, *supra* note 3, at 51.

³⁹ *See, e.g.*, POSNER III, *supra* note 27, at 20; Easterbrook I, *supra* note 27, at 1703–04; Lawrence A. Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CAL. L. REV. 1, 2 (1980) (“Preoccupation with efficiency is changing the law.”). Professor Sullivan adds:

A number of scholars have accepted the premise “that Congress passed the antitrust laws to further economic objectives,”⁴⁰ but disputed the precise nature of Congress’s economic objectives. Professor Robert Lande, for example, has brilliantly argued that Congress passed the early antitrust laws primarily to promote economic “objectives of a distributive rather than of an efficiency nature.”⁴¹ Professor Lande extensively reviewed the legislative histories of the Sherman, Clayton, and FTC Acts, and eloquently defended his thesis “that the antitrust laws were passed primarily to further what may be called a distributive goal, the goal of preventing unfair acquisitions of consumers’ wealth by firms with market power.”⁴²

Professor and economist Jonathan Baker more recently argued that “[t]he best interpretation of the understanding of antitrust’s original generation is neither Judge Bork’s nor Professor Lande’s.”⁴³ Instead, Professor Baker believes that “the Sherman Act was understood then as protecting natural rights to economic liberty, security of property, and the process of free and competitive exchange from artificial interference by private actors”⁴⁴ Ultimately, Professor Baker asserts that “[s]o long as competition policy remains the product of a political understanding aimed at capturing economic efficiencies, as it should, economic analysis will remain the essence of antitrust policy, enforcement, and litigation.”⁴⁵

The current Supreme Court has issued several revisionist decisions. It has expanded the scope of the rule of reason and reduced the reach of per se rules, thus calling for fewer rules and more analysis. At the same time it has narrowed inquiry under the rule of reason. Only competitive effects are relevant. This usually means efficiency effects. “Reason,” in antitrust, is becoming blind to other social consequences.

Id.

⁴⁰ Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 68 (1982).

⁴¹ *Id.*

⁴² *Id.* at 69–70; *see also id.* at 151 (“Congress wanted to encourage economic efficiency and to ensure that the fruits of this efficiency were passed on to consumers, but efficiency was never its primary goal. Congress attempted to accomplish its overriding redistributive aims in such a way that the benefits of modern productivity would still be realized.”).

⁴³ Jonathon B. Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 FORDHAM L. REV. 2175, 2177 (2013).

⁴⁴ *Id.* Professor Baker further posits that “the dispute over antitrust’s origins is largely irrelevant to the goals of modern antitrust because the contemporary Supreme Court has accepted the Sherman Act’s ‘dynamic potential.’” *Id.* (citing *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988)).

⁴⁵ *Id.* at 2196. Professor Baker adds that his “vision of antitrust’s goals and future recognizes the political context of antitrust while simultaneously embracing the central role of economics in the field.” *Id.*

Professor Robert Pitofsky agrees with Professor Baker that economic concerns should “remain paramount,”⁴⁶ and urges that “[t]he issue among most serious people has never been whether non-economic considerations should outweigh significant long-term economies of scale . . .” in interpretations of the antitrust laws and concrete antitrust analyses.⁴⁷ But he cautions that “the trend toward use of an exclusively economic approach to antitrust analysis excludes important political considerations that have in the past been seen as relevant by Congress and the courts.”⁴⁸ Coming from a somewhat different economic direction, Professors Areeda and Hovenkamp recognize the numerous legislative statements of concern “that the trusts (a) raised prices and (b) injured others.”⁴⁹ But Congress’s “most important and perhaps most troublesome conclusion is that while the framers of the Sherman Act were intent on condemning ‘monopoly,’ they saw the principal injury of monopoly as reaching competitors rather than consumers . . .”⁵⁰ Turning to other early antitrust legislation, Professors Areeda and Hovenkamp note that their legislative histories “offer little aid in identifying the fundamental interests that antitrust policy should protect[,]”⁵¹ and attribute to the legislative histories “little weight on the fundamental question of whether economic efficiency, injury to competitors, or some alternative ‘populist’ goal should guide antitrust policy.”⁵² Consequently, they go on to chide judges “[who] sometimes talk as if Congress has already decided the [antitrust] question before them.”⁵³

⁴⁶ Pitofsky, *supra* note 11, at 1075.

⁴⁷ *Id.* at 1051.

⁴⁸ *Id.* at 1075. Professor Pitofsky adds, “[s]uch considerations as the fear that excessive concentration of economic power will foster antidemocratic political pressures, the desire to reduce the range of private discretion by a few in order to enhance individual freedom, and the fear that increased governmental intrusion will become necessary if the economy is dominated by a few, can and should be feasibly incorporated into the antitrust question.” *Id.*

⁴⁹ P. AREEDA & H. HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 43 (4th ed. 2013).

⁵⁰ *Id.* at 42–43. Professors Areeda and Hovenkamp additionally observe, “[a] substantial history of sources other than the legislative debates suggests that the proponents of the Sherman Act were significantly more concerned about injury to competitors than injury to consumers.” *Id.* at 55.

⁵¹ *Id.* at 62.

⁵² *Id.* at 63. The authors emphasize “that the common law process of making [antitrust] law ultimately was both intended by the antitrust enactments and has occurred.” *Id.* at 64.

⁵³ *Id.* The authors believe that attempts to derive judicial decisions from the antitrust acts’ legislative histories “can be mischievous when it is a substitute for thought and analysis. The judge who really thinks that Congress has already decided the matter at issue is not likely to think very long or hard about the conclusion, for which he erroneously supposes that he is not responsible.” *Id.*

Other scholars and commentators have focused on the various implied and explicit social, political, and moral values that drove our early antitrust legislation. Perhaps most famously, historian Richard Hofstadter has observed that monopolies and trusts were viewed as violating Progressives' "inherited precepts and their moral preferences."⁵⁴ As a result:

The Progressive case against business organization was not confined to economic considerations, nor even to the more intangible sphere of economic morals. Still more widely felt was a fear that the great business combinations, being the only center of wealth and power, would be able to lord it over all other interests and thus put an end to traditional American democracy.⁵⁵

Professor Hofstadter saw America's early "antimonopoly tradition" as resting "intellectually upon [both] classical economic theory and upon the pluralism of American democratic thought."⁵⁶ Consequently, he opined, the original goals of antitrust were economic, political, and social.⁵⁷ Professor Hofstadter ironically added, "[a]mong the three, the economic goal was the most cluttered with uncertainties, so much so that it seems to be no exaggeration to regard antitrust as being essentially a political rather than an economic enterprise."⁵⁸

Professor Hofstadter built upon the work of Wisconsin Professor Hans B. Thorelli, who recognized in 1955 that the study of economic policy "runs the risk of becoming sterile unless a synthesis is attempted from time to time on the basis of knowledge made available and systematized by such differing social sciences as law, economics, history, political science, and the study of

⁵⁴ HOFSTADTER I, *supra* note 26, at 243.

⁵⁵ *Id.* at 227. Professor Hofstadter added that Progressives, "were trying, in short, to keep the benefits of the emerging organization of life and yet to retain the scheme of individualistic virtues that [business] organization was destroying." *Id.* at 217.

⁵⁶ Richard Hofstadter, *What Happened to the Antitrust Movement?*, in HOFSTADTER II, *supra* note 26, at 195.

⁵⁷ *Id.* at 199–200.

⁵⁸ *Id.* at 200. Professor Hofstadter elaborated:

The second class of goals was political; the antitrust principle was intended to block private accumulations of power and protect democratic government. The third was social and moral; the competitive process was believed to be a kind of disciplinary machinery for the development of character, and the competitiveness of the people—the fundamental stimulus to national morale—was believed to need protection.

Id.

public opinion.”⁵⁹ Noting that Congress “considered one antimonopoly bill after another without ever . . . calling on the advice of professional economists,”⁶⁰ Professor Thorelli opined that solid antitrust analyses were “eminently a matter of values.”⁶¹ Indeed, Professor Thorelli felt that the early American trusts and monopolies engendered “widespread public discontent and frustration,” as a result of the “conflict between some of the most ingrained ideas of the American people on the nature and workings of the political economy and the actual economic, technical, and institutional developments in certain fields”⁶²

Other antitrust scholars have picked up these themes. For example, Professor Rudolph Peritz has posited that antitrust legislation had to deal with “an underlying conflict, a fundamental disagreement about the political economy of competition. . . . between factions holding opposing views of society.”⁶³ Professor Peritz believed that “[i]n a fundamental sense, current antitrust policy reflects longstanding tensions between public policies favoring competitive markets and those favoring private rights of property and contract.”⁶⁴ Criticizing the manner in which antitrust’s “political sphere has come to be identified as an economic domain,”⁶⁵ Professor Peritz urged that

⁵⁹ THORELLI, *supra* note 26, at vii.

⁶⁰ *Id.* at 120.

⁶¹ *Id.* at viii (“Just where and how the balance between principles of cooperation and competition should be struck in different fields is, of course, eminently a matter of values.”).

⁶² *Id.* at 165. Presaging Professors Areeda and Hovenkamp, Professor Thorelli insightfully added, “[t]he fact that numerous and variegated attempts have been made to ‘map’ the intentions of the 51st Congress without any one investigator producing results generally accepted as conclusive appears to confirm the view that complete success is unattainable.” *Id.* at 214.

⁶³ RUDOLPH J. R. PERITZ, *COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC*, LAW 34 (rev. ed. 2000). Professor Peritz explained:

On the one side, the Literalists believed that the policy directing the antitrust laws should rest upon free and unrestricted competition among roughly equal market participants, among independent entrepreneurs or free workmen, whether or not the consequence in any particular transaction was fair or reasonable. On the other [hand], the advocates of a Rule of Reason urged that antitrust policy should tolerate large consolidations of capital and allow private agreements that restrain trade when the agreements protect a fair return on property or some other traditional exercise of freedom of contract.

Id. (alteration in original).

⁶⁴ *Id.* at 305.

⁶⁵ *Id.* at 302.

“[f]or competition policy to remain a durable good, it must reflect a dialogical sense of political economy.”⁶⁶

A diverse array of progressive antitrust scholars and commentators agree that our antitrust laws reflect a careful balancing of diverse social, political, moral, and economic goals. Professor William S. Comanor, for example, observes that “[a]ntitrust is not immune to the clash of conflicting interests, and indeed it represents, to a substantial extent, a political accommodation among various groups.”⁶⁷ Thus, “[t]hose who look for a single-minded purpose in antitrust are inevitably frustrated.”⁶⁸

Professors Maurice Stucke, Eleanor Fox, and Harry First concur. Professor Stucke, for example, has repeatedly described how antitrust historically has sought to promote diverse political, social, and moral goals in order to strengthen America’s economic system.⁶⁹ Professor Fox similarly has described Congress’s antitrust goals of promoting and protecting “pluralism, entrepreneurial freedom, opportunity to compete, access to the market, freedom from exploitation, and fair process.”⁷⁰ Meanwhile, Professor Harry

⁶⁶ *Id.* at 303; *see also* Sullivan, *supra* note 39, at 4. Professor Sullivan similarly observed:

The Warren Court was the custodian of a multivalued antitrust tradition. To that Court, the idea of competition included political and social objectives. Among those were easing market access, protecting dealer independence, promoting good faith in transactions, and correcting extreme disparities in bargaining power. The Warren Court also was interested in assuring, on grounds of equity and fairness, and regardless of supposed impact on resource allocation, that prices be related to cost. It sought each of these goals as an end in itself. Competition could foster all of them.

Id. at 4. Professor Sullivan added, “[c]ontext was important. The interests involved were identified: the strength of values pointing toward one resolution was measured against the strength of those pointing toward another.” *Id.*

⁶⁷ William S. Comanor, *Antitrust in a Political Environment*, 27 ANTITRUST BULL. 733, 734 (1982).

⁶⁸ *Id.* at 751. Professor Comanor adds that antitrust “can never be a precise policy tool designed to achieve specific objectives: whether the economist’s concept of economic efficiency or some other.” *Id.*

⁶⁹ *See, e.g.*, Stucke II, *supra* note 27, at 2580. Professor Stucke adds that “competition law has had, and will always have, multiple economic, political, social, and moral objectives.” *Id.* at 2578. Indeed, “[c]ompetition policy historically sought to promote political, social, and moral values of fair competition, dispersal of economic power, and promoting economic opportunity and individual autonomy.” *Id.* at 2637; *see also* Stucke I, *supra* note 1, at 560–62 (enumerating diverse social, political, and moral concerns that the Supreme Court has gleaned over the years in reviewing the Sherman Act’s legislative history).

⁷⁰ Fox, *supra* note 13, at 566–67. Looking specifically at the Clayton Act,

First persuasively posits that “[s]omething other than technical analysis is thus needed to make [antitrust] decisions. And the choice of the core concepts on which to focus antitrust enforcement is the product of political values, not technical decisions.”⁷¹

What are we to make of all this outstanding legal and historical scholarship reaching conflicting conclusions as to Congress’s legislative intents in its early antitrust statutes? Perhaps the reason that no definitive single conclusion or set of conclusions can be reached is that Congress, like it so often must do, had to balance different social, political, moral and economic values, objectives and visions in order to pass antitrust legislation that could pass the tests of time. Reviewing the extensive legislative histories and debates, it can be seen that the proponents of our early antitrust statutes shared such explicit and implied values as a belief in fair competition (equality of opportunity), economic diversity, and economic fairness through government oversight. Meanwhile, the opponents shared such express and implied values as efficiency through economic concentration, freedom of contract, protection of private property rights, and neo-Darwinian notions of “survival of the fittest.” Nearly 120 years after the passage of the Sherman Act, these battles rage on with no definitive conclusions yet attained. As observed in Parts II.B. and C. below, more recent congressional antitrust debates have sparked similar values clashes, and required Congress to carefully and delicately balance diverse social, political, moral and economic goals and objectives.⁷²

B. American Values and the Premerger Notification Requirements of the HSR Act of 1976

Decades of efforts to reform, modernize, and improve the Progressive

Professor Fox finds that “[i]ts major goals were to preserve diversity, to decentralize power for social and political reasons, and probably, but less explicitly, to prevent exploitation of consumers.” *Id.* at 578. Professor Fox adds that “[i]n short, allocative efficiency was never a self-conscious goal of the Congresses that enacted and strengthened the antitrust laws.” *Id.* at 566.

⁷¹ Harry First, *Bring Back Antitrust!*, THE NATION (May 15, 2008), <https://www.thenation.com/article/bring-back-antitrust/> [https://perma.cc/YX4A-VHY4]; see also First & Waller, *supra* note 2, at 2544 (“The institutional aspects of today’s antitrust enterprise . . . are increasingly out of balance, threatening the democratic, economic, and political goals of the antitrust laws.”); Frederick M. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law of Economics* 72 GEO. L.J. 1511, 1567 (1984) (“Yet antitrust, as a ‘charter of freedom,’ can perform a vital role for an entrepreneurial, pluralistic society: to mitigate the paradox of order and change, maintaining a balance of enterprise and power serving the felt needs of a given age. Consonant with its formative themes of pragmatism, pluralism, and distrust of power, antitrust is hardly definable by monopoly meters that count what is assumed, not shown, to exist.”).

⁷² See *infra* Parts II.B.–C. (illuminating recent antitrust congressional debates).

Era's Clayton Act⁷³ and the subsequent 1950 Celler-Kefauver Act⁷⁴ culminated in 1976 when Congress passed, following furious debating, maneuvering, and infighting, the HSR Act.⁷⁵ President Ford reluctantly signed the HSR Act into law on September 30, 1976,⁷⁶ although he attempted to mask his reluctance by saying that he was “pleased to see [the bill] enacted into law.”⁷⁷

The HSR Act is designed to provide the federal antitrust enforcement agencies “with the opportunity to review competitively-relevant information about large mergers and acquisitions—and to seek to enjoin or remedy them if, in the agency's view, they would create or enhance market power or

⁷³ Section 7 of the original 1914 Clayton Act prevented companies from acquiring the stock of rival companies where “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” Clayton Antitrust Act of 1914, Pub. L. No. 63-212, § 7, 38 Stat. 730, 731–32. Section 7 of the Clayton Act was designed to prevent economic concentrations through acquisition in their incipiency. See *United States v. United Machinery Shoe Co.*, 264 F. 138, 162 (E.D. Mo. 1920), *aff'd*, 258 U.S. 451 (1921). Unfortunately, companies frequently used asset purchases to completely evade the Act's objectives. See, e.g., *Arrow-Hart Hegemen Elec. Co. v. Federal Trade Comm'n*, 291 U.S. 587, 595 (1934); Lande, *supra* note 40, at 130.

⁷⁴ Celler-Kefauver Act of 1950, Pub. L. No. 81-899, 64 Stat. 1125 (amending Section 7 of the Clayton Act, 15 U.S.C. § 18 to state in part: “No person engaged in Commerce or in any activity affecting commerce shall acquire . . . the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the county, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”) Congress passed the 1950 Celler-Kefauver Act to close the Clayton Act's asset purchase loophole, and to further broaden the Clayton Act to help stem what it perceived to be a “rising tide of economic concentration in the American economy.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 315–23 (1962). The *Brown Shoe* Court emphasized that Section 7 of the Clayton Act is to be applied to mergers and acquisitions where the “trend to a lessening of competition in a line of commerce was still in its incipiency.” *Id.* at 317; see also Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 305–07 (1960) (discussing the “set of value premises” that drove the Celler-Kefauver Act; and observing that “none of the justifications for mergers by big companies were accorded any significance by Congress”); Wesley A. Cann, Jr., *Section 7 of the Clayton Act and the Pursuit of Economic ‘Objectivity’: Is There Any Role for Social and Political Values in Merger Policy?*, 60 NOTRE DAME L. REV. 273, 273–74 (1985); Lande, *supra* note 40, at 137–40; Note, *Section 7 of the Clayton Act: A Legislative History*, 52 COLUM. L. REV. 766, 779–80 (1952).

⁷⁵ Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 201, 90 Stat. 1390 (codified as amended at 15 U.S.C. § 18a (2012)).

⁷⁶ Hart-Scott-Rodino Antitrust Improvements Act of 1976: Statement by the President on Signing H.R. 8532 Into Law, Sept. 30, 1976, 12 WEEKLY COMP. PRES. DOC. 40, 1423 (Oct. 4, 1976) [hereinafter Presidential Statement of Sept. 30, 1976].

⁷⁷ *Id.* at 1424.

facilitate its exercise—before the merger or acquisition occurs.”⁷⁸ Under Title II’s premerger notification provision, companies with the requisite respective net assets or annual sales are required to notify the Federal Trade Commission (FTC) and the Antitrust Division of the United States Department of Justice (DOJ) before merging.⁷⁹

Once the proper premerger notification papers are filed, the FTC and the DOJ have 30 days to decide whether to ask for more information or to allow the merger or acquisition to proceed.⁸⁰ If the government quickly decides that there are no competitive problems with the acquisition, it can grant “early termination,” and allow the merger to proceed before the 30 days have passed.⁸¹ Conversely, if the government believes there may be a competitive problem, it can issue a “Second Request” requiring the parties to submit additional information.⁸² The government’s Second Request stops the clock, and stays the proposed acquisition while the parties gather the information necessary to respond.⁸³ “Requests for additional information . . . generally include both interrogatories and requests to produce documents, and are often far-reaching in their scope.”⁸⁴

After the parties have fully responded to the government’s Second Request, the government has an additional 30 days to decide whether to allow

⁷⁸ ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 356 (8th ed. 2017). “The HSR Act requires the parties to notify the DOJ and the FTC before consummating the proposed transaction and to observe the applicable waiting period. Notification requirements are triggered by ‘size-of-person’ and ‘size-transaction’ tests, so smaller transactions do not trigger HSR filing requirements.” ABA SECTION OF ANTITRUST LAW, MERGERS AND ACQUISITIONS: UNDERSTANDING THE ANTITRUST ISSUES 13 (4th ed. 2015). The FTC has issued implementing regulations and forms that can be found in the *Federal Register* and the FTC’s website. *See, e.g., Premerger Notification Program*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/enforcement/premerger-notification-program> [https://perma.cc/EWU4-ANA4] (last visited Feb. 2, 2018); *see also* 18 U.S.C. § 18a (2012) (Premerger notification and waiting period). For an excellent discussion of the Act’s requirements, *see* ABA ANTITRUST LAW DEVELOPMENTS, *supra* note 78, at 405–13.

⁷⁹ *See* 15 U.S.C. § 18a(a) (“Filing.”). The precise jurisdictional requirements include: 1) a commerce test; 2) a size-of-the-parties test; and 3) a size-of-the-transaction test. *Id.*

⁸⁰ *Id.* § 18a(b) (“Waiting period.”).

⁸¹ *Id.* § 18a(b)(2). The waiting time for cash tender offers is only 15 days. *Id.* § 18(b)(1).

⁸² *Id.* § 18a(e)(1)–(2).

⁸³ *Id.* (“Additional information; waiting period extensions.”).

⁸⁴ S. AXINN ET AL., ACQUISITIONS UNDER THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT: A PRACTICAL ANALYSIS OF THE STATUTE AND REGULATIONS § 1.03(2)(a)(i) (rev. ed., 2003) [hereinafter “AXINN ET AL.”].

the acquisition to proceed unchallenged.⁸⁵ If the government decides, however, that the effect of the proposed acquisition “may be substantially to lessen competition, or to tend to create a monopoly,” the government may file a motion for a preliminary injunction blocking the acquisition in a “United States district court for the judicial district within which the respondent resides or carries on business.”⁸⁶

1. The Legislative History of the HSR Act

President Ford’s simple statement on September 30, 1976, that he was “pleased to see [the HSR Act] enacted into law,”⁸⁷ and the Judiciary Committee’s straightforward Statement of Interest, masked a furious legislative battle and heavy Administration infighting against the bill that caused the final bill to be substantially changed and “watered down” from its early iterations.⁸⁸ Describing the intense and sometimes bitter legislative debates, Senator Edward Kennedy observed on September 8, 1976, that “[p]erhaps only the tax reform bill has been the subject of such extensive committee and floor consideration as this legislation.”⁸⁹

Consistent attempts to reform the Clayton Act by requiring companies to notify the government before they merged had been going on since at least 1938.⁹⁰ Thus, bills requiring advance notifications were introduced in 1938, 1943, and 1946, “but never came to a vote in either the House or Senate.”⁹¹ Additional reform attempts suffered similar fates due to intense opposition from business interests in 1956, 1961, and 1967.⁹²

Finally, in March 1975, Senator Phillip Hart of Michigan, a progressive protégé of Senator Estes Kefauver, made it one of his final missions to see meaningful antitrust reforms enacted. As Chairman of the Antitrust and

⁸⁵ 15 U.S.C. § 18a(e); 16 C.F.R. §§ 803.10, 803.20 (2017). In the case of cash tender offers, the additional waiting period is only ten days. Furthermore, in the case of tender offers, only compliance by the acquiring party, as opposed to both parties, is required to restart the waiting period. 15 U.S.C. § 18a(c)(2).

⁸⁶ 15 U.S.C. § 18; *id.* § 18a(f) (“Preliminary injunctions; hearings.”).

⁸⁷ Presidential Statement of Sept. 30, 1976, *supra* note 76, at 1424.

⁸⁸ Senator Abourezk, a leading supporter of the bill, noted that in June of 1976, he had been “opposed to any kind of compromise. But due to the illness of Senator Philip A. Hart [cancer], who was no longer physically able to keep up with the pace at that time—because this is Senator Hart’s bill . . .—a number of us who were involved in the legislation then agreed to go ahead with the weakening process.” 122 CONG. REC. 28,569 (1976). Senator Gary Hart of Colorado similarly observed, “I will vote for H.R. 8532 despite the fact that I am disappointed at the compromises which had to be made during its consideration in the Senate.” *Id.* at 29,163.

⁸⁹ *Id.* at 29,334.

⁹⁰ See AXINN ET AL., *supra* note 84, § 2.02.

⁹¹ *Id.*

⁹² *Id.*

Monopoly Subcommittee of the Senate Committee on the Judiciary, he introduced, in March 1975, Senate Bill 1284, a seven-title omnibus antitrust reform package.⁹³ It was well known that Senator Hart was suffering with terminal cancer, which gave his hard-fought battle for passage of his Bill a special poignancy and inspired the Bill's proponents.⁹⁴ Nevertheless, Senator Hart's Bill faced hostile and intense opposition over the next 18 months, and could not have been passed without substantial compromises and reductions in the Bill's scope, including the elimination of four of its original titles.⁹⁵

From the time that Senator Hart introduced his premerger notification Title in the Senate, and hearings began in the Antitrust Subcommittee in May 1975, the opposition from the Ford Administration and leading conservative Republicans, such as Senator Hruska of Nebraska and Senator Thurmond of South Carolina, was spirited.⁹⁶ The opponents made sure that numerous leading voices of the business community were permitted to appear and express "their strong opposition to the entire concept of preacquisition notification and to the specific provisions of Title V."⁹⁷

Although the Senate Antitrust Subcommittee ultimately favorably reported Title V to the full Senate by a vote of ten to five,⁹⁸ the Minority Views,

⁹³ *Id.* The premerger notification requirements were contained in Title V of the original bill. Other Titles included a Declaration of Policy (Title I); Antitrust Civil Process Act amendments (Title II); Federal Trade Commission Act amendments (Title III); parens patriae amendments (Title IV); a section affecting nolo contendere ("no contest") pleas in Clayton Act cases (Title VI); and various amendments, including an expanding of Section 7 of the Clayton Act's jurisdiction (Title VII). *See id.* at n.14.

⁹⁴ *See Senator Philip A. Hart Dies at 64; Was Called 'Conscience of Senate'*, N.Y. TIMES (Dec. 27, 1976), <http://www.nytimes.com/1976/12/27/archives/senator-philip-a-hart-dies-at-64-was-called-conscience-of-senate.html> [<https://perma.cc/U3XX-JATV>] ("Mr. Hart . . . did not seek re-election in 1976 because he was suffering from cancer.").

⁹⁵ In the final Bill, Title I "expand[ed] the civil investigating powers of the Antitrust Division." Presidential Statement of Sept. 30, 1976, *supra* note 76, at 1424. Title II covered premerger notification, and Title III "permit[ted] State attorneys general to bring antitrust suits on behalf of the citizens of their States to recover treble damages." *Id.* President Ford noted his strong opposition to Title III of the final Bill, but nevertheless signed the Bill in part because "[t]o meet in part my objection, Congress wisely incorporated a proviso which permits a State to prevent the applicability of [Title III]." *Id.*

⁹⁶ At one point, Senator Kennedy opined that with respect to the rights of the majority in the Senate, the minority was engaging in an "abuse of those rights." 122 CONG. REC. 16,939 (1976).

⁹⁷ AXINN ET AL., *supra* note 84, § 2.03(1); *see also The Antitrust Improvements Act of 1975: Hearings on S. 1284 Before the Subcomm. on Antitrust and Monopoly of the Comm. on the Judiciary*, 94th Cong. 151–201, 217–38 (1975) (testimony and proposed statements of J. W. Riehm and J. Randolph Wilson for the Chamber of Commerce of the U.S. and Richard D. Godown, Gen. Counsel, Nat'l Ass'n of Mfrs.)

⁹⁸ 122 CONG. REC. 7,570 (daily ed. May 19, 1976).

which were printed on May 20, 1976, were caustic and angry.⁹⁹ As an example, the Minority Report began by asserting, “Title V would give the Government arbitrary fiat powers to prevent any business acquisition, regardless of size or competitive impact, and runs counter to basic antitrust policies by inhibiting the competitive, efficient formation and allocation of capital resources.”¹⁰⁰ Such heated opposition continued up to the Bill’s final passage. For instance, on September 7, 1976, Senator Thurmond stated:

I shall vote against this bill with good reasons. . . . It will add more money to the already bulging pockets of the antitrust lawyers. It puts more big brotherism in Government. If fails to achieve balance. It does not require the big unions to follow the antitrust laws that the proponents thrust on business. It will hurt the small businessman. It will hurt the consumer.¹⁰¹

Although such intensive opposition did not ultimately block passage of the Bill, it led to numerous compromises, including reducing the initial stay period from 60 to 30 days,¹⁰² putting the burden of proof on the government in any preliminary injunction proceeding, and requiring the government to get a stay from a United States District Court if it wanted to challenge the transaction after the final 20-day post-Second Request period expired.¹⁰³ As Senator Edward Kennedy, a leading proponent, summarized on August 31, 1976:

[T]his whole issue, had been considered in subcommittee with 5 days of hearings, in full committee with 3 days of hearings and a total record of over 2,000 pages, with weeks of markup sessions in committee spanning up to 16 hours, with extensive debate on the floor of the Senate covering 10 days and some 70 votes. . . . We have compromised and compromised and compromised¹⁰⁴

One week later, Senator Kennedy added:

⁹⁹ S. REP. NO. 94-803 (1976) (report of the S. Comm. on the Judiciary together with Minority Views) [hereinafter “Senate Minority Report”].

¹⁰⁰ *Id.* at 205.

¹⁰¹ 122 CONG. REC. 29,155 (1976).

¹⁰² *See id.* at 16,479–81 (debating Senate Amendment No. 1747 to change initial waiting period from 60 to 30 days).

¹⁰³ *See id.* at 16,916 (testimony by FTC and DOJ officials stating that the Administration did not support an “automatic stay” provision). The Senate killed the proposed automatic stay provision on June 10, 1976. *Id.* at 17,427.

¹⁰⁴ *Id.* at 28,570.

Enough is enough, we have compromised the bill down and down, severely narrowing or even eliminating substantial portions of the original S. 1284. What remains may not be the best possible bill, but it is a good one. It will help bring better enforcement of the antitrust laws. It will be a solid step in the right direction.¹⁰⁵

2. The Political Context of the HSR Act

Political, economic, and institutional factors were especially critical in influencing the ultimate passage and scope of HSR Title II's premerger notification requirements.

a. Political Factors

President Ford originally opposed much of Senator Hart's seven-title omnibus antitrust reform Bill, as against the interests of the business community, but indicated a willingness to support limited aspects of the Bill. By early 1976, it was becoming clear that President Ford would face a tough reelection battle in November 1976. For example, the Ford Administration found itself facing escalating criticism from Democrats over "the quality of the administration's antitrust enforcement."¹⁰⁶ President Ford had to balance such concerns against his fear that he might be defeated in the Republican primary by the pro-business conservative Ronald Reagan. On April 4, 1976, the Ford Administration found itself under heavy Washington Post criticism in an editorial entitled *Waffling on Antitrust Laws*.¹⁰⁷ The editorial began:

President Ford is getting himself into needless trouble over the antitrust legislation now moving through Congress. It's sadly reminiscent of the way he got himself into trouble over the common situs picketing bill. In each case the administration strongly committed itself to the legislation. Then some months later, after assiduous lobbying by businessmen, Mr. Ford began to think of reasons for backing away from it. . . . [T]he legislation is fortunately, very much alive and the President may decide to think again and sign it.

¹⁰⁵ *Id.* at 29,335.

¹⁰⁶ See, e.g., Editorial, *The Antitrust Bill*, WASH. POST, Feb. 29, 1976, reprinted in 122 CONG. REC. 15,958 (1976). The Post noted "the ferocious opposition mounted by a wide variety of businesses" to antitrust reform, and questioned why "[a]s for the premerger notification rule, there has been, unaccountably, no action at all" in the House Judiciary Committee. *Id.*

¹⁰⁷ Editorial, *Waffling on Antitrust Laws*, WASH. POST, April 4, 1976, reprinted in 122 CONG. REC. 15,957 (1976).

But the stakes are large and the outcome is very much in doubt.¹⁰⁸

The editorial concluded, “Mr. Ford seems to find all the pressures of the Republican primary elections pushing against a broader enforcement of the antitrust laws. But he might discover, on further reflection, that they actually ought to be pushing the other way.”¹⁰⁹

Ultimately, once President Ford defeated Governor Reagan in the Republican primary and found himself facing the populist Jimmy Carter of Georgia, he grudgingly accepted the recommendations of his political advisors to sign the final Bill.¹¹⁰ Perhaps to protect his pro-business flanks, President Ford expressed ambivalence in signing the HSR Act on September 30, 1976:

I believe that far too many important managerial decisions are made today not by the marketplace responding to the forces of supply and demand, but by the bureaucrat. Government regulation is not an effective substitute for vigorous competition in the American marketplace.¹¹¹

The impact of the esteemed Senator Hart’s courageous battle against terminal cancer throughout the debates of 1975 and 1976 cannot be overemphasized in setting the context for the willingness of Senators on both sides of the aisle to reach compromises that would allow him to achieve his final mission, granting him an appropriate send-off. Eulogizing Senator Hart several months before the final Senate vote on Senate Bill 1284, Senator Kennedy poignantly observed:

Senator Hart assumed the chairmanship of the Antitrust Subcommittee almost 13 years ago when antitrust was far from “in vogue.” . . . It is indeed fitting and proper that—as

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ “Press reports indicated that the Justice Department, the office of Management and Budget, and Ford’s political advisors recommended that he sign the bill, while the Treasury Department, the Small Business Administration, and Attorney General Edward Levi (in a private communication to President Ford inconsistent with the official recommendation of his agency) recommended that he veto it.” Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 876 n.44 (1997) (citing Carole Shifrin, *Levi Recommended Veto of Antitrust Bill*, WASH. POST, Nov. 1, 1976, at C10; see also 5 DAILY EXEC. REP. (BNA), Sept. 29, 1976, at A-23-24).

¹¹¹ Presidential Statement of Sept. 30, 1976, *supra* note 76, at 1423.

Senator Hart concludes this term in the Senate—we should be tagged the “Antitrust Congress.”¹¹²

The HSR Act’s supporters also showed great perspicacity in bundling into the final Bill antitrust civil process reform, which the Ford Administration desired, to make the overall Bill more palatable to its opponents. This bundling allowed President Ford to crow, as he signed the final Bill, “[t]hese amendments to the Antitrust Civil Process Act were proposed by my administration two years ago, and I am pleased to see that the Congress has finally passed them.”¹¹³

b. Economic and Institutional Factors Surrounding the HSR Act

Changing macroeconomic factors were crucial to setting the context for the debates over the HSR Act. These included the ongoing transition from a domestic to an increasingly international economy, the continuing development of “allocative efficiency” theories at the University of Chicago and other conservative institutions, and increasing inflation.

As the economy shifted throughout the 1970s toward increasing internationalization and globalization, many businesspersons came to believe that American corporations would have to get bigger and stronger to successfully compete in the global marketplace. Senator Fannin of Arizona cogently summarized the rationale behind Republican opposition to any domestic governmental restraints on mergers and acquisitions by complaining that American companies could not fairly compete with merged companies from such countries as Germany, Japan, and France.¹¹⁴ Aligned against this

¹¹² 122 CONG. REC. 17,559 (1976).

¹¹³ Presidential Statement of September 30, 1976, *supra* note 76, at 1424.

¹¹⁴ 122 CONG. REC. 16,936 (1976). Senator Fannin stated:

Mr. President, we have many reasons to try to assist in the formation of capital today. I have mentioned the great need in the energy industry because I do feel that this is something that is very close to home to all of us here in Congress. We are daily trying to get greater development of these energy resources. But it takes a tremendous amount of capital formation, and what we are doing, if this title V is adopted, is going contrary to the work that is being done in so many committees.

It is my feeling that we must be competitive in our industries, not only within our country but as far as the competitive position we should be in with other countries of the world. We find ourselves lacking in that ability many times because of our inability to join our companies together to bring about an operation that can compete. We are in competition with countries such as Japan, West Germany, and

“bigger is better” philosophy stood progressives such as Senators Hart, Kennedy, and Abourezk, who believed that America could only remain strong through continuing economic innovation and rigorous domestic competition, which would be best provided by a diverse array of smaller and more aggressive competitors.¹¹⁵

Conservative senators such as Jacob Javits further expressed concerns that overly zealous enforcement of the antitrust laws was discouraging “the investment of private capital of the United States and other developed countries in the developing countries.”¹¹⁶ Senator Javits felt this revealed “a deep conflict between our antitrust philosophy and other major national policies when there should be coordination and thoughtful accommodation between them.”¹¹⁷ Senator Javits additionally observed that many experts had concluded that “uncertainty about the enforcement of U.S. antitrust law extraterritorially [was] the greatest single inhibitor to increased foreign trade and investment.”¹¹⁸ Senator Kennedy quickly and ably sought to address such concerns by citing to letters from the American Life Insurance Association, which stated, “[w]e are satisfied that . . . title V does not adversely affect the capital markets,” and “title V would not adversely affect the investment programs of mutual funds in the capital markets.”¹¹⁹

Ultimately, the developing philosophical values battle between those favoring economic concentration and efficiency, and the proponents of economic diversity and opportunity, also played a major role in the HSR Act debates. According to antitrust commentators Joe Sims and Deborah Herman¹²⁰:

By 1976, economic efficiency was increasingly elbowing “big is bad” out of its position as the principal framework for

France, countries that do not have all those restrictions that we have. In fact, in Japan, for instance, they have their government going hand in glove with their industries to see that they are in a position to compete in the other countries of the world. In fact, we have many reasons to be very jealous of what they are doing because it is working a great hardship on our industries and on the consumers in this country.

Id.

¹¹⁵ See *id.* at 15,310–14, 17,559.

¹¹⁶ *Id.* at 16,712.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 16,937.

¹²⁰ Both Sims and Herman served as Deputy Assistant Attorneys General for Antitrust in Republican administrations. Sims served under President Ford, and Herman in the Bush II Administration. Herman also later served as the Chairman of the FTC. Sims & Herman, *supra* note 110, at 865 n.3, 865–66.

antitrust analysis. The Supreme Court was starting to reflect this new learning in nonmerger cases like *Sylvania*, and even to some extent in merger cases like *General Dynamics* and *Marine Bancorporation*. The old antitrust was clearly losing steam.¹²¹

Such developing neoconservative economic thinking undergirded the opponents' arguments that the "so-called 'merger problem' [was] a myth," and that the Act "contradict[ed] fundamental antitrust principles favoring fluid resource mobility in free and competitive markets."¹²² The Act's opponents cited to a June 8, 1976 editorial in the Phoenix, Arizona Republic morning newspaper lambasting "Marxian principles," and argued that "the fundamental process that has been eroding our liberties is the politicization of economic decisions"¹²³

Countering this developing neoconservative economic doctrine was the idea that big indeed often is bad. Senator Abourezk blasted the "realities of the concentration of economic power."¹²⁴ He explained that although there were over 40,000 manufacturing corporations in the United States in 1976, "the 200 largest control two-thirds of all manufacturing assets. That's a greater share of assets than the thousand largest manufacturing corporations controlled in 1941."¹²⁵ Senator Abourezk was further troubled that "[i]ndustries in which four or fewer firms control 50 percent or more of sales account for one-fourth to one-third of all manufacturing sales," and that "[w]e now have five corporations whose sales exceed the total budget of our most populous state, California."¹²⁶

A third macroeconomic context in the HSR debate, as the Presidential election of 1976 approached, was the economic ravages caused by rising inflation. Proponents of the Bill contended that by helping to control monopolies, the Bill would control inflation. As an example, Senator Abourezk argued on May 25, 1976, "I firmly believe that this concentration of economic power is one of the root causes of the country's present economic difficulties. This concentration of power is the structural cause of our simultaneous inflation and depression."¹²⁷ Echoing this strong rhetoric, the Washington Post editorialized on September 16, 1976, "[s]tronger antitrust enforcement is a weapon against inflation. The bill deserves the votes of those

¹²¹ Sims & Herman, *supra* note 110, at 872.

¹²² Senate Minority Report, *supra* note 99, at 212.

¹²³ 122 CONG. REC. 16,936 (1976) (quotations omitted) (citing Editorial, *Antitrust* Government, Ariz. Republic, June 8, 1976).

¹²⁴ *Id.* at 15,313.

¹²⁵ *Id.* at 15,313–14.

¹²⁶ *Id.* at 15,314.

¹²⁷ *Id.*

congressmen who believe in open markets and greater competition in the American economy.”¹²⁸

In response, Senator Thurmond argued that unfettered private enterprise was the best way to fight inflation. He asked:

How are we going to increase employment if we do not have business growth, if we do not expand the economy and provide more jobs . . . ? [P]rivate enterprise will provide most of the jobs for our people if we will unshackle private enterprise and quit loading it down with more and more regulations and harassing it, as is now being done, by so many agencies of this Government¹²⁹

Finally, institutional factors affecting the Courts and the Executive branch’s antitrust regulatory agencies (the FTC and the DOJ’s Antitrust Division) also played a key role in catalyzing the passage of the HSR Act. “The poster child in the legislative debate was the tortured litigation history of *United States v. El Paso Natural Gas Co.*”¹³⁰ As noted in the legislative history, “the litigation spawned by the El Paso Natural Gas merger lasted seventeen years, and went to the Supreme Court six times, before the illegally-acquired firm was successfully divested. But the costs—to the firms, the courts, and the marketplace—were immense.”¹³¹ The House Judiciary Committee concluded:

To avoid the worst of these protracted exercises in futility is the major purpose of this bill. Merger litigation simply need not always continue for years and even decades—but if it takes place after consummation, it generally will, for the acquiring firm has no incentive to litigate the issues speedily.

In contrast, pre-consummation merger litigation proceeds rapidly and expeditiously, because all parties have a paramount interest in the quick resolution of the case.

In sum, the chief virtue of this bill is that its provisions will help to eliminate endless post-merger proceedings like

¹²⁸ Editorial, *Penalties for Price Fixing*, WASH. POST., Sept. 16, 1976, reprinted in 122 CONG. REC. 30,644 (1976).

¹²⁹ 122 CONG. REC. 15,322 (1976).

¹³⁰ William J. Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 ANTITRUST L.J. 825, 826–27 (1997) (discussing *United States v. El Paso Nat. Gas Co.*, 376 U.S. 651 (1964)).

¹³¹ H.R. REP. NO. 94-1373, at 10 (1976), as reprinted in 1976 U.S.C.C.A.N. 2637, 2642.

the El Paso and Papercraft cases, and replace them with far more expeditious and effective premerger proceedings. It can be done, and the savings will be considerable, as the AMAX case indicates.¹³²

Ultimately, the HSR Act was a quintessential piece of “top down” legislation. Leaders from the worlds of business, law, and economics, as well as members of the administration, dominated the hearings. Trade associations and consumer welfare associations such as the Consumer Federation of America, which claimed to represent more than 30 million “consumers,” also appeared.¹³³ Ironically, while both sides claimed to represent the “public interest,” there was very little record of any public participation other than a few letters placed in the Congressional Record, which upon close inspection, appear to be form letters prepared by elite business or consumer organizations.¹³⁴ It seems fair to assert that the public, who were most directly affected by economic concentration, had to hope that their interests were truly aligned with those of the participating elites.

3. The Underlying Values Assumptions and Premises of the HSR Act’s Proponents and Opponents

a. Proponents’ Underlying Assumptions for the Bill

As described above, the first key economic assumption held by the proponents of premerger notification was that the increasing consolidation of American industry was dangerous. Senator Abourezk and other proponents of the HSR Act staunchly believed that too much economic concentration was inherently dangerous. Senator Abourezk noted that: “The rapid trend toward consolidation is illustrated by the fact that between 1962 and 1968 alone, 110 of the 500 largest industrial firms disappeared in mergers. Between 1948 and 1968, some 1,200 manufacturing companies, each with assets of \$10 million or more, were merged with other firms.”¹³⁵ Similarly, Senator Kennedy pointed to a 1966 study chaired by Senator Phillip Hart warning that there was “a frightening amount of concentration of power in a few corporate hands, [and] that this had dangerous implications for our social and political, as well as our economic, welfare.”¹³⁶ Senator Kennedy further lamented “the almost daily newspaper stories on how these giant corporations have taken this power

¹³² *Id.*

¹³³ *See, e.g.*, Letter of Consumer Federation of America (Aug. 2, 1976), *reprinted in* 122 CONG. REC. 25,056 (1976).

¹³⁴ *See, e.g.*, 122 CONG. REC. 15,322–24 (1976) (citing a number of letters from businessmen addressed to Senator Thurmond).

¹³⁵ *Id.* at 15,314.

¹³⁶ *Id.* at 17,559.

and used it to corrupt and illegally influence governments and to destroy many of our traditional values”¹³⁷

Premerger notification opponents attacked this economic assumption as the “conjur[ing] up [of] a non-existent ‘merger problem.’” In their Senate Minority Subcommittee Report of May 20, 1976, they claimed “[t]he assertion that the alleged ‘concentrated structure of American industry . . . in major part stems from mergers and acquisitions’ is not only unsupported by the record, but is contrary to fact.”¹³⁸

A corollary to the HSR Act’s proponents’ assumption that economic consolidation was increasing was a growing belief that the resultant corporate power was increasingly undeserved. In introducing Senate Bill 1284 to the Senate on March 21, 1975, Senator Hart observed in part:

[C]urrently \$1 out of every \$4 consumers spend goes to buy products produced by a concentrated industry. Much of this concentration developed not from hardnose competition but from gobbling up a competitor rather than going out and establishing new competition.¹³⁹

A second key assumption of the proponents of premerger notification was that absent such notification, many illegal mergers would occur before the government had a realistic chance to challenge them.¹⁴⁰ Several commentators have challenged this assumption. For example, Sims and Herman “[did] not find it plausible that any truly significant transaction [would] escape detection in these days of intense media scrutiny and strategic complaints by competitors.”¹⁴¹ The HSR Act’s opponents also argued that “[s]ince 1969 an FTC program [had effectively] required premerger notification of proposed mergers involving large companies.”¹⁴²

Finally, the HSR Act’s proponents believed that the Bill ultimately would apply only to “the very largest corporate mergers—about the 150 largest out

¹³⁷ *Id.*

¹³⁸ Senate Minority Report, *supra* note 99, at 215.

¹³⁹ 121 CONG. REC. 8,143 (1975).

¹⁴⁰ See 122 CONG. REC. 14,711 (1976) (quoting Congressman Peter W. Rodino’s assumption that “if this bill’s premerger notification and waiting requirements are enacted into law, the Government will have a fair and realistic chance to challenge illegal mergers before they occur”); 122 CONG. REC. 15,310 *et seq.* (“[W]hat is even more troublesome, the Department may not investigate mergers under the Antitrust Civil Process Act until after the transaction has taken place. After an illegal merger has taken place, securing adequate relief is extremely difficult. Once the eggs of the two companies have been scrambled, it becomes difficult, if not impossible, to pull them apart.”).

¹⁴¹ Sims & Herman, *supra* note 110, at 892.

¹⁴² Senate Minority Report, *supra* note 99, at 216.

of the thousands that take place every year.”¹⁴³ This assumption was challenged by the Act’s opponents, who argued that “Title V’s premerger notification provisions are unjustifiably broad, reaching too many transactions and delaying them too long.”¹⁴⁴ Hindsight reveals that thousands of mergers and acquisitions annually fall within the ambit of the HSR Act’s premerger notification requirements, although the vast majority are quickly and expeditiously cleared.¹⁴⁵

b. Opponents’ Assumptions Against the Bill

A primary assumption of the HSR Act’s opponents was that the legislation and attendant rules would reach too many inconsequential transactions and impose unnecessary costs, burdens, and delays on business. One commentator opined in 1979, shortly after the final accompanying rules were promulgated, that “regulation writers descended upon the scene, like a swarm of locusts.”¹⁴⁶ Opponents branded the Bill’s requirements as “unrealistic,” and argued that it “cover[ed] far more than ‘giant companies.’”¹⁴⁷

A second major assumption was that the Act’s requirements would “inhibit[] the competitive, efficient formation and allocation of capital resources.”¹⁴⁸ Senator Buckley contended that his constituents in the investment community in New York feared “that the implications of this legislation of Title V [would] be to dramatically curtail the ability of people to move from one investment to another and all that this has meant down through the years to permit our system of capital formation and mobility of capital to perform its wonders.”¹⁴⁹ The correctness of this assumption is called into serious question by the tens of thousands of acquisitions and mergers that have proceeded without challenge since the Act’s passage in 1976. For example, in 2002, the FTC challenged only 24 transactions, and the Antitrust Division only

¹⁴³ H.R. REP. NO. 94-1373, at 11, (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2637, 2643.

¹⁴⁴ Senate Minority Report, *supra* note 99, at 210.

¹⁴⁵ See FED. TRADE COMM’N AND ANTITRUST DIV., ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2002: PURSUANT TO SUBSECTION (J) OF SECTION 7A OF THE CLAYTON ACT—HSR ANTITRUST IMPROVEMENTS ACT OF 1976 (TWENTY-FIFTH REPORT) 1 (2002), https://www.ftc.gov/sites/default/files/documents/reports_annual/25th-report-fy-2002/hsrannualreport_0.pdf [<https://perma.cc/J4NT-MYX8>] [hereinafter ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR, 2002]; *see also* Richard W. Pogue, *Effects on Other Merger Transactions: Does the Government Abuse its Newly Granted Power?*, 48 ANTITRUST L.J. 1471, 1473–75 (1979).

¹⁴⁶ Pogue, *supra* note 145, at 1471.

¹⁴⁷ Senate Minority Report, *supra* note 99, at 210.

¹⁴⁸ *See id.* at 205.

¹⁴⁹ 122 CONG. REC. 16,928 (1976).

10. Moreover, a number of the challenged transactions were allowed to proceed following limited divestitures of assets by the merging parties.¹⁵⁰

4. The Clash of Values in the HSR Debates

In debating whether the public would be better served by the HSR Act's premerger notification requirements, each side sought to invoke cherished American values. For example, the Act's proponents invoked such values as equal opportunity through increased competition, equality before the law, diversity (less concentration increases dynamic efficiencies and innovation), fairness, and accumulation of wealth deservedly through "hard-nosed competition" rather than "gobbling up competitors."

Opponents of premerger notification countered by invoking the values of freedom of the marketplace, due process, efficiency ("bigger is better"), and competition through neo-Darwinian philosophies of "survival of the fittest." As seen, these are essentially the same values that were argued and debated prior to the passage of the Sherman, Clayton, and FTC Acts. Set forth below is a comparison of the conflicting economic, moral, social, and political values invoked by the proponents and opponents of the HSR Act.

<u>Value Type</u>	<u>Proponents</u>	<u>Opponents</u>
Economic	Competitive Relations Diversity (small is better)	Collaborative Relations Efficiency (big is better)
Moral/Cultural	Interdependence Fairness	Independence Freedom/"Survival of the Fittest"
Social	Equality before the law Equal Opportunity	Due Process Freedom of Contract
Political	Anticipation of crisis Corporate responsibility to society	Responsive to crisis Protection of private property

¹⁵⁰ See ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR, 2002, *supra* note 145, at 1-2.

Ultimately, the HSR legislative debates continued to pit fundamental American values like protecting economic diversity, opportunity, and fairness against such countervailing values as economic freedom, private property rights, and efficiency through concentration. Throughout the HSR Act's legislative process, Congress sought to balance and blend the proponents' and opponents' conflicting social, political, moral, and economic values to forge a workable set of legislative compromises. Although the HSR Act's proponents urged Congress to accept and adopt the neoconservative economic values being espoused in 1976 by Robert Bork and other Chicago School neoconservatives, Congress declined to do so. Congress instead chose to enact antitrust legislation designed to encourage and enhance America's economic strength through aggressive governmental oversight of mergers and acquisitions and rigorous enforcement of the Clayton Act. Although some neoconservative commentators have branded the HSR Act as "in many ways . . . the last gasp of the old antitrust,"¹⁵¹ the HSR Act has served the test of time, and is an invaluable asset in America's ongoing antitrust merger and acquisition enforcement.

C. American Values and the National Cooperative Production Amendments of 1993 and 2004 to the National Cooperative Research Act of 1984

In 1993, after four years of spirited Congressional hearings and debates, President Clinton signed the National Cooperative Production Amendments of 1993,¹⁵² thereby creating the NCRPA.¹⁵³ Congress originally passed the NCRA in 1984 to "help ensure that fear of antitrust liability would not unduly discourage firms from forming R&D [research and development] joint ventures."¹⁵⁴ The 1993 Amendments expanded the NCRA to include production joint ventures, and the 2004 Amendments further expanded the NCRPA to include standards-setting organizations.¹⁵⁵ "With respect to production and research joint ventures, the NCRPA provides that such a 'joint venture' will not be illegal per se, but will 'be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition.'"¹⁵⁶ In passing the NCRPA, President Clinton worked closely

¹⁵¹ See, e.g., Sims & Herman, *supra* note 110, at 876.

¹⁵² National Cooperative Production Amendments of 1993, Pub. L. No. 103-42, § 3(b), (c), 107 Stat. 117, 118 (codified as amended at 15 U.S.C. §§ 4301-4306 (2012)).

¹⁵³ 15 U.S.C. §§ 4301-4306.

¹⁵⁴ ABA ANTITRUST LAW DEVELOPMENTS, *supra* note 78, at 468.

¹⁵⁵ See *id.* at 469; 15 U.S.C. § 4302 (applying rule of reason to joint ventures and standard-setting organizations). Congress set forth the purposes of its 1993 NCRA Amendments as helping "to promote innovation, facilitate trade, and strengthen the competitiveness of the United States in world markets . . ." 107 Stat. at 119.

¹⁵⁶ ABA ANTITRUST LAW DEVELOPMENTS, *supra* note 78, at 469 (citing 15 U.S.C. § 4302). Congress later amended the NCRPA again in 2004 to cover voluntary

with moderate Democrats and Republicans in Congress, as well as domestic business interests, to create a “real bipartisan coalition to make America work again, to help our business and our working people to move forward in the global economy.”¹⁵⁷

1. Legislative History of the National Cooperative Research Act of 1984

In 1984, Congress sought to address potential concerns and perceptions that the prospect of antitrust challenges was partially responsible for the reluctance of competitive firms in the United States to undertake joint research and development (R&D) activities.¹⁵⁸ The Assistant Attorney General for Antitrust, the Honorable J. Paul McGrath, testified in hearings before the Senate that:

The antitrust problem in the area of joint R&D is this perception—I should say misperception—that the antitrust laws constitute a barrier to joint R&D. The perception translates into a business risk—the risk that after substantial investments are made in joint R&D, the venture participants may be threatened by unfounded antitrust challenges¹⁵⁹

Congress sought to allay such concerns through the NCRA, which expressly allowed competitors to engage in approved joint R&D activities without having to fear the prospect of potential treble antitrust damages.¹⁶⁰ Congress concluded that such legislation was necessary to stimulate “the

standards development organizations, as well as research and production joint ventures. *See* Development and Promulgation of Voluntary Consensus Standards, Pub. L. No. 108-237, 118 Stat. 661 (2004) (codified as amended at 15 U.S.C. §§ 4301–4305).

¹⁵⁷ Remarks of President Clinton on signing the National Cooperative Production Amendments of 1993, 29 WEEKLY COMP. PRES. DOC., NO. 23, 1059 (June 10, 1993) [hereinafter 1993 Presidential Remarks].

¹⁵⁸ S. REP. NO. 98-427, at 2–3 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3105, 3107.

¹⁵⁹ *Id.* at 3, *as reprinted in* 1984 U.S.C.C.A.N. at 3107. Business executives echoed such testimony. For example, Steven Olson, Associate General Counsel of Control Data Corporation, testified in part that: “I think it fair to say that even among those who believe that our antitrust laws do not—or at least under reasonable application should not—inhibit cooperation in R&D, there is general agreement that many business executives perceive such laws as significant barriers to joint research. They thus shy away from such activities—and, over the long haul, our country is the loser.” *Id.*

¹⁶⁰ *See* 15 U.S.C. § 4303.

international competitiveness of U.S. firms in both mature and emerging industries.”¹⁶¹

Opponents of the 1984 NCRA legislation as originally proposed, tried, but were unable to delete key provisions awarding attorney’s fees to prevailing defendants in antitrust suits challenging joint R&D activities, and eliminating a “94-year tradition of treble damages for proven violations of the antitrust laws.”¹⁶² Criticizing President Reagan’s overall dramatic rollback of antitrust

¹⁶¹ S. REP. NO. 98-427, at 1, *as reprinted in* 1984 U.S.C.C.A.N. at 3105. The Report submitted by the Senate Judiciary Committee, then headed by Senator Strom Thurmond (R-S.C.) explained:

The international competitiveness of U.S. firms in both mature and emerging industries depends on their ability to remain at the frontiers of technological development. Equally important, the security of the United States vitally depends on the ability of U.S. firms to maintain their technological edge. Research and development is critical to the success of those efforts.

In many industries, however, the research and development necessary to remain competitive has become increasingly costly and risky—indeed, often prohibitively so. In addition, limits on the available pool of skilled scientific and technical personnel may preclude any single company from gathering the talent needed to make an R&D project successful.

In recent years, many of our trading partners have recognized the need for collaborative R&D efforts. Having seen the potential for tremendous economies that could be achieved through such efforts, firms in other countries have formed numerous joint R&D projects, often with government encouragement.

Many U.S. firms have also recognized the potential value of joint R&D efforts. These firms recognize that joint R&D holds the promise of a more efficient use of both scarce R&D capital and human resources. In light of the increasing competitiveness of the world economy, joint R&D efforts also represent a necessary step to continued prominence of U.S. firms. Furthermore, stepped-up joint R&D activity, and the innovation that it will make possible, promises to increase productivity and employment, and to permit continued American leadership in important fields of research.

Id. at 1–2, *as reprinted in* 1984 U.S.C.C.A.N. 3105, 3105–06.

¹⁶² *See id.* at 32 *as reprinted in* 1984 U.S.C.C.A.N. at 3126 (statement of Senator Howard Metzenbaum (D-Ohio)). Interestingly, Senator Metzenbaum mistakenly tied treble damages to the Sherman Act of 1890, when in fact they were created by the Clayton Act of 1914 (thereby creating only a 70-year tradition of treble damages for proven violations of the antitrust laws).

enforcement, Senator Metzenbaum, the former chair of the Judiciary Committee, argued:

The current administration's lax enforcement of the antitrust laws demonstrate[d] that now, more than ever, we need private antitrust enforcement. By eliminating the treble damages incentive in difficult antitrust litigation, we may be effectively immunizing such conduct. The elimination of treble damages will have a very adverse effect on the ability of those injured by violations committed by joint ventures—typically small businesses—to vindicate their claim.¹⁶³

Senator Metzenbaum and others also questioned the need for the NCRA, since “the principal administration official who pushed this legislation, former Assistant Attorney General William F. Baxter, has publicly conceded that ‘the extent to which the antitrust laws interfere with research and development is vastly overrated.’”¹⁶⁴

Through its passage of the NCRA in 1984, Congress showed that it understood and was not afraid to exercise its power to limit the potential breadth of its original antitrust laws. Importantly, however, Congress did so without adopting wholesale the neoconservative economic values currently in vogue. Instead, as with the HSR Act of 1976, Congress sought to carefully balance and blend conflicting fundamental political, social, and economic issues in an attempt to create a limited and workable legislative compromise that would promote general American welfare.

2. The Legislative History of the 1993 NCRPA

President Clinton enthusiastically signed the 1993 National Cooperative Production Amendments on June 10, 1993 in a White House ceremony, where he praised the “real bipartisan coalition” that “worked so hard to make this bill a reality and the leadership of both the House and the Senate.”¹⁶⁵ Three weeks earlier, on May 18, 1993, the House Judiciary Committee published an extensive report praising the bill as “economically beneficial and conducive to a resurgence of U.S. leadership in high technology.”¹⁶⁶ Congress set out three basic findings:

(a) technological innovation and its profitable commercialization are critical components of the ability of the

¹⁶³ *Id.* at 34, as reprinted in 1984 U.S.C.C.A.N. at 3128.

¹⁶⁴ *Id.* at 33, as reprinted in 1984 U.S.C.C.A.N. at 3128.

¹⁶⁵ 1993 Presidential Remarks, *supra* note 157, at 1058–59.

¹⁶⁶ H.R. REP. NO. 103-94, at 16 (1993), as reprinted in 1993 U.S.C.C.A.N. 176, 189.

United States to raise the living standards of Americans and to compete in world markets;

(b) cooperative arrangements among nonaffiliated businesses in the private sector are often essential for successful technological innovation; and

(c) the antitrust laws may have been mistakenly perceived to inhibit procompetitive cooperative innovation arrangements, and so clarification serves a useful purpose in helping to promote such arrangements.¹⁶⁷

Congress sought to justify the new amendments by painting a dire picture of America's declining competitiveness in the global marketplace.¹⁶⁸

The House Judiciary Committee also extensively focused on increasing criticism from Chicago School economists and business interests singling out America's antitrust laws "as a deterrent to innovative activity."¹⁶⁹ The Committee cast an envious eye upon how "in Europe, and most particularly in Japan, the formation of so-called 'depression' and 'rationalization' cartels has become an important aspect of industrial policy."¹⁷⁰ Nevertheless, to ease the

¹⁶⁷ National Cooperative Production Amendments of 1993, Pub. L. No. 103-42, 107 Stat. 117, 117 (1993).

¹⁶⁸ H.R. REP. NO. 103-94, at 8, *as reprinted in* 1993 U.S.C.C.A.N. at 180. The House Judiciary Committee worryingly observed:

At the beginning of the 101st Congress, a number of developments in several vital high-technology industries brought to the fore the issue of the antitrust treatment of production joint ventures. The last decade had witnessed a number of problems in economic and educational performance that all seemed to point to a condition of flagging U.S. international competitiveness: there was documented evidence of the continued dismal educational performance in math and science by American school children, a massive erosion of domestic market share in industries ranging from telephones and semiconductors to televisions and ball bearings, a serious deterioration in the high-technology trade balance, and a decreasing importance of American inventions in the patent system.

Id.

¹⁶⁹ *Id.* at 9, *as reprinted in* 1993 U.S.C.C.A.N. at 181.

¹⁷⁰ *Id.* at 9-10, *as reprinted in* 1993 U.S.C.C.A.N. at 182. The House Judiciary Committee emphasized:

The fundamental question presented by production joint venture legislation has ultimately to do with the relationship between the antitrust laws and innovation. The Committee is sympathetic to the

concerns of the legislation's diverse critics, the Committee stressed its substantial desire and objective to not override the thrust of the antitrust laws in blocking collusive and anticompetitive agreements between competitors.¹⁷¹

President Clinton's upbeat and optimistic remarks on June 10, 1993, as he signed the National Cooperative Production Amendments into law, presented a "non-controversial façade" that masked spirited legislative hearings and debates that had delayed the legislation's passage for four years.¹⁷² President Clinton exuberantly proclaimed that "by clarifying and eliminating misapprehensions about antitrust risk, this legislation will allow joint ventures that can increase efficiency, facilitate entry into markets, and create new productive capacity that otherwise would simply not be achieved."¹⁷³ Yet, in reality, the Amendments' opponents succeeded in substantially watering down the bill—thereby continuing some of the legal uncertainty surrounding production joint ventures.¹⁷⁴ Moreover, congressional recognition of nationalistic and xenophobic concerns seriously limited the ability of domestic

desire to enhance collaborative activity in order to spur American competitiveness, but not at the expense of those provisions of the antitrust laws that are in place to ensure that smaller economic players have the ability to redress antitrust injury resulting from the exploitation of market power advantage.

In some quarters, a new theory appears to be developing which holds that cooperation between firms engaged in industries subject to rapid technological change cannot possibly injure competition, because of the diversity of sources of innovation and the new nature of global competition. Yet, at this point in time, that theory—though obviously the product of thoughtful analysis—nevertheless remains an economic hypothesis, and not a statement of empirically demonstrated fact.

Id. at 16, as reprinted in 1993 U.S.C.C.A.N. at 189.

¹⁷¹ See *id.* ("Consequently, H.R. 1313, as the NCRA before it, seeks to clarify this favorable view of cooperative ventures without making unwarranted substantive changes in the fabric of the antitrust laws.").

¹⁷² See ERIC REDMAN, *THE DANCE OF LEGISLATION* 181 (1973).

¹⁷³ 1993 Presidential Remarks, *supra* note 157, at 1058.

¹⁷⁴ As an example, Congress stated that the Amendment "create[s] no exemption to the antitrust laws; nor does it change existing legal standards Nor does compliance with the reporting procedures relieve any person of the notification obligations under Hart-Scott-Rodino, 15 U.S.C. 18a." H.R. REP. NO. 103-94 at 5, as reprinted in 1993 U.S.C.C.A.N. at 177. Critics like Drake McKenney, an international antitrust lawyer, concluded that "[u]nfortunately the definition of 'joint venture,' when read in conjunction with the list of activities that are excluded from the definition of joint venture pursuant to the new law, is far from a model of clarity." See Drake D. McKenney, *New Antitrust Treatment of Production Joint Ventures*, 66 N.Y. ST. B.J., 46, 47, 49 n.2. (Sept./Oct. 1994).

companies to take advantage of the Act by partnering with foreign corporations.¹⁷⁵ In effect, Congress's and President Clinton's desire to create a broad bipartisan consensus "allow[ed] [the] legislators to avoid confronting difficult questions."¹⁷⁶

As background, following the NCRA's passage in 1984, its proponents were greatly disappointed by how few American companies seemed to be taking advantage of its provisions. For example, in 1989, Congressman Tom Campbell (R-Cal.) reported that "[w]hereas we have had roughly 30 filings a year under the National Cooperative Research Act, Europe under their block exemption from antitrust for the cooperative activity is running at over 300 per year."¹⁷⁷ As anxiety increased over America's perceived drop in global economic competitiveness, Chicago School economic theorists and business interests began pushing to greatly expand NCRA.¹⁷⁸

Beginning in 1989, in the 101st Congress, a series of proposed legislation was introduced seeking to expand domestic joint venture opportunities. Different approaches included: 1) "extend[ing] existing procedures and protections of the NCRA to cooperative activity beyond the research and development stage" (House Bill 1025; House Bill 2264; House Bill 423);¹⁷⁹ 2) taking a "certification" approach that "would have established a substantive antitrust safe harbor when the parties to a joint venture lack market power in the relevant product market" (House Bill 1024); and 3) "a project-specific bill (House Bill 2287) . . . that would have established under the direction of the Secretary of Commerce, an industry-led consortium for research and production of high definition television systems."¹⁸⁰

¹⁷⁵ See Derek Devgun, *Crossborder Joint Ventures: A Survey of International Antitrust Considerations*, 21 WM. MITCHELL L. REV. 681, 713 (1996). Reviewing Section 4306, Mr. Devgun observed "that Congress intended the 1993 amendments to inure to the benefit of the U.S. economy, regardless of the nationalities of the parties to the venture." *Id.*

¹⁷⁶ STEVEN M. GILLON, THAT'S NOT WHAT WE MEANT TO DO: REFORM AND ITS UNINTENDED CONSEQUENCES IN TWENTIETH-CENTURY AMERICA 238 (2000).

¹⁷⁷ *Production Joint Ventures Antitrust Legislation: Hearings on H.R. 423, H.R. 1024, H.R. 1025, and H.R. 2264 Before the Subcomm. on Econ. and Commercial Law of the Comm. on the Judiciary*, 101st Cong. 51 (1989) [hereinafter *House Subcommittee Hearings*] (statement of Hon. Tom Campbell (R-Cal.)).

¹⁷⁸ In opening the hearings on May 17, 1989, Chairman Jack Brooks observed that "[t]he media has given recent coverage to the concern that America is losing the all-important technological race in the areas of high definition television, supercomputers, and superconductivity. Industry and Government spokesmen now urge that American companies be allowed to form consortia to better compete." *Id.* at 1.

¹⁷⁹ H.R. REP. NO. 103-94, at 6, as reprinted in 1993 U.S.C.C.A.N. at 178. H.R. 423 "would have limited the NCRA protections only to small companies (less than 500 employees)." *Id.*

¹⁸⁰ *Id.* at 6.

Extensive hearings and debates ensued, and over the next four years, the legislation slowly evolved into its ultimate form through protracted subcommittee proceedings that included substantial mark-ups and introduction of new bills. Throughout this arduous legislative process, Congress expressed concerns over the White House's perceived lack of interest and involvement. For example, on July 26, 1989, Chairman Brooks admonished Secretary of Commerce Robert A. Mosbacher:

[W]e're still waiting. When do you think the proposal will be submitted to us?

....

You can understand, before we reach a decision in the Committee, we would like to have some indication really of where you're coming from on this issue We may not agree with you fully but we will have an idea of where we can go.

Nobody wants to dig into one of these issues when we don't have some basis of accord with the White House. This kind of issue is so important.¹⁸¹

President Clinton's and Vice President Gore's personal and substantial involvement in support of the legislation in early 1993 ultimately turned the tide in the proponents' favor.¹⁸² However, the lengthy congressional proceedings, which spanned three separate Congresses (the 101st through the 103rd), galvanized the opponents, and enabled them to firmly stamp their imprints upon the final bill.¹⁸³ Thus, Arthur Kaplan, a plaintiff's antitrust

¹⁸¹ *House Subcommittee Hearings, supra* note 177, at 157 (statement of Hon. Jack Brooks).

¹⁸² See THE CRISIS AND RENEWAL OF AMERICAN CAPITALISM: A CIVILIZATIONAL APPROACH TO MODERN AMERICAN POLITICAL ECONOMY 186 (Laurence Cossu-Beaumont et al. eds. 2016) (discussing President Clinton's efforts to build a more coherent, competitive competition policy through such means as increased R&D joint ventures and collaborations).

¹⁸³ See CONGRESS.GOV, [https://www.congress.gov/advanced-search/legislation?congresses%5B%5D=103&congresses%5B%5D=102&congresses%5B%5D=101&legislationNumbers=&restrictionType=field&restrictionFields%5B%5D=allBillTitles&restrictionFields%5B%5D=summary&summaryField=billSummary&enterTerms="national+cooperative+production"&wordVariants=true&legislationTypes%5B%5D=hr&legislationTypes%5B%5D=hres&legislationTypes%5B%5D=hjres&legislationTypes%5B%5D=hconres&legislationTypes%5B%5D=hamdt&legislationTypes%5B%5D=s&legislationTypes%5B%5D=sres&legislationTypes%5B%5D=sjres&legislationTypes%5B%5D=sconres&legislationTypes%5B%5D=sam](https://www.congress.gov/advanced-search/legislation?congresses%5B%5D=103&congresses%5B%5D=102&congresses%5B%5D=101&legislationNumbers=&restrictionType=field&restrictionFields%5B%5D=allBillTitles&restrictionFields%5B%5D=summary&summaryField=billSummary&enterTerms=)

attorney from Philadelphia, who testified aggressively against the Bill on September 28, 1989, was able to testify on March 18, 1993, in support of the ultimate Bill.¹⁸⁴ Kaplan was pleased that the Bill was “explicitly limited to joint production facilities in the United States, generating jobs here in the United States,” and felt the final Bill struck “a reasonable balance and correct[ed] misperceptions about the antitrust laws.”¹⁸⁵ Chairman Brooks similarly noted on March 18, 1993, that the ultimate Bill “represent[ed] a significant improvement over those measures previously introduced in this Committee,” and lauded such a “bipartisan agreement.”¹⁸⁶ He added, “it reflects not only today’s economic realities but also a determination, on both sides of the aisle, to take effective steps to meet that challenge.”¹⁸⁷

During the Presidency of George W. Bush, Congress further expanded the scope of the NCRPA in 2004 to extend to “standards development organization[s] while engaged in a standards development activity.”¹⁸⁸ Congress noted that:

Standard development organizations play a pivotal role in promoting free market competition. Technical standards promote product competition by ensuring a common interface between products that may be substituted for one another.¹⁸⁹

Congress was impressed in part by the arguments of economist David Teece that “[c]ompatibility standards are essential if products and their

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¹⁸⁴ *House Subcommittee Hearings*, *supra* note 177, at 424 (statement of Arthur Kaplan); *National Cooperative Production Amendments of 1993: Hearing on H.R. 1313 Before the Subcomm. On Econ. and Commercial Law of the Comm. on the Judiciary*, 103rd Cong. 45 (1993) [hereinafter *House Subcommittee Hearings II*] (statement of Arthur Kaplan).

¹⁸⁵ *House Subcommittee Hearings II*, *supra* note 184, at 43, 44–45 (statement of Arthur Kaplan).

¹⁸⁶ *Id.* at 17–18 (statement of Hon. Jack Brooks).

¹⁸⁷ *Id.*

¹⁸⁸ See 15 U.S.C. § 4302(2); 15 U.S.C. § 4301(a)(7).

¹⁸⁹ H.R. REP. NO. 108-125, at 3 (2004), *as reprinted in* 2004 U.S.C.C.A.N. 642, 643.

complements are to be used in a system.”¹⁹⁰ As with the NCRPA of 1993, the 2004 Amendments expressly excluded such activities as “[e]xchanging information among competitors relating to cost, sales, profitability, prices, marketing, or distribution of any product, process, or service that is not reasonably required for the purpose of developing or promulgating a voluntary consensus standard”¹⁹¹

3. The Political, Economic, and Ideological Context of the NCRPA

Political, economic, technical, and ideological factors all played critical roles between 1989 and 1993, in shaping and influencing the scope of the NCRPA as enacted in June, 1993, and subsequently amended in 2004.

a. Political Factors

Neither President H.W. Bush nor his Administration ever got behind the proposals to amend the NCRA in any meaningful way. A possible explanation may be that the Administration was concerned about opposition to the legislation by entrepreneurs such as Dr. T.J. Rodgers, the President and CEO of Cypress Semiconductor Corporation in San Jose, California, and George Gilder, a conservative Republican author.¹⁹² Another possibility is that the Administration was unable or unwilling to choose sides among the numerous competing interest groups.

In any event, once President Clinton came to power, the efforts to amend the NCRA took off. President Clinton’s support was largely due to his desire in early 1993 to be perceived as a friend to business while he got the sluggish economy moving.¹⁹³ President Clinton saw the legislation as:

¹⁹⁰ *Id.* at 3 (citing David J. Teece, *Information Sharing, Innovation and Antitrust*, 62 ANTITRUST L.J. 465, 475 (1994)).

¹⁹¹ 15 U.S.C. § 4301(c)(1)–(3); *see also* H.R. REP. NO. 108-125, at 9, *as reprinted in* 2004 U.S.C.C.A.N. at 649–50.

¹⁹² Interestingly, James F. Rill, who served as the Assistant Attorney General for Antitrust under Bush I, never testified concerning the legislation during his tenure at Justice. However, in March 1993, shortly after President Clinton assumed office, Mr. Rill was invited to appear as a featured speaker in favor of the legislation. *See House Subcommittee Hearings II, supra* note 184, at 23–33 (statement of James Rill). Mr. Rill testified that “of the various approaches that have been suggested in this area, a straightforward extension of the NCRA to joint production ventures is the best option.” *Id.* at 29.

¹⁹³ The Clinton campaign’s focus on the economy was made popular by campaign advisor James Carville’s infamous phrase “It’s the economy, stupid!” THE WAR ROOM (Cyclone Films et al., 1993). The phrase is memorialized in the notorious documentary *The War Room*, which followed the campaign in the New Hampshire primaries. *Id.*

[T]he embodiment of the concept that the Vice President and I strongly espoused during our campaign last year. It will allow American companies, large and small, to pool their resources to compete and win in the international marketplace.

. . . .

This is an example of how you can have a real bipartisan coalition to make America work again, to help our business and our working people to move forward in the global economy.¹⁹⁴

Perhaps even more importantly, President Clinton was looking forward to recommending a dramatic series of health care reforms. A key component of such reforms was expected to include “[t]he formation of large regional alliances which would buy health care insurance for individuals and small businesses. . . . [And] at the same time, . . . encourage greater cooperation among health care providers.”¹⁹⁵ Thus, President Clinton saw his visible and successful support for the National Cooperative Production Amendments as a crucial first step in priming the pump for future antitrust reforms related to health care.

In early 1993, with the American economy sagging, and a new President in office largely as a result of economic frustrations, Congress felt tremendous pressure to be perceived as aggressively supporting technological innovation and American competitiveness. As Chairman Brooks noted in his opening statement on March 18, 1993, “[a]fter two Congresses of contemplating possible legislation in this area, I think it is high time we act on this bill if we are going to do our part in bolstering American competitiveness.”¹⁹⁶ Praising the bipartisan nature of the legislation, Chairman Brooks expressed his agreement with President Clinton’s view of the legislation as “just the kind of forward-thinking initiative we need to drive the economy toward a decade of creative change.”¹⁹⁷

b. Economic Factors

Similar to the passage of the HSR Act, changing macroeconomic factors

¹⁹⁴ 1993 Presidential Remarks, *supra* note 157, at 1058–59.

¹⁹⁵ Thomas A. Piraino Jr., *Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures*, 35 WM. & MARY L. REV. 871, 875 (1994) (footnotes omitted).

¹⁹⁶ *House Subcommittee Hearings II*, *supra* note 184, at 1 (statement of Hon. Jack Brooks).

¹⁹⁷ *Id.* at 2 (statement of Hon. Jack Brooks) (quoting President Bill Clinton).

were crucial to setting the context for the debates over the National Cooperative Production Amendments of 1993. These included the ongoing transition from a domestic to an increasingly globalized economy, and the continued development of neoconservative Chicago School economic theories. Economists such as Milton Friedman were finding receptive audiences for their criticisms of “[t]he over-estimation of the importance of monopoly”¹⁹⁸ and their recommendations that government “let [people] follow the bent of their own interests because there is no way of predicting where they will come out.”¹⁹⁹

Contemporaneous with Congress’s consideration of the legislation, the media were focusing upon the developing economic thinking that effective global competition requires access to substantial amounts or resources procured through cooperative efforts. For example, on February 17, 1993, the *New York Times* praised a joint venture between Cummins Engine Company and Komatsu Limited of Japan, as another in the growing “list of huge multinationals pooling their resources to manufacture existing products and develop new ones.”²⁰⁰ Similarly, on April 13, 1993, the *Wall Street Journal* reported approvingly on a series of ten collaborative research and development activities between the “Big Three” American automakers.²⁰¹ Also receiving substantial media attention, as the legislation moved towards final passage, was a series of global telecommunications and network alliances.²⁰² Picking up on such media reports, Representative Carlos J. Moorhead submitted a formal statement advocating joint venture legislation that would result in “more efficient use of capital, the development of new products for the American consumer, and the creation of new jobs for American workers.”²⁰³

Also critically important to the passage of the Amendments was the economic perception in early 1993 that the Japanese and Europeans were gaining ground, and even beating America in the new global economy. Representative of such thinking was the testimony in March 1993 of Pat

¹⁹⁸ See, e.g., MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 123 (rev. ed., 2002).

¹⁹⁹ *Id.* at 118.

²⁰⁰ Barnaby J. Feder, *Two Diesel Giants Set Alliance*, *N.Y. TIMES*, Feb. 17, 1993, at D1. The article added that the diesel engine production joint venture “comes at a time when the pace of industrial cooperation is accelerating both domestically and across borders.” *Id.* at D5.

²⁰¹ Oscar Survis, *Big Three Win Joint Patent, Making a First*, *WALL ST. J.*, Apr. 13, 1993, at B1.

²⁰² Mary Lu Carnevale et al., *U.S. West Move Puts Pressure on Its Rivals*, *WALL ST. J.*, May 18, 1993, at B1; *AT&T Plans to Establish Global Information System*, *WALL ST. J.*, May 26, 1993, at B6; John J. Keller & Mary Lu Carnevale, *MCI and BT Set a Counterstrike Against AT&T*, *WALL ST. J.*, June 2, 1993, at A3; Stephen K. Yoder & G. Pascal Zachary, *Digital Media Business Takes Form as a Battle of Complex Alliances*, *WALL ST. J.*, July 14, 1993, at A1.

²⁰³ *House Subcommittee Hearings II*, *supra* note 184, at 19 (statement of Hon. Carlos J. Moorhead).

Choate, an economist and former vice president for policy analysis at TRW, and a director of the Manufacturing Policy Project.²⁰⁴ Additional economic concerns included America's growing trade deficits, and the loss of manufacturing jobs as the domestic manufacturing base shifted from "smokestack" to hi-tech industries.²⁰⁵

c. Ideological Factors

As Milton Friedman observed, "[i]n the economic area, a major problem arises in respect of the conflict between freedom to combine and freedom to compete."²⁰⁶ By the late 1980s, the American courts and regulatory agencies

²⁰⁴ Mr. Choate argued:

When one takes a look at American industry and the global economy, we have to find the ways and means to make American industry swift and strong.

Now, one of the reasons that the country's industries have not been able to compete is they lack some of the options that other industries in other countries have to work together. I think H.R. 1313 cuts out some underbrush that is hampering American industry today.

The second thing that is very clear is that American industry today is facing competition that is organized in a very different way in Europe and in Japan and Korea than in the United States. These industries operate, as this committee has studied before, in giant keiretsus that have banks that stand in the center, and these banks are backed by their governments. They literally cannot go bankrupt. These are competitors who cannot go bankrupt.

. . . .

Now, I am an economist and not a lawyer, but reading H.R. 1313 through an economist's eyes, I think it does some things that need to be done in this economy. It permits our companies to come and work together. It allows them to do it with greater assurances of no frivolous lawsuits, primarily private lawsuits.

Id. at 39. In his written comments, Mr. Choate pessimistically added that "global competition for American entrepreneurs and firms is a bet your company gamble. And we are losing." *Id.* at 41.

²⁰⁵ See, e.g., *House Subcommittee Hearings*, *supra* note 177, at 163 (statement of Chairman Jack Brooks "that the trade is moving steadily to the Eastern rim.")

²⁰⁶ FRIEDMAN, *supra* note 198, at 26.

had dramatically shifted from favoring the freedom to compete²⁰⁷ over the freedom to combine, to favoring more competitor combinations and collaborations under the guise of increasing allocative efficiencies.²⁰⁸

Equally important from the legislation's opponents' perspective was the countervailing economic idea that "free and open competition" was the key to long-term American economic competitiveness.²⁰⁹ San Francisco plaintiffs' antitrust attorney (and former San Francisco mayor) Joe Alioto argued, "there's absolutely no question that something like 8 to 9 out of 10 of the new products are developed by smaller companies and that 8 out of 10 of the jobs are created by smaller companies."²¹⁰ Mr. Alioto concluded that "[e]veryone should have the right to compete and all of our markets should be free, open and unfettered. There should be no fixes."²¹¹

Throughout the legislative debates, ideologies and viewpoints relating to the economic impacts of global technological competition were fiercely debated. For example, Representative Boucher (R-Va) observed that

²⁰⁷ For example, in 1984, economists David Teece and Thomas Jorde criticized the earlier prevailing view that "no cooperation should be permitted, that it is best we keep companies apart from one another." Thomas M. Jorde & David J. Teece, *Innovation, Cooperation, and Antitrust*, 4 HIGH TECH L.J. 1, 12, 18 n.43 (1989). Professor Jorde, from University of California, Berkeley, testified in favor of the National Cooperative Production Amendments on July 26, 1989. *House Subcommittee Hearings, supra* note 177, at 221 (statement of Professor Thomas Jorde). Professor Jorde noted that "[t]he need for business cooperation and the drag the current antitrust law places upon that cooperation is a subject that I have been studying now for a number of years with my colleague, David Teece, of the University of California." *Id.* at 222.

²⁰⁸ See, e.g., *Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185 (7th Cir. 1985). Judge Easterbrook wrote:

Cooperation is the basis of productivity. It is necessary for people to cooperate in some respects before they may compete in others, and cooperation facilitates efficient production The war of all against all is not a good model for any economy. Antitrust law is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment.

Id. at 188 (citations omitted).

²⁰⁹ *House Subcommittee Hearings, supra* note 177, at 203, 219 (statement of Dr. T.J. Rodgers of Cypress Semiconductor Corp.). Dr. Rodgers argued, "I don't think we have to give up the American entrepreneurial system to Japanese-like controls in the United States. I think the solution is education. Give us more engineers. We'll go off and fight with the Japanese." *Id.*

²¹⁰ *Id.* at 260.

²¹¹ *Id.* at 258. Mr. Alioto added that "the antitrust laws are our Magna Carta of free enterprise . . . They are as important to our economic freedom as the Bill of Rights is to our personal freedom." *Id.* at 256.

“technically oriented industries are characterized today by increasingly short product life cycles, by continuous modification of products as experience suggests new areas for improvements, and rapid response to consumer demand both for variety and customization”²¹² Contemporary media reports similarly focused on the purported success of competitive alliances in developing new technologies and cutting-edge innovations.²¹³ The need for accumulated capital to conduct expensive R&D and bring innovations to market successfully also was paramount.²¹⁴

4. The Underlying Values and Ideological Premises of the Proponents and Opponents of the NCRPA

a. Proponents’ Assumptions for the Bill

A major assumption driving the Bill’s proponents was that the Japanese and the Europeans were winning the long-term economic battle for control of the globalized marketplace due to their government-sanctioned cooperative efforts. By 1993, Japan was being referred to as “Japan, Inc.,” and authors like Michael Crichton were writing sinister novels about Japan’s economic conquest of the western world.²¹⁵ In the words of Pat Choate, “we are losing.”²¹⁶ Ironically, as Japan’s economy crashed in the mid-1990s, the Japanese began questioning the effectiveness of their Keiretsus (business

²¹² *House Subcommittee Hearings*, *supra* note 177, at 48 (statement of Rep. Boucher).

²¹³ *See, e.g.*, Stephen E. Almassy & E.B. Baatz, *455 Electronics Execs Say Rugged Individualism is Fading*, reprinted in ERNST & YOUNG, PROGRESSION OF AN INDUSTRY: ELECTRONICS 92: STRATEGIC ALLIANCE OUTLOOK (1992).

²¹⁴ *See, e.g.*, *House Subcommittee Hearings*, *supra* note 177, at 55. Representative Tom Campbell (R-Ca.) noted:

Many of the cutting-edge industries for international competition require massive amounts of capital This high specific capital cost takes many of these investments beyond the scope of single American firms. The joint venture, or consortium, provides an appealing alternative. Capital costs are shared; market risks are diversified.

Id. at 55–56.

²¹⁵ *See generally* MICHAEL CRICHTON, *RISING SUN* (1992) (unraveling a fictitious murder-mystery whilst providing a skeptical commentary of Japanese-American economic relations).

²¹⁶ *House Subcommittee Hearings II*, *supra* note 184, at 41.

networks) and ultimately implemented more comprehensive and tougher competition laws.²¹⁷

The second major assumption held by the proponents was that a fear of antitrust liability had chilled the formation of efficient procompetitive production joint ventures. Representative Thomas Campbell, who had formerly served as the director of the Federal Trade Commission's Bureau of Competition, presented the specter of "per se treatment" in arguing that far more production joint ventures would exist in a more hospitable legal environment.²¹⁸

As early as 1984, during the hearing on the NCRA, Senator Metzenbaum and others had questioned such assumptions. They pointed to the paucity of historical antitrust challenges to research joint ventures and the absence of "hard evidence to support the claim that elimination of treble damages will encourage significantly more joint ventures."²¹⁹ Representative Synar observed that: "First, there are several examples of joint ventures already formed, operating and successful under the antitrust laws. Second, the Antitrust Division . . . has never challenged a joint venture with an allegation of per se antitrust illegality. And third, it is difficult to believe that any negative perception exists even under this [lax] Antitrust Division."²²⁰ The opponents' criticisms appear to have been justified. Since 1993, relatively few companies have chosen to avail themselves of the Act's notification provisions, and not a single legal case interpreting or applying the Act appears today in Title 15 of the United States Code Annotated.²²¹

b. Opponents' Assumptions Against the Bill

A primary assumption of the legislation's opponents was that the durability of America's antitrust laws has helped protect America's long-term economic prospects. George R. Heaton, an industrial economist at MIT, stated in 1989, "[t]o me, the fact of 100 years [of American antitrust laws] suggest

²¹⁷ A series of studies examining all of Japan's government-sanctioned cartels from 1953 to 1994 "found virtually no cartels in Japan's highly successful industries, while cartelized industries such as petrochemicals, chemical fertilizers, textiles and cement were largely unsuccessful internationally." Michael E. Porter & Mariko Sakakibara, *Competition in Japan*, 18 J. ECON. PERSPS., 27, 40 (Winter 2004).

²¹⁸ *House Subcommittee Hearings*, *supra* note 177, at 53.

²¹⁹ S. REP. NO. 98-427, at 33 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3105, 3127.

²²⁰ *House Subcommittee Hearings*, *supra* note 177, at 43, 269 (statement of Rep. Synar) ("Since [May], there has been nothing presented to change my mind."); *see also id.* at 393 (statement of Rep. Coelho) ("I don't believe that an antitrust law change will help facilitate what they're trying to do.").

²²¹ *See* 15 U.S.C.A. §§ 4301-4306 (West 2009 & Supp. 2017) (citing no cases that analyze the disclosure requirements).

[sic] a differing starting assumption, and that is, conservatism. The durability of antitrust law coupled with its relative resistance to change reflect, in my view, a well-considered wisdom of the American people.”²²²

A second key assumption of the opponents was that “wide open competitiveness,” rather than competitor collaborations, creates the best chances for inventing new technologies. Dr. T.J. Rodgers of Cypress Semiconductor Corporation pointed to the success of Intel in developing the dynamic RAM, but then losing its “position as the American leader in that market to Micron Technology, an entrepreneurial start-up in Boise, Idaho. Intel also invented the static RAM, a faster memory used in high-performance computers, only to abandon that market to Cypress, and our arch rival, Integrated Device Technology.”²²³ Dr. Rodgers asserted that “[i]f the antitrust laws had been relaxed a few years ago at the expense of these start-ups who held their ground in the memory market, the Japanese would have been virtually 100% successful in wiping out our semiconductor memory industry.”²²⁴

Finally, the opponents assumed that the Bill’s attempts to discriminate in favor of American companies would “hurt American competitiveness” by depressing the level of foreign investment in the United States.²²⁵ This assumption has been effectively rebutted by the continuing staggering level of foreign investment in the United States, which helps support our escalating budget deficits.²²⁶

5. Conflicting Values in the NCRPA Debates

In debating the merits of the National Cooperative Production Amendments of 1993, both sides agreed upon the desired economic outcome: enhanced American global competitiveness through greater scientific advancements and technological innovations, and increased domestic productivity. Yet they differed dramatically in the role Congress and government regulation should play in helping to achieve such objectives. In debating whether to allow increased cooperation and collaboration between

²²² *House Subcommittee Hearings, supra* note 177, at 88.

²²³ *Id.* at 198.

²²⁴ *Id.*

²²⁵ See Letter of Robert Umphrey, Chairman, Investment Committee, Organization for International Investment (an association “of more than 50 U.S. companies representing a broad cross-section of the manufacturing and services sections”) to Hon. Jack Brooks (Mar. 17, 1993), *reprinted in* the Appendix to *House Subcommittee hearings II, supra* note 184.

²²⁶ See generally MARC LABONTE AND JARED C. NAGEL, CONGRESSIONAL RESEARCH SERVICE, FOREIGN HOLDINGS OF FEDERAL DEBT (Mar. 28, 2016), <https://fas.org/sgp/crs/misc/RS22331.pdf> [<https://perma.cc/FJ2D-7GWM>].

competitive businesses, each side invoked their own set of cherished and historical American values. A powerful tension existed between the proponents' belief in increased cooperation, collaboration, and efficiency, and the opponents' belief in competition and diversity. For example, the proponents lauded the potential efficiency gains from increased cooperation and collaboration, and the fairness to businesses of greater legal and regulatory certainty. The opponents countered that open and unfettered competition between a diverse group of entrepreneurial small businesses would allow the economic cream to rise to the top, and spur innovation and technological advances.

Set forth below is a comparison of the conflicting economic, moral, social, and political values that drove the debates and the ultimate legislative compromises.

<u>Values Type</u>	<u>Proponents</u>	<u>Opponents</u>
Economic	Collaborative/cooperative relations Efficiency	Competitive relations Diversity
Moral/Cultural	Interdependence Nationalism Freedom	Independence Globalism Fairness
Social	Due Process Legal Certainty	Equality Before the Law Legal Responsibility
Political	Spontaneous Cooperation Government Support of Business (Government as a Partner) Anticipation of Crisis Private Property is Owned Absolutely	Regulated Cooperation Government Regulation of Business (neutral government) Responsive to Crisis Societal Interest in Business Resources

Similar to earlier legislative debates concerning American antitrust legislation, core American political, social, and economic values had to be balanced and blended to achieve working legislative majorities. The four years

of hearings leading to the NCRPA mirrored the earlier debates over the 1976 HSR Act. The core American values of competition, diversity, and fairness held by progressive thinkers such as Louis Brandeis, Teddy Roosevelt, and Howard Metzenbaum ran headlong into the competing values of concentration, collaboration, efficiency, and economic freedom held by free-market conservatives such as Milton Friedman, Ronald Reagan, and Strom Thurmond.

A unique confluence of political factors, including President Clinton's recent election based primarily upon widespread economic anxiety, enabled the NCRPA's opponents and proponents to craft a series of compromises that generated widespread bipartisan support for the legislation. Bipartisan support was further solidified by focusing upon the shared values of increased American economic competitiveness through scientific advancement and technological innovation, and the generally shared assumption that greater protections from the antitrust laws would catalyze the formation of a myriad of new production joint ventures.²²⁷ Perhaps most importantly, between 1984 and 2003, Congress never adopted wholesale neoconservatives' economic philosophies or values, and instead passed and amended legislation designed to create carefully circumscribed and limited exceptions to aggressive enforcement of the Sherman Act. As it had done in passing the HSR Act in 1976, Congress made it clear that it was not prepared to abandon or discount the diverse political, social, and moral goals underlying our early antitrust laws.

III. CONGRESS'S HISTORICAL BALANCING AND BLENDING OF DIVERSE FUNDAMENTAL SOCIAL, POLITICAL, MORAL, AND ECONOMIC VALUES AND OBJECTIVES IN AMERICA'S ANTITRUST LAWS

The antitrust legislative histories and impressive scholarship discussed in

²²⁷ As discussed, President Clinton announced the 1993 NCRPA Amendments with great fanfare, and Congress then passed the 2004 Amendments with little discussion or opposition. This showed that following extensive legislative debates in 1984 and 1993, the legislation was no longer seen as controversial during the Bush II years. Nevertheless, the initial extensive opposition and heated values debates ultimately resulted in a substantial watering down of the proponents' original objectives. Ultimately, the ongoing debates and congressional review had the positive unintended consequence of catalyzing the promulgation seven years later by the Department of Justice and the Federal Trade Commission of extensive, meaningful, and useful Antitrust Guidelines for Collaborations Among Competitors. These Guidelines serve today as a material source of legal guidance for competitive companies seeking to enter into joint ventures. *See generally* U.S. DEP'T. OF JUSTICE AND FTC ANTITRUST GUIDELINES FOR COLLABORATION AMONG COMPETITORS (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf [<https://perma.cc/N44F-XF25>].

Part II confirm that Congress has never sought to codify through our antitrust laws a single economic philosophy or ideology such as Chicago neoconservative economics.²²⁸ Neither has Congress sought to promote a single neoconservative economic objective such as maximizing consumer welfare or allocative efficiency.²²⁹ Rather, Congress has sought to balance various communal and market values with the goal of promoting America's economic and political welfare while safeguarding and protecting cherished historical American values including equality of opportunity, economic diversity, divided economic and political power, and economic ethics, morality, and fairness.²³⁰

For more than 100 years, Congress has approached antitrust with the political understanding that it must balance and blend a diverse array of social, political, moral, and economic objectives. In so doing, Congress has recognized that the relevant social, political, moral, and economic concerns underlying our antitrust laws are “more than menacing neighbors.”²³¹ Rather, they are “interdependent and mutually defining” sets of societal values and visions that must be balanced and blended if our antitrust laws are to be

²²⁸ See, e.g., PERITZ, *supra* note 63, at 26 (discussing how “the common-law Sherman Act, with its supplement of uncommon-law remedies, seemed to be reaching for a middle ground between the rhetorics of industrial liberty and fair price, between their logics of competition policy and private property rights, and between their statist and libertarian approaches.”); Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1191 (1977); HOFSTADTER II, *supra* note 26, at 199–200 (discussing Congress's economic, social, and political goals); Stucke II, *supra* note 27, at 2578 (discussing how competition policy “has had, and will always have, multiple, economic, political, social, and moral objectives”).

²²⁹ Stucke I, *supra* note 1, at 599; see also THORELLI, *supra* note 26, at 165 (discussing how the Sherman Act sought to balance “the conflict between some of the most ingrained ideas of the American people of the nature and workings of [our] political economy”); Fox, *supra* note 13, at 578 (discussing Clayton Act's diverse economic goals); Pitofsky, *supra* note 11, at 1051–60 (discussing antitrust's key political goals); Horton IV, *supra* note 12, at 632–34 (discussing Congress's concern with protecting competitive opportunities); Andreas Koutsoudakis, *Antitrust More Than a Century After Sherman: Why Protecting Competitors Promotes Competition More Than Economically-Efficient Mergers*, 34 U. DAYTON L. REV. 223, 230 (2009) (“[P]rotecting competitors is one main purpose for which Congress enacted antitrust legislation . . .”).

²³⁰ See generally Daniel Yankelovich, *How Changes in the Economy Are Reshaping American Values*, in VALUES IN PUBLIC POLICY 16, 23 (H. J. Aaron et al. eds., 1994) (discussing the importance of such “unchanged values” as equality of opportunity, fairness, and freedom); *id.* at 43 (discussing the “conflict Americans feel between what might be called ‘market values’ versus ‘communal values’”); *id.* at 44 (arguing that even in harsh economic times, “Americans care deeply about reconciling communal with market values”).

²³¹ PERITZ, *supra* note 63, at 303.

workable, effective, and supported by both the business community and the American public.²³²

When Congress passed such core antitrust legislation as the Sherman Act in 1890, and the Clayton and FTC Acts in 1914, it was fully cognizant of and wished to push forward the broad social, political, moral, and economic currents favoring equality of opportunity, fair and ethical competition, and the fear of concentrated power—both political and economic. These core American values predated the American Revolution, and sparked the Boston Tea Party on December 16, 1773—a revolt against the British East India Company’s efforts to monopolize the colonial tea trade.²³³

Such fundamental values and concerns continued to mold Americans’ thinking in the early years of our Republic.²³⁴ For example, on September 18, 1833, President Andrew Jackson stated that American citizens’ freedoms were at risk “from combinations of the wealthy and professional classes,” whose wealth was too often “insidiously employed.”²³⁵ President Abraham Lincoln

²³² *Id.* Professor Peritz believes that the blending of such values through congressional bargaining and negotiation represents our antitrust laws’ strength. He explains:

Such treatment of economic and political affairs can open the rhetorical space necessary for competition policy to promote public deliberation, to sustain participatory government, while inspiring individual aspirations and economic enterprise. For competition policy to remain a durable good, it must reflect a dialogical sense of political economy. It is in that sense of interdependence between liberty and equality, between individual and collectivity, and, finally, between “the market” and “the state,” that we find the continuing possibility of democratic politics and economic opportunity.

Id.

²³³ See TED NACE, *GANGS OF AMERICA: THE RISE OF CORPORATE POWER AND THE DISABLING OF DEMOCRACY* 41–45 (2005). The Boston Tea Party was led and carried out largely by Boston merchants, who were neither concerned about “consumer welfare” nor “allocative efficiency.” Rather, they were protecting their rights to compete equally on a fair playing field against the attempted “vertical integration” sought by the British East India Company. *Id.* at 43; see also BENJAMIN WOODS LABAREE, *THE BOSTON TEA PARTY* 60–62 (1964).

²³⁴ See, e.g., NACE, *supra* note 233, at 46–55. Thomas Jefferson, for example, expressed grave concerns in 1816 concerning the potential of “monied corporations” challenging the strength of the federal government, and “bid[ding] defiance to the laws of our country.” *Id.* at 46 (quoting Letter from Thomas Jefferson to Tom Logan (Nov. 1816), in PAUL LEICESTER FORD, *THE WRITINGS OF THOMAS JEFFERSON*, VOL. 10 69 (1892-1899)).

²³⁵ JON MEACHAM, *AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE* 267 (2008).

expressed similar concerns about powerful aggregations of capital threatening our democracy in a letter to businessman and friend William Elkins in November 1864, while the Civil War was still raging.²³⁶ Henry Adams, the grandson and great-grandson of two American Presidents, also expressed deep fears in 1870, “that the day is at hand when corporations . . . after having created a system of quiet but irresistible corruption—will ultimately succeed in directing government itself.”²³⁷

Americans also historically were driven by sacred notions of equal economic opportunity on a fair playing field.²³⁸ For example, in 1864, Lincoln told a group of Ohio soldiers returning home from the Civil War that America represented “an open field and a fair chance for your industry, enterprise, and intelligence; that you may all have equal privileges in the race of life, with all its desirable human aspirations.”²³⁹ President Lincoln’s speech typified a growing American belief that true freedom and liberty could not exist in “situation[s] of extreme economic inequality” and economic unfairness.²⁴⁰

Against these fundamental visions of American freedom, the early antitrust Congresses had to balance the growing social, political, and economic philosophies and ideologies of Social Darwinism and its attendant rhetoric of “survival of the fittest,” *laissez-faire* economics, and the supposed efficiencies

²³⁶ NACE, *supra* note 233, at 14–15 (quoting Letters from Abraham Lincoln to Col. William Elkins (Nov. 21, 1864)); *see also* EMANUEL HERTZ, ABRAHAM LINCOLN: A NEW PORTRAIT, VOL. II 954 (1931). A number of critics have questioned the authenticity of the quoted letters, but no definitive proof backing this claim exists.

²³⁷ NACE, *supra* note 233, at 15 (alteration in original) (quoting *The New York Gold Conspiracy*, WESTMINSTER REV. (1870)).

²³⁸ *See, e.g.*, HOFSTADTER I, *supra* note 26, at 10 (discussing how nineteenth century American traditions of political revolt revolved around attacking monopolies and “against limits upon the avenues of personal advancement”).

²³⁹ DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN 653 (2005) (citing Abraham Lincoln, Speech to One Hundred Sixty-Sixth Ohio Regiment (Aug. 22, 1864), *in* VII COLLECTED WORKS OF ABRAHAM LINCOLN 512 (2001)).

²⁴⁰ *See, e.g.*, SEAN DENNIS CASHMAN, AMERICA IN THE GILDED AGE: FROM THE DEATH OF LINCOLN TO THE RISE OF THEODORE ROOSEVELT 323–27 (1993); ERIC FONER, THE STORY OF AMERICAN FREEDOM 126–30 (1998); PERITZ, *supra* note 63, at 11 (“Progressives and some conservatives understood the proliferation of large-scale commercial enterprise as a new form of commercial genius that exploded rough equality and economic independence.”); W. SCOTT MORGAN, HISTORY OF THE WHEEL AND ALLIANCE, AND THE IMPENDING REVOLUTION 15–17 (1889) (describing how trusts were “demoralizing in [their] influence, inconsistent with free institutions and dangerous to our liberties”); THORELLI, *supra* note 26, at 147 (quoting HAROLD V. FAULKNER & MARK STARR, LABOR IN AMERICA 67 (1944)) (“Many, perhaps most, workers [in 1890] felt a natural affinity with other economically less favored groups who were trying ‘to bring back some equality of opportunity.’”).

of corporate and capital concentrations.²⁴¹ In this neo-Darwinian world, “the most ruthless and unfair business practices . . . seem[ed] to be justified” to ensure the “survival of the fittest” and overall societal progress.²⁴² As put by historian Richard Hofstadter, “[w]ith its rapid expansion, its exploitative methods, its desperate competition, and its peremptory rejection of failure, post-bellum America was like a vast human caricature of the Darwinian struggle for existence and survival of the fittest.”²⁴³ According to historians Eric Foner and Richard Hofstadter, “social Darwinism served the needs of those groups that controlled the ‘raw, aggressive, industrial society’ of the Gilded Age. Spencer, Sumner, and the other Social Darwinists were telling businessmen and political leaders what they wanted to hear.”²⁴⁴ Social Darwinism in economics was supported by the growing ideologies of liberty of contract, protection of private property, and *laissez-faire* non-interference with economic relationships.²⁴⁵

²⁴¹ See, e.g., FONER, *supra* note 240, at 119–23; HOFSTADTER III, *supra* note 24, at 118–21 (“In a society of great collective aggregates, the traditional emphasis upon the exploits of the individual lost much of its appeal. The old problem of defending competition from critics on the left now paled as people were forced to face ‘the curse of bigness,’ the more imminent threat to competition from the offspring of competition itself.”); Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645, 645–50 (1985).

²⁴² Richard McCarty, *Business and Benevolence*, in BUSINESS ETHICS: A PHILOSOPHICAL READER 46–47 (Thomas I. White ed. 1993); see also Louis D. Brandeis, *Competition*, in THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS 112, 115 (Osmund K. Fraenkel ed. 1935) (“[I]t is not competition to resort to methods of the prize ring, and simply ‘knock the other man out.’ That is killing a competitor.”); CASHMAN, *supra* note 240, at 61 (describing how Rockefellers bought out his competitors “at knockdown prices” while Carnegie “simply squeezed them out by cutthroat competition”).

²⁴³ HOFSTADTER III, *supra* note 31, at 44.

²⁴⁴ FONER, *Introduction* to HOFSTADTER III (Beacon Press ed., 1992), *supra* note 31, at xvi.

²⁴⁵ William Graham Sumner, perhaps Social Darwinism’s greatest proponent, believed that government should exist only to protect private property, and “not to upset social arrangements decreed by nature.” FONER, *supra* note 240, at 122; see also JAMES W. BROCK, THE STRUCTURE OF AMERICAN INDUSTRY 332 (13th ed. 2016) [hereinafter BROCK I] (“The Darwinian criticism has long held that a *laissez-faire* policy best promotes economic performance by nurturing natural selection among the economically fittest firms.”); FONER, *Introduction* to HOFSTADTER III (Beacon Press ed., 1992), *supra* note 31, at ix, xix (describing how the roots of legal thought supporting Social Darwinism lay “in classical economics and a preoccupation with defending property rights and limiting the power of the state”); William Graham Sumner, *The Concentration of Wealth: Its Economic Justification*, in ON LIBERTY, SOCIETY, AND POLITICS: THE ESSENTIAL ESSAYS OF WILLIAM GRAHAM SUMNER 149–50, 155 (1992) (describing monopolies as the naturally selected economic agents of society);

Congress was also faced in 1890, and again in 1914, with the growing political power of the trusts, monopolies, and great aggregations of capital, which threatened Americans' longstanding historic values of divided and diluted political and economic power.²⁴⁶ Professor Peritz, for example, has observed that “[a]s the [Sherman Act] legislative debates demonstrate, the loss of political liberty itself became an issue.”²⁴⁷ “[Senator] Sherman and his allies believed that rough competitive equality was important not only for economic or vocational liberty, but for political liberty in a free society as well.”²⁴⁸ Senator Hoar warned that the trusts were “a menace to republican institutions themselves,”²⁴⁹ while Senator Sherman feared the ability of the trusts to “disturb social order.”²⁵⁰ Thus, “the political impulse behind the Sherman Act was clearer and more articulate than the economic theory.”²⁵¹ Similar to the Sherman Act, the Clayton Act also sought “to decentralize power for social

²⁴⁶ See, e.g., HOFSTADTER I, *supra* note 26, at 227–29 (discussing the growing fears in America “founded in political realities—the fear that the great business combinations, being the only centers of wealth and power, would be able to lord it over all other interests and thus to put an end to traditional American democracy”); HOFSTADTER III, *supra* note 31, at 118–20 (“The middle class citizen, as producer and consumer, was beginning to feel the growth of monopoly and to fear that he would be ground between large combinations of capital and labor.”).

²⁴⁷ PERITZ, *supra* note 63, at 24. Professor Peritz further noted that “[t]he concern for consumer and producer liberty also implicated political liberty . . . [Senator] Sherman was invoking the fundamental belief that representative government depended upon an economically independent citizenry, whose independence was served by widespread ownership of private property.” *Id.* at 15; see also Lande, *supra* note 40, at 99 (“Alarm over corporate aggrandizement of economic, social, and political power pervaded the [Sherman Act] debate.”).

²⁴⁸ PERITZ, *supra* note 63, at 15.

²⁴⁹ 21 CONG. REC. 3,146 (1890) (statement of Sen. Hoar).

²⁵⁰ *Id.* at 2,460 (statement of Sen. Sherman). Senator Sherman added that “[s]ociety [was] now disturbed by forces never felt before.” *Id.* at 2457; see also HOFSTADTER II, *supra* note 26, at 197 (“A nation that had gone so fast from competitive small enterprise to corporate giantism might readily go with equal speed from corporate giantism to a system of monopolistic tyranny.”).

²⁵¹ HOFSTADTER II, *supra* note 26, at 205. Professor Hofstadter added that the legislators “were reasonably clear about what they were trying to avoid: they wanted to keep concentrated private power from destroying democratic government.” *Id.* at 206–07; see also PERITZ, *supra* note 63, at 15 (quoting 21 CONG. REC. 2,460 (1890) (statement of Sen. Sherman)) (“[I]ndustrial liberty’ called for entrepreneurial independence, for preservation of the ‘small dealers and worthy men’ threatened by the new economic order of large-scale enterprise.”); Pitofsky, *supra* note 11, at 1051 (discussing the “political values” behind our antitrust laws, including “a fear that excessive concentration of economic power will breed antidemocratic political pressures”).

and political reasons.”²⁵²

Moral and ethical values and goals also were paramount in Congress’s minds in passing the Sherman, Clayton, and FTC Acts. As noted by Professor Hofstadter, “the competitive process was believed to be a kind of disciplinary machinery for the development of character, and the competitiveness of the people—the fundamental stimulus to national morale—was believed to need protection.”²⁵³ Monopolies were seen as “morally reprehensible,”²⁵⁴ and anathema to fundamental American notions of “full and free competition.”²⁵⁵ As a result, “[r]epeated references [were] made throughout the [Sherman Act] proceedings to the policy favoring ‘freedom and fairness’ in commercial intercourse which was violated by the combinations at which the proposed bill was aimed.”²⁵⁶ Congress believed that unfair “hindrances to equal opportunity were to be eliminated.”²⁵⁷ As noted by Professor Peritz, “[t]his strong sentiment in favor of protecting industrial liberty . . . surpassed even the abhorrence of higher prices.”²⁵⁸

Finally, from an economic standpoint, Congress had to deal with the wanton and ruthless destruction of competitors and competition being wrought by the trusts in the late 1800s and early 1900s. As previously noted,²⁵⁹ Professors Areeda and Hovenkamp correctly observed based on both the legislative history and other substantial sources, that from an economic standpoint, “the proponents of the Sherman Act were significantly more

²⁵² Fox, *supra* note 13, at 578; Lande, *supra* note 40, 129 (discussing the evidence suggesting that in passing the Clayton Act, Congress was “motivated by concern for the social and political power possessed by large corporations”).

²⁵³ HOFSTADTER II, *supra* note 26, at 200.

²⁵⁴ THORELLI, *supra* note 26, at 228.

²⁵⁵ See, e.g., *id.* at 226.

²⁵⁶ THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES, VOL. 1 20 (Earl W. Kintner ed. 1978); see also *id.* at 155 (quoting 21 CONG. REC. 2,558–59 (1890) (statement of Senator Pugh that the trusts were “contrary to the public policy of the United States” because “they hinder, interrupt, and impair the freedom and fairness of commerce . . .”).

²⁵⁷ THORELLI, *supra* note 26, at 314 (discussing the trusts’ perceived negative impacts on equality of opportunity); *Id.* at 327 (discussing “whether individualist democracy would be able to persist in the brave new world that was unfolding”); *Id.* at 569 (“The widespread impression that the growth of giant and anonymous combinations in business constituted an increasing threat to the cherished equality of opportunity took on particular significance in an era when the agricultural frontier was disappearing.”).

²⁵⁸ PERITZ, *supra* note 63, at 15. Professor Peritz further observed that “Senator Sherman and his contemporaries were concerned with another kind of freedom—freedom from corporate control of trade and commerce. Industrial liberty embodied a sense of the public as competitors and employees of new large combinations of capital, whose power rendered ‘the boasted liberty of the citizen . . . a myth.’” *Id.* (alteration in original).

²⁵⁹ See *supra* Part II.A.

concerned about injury to competitors than injury to consumers.”²⁶⁰ Representative William Mason (R-Ill), for example, pointed out that even if the “trusts ha[d] made products cheaper . . . , [they] ha[d] destroyed legitimate competition.”²⁶¹ Both Presidents Theodore Roosevelt and Woodrow Wilson expressed similar concerns.²⁶²

Although neoconservative historical revisionists delight in saying that our antitrust laws “protect competition, not competitors,” they fail to recognize that their artificially created mantra is completely inconsistent with the actual legislative histories of the Sherman and Clayton Antitrust Acts, not to mention the never-repealed 1936 Robinson-Patman Act. Throughout the history of our antitrust laws, Congress has recognized that protecting competitors against unfair and predatory acts is crucial to protecting competition.²⁶³

Neoconservative critics also unfairly denigrate Congress’s laudable historic insights in progressively recognizing that moral and ethical values and norms are fundamental keys to sound economic and competition policy.²⁶⁴ Indeed, neoconservatives’ assertion that values such as economic fairness and competitive diversity are so-called “non-economic values” that are somehow concerned “with values other than the economic well-being of consumers or the economy as a whole”²⁶⁵ reveal a profound and ultimately biased

²⁶⁰ AREEDA & HOVENKAMP, *supra* note 49, at 55.

²⁶¹ 21 CONG. REC. 4,100 (1890) (statement of Rep. Mason). Such “view[s] derive[d] from the moral precept of Jeffersonian entrepreneurialism and the consequentialist rationale that such competition promotes economic prosperity.” PERITZ, *supra* note 63, at 17.

²⁶² See, e.g., DORIS KEARNS GOODWIN, *BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM* 254 (2013) (discussing President Roosevelt’s concern with “unfair competition, resulting in the crushing out of competitors”); *id.* at 730 (discussing President Wilson’s belief in “fair play” and the need to “open again the fields of competition, so that new men with brains, new men with capital, new men with energy in their veins, may build up enterprises in America”).

²⁶³ See Harrison, *supra* note 2 at 409–10 n.2 (“Interestingly, the one portion of the antitrust laws that is not expressed in general terms is the Robinson-Patman Act, 15 U.S.C. § 13, which provides fairly clear guidance with respect to interpretation and has been redefined by the current Supreme Court.”); Herbert Hovenkamp, *Antitrust’s Protected Classes*, 88 MICH. L. REV. 1, 23–24, 44–46 (1989); Horton IV, *supra* note 12, at 623–34 (detailing the history of the “protecting competition, not competitors” mantra, and showing its inconsistency with the goals of the Sherman, Clayton, and Robinson-Patman Acts); Andreas Koutsoudakis, *Antitrust More Than a Century After Sherman: Why Protecting Competitors Promotes Competition More Than Economically Efficient Mergers*, 34 U. DAYTON L. REV. 223, 230 (2009) (“Protecting competitors is one main purpose for which Congress enacted antitrust legislation.”); Kovacic, *Intellectual DNA*, *supra* note 25 at 80–81; Pitofsky, *supra* note 11, at 1058–59; see also Robinson-Patman Act 15 U.S.C. §§ 13, 21a (1936).

²⁶⁴ See, e.g., Horton II, *supra* note 12, at 46.

²⁶⁵ See GAVIL ET AL., *supra* note 5, at 35.

misunderstanding of the fundamental requisites for a stable, healthy, and sustainable competitive economic ecosystem.

As seen, our early antitrust Congresses faced a conflicting and diverse array of fundamental ideologies and values in seeking to enact laws that would control the growing problem of trusts and monopolies dominating our economy. The chart below sets forth some of the fundamental values/philosophical clashes that Congress sought to balance.

<u>Social</u>	<u>Moral and Ethical</u>
Equal opportunity v. Freedom of contract	Fair competition v. Survival of the fittest
<u>Political</u>	<u>Economic</u>
Divided power/democracy v. Protection of private property	Diversity/dynamic efficiencies v. Concentration efficiencies/ <i>laissez-faire</i>

Comparing the values chart above to those set forth in Parts II.B and II.C., one can see that Congress has continued to face similar philosophical and ideological conflicts for more than a century. Throughout this time, Congress has shown the ability to balance and blend our conflicting values and philosophical differences, and to enact legislation with the potential to advance fundamental American values and democratic goals—by “deal[ing] with concentrations of economic power and . . . polic[ing] business behavior that exploit[s] consumers and exclude[s] competitors.”²⁶⁶ Given the deep fundamental philosophical and ideological conflicts Congress has had to balance, it is hardly surprising that Congress consistently has chosen to enact flexible constitutional-like antitrust laws that allow for growth and judicial development.

It is time for our Executive and Judicial branches to do their part to begin addressing “antitrust’s democracy deficit.”²⁶⁷ A good starting point would be more faithfully honoring and implementing such congressional goals as protecting competition by: guarding competitors against unfair predation; preventing undue concentrations through more aggressive merger control;

²⁶⁶ First & Waller, *supra* note 2, at 2573.

²⁶⁷ *Id.*

continuing to prevent anticompetitive collusion while encouraging R&D joint ventures; and preserving the dynamic efficiencies and technological innovations resulting from a diverse array of aggressive competitors at all competitive levels.

IV. REDISCOVERING ANTITRUST'S LOST HISTORIC AMERICAN VALUES

Conservative antitrust commentators rejoice today in claiming that “the powerful impact of economic analysis” has led to an American antitrust system that “has become relatively politics-agnostic.”²⁶⁸ In their view, the courts and executive branch’s deference to neoconservative economic ideologies have “yield[ed] a body of widely accepted law that is largely impervious to political intrusion.”²⁶⁹ Neoconservative economics having finally captured the day, little remains “open to legitimate disagreement.”²⁷⁰

This author respectfully disagrees. Putting aside the differing impacts of “the ideological differences” between the antitrust enforcers of recent administrations,²⁷¹ there is little doubt that American “[a]ntitrust has moved too far from democratic institutions and toward technocratic control, in service to a *laissez-faire* approach to antitrust enforcement.”²⁷² American courts and enforcers have lost sight of the fundamental values balanced and blended by Congress for more than 100 years to create a set of regulatory checks and balances designed to protect our economic system from undue concentrations and exercises of economic power and their “destructive consequences in a free society.”²⁷³ In so doing, they have precipitated a “destructive alienation” of

²⁶⁸ Voorhees, *supra* note 1, at 558, 576; *see also id.* at 562 (noting that over the past forty years, “economics analysis has taken a central place in the antitrust thinking of the U.S. Supreme Court as well as the lower courts”).

²⁶⁹ *Id.* at 576; *see also* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 948 (1979) (“Differences remain, but increasingly they are technical rather than ideological.”).

²⁷⁰ Voorhees, *supra* note 1, at 576.

²⁷¹ *See, e.g.,* Salop, *supra* note 26, at 638.

²⁷² First & Waller, *supra* note 2, at 2574; Harrison, *supra* note 2, at 422.

²⁷³ James W. Brock, *Economic Power, Henry Simons, and a Lost Antitrust Vision of Economic Conservatism*, 58 S.D. L. REV. 443, 443 (2013); *see also id.* at 461 (“The decisive role of antitrust policy in meeting that challenge [of making markets work], and in limiting the destructive consequences of private economic power in a free society, constitutes the lost vision of one kind of economic conservatism.”); WALTER ADAMS & JAMES W. BROCK, *THE BIGNESS COMPLEX: INDUSTRY, LABOR, AND GOVERNMENT AND THE AMERICAN ECONOMY* 7 (2d ed. 2004) [hereinafter ADAMS & BROCK II] (“[T]he essence of power is dominance. And dominance may arise simply from disproportionate size. It entails an absence of effective constraints, a freedom from accountability, and a relative immunity from sanctions.”); HENRY C. SIMONS, *ECONOMIC POLICY FOR A FREE SOCIETY* 43–44 (1948) (“Political liberty can survive

antitrust from our most fundamental and essential historic American social, political, moral, and economic values.²⁷⁴

Congress has had ample opportunities to incorporate into our antitrust laws neoconservatives' economic philosophies, but has never done so. As seen, Congress easily could have done so in passing the HSR Act in 1976, in enacting the NCRA in 1984, or in amending the NCRPA in 1993 and 2004. However, in each case Congress declined to do so even though neoconservative economic ideologies were then largely ascendant. Instead, Congress chose in 1976, 1984, 1993, and 2004, to strengthen our antitrust laws while adding a relatively limited set of exceptions to the Sherman and Clayton Acts. Consequently, our courts and antitrust enforcement agencies should stop interpreting our antitrust laws as though they were somehow written or amended by Congress to bless neoconservatives' social, political, moral, and economic ideologies.

We also need to stop treating neoconservatives' economic values as a supposedly neutral set of scientifically objective economic laws. The preceding review of our antitrust laws' legislative histories and the history surrounding them shows that the modern neoconservative economic philosophies of today are eerily reflective of the *laissez-faire* values put forward by the Social Darwinists in the late 1800s, which have been consistently rejected by Congress. Although wrapped in claims that modern neoconservative economics are "of course a science,"²⁷⁵ modern evolutionary biology and economics have shown the alleged scientific bases of Social Darwinism to represent a misguided and fundamental misreading of Darwin's discoveries.²⁷⁶ It is time therefore to stop treating neoconservative economics and its attendant *laissez-faire* antitrust implications as hard unrefuted science. We should instead begin recognizing neoconservative economic ideologies for the values-laden political, social, moral and economic ideologies they are. By doing so, we can return to balancing and blending in our antitrust analyses the

only within an effective competitive economic system. Thus, *the great enemy of democracy is monopoly, in all its forms . . .*" (emphasis in original).

²⁷⁴ HOFSTADTER I, *supra* note 26, at 21.

²⁷⁵ BORK I, *supra* note 3, at 8; *see also* PERITZ, *supra* note 63, at 228 (discussing RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (1973)) (observing that Judge Richard Posner has long argued that the promotion of economic efficiency is "positive, not normative; scientific, not ideological").

²⁷⁶ *See, e.g.*, BROCK I, *supra* note 245, at 335 (noting that neoconservative economists "may have fundamentally misread Darwin and Schumpeter"); ANTITRUST, THE MARKET, AND THE STATE: THE CONTRIBUTIONS OF WALTER ADAMS 250–51 (J. Brock & K. G. Elzinga eds. 1991) (portraying Judge Bork's concentration efficiencies arguments as outmoded social Darwinism); Thomas J. Horton, *Efficiencies and Antitrust Reconsidered: An Evolutionary Perspective*, 60 ANTITRUST BULL. 168, 186 (2015) [hereinafter Horton V]. *See generally* Horton II, *supra* note 12; Horton III, *supra* note 12.

fundamental American political, social, moral, and economic values that Congress has paid homage to for more than a century.

Pursuing such goals will require us to stop classifying and characterizing any values not supported by neoconservative economic ideologies as “non-economic goals” undeserving of antitrust’s protection. As previously argued, values such as competitive fairness, level economic playing fields, economic justice, a healthy diversity of competitors, and reduced economic concentration are actually crucial economic values in the sense that they provide the foundational underpinnings for a healthy, stable, and sustainable capitalistic economic system.²⁷⁷ Attempts to label them as “non-economic values” are therefore overly simplistic and conclusory, and provide a rhetorical justification for wrongfully denying their powerful progressive economic implications—implications which call into serious question neoconservatives’ own economic philosophies, which favor increasing economic concentration and the economic justification of all manner of unethical, immoral, and economically harmful predatory conduct.²⁷⁸

Neoclassical economics are neither scientifically neutral nor free from normative social, political, and moral values and ideologies.²⁷⁹ Indeed,

²⁷⁷ See, e.g., ALAN S. BLINDER, *AFTER THE MUSIC STOPPED: THE FINANCIAL CRISIS, THE RESPONSE, AND THE WORK AHEAD* 442 (2013) (“Because fairness normally matters more than anything else, it should be an obsession with policymakers.”); BROCK I, *supra* note 245, at 332–36 (discussing the importance of diverse competition and economic opportunity at all levels of our economic system to ongoing economic innovation and progress); Horton I, *supra* note 2, at 863 (“Evolutionary biologists and behavioral economists increasingly appreciate and demonstrate how fundamental and critical our sense of fairness has been to our long-term evolutionary and economic success.”); Horton II, *supra* note 12 (arguing that a stable and healthy economic system must be grounded by moral and ethical roots); Horton V, *supra* note 276, at 186 (“Economic diversity, variability, and opportunity, rather than increasing concentration and speculative short-term ‘efficiencies,’ are therefore the keys to the overall health, productivity and robustness of our economic system.”); Stucke I, *supra* note 1, at 608 (discussing the importance of ethics, morals, and fairness to the functioning of our market economy).

²⁷⁸ See, e.g., Foer, *supra* note 3, at 116 (questioning the labeling of various values as “non-economic,” and noting that “the line between what is political/social and what is economic is not always clear”); Harrison, *supra* note 2, at 425–26 (arguing that neoconservative antitrust economists’ attacks on alternative economic theories and values “borders on a kind of intellectual bullying”).

²⁷⁹ See, e.g., ADAMS & BROCK II, *supra* note 273, at 302 (“[A]lthough economic Darwinism makes superior economic performance the centerpiece of its policy position, its advocates concede that measuring such performance is inordinately difficult, if not outright impossible.”); BORK I, *supra* note 3, at 124 (conceding that “[t]he real objection to performance tests and efficiency defenses in antitrust law is that they are spurious. They cannot measure the factors relevant to consumer welfare, so that after the economic extravaganza was completed we should know no more than before it began.”); Alfred E. Kahn, *Standards for Antitrust Policy*, in *MONOPOLY*

economists Walter Adams and James Brock observe that economic analyses in antitrust cases “hinge . . . ultimately on the analyst’s premises, values, and belief system[s].”²⁸⁰ As Professor Lao suggests, it is therefore time to deal with the real economic values conflicts in antitrust, instead of relying on economic proxies that unilaterally declare the values debates to be scientifically and theoretically resolved.²⁸¹

V. CONCLUSION

For more than 100 years, Congress has carefully and deliberately balanced and blended a diverse array of fundamental social, political, moral, and economic values and goals in crafting our antitrust laws. Although it has had plenty of chances to do so, Congress has never adopted or accepted any single set of economic objectives, and has never endorsed neoconservatives’ economic ideologies. Instead, Congress has treated Americans’ fundamental social, political, moral, and economic values as interdependent, and deserving of protection against the menaces of concentrated economic power.

It is therefore time to return to an antitrust regulatory system that better reflects Congress’s dynamic historical balancing of multiple fundamental social, political, moral, and economic values. To do so, we must begin rediscovering antitrust’s lost values, and recommence our historic pursuit of an ethical, moral, and fair free-enterprise system truly devoted to our long-term economic and social welfare. In pursuing such a quest, we can begin moving away from our increasing global isolation and growing economic inequality.²⁸² We can instead seek a closer convergence with the more progressive and enlightened systems of antitrust and competition regulation developing in Europe and throughout the world—systems ironically attuned and deferential to, and built around, the fundamental historic American social, political, moral, and economic values Congress has long recognized and sought to protect.

POWER AND ECONOMIC PERFORMANCE: THE PROBLEM OF INDUSTRIAL CONCENTRATION 160 (Edwin Mansfield ed. 1968) (arguing that “economics offers no objective measure of the vitality of competition in all its aspects”); Foer, *supra* note 3, at 116.

²⁸⁰ Adams & Brock I, *supra* note 35, at 294; Harrison, *supra* note 2, at 409 (“The core notion of examining all policies, laws, and values from any relevant perspective is something that is too often lacking in legal scholarship.”).

²⁸¹ See Lao, *supra* note 4, at 685. Professor Lao astutely calls for “an honest conversation on what values should matter and why . . . and whose interests are important and how these interests should be reconciled if they conflict.” *Id.*

²⁸² See generally JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY’S DIVIDED SOCIETY ENDANGERS OUR FUTURE (2012).