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An Introduction to the American Antitrust Institute's 11th Annual National Conference: Are the Boundaries Between Public and Private in Transition?

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The theme of the American Antitrust Institute's (AAI) conference on June 24, 2010, was embedded in a question: are the boundaries between what is public and what is private in transition? Our premise was that antitrust strikes a balance between government regulation of the economy and an extremely free market system. Another way to say this is that there is, on one hand, the public sector, represented by the government, and on the other hand, the private sector, represented by individuals, families, commercial units, and various other associations. Our concern as experts in antitrust and competition policy is in the nuances of the relationship between what, at any point in time, is public and what is private because the balance establishes the framework in which competition plays its role.

That relationship may be viewed in many ways, but one starting point is to focus on who exercises the dominant influence on decisions affecting economic behavior. In a state-led economy, the state (by definition) has the upper hand, at least in certain spheres. In a laissez-faire economy, the private sector has the upper hand in most spheres. By "upper hand," I mean to indicate whether it is the state or the private sector actor who has the greater discretionary power with respect to particular kinds of economic decisions. As we will see, there are many points in the real world between the two poles of this simple public-private model.

The balance between public and private has occasionally been static, but it is now fairly dynamic around the world. For example, the state in China and India in our lifetimes has yielded considerable new leeway to the private side of the equation. In the United States, where a generation ago the traditional apparatus of command-and-control regulation of much of the U.S. economy yielded to a deregulatory model, there is a movement toward more government intervention. The balance between public and private can change as a result of an election, as knowledge and ideologies change, as technology opens or closes new spheres of activity, or as popular trust shifts toward or away from bureaucrats or business leaders. Or the balance may shift as a result of all of these forces and others, such as broad economic crisis or public policy recognition of major challenges, such as global climate warming, playing out against a background of politics.

And notice that I say "spheres," in the plural, because influence may shift toward the state in some sectors and in some respects while it shifts toward the private sector in others. It may also shift from one

part of the government, such as the state or municipality, to another, such as the federal government, with practical implications for the private sector. By inquiring as to whether—and if so, in what ways—the boundaries between public and private are changing, we move beyond a narrow focus on economics in recognition that antitrust is part of a political economy.

Our hypothesis is that the relationship between the government and the private sector *is* in a significant state of transition and that this affects the dynamics of competition in specific industries and sectors. Many current events topics came readily to mind as we planned the conference: Does health care reform mean that seventeen percent of the economy is being taken over by the federal government? Are we being socialized, as some critics have proclaimed? Does the government's response to the banking meltdown mean that the state will play a larger role in the financial services industry in the long term? Do job stimulation and other federal programs responsive to the economic recession mean that government intervention in private markets is expanding? Do the Supreme Court's recent rulings on antitrust issues mean that antitrust will not apply as widely to regulated sectors? Will this increase or decrease public intervention in the economy? Does the Obama administration's antitrust rhetoric mean that the laissez-faire, semi-libertarian philosophy that dominated so much of the past thirty years has now been put out to pasture? What does it mean to say that an entity is "too big to fail," and what is the appropriate government response to such entities? Finally, does a perceived crisis in climate warming and energy production, including our ability to cap a leak deep below the ocean surface, mean that the government's role in the energy sector will inevitably become more powerful?

Consider this excerpt from a *New York Times* article by David Sanger:

> Mr. Obama reinvigorated a debate about the renewed reach of government power, or, alternatively, the power of government overreach. . . .
>
> To Mr. Obama, this is all about rebalancing the books after two decades in which multinationals sometimes acted like mini-states beyond government reach, abetted by a faith in markets that, as Mr. Obama put it at Carnegie Mellon University a few weeks ago, "gutted regulations and put industry insiders in charge of industry oversight." When Representative Joe L. Barton, the Texas Republican, opened hearings Thursday about the gulf oil gusher by accusing Mr. Obama of an unconstitutional "shakedown" of BP to

> create a "slush fund," he was giving voice to an alternative narrative, a bubbling certainty in corporate suites that Mr. Obama, whenever faced with crisis that involves private-sector players, reveals himself to be viscerally antibusiness.
>
> The reality, not surprisingly, is more complex.[1]

At the conference, we tried to identify diverse dots among the complexity to see whether they can be connected in a coherent way. Our focus, as an antitrust advocacy organization, was on issues that relate to competition, but, as I have already suggested, competition takes place within a framework established by the government and influenced by the overall political culture. If normative understandings about what ought to be private and what ought to be public are changing, we should expect this to have an effect on competition policy.

Many of the issues we heard about and discussed could have been delivered in time-tested conversations about antitrust and regulation, about exemptions and immunities and state action. Other topics, such as public-private partnerships, represent deviations from standard antitrust discourse. The amount of change that seemed to be in the air suggested to us that, if we were pouring old wine, it should be into new bottles. In hindsight, we believe that some of the wine is new and that a broader view of competition policy will be especially helpful at this time.

In this introduction to the symposium issue of *Oregon Law Review*, I provide a personalized summary of the conference itself, based on the live presentations. The articles that will follow are edited elaborations on those presentations. Because we cannot include articles by all of the speakers, I will provide the flow of the entire day, ending this introduction with my own effort to link the dots.

I
EXEMPTIONS

The Assistant Attorney General of the United States, Christine Varney, provided a keynote address and shared her views on the rise of a more flexible approach in antitrust law and policy and the

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[1] David E. Sanger, *Strong Steps or Oversteps? BP Is Latest Example of Tactic by Obama*, N.Y. TIMES, June 18, 2010, at A1.

absence of a continuing need for certain traditional antitrust exemptions in the contemporary era.[2]

Ms. Varney began with a review of the recent history of antitrust in the United States:

> While the Chicago School introduced a level of much-needed rigor into antitrust analysis, the belief that government intervention in the market does more harm than good, and that left unfettered the market will best protect competition and consumer welfare has, I believe, been discredited. I think many would agree that the days of excessive antitrust intervention are behind us, thanks in part to the Chicago School, and this is a good thing.[3]

But antitrust enforcement is now in need of some reinvigoration.[4] The pendulum swing that began in the 1970s, and that was propelled by the Chicago School's belief in the supremacy of markets, has gone too far in the direction of skepticism about enforcement and reliance on the markets' abilities to self correct.[5]

In the modern era of antitrust, she said, many exemptions are not needed, simply because antitrust applies a flexible approach to so many collaborative activities.[6]

> To put it plainly, the complaint that antitrust law is frequently too rigid to accommodate efficiency-enhancing business behavior has been overtaken by events. The reality is that efficient behavior is ultimately beneficial for fair and free markets, and is consistent with the aims of antitrust. Antitrust law and enforcement policy has the ability to prevent anticompetitive behavior without stifling the kinds of innovative, procompetitive business behavior that keeps our dynamic economy moving and growing while promoting consumer welfare.[7]

With this background, she explored the reasons why "it is time to retire" a particular exemption, the McCarran-Ferguson Act's

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[2] Christine A. Varney, Assistant Att'y Gen., U.S. Dep't of Justice, Keynote Address at the American Antitrust Institute's 11th Annual Conference: Public and Private: Are the Boundaries in Transition? (June 24, 2010) [hereinafter Varney Keynote Address]; *see also* Christine A. Varney, *Antitrust Immunities*, 89 OR. L. REV. 775 (2011).

[3] Varney Keynote Address, *supra* note 2.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

exemption of the business of insurance.[8] This is a topic that is also taken up in this issue in articles by Beth Farmer[9] and Randy Stutz.[10] Despite the Obama administration's support of repeal limited to the context of health care reform, the exemption remains on the books.

Ms. Varney closed with a few observations about antitrust exemptions. First, "new legislative exemptions for specific industries should be avoided."[11] Second, "when new exemptions are considered or existing exemptions are going to be redesigned, there are better and worse ways to go about it."[12] Finally, "exemptions for regulated industries, whether in statute or judicial precedent, should be narrowly construed."[13]

My comment is that skepticism of exemptions does not represent a change from previous Department of Justice (DOJ) policy. If antitrust represents one form of government intervention, an exemption from antitrust may represent a high degree of freedom from government oversight for private decision making—unless, as often occurs, the exemption responds to an enhanced framework of more direct government regulation. In the case of insurance, as Beth Farmer points out in her article, the exemption from federal antitrust reflects an allocation of power to the state level, not (in theory at least) a withdrawal of the insurance industry from regulation.[14] To the extent the Obama administration succeeds in reducing the role of exemptions, this may result in a greater role for antitrust, which would likely enhance the federal regulatory role. With respect to the Obama administration's announced efforts to give antitrust enforcement a more aggressive role,[15] this could tilt the balance between public and private in the public direction, keeping in mind that antitrust is one of the lightest forms of government intervention. At the time of the conference, while the appointments and the rhetoric of the Obama administration reflect an intent to make more use of the

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[8] *Id.*

[9] Susan Beth Farmer, *Competition and Regulation in the Insurance Sector: Reassessing the McCarran-Ferguson Act*, 89 OR. L. REV. 915 (2011).

[10] Randy Stutz, *Market Allocation in the Health Insurance Industry and the McCarran-Ferguson Act*, 89 OR. L. REV. 885 (2011).

[11] Varney Keynote Address, *supra* note 2.

[12] *Id.*

[13] *Id.*

[14] Farmer, *supra* note 9.

[15] Stutz, *supra* note 10.

antitrust laws, there were relatively few cases on the basis of which an evaluation can be made.

II

PUBLIC AND PRIVATE: ARE THE BOUNDARIES MOVING? THREE CHALLENGES IN COMPETITION POLICY

In this plenary session, we introduced three areas of activity that are not often discussed in antitrust conferences but are highly relevant to any serious look at how the economy is or is not changing and what this implies for competition policy.[16]

Setting standards was the topic of Chris Sagers, a professor of law at Cleveland-Marshall College of Law.[17] Professor Sagers placed standard setting in an area between regulation by the government and regulation by the market, thereby directly questioning the value of a public-private polarity, or at least presenting a third model.[18] He emphasized the ubiquity and importance of standards; their long history; the peculiar role of engineering ethics wherein the representatives of companies in setting standards sometimes give higher value to professional, technical values than to the interests of their companies; and that setting standards takes place largely outside the supervision of either the market or the government.[19] He noted that it is difficult successfully to sue standard-setting organizations and that many standards are being adopted into law, usually with little discussion of their substance by legislators and sometimes even on a basis of adoption of future amendments that will be incorporated into law by reference.[20]

Although not stressed by Professor Sagers in his talk, the rapid emergence of new high-tech industries has increased the importance of standards, often because a standard is the focal point for interoperability between networks. Moreover, whereas antitrust has traditionally intervened in setting standards only in the most

16 The moderator of this session was Phil Weiser, the Senior Advisor for Technology and Innovation to the National Economic Council Director.

17 Chris Sagers, *Standardization and Markets: Just Exactly Who Is the Government, and Why Should Antitrust Care?*, 89 OR. L. REV. 785 (2011).

18 *Id.*

19 *Id.*

20 *Id.*

outrageous abuse situations, the Federal Trade Commission (FTC) has taken a more active role in recent years, particularly in the development of a policy against "patent ambush,"[21] which occurs when a participant in setting standards owns a patent that it fails to disclose at the time the standard is being adopted but later, as a result of the adoption, holds a monopoly position and can reap monopoly rents. By the FTC's becoming more engaged with the standard-setting process, one can argue that the degree of freedom for self-regulation by private parties has been somewhat reduced.

The role of public-private partnerships was introduced by Michael Likosky, a senior fellow at New York University's Institute for Public Knowledge.[22] Professor Likosky traced the evolution of public-private partnerships from leasing of existing infrastructure (e.g., parking meters) to a new stage, after the Iraq War, in which large private equity funds began seeking access to the lucrative U.S. public works sector.[23] The basic trade-off is that the private investors build new projects like roads, telecommunications, water and sewage plants, and wind farms and other energy projects,[24] and the projects are funded by user fees, and a return of capital is guaranteed by the government over a long term, perhaps thirty or forty years.[25] The projects appeal to the government because they are "off-budget."[26] The government benefits from the capital improvements without putting forth the up-front capital.[27]

Typically, these projects assume a monopoly position, and the government bears most of the risk. If the return on investment does not meet projections, the project may increase user fees (likely to be a form of regressive taxation), or the government may have to make up the shortfall. This gives the government an investment in maintaining a long-term monopoly over which it has relinquished regulatory power. Because the projects usually involve the most appealing

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[21] *Id.*

[22] Michael Likosky, Senior Fellow, Institute for Public Knowledge, New York University, Panel Titled Public and Private: Are the Boundaries Moving? Three Challenges in Competition Policy at the American Antitrust Institute's 11th Annual Conference: Public and Private: Are the Boundaries in Transition? (June 24, 2010).

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

assets of the government, the projects can deprive the government of revenues with which it might have cross-subsidized other governmental functions in the future. Professor Likosky also described the large fees that are generated for bankers, law firms, and consultants, which are not tied to assumption of risk.[28] He pointed out that the government often obtains advice on these projects from investment bankers who later become beneficiaries.[29] Raising questions but not fundamentally disapproving of public-private partnerships, Professor Likosky proposed a governmental infrastructure bank (e.g., for energy) in which conflicting interests could be converged and risks could be more equitably addressed.[30]

Thus the development of public-private partnerships in very recent years represents a new flow of power from the government to private parties, and it raises significant questions about long-term government support for private monopolies.

The third example of changing relations between what is public and what is private is the government-sponsored enterprise (GSE), such as Fannie Mae and Freddie Mac. The presenter was Jonathan Koppell, Director of the School of Public Affairs, Arizona State University. Because these publicly funded GSEs are presently in conservatorship, the government must now decide how to treat them going forward. Dr. Koppell suggested that two questions should be separated.[31] First, what, if any, role should the government play in promoting home ownership?[32] Current policies alter the landscape for capital investment decisions, giving the housing sector an advantage over other sectors, although the GSEs are only one of many programs that have this effect.[33] Second, if there is to be government intervention in the housing sector, what institutional form should it take?[34] The GSE form, Dr. Koppell said, is an accident of history

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28 *Id.*

29 *Id.*

30 *Id.*

31 Jonathan Koppell, Director of the School of Public Affairs, Arizona State University, Panel Titled Public and Private: Are the Boundaries Moving? Three Challenges in Competition Policy at the American Antitrust Institute's 11th Annual Conference: Public and Private: Are the Boundaries in Transition? (June 24, 2010).

32 *Id.*

33 *Id.*

34 *Id.*

rather than the result of an ideological or policy-driven calculation.[35] Like the public-private partnerships that Professor Likosky discussed, GSEs are organized in a way that keeps the government's funding "off-budget," which Dr. Koppell called dishonest, particularly under current circumstances.[36]

Dr. Koppell outlined four options: (a) to make the GSEs explicitly government agencies, (b) to improve the GSE structure following a public utility model, (c) to fully privatize them, or (d) to provide a more direct subsidy to housing with minimal institutional overhang.[37] Every solution, he says, has trade-offs.[38] The GSE, as it stands, has modest public control and very limited competition.[39] He asks whether we are willing to relinquish some level of public control with the goal of enhancing private competition.[40]

Here we have a strange hybrid institution that, having failed in a serious way, currently faces an uncertain future.

III
INDUSTRY-SPECIFIC PRESENTATIONS

The conference at this point broke into four simultaneous sessions that dealt with specific sectors of the economy: insurance, financial institutions, telecommunications, and transportation.[41]

In his introduction to the panel on insurance, Lawrence Mirel, former Commissioner of Insurance for the District of Columbia, asked whether repeal of the McCarran-Ferguson Act (exempting the business of insurance from federal antitrust exposure) is a good idea and whether it would benefit consumers.[42] He identified several

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[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] Summaries of the breakout sessions may be found at AMERICAN ANTITRUST INSTITUTE 11TH ANNUAL CONFERENCE, JUNE 24, 2010, PUBLIC AND PRIVATE: ARE THE BOUNDARIES IN TRANSITION?, BREAKOUT SESSION SUMMARY (2010), *available at* http://www.antitrustinstitute.org/sites/default/files/Insurance%20Breakout%20Session%20Summary_071120101659.pdf.

[42] Lawrence Mirel, Partner, Wiley Rein, Introduction to the Panel on Insurance at the American Antitrust Institute's 11th Annual Conference: Public and Private: Are the Boundaries in Transition? (June 24, 2010).

potential drawbacks: (1) the risk that repeal would harm small and local insurers, which depend on collaborative information sharing to accurately price their products; (2) the risk that repeal would result in higher insurance premiums; and (3) the risk that repeal would lead to increased concentration in the insurance industry.[43]

Randy Stutz, an AAI Research Fellow, provided a history of the insurance exemption.[44] Agreeing with Assistant Attorney General Varney, he stressed that antitrust had evolved since passage of the McCarran-Ferguson Act and that the rule of reason now protected most of the information sharing that the industry needs.[45] He also suggested that the state action doctrine could be used where necessary to further protect the industry without need for an overall exemption.[46] Mr. Stutz then called attention to the evolution of the Blue Cross/Blue Shield companies, which have traditionally not permitted their companies to cross into one another's geographical markets.[47] While concluding that it is unclear whether allocation of insurance markets is exempted by the McCarran-Ferguson Act, he predicted that repeal would increase the hitherto rather light scrutiny given to the absence of Blue-on-Blue competition.[48] If the Blues could be induced to compete against one another, concentration in health insurance would be dramatically reduced.[49]

Beth Farmer, a professor of law at The Dickinson School of Law, urged that the McCarran-Ferguson Act's major feature is not antitrust but rather the allocation of power and deference among the federal government and the states, although she thought that the antitrust exemption is overbroad and unnecessary.[50]

The session on financial institutions dealt with two topical issues: the too-big-to-fail (TBTF) problem and interchange fees.[51] Financial reform legislation, pending at the time of the conference, was

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43 *Id.*

44 Stutz, *supra* note 10.

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 Farmer, *supra* note 9.

51 This panel was moderated by K. Craig Wildfang, Partner, Robins, Kaplan, Miller & Ciresi LLP.

described by Arthur E. Wilmarth, a professor of law at the George Washington University Law School.[52] Professor Wilmarth argued that the primary objective of the legislation should be to eliminate TBTF subsidies and that sweeping structural reform, which separates traditional banking from high-risk investment banking in complex institutions, is necessary to curb excessive risk taking among large financial conglomerates.[53] Because financial reform legislation has now passed, I leave it to Professor Wilmarth's article in this volume to update his analysis.[54]

A financial services expert, attorney Henry Polmer, took up another issue—interchange fees—that has since been partially dealt with by the financial reform legislation.[55] He argued that these fees, which are so important to merchants and consumers as well as the credit and debit card industries, should be subject to some form of federal utility regulation.[56] Mr. Polmer concluded that the Durbin Amendment, which was subsequently incorporated into the legislation that passed Congress, signals a willingness in Congress to begin viewing debit card interchange fees as a public utility.[57] He stressed that this view should be extended to credit card interchange fees.[58] Lastly, he argued that the United States should draw from the experiences of Australia, New Zealand, and the European Commission in their successful application of antitrust law and competition policy to protect their consumers against excessive, duopoly-imposed interchange fees.[59]

My comment is, given that so much of the recent financial crisis has been so widely blamed on inadequate regulation of a dynamic

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[52] Arthur E. Wilmarth, Jr., *The Dodd-Frank Act: A Flawed and Inadequate Response to the Too-Big-to-Fail Problem*, 89 OR. L. REV. 951 (2011).

[53] *Id.*

[54] *Id.*

[55] Henry Polmer, Panel on Financial Institutions at the American Antitrust Institute's 11th Annual Conference: Public and Private: Are the Boundaries in Transition? (June 24, 2010).

[56] For background on the interchange industry's competition problems and elaboration on the arguments presented by Mr. Polmer, see my paper (prepared with Mr. Polmer's important input) for the AAI. ALBERT A. FOER, ELECTRONIC PAYMENT SYSTEMS AND INTERCHANGE FEES: BREAKING THE LOG JAM ON SOLUTIONS TO MARKET POWER (2010), *available at* http://www.antitrustinstitute.org/sites/default/files/Interchange%20Foer.pdf.

[57] Polmer, *supra* note 55.

[58] *Id.*

[59] *Id.*

financial services sector, crucial parts of which had altogether escaped regulatory oversight, it should come as no surprise that financial reform will expand the federal government's role in this sector. Although there will be some curtailment of what certain private institutions can do, more drastic measures that could have increased the role of competition (such as establishing caps on the size of financial institutions in order to restore competition) were not adopted. The government's enhanced obligation to look for systemic risks and new authority that may authorize action when systemic risks are found seems to reflect an understanding that the cause of the financial collapse had less to do with the size of corporate entities than with their interconnectedness to the larger economy. In the absence of future crises, it is not clear that this enhanced authority will increase the government's day-to-day potential for intervention. In the case of interchange fees, Congress stepped into a long-playing dispute between merchants and consumers, on the one hand, and bankers and credit card companies, on the other. With private negotiations unable to resolve the problem, antitrust litigation unlikely to provide a solution, and examples of direct regulation in other countries showing the way, the only question is why Congress dealt only with debit cards and not also with credit cards.

The telecommunications panel was moderated by Jonathan Baker, the Chief Economist of the Federal Communications Commission, and panelists included Joseph Farrell, Director of the Federal Trade Commission's Bureau of Economics, and Marius Schwartz, a professor of economics at Georgetown University. The future-oriented, wide-ranging conversation focused on the National Broadband Plan, which had recently been issued by the Federal Communications Commission (FCC), and raised questions of what the government's role will be in the regulation of broadband, particularly with respect to questions of access. Unfortunately, articles were not prepared for this session.

The final breakout session covered issues relating to the transportation sector.[60] Peter Carstensen, a professor of law at University of Wisconsin Law School, reported on statutory

[60] The moderator was Spencer Weber Waller, Professor and Director, Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law.

immunities related to transportation.[61] Professor Carstensen identified six exemptions from antitrust law for various aspects of the transportation industries.[62] The main notion of his presentation was that these exemptions no longer serve their historic purpose of shielding regulatorily supervised, private agreements over rates and service as well as mergers among rate-regulated transportation providers from the conflicting demands of antitrust.[63] According to Professor Carstensen, the transportation agencies should not be removed from the process, as they play an important role in establishing rules and regulations; establishing reporting requirements; and providing continuing oversight, monitoring, and investigative capacity.[64] Professor Carstensen argued, however, that all current exemptions for the transportation industries should be repealed.[65] Further, he proposed a new process whereby the transportation entities engaged in joint ventures could request a "robust business review clearance" from the relevant regulatory agency and the DOJ.[66] If the DOJ were to approve the clearance, the parties would be exempt from antitrust liability for the actions specifically approved, with periodic review and the ability of the DOJ to withdraw the clearance on a going-forward basis.[67]

John Kwoka Jr., a professor of economics at Northeastern University, discussed the plight of the U.S. automobile industry.[68] As a result of the recent bailout, two of the U.S. Big Three—General Motors (GM) and Chrysler—were now suddenly owned by the United States and Canada.[69] Professor Kwoka began with a history of how the U.S. auto manufacturers had lost their way and the real but limited role the U.S. government had played in subsidizing the

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[61] Peter C. Carstensen, *Replacing Antitrust Exemptions for Transportation Industries: The Potential for a "Robust Business Review Clearance*,*"* 89 OR. L. REV. 1059 (2011).

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] John Kwoka, Jr., Panel on Transportation at the American Antitrust Institute's 11th Annual Conference: Public and Private: Are the Boundaries in Transition? (June 24, 2010).

[69] *Id.*

industry, but not individual companies, until the recent bailouts.[70] He described the public policy choice between allowing a bankruptcy without bailout and providing short-term liquidity to specific companies, to be followed by bankruptcy and reorganization.[71] Professor Kwoka agreed that, because of their size and interdependence with other sectors of the economy, the U.S. automakers were "too big to fail."[72] He claimed that the government's challenge now is to ensure that the companies adopt different operating and management strategies so that such intervention is not again required for the foreseeable future.[73] Professor Kwoka concluded that, by requiring fundamental changes in GM and Chrysler as conditions for intervention, the Obama administration has in fact pursued a prudent approach toward the auto industry.[74]

My comments are that removing the transportation exemptions would add an overlay of antitrust exposure without reducing existing regulation. Thus, if Professor Carstensen's view[75] were to be enacted, the state would gain incrementally vis-à-vis the regulated industries. But Professor Carstensen is not the transportation tsar, and there is no indication that his proposals are about to change the face of regulation. In the case of the auto industry, on the other hand, the bailout resulted in a historic transfer of ownership from the private to the public sector, but there is a high probability that this will be a temporary transfer imposed to create as painless a transition as possible from bankruptcy to reorganization. Neither GM nor Chrysler is intended to be a yardstick company, and the government, other than ousting the CEO of GM, has apparently not taken a particularly active role in running either company. Nonetheless, competitive auto companies worry that government ownership will provide unfair advantages to the bailed-out companies.

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[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *See* Carstensen, *supra* note 61.

IV
HEALTH CARE REFORM AND COMPETITION

In a plenary session, Thomas Greaney, a professor of law at St. Louis University School of Law, and Barak Richman, a professor of law at Duke University School of Law, explained how the extensive new health reform might impact competition.[76] Professor Greaney pointed to a variety of imperfections in the health care market that are to one extent or another addressed by the reform legislation.[77] Much depends on the specifics of rules and regulations that must be worked out by the administration.[78]

Standard microeconomic models do not apply well. The delivery system is fragmented and uncoordinated. The insurance system is highly concentrated. Hospitals and medical practices have been allowed to become concentrated through mergers. Bilateral monopoly occurs in many health markets, and there is inadequate entry at all levels. Professor Greaney believes, or at least hopes, that the reforms will address many of the imperfections.[79] For example, the proposed market exchanges should reduce adverse selection. Half the new legislation offers up demonstrations and pilots that could result in new entry, changed attitudes, and efficient innovations.[80] A major example is the creation of Accountable Care Organizations that will go into effect in 2012. He stressed that these need to be structured deliberately if they are to create greater competition; if improperly monitored, they instead could strengthen cartels and market power.[81] Meanwhile, a new wave of mergers among hospitals and physician groups seems to be underway, requiring that health care sector mergers be given serious attention by the antitrust agencies.[82]

Professor Richman noted that, with the employer at the center of the health care system, purchasers of health care do not give the usual scrutiny to their purchases because withheld wages that go to buy

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[76] The session was moderated by Max Huffman, Associate Professor of Law and Dean's Fellow, Indiana University School of Law.

[77] Thomas L. Greaney, *The Affordable Care Act and Competition Policy: Antidote or Placebo?*, 89 OR. L. REV. 811 (2011).

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

insurance are essentially invisible.[83] This may help account for the misplaced antitrust sympathy shown toward hospital and doctor group mergers, which were portrayed as community assets bracing themselves against purchasing groups and Health Maintenance Organizations (HMO).[84] The combination of market power and insurance led to higher prices and more distortion than simple market power has.[85] Reform was a missed opportunity to address foundational problems in the provision and financing of health care services.[86] Because concentration is already a big problem and deconcentration seems unlikely, the antitrust authorities will have to focus on conduct—including tying and bundling—as well as mergers.[87] Increased medical tourism may be one response to concentration.[88]

It is fair to say that neither speaker was especially optimistic, but both saw value in the reforms. Even though the federal government and the states will play a larger role than in the past, there are possibilities for competition to play a larger role, but much will depend on the ways the various specifics of reform are rolled out and enforced—and how private parties respond.

V
ENERGY REFORM AND COMPETITION

While health care reform was accomplished legislatively just prior to the conference and financial reform was accomplished shortly after, energy reform (as this is written) remains bogged down in Congress. The two presenters at our plenary session on energy reform were Peter Fox-Penner, Principal of The Brattle Group and author of *Smart Power: Climate Change, the Smart Grid, and the Future of Electric Utilities*, and Susan Kelly, Vice President of Policy

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[83] Clark C. Havighurst & Barack D. Richman, *The Provider Monopoly Problem in Health Care*, 89 OR. L. REV. 847 (2011).

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

Analysis and General Counsel of the American Public Power Association and President of the Energy Bar Association.[89]

Ms. Kelly pointed out that the American Public Power Association is itself a good example of the difficulty of talking about what is public and what is private.[90] It is an organization of publicly owned (i.e., owned by units of state and local government) providers of retail utility services that compete against investor-owned "public utilities" that are regulated.[91] The publicly owned power companies were designed to be yardsticks that could curb the worst abuses of investor-owned (private) utilities.[92]

Ms. Kelly's presentation focused on the challenges presented to the energy sector by public policies dealing with climate change.[93] Of particular note are the investment challenge (the hugely expensive infrastructure that will be needed) and the questions of how much demand will grow, how consumers will be able to make choices in an era of smart meters, and how angry ratepayers can be induced to accept higher rates at a time when credit rating companies are watching utilities so closely for deteriorating credit quality.[94] Ms. Kelly also questioned the recent history of the Federal Energy Regulatory Commission (FERC), which had preferred competition to regulation under President Bush and apparently has not changed much under President Obama, recently going so far as to say that it did not have to consider antitrust in its decisions (a position that it claims it has never taken).[95] She expressed concern that the Great Depression era's Federal Power Act is in danger of being used by the

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89 This session was moderated by Diana Moss, Vice President and Senior Fellow, American Antitrust Institute. Articles were not produced for this session. For useful background information, see Diana L. Moss & John Kwoka, Jr., *Competition Policy and the Transition to a Low-Carbon, Efficient Electricity Industry* (Am. Antitrust Inst., Working Paper No. 10-02, 2010), *available at* http://www.antitrustinstitute.org/sites/default/files/AAI%20Working%20Paper%20No.%2010-02_Moss%20and%20Kwoka_Elec%20Comp_051820101303.pdf.

90 Susan Kelly, Vice President of Policy Analysis and General Counsel, American Public Power Ass'n, Panel on Energy Reform and Competition at the American Antitrust Institute's 11th Annual Conference: Public and Private: Are the Boundaries in Transition? (June 24, 2010).

91 *Id.*

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.*

FERC to favor some resources over others—even though a utility's resource mix is traditionally within the purview of states and local governments.[96]

Dr. Fox-Penner also focused on climate warming as one of two major drivers of change in the energy sector[97] and agreed with Ms. Kelly that the huge costs imposed on both public and private entities will trigger rate increases. There are still major technology risks to be overcome as well, and one cannot assume that a competitive generation market, for example, can work without careful governance.[98] The second driver he discussed is the so-called smart grid.[99] A particular characteristic having a disruptive effect will be the transparency of short-term prices and the ability to adjust demand to price.[100] He predicted it will take one or two decades to shift ten percent of peak load into off-peak usage, and this will require educating residents and developing appliances that will keep their decisions simple.[101] Dr. Fox-Penner also described the coming collision between vertical integration and separation/deregulation and how this will require the government to develop new tools of regulation.[102] The government's structure itself is a problem.[103] The states still have the bulk of authority to regulate the electricity industry, despite the FERC's increased role.[104] However, the level at which regulation is most needed—the regional level—has virtually no workable institutions.[105]

In terms of changes in public-private relationships, not much can be said until legislation is finally passed. The smart grid would represent a major transformation in which individual and business consumers would have a role that is much greater than their current role. At the same time, we can probably expect many regulatory

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96 *Id.*

97 *See* Peter Fox-Penner & Heidi Bishop, *Mission, Structure, and Governance in Future Electric Markets: Some Observations*, 89 OR. L. REV. 1107 (2011).

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.*

decisions to move from the state level to a regional level (if institutions can be created) and to the federal level. The government's influence on the private sector will likely be felt in terms of programs that give advantage (or disadvantage) to particular types of fuel and to various supports for energy conservation.

VI
SOME OBSERVATIONS ABOUT PUBLIC AND PRIVATE

The distinction between what is public and what is private can best be viewed as a simplistic bipolar model. In between are a myriad of mixtures of public and private: yardstick public corporations, GSEs, public-private partnerships, standard-setting organizations, private associations of publicly owned utilities, private utilities that are publicly regulated in varying degrees, publicly traded private companies in which the public is the major stockholder, financial services firms that are regulated differently according to their size and interconnectedness—to name some of the intermediate mixtures that we examined in the conference. Plainly, there are varying ways one can be private and varying ways a government can exercise influence over private commercial behavior.

It is apparent that the power to make or influence decisions, as between the government and the private sector, is in a state of flux. Passage of major national financial reform and health care legislation and the clear recognition that climate change will require major energy reform—together accounting for a major portion of the national economy—are shaking up both existing industries and government. For the most part, but not by any means exclusively, these changes reflect a movement away from the pole of completely free markets toward more state intervention, although much of this movement occurs in industries that have long been affected with a public interest and greater or lesser degrees of government intervention. Even the auto industry, now partially but probably only temporarily owned by governments, had a history of financial advantages from government, although the urgency of the bailout led to a significantly increased role for government.

In both the financial sector and the health care sector, much of the story remains to be determined, based in large part on how the interstices of the legislation are filled in by government and how the private sector reacts to new incentives and disincentives. The

overhang of pending energy reform currently affects decision making in sectors far removed from the production or distribution of energy.

What does all this have to do with antitrust? Antitrust mediates between the state and the private sector as a relatively light form of regulation, working on an after-the-fact basis only when private decisions are outside generally expressed bounds. The generality and flexibility of its rules provide guidance but do not command. Antitrust can be a substitute for more direct forms of regulation. It can also be an adjunct to regulation, a subject that is itself in flux in light of recent Supreme Court decisions.[106]

Several collision points between what is public and what is private find their loci in the application of antitrust laws: exemptions and immunities, state action, and the ability to force access to essential facilities owned by private companies. Exemptions from antitrust amount to a degree of freedom for private decisions from federal oversight. Removal of exemptions do not necessarily mean more freedom, however, as exemptions and immunities are often tied to forms of regulation at the state or local level and may relate to allocation of power within a federal system rather than allocation of power between the public and private sectors.

We set out to see if we could connect some dots in a meaningful pattern. It seems that ideology and theory played a large role in bringing the U.S. economy to the present balance between public and private, a structure that might be described as mostly private markets marbled with government interventions ranging from nearly invisible to highly intrusive. I think the clearest pattern in the current transition seems to be a moderate swing away from the theory and ideology of free markets to a strong concern with what will work in a time of multiple crises. Empirically driven pragmatism is a far cry from claims of an antibusiness, socialist takeover that we hear from ideologues and stakeholders in the status quo.

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[106] Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264 (2007); Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).