

# The “Antitrust Revolution” and *The Antitrust Revolution*: A Perspective from the Inside

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## Abstract

There clearly has been a revolution in the way that modern microeconomics has come to occupy a central role in the development of antitrust policy and in the structuring of antitrust cases over the past forty years or so. And during the past thirty plus years, there have been seven editions of *The Antitrust Revolution* that we have edited. In this essay, we offer our perspective on the “antitrust revolution,” as well as provide an insiders’ view of those seven editions and how they came to be.

## Keywords

antitrust, revolution, merger guidelines

## I. Introduction

When Bill Curran asked if we would be interested in contributing an essay to this symposium, we were pleased to be able to join the distinguished group of scholars that he had gathered for the symposium. We felt that we could offer a unique perspective: as the coeditors of all seven editions of *The Antitrust Revolution*, but also as participants in the “antitrust revolution” itself, as economists at the Antitrust Division of the U.S. Department of Justice (DOJ) and at the Federal Trade Commission (FTC), as economics experts in a number of government-initiated and private antitrust lawsuits, and as the authors of articles on antitrust economics that have been published in economics and law journals, as well as book chapters.

That perspective is what we will try to offer in this essay. Since the central ideas that guided the development of the book (which will be described in Section III) were formulated in the mid-1980s, it will be useful to start by offering a brief review of what the environment of antitrust economics looked like shortly before then; we will take the late 1970s as that initial point but also describe the changes that began in the early 1980s since many observers at the time—both critics and supporters of the changes—could see that major changes were beginning to occur. We will follow with another brief review—this time providing our perspective on the state of antitrust economics circa 2020 and thus

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offer our perspective on the “antitrust revolution” that occurred over the intervening forty years. Section III will then offer our insiders’ view of the origins and development of the seven editions of *The Antitrust Revolution* itself. And Section IV will offer some concluding comments.

## II. The “Antitrust Revolution”: A Comparison of the Late 1970s with 2020

We will begin by describing the state of antitrust economics as of the late 1970s—but also include the changes of the early 1980s since they helped shape the formulation of the book.

### A. The Late 1970s

As of, say, 1979, at the DOJ, economists were starting to gain “a position at the table.” But they still had a long way to go. The first prominent economists to appear at the DOJ were one-year “special economic assistants” (SEAs) to Donald Turner, who was the Assistant Attorney General (AAG) for Antitrust during 1965–1968.<sup>1</sup> Turner’s successors continued the practice;<sup>2</sup> and George Hay, who was the SEA during 1972–1973, chose to stay at the DOJ and develop a larger and more professional staff of economists.

Nevertheless, the general culture at the DOJ was not favorable for economics and economists. Economists had the reputation of being “case killers,” and the DOJ attorneys were reluctant to have economists involved in their cases.<sup>3</sup> Further, the DOJ in the 1970s had uncovered—and continued to uncover—a large number of “bid-rigging” (i.e., price-fixing cartel) cases that involved highway construction and repair firms; since these were “per se” cases, there was little role for economists to play in these cases.

Further, the AAGs of the 1970s were suspicious of vertical restraints—such as resale price maintenance (RPM), tying and bundling, and exclusive dealing—and were content to see the “per se” violation status that the U.S. Supreme Court had bestowed on RPM and tying remain in place.<sup>4</sup> But this was at just the time when academic economists (and law professors) were developing arguments that illustrated the potential efficiency enhancements that unilaterally imposed vertical restraints could enable.

At the FTC, there was a history of stronger involvement by economists in antitrust issues—despite leadership that was at best ambivalent about their role. The Commission’s Bureau of Economics (BE) had a tradition of having as its Director a leading industrial organization (IO) economist and a long-standing mandate to undertake “industry studies.” During the period 1974–1980, F.M. Scherer, Darius Gaskins, and William Comanor each served successive two-year terms as the Director of BE. The Chairman of the FTC in the late 1970s—Michael Pertschuk—was not especially sympathetic toward economics and economists, and the agency seemed content to have its economists located far from the “headquarters” building.

Nonetheless, the BE was actively involved in developing the FTC’s two major innovative “joint monopolization” cases at the time—against the petroleum industry and the breakfast cereal industry. Economists were also heavily involved in the FTC’s pursuit of a “facilitating practices” case against the four producers of tetraethyl lead.

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1. It is important to note that Turner had a PhD in economics, as well as a JD.

2. The special economic assistant group encompassed William Comanor, Leonard Weiss, H. Michael Mann, William G. Shepherd, Kenneth Elzinga, Oliver Williamson, George Eads, and George Hay.

3. It probably didn’t help that the Department of Justice (DOJ) economists were not sympathetic to and largely steered clear of involvement in the monopolization case against IBM that the DOJ initiated in January 1969.

4. In 1980, Cuisinart was prosecuted criminally for resale price maintenance (RPM).

With respect to the involvement of economics and economists in antitrust litigation more generally—much of it involving private litigation by companies rather than by the federal agencies—a reasonable characterization might be “modest (at best).” The “merger guidelines (MGs)” that the DOJ had issued in 1968 (with important contributions from SEA Oliver Williamson) had not become a central organizing framework for merger litigation. Although economists were sometimes involved in private suits, it wasn’t a common practice. Also, even when economists were involved in antitrust cases, it was not common for them to write analytical articles about their involvement.<sup>5</sup>

Further, at the time, there were only two “brand name” economics consulting firms—National Economic Research Associates (NERA), which had been formed in 1961, and Charles River Associates (CRA), which had been formed in 1965 to assist IBM in its defense to the DOJ’s suit—to which companies could turn if they wanted economics expertise beyond what individual economics academics might offer, but NERA had built its expertise and reputation in the public utility rate regulation area, not in antitrust.

## B. The Early 1980s

The early 1980s brought substantial changes to both agencies: In the spring of 1981, William Baxter—a Stanford Law School professor—was appointed AAG for Antitrust. Although Baxter had no formal graduate training in economics, he had a good appreciation for basic price theory and its implications. Toward the end of 1981, James Miller became the Chairman of the FTC; and about a year later, George Douglas joined him as an FTC Commissioner. Both men had PhDs in economics. These were the first instances of economists’ occupying seats on the Commission.<sup>6</sup>

At the DOJ, Baxter made a number of important changes. First, he elevated the role of economics in the DOJ’s decision processes.<sup>7</sup> Second, he saw that the original set of MGs that had been issued in 1968 had fallen out of use and that a new set of MGs needed to be developed. The new MGs were issued in June 1982 and—although initially quite controversial—have proved to have sustaining value almost forty years later.<sup>8</sup> Perhaps the most important feature of these new MGs was its market definition paradigm—the construct of “the hypothetical monopolist”—that identified a relevant market for the purposes of merger analysis as one in which incumbent firms (if they coordinated their actions) could exercise significant market power.

Third, Baxter was much more sympathetic to the potential efficiencies that could accompany unilateral vertical restraints than were his predecessors. It was clear that Baxter would be unlikely to initiate a DOJ case that challenged unilateral vertical restraints, and he was eager to find private suits

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5. A major exception was Carl Kaysen’s book on the DOJ’s suit against United Shoe Machinery, in which Kaysen served as a law clerk to the district court judge—Charles Wyzanski—who presided over the case.

6. There have been only two additional instances since then: Dennis Yao, who served as a Federal Trade Commission (FTC) Commissioner 1991–1995; and Joshua Wright, who served as an FTC Commissioner 2013–2015.

7. One structural indicator of this elevated role was the following: Until 1982, the head of the “Economic Policy Office” (EPO) at the DOJ reported to a deputy AAG (DAAG)—not to the AAG. In early 1982, the organization chart was changed, so that the head of the EPO reported directly to the AAG and thus had the organizational-equivalent status of a DAAG. Later in the 1980s, one of Baxter’s successors—Douglas Ginsburg—took the further step to redesignate this position formally with the title of the DAAG for Economic Analysis. In addition, Baxter regularized the idea—following the FTC’s pattern—of having an academic industrial organization economist lead the EPO for two or so years; again, Baxter’s successors continued this practice.

8. The merger guidelines (MGs) have been revised a number of times since 1982; the last—and most significant revision—occurred in 2010. Also, in 1992, the FTC joined the DOJ as a joint author of the MGs. And since the 1980s, almost all countries that have antitrust (or “competition policy”) legal regimes have adopted analytical constructs for merger policy that can be traced to the MGs.

in which the DOJ could enter friend of the court “amicus” briefs that could move judges away from the “per se” violation standard in vertical restraints cases.<sup>9</sup>

Fourth, Baxter was unsympathetic to the arguments that the DOJ had advanced in its monopolization suit (which was originally filed in 1969) that challenged IBM’s position and practices in main-frame computers and peripheral equipment. After reviewing the arguments for nine months, Baxter in January 1982 decided that the DOJ should simply drop the case and walk away. However, on the same day that he announced the dropping of the IBM case, Baxter also announced the reaching of a settlement with AT&T (the former “Bell System”) that achieved virtually all of the DOJ’s goals of increasing competition in long-distance (intercity) telephone service and in telecommunications equipment manufacturing when it had initiated a monopolization suit against AT&T in November 1974. The settlement broke the ubiquitous local telephone service + long distance + equipment manufacturing telecommunications giant into seven regional local service operating companies (that would continue to be regulated by state and local regulatory agencies), plus an eighth company that could offer long-distance service, manufacture telecommunications equipment, and engage in other less regulated or unregulated activities.

The change of regime at the FTC proceeded differently: Though the new Commission now had economists in leadership positions, the new leadership was unsympathetic to the antitrust directions toward which the BE had been heading in the late 1970s. The petroleum and breakfast cereals shared-monopoly cases were dropped, the latter under Congressional pressure. When the FTC lost its “facilitating practices” case against the tetraethyl lead producers in the Second Circuit, the Commission declined to pursue an appeal to the Supreme Court. Further, in the late 1970s, the FTC had started collecting “line of business” data from over 400 large (mostly manufacturing) companies, but the new leadership simply ended the data collection in 1984.

As compared with the changes at the DOJ, where the changes strengthened the role of economics and the staff economists, the changes at the FTC made the BE career staff feel that they—and the role of economics—were being weakened.

Alongside the changes at the DOJ and FTC, there were important things starting to happen in private antitrust litigation. The DOJ cases against IBM and AT&T and the FTC joint monopolization cases against the large petroleum and breakfast cereals companies changed the prevailing environment of little involvement by economists. The stakes were high, and the companies were large and well funded. AT&T turned to NERA to supply it with economics expertise; and IBM relied on CRA. In addition, the larger and better-trained economics staffs that had developed at the DOJ and the FTC in the 1970s provided a potential supply of economists (as of the early 1980s) with agency expertise who could be employed at the two incumbent consulting firms or who could start new ones.

### C. As of 2020

It is not an overstatement to claim that economics and economists today play a central role in the development and structuring of antitrust cases of all kinds. Rare is the antitrust case that goes to trial that does not have one or more economists testifying on each side, plus backup economists helping with the development of the economics arguments and the gathering and analysis of data. Even in those “routine” price-fixing cases, because private parties can sue the price-fixing parties for treble damages, economists have become involved in the calculations of the “overcharges” by the price fixers, as well

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9. Long after Baxter left the DOJ, his efforts finally prevailed: In 1997, the Supreme Court declared that maximum RPM should be judged under a “rule of reason” standard; and in 2007, the Court similarly decided that minimum RPM should be judged under a rule of reason standard.

as helping develop theories of how and why the price-fixing did (or didn't) occur. "Dueling economists" at trial has become the norm.

And, of course, with this expanded demand for economics expertise has come supply: There are now roughly a half dozen "brand name" economics consulting firms that have large staffs (who are often "alumni" of the DOJ or FTC) and with which many academic IO economists have formal or informal ties. In addition, there are about a dozen smaller economics consulting firms that serve similar functions.

At the enforcement agencies, the tradition of having academic IO economists take leaves of absence to serve as the "Chief Economist" at the DOJ (in the deputy AAG position that was noted above) and at the FTC (as the Director of BE) has become firmly rooted. The staffs themselves—despite the vagaries of periodic federal government budget tightening—have grown somewhat larger as compared to the late 1970s.

Perhaps the pervasive influence of economics and economists can be best seen in the area of merger analysis: Recall that the DOJ's MGs of 1968 had failed to become the standard organizing framework for merger litigation. By contrast, the 1982 MGs proved to have a lasting influence. The MGs were modified a number of times, but the core ideas remained relevant. The most notable changes occurred in 1992 when the analysis of markets with differentiated products was introduced (and the FTC joined the DOJ as coauthor, and the document became the "Horizontal Merger Guidelines" [HMGs]), and in 2010, when the differentiated-products analysis moved to center stage, along with the "unilateral effects" and "upward pricing pressure" analyses that accompany mergers of differentiated products. And it is clear—especially for the 2010 HMGs—that the chief economists at the two enforcement agencies and their staffs were the driving intellectual forces.

Since the early 1990s, all analyses of mergers—by the agencies and by the merging parties—have embodied the HMGs. And—even though the HMGs are not a legal document and thus need not influence judges' decisions—when cases have gone to trial, the HMGs have been cited by and have clearly influenced the structure of judicial decisions.

Finally, it is worth noting that the area of vertical mergers has received much less attention. Although vertical mergers were part of the analysis in the 1984 revision to the DOJ MGs, that part of the analysis was considered unsatisfactory and was dropped from the 1992 revision (which, as mentioned above, became the HMGs). But after the DOJ lost its challenge to the AT&T/Time Warner merger at trial (in 2018) and on appeal (in 2019), there was widespread sentiment for the development of a set of "vertical merger guidelines" (VMGs). The DOJ and the FTC jointly issued a set of draft VMGs in January 2020 and a final set of VMGs in June 2020. Again, economics and economists have played a central role in the development of these VMGs. Whether these VMGs will play the lasting role that the HMGs have played remains to be seen.

#### *D. A Summing Up*

As of the late 1970s, the involvement of economics and economists in antitrust was relatively underdeveloped. But by the early 1980s, things were beginning to change. And now, from the vantage point of midyear 2020, there clearly has been an "antitrust revolution" with regard to economics and economists.

### **III. The Antitrust Revolution**

The last section described the enormous substantive changes in antitrust economics over the past thirty years and the equally enormous institutional changes at the FTC and the DOJ that have accompanied those advances. As these changes were beginning to emerge in the 1980s, we were prompted to compile and publish a compendium of the major antitrust cases of the time, focusing on their novel

economic content *and written by economists who were involved in each of the cases*. In the Preface of the book, we declared that “collectively these cases document what may be termed the ‘antitrust revolution’—the increasingly important role of economics in antitrust since the mid-1970s.”

The title of the book—*The Antitrust Revolution*—stuck. Thirty years later—with six more editions, a total of 130 cases, and a similar count of authors—much has stayed the same. The book has maintained its essential purpose, which has been to continue to document the ever-expanding role of economics and economists in antitrust. Whereas antitrust had been a largely legal and formulaic policy, there are no longer any cases that do not begin with an economic foundation and rely on economic analysis. The book has captured that profound change. The cases in each edition reflect this ever-greater reliance on economic models, data, and analysis that has characterized the process.

And each edition has reflected the growing role of economists in the process. Whereas in many instances that role began as secondary, economists had begun to take a much more prominent—often key—role in the antitrust proceedings that are described in later editions. Indeed, as was discussed in the previous section, this rising role for economists has fed a rapid expansion of consulting firms with distinguished economists on their staffs and as affiliates from academia. This, too, is reflected in the prominence of authors in successive editions of the book.

Throughout, the book has maintained its strict condition that the principle (if not sole) author be an individual who was significantly involved in the case itself. The reasons for this are straightforward: An individual who is involved in a matter lends authenticity to a case study that no outside observer can duplicate. An insider has detailed information and insights that give credence and color to the case study. Although insiders must avoid disclosure of confidential information to which they may have become privy in the process of working on the matter, at least they know such information and can either work around it or sometimes find sufficient public discussion of it to be able to cite public sources. Again, an outsider would not necessarily know what to look for in the public record. Indeed, since an increasing number of cases over time have been resolved without trial records, the ability to “reverse engineer” (or maybe we should say, “publicly engineer”) evidence and arguments necessary for full case studies has become ever more important over time.

A further constant has been the criteria for inclusion of the cases themselves. All cases have been selected for their importance in the evolution of economics in antitrust: the “antitrust revolution.” They represent cases that embody the first or early uses of new methodologies, theories, or empirical approaches, as those have been developed in economic research; cases that have required new and specialized approaches in order to address entirely novel issues; and cases that have simply altered or expanded the importance and range of uses of economics in antitrust. The successive editions of the book have included almost all of these cases. They have missed very few important cases and at the same time have included and highlighted some others that might otherwise not have received the attention that they deserved.

The final constant has been the editors of the book. Like most authors of novel books, in 1989, we launched the book with more optimism than we had any basis for. The book was unlike anything otherwise available; it was aimed at serving a market for an economic perspective on antitrust that might range from nonexistent to small. We were grateful that Scott Foresman was willing to place a small bet on the outcome, and we have been grateful for—and repeatedly encouraged by—successive publishers to continue to reissue updated editions every five years. The book has gained a steady and interested readership that has made this possible.

But if all those considerations have remained the same, much else has changed. For one thing, we originally expected the book would be useful primarily as a supplement in economics courses on IO and policy, and perhaps business courses on strategy and law school antitrust courses. Much of that has proven to be the case. One of us has regularly used it as a supplement in undergraduate teaching but also selectively in a graduate policy course. And the bulk of sales reflected precisely that use. What we did not expect, however, has been its wide readership among antitrust practitioners—especially

lawyers who wanted insights into current economic thinking about antitrust issues. Since the book is written in a nontechnical style but includes cases that apply cutting-edge ideas and methods, it has proven to be an easily accessible resource to a wider readership than we expected.

More unexpected yet has been the fact that the wide readership has included policy makers in other countries. As we have traveled internationally, it has become apparent that the book has preceded us. It is widely read by economists and others who are interested in competition questions across the globe. It is well recognized by economists at international conferences and even more strikingly by economists and noneconomists at competition agencies in many countries. Many smaller and newer competition agencies are staffed with individuals whose experience with antitrust economics is limited, so that the book once again provides an accessible introduction to how the relevant issues are addressed in the country where many of these advances originated. It is gratifying to learn of such an important use.

As a very concrete reflection of that wider audience, two editions of the book—the fifth and sixth editions—have been translated into Chinese. This interest in the U.S. experience has accompanied China's adoption of competition legislation—the Anti-Monopoly Law—in 2008 and the development of institutions to implement the new laws. It would seem, again, that the book has provided useful insight to regulators and businesses into modern competition policy and practice.

Further confirmation of the usefulness of the template used in the book—having economists involved in antitrust cases write them up—comes from its being copied in other jurisdictions. In Brazil, Cesar Mattos edited and published two editions of *A Revolucao do Antitruste no Brasil*,<sup>10</sup> with prominent antitrust cases largely from Brazil. These accompanied the emergence of the Brazilian competition agency CADE as a potent force for competition policy in that country.

While competition policy was perhaps better established in the European Union (EU), there has also been interest in that jurisdiction in a similar compendium. In 2009, Bruce Lyons of the University of East Anglia published *Cases in European Competition Policy: The Economic Analysis* with the same format as that in our book.<sup>11</sup> It contained seventeen cases that were drawn from the growing EU experience with competition policy, written by economists who were playing an increasingly important role in applying the tools of economics to such policy there.

The final and perhaps most significant unexpected development has been that the antitrust revolution has, at least seemingly,<sup>12</sup> in fact been won. The barricades protecting the old regime have been stormed, and the final defenses have been breached. The old rules and rulers have been disgraced and replaced. The new regime is fully in charge of the antitrust agencies (the FTC and DOJ) and the rules (HMG and now VMG, plus more). A simple comparison of the first MGs issued in 1968 with the latest, in 2010, reveals the thoroughgoing nature of the transformation. Definitions of markets and concentration, numerical thresholds, theories of harm, and defenses to allegations all have undergone major changes that are defined by the underlying economic considerations.

Indeed, these changes have been so thorough that the very title of the book—*The Antitrust Revolution*—may seem oddly out of place. “What revolution?” some current students and practitioners might ask. Indeed, two editions ago, we considered changing the title so as to reflect better the current contribution of the book, which arguably is no longer to document a revolution but rather to illustrate the ongoing application and the steady continuing evolution of economics in antitrust. We were, however, persuaded that maintaining continuity of the title was useful.

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10. Editora Singular, Sao Paolo, 2003, 2008. Mattos was originally on the faculty of the University of Brasilia and subsequently at the Brazilian Ministry of Economics.

11. *CASES IN EUROPEAN COMPETITION POLICY: THE ECONOMIC ANALYSIS* (Cambridge University Press, 2009).

12. We use the term “seemingly” since one of us is concerned that some of the major changes have in fact weakened antitrust. See J. Kwoka, “So You Want to Have an Antitrust Revolution? Paradoxes in Modern Merger Control,” in this symposium.

Of course, while the revolution may have prevailed, some aspects of current antitrust economics and enforcement continue to be controversial. There are great debates over vertical mergers, laxity of merger enforcement, overuse of behavioral and weak structural remedies, and now serious allegations of corruption of the decision-making process at one of the agencies. But none of these constitutes a revolution in itself, nor do any obviously require a revolution in order to resolve the concerns.

In the first edition, we concluded the Preface with the following:

The shape of future antitrust policy and the role of economics in that policy cannot be predicted with certainty . . . . Nonetheless it is probably safe to say that economics has narrowed the bounds of what may be thought of as rational acceptable antitrust policy . . . . The essence of the revolution in antitrust wrought by economics is likely to be permanent.

Indeed.

## IV. Conclusions

There can be little doubt that antitrust has undergone a revolution in the past forty years. As we have described here, the institutions, personnel, and policies of the FTC and DOJ have all fundamentally changed, and economics has been central to those changes. Indeed, along with deregulation, antitrust stands as one of the major applications and signal achievements of the discipline.<sup>13</sup> That is not to say that there is unanimity on all the changes or their effects, but there is a substantial consensus on the direction that economics has taken antitrust.

We are pleased that the title of our book *The Antitrust Revolution* has also been an appropriate name for this movement. And we are certainly pleased that its seven editions seem to have successfully captured the ever-evolving nature of this movement through the medium of case studies. We appreciate that this symposium has provided a forum for a discussion of this revolution.

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13. Indeed, when John Siegfried commissioned essay contributions to a book that was eventually titled *Living Better through Economics* (Harvard University Press, 2010), antitrust was one of the areas for which he commissioned an essay.