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In 1940, while head of the Justice Department's Antitrust Division ("DOJ"), Thurman Arnold published *The Bottlenecks of Business*,¹ a book that defended reinvigorated antitrust enforcement. He entitled Chapter IV *A Free Market in Times of National Emergency or War*. Arnold wrote that "[t]he antitrust laws must constantly defend the ideal of industrial democracy against all sorts of pressures."² With the prospect of war on his horizon, Arnold observed that "these pressures increase when the government is suddenly forced to buy huge quantities of defense materials from closely controlled sources of supply."³ He further noted that "[t]he temptation to exploit consumers and the government through domination of a suddenly expanding market is almost irresistible, and usually prevails unless it is curbed."⁴

Arnold turned out to be writing his own political obituary. As Spencer Waller has detailed in his excellent biography,⁵ Arnold began to face the "wholesale repeal or practical nullification of antitrust in the face of the war planning and production leading

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¹ THURMAN ARNOLD, *THE BOTTLENECKS OF BUSINESS* (1940).

² *Id.* at 60.

³ *Id.*

⁴ *Id.*

⁵ SPENCER WEBER WALLER, *THURMAN ARNOLD: A BIOGRAPHY* (2005).

up to the U.S. entry into World War II.”⁶ Consistent with the themes laid out in *Bottlenecks*, Arnold continued to push aggressive antitrust enforcement as an aid rather than obstacle to the war effort. But the handwriting was on the wall. In 1942, when Arnold tried to indict political luminary Averell Harriman, the chairman of the Union Pacific railroad, for price-fixing, he was quietly forced out of the Justice Department. Antitrust was simply a luxury that the nation could not enforce in wartime.

Indeed, antitrust seems to be a luxury that the country cannot afford in any crisis. Or at least this is the lesson one would draw from observing our national behavior during moments of economic crisis or war. Throughout our national history, wars and financial panics have been opportunities for consolidation of industrial power. Arguments that competition policy is a help rather than a hindrance fall on deaf ears in the face of panic.

The history of the 2008 (and beyond?) financial crisis has yet to be written. But already the familiar telltale signs are appearing. The Treasury Department is reportedly pushing consolidation as a remedy for bank illiquidity, Chrysler and General Motors have discussed merger without any appearance of antitrust objection, and the failure of corporate titans like Lehman Brothers leaves little doubt that the industrial landscape will emerge considerably more concentrated than it was before.

In this essay, I have the gloomy task of mapping the failure of competition policy during periods of crisis. For purposes of the historical narrative, I conflate war and financial crisis. The strong tendency toward abandonment of competition principles

⁶ *Id.* at 106.

arises in both circumstances. I will argue, however, that not all crises are created equal when it comes to the suspension of antitrust.

I. THE UNHAPPY HISTORY BRIEFLY EXAMINED

In the almost 120-year history of the Sherman Act, no political administration has reacted to a crisis by calling for more vigorous enforcement of the antitrust laws. To the contrary, administrations of both parties have responded to crises—both martial and economic—by explicitly or implicitly pulling back on antitrust enforcement. Industrialists have used crises as opportunities to deepen their grip on markets.

It is perhaps unfair to begin the story with the first major financial crisis following the adoption of the Sherman Act—the panic of 1873—since there was very little antitrust enforcement during the first decade of the Sherman Act. Still, it is worth observing how that crisis propelled industrial consolidation in a way that made a mockery of the Sherman Act adopted just three years earlier. In 1893 began a steep recession that threatened to cripple the overextended railroad industry. More than a third of the nation’s railroad trackage fell into bankruptcy or receivership.⁷ Acting on behalf of English investors, J.P. Morgan began systematically to reorganize the railroads, in the process placing them under his control through a process derisively labeled “morganization.”⁸ By the end of the crisis, he had morganized one sixth of the country’s trackage, including almost every bankrupt railroad east of the Mississippi.⁹ By 1900, the nation’s railroads

⁷ RON CHERNOW, *THE HOUSE OF MORGAN* 67 (1990).

⁸ *Id.*

⁹ *Id.*

were consolidated into six large systems principally controlled by the House of Morgan and its rival, Kuhn, Loeb.¹⁰

Teddy Roosevelt tried to halt this consolidation and eventually prevailed—far too little, too late—in the *Northern Securities* case.¹¹ But Morgan was undeterred when another financial crisis—the 1907 panic—provided another opportunity for consolidation. This time, his target was the banks and steel. First, the House of Morgan acted as a national bank during the crisis, thereby extending its control ever deeper into the banking system and eliciting a negative backlash that led to the creation of the federal reserve system a few years later. Second, in response to the imminent failure of the Moore & Schley brokerage house, Morgan devised a rescue plan that had U.S. Steel buying a large interest in the Tennessee Coal and Iron Company.¹² The House of Morgan was concerned that Roosevelt would “bite the hand that fed him” by bringing an antitrust action and therefore made the deal contingent on Roosevelt’s express blessing. Eager to avoid a “general industrial smashup,” Roosevelt endorsed the deal within twenty minutes and then sent word to Attorney General Bonaparte that the deal had his approval.¹³ Subsequently, “there were charges that [J.P. Morgan] had duped Roosevelt into scuttling his antitrust policy and sanctioning, under duress, an anticompetitive steel merger.”¹⁴ If so, it would not be the last time that pattern would occur.

¹⁰ *Id.* at 68.

¹¹ *Northern Securities Company v. United States*, 193 U.S. 197 (1904).

¹² EDMUND MORRIS, *THEODORE REX* 499 (2001).

¹³ *Id.*

¹⁴ Chernow, *supra* n. 7 at 128.

Antitrust law was reinvigorated under Woodrow Wilson and with the passage of the Federal Trade Commission and Clayton Acts, but it was not long before further crises would pave the way for renewed suspension of antitrust scrutiny. Richard Hofstadter called the period from World War I to 1937 “the era of [antitrust] neglect,”¹⁵ and given the low level of antitrust activity during this time, it is tempting to understand the entire period as a unified stretch of antitrust laxity. But the impetus for antitrust’s hibernation lay in two successive crises—war and depression.

The initial trigger was the First World War.¹⁶ The war brought a dramatic end to the trustbusting run that began with Teddy Roosevelt (interrupted by the 1907 concessions) and continued by William Howard Taft and Woodrow Wilson.¹⁷ In 1918, Attorney General Thomas Gregory opined that “the natural laws of trade” could not be relied on to regulate market behavior during war.¹⁸ Thereafter, “[a]ntitrust ceased to be an obstacle” to collaboration among competitors, who were actually encouraged to cooperate in order to boost the war effort.¹⁹ Wilson opined that “to vindicate the law, would disorganize industry”²⁰ and most major antitrust cases were suspended until the end of the war.²¹

¹⁵ Richard Hofstadter, *What Happened to the Antitrust Movement?*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 188, 193 (1965).

¹⁶ See Carol B. Swanson, *Antitrust Excitement in the New Millennium: Microsoft, Mergers, and More*, 54 *OKLA. L. REV.* 285, 293 (2001) (noting that the war “reduced the country’s enthusiasm for antitrust enforcement.”).

¹⁷ Richard M. Steuer & Peter A. Barile, *Antitrust in Wartime*, 16-*SPG ANTITRUST* 71, 71-72 (2002).

¹⁸ *Id.* at 71.

¹⁹ Ellis W. Hawley, *Herbert Hoover and the Sherman Act, 1921-1933: An Early Phase of a Continuing Issue*, 74 *IOWA L. REV.* 1067, 1068 (1989).

²⁰ Thomas K. Fisher, *Antitrust During National Emergencies*, 40 *MICH. L. REV.* 969, 996 (1942).

²¹ Steuer & Barile, *supra* n. 17 at 72.

The Republican administrations that succeeded Wilson during the Roaring Twenties had little interest in enforcing antitrust law and largely did not. In response to the advent of the Great Depression, Herbert Hoover nominally supported the continuation of antitrust enforcement (against advocates for suspension or repeal) but his administration brought few cases.²² In 1933, the Supreme Court permitted a clearly anticompetitive coal selling agency agreement largely on the grounds of the depressed conditions in the coal industry.²³

The inauguration of Franklin Roosevelt and the launch of the New Deal in 1933 did nothing to reinvigorate antitrust enforcement in the face of the continuing Depression. Instead, during the first half of the New Deal, from 1933-35, the administration suspended antitrust law through the National Industrial Recovery Act ("NIRA") and put in its place a system of industry-sponsored codes and controls on prices and output levels.²⁴ The NIRA probably prolonged the Depression.²⁵

With the Supreme Court's invalidation of key portions of NIRA in 1935 and sentiment within the administration turning against the NIRA system, the Roosevelt

²² Hawley, *Herbert Hoover*, *supra* n. 19 at 1067-68.

²³ *Appalachian Coals v. U.S.*, 288 U.S. 344 (1933).

²⁴ *See generally* ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* (1966). Between 1933 and 1935, roughly the dates of the NIRA experiment, GDP increased about 28 percent and unemployment dropped by about 2 million. *Id.* at 131. Although these figures show improvement in the national economy compared to the preexisting state of affairs, the experiment was roundly considered a failure, particularly in light of the fact that "[o]ver ten and a half million workers were still unemployed, approximately twenty million people were still dependent upon relief, basic industries were still operating at little more than half their capacity, and the real income of the average family was still thirteen percent below that of 1929." *Id.* at 131-32,

²⁵ Hawley, *New Deal*, *supra* note 24, at 72-90.

Administration abruptly turned toward renewed antitrust enforcement.²⁶ The antitrust divisions of Robert Jackson and Thurman Arnold greatly reinvigorated antitrust activity. But then along came Pearl Harbor and antitrust was once again an unaffordable luxury. As detailed in the introduction, Arnold's efforts to use antitrust constructively to support the national economy during the war led to his removal from the Justice Department. The Roosevelt administration implemented formal policies allowing immunization from antitrust prosecution, issued guidelines for industry collaborations, permitted pooling of small firms, and gave the secretaries of war and the navy the power to toll (i.e. hold-off) antitrust cases until the termination of the war.²⁷ Over thirty cases were tolled.²⁸

Antitrust enforcement took off again during the post-War boom and thereafter largely stabilized. This is not to say that ideological and political developments have not contributed to changes in the level of antitrust enforcement but rather that the changes tend to be more gradual. Whereas the enforcement trend line during the first half of the twentieth century is characterized by sharp peaks and valleys, the trend line in the second half of the twentieth century is much flatter.²⁹ Antitrust enforcement largely continued during the Korean and Vietnam Wars and the oil and inflation crises of the 1970s. This is in large part a reflection of the fact that the wars and financial crises of the second half of the twentieth century were less severe than those of the first.

²⁶ See Daniel A. Crane, *The Story of United States v. Socony-Vacuum: Hot Oil and Antitrust in the Two New Deals*, in ANTITRUST STORES 91 (Eleanor M. Fox & Daniel A. Crane, eds. Foundation Press 2007).

²⁷ Steuer & Barile, *supra* n. 17 at 72-73.

²⁸ *Id.*

²⁹ See Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1175 (Figure 2) (2008).

Still, it is possible to observe antitrust retrenchment during crises on an industry-, if not economy-wide, level. Examples include the U.S. government's dropping a criminal investigation of the major U.S.-owned oil companies in exchange for their cooperation in boosting Iranian oil production during the 1950s,³⁰ selective exertion of White House pressure on the Antitrust Division and Federal Trade Commission ("FTC") to allow large mergers during the Vietnam War,³¹ and the Transportation Security Act's³² limited antitrust exemption for airlines in the wake of the September 11, 2001 terrorist attacks.³³ Antitrust laxity is often the government's first bargaining chip when it urgently needs something from industry.

To describe this phenomenon is not to criticize it. There may be good and sufficient reasons for using antitrust relaxation as a bargaining chip. However, greater thought should be given to when this is likely to improve matters and when it is likely to make them worse.

II. WHY ANTITRUST SHOULD PERSIST DURING RECESSIONS, IF NOT WARS

The empirical lesson to be drawn from the previous historical narrative is that antitrust enforcement is a political luxury good consumed during times of relative peace and prosperity. Perhaps it is naïve to aspire to anything different. After all, the benefits of

³⁰ Linda A. Mabry, *Multinational Companies and U.S. Technology Policy: Rethinking the Concept of Corporate Nationality*, 87 GEO. L.J. 563, 620-21 (1999).

³¹ Tony Freyer, *Book Review, reviewing JAMES R. WILLIAMSON, FEDERAL ANTITRUST POLICY DURING THE KENNEDY-JOHNSON YEARS*, 40 AM. J. LEGAL HIST. 506, 507 (1996).

³² Pub. L. No. 107-71, 115 Stat. 597 (codified as amended in scattered sections of 49 U.S.C.) (Nov. 19, 2001).

³³ See generally Roger D. Blair, James Mak, & Carl Bonham, *Collusive Duopoly: The Economic Effects of the Aloha and Hawaiian Airlines' Agreement to Reduce Capacity*, 74 ANTITRUST L.J. 409 (2007).

competition policy are hard to demonstrate tangibly and seem like a cheap bargaining chip in the face of the imperative for order and stability.

Still, it is a mistake to bargain away antitrust law too cheaply, particularly when the crisis at hand is an economic recession rather than a war. War often involves a very different set of economic circumstances than a peacetime financial crisis and, accordingly, the implications for competition policy differ considerably.

War often involves a government economic stimulus package as a side-effect of the military build-up. For example, it is conventional wisdom that military spending during World War II helped to lift the country out of depression. This does not mean that antitrust is unnecessary in wartime. As Thurman Arnold argued, targeted antitrust enforcement can be an aid to the war effort by preventing inefficient exploitation by producers. Still, the government's economic stimulus may counteract the recessionary pressures of any industry consolidation and anticompetitive conduct, making anticompetitive activity less of a concern than in other times.

On the other hand, antitrust laxity may deepen economic recessions. When firms are freed from competitive constraints and raise their prices, they must of necessity reduce output as well. When the economy is already contracting, a shift in antitrust enforcement that enables such monopolistic output reductions only deepens the economic contraction. Suspending antitrust law was exactly the wrong tact to take during the Depression because it limited producers' incentives to expand output and increase employment. Similarly, antitrust laxity during the current financial crisis is likely to

reduce producers' incentives to expand sales and hire—the very measures needed to get the economy back on track.

Antitrust law has existing tools that permit consideration of financial distress in evaluating competitive effects. The failing firm defense allows otherwise anticompetitive mergers as a last resort.³⁴ The “last resort” in this is key. The failing firm defense is not an abandonment of antitrust scrutiny but an analytical tool that applies antitrust reasoning and identifies circumstances where disallowance of a merger would actually make things worse.

Allowance of anticompetitive activity should be a last resort—as much, *or more so*, in times of crisis as in times of calm. Antitrust is not merely a luxury for times of plenty but an aid for times of want. Particularly during economic crises, antitrust is not a hindrance, but a help.

III. CONCLUSION

If history is a reliable teacher, the 2008-forward recession will be marked by antitrust laxity, despite President-elect Obama's professions to the contrary. In economic crises as deep as this one, antitrust has historically given way to other priorities. That is a shame, because antitrust law can be a valuable tool for revitalizing the economy and antitrust laxity can deepen the recession. One can only hope that we have at last learned the lessons of history.

³⁴ See U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines*, §5 (Sept. 10, 1992).