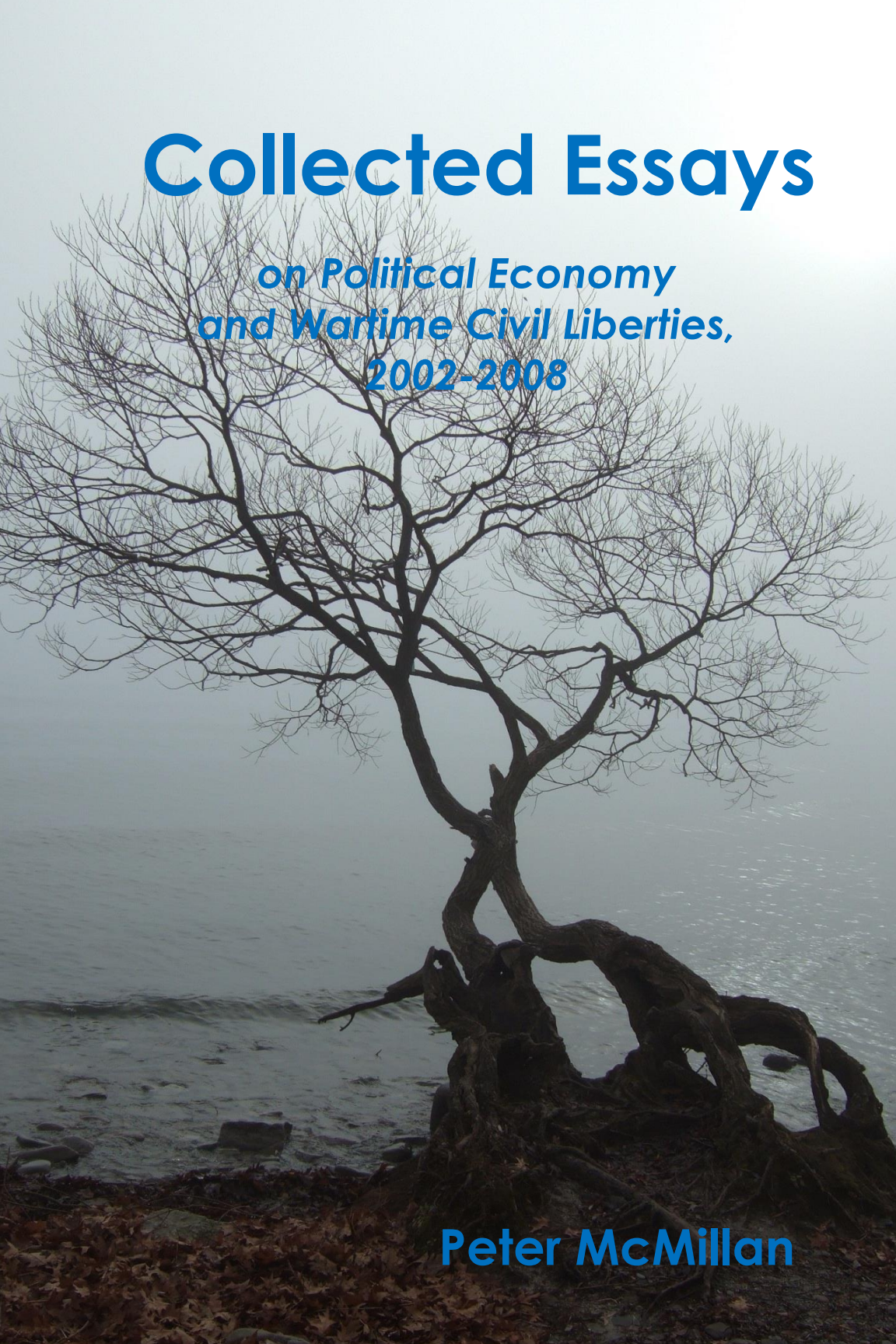
Collected Essays
on Political Economy
and Wartime Civil Liberties,
2002-2008
Peter McMillan

Flash! Fiction (2012) by Peter McMillan

Flash! Fiction 2 (2013) by Peter McMillan with Adam Mac

Flash! Fiction 3 (2014) by Peter McMillan with Adam Mac

Flash! Fiction 4 (2015) by Peter McMillan with Adam Mac

Flash! Fiction 5 (2017) by Peter McMillan with Adam Mac

Willowing Skywardly: Stories and Essays (2022) by Peter McMillan

Flash! Fiction: Around the Block (2022) by Peter McMillan

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To my parents, Virgil and Donabel McMillan.

Contents

The 64 essays in this volume are primarily about political economy — as opposed to either business or academic economics — and democratic government in the English-speaking nations of the Northern Hemisphere, primarily the U.S. The first, political economy, is viewed in terms of the differences between the theory of economic thought and the reality of actually existing capitalism as considered in topics such as economic growth, business cycles, globalization and monopoly power. The second, political science, is concerned with the contrast between the theory of democratic government and the reality of actually existing democracy, specifically regarding constitutional government, emergency powers, and civil liberties.

While the neoliberal consensus, the unipolar world after the Cold War, and the world post-9/11 provide the context for these essays, their relevance persisted in the midst of the COVID-19 global pandemic, widespread human rights protests against systemic anti-Black racism, and the profound constitutional crisis in America, which were in full force when this collection was first published. Three years later, the essays remain instructive even though geopolitical unipolarity is rapidly disappearing, the hot wars among the great powers have returned to Europe, and there is increasing demand for an illiberal Leviathan that mirrors the governance model of the powerful CEO.

Written between 2002 and 2008, these essays have not been updated with subsequent developments but have been left to reflect the state of affairs at a point time. A second reason for establishing this time frame is that it corresponds to a period when I was experiencing my own 'darkness at noon.'

I have since turned to writing mostly fiction.

Peter McMillan
Oakville
2023

Introduction

In this essay, the principal features of a theoretical model of perfect competition will be identified and then compared with the real world of contemporary free enterprise economies. The term ‘perfect competition’ translates to ‘unrestricted competition,' meaning that in the hypothetical world of perfect competition, there are no impediments to the operation of competitive forces. The model of perfect competition is not intended to represent in detail the workings of a free enterprise system. As a model in which detail has been stripped away, its value is that of a tool that has been developed to assist our understanding of the complexities of human economic interactions. Understanding the structural form of economic reality through the use of such a tool can only be achieved at the expense of increasing inaccuracy due to oversimplification. Thus a balancing act is required: the limitations of our human intellect in comprehending the total complexity of economic affairs must be balanced against the human need to understand the ‘hows’ and ‘whys’ of economic phenomena.

The purpose of the essay is not to provide a modified version of the model of perfect competition. Instead the purpose is to show the differences between the model of perfect competition and actual competition so that we have a better idea when we are moving towards or away from the principles of competition. In addition, the reader will be encouraged to approach Economics as an art form and not as a rigorous science. In other words, despite the best efforts of academic and professional economists to systematize Economics, it remains a values-based discipline not unlike Political Science, providing grounds for the reinstatement of its 19th century name, Political Economy.

Although it would be ideal to provide a positivistic (fact-based, value-neutral and rigorously scientific) account of the model and the real world, I will argue that normative (fact- and values-based) considerations play a prominent, even predominant, role in both the descriptive and comparative analyses. This is because Economics

is not just about the inanimate world around us. It is about human beings with their intellects, emotions, beliefs, instincts and ambitions. It is about their relationships with one another, including, but not limited to, economic activities such as production, distribution, sales, marketing, labour, investment and entrepreneurship. It is about their relationships with the inanimate world – natural resources, climate, geography and laws of nature.

The issue of the influence of value on theory arises immediately upon explaining the perfect competition model, e.g., the market's predisposition and tendency to correct itself when disturbed by external factors. In a perfect world, equilibrium would obtain in the short run as well as the long run. However, even the perfect competition model acknowledges that equilibrium is more appropriately applied to the long run rather than to the short run. Equilibrium conditions are believed to prevail in the long run (i.e., the time frame within which all productive resources can be deployed or re-deployed). However, in the short run (i.e., the time frame within which productive resources are relatively fixed in terms of usage), there will be disequilibrium. In transitioning from the short run to the long run, adjustments are necessary to align suppliers' costs, risks and expectations with the buyers' income, wealth, standard of living and tastes and preferences – these supply and demand adjustments taking place within the context of changes in productivity, population, labour force, capital accumulation and income distribution. Note how attention has been shifted away from one problem (short run disequilibrium, e.g., unemployment, excess inventory, scarce energy resources, etc.) to another (the process of achieving equilibrium in the long run), and consider how it comes about that the importance of the long run takes precedence over that of the short run.

Naturally, there are different perspectives. For example, one can work from the assumption that the long run is the more important problem. In the previous paragraph, reference was made to 'external' factors that might disturb a state of economic equilibrium. Economists understand 'external' to mean something, usually a cause of some sort, that is outside their theoretical model. Outside the theory implies that the mathematical representation of the theory regards the 'external' variable to be determined by other equations,

e.g., probability-based estimates, which are independent of the theory under examination, because their causal connection has not been determined. Examples of 'external' factors or variables or forces with respect to the model of perfect competition would be natural disasters (floods and earthquakes), terrorism (September 11th), wars (civil, border and international), technology effects (U.S. productivity growth in the late 1990s), monopolistic behaviour (OPEC in the 1970s) and political change (breakup of the Soviet Union and the democratization of the Warsaw Pact countries in the late 1980s).

A second and contrary perspective challenges the priority of the long run orientation in economic research and analysis. John Maynard Keynes challenged the orthodox view that short run disturbances need not concern us since they will eventually resolve themselves, arguing that the short run may be sufficiently long to warrant a different approach. Many have no doubt heard the famous statement attributed to Keynes that in the long run we are all dead. Of course, Keynes' *General Theory* was written during the Great Depression of the 1930s, but it is worth noting that he distanced himself from two extreme positions, viz. socialists and stock market speculators. In other words, Keynes' challenge was moderate in comparison to some of the views at the time, but it was nevertheless a severe challenge to the Classical tradition, a tradition according to which he had been trained by, among others, Alfred Marshall.

In the debate between Keynes and the Classics, positive Economics gave way to normative Economics, as each party's values provided the foundation for their logical arguments. Keynes and the traditions that developed along 'Keynesian' values believed that intervention in the market (usually in the form of the non-business entity, government, acting to influence consumer and/or business spending) could be a good thing, while according to Monetarists, Rational Expectations theorists and Real Business Cycle theorists (genealogically linked to the Classics), there could be a short term benefit accruing from intervention in the market, but the long term negative impact would offset the short term amelioration. Both traditions assume different, values-based positions regarding business cycle fluctuations (pattern-like phases of economic expansion and

contraction), particularly economic contractions such as recessions and depressions.

This concludes the digression offered to illustrate the difficulty of separating Economics as a science from Political Economy as an art and to remind us that in Economics, there is sometimes a subtle blending of fact, logic and values. In the following, the reader is advised to watch for the influence of values in the facts and arguments that are advanced. The reader is encouraged to apply the same critical approach when reading about business and Economics in newspapers, magazines, journals and books.

Model of Perfect Competition

In the next section, I will sketch a model of perfect competition. This model is theoretical, which means that it is an abstraction from the complexities of real economic life – what William James might have described as a "bloomin,' buzzin' confusion." The model is attributed to no one in particular, but it is consistent with the description one would find in standard treatments of the history of economic thought. Interested readers may turn to the following economists and their works whose influence I acknowledge: Alfred Marshall's *Principles of Economics* (1890), Frank Knight's *Risk, Uncertainty and Profit* (1921), Piero Sraffa's "Laws of Returns under Competitive Conditions" (1926), Edward Hastings Chamberlin's *Theory of Monopolistic Competition* (1933) and Joan Robinson's *Economics of Imperfect Competition* (1933).

In view of the contributions that have been made by many economists over the past two centuries (assuming that we choose Adam Smith's late 18th century classic, *The Wealth of Nations*, as our starting point), there is one further point to be made before advancing into a description of the model of perfect competition. This point is simply that Political Economy is a dynamic field of inquiry that is subject to a variety of human impulses. For example, with respect to the development of alternative theories to the perfect competition model, Alfred Marshall has been set up as straw man by some of his critics in their attempts to carve out a space for themselves in the history of economic thought. In fact, Marshall did recognize the discrepancies

between the model of perfect competition and the real world, and some of the writers (e.g., Knight, Sraffa, Robinson and Chamberlin) who have made significant contributions to our understanding of competition in the real world have elaborated and improved upon, but not replaced, the received economic theory.

The history of economic thought can be viewed as evolutionary, where theory can be progressively improved and specialized in light of new and better understood evidence from the real world as well as in the context of different values and social norms. Of course, this 'rational' evolution also requires open-mindedness, which, in turn, is functionally related to values and interests. This is the challenge for a rationally based Economic science, whose foundation reveals a combination of the rational search for truth and objectivity and of the non-rational desire (not to be confused with irrational desires) to satisfy a variety of material, social and spiritual needs.

Turning to the model for perfect competition, I will present the principal features of the theoretical model, and I believe that the reader will recognize all of these features, since they all have become part of our common background knowledge. First, under perfect competition, the supplier is a price taker (this requires that there be no dominant firm or group of firms), and suppliers will produce whatever quantity they can at that price so long as their revenues equal costs – no more, no less. The following consequences are implied. If one supplier raises his price while all other suppliers maintain their prices, then all buyers will move their business to other suppliers whose price remains unchanged. Thus, the supplier who raised his price will be driven out of business. On the other hand, if one supplier lowers his price while all other suppliers keep their prices unchanged, then he will attract all buyers away from other suppliers; however, he will not be able to sustain his business, since he will necessarily be selling below cost.

Second, products of various suppliers in the same industry are homogeneous. This means that buyers can discriminate among a variety of similar products only in terms of their prices. In other words, soap is soap is soap, and so on for any other product. Clearly, this is not a description of the real world, with the exception of some

agricultural commodities in specific geographic markets, but then we are considering a theoretical model and are interested in observing the model's outcomes with respect to its conditions in order to better understand which conditions may determine/influence which outcomes.

Third, ease of entry into the industry ensures that variable returns apply in the short run. Increasing returns in the short run will increase the entry of new businesses to take advantage of profit opportunities, while decreasing returns will increase exits as some firms will find it unprofitable to operate over the long run. Related to this is the assumption that in the short run, supply creates demand, while in the long run demand forces a reallocation of productive resources, i.e., supply.

Fourth, the long run equilibrium is one where the economy functions at full capacity, e.g., production at industrial capacity and full employment. The short run is a period of adjustment, and the long run is the culmination of these adjustments. As noted near the beginning of this essay, full employment of labour and physical capital is not necessarily, nor likely, to obtain in the short run, since even in a perfectly wage- and price-flexible system, lag times will exist in the real world. These delays may be attributable to changes in technology and the related adjustments of labour and physical capital, changes in demand and the related changes in production activities and the non-homogeneity of labour and physical capital, which constrains the redeployment of productive resources. Although instantaneous adjustment to changes within the economic system is not strictly part of the model of perfect competition, it is not inconsistent with the model.

The model of perfect competition, as presented above, describes the conditions and outcomes of a free enterprise system. The conditions or assumptions that suppliers are price-takers, that there is no dominant supplier or group of suppliers, that price is the only difference among similar products and that suppliers can easily enter/exit industries in response to profit/loss situations give rise to the fundamental long run outcome that all resources are employed. In other words, given these assumptions, the economic system will,

in the long run, perform at its potential, and unemployment, aside from intentional or transitional unemployment, will not exist.

Real World of Competition

In the next section, I will describe how free enterprise actually works, i.e., what form actual competition takes in our free enterprise economy. First, unlike the model of perfect competition, firms set prices in the real world, especially in industries with small numbers of large firms, e.g., automobile manufacturers. Second, in the real world, products are highly differentiated, e.g., soaps. Third, increasing returns do exist in the long run, in part because the entry of firms is restricted in some industries, e.g., banking. Fourth, the real world is characterized by capacity underutilization and unemployment, and this is not limited to the recessionary troughs of the business cycle.

The first three features (price-setting, business combinations, differentiated products and services and restricted entry) modify the original conditions for perfect competition so that the outcome of actual competition tends towards the underemployment of human and capital (plants, equipment, technology, etc.) resources. This is not a profound discovery. Economics textbooks describe the same conditions and outcomes.

For example, with respect to non-homogeneous products, Chamberlin's investigation into the nature of actual competition led him to develop an expanded definition of product such that non-price characteristics could be factored into the buyers' decisions. By allowing products to be distinguishable by non-price characteristics, e.g., patented features, trademarks, brand names, etc., Chamberlin prepared the way for his theory of monopolistic competition, where firms combine competitive and monopolistic behaviour and achieve this in part by establishing and maintaining market share for their unique product. To the extent that the product is unique, the firm can act as a monopolist; however, since there are similar products that can be substituted, the firm must also regard its competitive position.

The net effect of Chamberlin's monopolistic competition is that firms may find it more profitable to operate at less than full capacity.

Similar reasoning may be applied with respect to business combinations (e.g., mergers and acquisitions) and restricted entry conditions, since they both describe the consolidation of market power whereby firms are able to set prices and output levels. A firm's ability to determine its own price and output means that it may be more profitable for the firm to produce less output at a higher price than would obtain under perfect competition. Recall that under perfect competition, if one supplier raised his price, then he would be driven out of business. This is not the case under actual competition, because the firm now has market share, through business combination, differentiated product and/or protected industry. In contrast, buyers insofar as they are not similarly organized, are more likely to stay with a supplier as prices increase and to make the necessary adjustments in the amount of product purchased. To the extent that production levels are lower under actual competition than under perfect competition, there is a gap between potential output and employment and actual output and employment.

Comparing the model of perfect competition with the real world competition that we experience reveals significant discrepancies and suggests the marginalization of competition in the real world. So, what is it about the competition described in the model that has failed to materialize in reality? The answer is that the checks and balances between and among suppliers and buyers in the perfect competition model do not work in the real world.

Essentially, competition requires feedback, which implies the power to exercise choice and the existence of options. Accountability, via laws and regulations as well as voluntary standards, methodologies and best practices provide a feedback substitute where choices and options are otherwise limited. However practical and necessary such accountability measures may be in imperfectly competitive markets, they are limited in effectiveness by the administration overhead required to mediate between the supplier and the buyer as well as by their inherent inability to perfectly reflect the needs of the buyer. For example, in the world of publicly traded companies, which raise capital by issuing equities (stocks), accountability

to the stockholders often takes precedence over accountability to clients/customers and employees. While in the world of government, using the education sector as the example, accountability to stakeholders, (e.g., boards of education, teachers' and principals' federations, OECD [Organization for Economic Cooperation and Development] and universities in the publicly funded education sector) often takes precedence over accountability to the citizens who directly or indirectly obtain publicly supported education benefits. In both cases, arguments are made that the 'production and distribution' issues are so many and so complex and the constituents are so many and so diverse that a filtering layer of 'representative experts' is necessary to mediate the interests of the consumer/citizen and the provider/government. However, the concept of provider capture, which can be traced back to George Stigler's 1971 article, "Theory of Economic Regulation," has recently surfaced in various public sector reform initiatives (New Zealand, England, U.S. and Canada) and has resurrected notions of direct democracy and free market competition. Similarly, in the private sector, the initiation of quality control and customer relationship management programs is fundamentally an admission of shortcomings in the real world of free market competition.

The point is that when the feedback from the buyer to the supplier is mediated or otherwise blocked, the resulting state of affairs is completely out of alignment with the theory of perfect competition. To the extent that the choices and options of the buyer are frustrated, the application of the perfect competition model has to be modified to fit the real world by making adjustments to allow for these imperfections. Such imperfections manifest themselves in a variety of forms and these manifestations are not restricted to governments and private enterprise monopolies but also extend to large multinational corporations, small and mid cap companies, small businesses, trade unions, non-profit organizations, professional associations, religious organizations, etc. Whenever a product or service is being provided, if the ultimate consumer has limited choice or no choice, then the provider of that product may be considered to have disproportionate power, and the nature of the market in which that product or service

is offered may be described as imperfectly competitive, somewhere on the continuum between Chamberlin's monopolistic competition and absolute monopoly power.

Examples of barriers that shift the real world away from the model of perfect competition are widespread and familiar. Patents, copyrights, import quotas and tariffs, industry subsidies, business location incentives, government regulations, legal contracts and product dependencies are just a few examples of the variety of restrictions that prevent the realization of perfect competition. What is significant in all of the instances listed is that there are values and interests at stake. Knight argues that it is the nature of the human condition that we find ourselves in an imperfectly competitive system, since it is fundamental to human survival, individually and collectively, to attempt to know and control the inherent uncertainty of the future. According to Knight, uncertainty, unlike risk, is in no way quantifiable even by way of statistical probability forecasting, and as a result, there are natural tendencies to diffuse the potentially adverse effects of an unknown future by such means as business combination. The restrictions listed above (e.g., patents, copyrights, etc.) may also be viewed as various means adopted for the purpose of mitigating risks and uncertainty. However, one should bear in mind that the overall level of risk and uncertainty in society may not be reduced but that relative levels of risk and uncertainty may be all that change as risk and uncertainty are transferred and redistributed.

The above addresses only the aggregate discrepancy that exists between the organization, as a discrete entity, and its clients, customers, citizens, etc. There is also a discrepancy between the individuals, who are part of and act on behalf of their respective organizations, and the organization's clients, customers, citizens, etc. Alienation from (non-ownership of) their work further distorts the mediation that employed individuals provide between the supplier (provider) and buyer (client). The alienation of the worker (regardless of level) from his/her work is a recognized shortcoming of modern, bureaucratic organizations, regardless whether they are private sector firms, governments, non-profit organizations or labour unions. A detailed exploration of this topic is beyond the scope of this essay;

however, it should be apparent that bureaucratic organization inhibits competition.

Conclusion

In conclusion, actual competition differs greatly from the model of perfect competition, and from a normative view, the perfect competition model may be more appealing in some respects than what actually exists. Moving the model of perfect competition to an even higher level of abstraction, there may be a multitude of solutions, and this is the beauty of competition as a natural system of checks and balances – not just checks and balances within the economic system but also checks and balances among the theories and policies that describe, explain and govern the economic system. There may be a multitude of problem assessments, depending on which issue or set of issues one chooses to address – full employment, economic growth, environmental sustainability, free market enterprise, income/wealth redistribution as they apply to individual nations, groups of nations or the international community. The selection of topics to be addressed, whether by economic research or economic policy development, reveals values-based preferences or what Joseph Schumpeter referred to as pre-theoretical foundations. There is nothing inherently wrong with this approach as long as these pre-theoretical foundations are made explicit in the formulation of theory and policy.

Keynes was an early advocate of full employment solutions, as was Robinson. She went beyond Keynes' macroeconomic approach to the problem of general unemployment, developing her own theory of imperfect competition to explain how anti-competitive behaviour, especially on the part of monopolies and oligopolies (small numbers of large firms), tends to produce the very kind of underemployment and undercapacity production that was witnessed during the Great Depression. Neither Keynes nor Robinson pretended to be value-neutral, nor do I believe that they were under any illusions as to the simplemindedness of such an approach.

Regardless whether one believes that there are problems to be solved and what those problems are, it should be clear that it is more than just facts and logic that must be taken into account. Ultimately, values and interests are at stake, and this is the meaning of Political Economy. We cannot hide behind the facts, nor can we hide behind the logic. There are choices that must be made, and as Knight states, most of our conduct is arrived at by dealing with uncertainties that are incapable of being measured by actuarial, 'insurance-type' estimates but that are nevertheless addressed. One need only go back as far as September 11th to find an example of how human beings prepare for uncertainty and how we react to the devastating unfolding of the unexpected.

It should be clear that there are limits to the extent to which our contemporary economic system can be aligned with the theory of perfect competition. It should be equally clear where the actual economic system differs from the theoretical model of perfect competition. Finally, it should be clear that whatever the response to these discrepancies, more will be involved than just the discovery of meaningful economic facts and the logical development of economic theories that have more descriptive, explanatory and predictive legitimacy. Pre-theoretical beliefs, values and vision will be instrumental in determining just what economic problems will be addressed, who the principal economic stakeholders happen to be and, thus, what objectives would be considered desirable outcomes.

In keeping with my advice provided earlier in this essay that all business and Economics literature should be scrutinized for explicit and implicit value preferences, I will point out that my selection of the model of perfect competition as a reference point for comparing the actual economic system was motivated by three principal beliefs. First, in my view, many of those who claim to espouse the virtues of competition fail to acknowledge that competition, for them, is often just a means to an end, that end being the establishment of control of some market or market niche. Second, I acknowledge that I subscribe to the view that underemployment represents a waste of economic and social resources, and I believe that the imperfections in the actual economic system not only help to explain how market imperfections are developed and maintained, but also provide

opportunities for economic research and policy development to look for solutions. Third, I believe that concentrations of economic power and the ideas that maintain them tend towards abuse unless checks and balances, not unlike John Kenneth Galbraith's countervailing powers, are in place. These beliefs are unquestionably values-based, but I contend that any and all perspectives on the underlying issues are also values-based.

Business Cycles

Business cycles are a characteristic feature of modern capitalist economies. Cycles move from periods of expansion through contraction and back to expansion. Their cyclical nature derives from this sequence, although the length and severity of cycles are variable. According to the National Bureau of Economic Research (NBER), there have been 31 complete cycles (peak of expansion through trough of recession and back to next peak of expansion) in the U.S. since 1854. Interventions in the U.S. since the Great Depression of the 1930s have lessened the length of contractions. From 1854 through the Great Depression, the contraction phase of recessions averaged 21 months, while since the Great Depression, the contraction phase averaged 11 months. Recently, the U.S. experienced the longest expansion on record (10 years from March 1991 through March 2001), and the current U.S. recession, begun in April 2001, is expected to be one of the shortest recessions on record. While history indicates that recessions in the U.S. and in Canada often coincide, in this most recent instance, Canada did not officially report a recession.

The business cycle starts with increasing expectations for profitable business ventures. Plans to build/upgrade facilities (plants, administrative offices, warehouses, etc.), to add to inventories and to acquire state of the art technologies all become feasible due to expectations that these additional costs to businesses will be not only be recovered but will also generate net income gains. The anticipation of a return on investment that exceeds the market rate for providing finance capital is the driving force behind investment in physical capital. The distinction between physical capital and financial capital is crucial in understanding the business cycle. Physical capital represents the tangible means of production which enable greater levels of future production, while finance capital represents the financial counterpart that facilitates the production of physical capital, e.g., the manufacturing equipment that must be produced before it can be introduced into the production system and can begin to facilitate an increase in manufacturing output and the

inventory that must be produced before the sales, marketing and distribution staff can begin to service the customers who wish to buy the products.

During expansion, investment opportunities develop for both physical and finance capital to expand production capacity and to extend the usage of productive capacity. Regarding the extended utilization of idle productive resources, the argument is made that idle productive resources (physical and human capital[1]) cannot be fully employed without generating excess demand, i.e., inflationary pressures, since a certain amount of slack in these markets necessarily exists due to their non-homogeneity. In other words, at the margin, say beyond 85 percent capacity utilization[2] or 95 percent

[1] The development of human capital theory and its incorporation into mainstream economic theory began in the 1950s. While the term 'human capital' suggests that such theory will regard human beings as little more than inputs into economic production, there are opportunities for using the economic arguments underlying human capital theory to improve the lot of the labour force. For example, the traditional definition of capital assumes that capital is a productive resource whose duration extends beyond a year but whose depreciation requires continuous investment to maintain productive capacity. Where human capital is concerned, the arguments for productivity and durability are even greater, and so, organizations who invest in training, educating, and promoting their employees stand to benefit from their investment in terms of increased productivity as well as the continuity of productivity gains. Recently the G-7 countries modified their respective national income accounting methodologies to permit software acquisition costs to be treated as capital investments. The effect on revised GDP figures was positive but not dramatic. Imagine the changes to national and international GDP measures if the G-7 countries were to change their national income accounting approaches to regard labour expenditures as human capital investments.

[2] Based on annual industrial capacity utilization data from the U.S. Federal Reserve System and Statistics Canada for the period from 1980-2000, the average industrial capacity utilization in the U.S. and in Canada was between 81 and 82 percent, and the upper limits of industrial capacity utilization in the U.S. and in Canada were 84 percent and 86 percent, respectively. The Federal Reserve Board considers industrial production to include manufacturing, mining and utilities. Statistics Canada includes these categories and adds construction and forestry. With respect to industrial production and capacity utilization, the Federal Reserve System notes that these economic indicators are highly procyclical, meaning that they track closely the path of the business cycle.

employment[3], any additional employment will introduce less efficient resources, that is, resources not well adapted or easily adaptable to the production needs at the time.

Business cycles, economic growth and output gaps are all closely related, but there are important differences as well. In this essay the focus will be on business cycles, but both economic growth and output gaps will figure prominently. Business cycles measure deviations from trend growth. Contractions necessarily fall short of output capacity, but even expansions may result in production at less than full capacity. To the extent that full capacity is not attained, there is an output gap representing the difference between what could have been produced and what actually was produced.

NBER and Statistics Canada

In the U.S., the NBER, an independent economic research think tank, has been conducting business cycle research since 1920. It is the recognized authority for dating economic expansions and recessions in the U.S. Its measurements are based on four key monthly indicators – employment, income minus transfers, manufacturing and trade sales and industrial production. The NBER does not use quarterly real Gross Domestic Product (real GDP is the total value of goods and services excluding inflation) data, because it believes that monthly indicators track economic conditions more closely, facilitating more timely fiscal and monetary intervention and that its selection of economic indicators gives a better overall description of the state of the economy. The NBER is alone in its approach of defining a recession as “a period of significant decline in total output, income, employment, and trade, usually lasting from six months to a year, and marked by widespread contractions in many sectors of the economy.” Nearly all other countries and international organizations

[3] Based on annual unemployment data from the Bureau of Labor Statistics (U.S. Department of Labor) and Statistics Canada for the period from 1980-2000, the average unemployment rates in the U.S. and in Canada were 6.4 percent and 9.3 percent, respectively. The lower limits for unemployment in the U.S. and in Canada for this period were 4 percent and 6.8 percent, respectively.

define recessions in terms of two consecutive quarters of declining real GDP.

In dating the most recent business cycle that began with the expansion in March 1991 and peaked in March 2001, the NBER considered trends in employment (nearly 0.7 percent decline in the first 7 months of the recession, compared with an average 1.1 percent decline in employment in the previous six recessions) and industrial production (nearly 6 percent decline in the 12 months following the peak of September 2000, compared with an average 4.6 percent decline in industrial production in the previous six recessions) to be the principal indicators that a recession had begun. Although the NBER's dating of the 2001 U.S. recession was not made until November 2001, had the NBER used real GDP data as the basis for determining whether and when a recession had occurred, its decision could have been made no earlier than January 30, 2002 when the advance estimates of 4th quarter real GDP were announced. However, had the NBER waited until the final estimate of 4th quarter real GDP came in, there would have been an additional two-month delay, since the final estimates of 4th quarter real GDP were not published until March 28, 2002. Furthermore, since 4th quarter real GDP in the U.S. was positive in all three estimates (advance, preliminary and final), the U.S. would not have experienced two consecutive quarters of decline in real GDP, hence no recession.

In Canada, Statistics Canada, a federal government department, uses quarterly changes in real GDP to determine the date and length of recessions. Its definition of a recession is two consecutive quarters of negative growth in real GDP. Although real GDP declined in the 3rd quarter of 2001 by 0.6 percent, the 4th quarter grew at an annualized rate of 2.0 percent. Had the NBER used the same definition, the U.S. would not have experienced a recession, since 3rd quarter real GDP declined by 1.3 percent while 4th quarter real GDP grew by 1.7 percent. On the other hand, had Statistics Canada used the NBER's method, Canada would still probably not have recorded a recession. What is important is that in this most recent case of a severe economic slowdown in both countries the NBER's definition of recession provided an opportunity for a more aggressive

economic stabilization program in the U.S., which arguably mitigated both the severity and duration of the recession in the U.S. and contributed to Canada's escaping an official recession. Undoubtedly the economic effects of the terrorist attacks in the U.S. on September 11, 2001 were an important factor in distinguishing U.S. and Canadian responses to slowing economic activity, but that does not change the fact that the NBER's recession monitoring methodology provides credibility for a more flexible response to economic downturns.

Economic Stabilization

As a result of the Great Depression, the U.S., Canada and other countries adopted permanent fiscal stabilization programs to reduce the effects of cyclical downswings. In the U.S., during the 1930s, the unemployment rate peaked at 25 percent, and this provided the important context for the introduction of economic stabilization programs. Unemployment insurance is the principal non-discretionary fiscal stabilization program that exists to ameliorate the negative income effects of recessions. The aims of unemployment insurance are essentially twofold: first, to provide an income safety net for workers who find themselves unemployed during a recession and second, to prevent the overall economy from spiraling deeper into recession by propping up aggregate demand by means of unemployment insurance benefits.

Similarly, central banks, e.g., the Bank of Canada and the Federal Reserve Board, are more capable and willing to intervene in money markets to stimulate business and consumer activity than was the case in the 1930s. The most recent and dramatic example of the U.S. and Canadian monetary authorities' willingness to intervene was provided by the number and cumulative size of interest rate reductions facilitated in 2001 in response to sluggish economic behaviour, especially in the manufacturing sector since mid-2000. There have been exceptions, notably the Federal Reserve Board's aggressive anti-inflationary campaign in the early 1980s and the Bank of Canada's aggressive anti-inflationary regime in the early 1990s – both of which resulted in the desired inflation outcome (lower inflation rates) but a negative unemployment outcome (higher

unemployment rates). This trade-off (depicted graphically in a downward-sloping Phillips Curve, where unemployment is measured on the x-axis and wages or inflation is measured on the y-axis) leads to one of the most persistent debates in economics in the second half of the twentieth century – the debate about whether and to what extent there really is a trade-off between inflation and unemployment.

The idea of a trade-off between inflation and unemployment is based on the view that unemployment can only be reduced by actions that stimulate the economy (government spending and central bank actions signaling lower interest rates). The increased business activity that results from fiscal and money policies creates additional jobs, but it also sets the stage for inflation. As economic activity improves, unemployment declines and the scarcity of available qualified workers emerges as an issue. The additional costs of hiring and training unqualified employees and/or recruiting qualified workers away from their current employment tends to bid up wages and salaries, and to the extent that organizations (in both private and public sectors) can pass these rising costs along to their consumers, product and service prices increase.

With respect to the inflation-unemployment trade-off, there are two points in particular worth noting, because they provide a linkage to economic growth and output gaps. The first point is that whether and to what extent there is a trade-off depends on the economy's capacity utilization and the flexibility of its idle resources. For example, if the economy is operating at 85 percent industrial capacity and 95 percent employment capacity, and if the idle 15 percent industrial capacity and 5 percent employment capacity could be brought into production with no loss in productivity, then economic expansion to 100 percent capacity need not generate inflationary pressures. However, and this is the second point, both physical capital and human capital are non-homogeneous, which means that they are not readily adaptable to meet any and all production demands. It may be costly or economically infeasible to retool an idle manufacturing plant to produce an in-demand product, and similarly, it may be costly to hire and train unemployed workers to fill the vacancies for highly-trained and specialized labour. Full capacity production, defined as 100

percent utilization of industrial capacity and employment capacity is, therefore, unrealistic. Nevertheless, it does represent a target for achieving maximum economic output in terms of GDP and full employment of labour.

There are a variety of opinions that exist regarding the inflation-unemployment trade-off, but they can be summarized into two schools of thought: the first takes a non-interventionist approach to economic disequilibria (e.g., Monetarist, New Classical and Real Business Cycle theorists), and the second advocates intervention (e.g., Keynesian and New-Keynesian theorists).[4] The noninterventionist school believes that economic disequilibria are the result of

[4] Monetarist economists (e.g., Milton Friedman), while acknowledging the effectiveness of monetary policy, believe in adherence to fixed monetary policy rules, because discretionary monetary policy interventions tend to destabilize the economy. New Classical theorists (e.g., Robert Lucas) go one step further, arguing that the business cycle may not be an intrinsic part of the dynamics of a capitalist economy. Like the Monetarists, the New Classical theorists suggest that fiscal and monetary stabilization policies are inherently destabilizing and should not interfere with the long run natural adjustments of the market. Real business cycle theorists (e.g., Edward Prescott) explain the business cycle in terms of its *real* determinants, e.g., output, productivity and technology changes, thereby marginalizing the importance of monetary policy. Monetarist, New Classical and Real Business Cycle theorists differ on some key points, but the consistent 'pre-theoretical' position of these schools is that government intervention in the market produces a less optimal solution than a strictly *laissez-faire* policy.

Franco Modigliani was a Keynesian whose contributions to Keynesian economics was the integration of monetary with fiscal stabilization measures. In the Keynesian tradition, Modigliani believed that the economy would not necessarily be established and maintained at full-employment equilibrium and that government could and should pursue full-employment stabilization policies combining fiscal and monetary tools. Post Keynesians (e.g. Joan Robinson), reacting to neoclassical economic orthodoxy, expanded the Keynesian macroeconomic worldview to include microeconomic topics, e.g., the development of theories describing market imperfections. New Keynesians (e.g., Gregory Mankiw) have continued to advance the theme that market failures may require non-business intervention, and the principal contribution of this school has been to further develop auxiliary hypotheses that provide microeconomic foundations for Keynesian macroeconomic theory. Keynesians, Post Keynesians and New Keynesians share a common 'pre-theoretical' position, which is in direct contrast with that of the Monetarists, et al. According to the Keynesian tradition, market failure is a fundamental characteristic of modern capitalism, which is not to say that capitalism should be abandoned but that government and the monetary authority can and should intervene during periods of persistent macroeconomic disequilibrium.

short term imbalances between supply and demand, which will in the long run be worked out as market forces realign the economy's inputs (natural resources, fixed capital and labour) and outputs (products and services) within and across the various industrial and service sectors. The non-interventionists also believe that interference will produce further distortions in market conditions, i.e., activist fiscal and monetary policy may reduce unemployment levels in the short run, but in the long run, the net effect of such policies will be inflationary with rising unemployment as inflation impacts supply and demand conditions. In contrast, the interventionist school believes short-term disequilibria may be sufficiently severe to justify immediate action in the form of non-market interventions. In other words, unemployment levels and their attendant social costs may be so high for so long that fiscal and monetary intervention may be critical for the short run, regardless of long run consequences.

In the long run, structural improvements in resource flexibility and resource planning can reduce what, in the labour market, is referred to as the natural rate of unemployment[5] and what in the physical capital market is essentially the same thing – capacity utilization. The idea is that employment of physical and human capital is non-inflationary until the natural rate of unemployment is reached, and inflation sets in beyond this point because the resources (plant,

[5] Various attempts to develop an empirical definition of the natural rate of unemployment have been made over the years, but they all have in common the intention of describing an 'acceptable' level of unemployment vis-à-vis inflation. One of the first attempts was the Non-Inflationary Rate of Unemployment (NIRU). This proved unworkable, because the goal of zero percent inflation was unrealistic. Next came the Non-Accelerating Inflation Rate of Unemployment (NAIRU), which accepted the reality of some level of inflation but attempted to differentiate a stable inflation rate from a growing (accelerating) inflation rate. The Non-Accelerating Wage Rate of Unemployment (NAWRU) is a variation on the NAIRU, which actually gets back to the origins of the Phillips Curve in measuring wage rate changes and unemployment rates. Over the years, wage rate changes and inflation rate changes have been substituted back and forth on the basis that each is a reasonable proxy for the other, since wage rates are believed to translate into general price-level changes. In the late 1990s, the idea of a fixed natural rate of unemployment was severely challenged by the U.S. economic expansion, which saw unemployment rates fall to four percent – below the consensus view of the natural rate of unemployment – without any sign of immediate or future inflation.

equipment, and labour) that are idle do not suitably match the resources that are required. The lost productivity associated with hiring and retooling/retraining mismatched resources or alternatively bidding resources away from their current employment is inflationary. The significance of structural changes in the long run is that they can have the effect of reducing the natural rate of unemployment. Structural changes include training and education, which provide workers with the skills necessary to adapt more readily to changing production demands. Similarly, plant, equipment and inventory can be designed for alternative uses. Both types of structural changes affecting the labour force and physical capital require long run planning. These types of planning activities will only be undertaken if, in the case of business, there are competitive firms who look beyond satisfying the short term market capitalization expectations of amateur and professional speculators, or in the case of non-market intervention, there is results-based competition among the non-business entities, i.e., there is competition between and among the views and interests advanced by independent think tanks, governments, international organizations, labour unions, etc.

Economic Growth

Economic growth represents an increase in the size of the economy over a period of time (quarters for short-term periods and years for intermediate to long-term periods). Economic growth is a function of three key variables: first, changes in size of the labour force, which is in turn a function of population and labour participation rates; second, changes in capital stock, which is a function of investment and capital durability; and third, changes in productivity, which is a function of efficiencies introduced in the productive activities of labour and capital. The labour force component assumes a fixed proportion of physical capital, such that an incremental change in the labour input will require a corresponding proportional incremental change in physical capital input and vice-versa. The productivity component, also referred to as multifactor or total factor productivity, represents the overall efficiency gains associated with combined efforts of labour and physical capital in the

production process. The physical capital component represents what is currently referred to as capital deepening, which is simply the addition of physical capital to the production process such that the previous ratio of capital to labour is increased and production becomes more capital intensive, although not necessarily at the expense of labour.

Full employment of existing labour and physical capital resources combined with projected trend growth rates (i.e., based on extrapolations from historical patterns) for multifactor productivity and capital deepening determine the potential output trend. When the economy is in recession, the growth rate is near or below zero (depending on how the authorities decide to define a recession), so one or more of the three key economic growth variables will be falling short of potential. Usually, during recessions, it is the labour component that is operating below capacity. Remember that the labour component presupposes its corresponding proportionate capital component, so as existing labour and capital resources become idle, actual economic production falls short of potential. In addition, if existing capital resources are idle, then this usually means that as long as there is a surplus of existing and unemployed capital, it will not be profitable to produce similar, new capital (e.g., through capital deepening) since there is no reasonable expectation that the new capital can be profitably employed to produce goods and/or services for which the current level of demand is inadequate.

Output Gap

The output gap represents the difference between the economy's capacity to produce goods and services and its actual production. As described above, the output gap shows up in the recessionary phases of the business cycle, but it may also show up during the expansionary phases if the economy is not operating at full capacity. Notwithstanding the number (31 complete cycles in the U.S. since 1854) and duration (the average length of the downswing has been 18 months), the secular (long-term) trend of economic growth has been positive, i.e., increasing. Needless to say, had the U.S. economy not experienced 31 economic contractions and had the

economy grown at its full employment rate (where both labour and physical capital were fully employed), then the current level of output and the overall standard of living would be significantly higher than they are at present.

The same applies to Canada where for seven years in the 1990s, the unemployment rate was 9 percent or higher. In fact, during the Bank of Canada's campaign to bring inflation under control in the early 1990s, the national unemployment rate in Canada remained above 10 percent for the four years from 1991 through 1994 and remained above 9 percent for the next three years. During the 1990s, the International Monetary Fund (IMF) and the Organization of Economic Cooperation and Development (OECD) were firmly supportive of the Bank of Canada's inflation-oriented austerity program. The OECD even offered empirical evidence to support its anti-inflationary advice, stating in "The OECD Jobs Strategy Under Scrutiny" (December 1997/January 1998 edition of *The OECD Observer*) that Canada's structural (natural) unemployment rate (i.e., the rate below which inflation accelerates) was 8.5 percent in 1996, having declined from a level of 9 percent in 1990. Furthermore, regarding high unemployment in Canada, the OECD and IMF have for years been pointing to the problem of structural unemployment and have advised the Government of Canada on a number of points, not least of which are Employment Insurance and the Canada Pension Plan, both of which are considered too costly. Since the unemployment rate peaked at 11.4 percent in 1993, the unemployment rate had been declining, reaching a low of 6.8 percent in 2000, before it rose to 7.2 percent in 2001. Stronger economic growth facilitated the decline in unemployment levels and was itself positively impacted by the depreciation of the Canadian currency and the related growth in the proportion of GDP that derives from exports targeted for the U.S. market. The correlation between a depreciated currency and an increased reliance on exports to the U.S. from 1991-2000 (the decline in U.S. exports in 2001 may be attributed to the U.S. recession) is supported by Statistics Canada's international trade data. The Government of Ontario has acknowledged the comparative advantage provided by a depreciated Canadian

currency in making Ontario exports more competitive in the global market, although neither the Government of Canada nor the Bank of Canada has been willing to acknowledge a Canadian dependence on a low-value dollar.

With respect to unemployment levels for physical capital, industrial production typically produces at no level greater than 85 percent capacity. Idle machines are not the same as idle workers, but as described above, both labour and physical capital are required for production of goods and services, so when physical capital is taken out of production, there is an impact on the labour that is also removed from production. Witness the layoffs associated with what CIBC World Markets has called a manufacturing recession in Canada dating back to September 2000. When Ford, General Motors or Daimler-Chrysler reduces production levels in response to excess inventories and lagging demand, the effects on employment are visible.

Explanations for business cycles and output gaps can be provided in terms of uncertainty, imperfect information and imperfect competition. With respect to uncertainty, future economic conditions cannot be accurately predicted in the aggregate (i.e., for the economy as a whole), and they certainly cannot be accurately predicted in any microeconomic environment (e.g., for particular industries or labour markets). Forecasts of future GDP growth are continuously being revised in view of new political developments (Afghanistan and the Middle East) and updated economic information (oil prices, leading economic indicators, central bank actions, etc.) Changing forecasts of aggregate economic conditions make it even more difficult to develop accurate forecasts of supply and demand conditions in specific industries (e.g., steel, automotive and forestry) and in specialized labour markets, e.g., education, Information Technology and health care professionals. Imperfect information is related to the difficulties associated with economic forecasting, but it also includes the uneven distribution of and access to current and historical economic information. Shareholders and employees of high tech companies provide examples of individuals whose information, at the time of stock price devaluation or layoff,

was not only imperfect but also uneven with respect to information held by others. Finally, imperfect competition, specifically in the form of monopolistic competition, provides firms whose products and services have established strong market share with the ability to achieve greater profits by producing less output, thus operating at less than full capacity and full employment, than would result in a perfectly competitive industry where firms are unable to set prices by adjusting production levels.

Theories about business cycles, economic growth and output gaps are not necessarily scientific in the sense that they are objective and neutral in terms of values, notwithstanding the attempts of economists to regard themselves as value-neutral scientists on the same level as physicists. From a short-term, efficiency perspective, unemployment may be viewed as necessary, while economy-wide supply and demand forces readjust to optimal full capacity production. However, from a different perspective, there are significant losses to groups of individuals as well as to the economy and society as a whole. Insofar as labour and physical capital resources are unemployed, not only are opportunities for producing additional income and wealth lost but also this suboptimal output combined with the redistribution of income tends to reduce the standard of living for unemployed labour.

In addition, there are costs associated with undercapacity production and unemployment that are not reducible to monetary measurement, and this is where macroeconomic research and forecast methodologies lose their objectivity. To say that only those aspects of the economic system which can be quantified and assigned a monetary value should be factored into economic theory and policy is no less a value judgment than to say that unemployment is a social problem that requires a rethinking of economic theory and policy. Value judgments are embedded in the work of economic think tanks, international organizations, labour unions, business forecast analysts, government economists and academic economists. Economics may need to remove itself from the role of arbiter in economic matters or better still lead an interdisciplinary approach to address socioeconomic problems. A few first steps in that direction would be to remove the pretensions to scientific

objectivity, to reinstate Political Economy as the proper name for the discipline and to open the discourse of Political Economy to the competition of ideas inside/outside academia, multinational corporations, governments, international organizations, trade unions, etc. In a discipline where competition figures so prominently, at least in theory, there is a need for more competition among ideas.

Notes on sources of economic data referenced:

U.S.

GDP – Bureau of Economic Analysis, U.S. Department of Commerce

Unemployment – Bureau of Labor Statistics, U.S. Department of Labour

Industrial Capacity Utilization – Federal Reserve System

Business Cycles – National Bureau of Economic Research

Canada

GDP – Statistics Canada

Unemployment – Statistics Canada

Structural Unemployment – Organization of Economic Cooperation and Development

Industrial Capacity Utilization – Statistics Canada

Exports to U.S. – Statistics Canada

Exchange Rates – Statistics Canada

The Keynesian Tradition

This essay will consider developments within the Keynesian tradition in the context of the history of economic thought. The classification, Keynesian tradition, refers to the common ground shared by a very diverse group of economists – the 'Keynesian' label representing merely a category name for the modified *laissez-faire* economic thought that emerged from the Great Depression of the 1930s. For the purpose of this essay, the economists grouped in the Keynesian tradition share three principal, pre-theoretical beliefs, which provide the framework for the variety of hypotheses that have been developed over the years under different schools (Keynesian 'proper,' neoclassical synthesis, Post-Keynesian and New Keynesian). First, market failure is a characteristic feature of existing capitalist economic systems, where market failure refers to the failure of economic forces (e.g., supply and demand, and their respective determinants) to bring about a condition of full employment equilibrium. Second, market failure requires market intervention on the part of governments and central banks in the form of fiscal and monetary policies aimed at increasing the level of economic activity. Third, the long run is important for economic growth, but the short run is equally important and requires fiscal and monetary policy intervention in order to reduce unemployment by shrinking the gap between potential economic output and actual output.

These beliefs are not shared by all economists, in particular the Monetarists, New Classicals and Real Business Cycle theorists, whose views on market failure, state intervention in markets and the long run are similar to those of the Classical economists. According to the contemporary pre-theoretical beliefs shared by these economists, the long run is the appropriate context for purely economic forces to restore market equilibrium conditions, and however well-intentioned, fiscal and monetary policy intervention is more likely to destabilize than to stabilize short run disequilibria. Based on the fundamental differences between the Keynesian and Classical traditions with respect to market failure, government and central bank intervention in the market and the relative importance of the

short and long runs, the Keynesian tradition is a sufficiently well delineated tradition, notwithstanding the heterogeneity of views among its members as one moves away from the central, core beliefs to the more specific and relatively auxiliary theoretical and policy positions.

Borrowing from Lakatos and Quine, philosophers influential in the history and methodology of science, the Keynesian tradition may be viewed as a central, common ground of beliefs from which a variety of research programs radiate outwards, connecting theory with the real world of economic phenomena at the perimeter. Although attention will be concentrated on the Keynesian tradition, the views of economists outside the tradition will also be referenced in terms of their contributions to the development of economic thought within the Keynesian tradition, based on the belief that theory is affected as much by alternative theories as by how well the theory describes, explains and predicts economic phenomena.

Imperfect Competition and the Phillips Curve in the Keynesian Tradition

The two topics that will be discussed with reference to the development of Keynesian economic thought are imperfect competition and the Phillips Curve. Theoretical developments in each area may be considered consistent with the pre-theoretical Keynesian beliefs regarding market failure, government and central bank stabilization activities and the importance of addressing short run disequilibria.

In addition to the standard treatment of monopoly rents and the related issues of concentrated pricing power and income redistribution long associated with non-competitive markets, the theories of imperfect competition developed by Knight, Sraffa, Robinson and Chamberlin provide a microeconomic explanation of the real world phenomena of undercapacity production, i.e., less than full employment output – this being market failure in the sense that productive resources (labour and capital) are unemployed. Intervention on the part of government in the instance of imperfect competition may take the form of antitrust legislation and/or regulatory control, such as the breakup of Bell into several smaller, regional companies and the

pending actions against Microsoft to sever the product dependencies between the Windows operating system and application software. Both short and long run objectives are considered given that imperfect competition is not just a transitory phenomenon. Marshall, whose Principles served as the textbook for a generation at the turn of the 19th century (much like Samuelson's *Economics* in the post-World War II era), pointed out that the model of perfect competition did not fit the real world and that imperfect competition may well persist into the long run, notwithstanding market adjustments. Subsequent to the publication of Robinson's *Economics of Imperfect Competition* (1933) and Chamberlin's *Theory of Monopolistic Competition* (1933), economic textbooks have incorporated formal treatments of monopoly, oligopoly and monopolistically competitive markets.

The Phillips Curve provides a model for describing the relationship between the rate of wage changes and changes in the unemployment level. The model was introduced by A.W. Phillips in a 1958 journal article. It was subsequently modified to substitute inflation (rate of change in prices) for the rate of change in wages on the ground that inflation is a more appropriate dependent variable for reflecting the impact of changes in unemployment levels. The Phillips Curve provided a menu of policy choices where inflation and unemployment could be traded off in order to achieve the desired objectives. The notion of a trade-off suggested the existence of market failure, again, in terms of unemployment of productive resources, labour in particular. The model presupposed the necessity of government and central bank stabilization programs, and the trade-off was acknowledged to provide options for fiscal and/or monetary policy intervention where the problem to be addressed was one of short run (as opposed to long run) disequilibrium.

Imperfect Competition

Both imperfect competition and the Phillips Curve offered theoretical explanations of market failure – market failure being the core belief of the research tradition and imperfect competition and the Phillips Curve serving as extensions of this belief in the form of

empirically testable hypotheses. In order to understand what is meant by imperfect competition, the model of perfect competition should be borne in mind. Under perfect competition, firms are price-takers, which means that they can adjust their level of output, but cannot thereby affect prices, either to raise or lower them. In contrast, a firm operating in an imperfect market (monopolistic, oligopolistic or monopolistically competitive industry) is a price-setter and is therefore able to control its level of output and its price and still remain in a profitable position. Thus, in response to a reduction in the level of demand during a recession, instead of facing a lower price as would a firm in a competitive industry, the firm will be able to reduce output, operate at less than full capacity and either maintain or raise prices consistent with its reduction of product supplied to the market.

The firm in the imperfectly competitive industry is able to set prices, because it has control of some part of its market. Its product is not perfectly substitutable with others, i.e., it is a differentiated product, and because of this relative uniqueness of its product, the firm is able to adjust prices and production levels without fear of bankruptcy as would be the case if a firm in a perfectly competitive market were to raise its prices. Patents, trademarks and advertising are some of the means by which firms achieve product differentiation in order to consolidate market share. In addition, large capital outlay requirements and government legislation and regulations support market consolidation, e.g., airlines, banking and energy-generating firms. Similarly, subsidies and trade protections (tariffs and quotas) protect market consolidations, e.g., steel, forestry and agriculture. The net effect of imperfect competition is a combination of higher prices and lower output than would have obtained under perfect competition. Thus, market failure results in less than full employment output, not to mention the adverse income distribution effects on unemployed labour.

Recent work has continued the search for causes of market failure, e.g., theories developed to explain wage and/or price stickiness - stickiness being the term used to describe the tendency of wages and prices to move upwards with relative ease but to move

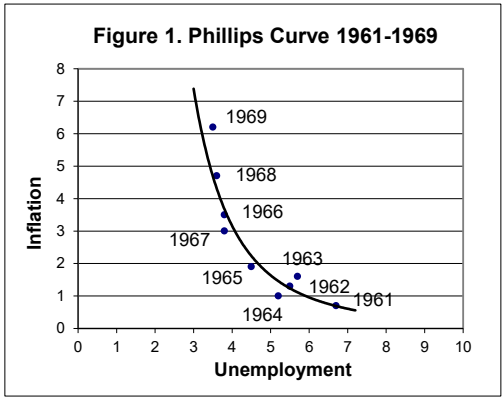
downwards with much less ease. Downwardly rigid wages and prices are regarded by some economists, especially economists included in the Classical tradition, as the principal reason for the market's inability to re-establish itself at full employment equilibrium. Theories have been advanced to explain how and why in the goods and services markets firms do not adjust prices to match reductions in demand, e.g., coordination failure (no firm wants to be the first or only one to reduce prices), menu costs (administrative, marketing and negotiating costs), debt versus equity financing (loans relatively more attractive in terms of preventing the dilution of equity shares but riskier in terms of actual debt obligations), and how and why in the labour markets, wages do not fall during recessions to accommodate unemployed labour, e.g., insider-outsider theories (non-regulatory barriers to entry, such as union contracts, for lower-priced labour), quotas (regulated entry into professional and technical occupations), staggered, multiyear contracts (forward-looking wage expectations benchmarked against other current contracts) and efficiency wages (wage premiums paid to maintain productivity and reduce labour turnover costs).

In all cases, market imperfections prevent the sort of market clearing that the Classical tradition believes will restore full employment equilibrium in the long run. To the extent that firms set prices and thus output levels and that labour groups (unions, management and professionals) set wages and control entry, unemployment of labour and capital will result as will changes in the distribution of income – to the employed and away from the unemployed. Government intervention provides some checks on the degree of consolidation in product and labour markets, while at the same time supporting consolidation in other respects. Antitrust and unemployment insurance are examples of such checks, while tariffs, subsidies, restricted entry and patents are examples in which one of the outcomes of government intervention is sustained imperfect competition.

Phillips Curve

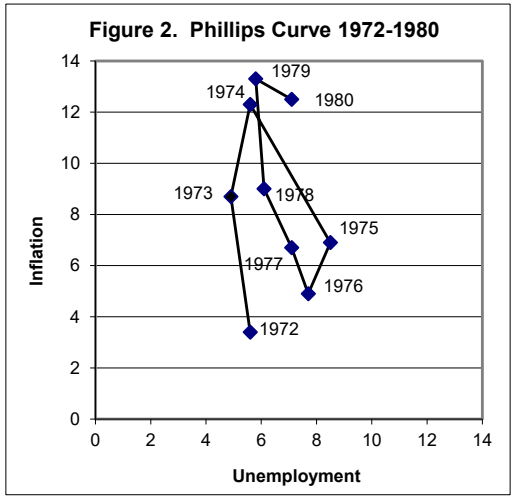
The Phillips Curve should be viewed within the context of the GDP gap – the difference between what the economy is capable of

producing and what it actually produces. The Phillips Curve was developed to provide a framework for policy intervention intended to shrink the GDP gap – a framework detailing the costs and benefits, in terms of a trade-off, between inflation and unemployment.



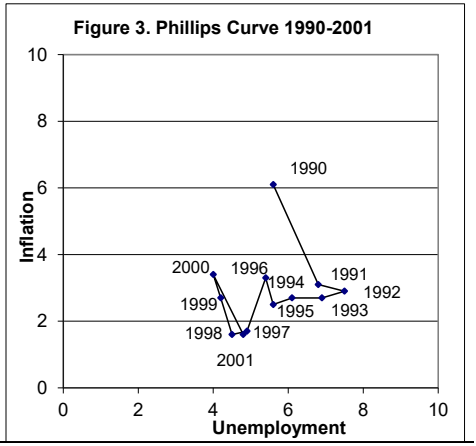
In the early 1960s, the Phillips Curve appeared to be a useful policy model. See Figure 1 where the U.S. Phillips Curve for 1961-1969 indicates a fairly stable correlation between inflation and unemployment, based on annual changes in the Consumer Price Index (proxy for inflation) and unemployment statistics drawn from the Bureau of Labor Statistics (U.S. Department of Labor).However, with the high unemployment and high inflation of the 1970s (due in large measure to a low productivity growth and OPEC-induced energy price shocks), the model appeared to have been invalidated. The empirical data seemed to refute the model's hypothesis that inflation and unemployment were negatively related such that when unemployment decreases, inflation increases and vice-versa. In fact, some economists went so far as to claim this to be a grand failure of the Keynesian tradition. The theory behind the Phillips Curve's prediction of inversely related inflation and unemployment held that unemployment can only be reduced so far before incremental costs begin to rise, e.g., training costs for underqualified employees or bidding costs for attracting qualified employees from other firms. In the 1970s, the Phillips Curve for inflation and unemployment no longer demonstrated a negative trade-off. A similar pattern emerged again in the 1990s, but by this time Gordon and others were resuscitating the Phillips Curve, pointing out that the Phillips Curve was not designed to reflect import price shocks such as the OPEC energy price shocks of the 1970s nor was it designed to reflect the supply shocks resulting from the

low productivity levels of 1973-1990 and the unprecedented high productivity levels of the late 1990s.



If viewed in this context, the graphical representation of the Phillips Curve for the second half of the 20th century would still be negatively sloped, but in the 1970s the curve would be seen shifting to the right, and in the 1990s, it would be seen shifting to the left. See figures 2-3 representing annual changes in the Consumer Price Index (proxy for inflation) and unemployment statistics drawn from the Bureau of Labor Statistics (U.S. Department of Labor).

The theoretical explanation of a shifting Phillips Curve is based on the natural rate of unemployment shifting over time. The concept of the natural rate became part of the Phillips Curve model in the 1960s, as is demonstrated in the analytical writings of economists such as Okun, Phelps and Friedman. The natural rate of unemployment represents a limit beyond which further reductions in unemployment will precipitate an acceleration of inflation owing to the heterogeneity and non-substitutability of productive resources (labour and capital). Improvements in productivity and inflation stabilization (stable level of inflation as opposed to an increasing rate of inflation growth) are believed to contribute to structural supply changes that effectively reduce the natural rate of unemployment, making it possible to attain lower levels of unemployment without triggering spiralling inflation.



Interpreting the inflation and unemployment data for the 1970s and the 1990s in terms of a shifting natural rate of unemployment indicates that full employment capacity was decreasing in the 1970s and increasing in the 1990s.

Trade-off choices continue to be valid, notwithstanding the empirical and theoretical challenges of the last four decades. In fact, the choices have been augmented by the prospect of shifting the Phillips Curve in addition to moving along the curve. The inflation-augmented Phillips Curve developed by Phelps and Friedman can be incorporated into an enhanced Phillips Curve. Their view that the Phillips Curve is vertical in the long run is true to the extent that the short run Phillips Curve is not fixed, but will move to the left and to the right depending upon exogenous factors such as productivity and trade-based inflation (imports). Phillips explicitly stated that his model excluded import price inflation and changes in productivity. He also recommended that his correlation be further tested, which it has been, both by Monetarists who attempted to refute the hypothesis and by empirical data over a period of four decades.

The Phillips Curve continues to provide a working explanation of market failure, grounds and opportunities for fiscal and monetary policy intervention and prospects for both short run and long run adjustments. From a policy perspective, what remains is to determine how to flatten the Phillips Curve so that the cost (measured in terms of inflation) of further reducing unemployment is minimized. This can be achieved to the degree that labour and capital are portable across different types of employment, where portable should be understood to imply the non-degradation of productivity and factor returns (wages and profits).

Conclusion

The theory of imperfect competition and the Phillips Curve offer explanations of market failure – thus, their place within the Keynesian tradition. The first step is to identify the problem. The Keynesian tradition defines the problem as market failure, and this sets the Keynesian tradition apart from the Classical. The second step is to

identify solutions for the problem. This is where government and central bank intervention plays a role – either in facilitating greater competition within the market or in prescribing fiscal and monetary policies to move along the Phillips Curve trade-off points (unemployment reduction in the short run) or to shift the Phillips Curve to the left (increased output potential in the long run). Imperfect competition provides microeconomic foundations for the Keynesian tradition, and an enhanced Phillips Curve could provide a model for addressing short run output gaps and related unemployment as well as the long run expansion of output potential and the shrinking of the output gap.

What is particularly relevant about these theories within the context of the history of economic thought is that their successful application advanced the Keynesian tradition. Perceptions of the failure of the Phillips Curve during the 1970s generated attempts among 'loyal Keynesians' to save the core beliefs of the Keynesian tradition by other means. Adapting Lakatos' framework for scientific research to the Keynesian tradition, there remained Keynesian economists who continued to believe in the core propositions regarding market failure, fiscal and monetary intervention and the importance of the short run. For them, the model of the Phillips Curve was an auxiliary hypothesis that seemed to provide a valid link between their core beliefs and the real world of economic phenomena, so when the model came under attack, research efforts were dedicated to salvaging the model (noting the violation of *ceteris paribus* conditions by import price shocks and productivity shocks) as well as discovering new hypotheses for explaining the connection between the tradition's core beliefs and economic reality. One can only speculate about whether and how the Keynesian tradition would have survived had the theories of imperfect competition and the Phillips Curve not withstood the challenges of alternative theories and of a dynamic world of economic phenomena. To the extent that theory modification and replacement at the perimeter, i.e., outside the core beliefs, proceeded in establishing new linkages between the theoretical core and the real world, the tradition would have been maintained, subject to competition from external research traditions.

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Theoretical Framework

According to the Ricardian and Heckscher-Ohlin theories of international trade[1], countries trade on the basis that some commodities can be produced at relatively lower costs in one country than in another. In order for there to be potential gains in the trade between two countries, it is not necessary that each country have an absolute advantage in the production of the commodity to be traded. If each county has such an absolute advantage, then trade will certainly take place, and both countries will benefit. However, it is sufficient that each country simply have a comparative advantage in the production of a given commodity. Country A is said to have a comparative advantage in the production of commodity X when the ratio of production costs between X and some other commodity, Y, is less than the ratio of production costs between X and Y in country B. These production cost ratios are relative prices[2], and as long as the relative prices of the two commodities in the two countries are different, trade will benefit both countries. The world trade price for each commodity will fall somewhere between the limits set by the relative prices in the two countries. This means that each country will be able to import at a lower cost the commodity that is relatively costly for it to produce domestically. In addition, each country will be able to get a better price by exporting the commodity that it produces relatively more efficiently and at relatively lower costs. Each country will be better off by having a larger aggregate volume of products due to the bilateral improvements in purchasing power, and this

[1] The Ricardian model was outlined in David Ricardo's 1817 classic, *The Principles of Political Economy and Taxation*, in particular the chapter entitled "On Foreign Trade." A century later, two Swedish economists, Eli Heckscher in his 1919 article, "The Effect of Foreign Trade on the Distribution of Income," and Bertil Ohlin in his 1924 book, *The Theory of Trade*, advanced what has since become known as the Heckscher-Ohlin international trade theory.

[2] Prices in this paper should be understood to refer to relative prices, e.g., the price of commodity X in terms of Y or vice-versa. Thus, money prices and exchange rates are excluded from the simple model.

outcome follows regardless whether aggregate national incomes remain unchanged or increase.

The above outline applies equally to the Ricardian and Heckscher-Ohlin models. Both models are based on a supply-side, cost of production approach. Aggregate preferences, i.e., aggregate demand, is assumed to be constant and identical between countries so that the role of cost of production and comparative advantage can be highlighted in the models. While both models rely upon the notion of comparative advantage, they diverge with respect to the determinants of comparative advantage. In the Ricardian model, it is productivity differences, technology-based and labour-based, that determine comparative advantage. While in the Heckscher-Ohlin model, comparative advantage is determined by the relative abundance (or scarcity) of factor endowments. In the remainder of this essay, the Heckscher-Ohlin model will be referenced – the Ricardian model having been introduced as the precursor and classical counterpart of the neoclassical Heckscher-Ohlin model.

The framework for the simple 2x2x2 Heckscher-Ohlin international trade model is based on two countries, two commodities and two factors of production (hence, '2x2x2') and the following four theorems.

Heckscher-Ohlin Theorem

A country will export the commodity that uses relatively intensively the factor of production which is relatively abundant and will import the commodity that is relatively intensive in the use of the factor of production that is relatively scarce.

In essence, free trade is advantageous, because each country's aggregate welfare is improved by producing efficiently in terms of greatest output and lowest cost and by trading to obtain the maximum quantities and lowest prices of the remaining commodities required to satisfy its aggregate preferences (i.e., overall consumer demand). For instance, if country A is a developed country with a strong industrial base and country B is a developing country with a large, rural population, then it is likely that free trade between these two countries will result in country A exporting manufactured goods to country B and country B exporting agricultural goods to country A.

Factor Price Equalization Theorem

If two countries use the same technology and techniques of production and produce the same two commodities, i.e., there is no complete specialization, then the free trade of these commodities will not only equalize commodity prices in both countries, but it will also equalize the prices of these commodities' factors of production. In other words, free trade achieves the uniformity of commodity and factor prices that would obtain if all factors were perfectly mobile. For example, when countries A and B trade in commodities X and Y, individual country prices converge into a single world price for each commodity and its factors of production, thereby reflecting the new reality and price structure of an expanded market.

Stolper-Samuelson Theorem

A rise in the price of the labour-intensive commodity will raise real wages and lower the real return to capital. Assuming two commodities, two factors and the absence of complete specialization, the relatively scarce factor (in terms of relative proportions of the two factors in two countries) must be harmed absolutely by free trade, thus protection (e.g., tariffs and quotas) will benefit the relatively scarce factor. In general as a result of trade, the prices of commodities exported increase, and the prices of commodities imported decrease. Similarly, the prices for factors used intensively to produce exports increase, and the prices for factors used intensively to compete with imports decrease. Specifically, if labour is the relatively scarce factor, then the commodity that employs labour intensively will be harmed by free trade due to the importation of less expensive competing commodities. Protectionism would benefit labour in this case, albeit at the expense of lower aggregate efficiency.

Rybczynski Theorem

An increase in the endowment of one factor of production, assuming constant prices, will expand the output of the commodity that uses this factor relatively intensively (commodity X) and contract the output of the other commodity (commodity Y). If the constant price assumption is removed, then the relative price of commodity X will decline, and the terms of trade for commodity X will have worsened. For

example, if the endowment of factor K were suddenly doubled, then output of the commodity that uses this factor intensively (commodity X) will increase, and insofar as the country is a price-setter in the global market for X, the price of X will decline.

The basic 2x2x2 Heckscher-Ohlin international trade model sketched above is an abstraction as are all models that attempt to organize and make sense of an untidy and complex world of economic phenomena. Specifically, the model assumes perfect competition (no country is a price-setter, as would be the case under a global monopoly or cartel), all factors of production are fully employed (aggregate demand is sufficient to absorb full-capacity production) and production functions for any given commodity are identical across countries (technology and productivity advantages are removed (in contrast to the prominent role they played in the Ricardian model) in order to concentrate on the impact of factor endowments). These assumptions have been made to facilitate an investigation into the nature and causes of international trade, and while they have not been hidden from sight in the writings of preeminent and founding international trade theorists (e.g., Heckscher, Ohlin and Samuelson), they often fail to be prominent in discussions of international trade. The significance of these assumptions in the basic 2x2x2 Heckscher-Ohlin international trade model will be discussed in the next section.

Continuing with the Heckscher-Ohlin model, assume that countries A and B both produce commodities X and Y and that country A is more cost-efficient in the production of both commodities. The Heckscher-Ohlin model shows that even though one country has an absolute advantage in the production of both commodities, it may nevertheless be to the advantage of both countries to trade provided their relative costs are different. In this scenario, relative costs are based on relative prices which reflect the relative abundance or scarcity of factors of production. For example, assume that in country A, the relative price of commodity X in terms of factors K and L is 2:5. In country B, assume that the relative price of commodity X in terms of factors K and L is 1:2. By assumption, the production function for each commodity is identical for each country. In other words, in country A and B it takes the same ratio of K and L units to produce one unit of commodity X. Thus, the difference in relative prices is not due to a

difference in factor proportions, since neither country has technology or productivity advantages over the other. The difference in the relative prices of commodity X in countries A and B is entirely due to the price ratio of K to L, which is itself determined solely by the relative abundance/scarcity of the factors K and L in each country. It is the differences in the endowments (supplies) of the factors of production that determine the different commodity prices between countries.

Country A clearly is the lowest cost producer of both commodities, but since the relative price of X is lower and the relative price of Y is higher in country A, country A will benefit from exporting X and importing Y. The world trade price for X will fall somewhere between 2/5 and 1/2 X (in terms of Y), and the world trade price for Y will fall somewhere between 2 and 2 1/2 Y (in terms of X). Country A will get a higher price on the world market for commodity X, and it will import commodity Y at a lower relative price than it can produce it domestically. Country B will get a higher price through international trade for commodity Y, and it will be able to import commodity X at a relatively lower price. Thus, in accordance with the Heckscher-Ohlin theorem, country A will export the commodity (X) that uses relatively intensively the factor of production which is relatively abundant and will import the commodity that is relatively intensive in the use of the factor of production that is relatively scarce.

According to the factor price equalization theorem of the Heckscher-Ohlin international trade model, under free trade, commodity prices tend to converge towards an equilibrium level between the trading countries, and these world prices, in turn, determine domestic price levels in both the importing and exporting countries. When the world price of an imported good falls below the domestic price, then the producers of the domestic good must bring their prices down or abandon the market. The world price of an exported commodity will be higher than its original domestic price, but the domestic price will adjust upwards to match the world price. The domestic market price response to world prices is analogous in the cases of both imported and exported goods, and this price response is fundamentally due to forces of perfect competition (disallowing excess profits) and perfect in-country mobility of the factors of production.

In addition, free trade between two countries tends to equalize all commodity prices, both traded and non-traded commodities. This tendency towards equalization has the effect of reducing the disproportionate rewards to factors of production (land, capital and labour), i.e., factor prices tend[3] towards uniformity. The tendency towards equalization of commodity and factor prices is the direct result of the international trade of commodities. Thus international trade achieves what the imperfect international mobility of factor resources prevents. Once an equilibrium position of fairly uniform prices obtains, trade continues to be necessary, otherwise, the pre-equilibrium price variations will reappear.

Summing up, the Heckscher-Ohlin theorem indicates the direction of trade between countries, i.e., which country will export/import which commodity, based on the proposition that a country's comparative advantage is determined by its endowment of factors of production – an endowment that ultimately determines costs of production and thus relative cost-efficiency with respect to other countries. The factor price equalization theorem states that free trade expands the market to encompass both trading countries, resulting in a 'common market' where a single world price develops for each commodity and each factor of production. This system of prices encourages each country to concentrate in the production of commodities where its endowment of factors gives it the cost-efficient advantage.

In the Heckscher-Ohlin international trade model thus far (i.e., the first two theorems), each country benefits from trade. In terms of total national production and consumption, each country is better off as a result of trade – trade is a win-win proposition from an aggregate perspective. Production in accordance with the principle of comparative advantage results in more efficient and expanded aggregate production, and it is the common pricing system between countries that allows each country fully exploit its cost-efficient production opportunities.

The Stolper-Samuelson and Rybczynski theorems extend the view to consider the effect one level down from the national aggregates

[3] As noted by Bertil Ohlin in his *Theory of Trade*, complete convergence of commodity and factor prices is an idealization that is subject to the influence of transport costs and unemployment among the factors of production.

(production, income and expenditure). These theorems analyze the effects of trade on the factors of production, and both point to the existence of win-lose situations, e.g., income distribution effects. In the case of the Stolper-Samuelson theorem, tariffs and other protectionist devices have differential effects on the factors of production, benefiting some and harming others. Much the same is the case with the Rybczynski theorem, wherein it is the sudden change in the endowment of a factor of production (e.g., produced by means of immigration policy) that results in relative gains and losses. The existence of conflicting outcomes through the combination of a win-win scenario from the national aggregate perspective and win-lose scenarios from an income distribution scenario was not missed by the founders of the 2x2x2 Heckscher-Ohlin international trade model (cf. Heckscher, Ohlin and Samuelson). Nevertheless, what remains most prominent in the 2x2x2 Heckscher-Ohlin international trade model is the promotion of national aggregates.

Unreal Assumptions … Relaxed and Emphasis Added

The Heckscher-Ohlin international trade model sketched in the preceding section features three fundamental assumptions which are inconsistent with economic reality and which predict idealized outcomes that deviate significantly from the real world. The trade model was not designed nor should it be expected to conform to economic reality in all of its details, since models are by their very nature abstractions from reality. However, to the extent that, in the process of abstracting the essence of economic reality, the model materially and substantially misrepresents economic reality then its crucial assumptions should be made explicit, particularly for benefit of non-specialists for whom the caveat, *ceteris paribus,* does not bring pause. Crucial assumptions are those that fundamentally impact the model's predictions. In the case of the Heckscher-Ohlin trade model, the critical assumptions embedded in the theoretical framework are that economics is a positivist science characterized by impartial methods and objective truth, that perfect competition reigns globally and that all factors of production are fully employed.

Based on a straightforward reading of the international trade model, one would easily be disposed to accept that free and unrestricted international trade would be desirable in that it provides the most efficient means of maximizing economic production. However, the question whether free trade maximizes productive resources is secondary to the question about the objective(s) of international trade. The objective is typically maximization of economic production; however, it could also be or include profit maximization[4], sustainable growth, income redistribution, etc.

A number of international trade economists seem to have recognized the important distinction between primary and secondary objectives. For example, Heckscher, the early 20th century Swedish international trade theorist and author of the influential 1919 article, "The Effect of Foreign Trade on the Distribution of Income," argued that international trade affects the distribution of income within countries insofar as production and resources shift between import and export goods and that changes in the distribution of income may move either way with respect to income equality, i.e., either towards or away from greater/lesser income equality. Heckscher concluded that since international trade unambiguously improves the overall income of a country, trade-induced income inequality should not be remedied by restrictions on trade but by income redistribution through taxes and subsidies. Stolper and Samuelson, in their classic article on international trade theory, "Protection and Real Wages," came to the same conclusion in their assessment of protectionist tariffs. More recently, Alan Blinder, a prominent Keynesian economist (Princeton professor and former Vice Chairman of the Federal Reserve Board), presents a summary argument for free trade (cf. Blinder's article entitled "Free Trade" at www.econlib.org and *Fortune Encyclopedia of Economics*) that is similar to Heckscher's with respect to its regard for the aggregate efficiencies of free trade and comparative advantage and tacked-on belief that income maldistributions can and should be addressed by means other than trade restrictions. As a final example, Robert Lawrence,

[4] Owing to concentrations of market power in the form of monopolies, oligopolies, cartels, etc., profit maximization is not synonymous with production maximization.

Harvard professor and former member of Clinton's Council of Economic Advisor, concluded his "U.S. International Trade Policy in the 1990s" with the assertion that income inequalities resulting from trade policy are appropriate objects for tax policy, i.e., income redistribution.

While international trade economists have pointed out the different and sometimes conflicting objectives of productive efficiency and income distribution, what is not adequately emphasized is that both primary and secondary objectives are values based. Since the maximization of productive efficiency is no less value-based than income redistribution or sustainable growth, it is disingenuous to grant technical production an objective and unquestioned status which politics cannot challenge and to remand all other 'values-based' objectives to the political arena for conflict resolution. What is in essence being argued is that free trade is good because it maximizes production, a technical economic objective, while any restriction on trade or modification of the results of trade such as the redistribution of income or environmental regulation are values-based objectives inappropriate for positivist economics but appropriate for politics.

However, an analysis of the objectives of international trade indicates that this branch of economics is not value-neutral and in fact appears to be more aptly described as a subdiscipline of political economy than actuarial economics. How else could one look upon a hypothetical economic policy that advocated free trade, unmitigated by income redistribution or environmental protection, and resulted in an absolute increase in per capita income but at the same time produced an increased division in relative shares of total income as well as significant negative externalities in the form of hazardous waste? Maximum productive efficiency, as a primary objective, is not neutral, otherwise why would there be a need for income redistribution after the introduction of free trade?

The second and third 'unreal' assumptions of the international trade model are consistent with the neoclassical tradition. In fact, all three of the 'unreal' assumptions are consistent with neoclassicism. In the remainder of this section, the second and third assumptions will be

treated together. The second assumption is that perfect competition obtains globally. This is standard neoclassical microeconomics. The third assumption is that full employment of all productive resources obtains globally. This, too, is standard neoclassical microeconomics. Moreover, it is the antithesis of the Keynesian tradition wherein market failure is regarded as the norm. Imperfect competition, i.e., the antithesis of the neoclassical tradition, is also grounded in the Keynesian tradition, particularly in the investigation of the microeconomic causes of market failure.

The existence and significance of the three 'unreal' assumptions of the international trade model indicates a sort of fault line between Keynesians on the one side and neoclassicals on the other. Generally speaking Keynesians argue for increased reality in the assumptions of an economic model, while neoclassicals tend towards abstract, predictive models of the sort championed by Friedman in his 1953 essay "The Methodology of Positive Economics." In addition, Keynesians tend to be less fearful of being labelled normative scientists as is demonstrated in their general support for the unemployed, a group more often than not regarded as voluntarily or structurally unemployed by neoclassicals. With respect to the second and third 'unreal' assumptions, a Keynesian trade theorist would be expected to maintain that the absence of perfect competition and full employment would significantly affect the outcome of free international trade.

Jagdish Bhagwati, Columbia professor and one of the foremost international trade theorists of the 20th century and a strong advocate of free trade[5], which he regards as inherently destabilizing, has argued that protectionism is nothing short of market power at the international level[6], implying that wherever protectionism exists so, too, does imperfect competition. Similarly, to the extent that market power is maintained or augmented, global cartels (OPEC, global

[5] Incidentally, Bhagwati is an equally strong opponent of complete capital convertibility. Cf. Bhagwati's article entitled "The Capital Myth" in which the author argues that full capital mobility is inherently destabilizing, as demonstrated in the 1998 Asian Crisis, and that commitment to free trade does not require the endorsement of unconstrained capital flows into and out of countries, in particular vulnerable developing countries.

[6] Cf. Bhagwati's article entitled "Protectionism" at www.econlib.org and *Fortune Encyclopedia of Economics*.

aluminum cartel), international organizations (IMF, World Bank, WTO, OECD), nation states (U.S.) and trading blocs (European Union, NAFTA, proposed FTAA) introduce additional market imperfections which distort the theoretical free trade outcome in favour of their members. For example, member nations and firms of the global oil and aluminum cartels benefit from the higher prices and monopoly rents associated with the manipulation of the volume of commodities supplied to the global market. While the membership of international organizations is much less exclusive than in cartels, it is nevertheless widely accepted that the policies of the IMF, for instance, are clearly biased in favour of developed countries and financial institutions headquartered in the developed world.

It is interesting that the different perspectives on organizations like the IMF reflect a similar difference of worldviews between Keynesians and neoclassicals. A neoclassical like Stanley Fischer, former Managing Director of the IMF, believes that international economic stabilization is best advanced by IMF policies framed within the context of neoclassical economics and free markets, while a Keynesian like Joseph Stiglitz, Columbia professor and former Chief Economist for the World Bank, believes that the economic stabilization on the international stage requires non-market intervention in much the same way that national economic stabilization requires fiscal and monetary intervention in order to remedy what Keynesians would describe as market failures, e.g., high unemployment. Similar distortionary effects, particularly with regards to factor price equalization as Ohlin noted, can be anticipated where trading partners are in different states of equilibrium/disequilibrium, one with low unemployment the other with high unemployment, the former with strong aggregate demand and the latter with weak aggregate demand. Factor price differentials, e.g., wages, between developed and developing countries, even allowing for purchasing power and productivity adjustments, illustrate the distortionary effect of uneven global economic development and growth.

In summary, the positivist assumption implicit in the international trade model promotes the illegitimate notion that there is a clear line

of demarcation separating the scientific objectivity of economics from the relativity of values-based politics. Free trade is not universally and unambiguously good. It is unambiguously good relative to particular interests, as opposed to universal interests, since it is not at all the case that trade, i.e., economic transactions, always results in a win-win situation for all parties concerned. It may improve aggregate economic well-being, but it does not produce a situation where all are as well off or better off than they were before free trade. Additionally, the 'unreal' assumptions regarding perfect competition and full employment promote the same bias in international affairs that they support in national economic debates between neoclassicals and Keynesians. Interpreting the international trade model too literally, i.e., ignoring simplifying assumptions, downplays at best and ignores at worst the negative impacts of market coordination failures. Such an interpretation is misleading in representing market imperfections as the exception and full employment and perfect competition as the normal and natural state of affairs. The 2x2x2 Heckscher-Ohlin international trade model is a useful analytical tool, but its utility is only enhanced by a careful attention to the *ceteris paribus* assumptions.

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Economic growth theory attempts to identify and explain the causes of national wealth in terms of an aggregate production function. The aggregate production function is a macroeconomic model that relates inputs (factors of production such as labour and capital) to outputs (products and services). In the short run[1], one or more of the factors of production are assumed to be fixed for the period under investigation due to the lag time required to produce additional quantities of some of the factors of production, such as plants, equipment and machinery. However, in the long term, all factors of production are considered variable, since the supply of any factor may be increased/decreased as required within the expanded timeframe. Although economic growth forecasts are often developed for the short run (forward-looking GDP estimates are commonly developed with one- and two-year time horizons), in this article, which is devoted to the theory of economic growth as opposed to the empirical application of that theory, the long run will be assumed, because this assumption facilitates consideration of the impacts of changes in factor quantities (labour and capital) as well as changes in factor proportions (due to changes in production technique) and technology changes (e.g., innovations and improvements in capital inputs).

In a short run analysis of the economy, some of the factors of production and techniques/processes of production are also assumed to remain constant, while in a long run analysis, focusing on economic growth, both the inputs into the production processes as well as the production processes themselves are allowed to vary. In other words, over the long run, not only are the quantities of labour and capital expected to change, but production processes are also expected to change to accommodate changes in the quantity and quality of productive resources. Economies[2] grow as a result of

[1] Although there are no precise and universally accepted durations that define the short run and the long run, the short run may be approximated as no more than a few years – that being an approximation of the mean duration of capital formation.

[2] Since Adam Smith's *Wealth of Nations*, the nation state has been the principal object of economic growth research and analysis; however, it is possible to imagine the theory of economic growth applying to supranational organizations, e.g.,

increases in the quantity of productive resources (labour and capital) and as a result of the increased efficiency of productive resources (better educated and more highly skilled labour, faster and less expensive microprocessors, etc.) A critical assumption[3] of economic growth theory is that labour and capital, the principal factors of production in the post-industrial age, are fully employed. This full employment result is itself an outcome of a more fundamental assumption, viz. that the aggregate economy is perfectly competitive with markets clearing such that there are no disequilibria in factor or product markets. In addition, the full employment assumption indicates an important difference between economic growth and business cycle studies. In theory, economic growth represents changes in economic output potential, while business cycles represent deviations from potential In addition, insofar as the long run is concerned, the peaks and troughs of the business cycle tend to be smoothed out by the trend rate of actual economic growth.

In the following, the current, mainstream model of economic growth will be described in the broad context of its development, specifically in terms of the influence of the Harrod-Domar Model and Solow's extensions of that model. The Harrod-Domar model, based on the independent yet similar research of Roy Harrod and Evsey Domar, and Solow's contributions are fundamentally in agreement with respect to the principal elements of long run economic growth, viz. labour force, capital and technology. Each of these components can be decomposed further, e.g., labour force growth is a function of population growth as well as changes in labour force participation; capital growth is a function of investment, savings, interest rates and profit; and technology is a function of the proportion of net investment to the total capital stock as well as the age and durability of the

the European Union or regional trading blocs such as NAFTA and potentially the FTAA.

[3] Assumed unless otherwise specified as in the Harrod-Domar Model (see below) where the assumption of fixed factor proportions will likely prevent the full employment of both capital and labour unless both capital and labour grow at precisely the same rate.

existing capital stock[4]. For the purpose of this article, the labour, capital and technology components will not be disaggregated, since it will be sufficient to show how they fit into the neoclassical model.

According to the Harrod-Domar Model, national income is proportional to the quantity of capital required to produce national output. This is a statement of the familiar 'growth by capital accumulation' thesis. By assumption, capital and labour are not substitutes for one another and, there is a fixed proportion of capital to labour in each production process. Thus, given a rate of population growth, the opportunity for economic growth depends upon the accumulation of capital sufficient to employ the additional labour. Technology improvements and labour productivity are outside the scope of this model, since they imply variable factor proportions. If the capital stock is fully employed, then annual national income growth is constrained by annual growth in the capital stock – annual replacement of degraded capital being given.

The equilibrium growth rate is the rate at which both capital and labour are fully employed allowing for a predetermined rate of technological progress. In Harrod's terminology, the warranted rate of growth, which is the rate of growth required to fully employ all capital resources, would be equal to the natural rate of growth, which is the

[4] Over the past 40+ years, the deconstruction of the Solow residual has been advanced by considerations of embodied technical change (wherein new capital investments 'carry'/embody new technologies and new ways of doing things), technology diffusion and human capital development. As the Solow residual has been unpacked, the complexity of the production function has increased. For example, economic growth models may reference both physical capital (plants, equipment and machinery) and human capital (education and skill levels and health conditions of the labour force) and 'technical change' may be expanded to encompass the conditions within which technical change occurs, e.g., intellectual and physical property laws, financial and equity markets and government and regulatory systems. It is argued that the convergence of country incomes has been prevented largely because of the absence of infrastructure required for the adoption of technological progress. Endogenous theorists emphasize the point that a country's growth path cannot be radically improved simply by parachuting technology into the country. The preconditions for economic growth must be in place and towards that end international financial organizations like the International Monetary Fund and the World Bank have been advocating, and more controversially, insisting, on structural changes in developing and transitional economies.

rate of growth required to fully employ all labour. These rates of growth must be equal owing to the fixed factor proportions assumption which dictates that any incremental change in the quantity of one productive resource must be matched by a corresponding and proportional change in the other productive resource. Since the equilibrium growth rate requires the equality of two independently determined growth rates, the probability of attaining and maintaining such equilibrium is very low. If capital expands at a rate greater than that of labour, then there will be excess capital capacity, and if labour grows faster than capital, then there wlll be unemployment[5].

The instability of Harrod-Domar's razor-edge equilibrium and the model's inability to retrodict and explain economic growth time series data contributed to the context for Solow's work in the mid-1950s. Solow's 1956 article, "A Contribution to the Theory of Economic Growth," extended the Harrod-Domar Model by relaxing the fixed factor proportions assumption, and in the following year, his article, "Technical Change and the Aggregate Production Function" advanced the thesis that technological change is the key missing variable in the Harrod-Domar production function. The resulting Solow growth model was therefore a theoretical enhancement and elaboration of Harrod-Domar, incorporating key observations of economic reality with respect to variable factor proportions and technological change.

Regarding Harrod-Domar's razor-edge equilibrium, the introduction of technological progress and the removal of the fixed factor proportions assumption provided for a more stable equilibrium wherein qualitative adjustments (under the rubric of

[5] As previously indicated, the Harrod-Domar Model describes the conditions for disequilibrium in terms of the unemployment of aggregate productive resources – a state of affairs where full employment of capital and labour is theoretically impossible. In the real world (of the US economy), neither capital nor labour are fully employed – the capacity utilization rate, a proxy for capital employment, rarely exceeds 85 percent, and the unemployment rate seldom falls below 5 percent. Thus, the difference between theoretical full employment/capacity and actual real-world employment/capacity may be regarded as the resource gap that corresponds, via the production function, to the output gap.

technical/technological change) could augment quantitative adjustments (supply side changes in labour and capital) in the aggregate production function. Theoretically, labour and capital could be simultaneously and fully employed, since productivity improvements and flexible factor proportions tended to eliminate resource imbalances, by permitting labour and/or capital to stretch further as necessary. For example, an overabundance of capital could be offset by moving to more capital intensive and higher output production techniques, and an overabundance of labour could be countered by moving to higher labour intensive and higher output production techniques[6].

With respect to measuring, predicting and explaining economic growth, the Solow extensions, especially technological progress, made it possible to account for growth that otherwise could not be reduced to population growth and/or capital accumulation. The technological component of economic growth, the so-called Solow residual, represented a new and powerful explanatory variable in the aggregate production function – a variable that continues to stimulate research and debate most notably in recent years in the endogenous growth theory research program pioneered by among others Paul Romer[7]. The Harrod-Domar Model supplemented by the Solow extensions describes how capital, labour and technology interact to determine economic growth. This basic equation helps to explain

[6] Reference to the supply side of the production function in the context of scarcity and abundance provides an opportunity for connecting the theory of economic growth with the theory of international trade insofar as the latter provides, via Heckscher-Ohlin plus extensions, the theoretical means by which full employment in a local market (country X) is a function of the demand conditions in both country X and country Y (country that wishes to import from country X).

[7] Although the work of Romer dates back to the mid-1980s, its precursors could be dated further back to the early 1960s and the work of Theodore Schultz and Gary Becker, for example. The gist of endogenous growth theory is that technological progress (a.k.a. the Solow residual) is endogenous to the aggregate production function in the sense that things like human capital (education, skills, etc.) and technology diffusion (property laws, production standards, competitive conditions, etc.) are prerequisites in a recursive production function. Incidentally, endogenous growth theory (or its most recent manifestation) developed as a research program to address the nature of the technology component, particularly in light of the failure of cross-country studies to confirm the predicted convergence of world incomes.

Japanese and German growth since World War II (intensive replacement and modernization of capital), China's recent growth (rapid capital accumulation from a largely agrarian base) and U.S. growth in the late 1990s (strong productivity growth).

The debate regarding the Solow residual continues along another path, which can be dated back to the early 1960s. In 1962, Phelps' discussion of the sources of productivity gains (capital deepening and technological progress) led him to challenge the 'infinite growth possibility' scenario on the grounds that since new capital is the carrier of technological progress (cf. Solow's vintage capital approach) and capital has a finite but nevertheless definite durability the rate of capital modernization cannot increase ad infinitum. Capital deepening (the increase in capital per worker – a measurement of the capital stock) and technological progress (technical change proper and the associated changes in the human capital of the labour force) continue to be the objects of investigation in terms of their relative contributions to labour productivity and the Solow residual. The U.S. productivity statistics (and their revisions) for the late 1990s continue to provide the empirical basis for the capital deepening versus technological progress debate.

Another significant aspect of the Harrod-Domar-Solow growth model is that it presents the upper limit of economic growth, i.e., the potential output extrapolated into the future. As early as 1956, Solow had indicated that the model's assumption regarding perfect competition was unrealistic and that future research should consider relaxing this assumption given the economic reality of wage and price rigidities and the possibility of a liquidity trap, all of which indicate conditions of imperfect competition and market failure wherein long run output growth will deviate from the equilibrium growth path. In essence Solow was stating for the long run, what Arthur Okun was to state for the short run, viz. that market forces will not necessarily produce full employment conditions for labour and capital resulting in an output gap between potential output and actual output. Endogenous growth theory, especially under the influence of Romer, has identified the unreality of the perfect competition hypothesis as an obstacle to economic growth studies. Essentially, the value of

endogenous growth theory incorporating imperfect competition, market power, etc. would be that two distinguishable output potentials would be available for research and analysis: one would represent the economy's maximum output potential under perfectly competitive conditions where markets clear instantaneously and all factors are fully employed, and the second would represent the economy's maximum output potential under constrained competition, where markets do not clear in the short term, where prices are sluggish and where productive resources are unevenly employed.

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Clearly, the answer is 'yes' if you are not an American, but if you are an American, the answer is not so much ‘yes’ or ‘no’ as it is ‘so what?’ At least this is the answer that is suggested by evidence drawn from the history of U.S. public policy in international trade.[1] In this essay, two distinctly different international public policy scenarios will be evaluated and shown to share a pragmatic and cynical view of international trade. The two scenarios differ in key respects, which is intended to demonstrate the generality of the assertion. For example, one scenario plays out during a war, is directed by a conservative Republican administration and reveals a unilateralist impulse to impose U.S. objectives. The other scenario unfolds as a contagious, global financial crisis, is managed by a moderate Democratic administration and reveals a multilateralist attempt to achieve U.S. objectives. In both cases, International Trade (an Economics subject) will be shown to be inseparably linked to International Relations (a Political Science subject), and the economists’ claims to objectivity and value-neutrality will be exposed as rhetorical devices common in the world of politics, whether local, national or international. This linkage will be shown to be the basis for the thesis that the U.S. does employ double standards in international trade, notwithstanding the further conclusion that this is more a characteristic of the nation-state than it is of a particular nation-state.

Most recently, the U.S. has come under widespread criticism for its unilateral extension of the internationally-supported War on Terror to regime change and nation-building in Iraq with the unseemly revelations of crony deals not just with American allies but also friends of the Bush Administration. What does the Iraq War have to do with international trade? A lot … even more than the tens of billions of dollars worth of reconstruction and modernization projects financed by the U.S. government. The war was initiated for two principal reasons: first, to expose Iraq’s decade-long violation of United Nations’ proscriptions against weapons of mass destruction (WMD) and to remove the WMD threat from Iraq permanently by means of regime change; and second, to underscore the lesson delivered to the Taliban in Afghanistan that governments that sponsor terrorism will be

considered legitimate targets in the War on Terror. This is the Bush Doctrine of preemptive self-defense, which is important in understanding why the U.S. wars in Afghanistan and Iraq were waged and why the U.S. has not engaged in 'Africa's First World War' in the Congo – there is a humanitarian disaster in the Congo, but absolutely no political or economic threats originate from the centre of the African continent.

Underlying these two principal and official justifications for the Iraq War are economic motives: to maintain stability in the supply and pricing of the world's oil and to promote economic and political stability in the face of global terrorism. The argument as to whether the Iraq War was about oil is fairly straightforward. The oil from the Persian Gulf and its neighbours is essential for the smooth functioning of the industrialized world's economies. The Oil Embargo of 1973-74 demonstrated just how sensitive industrialized economies are to shocks in the supply and pricing of this critical energy source.[2] It is not just that Saddam Hussein was a threat to use WMD again, but also that the oil supply line from the Persian Gulf was vulnerable as long as an international pariah state possessed the means to disrupt the global economy. The U.S. still has not recovered from the 2001 recession, which seemed more than coincidentally linked to the September 11th terrorist attacks, so the threat to the U.S. economy was perceived to be credible.

In a more general sense, the climate of international business was vulnerable to terrorism as was demonstrated in the sharp declines in the travel, hospitality and tourism sectors and in the anxious uncertainty of international finance. Throughout history, stability and predictability have been important preconditions for business and commerce, and the events of September 11th reinforced that lesson. Serious threats to the stability and predictability of the economic world have been and continue to be addressed aggressively. For example, for the past two decades, inflation has been the official enemy of Western central banks owing to the inherent and persistent instability and uncertainty that it imparts to economies. Global terrorism is a parallel and equally serious threat to economic growth and stability. Iraq's alleged WMD capability and its alleged connection with global

terrorism gave the Bush Administration the cover for the Iraq War much like the high inflation of the 1970s and early 1980s gave Paul Volcker and the Federal Reserve Board the cover for their double-digit interest rate disinflationary campaign. In both cases, the threat was fundamentally economic in nature – the key difference lay in the choice of public policy tools.

So much for how the Iraq War ties into the nexus of international trade issues. It is not that other countries critical of the U.S. policy in Iraq fail to understand and appreciate the economic arguments. France, Germany and Russia all have commercial interests in Iraq, each values a stable global oil market, and all have a stake in the War on Terror. But they reject the unilateralist approach of the Americans. Even in the U.S., there is an ongoing debate between unilateralists and multilateralists; however, multilateralists, such as the host of Democratic Party presidential candidates in the running early on in the primary/caucus season, should not be regarded as anything less than advocates of a dominant global U.S. economic and political presence. In other words, the national interest that unites Americans, multilateralists and unilateralists, is a much stronger unifying force than is the internationalism that unites multilateralists from the U.S., France, Germany and Russia. The difficulties rebuilding and democratizing Iraq, compounded by the largest military death toll since the Vietnam War, have caused the U.S. to relax its unilateralist position somewhat, as shown by the change in U.S. policy that now allows Canada (and may allow other allies) to bid on Iraqi projects and by more active U.S. solicitation of G8 and UN support for the Iraqi reconstruction and transition to Iraqi self-rule. Unilateralist ideology appears to have yielded to multilateralist pragmatism, but once the rhetoric has been removed, economic motives remain the fundamental driving force for both unilateralists and multilateralists.

Summarizing with respect to U.S. double standards in international trade, the Bush Doctrine of pre-emptive self-defense would certainly not be considered a universal right shared by all sovereign nations … and for obvious reasons, given the facility with which wars, conflicts and defensive actions are undertaken anyway. In addition, the U.S. Iraq policy is, in a very important sense, about securing a

strategic resource market by means of military and political support. What is ironic is that in a world of global markets, free trade, market governance, etc., the military and political power of the nation-state have been summoned to facilitate commerce – reminiscent of the mercantilism against which Adam Smith wrote. Finally, although America is the dominant economic, military and political power in the world, unilateralism is incongruous for a country that has been governed for two-and-a-quarter centuries by the liberal democratic constitutional principles of checks and balances and separation of powers.

The centrality of economic motives is not unique to Republican administrations. During the Democratic Clinton Administration, the Asian, Latin American and Russian crises of the late 1990s and early 2000s provide an important context for the examination of U.S. international economic policy and the tension between U.S. national and international economic policy. The Latin American debt crisis of the 1980s, the fall of communism, the emergence of the Washington Consensus (so-named because of the common headquarters of the U.S. Government, IMF and World Bank) to address Third World financial crises, the election of traditionally liberal, neo-conservative governments (Democratic Party in the U.S., Liberals in Canada, Labour Party in the United Kingdom and Social Democratic Party in Germany) and the nearly unanimous central banking obsession with inflation[3] provide the background for this examination.

During the 1980s, Latin American countries experienced enormous macroeconomic crises that left behind the legacy of the 1980s as the 'lost decade' in terms of economic stagnation and increasing economic inequality. Among the causes were the large volume of U.S. dollar-denominated sovereign debt, which became extremely costly to service when the U.S. Federal Reserve Board raised interest rates to double digits in its campaign to disinflate the U.S. economy. Government excesses, including corruption and irresponsible fiscal policies, were at the heart of the problem in the view of the Washington Consensus. Exercising its influence through the U.S. Government, especially the Treasury Department, and international financial institutions, such as the International Monetary Fund

(IMF), the Washington Consensus identified and prescribed an overarching framework of fiscal conservatism, privatization of public assets and services, deregulation, open capital markets and elimination of domestic industry protections as the solution to massive government deficits and debts, sluggish economic growth and high levels of unemployment and poverty. The Washington Consensus was, thus, much more subtle (at least to American audiences) than a military invasion and occupation, but it was nevertheless intended to advance American economic interests, in terms of export markets for American goods and services, investment markets for financial capital flows and import markets for low-cost products.

The agenda of the Washington Consensus became most visible during the East Asian financial crisis that began in Thailand in 1997, then spread to Indonesia, Malaysia and South Korea. The IMF and its principal stakeholder, the U.S.[4], were the primary movers behind the financial rescues. IMF loans, plus the good housekeeping seal that accompanies IMF loans and signals the borrowing country's creditworthiness to other investors, were made available at emergency levels deemed necessary to contain the threat of contagion. However, these loan packages came at a price, which exceeded the ordinary principal plus interest calculation and extended to the management of the borrowing country's macroeconomic policies regarding interest rates, exchange rates, government spending, unemployment, etc. In keeping with the longstanding tradition of conservative economic thought, the economics of the Washington Consensus maintained that economies that are structurally unbalanced (e.g., in the form of persistent budget deficits and rising debt loads) require remedies that may be severe in the short run but will be healthy in the long run. This was the argument behind the Volcker disinflation of the early 1980s, which purged inflation from the U.S. economy (albeit at the price of the deepest and most protracted recession since the Great Depression) and laid the foundations for its phenomenal inflation-free growth of the next two decades.

Subsequent U.S. recessions in 1990-91 and 2001 were moderated by government intervention through expansionary fiscal and monetary policy, facilitated by a low inflation environment, despite large budget deficits. Recessions and high unemployment are

politically unpopular, so countercyclical policies are preferable in a domestic context. However, the IMF and the U.S. were not exposed to domestic political pressures arising from the crisis-stricken countries of East Asia and Latin America, so the economic austerity conditions linked to IMF rescue packages were not politically charged for the U.S. Instead, the significant political constituency in the U.S. was the investment community, and the IMF, in collaboration with the U.S., advanced the interests of creditors at the expense of the bankrupted and unemployed in the debtor countries. Not only are the automatic fiscal stabilizers (unemployment insurance, welfare and progressive income taxation) that have been built into Western economies since the Great Depression not as common in developing countries, but the discretionary fiscal (government spending and tax cuts) and monetary (interest rate reductions) stimulus options were denied under the conditions of the loan packages. High interest rates were introduced to prevent a free fall in the local currencies, fixed exchange rates gave way to flexible exchange rates and devalued currencies, dollar-denominated debt increased owing to currency depreciation, bankruptcies increased, foreign investors pulled their financial capital out of the country, local unemployment rose, government revenue declined and government expenditures declined … but after a couple of years, growth and employment were back on track. It may seem brief now that the formerly crisis-stricken countries (except Argentina) are back on their secular growth paths, but a massive redistribution of wealth had taken place with the IMF bailing out high risk investors, transferring the cost of the bailout to a broad base of taxpayers in both creditor and debtor countries and imposing the austere terms of the bailout on local populations already impacted by widespread bankruptcy and unemployment.

Insofar as the IMF and U.S. Government positions on countercyclical policy in the East Asian and Latin American countries were essentially the same, there is a double standard between the way the U.S. views its options during a recession and the way it views the options of other countries in crises. Although the U.S., through its central bank, supports a dual employment/output and inflation objective, it does not regard this dual objective mandate as universally

applicable or desirable. Unemployment of 20 percent in Argentina is not nearly as worrisome to the U.S. as are loan defaults and triple-digit inflation. Not only is the U.S. much more conservative with fiscal and monetary policy where other countries are concerned, but it also holds a conservative, free market view with respect to the regulatory role of government that misrepresents its own recent checkered history with unregulated or under-regulated markets, e.g., the bankruptcy of and criminal wrongdoing at Enron and its auditor Arthur Andersen, the bankruptcy of electric utilities and the failure of electricity deregulation in California, the widespread practices of inflating revenues and earnings in order to pad stock prices and executive options, etc. In light of its own regulatory shortcomings, it is ironic that the U.S., with one of the longest-running capitalist economies in the world, has such high expectations of corporate self-governance for developing countries that are in the early stages of transition to capitalist economies.

Finally, with respect to the narrower topic of the international trade of goods, the U.S. is well known for protecting its own key industries, e.g., automobiles, steel, and agriculture, while prying open foreign markets to U.S. exports. In the history of capitalism since the writings of Adam Smith, protectionism and mercantilism have been more the rule than the exception. Domestic industries seek protection from cheaper exports, and to the extent that their political influence is considerable enough, they get their protection, whether in the form of tariffs, import quotas, tax incentives, etc. The bargaining power of the U.S. and U.S. multinationals is sufficiently strong to exert a restraining influence on the protection that foreign countries afford their domestic industries. It is this asymmetry of economic power (sometimes in conjunction with political and military power as in the Persian Gulf) that produces a free trade system that is not equally beneficial to all. ‘Balance of power,' a term drawn from International Relations, describes a world that is not dominated by a single country but contains two or more power centres (countries or alliances) that check one another’s unilateral political, economic and military ambitions. Since the collapse of the Soviet Union, the U.S. has been the world’s only superpower. The European Union is the most likely candidate to counteract U.S. political and economic

power, but as an alliance its stability is not as durable as that of a longstanding nation-state. Similarly, the alliance of Latin American countries, led by Brazil and Argentina, may be able to challenge some of the double standards in U.S. trade policy, e.g., agricultural subsidies, but this will be difficult especially since the U.S. intends to preempt this bloc by means of the proposed Free Trade Agreement of the Americas.

It has been shown that U.S. economic policy has an external standard that it applies internationally and an internal standard that it applies to itself. Internationally, the U.S. seeks to gain as much from other countries as it can – its accountability being first and foremost to Americans … citizens, corporations, investors, employees, etc. An unemployed Brazilian or Indonesian or Zimbabwean is not as important as an unemployed American. Similarly, the security of Americans and America is more important than that of Iraqis and Iraq or Afghanis and Afghanistan. Protection of economic and physical security against real external threats is generally regarded to be a legitimate and fundamental role of governments. In the absence of an effective international government or other countervailing power, the unequal distribution of political, economic and military power among nation-states will result in asymmetric international trade outcomes, thereby perpetuating the inequality gap. Nation-states act on behalf of their citizens, sometimes at the expense of the citizens of other countries. In this sense, the U.S. does have a double standard when it comes to international trade. The nation-state simply was not designed to do otherwise.

Endnotes

[1] For the purpose of this non-technical essay, the familiar term international trade will be used to refer to the commerce in goods, services and capital (financial and physical) between and among countries as well as the systems that facilitate trade, e.g., exchange rates, and the barriers that impede trade, e.g., tariffs and quotas.

[2] In January 2004, the British Government declassified 30-year-old documents, which disclose that the U.S. was planning to

send troops to Middle Eastern oilfields in the event of a protracted Oil Embargo. The Carter Doctrine, presented in the 1980 State of the Union address, declared that “An attempt by any outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the United States of America, and such an assault will be repelled by any means necessary, including military force.” While the Carter Doctrine was issued in direct response to the Soviet invasion of Afghanistan in 1979, it also made it clear that U.S. military and economic policy converged in the oilfields of the Persian Gulf.

[3] The U.S. is the exception with its central bank, the Federal Reserve Board, being governed by a dual objective mandate that includes output and employment stability and growth as well as price stability. Not surprisingly, the U.S. unemployment rate has been consistently lower than the unemployment rates in Europe and Canada, where the European Central Bank (ECB) and the Bank of Canada, respectively, are strictly committed to one goal – price stability.

[4] Not only is the U.S. the largest donor country to the IMF, but it is the only country that possesses independent veto power over IMF decisions. Under the IMF’s rules, an 85 percent majority is required to approve key decisions, and the U.S. voting bloc is 17 percent of the total.

In 2001, the U.S. Department of Justice (DOJ) approved General Electric's (GE) proposed acquisition of Honeywell, while the European Commission (EC), the administrative body of the European Union (EU), decided to block the merger. Without EC consent, the merger proposal was dead. The EC's decision to prohibit the merger is an important example of checks and balances in global governance, in general, and in market regulation, in particular. Although the result failed to satisfy the government and corporate business communities in the U.S., it should not be forgotten that antitrust policy is economic public policy, and as such, it reflects conflicting and competing interests. Contrary to the Positivism of economists who believe in the scientific objectivity of modern Economics, economic public policy is not reducible to objective, value-neutral outcomes.

The history of U.S. antitrust policy, embodied in congressional legislation, administrative orders and enforcement guidelines, and judicial case law over the past 114 years, has been characterized by the ebb and flow of ideologies. For example in the early 1970s, the Chicago School revolutionized antitrust policy and jurisprudence. Reacting against the interventionist and structuralist antitrust policies of the 1950s and 1960s and responding to the stagflation of the 1970s and the perception of the decline in U.S. competitiveness in international trade, the Chicago School re-introduced a *laissez-faire* antitrust approach with a new twist. The second generation Chicago School argued that since economic efficiency was the primary goal of antitrust policy, industry concentration and market power should be left alone unless anti-competitive behaviour could be demonstrated and connected to market structure. The Structuralist School of thought, which had held in *ALCOA* (1945) that a monopoly is illegal irrespective of the monopolist's behaviour, was discredited. For example in *U.S. v. Microsoft* (2001), the Appeals Court asserted that monopoly power does not entail monopolist behaviour and that technological monopolies are temporary owing to the phenomenon of perpetual innovation (i.e., often cited 'creative destruction' from

Joseph Schumpeter's *Capitalism, Socialism and Democracy*). Similarly, the U.S. Department of Justice/Federal Trade Commission's *Horizontal Merger Guidelines* since 1968 reflect the increasing shift away from strict adherence to market structure rules and towards market structure exceptions based on economic efficiency arguments (e.g., economies of scale).

The GE/Honeywell merger case was separately evaluated by the DOJ's Antitrust Division and by the EC. The U.S. and the EU account for approximately 40 percent of the world's annual income, roughly 20 percent each. Among the nearly 200 countries in the world, these are the two dominant economic blocs. The EU is a supranational organization, comprised of 15 member states from Europe. On one side, then, was the U.S., the world's remaining superpower since the fall of Communism and the breakup of the Soviet Union; and on the other side, was the nearly 50-year-old European economic union of 15 sovereign states, including four of the G7 member countries (Germany, the United Kingdom, France and Italy).

GE and Honeywell are U.S. companies, the former, at the time run by CEO 'Neutron Jack' Welsh, was the largest company in the world in terms of market capitalization. GE is a large conglomerate whose ownership interests include financial services (GE Capital), information services (GE Technology Services), broadcasting (NBC) as well as GE's traditional lines of business, e.g., lighting, appliances, power systems, etc. The DOJ considered the merger to be a conglomerate merger, where GE was the conglomerate and Honeywell was just another line of business to be incorporated into GE's diverse portfolio. Under current U.S. antitrust policy, conglomerate mergers tend to pass antitrust scrutiny more easily than do horizontal mergers (two firms in the same market) or vertical mergers (two firms vertically aligned in a supply chain). Although GE and Honeywell were not found to be direct competitors in most of their lines of business, they did have overlapping markets in aircraft engine manufacturing, and this is where the controversy arose.

Within the overall aircraft engine manufacturing market, GE produced jet engines for large commercial aircraft and large regional jets, while Honeywell produced jet engines for small regional aircraft and corporate jets. In their respective sub-markets, they shared the

same competitors – Pratt & Whitney (a division of United Technologies) and Rolls Royce. The DOJ discovered two overlapping markets where it believed the merger would have created antitrust issues – the market for U.S. military helicopter engines and the market for MRO (maintenance, repair and overhaul) servicing of certain Honeywell aircraft engines. The DOJ and GE agreed to a pre-merger divestiture remedy, and with the removal of the two antitrust issues, the DOJ indicated that it supported the GE/Honeywell merger.

The DOJ and the EC were fundamentally opposed in their conclusions about the impact of the GE/Honeywell merger on competition in the aircraft engine markets. While the DOJ indicated that competition need not be compromised, its arguments were focused on increased economic efficiency expected to accrue as a result of synergies from the GE/Honeywell merger. In contrast, the EC argued that the merger would reduce competition and result in higher prices in the aircraft manufacturing industry, an industry in which the European Airbus was a principal competitor.

The areas of disagreement can be summarized into four major points.[1] First, the DOJ and the EC disagreed on the definition of 'market dominance,' which was germane to the determination of whether the GE and Honeywell were already dominant firms in their respective markets and therefore whether a merger would serve to further their dominance over their competitors. The assessment of market dominance is relative to the definitions of 'dominance' (e.g., as reflected by a high concentration market share) and of 'market' (e.g., in consideration of the product/service line and geographical area). The difference of opinion essentially came down to the fact that the DOJ set a higher threshold and broader market parameters for market dominance. The higher the threshold, the less likely the violation of that threshold. Similarly, the broader the market, the less likely the chance of observing a dominant firm.

The second major point of disagreement between U.S. and EU antitrust officials was related to the likelihood of a bundled GE/Honeywell product being used to leverage market share for GE in the large aircraft engine market and for Honeywell in the small aircraft engine market. The theory of product tying addresses the

marketing and sales tactic whereby prices are discounted for a bundle of products/services in order to sell all of the components of the bundle. The EC believed that the GE/Honeywell merger would produce a situation where GE aircraft engines and Honeywell avionics (navigation and communication equipment) and non-avionics (landing gear, electrical power, auxiliary power units, wheels, brakes, lighting, etc.) products and services would be bundled together and sold as a package and at a discount, simultaneously limiting customer options and harming GE's competitors. The DOJ disagreed, arguing that GE's customers, Boeing and Airbus, were able to wield significant and effective countervailing power against any such possible behaviour and that antitrust regulation is not about protecting competitors but about protecting competition.

The third area of disagreement dealt with the vertical integration of GE aircraft engines with GE financing and GE aircraft purchasing. The engines were made by GEAE (GE Aircraft Engine division), then sold to aircraft manufacturers (e.g., Boeing and Airbus). The finished jets were then purchased by GECAS (GE Capital Aviation Services), which leased them, including financing, to its customers. According to the EC, this vertical channel would have become available to Honeywell, upon consummation of the merger, with the result that Honeywell engines could have been leveraged in a similar manner and Honeywell avionics and non-avionics could have been leveraged, via tying, into GE's vertical channel for aircraft engines. According to the DOJ, there was no real threat of unfair competition due to GE's vertical channel, since GE's leverage as a buyer of finished aircraft was vastly overstated by the EC.

The fourth area of disagreement concerned the potential for unfair competition due to the availability of unlimited, low cost capital financing of Honeywell by GE Capital, which would have allowed Honeywell to reduce costs and prices significantly below those of its competitors. The EC argued that this unlimited, low cost capital financing threatened the competition by threatening to drive undercapitalized rivals out of the market. The DOJ found the EC's 'ruinous competition' position to be incredulous, arguing that the EC's logic would prevent GE from acquiring any capital-intensive firm in an industry with high entry barriers. Furthermore, the DOJ argued

that Honeywell's preferential access to low cost capital would not lead to predatory behaviour and forced exits. On the contrary, extending GE's comparative advantage in capital efficiency to Honeywell would lower prices and improve consumer welfare. Thus, the DOJ adopted the logic of the Chicago School, asserting that economic efficiency is the primary goal of U.S. antitrust policy and competition is simply a means to that end.

What the GE/Honeywell merger case demonstrates is that globalization introduces additional checks and balances in U.S. antitrust policy. From its beginning, antitrust policy inherited the system of checks and balances from the constitutional separation of powers. Congress enacted the antitrust legislation, the executive branch enforced antitrust policy and the courts interpreted antitrust case law. Throughout more than a century of antitrust policymaking, Congress, the DOJ, the Federal Trade Commission (FTC) and the federal court system have been the dominant government actors, but with the GE/Honeywell merger case, the EC demonstrated that antitrust regulation of U.S. multinationals is not the exclusive purview of the U.S. Government. The EC introduces a new dynamic in U.S. antitrust policy, which may provide a beneficial dose of competition among the regulators of commercial competition given the fundamental economic rivalry between the EU and the U.S. Furthermore, to the extent that the EC maintains a less merger-friendly position, at least *vis-à-vis* U.S. multinationals, the influence of the Chicago School in promoting large, complex mergers may be somewhat counterbalanced.

Endnotes

[1] The following documents summarize and comment on the GE/Honeywell merger case. William J. Kolasky, *U.S. and EU Competition Policy: Cartels, Mergers, and Beyond*, Address Before the Council for the United States and Italy (January 25, 2002). Deborah Platt Majoras, *GE/Honeywell: The U.S. Decision*, Remarks Before the State Bar of Georgia (November 29, 2001). Dimitri Giotakos, Laurent Petit, Gaelle Garnier, and Peter De Luyck, "General

Electric/Honeywell - An Insight into the Commission's Investigation and Decision" in the EC's *Competition Policy Newsletter*, No. 3 October 2001. The first two documents are speeches by Deputy Assistant Attorneys General in the DOJ's Antitrust Division. These documents were obtained from the DOJ's website at http://www.usdoj.gov/atr. The third document was prepared by staff in the EC's Directorate-General for Competition and was obtained from EC's website at http://europa.eu.int/comm/competition.

Since and notwithstanding the controversial European Commission (EC - the executive branch of the EU) ruling in the 2001 GE/Honeywell merger case, the harmonization of U.S. antitrust and EU competition policy has been officially promoted in Washington and Brussels as the deeper reality of the transatlantic relationship. The EC's decision to block the GE/Honeywell merger, made almost immediately after the U.S. Department of Justice's (DOJ) approval of the merger, was widely regarded as a major setback in the coordination of U.S.-EU competition policy, so the *Microsoft* case was being closely watched in order to determine whether the EC would move towards the U.S. position (convergence) or would instead maintain an independent and competing antitrust perspective (divergence). Reminiscent of the Structuralist School of antitrust policy in the U.S., the EC's decision in the GE/Honeywell case rested on the argument that concentrated market power, as measured in terms of market share, is inherently dangerous to competition – this in sharp contrast to the Chicago School (of antitrust thought) logic of the DOJ according to which economic efficiency, not competition for its own sake, is the primary objective of antitrust policy.

The U.S. case against Microsoft was initiated in 1998 with the DOJ suing Microsoft for antitrust violations under the 1890 Sherman Act – after more than 100 years, the Sherman Act remains the principal U.S. antitrust statute. The DOJ, under the Clinton Administration, advanced four separate antitrust charges. First, in violation of Section 2 of the Sherman Act, Microsoft was alleged to have engaged in unlawful activity in support of its monopoly in the Intel-based (i.e., non-Apple and non-UNIX), personal computer (PC) operating system (OS) market with its Windows product. Second, also in violation of Section 2, Microsoft was alleged to have attempted to establish a monopoly in the Internet browser market with its Internet Explorer product. Third, Microsoft was alleged to have illegally tied (or bundled) its Internet browser to its OS software in violation of Section 1's prohibition against restraint of trade. Fourth, Microsoft was alleged to have arranged exclusive deals with other

technology suppliers in violation of Section 1's prohibitions against restraint of trade.

In the same year, the EC began its investigation of Sun Microsystem's complaint that Microsoft violated EU competition policy by restricting access to Windows' interoperability documentation, i.e., information, in this case, necessary for workgroup servers (servers that manage file, printer, directory and security activities – not to be confused with enterprise servers that host complex business applications and databases) to communicate with the Windows OS, the ubiquitous platform for client PCs. Invoking Article 82 of the EC (European Community) Treaty and its prohibition against the abuse of dominant market power, Sun complained that Microsoft deliberately withheld Windows interface documentation in order to inhibit competitors from developing non-Microsoft, Windows-compatible OS software that could manage workgroup services for Windows client PCs. Since Microsoft dominated the Intel-PC OS market, almost to the degree of a pure monopoly, it had the capability of leveraging market share in the market for workgroup server OS software.

During the course of the its initial investigation, the EC initiated a related investigation into whether Microsoft's practice of bundling its Windows Media Player (WMP) with its OS software violated the EU's competition policy. This investigation also proceeded on the grounds that Microsoft's behaviour allegedly constituted an abuse of its dominant position in the Intel-PC OS market. The EC investigation, thus, focused on two charges: first, anticompetitive behaviour in support of monopoly or dominant market status, and second, anticompetitive behaviour promoting the expansion of monopoly power to other product markets.

The U.S. and EC investigations overlapped on the two broad issues of monopoly maintenance (in the OS market) and monopoly expansion (into a secondary applications market – the Internet browser market in the U.S. case and the multimedia applications market in the EC case). In each case, the discovery and proof of anticompetitive practices was crucial … both in terms of assigning liability and in terms of applying remedies. Recognition of Microsoft's monopoly power was a necessary step, a step taken by both the U.S. and the EC, but it was insufficient to provide grounds for divestiture,

injunctive relief or damages. In the U.S. case, after two dramatic court decisions, including a sweeping reversal by the U.S. Court of Appeals, and a shift in the DOJ's prosecution strategy (the Bush Administration's DOJ decided to drop the tying charge), Microsoft acknowledged liability, as per the November 2002 settlement struck with the DOJ (and approved by the U.S. District Court on remand), for its anticompetitive behaviour in the OS market and agreed to remedies designed to enforce its compliance with U.S. antitrust policy. Similarly, the EC ruled that Microsoft was guilty of anticompetitive behaviour and that Microsoft was, therefore, liable and subject to both remedies and damages. Unlike in the U.S. where Microsoft's guilt was limited to anticompetitive behaviour in the maintenance of its OS monopoly, the EC found Microsoft guilty of anticompetitive behaviour with respect to both monopoly maintenance and monopoly expansion.

The similarities and differences between the U.S. and the EC positions on Microsoft's alleged monopolistic behaviour also depend upon which stage of the U.S. case is examined. The comparison described above refers to the final settlement agreed to by the DOJ and Microsoft. It also reflects the judgment of the U.S. Court of Appeals in its June 28, 2001 reversal of the divestiture decision rendered by the U.S. District Court a year earlier. However, substituting the U.S. District Court's divestiture decision of June 7, 2000 reveals even greater similarities between the U.S. and the EC decisions. For example, the initial U.S. District Court judgment found Microsoft guilty of three of the four allegations described in the DOJ's lawsuit. Microsoft was found guilty of monopoly maintenance, attempting to monopolize and unlawful product tying. The latter two findings correspond to the EC's ruling that Microsoft had attempted to use its OS market dominance as leverage in gaining dominance in the multimedia applications market.

On the surface, a comparison of the U.S. District Court's divestiture judgment with the EC's decision against Microsoft suggests a convergence of views. However, the subsequent U.S. Appeals Court ruling and the ensuing DOJ-Microsoft settlement suggest that the final U.S. position and the EC position are further apart. The

divergence of views shows up most clearly in the EC's finding that Microsoft's bundling of WMP with Windows, insofar as it represented a strategy to undermine competition and to establish market dominance, was anticompetitive and illegal. The EC disregarded the Microsoft defense that the two products were technologically tied and could not be unbundled without loss of significant product efficiencies. Instead, the EC considered the technological tie-in to be a ruse by which Microsoft could use one dominant product to leverage market dominance for a second product. In addition, the remedy imposed by the EC involved the dis-integration of Windows and WMP, which involves the removal of code from the Windows product – a remedy that the DOJ in its early response to the EC decision, criticized strongly as inefficiency-biased interventionism.

Beneath the level of liabilities and remedies lies a fundamental point of difference between the U.S. and the EC. According to the EC, the concentration of market power tends to have a negative effect on innovation and consumer welfare, thus marking a position that diverges significantly from the Chicago School logic of the priority of economic efficiency and rationalization of economies of scale. Furthermore, the Schumpeterian creative destruction argument advanced, in the Chicago School tradition, by the U.S. Appeals Court in defense of the highly innovative and transient monopolies of the New Economy industries was rejected by the EC.

In summary, the U.S. and the EC agreed that Microsoft demonstrated market dominance in the OS market, that Microsoft exhibited behaviour that was inimical to competitive markets and perhaps, most importantly, that they shared jurisdiction over the activities of Microsoft, a U.S. multinational corporation and the world's largest software manufacturer. These, then, would be the areas where U.S. antitrust and EC competition policy converge. However, the U.S. and EC views on specific antitrust/competition policy violations and remedies are mixed. On one hand, the U.S. and the EC agree that Microsoft has unlawfully perpetuated its OS monopoly by restricting information and thereby access to the interface layer of its Windows software interface and that the remedy includes disclosure of such relevant information as will facilitate competition in the markets for Windows-compliant applications and workgroup server OS software.

On the other hand, the two sides are far apart regarding the applicability of unlawful product tying and the remedy of code removal. On balance, in light of these considerations, the U.S. and the EC positions do not appear to be irreconcilably divergent.

However, the underlying principles of their respective antitrust and competition policies, as illustrated in the DOJ-Microsoft settlement and the EC decision, seem to be as incompatible as are those of the Structuralist and Chicago schools. The DOJ in its earlier commentary on the EC decision restated the *laissez-faire* Chicago School belief in free markets, competition in concentrated markets (small number of large firms), economic efficiency via economies of scale, innovation and consumer welfare benefits of large-firm economies of scale, etc. In contrast, the EC's announcement indicated that it believed somewhat differently … that free markets cannot operate free from state regulation, that concentrated markets are not necessarily competitive, that economic efficiency and economies of scale do not entail greater innovation and improved consumer welfare, etc. Basically, the U.S. position is *laissez-faire*, advocating that antitrust behaviour should be corrected and/or punished after the crime has been committed, so to speak. The EC, much like the Structuralist School, whose influence pre-dates the Chicago School in the U.S., advocates regulatory intervention to preserve competitive markets and to prevent the concentration of market and economic power.

The U.S. experience with antitrust policy over the past 100-plus years has been dynamic, displaying alternating periods of variable intensity in antitrust activism and *laissez-faire* restraint. The constitutional principles of separation of powers and checks and balances have themselves acted as proto-antitrust barriers to the consolidation of government authority and monolithic continuity. All three branches of government (Congress, the executive branch through the DOJ and the Federal Trade Commission, and the courts) have been active participants in the development and enforcement of U.S. antitrust policy. Political parties and economic ideologies have influenced each of these institutions, and over time, the path of antitrust policy development discloses a public policy dynamic that can only simplistically be characterized as linear. War, depression and

international competition have shaped and will likely continue to shape U.S. antitrust policy, thereby ensuring that an external and unpredictable dynamic will always complicate its evolution.

A similar development process may be in store for transatlantic, if not global, antitrust/competition policy. From the perspective of the American antitrust history, the role of the EC may be that of an additional, potentially countervailing competitive check on U.S. antitrust policy as it pertains to multinational corporations. The potential for influence lies in the fact that the EU is roughly equivalent to the U.S. in population and economic output. The potential for countervailing influence rests upon different and conflicting interests and opportunities, as reflected in political economy bias (e.g., *laissez-faire* v. interventionist), national (regional) bias, etc. However, the changeable nature of antitrust policy in the U.S. suggests that a similar future for EU competition policy not only might produce ebbs and flows in European competition policy activism and restraint but also might produce periods of non-permanent and reversible convergence/divergence with U.S. antitrust policy.

In conclusion, a caveat is needed. Microsoft has appealed the EC's decision to the European Court of First Instance. Should Microsoft fail in having the EC's decision overruled at this level, further appeal may be filed with Court of Justice of the European Communities. As in the *U.S. v Microsoft* case, a settlement between the EC and Microsoft may still emerge as a viable option in the event that the EC's decision is reversed along the lines of the U.S. Court of Appeal's reversal of the lower court's divestiture judgment.

References

Conclusions of Law of April 3, 2000, U.S. District Court for the District of Columbia, *U.S. v. Microsoft*, Civil Action No. 98-1232 and 1232 (TPJ).

Final Judgment of June 7, 2000, U.S. District Court for the District of Columbia, *U.S. v. Microsoft*, Civil Action No. 98-1232 and 1232 (TPJ).

Judgment of June 28, 2001, U.S. Court of Appeals for the District of Columbia Circuit, *U.S. v. Microsoft*, No. 00-5212.

Memorandum Opinion with Findings of Fact and Final Judgment of November 1, 2002, in *re U.S. v. Microsoft*, Civil Action No. 98-1233 (CKK).

EU press release of March 24, 2004, *Commission concludes on Microsoft investigation, imposes conduct remedies and a fine*.

EU press release of March 24, 2004, *Microsoft - Questions and Answers on Commission Decision*.

U.S. Department of Justice press release of March 24, 2004, *Assistant Attorney General for Antitrust, R. Hewitt Pate, Issues Statement on the EC's Decision in Its Microsoft Investigation*.

Commission Decision of March 24, 2004, in Case COMP/C-3/37.792 - Microsoft.

Background

Conclusions of Law of April 3, 2000, U.S. District Court for the District of Columbia, *U.S. v. Microsoft*, Civil Action No. 98-1232 and 1232 (TPJ).

U.S. DOJ's allegations regarding Microsoft's violations of U.S. anti-trust law (Sherman Act)

Microsoft violated Section 2 through exclusionary, anticompetitive and predatory activities intended to maintain its OS monopoly.

Microsoft violated Section 2 by attempting to monopolize the Internet browser market.

Microsoft violated Section 1 by illegally tying its Internet browser, Internet Explorer, to its Windows OS.

Microsoft violated Section 1 by engaging in exclusive dealing in order to protect its OS monopoly.

Conclusions of the Court

Microsoft had an OS monopoly and, in violation of Section 2, engaged in predatory, exclusionary and anticompetitive conduct in order to maintain its monopoly. Microsoft's behaviour was predatory with reference to its demonstration of non-profit-maximizing behaviour where costs were regarded as an investment in eliminating competition from Sun and its Java platform and Netscape and its Navigator platform.

Microsoft attempted to monopolize the Internet browser market, in violation of Section 2, by means of predatory and thus anticompetitive behaviour.

Microsoft unlawfully tied its separate Internet browser and OS products in violation of Section 1. Tying was not found to be necessitated by technological or efficiency considerations but was considered to be intended to limit competition.

Microsoft was not guilty of exclusive dealing under Section 1.

Final Judgment of June 7, 2000, U.S. District Court for the District of Columbia, *U.S. v. Microsoft*, Civil Action No. 98-1232 and 1232 (TPJ).

The U.S. District Court issued its final judgment, which included: 1) the divestiture remedy that called for the breakup of Microsoft into two separate companies – one dedicated to OS products and the other dedicated to applications products; and 2) interim restrictions on Microsoft's conduct, e.g., retaliation, coercion, exclusive dealing, contractual tying and nondisclosure of interface documentation.

Judgment of June 28, 2001, U.S. Court of Appeals for the District of Columbia Circuit, *U.S. v. Microsoft*, No. 00-5212.

Decisions of the Court

The divestiture remedy was annulled, and the case was remanded for reconsideration of the remedy in view of the facts that only one of the three violations found by the District Court was upheld and that the trial judge in the District Court was guilty of judicial misconduct.

The District Court's ruling on monopoly maintenance was affirmed in part and reversed in part. The Appeals Court agreed that Microsoft possessed a monopoly in the OS market and that Microsoft had engaged in illegal activities in support of its monopoly. This is the only antitrust charge that was not struck down or remanded; however, the Appeals Court did not accept in its entirety the District Court's list of Microsoft's illegal activities in support of its monopoly.

The District Court's finding that Microsoft had attempted to monopolize the Internet browser market was reversed on the basis that the plaintiff had failed to demonstrate the existence of barriers to entry which would facilitate Microsoft's monopolization of the Internet browser market.

The District Court's ruling regarding unlawful product tying was remanded for reconsideration on the basis that the allegation of unlawful tying should be judged in accordance with the rule of reason

instead of the rule of *per se* compliance (i.e., a contextual, 'all the facts' approach versus a rigid, literal approach).

Memorandum Opinion with Findings of Fact and Final Judgment of November 1, 2002, in *re U.S. v. Microsoft*, Civil Action No. 98-1233 (CKK).

The U.S. District Court, on remand, approved the U.S.-Microsoft settlement agreement. The terms of the final judgment contain specific proscriptions against anticompetitive conduct on the part of Microsoft (e.g., retaliation, coercion and exclusive dealing) and requirements that Microsoft disclose Application Programming Interfaces (APIs), communication protocols and technical information necessary for third-party software interoperation with the Windows OS. In addition, the settlement provided that information protected under intellectual property law should be disclosed subject to licensing provisions. Since the U.S. DOJ dropped the tying charge after the Appeals Court ruling, the only antitrust charge remaining was Microsoft's anticompetitive conduct in support of monopoly maintenance. Microsoft's acceptance of the final judgment represents tacit acknowledgment of its having violated U.S. antitrust law.

Commission Decision of March 24, 2004, in Case COMP/C-3/37.792 - Microsoft.

Microsoft violated EU competition policy by abusing its dominant market position in the PC OS market by restricting interoperability between Windows PCs and non-Microsoft servers in order to enhance and protect its market dominance and by tying separate products, Windows Media Player (WMP) and Windows OS in order to use market dominance in one product, Windows, as leverage in expanding market share for the other product, WMP.

The EC's remedies include a 500 million Euro fine, compulsory disclosure of interface protocols and documentation with release updates, and provision of Windows OS software without installation of WMP. While the EC does not regard interface protocols and documentation to be Windows source code, it does provide that in the

event that intellectual property issues emerge, Microsoft will be compensated for the disclosure of proprietary information.

The U.S. and EC draw different conclusions about the implications of market dominance in New Economy industries, such as the computer software industry. According to the Chicago School, the dominant school of antitrust thought in the U.S., economic efficiency is the primary objective of antitrust policy, and the New Economy is characterized by a dynamic form of competition, wherein rapid innovation is encouraged by the incentive of monopoly profits, economies of scale provide cost efficiencies that benefit consumers and the duration of any given monopoly is constrained by the continual innovation that fundamentally changes and disrupts the status quo (Schumpeter's creative destruction dynamic of capitalist progress). In contrast, the EC argues that network effects and applications barriers to entry may actually entrench incumbents for a considerable length of time, notwithstanding the dynamically competitive nature of the New Economy. Furthermore, these entrenched monopolists will neither tend to promote innovation nor consumer welfare but rather their own dominant market positions.

Since the early 1990s, consolidation in the global pharmaceutical industry has been vigorous and sustained. Growth by acquisition has characterized the industry for the last 15 years. In 1990, the top 10 pharmaceutical firms accounted for approximately 28 percent of global pharmaceutical sales, while 10 years later, in 2000, the top 10 companies claimed approximately 45 percent of global revenue.[1] By the end of 2004, the top 10's global share should exceed 50 percent, given Pfizer's $60 billion acquisition of Pharmacia in 2003 and the imminent $65 billion Sanofi-Synthélabo acquisition of Aventis. Clearly, the recent history of the pharmaceutical industry has shown a decisive shift towards fewer firms controlling more revenue. In addition, the industry continues to be concentrated geographically among U.S. and European firms.

Because of the considerable and rapid consolidation of the pharmaceutical industry, the rankings and membership of the top 10 firms change from time to time, especially during periods of intense merger and acquisition activity. For example, in one year, 1999, there were three prominent mergers that increased the market share for three separate top 10 firms: Aventis was formed by the merger of Hoechst (Germany) and Rhône-Poulenc (France); AstraZeneca was created from the merger of Astra (Sweden) and the Zeneca (U.K.); and Pfizer (U.S.) acquired Warner-Lambert (U.S.) In terms of changes in the list of members, the merger of Glaxo Wellcome (U.K.) and SmithKline Beecham (U.K.) in 2000 involved two top 10 firms, as did the merger of Pfizer and Pharmacia (U.S.) three years later – in each case, one more opening was made available for a newcomer.

In addition to the trend towards industry consolidation, there has also been a gradual increase in the individual market shares of the top 10 firms. In 1990, Merck had the largest share of the global sales market at just under four percent, while Pfizer's current leading market share is estimated at 11 percent, nearly three times higher than Merck's 1990 share. Since its acquisition of Pharmacia, the spread between Pfizer's market share and the market share of its competitors has increased, but even so, the other top 10 positions have seen their market shares increase significantly. Another merger among the top 10 firms could quickly close the gap with Pfizer, as the

Novartis-Aventis merger threatened before the Swiss firm Novartis (itself a product of the 1996 merger between the two Swiss firms Ciba-Geigy and Sandoz) lost out to Sanofi-Synthélabo.

Perpetual growth by acquisition among the pharmaceutical firms will continue to increase the 10-firm concentration ratio, until U.S. and European merger reviews determine that the concentration ratio is approaching the threshold beyond which a competitive market may be compromised. However, that threshold is not in imminent danger of being breached. Both U.S. and European officials use an index (Herfindahl-Hirschman Index) that measures market concentration based on market shares in order to identify potential merger-related competitive issues. The HHI, calculated by summing the squares of all participants' market shares, ranges from near zero (perfect competition among an infinite number of competitors) to 10,000 (absolute monopoly) with three broad regions that correspond to unconcentrated, moderately concentrated and highly concentrated markets. In a market, like the global pharmaceutical market, with a 10-firm concentration ratio of 45 percent, the HHI would fall well below 1000 (unconcentrated), whereas, by comparison, in a hypothetical market where the four-firm ratio was 80 percent (20 percent market share for each firm) and no other firm had more than 5 percent market share, the HHI would fall within the 1000 – 1800 range (moderately concentrated). A highly concentrated market would be found to exist if, for example, three firms each controlled 25 percent market share, in which case, the HHI would exceed 1800, the lower boundary for highly concentrated markets. While neither the U.S. nor European merger authorities rely exclusively on the HHI (e.g., the failing company defense may justify a merger in a highly concentrated market, if the targeted firm is facing imminent bankruptcy), the index is nevertheless a useful indicator regarding potential merger complications.

The consolidation in the pharmaceutical industry has attracted considerable attention from investors and consumers. Among investors, the sentiment is positive regarding profit opportunities – the idea being that consolidation is a profit-oriented, cost-efficiency strategy … a sort of profitable 'hold' position until the next major drug

breakthrough or the 'new drug' pipeline is replenished. For investors, the expectation is for competitive profits (i.e., better than what can be got elsewhere given returns and discounts for risk) resulting from economies of scale (i.e., lower cost structure) in research and development (R&D), production, distribution and sales. For consumers, expectations are somewhat mixed. On one hand, there is the possibility that drug prices will be either maintained or scaled back, if not for individual consumers, then at least for members of drug plans. On the other hand, increasing industry concentration threatens to increase opportunities for collusive behaviour, especially price-fixing, among pharmaceutical firms. With respect to the employees, a third important constituency, there are clearly winners and losers - the former generally accepting the efficiency-*cum*-size argument, and the latter feeling betrayed by it. These, then, represent the most common reactions to industry consolidation.

Underlying investor, consumer and employee reactions to consolidation in the pharmaceutical industry are a variety of issues relating to corporate profits, R&D, intellectual property (IP) rights, and competition policy, all of which merge and overlap to a considerable degree. Furthermore, notwithstanding efforts by economists to offer objective, value-neutral advice based on microeconomic theory, the absence of consensus regarding the benefits and costs of consolidation reflects a reality better described by politics (or political economy) than by science … a reality characterized by asymmetric information to be sure, but even more fundamentally one characterized by competing interests and by an asymmetry of power behind those interests.

The profit motive looms large among the motives driving pharmaceutical consolidation. In the short run, market share, R&D innovation or market capitalization may appear to be the goals of management, but in the long run, which seems relatively short in the pharmaceutical industry, profits in the form of returns to investors remain the primary goal and the principal statistic of corporate wellbeing. Profit maximization seems to best capture the essential motive force driving pharmaceutical firms, as demonstrated in the competitive, profit-seeking mergers and acquisitions of the past 15 years.

Profits are a function of R&D, and R&D expenditures in the pharmaceutical industry, as a percentage of total cost, are among the highest in the manufacturing sector. The cost of bringing a new drug to market is highly disputed by industry protagonists (e.g., Pharmaceutical Research and Manufacturers of America or PhRMA) and antagonists (e.g., Ralph Nader's Public Citizen). However, PhRMA's estimated $800 million cost of bring a new drug to market goes a long way towards rationalizing the industry's consistent and highly ranked profitability as well as the prescription drug price differential between the U.S. and other countries, such as Canada. Costs are high in large part, because discovery, testing, regulatory compliance, marketing and production are human capital-intensive, i.e., intensive in the use of highly skilled labour, and therefore expensive. In addition to high upfront costs for new drugs, the risks of failure (in terms of not satisfying expected rates of return on investment) are also high. The patent systems of the U.S., the European Union (EU) and the various European national patent offices exist in order to provide incentives for innovation – the product of R&D – by granting inventors (including corporations) temporary monopoly rights to a specific product or process. Patents are essentially IP rights. For a limited time, the patent holder has exclusive rights regarding the patented product or process, and during this time, these IP rights protect the patented product or process from the competition or infringement of a close substitute. The patent argument maintains that innovation requires protection, i.e., a temporary departure from the competitive market, in order to compensate the entrepreneur for the risk of financing innovation. Otherwise, so the argument goes, the financial capital of the entrepreneur would be lured elsewhere, and innovation would suffer.

Critics of the patent laws, IP rights and high profit rates in the pharmaceutical industry argue that monopoly rents (i.e., profits over and above those found in a market with no patents or other departures from a perfectly competitive market) are excessive and tend to benefit investors at the expense of consumers, especially weak buyers, e.g., potential consumers of AIDS or anti-malarial drugs in sub-Saharan Africa. The developed countries and the developing

countries are in basic conflict regarding the pharmaceutical industry, with the rich countries defending their IP rights, patent laws and innovation incentives and the poor countries seeking access to affordable (usually generic and patent-exempted), life-saving drugs. While the pharmaceutical industry is acknowledged to have significant producer power in the U.S. and Europe, the power imbalance between the pharmaceutical industry, as producers, and say, sub-Saharan African countries, as consumers, is obviously substantial.

Discussion of R&D, IP rights and patent laws in the pharmaceutical industry would be incomplete without addressing the phenomenon of monopolistic competition. Drawing from Edward Chamberlin's classic 1933 work, *The Theory of Monopolistic Competition*, this form of competition is a hybrid of the two market extremes, monopoly at one end and competition at the other. According to this view, whose influence continues in contemporary Microeconomic textbooks, the market for a non-homogeneous good, e.g., soap, allows each firm to advertise its soap as unique (thus, the monopoly), constrained only by other firms' advertisements on behalf of their unique soaps (thus, the competition). In the pharmaceutical industry, the male erectile dysfunction drug market provides an example of a monopolistically competitive market, where the major competitors (Pfizer, GlaxoSmithKline and Lilly) manufacture and market their own branded impotency drugs. In this case, the R&D and promotional costs of bringing these drugs to market and the patent laws that protect them do not advance drug innovations or public health research – instead, costs are incurred in creating a brand and in creating brand loyalty.

Competition policy in the U.S. and in the EU is divided into *ex ante* merger and *ex post* antitrust policy. Merger policy addresses potential threats to competitive markets posed by mergers and acquisitions and is therefore preventive and proactive in nature. Merger policy is further divided into horizontal and vertical merger policy, corresponding to horizontal mergers between firms in the same market and vertical mergers between firms in different markets but in the same supply chain. Antitrust policy, on the other hand, addresses actual threats to competitive markets and is thus remedial and reactive in nature.

Both U.S. and EU merger policy regard consolidation in the pharmaceutical industry as being subject to both merger review and antitrust investigation. Merger reviews in the pharmaceutical industry have not provoked injunctions or prohibitions against the proposed mergers, as was the case with the high profile GE-Honeywell merger proposal of 2001 or as appears to be the case in Oracle's planned hostile acquisition of PeopleSoft. First, the pharmaceutical industry is more competitive than either the aircraft engine manufacturing market and related markets, where GE and Honeywell's businesses were horizontally and vertically aligned, or the market for corporate human resources and financial systems software dominated by Oracle, PeopleSoft and SAP. In the pharmaceutical industry, no single merger to date has threatened to create a firm that would have dominant market power. Second, the U.S. Department of Justice (DOJ) and the European Commission (EC) have approved mergers subject to divestiture agreements, according to which specific products have been divested when the product market analysis indicates the merging companies would possess concentrated market share. Thus, pharmaceutical mergers are not blocked. They are allowed, although not all product lines are merged into the consolidated firm.

U.S. and EU antitrust enforcement involves investigations into alleged anticompetitive behaviour, such as price-fixing, market allocation and bid rigging, examples of collusion where firms coordinate their activities in order to exercise market power. Between 1999-2002, the DOJ and the EC successfully prosecuted numerous pharmaceutical firms from North America, Europe and Japan in several cases against international vitamin cartels. In the pharmaceutical industry, there is no clear dominant firm as there is, for example, in the Intel-PC operating system market, of which Microsoft controls upwards of 90 percent. For this reason, in the pharmaceutical industry, U.S. and EC antitrust charges require proof of collusion or coordinated market power, unlike in *U.S. v. Microsoft* and the EC's investigation of Microsoft, where antitrust charges were made against the unilateral anticompetitive behaviour of Microsoft, the monopolist or dominant firm. In the vitamin cartel cases, Hoffman-La

Roche (Roche) and BASF were the dominant firms in the global vitamins market and in the vitamin cartels. However, their anticompetitive strategy was coordinated, since cartelization is more practical in other than monopoly markets.

In summary, consolidation in the pharmaceutical industry is ongoing and significant. Industry consolidation highlights issues dividing investors, consumers and employees. Consolidation increases profitability, but it is not necessarily compatible with lower drug prices or full employment. Patent laws promote innovation, but they also restrict availability of affordable, life-saving drugs. IP rights protect the R&D investment from theft or copy, but they also limit the diffusion of innovation to developing countries. R&D makes innovation possible, but it also supports the bias in favour of impotency drugs and against anti-malarial drugs. Pharmaceutical mergers and acquisitions are routinely modified by divestiture agreements removing excessive product market concentrations, but micromanagement of mergers may not prevent the oligopolization of the pharmaceutical industry. Finally, antitrust remedies are available in cases of post-merger, anticompetitive behaviour; however, these appear to be constrained by the need to prove collusive cooperation between two or more firms. Clearly, there are no equal-share 'win-win' scenarios – the market creates winners and losers, but then so does public regulatory policy. Nevertheless, there is some beneficial competition between the market and government regarding social-economic objectives.

Endnotes

[1] IMS HEALTH, "M&A Drives Decade of Change," April 25, 2001, accessed at http://www.imsglobal.com/insight/news_story/0104/news_story_010425.htm on April 29, 2004.

Top 10 in 1990 by % Global Market Share			Top 10 in 2000 by % Global Market Share		
Merck	3.8	US	Pfizer	7.1	US
Bristol-Myers Squibb	3.5	US	GlaxoSmithKline	6.9	UK
Glaxo	3.3	UK	Merck	5.1	US
SmithKline Beecham	2.9	UK	AstraZeneca	4.4	UK
Ciba-Geigy	2.8	Swiss	Bristol-Myers Squibb	4.1	US
American Home Products	2.6	US	Novartis	3.9	Swiss
Hoechst	2.6	German	Johnson & Johnson	3.9	US
Johnson & Johnson	2.5	US	Aventis	3.6	French
Lilly	2.2	US	Pharmacia	3.2	US
Bayer	2.2	German	American Home Products	3.0	US
Total	28.4		Total	45.2	

Competition is like a coin – it has two faces or two sides, a front and a back. Depending on which of its two faces are emphasized, competition may be viewed with favour or aversion. On one side of the coin, the face of competition is that of warfare, conflict and the struggle for power. Competition is ruthless, and it leads to the Hobbesian ultimatum: either the perpetual anarchy of endless competition or the sacrifice of freedom for order through submission to a higher, absolute authority. Thomas Hobbes' *Leviathan* (1651), a classic critique of excessive competition and individual liberty, was written during the period of the Thirty Years' War (1618-1648) in Europe and, closer to home, the English Civil War (1642-1648), a war between Protestants and Catholics and between Royalists and Parliamentarians. Against the backdrop of civil war and the long European religious wars, Hobbes argued for a return to the absolute, yet secular, authority of the commonwealth as a defense against anarchy, violence and uncertainty.

On the other side of the coin, the face of competition is that of freedom from absolute and arbitrary power, as shown, for example, in John Locke's rejection of absolute monarchy and advocacy of constitutional government. Locke's *Two Treatises of Government* (1690) written in defense of the Glorious Revolution of 1688 that brought William of Orange to power in England, attacked the theoretical basis of absolute monarchy and proposed, as its replacement, a constitutional monarchy whereby the authority of the monarch would be checked by Parliament and ultimately by the natural law-based civil right to revolt against tyranny.

Freedom, as the positive face of competition, is well documented within the history of democratic thought. Absolute power is called into question, concessions are made and a new balance of power is struck. For example, in the 17th century, Locke denied the monarch's claim to absolute power; Voltaire challenged the absolute power of the Catholic Church in 18th century France; and Marx, in 19th century England, advocated the demise of Western capitalism. In each case, the established and dominant views were shaken by the emergence of competing views, views that offered radical

alternatives but, most importantly, asserted the freedom to choose. This notion of the competition of ideas was neatly, although somewhat naively, captured by Justice Oliver Wendell Holmes' free speech metaphor, 'the marketplace of ideas," presented in his dissenting opinion in the 1st Amendment case *Abrams v. U.S.* (1919). The image of ideas competing freely in a market where truth necessarily wins out is poetic, but it is idealistic and naïve in ignoring the real struggle involved in winning freedoms from and imposing limits on absolutist regimes or absolutist tendencies (e.g., war-time suppression of civil liberties).

A century after Locke, the classical economists framed their *laissez-faire* Political Economy as an extension of the tradition of curbing the power of the state. It was the classical economists, Adam Smith, David Ricardo and others, who, in making the case against anti-competitive mercantilist policies that restricted cheap food imports, subsidized local industries and granted monopoly privileges to trading companies, set the stage for the introduction of free trade and competition. More than two hundred years ago, Smith argued that monopolies tended to reward inefficient behaviour, reduce consumer welfare and generally impede economic growth … and economic growth was the essence of Smith's argument for free trade and increased competition. In mainstream Western capitalist economic thought since the late 18th century, competition has been viewed positively, because it is regarded as the invisible hand that guides the self-interested behaviour of individuals to a 'best-of-all-possible-worlds' market equilibrium.

In contrast to the view that competition promotes democracy and economic well being, the other side of competition reveals a sinister and disorderly world that requires an absolute master capable of imposing order and security. Parallel to Hobbes' world of complete political anarchy and social breakdown is an economic world where competition, like warfare, is waged one against the other. Competition is cutthroat. Bankruptcies abound. The only path to stability is by way of market consolidation and concentration of economic power. Monopoly/cartel power restores equilibrium (i.e., absence of predatory behaviour and internecine conflict) and maintains calm by

controlling market entry, allocating market share and setting price and output levels. Competition, according to this view, is something naturally abhorrent – it is chaos. It must be controlled, which means that power must be consolidated, individual freedoms must be centrally managed and the invisible hand must be controlled. The net gains of security and peace for society as a whole outweigh the inconvenient sacrifice and discipline of individual idiosyncrasies.

A comparison of the two faces of competition reveals certain preconceptions about human nature. The 'warfare' side of competition emphasizes struggle, conflict and domination. Competition and absolute power are located at opposite ends of the political spectrum. At one end, competition, with its incessant violence and dark uncertainty, is not desirable; while at the other end, the tyranny of absolute power is desirable only insofar as it brings order to a chaotic world. The world of state socialism in Eastern Europe and the former Soviet Union provides a recent modern example of this 'warfare' view of competition. The absolute power of the Party-State secured peace and order against the anarchy of unchecked competition. Almost predictably, Marx's utopian vision of a stateless society, where all state power was to revert back to the new socially conscious man, has been proven to be beyond reach. Instead what was supposed to be a transitional dictatorship of the proletariat became a permanent dictatorship of the proletariat – the new Leviathan of the self-contradictory communist state.

The 'freedom' side of competition emphasizes the dispersion of power from the centre. At one end is the ideal of perfect competition, at the other end is absolute power. Somewhere in between is the American economic system. In the American economic system, competition is generally viewed positively, although, the consolidation of economic power has also been well received. In contrast to the Leviathan of the former Soviet Union, the U.S. economic system is characterized by competition among large firms, industry lobby groups, labour unions, political parties, environmental groups, etc. The American economic system is not perfectly competitive – there have always been industries where markets were concentrated in the hands of a few firms, and government has a long history of intervening in markets to support domestic firms.

Ironically, the Chicago School descendants of the classical economists have increasingly less regard for competition than for consolidation and efficiency as shown in the U.S. Court of Appeals' ruling in *U.S. v. Microsoft* (2001) and in the U.S. Department of Justice's argument on behalf of the proposed GE/Honeywell merger. According to the Chicago School of antitrust policy, competition is simply a means to the ultimate goal of greater economic efficiency, a goal that can just as easily be promoted by leveraging economies of scale, increasing the size of firms, relaxing constraints on allowable market concentration and restricting government regulation.

Although there are strong forces pulling the American economic system towards increasingly concentrated power, there are countervailing tendencies working in the opposite direction. For example, despite the occasional collusion between regulators and the regulated, regulatory intervention, on the whole, limits the negative externalities associated with free and unconstrained markets, e.g., pollution and environmental degradation, stock market misinformation and fraud and anti-competitive monopolist and collusive behaviour. In addition, the constitutional separation of powers and the system of checks and balances limit the consolidation of governmental power. The division of government power tends to promote inefficiencies as often seen in the gridlock in Congress. However, the division of power also protects against the monopolization of government power, as it did in the 1970s when Congress and the courts checked presidential war authority and executive privilege, vis-à-vis the Vietnam War and Watergate, respectively.

Whichever face of competition one sees depends upon a predisposition towards competition. Either it has positive connotations, being associated with freedom and an aversion to absolute authority; or it has negative connotations, such as chaos, anarchy or non-cooperation. The coin metaphor suggests it impossible to see both sides at the same time. It is, however, possible to switch from one view to the other as was done in the following example of a remarkable gestalt switch in antitrust policy. In response to the economic crisis of the Great Depression, the National Recovery Administration (NRA) was established in 1933 as an emergency central planning

agency, exempted from antitrust laws, to coordinate industry-wide competition by establishing wages, prices and output levels. In 1935, the NRA was declared unconstitutional, and the antitrust policy of the Roosevelt Administration was reversed. With respect to antitrust policy (and not New Deal policy in general), the negative aspect of competition was replaced by the positive aspect – an about-face not unknown in the history of antitrust policy. The view that competition was associated with economic instability and market anarchy was exchanged for the view that competition was the best defense against business combinations' abuse of economic power. Perspective shifts are not uncommon in the history of antitrust policy – in large part because antitrust policy is divided among the three branches of government whose interests and ideologies are not only dynamic but rarely in sync and because external forces (e.g., world war, depression, stagflation and globalization) often dictate their own responses.

During the last two decades, there has been a convergence of views regarding the role of the state in a market economy. Increasingly, the direction chosen has been towards greater market autonomy and smaller, less intrusive government. Conservatives, moderates and even socialists have to varying degrees moved towards a model of political economy that emphasizes the benefits of market allocation and self-regulation and that de-emphasizes the utility of government interventions in the economy.

During the 1980s, it was the Republican U.S. President Ronald Reagan and the Conservative British Prime Minister Margaret Thatcher who ushered in a new decade of conservative ideology regarding the role of the state and the market. The hold of the new economic orthodoxy was substantially enhanced by the most dramatic development of the late 20th century – the fall of communism in Eastern Europe and the Soviet Union. The fall of communism changed the ideological landscape of political economy overnight. No longer was state socialism and central planning a viable economic model for development and growth. Capitalism had triumphed over communism, and the conservative political economy of market self-regulation was the new face of capitalism in the West.

In the 1990s, leaders from across the political spectrum endorsed the new political economy as they redrew the boundaries of government and the market. In the G-7 countries, the new political economy was championed by political parties traditionally sympathetic to government interventions in and regulations of the market: in the U.S., it was the Democrats under President Bill Clinton, in Canada, it was the Liberals under Prime Minister Jean Chretien, in Britain, it was the Labour Party under Prime Minister Tony Blair, and in Germany, it was the Social Democratic Party under Chancellor Gerhard Schroeder.

By the end of the 1990s, the three European G-7 countries (Italy and France and Germany) had joined the new European Monetary Union (EMU), acceded to the fiscally conservative convergence criteria and adopted the euro currency. Under the terms of the new

Eurosystem, member countries ceded monetary policy sovereignty to the new supranational European Central Bank (ECB) and agreed to limit fiscal policy autonomy in view of Eurosystem-defined deficit and debt ceilings as established in the Maastricht Treaty. The remaining G-7 country, Japan, is a special case owing to its decade-long economic stagnation that followed the collapse of its real estate and equity markets. Notwithstanding expansionary fiscal policy and near zero short term interest rates, the Japanese economy has yet to establish a sustained rebound, and structural reform remains tentative, particularly in the banking sector which still has a high percentage of non-performing loans.

The convergence of views in the West has not been restricted to the West. Through the influence of their governments, financial institutions, industrial firms, think tanks and universities, Western countries have exerted a considerable influence on the international economy – dismantling barriers to international trade,[1] advancing macroeconomic stabilization programs[2] and establishing the case for market-based economic development.[3] The ideological shift that occurred first in the West has simply been transmitted through a variety of channels to the broader global community. The effectiveness of the transmission and reception of Western views is without question a function of the West's disproportionate economic power. International finance, foreign direct investment, export markets, advanced research and development, imports from capital-intensive industries … in all of these areas developing countries are dependent, and the West is the largest provider. In summary, there has been a convergence of views regarding the changing roles of the state and the market both within the West and around the world.

The principal thesis of this essay is that the consensus view of the state and the market misrepresents the actual development history of the West. The economic development history of the U.S. will be examined to show that the state and the market were synthesized into a hybrid, mixed capitalist model, which broadly represents the economic models of the West but bears little resemblance to the rhetorical free market model in vogue nationally and internationally. The rhetorical model is a highly abstract and implausible description of economic reality. In the real world, some firms exercise market

power *vis-à-vis* their competitors and their customers; not all economic actors are created equal; there is a business cycle with many points of disequilibria; and there are exploitable welfare gains to be had from policy intervention. The evolution of the actual American economic system will be described below with reference to the three key areas of antitrust, fiscal and monetary policies.

With respect to U.S. antitrust policy, the Sherman Act (1890) was a watershed in government regulation of the market. In enacting federal legislation to replace the common law of anti-competitive practices, Congress was responding to increasing industry concentration, especially in the new railroad sector, as well as consolidating its jurisdiction over interstate commerce (cf. Interstate Commerce Act of 1887). The Sherman Act, the most important antitrust statute, prohibits contracts, combinations and conspiracies in restraint of trade and proscribes monopolization, attempts to monopolize and conspiracies to monopolize. Collectively, the U.S. Code regarding antitrust law is embodied in federal law enacted nearly a century ago: Sherman Act (1890), Clayton Act (1914) and FTC Act (1914).

Under the Constitution's separation of powers, Congress enacts the law, the executive administers the law and the courts interpret the law. It is the executive branch's prerogative to pursue antitrust cases either through the prosecutorial function of the Department of Justice's Antitrust Division or through FTC (Federal Trade Commission) investigations, and the federal court system has jurisdiction in interpreting and applying the body of antitrust law comprised of federal statutes and case law. Antitrust lawsuits are filed in federal courts, FTC injunctions are sought there, and FTC orders are appealed in federal courts.

Given the separation or fragmentation of antitrust policy, it is not surprising that antitrust policy is dynamic, conflicting and subject to the mood of the times. For example, there are two well-defined schools of thought regarding antitrust policy. The structuralist approach views the economic objectives of antitrust policy broadly, so that promoting competition and limiting economic power is considered a legitimate public policy goal, in itself, in keeping with the constitutional principle of checks and balances regarding political

power. The assumption is that if market power exists, it will be exploited; therefore, where market power exists, it should be remedied. According to the structuralist view, the existence of industry concentration and of barriers to entry produce a non-competitive market where firms can restrict output and set prices above marginal cost. This view is consistent with the belief that government interventions are required to maintain competitive markets. A recent and high profile example of a structuralist approach appears in *U.S. v. Microsoft*, where the U.S. District Court for D.C. agreed with the government that Microsoft was in violation of U.S. antitrust law and directed that Microsoft be split into two separate companies.[4]

The Chicago School, which has become prominent since the early 1970s, partly as a reaction to the perceived failure of Keynesian macroeconomic policies, regards the economic objective of antitrust policy much more narrowly. According to this view, the objective of antitrust policy should be economic efficiency and not competition for the sake of competition. Furthermore, economic efficiency does not require the ideal of perfect competition – intense competition for profits among a few large firms is sufficient. According to the Chicago School, markups and industry concentration do not prove anti-competitiveness, since they may be the result of cost efficiencies and economies of scale. In addition, the Chicago School maintains that markets are generally open to new entrants and that therefore, monopoly profits will tend to be self-regulated under the threat of potential competitors seeking a share of the profits. In general, Chicago School is *laissez-faire*, anti-interventionist and pro-invisible hand. The conclusion of the *U.S. v. Microsoft* case illustrates the economic reasoning of jurists from the Chicago School tradition. The U.S. Court of Appeal for D.C. declared that the government had not demonstrated proof that Microsoft's dominant market position was causally responsible for alleged anti-competitive behaviour, and it proceeded to reverse the lower court's ruling.[5]

Fiscal policy, i.e., taxation and expenditure policy, is jointly controlled by the President and Congress. In response to the Great Depression of the 1930s, unemployment insurance and welfare programs were initiated to provide the most vulnerable with a temporary financial buffer against the adverse economic shock of recessions

and depressions. Combined with the progressive income tax, unemployment insurance and welfare programs constitute a set of automatic fiscal stabilizers that kick in during economic downturns and reverse themselves during economic upturns. The nature of the stabilization provided is that incomes of the most vulnerable are propped up at government's expense, and this almost certainly implies that government expenditures will exceed government revenues during recessionary periods. However, as the expansionary side of the business cycle kicks in, these deficits are reversed, as unemployment insurance and welfare payments are replaced by the paycheques of a growing economy and as tax revenue increase along with a growing economy.

In addition to the automatic fiscal stabilizers, there is discretionary fiscal policy. For example, under the Republican Bush Administration and Republican Congress, discretionary fiscal policy has produced a near $500 billion deficit, attributable to three separate tax cuts, a sluggish jobs recovery from the 2001 recession, the War on Terror, the Iraq War and Medicare reform. Even a conservative economic agenda can give way during a presidential election campaign – a reminder that Keynesian-like countercyclical fiscal policy is not dead. Thus, in addition to the automatic fiscal stabilizers that give some cushion during economic hard times, discretionary fiscal policy may be exercised even by a government otherwise inclined towards conservative political economy. In contrast, in the Eurosystem, France and Germany's countercyclical deficit spending is no longer just a sovereign policy issue, insofar as it violates the Maastricht Treaty and threatens to undermine the EMU.[6]

Monetary policy is exercised by the Federal Reserve Board, under the authority of the Federal Reserve Act, which charges the Fed with the dual mandate of maximum sustainable output and employment and stable prices. This is in contrast to the inflation-only objective pursued by most Western central banks, e.g., the ECB (for the Eurosystem), the Bank of England, and the Bank of Canada. Any history of the Fed requires a thoughtful look back to the Great Depression, which according to some Monetarists, notably Milton Friedman and Anna Schwartz, was largely the result of the Fed's

failure to respond to the 1929 stock market crash and consequent liquidity crunch. The Great Depression was a singular and protracted event that shaped public policy in the U.S. for decades. Unemployment peaked at 25 percent in 1938, and the combined popular vote of the socialist and communist parties nearly reached three percent in 1932 – measures of the hardship and social unrest of the decade-long depression. The lesson from the Great Depression is that government legitimacy is not guaranteed by political democracy alone, and this is the context for what is, relatively speaking, an activist countercyclical fiscal and monetary policy framework in the U.S.

The history of American capitalism, as indicated in the above references to antitrust policy, fiscal policy and monetary policy, depicts a more moderate and balanced version of capitalism than is portrayed in the rhetoric of free markets. What is most interesting about American capitalism is the competition between the state and the markets over political economy outcomes. Markets, when competitive, are efficient in setting prices and allocating resources. However, in the absence of perfect competition or government regulation, markets cannot prevent monopolies and cartels, nor can markets smooth the troughs of the business cycle, nor can markets moderate speculative bubbles. The state, to the extent that it is not itself aiding and abetting monopoly and collusive behaviour or choking off countercyclical income supports or feeding the irrational exuberance of markets,[7] has a necessary and valuable countervailing role to play in the political economy of the U.S. The history of American capitalism certainly has an earlier and darker side, but after more than two centuries of practice, American capitalism is a mixture, somewhere between the excesses of 19th century capitalism and those of 20th century state socialism.

The pervasive rhetoric of free markets stands in sharp contrast to the history of American capitalism. It is as if the clock is to be turned back, and there are certainly forces in American society who would like to do just that. They would like to roll back the automatic fiscal stabilizers (welfare programs were scaled back significantly during the Clinton Administration), to eliminate discretionary fiscal policy (attempts have been made to pass a balanced budget Constitutional amendment), to relax antitrust enforcement to allow large

U.S. multinationals to compete globally and to focus U.S. monetary policy on inflation targeting (the debate over a dual v. inflation-only mandate continues both in and outside the Fed). On the other side, there are equally determined advocates of government intervention in the economy, particularly with respect to the big market failures: unemployment and monopoly power. Whatever changes do emerge, based on the last two-and-a-quarter centuries of tugging to-and-fro, it is likely to be evolutionary and gradual change as opposed to a revolutionary break with the past.

In conclusion, it remains to be discussed whether the historical or rhetorical version of American capitalism should be advanced on the international scene, especially to developing countries. One view is that economic development requires great sacrifice and hardship in the beginning and only later is it feasible to adopt something like America's mixed capitalism – economic development must precede political development. This would seem to be the view of a diverse group whose prominent members include the Washington Consensus,[8] the current Chinese leadership and former Prime Minister of Singapore, Lee Kwan Yew. An opposing view would emphasize the priority of human rights and political rights, but it remains to be seen whether and by whom the governments in developing countries can be held responsible. This appears to be an empty set, with India perhaps being the closest example of a developing country where democratic development is more mature than economic development. Ideally, both economic and political development would proceed in tandem. Pragmatically, the mixed capitalism model would combine market profit incentives and growth opportunities with income stabilization measures and regulatory safeguards against illegal or harmful market activities.

Endnotes

[1] The U.S. and the EU have exercised their respective economic clout to retain protections for specific domestic markets, notably agriculture, and this has not gone unnoticed in the South, where the double standard is the source of grievance against the

World Trade Organization, the new governor of international trade, that replaced the old Bretton Woods General Agreement on Tariffs and Trade (GATT).

[2] In the case of International Monetary Fund loans, the conditions attached required compliance with austere macroeconomic policies that stabilized financial markets at a severe price to local economies. The East Asian financial crisis of 1997-98 is an example of a sizable redistribution of income and wealth from foreign and domestic taxpayers, displaced workers, uninsured depositors and bankrupted local businesses to the foreign and domestic investors who were bailed out.

[3] For example, economic development once considered the domestic protection of emerging industries to be a legitimate form of government intervention and, in fact, a necessary exemption from free trade, in order to build self-standing, competitive industries. The argument is not compelling for large multinationals and their host governments. For these established players, the entry of outsiders is unwelcome competition, ostensibly on the grounds that state subsidization is fundamentally unfair and anti-competitive. Additionally, governments in developing countries, excluding the East Asian countries, have not demonstrated competence, fairness or integrity in managing economic development policy; therefore, the vacuum created has been quickly filled by free market solutions such as privatization, deregulation, free trade and free capital movements.

[4] The court agreed with Department of Justice Antitrust Division that Microsoft, in contravention of Section 2 of the Sherman Antitrust Act, had unlawfully maintained a monopoly in the Intel-compatible personal computer operating system market and had unlawfully attempted to establish a monopoly in the internet browser market and 2) that, in contravention of Section 1 of the Sherman Antitrust Act, Microsoft had illegally tied its Windows operating system to its Internet Explorer browser. The district court's remedy was divestiture such that Microsoft would be split into two separate business entities: one in the applications market and the other in the operating system market.

[5] The appellate court thus vacated (annulled) the divestiture remedy, allowing Microsoft to remain intact as a provider of both

operating system and application software. In addition, the appellate court reversed the lower court's determination that Microsoft had attempted to establish a monopoly with Internet Explorer, and it, therefore, vacated the lower court's decision that Internet Explorer was illegally tied to Windows. In 2001, in the case that was remanded to the U.S. District Court for D.C., the government dropped its original tying claim and chose not to pursue the breakup of Microsoft.

[6] The Treaty (Treaty of Rome that created the European Economic Community and was subsequently modified to include the EMU) provides the context for the ECOFIN-ECB dispute regarding Germany and France's violation of the deficit and debt ratios established in the Stability and Growth Pact. ECOFIN (EC council of economic and finance ministers) has a much broader economic mandate than does the ECB. According to the Treaty, ECOFIN's objectives include high employment, rising living standards, non-inflationary growth and environmental protection. These objectives are not always compatible, so it is not surprising that they are sometimes in conflict with the ECB's single objective of price stability. The conflict over economic goals is based on the institutional separation of economic power between a political body (ECOFIN) with a broad mandate and limited administrative power and a technocratic body (ECB) with a precise mandate and the corresponding authority and apparatus to deliver.

[7] The state is, however, Janus-faced. On the one hand, the state can and does intervene in the market to promote broader social goals; however, often at the same time, the state either chooses a *laissez-faire* approach or actively promotes anti-competitive behaviour. Several examples of the failed *laissez-faire* approach are in recent memory. Financial market deregulation, through the repeal of the depression-era Glass-Stegall Act, contributed to the conflicts of interest that emerged in the financing of Enron and its shadow partnerships. Leniency in the governance of the accounting profession prevented the separation of the audit and consultancy functions until after Arthur Andersen's collapse during the Enron scandal. The Department of Justice's decision to settle in the *U.S. v. Microsoft* case indicates a less than vigorous antitrust enforcement policy.

Similarly, examples of government interference for the purpose of creating a greater consolidation of market power are in the headlines. The post-war reconstruction in Iraq offers an example of American crony capitalism in the instance of the Halliburton-Cheney connection. Government subsidies of agricultural products (especially sugar and cotton) and tariffs on steel imports contradict the American rhetoric of free trade as developing countries in Latin American and Africa are well aware. Finally, the Bush tax cuts are reminiscent of the trickle-down, supply side economics of the Reagan decade.

[8] The Washington consensus emerged during the 1980s as an international champion of conservative political economy, comprised of an informal yet influential group of key officials from the U.S. Treasury, IMF and World Bank. The economists, bankers, and finance experts identified and prescribed an overarching framework of fiscal conservatism for the developing world and the transitional economies of the former communist world. Privatization of public assets and services, deregulation, open capital markets and elimination of domestic industry protections were promoted as the solutions to massive government deficits and debts, sluggish economic growth and high levels of unemployment and poverty.

On May 1st of this year 10 European countries joined the European Union (EU), bringing the total to 25 countries. For the most part the accession countries are small or medium-sized - Poland is not only the most populous but also most economically significant; the Czech Republic and Hungary occupy a distant 2nd tier; and the remaining seven countries (Estonia, Latvia, Lithuania, Slovakia, Slovenia, Cyprus and Malta) fall in an even more distant 3rd tier. Overall, the EU now comprises more than 450 million people and accounts for nearly $10 trillion or approximately 20 percent of the global economy's GDP. However, the accession of the 10 new members has increased the EU's population and economy disproportionately. Population has increased by 20 percent, but GDP has grown by only five percent. Therein lies one of the challenges for the EU - addressing the income gap across countries by promoting the convergence of national income as measured by GDP per capita.

Less than two months later, member countries concluded the drafting of a new EU constitution. Since the EU is a treaty-based supranational organization, the constitution is a legal document in the form of a treaty that all members must ratify, e.g., by legislative action and/or public referendum. Ratification may prove especially difficult in countries where popular support for national sovereignty continues to be vigorous. For example, the U.K., Denmark and Sweden have yet to join the European Monetary Union and submit to EU monetary policy. Nevertheless, the provisional constitution represents a significant success in light of last year's failed talks. On the contentious issue of voting majorities for EU decisions, an important compromise was reached between the so-called small states (e.g., the Benelux countries, Denmark, Austria, Portugal, Greece, etc.) and the large states (e.g., Germany and France). The double majority rule requires that EU decisions be supported by at least 15 member countries (or 55 percent of the total number of member countries as the EU expands) and by countries whose total population represents at least 65 percent of the total EU population. In addition, the EU

constitution limits the likelihood of a large state minority veto by requiring that at least four member states vote against a proposal, i.e., no combination of three of the four largest states (Germany, France, Italy and the U.K.) could block an EU decision even though 35 percent or more of the EU population may be represented by those three member states.

Centralized control of monetary policy in the EU has been one of the great controversies in the past decade. The European Central Bank, the EU's central bank for the 12 member countries that have adopted the Euro and yielded sovereign monetary policy to Brussels (referenda in the U.K., Denmark and Sweden rejected the Euro and EU central banking), continues to be at the centre of controversy in what is becoming a decisive challenge to EU supremacy by Germany and France. The Stability and Growth Pact adopted in 1997 and incorporated into the EU Treaty requires that member countries comply with deficit (3 percent of GDP) and debt ceilings (60 percent of GDP) judged consistent with business cycle smoothing (e.g., countercyclical spending during recessions) and long-term economic growth. From 2002 through 2004 (projected), Germany and France have failed to comply with these EU budget requirements, triggering a battle between EU bureaucrats, especially the European Commission (EC) and the ECB, and the national authorities of Europe's two most powerful nations. Despite the fact that the Treaty contains provisions for punitive sanctions in the event of budgetary noncompliance, ECOFIN, the EU's council of economic and finance ministers, has thus far been unwilling to proceed farther than simply identifying 2005, tentatively, as a target for Germany and France to return to budgetary compliance. From the German and French perspectives, suspension of deficit and debt ceilings is appropriate given their protracted sluggish, even recessionary economies of the past several years. Such provisions as the Stability and Growth Pact make for economic downturns and temporary suspensions of budget limits are regarded as insufficient from the national perspective of the German and French governments, while the EC and the ECB argue that Germany and France have well exceeded the timeframe of temporary and exceptional suspensions and that their non-cooperation threatens to subvert the fiscal-monetary policy framework of the EU.

There is, therefore, a natural conflict of interests between ECOFIN, a political body comprised of economic and finance ministers from the EU's member countries and the EC, the non-elected government bureaucracy that runs the EU on a day-to-day basis, and the ECB, the central bank that controls monetary policy for the Euro zone. Among ECOFIN members, subpar economic performance and political accountability (electability) provide the conditions for which EU economic policy may be too strict, as many EU member countries have discovered. The EC, on the other hand, is responsible for enforcing the Stability and Growth Pact and its fiscal policy constraints on national government spending, and the ECB, although in charge of monetary policy, argues that independent national fiscal policy-making threatens to undermine the European Monetary Union.

Related to the fiscal policy controversy over the Stability and Growth Pact is the continuing resistance to structural economic reforms in the EU. The kinds of reforms that are being advocated by Brussels include labour, product and welfare reforms intended to increase productivity, cost efficiency and competitiveness of the EU trading bloc. Europe continues to struggle with high levels of unemployment - higher than levels in North America for example - a fact that reform advocates attribute in large part to overly-protective labour laws and excessively generous social safety nets. Structural reforms, intended to reduce government intervention, thereby reducing government spending and taxes, clearly link to the fiscal policy of the Stability and Growth Pact. Economic reform in the EU is part of a global phenomenon that stretches back to the economic reforms that swept the U.K., the U.S., New Zealand and Canada in the last two decades of the 20th century and that extends out to the developing and transitional (i.e., formerly communist) countries by means of the World Bank and the International Monetary Fund.

The ECB consistently champions the cause of structural economic reform, arguing that the effectiveness of its mandate to maintain price stability is dependent upon not only upon the fiscal responsibility of the member countries but also upon competitive, innovative and efficient markets, i.e., markets freed from the constraints of excessive and costly government regulation.

Connecting this long run, supply-side macroeconomic approach and the ECB's price stability mandate is the judgment that demand-oriented countercyclical government intervention combined with the high production costs of a heavily regulated economy tend to produce an inflationary bias in the economy, which in turn tends to impede long run economic growth. This is the legacy of the stagflation of the 1970s, and the ECB, in keeping with the monetarist tradition of the formerly dominant Deutsche Bundesbank, is aggressively inflation-conscious. In fact, the ECB is one of the world's most successful inflation-targeting central banks, notwithstanding its claims to be more balanced in assessing inflation and unemployment tradeoffs. The U.S. in comparison has slightly higher inflation and lower levels of unemployment; although, the greater flexibility of labour and product markets in the U.S. is part of the explanation. According to the ECB and other advocates of structural economic reform in the EU, greater price and wage responsiveness to natural market conditions will result in both lower inflation and lower unemployment. The supply-side focus of structural economic reform is expected to produce a win-win result, with respect to inflation and unemployment in the long run, where traditional demand-side Keynesian policies involved short-run tradeoffs between inflation and unemployment. The ECB's monetary policy, structural economic reform and the Stability and Growth Pact's limits on fiscal policy represent the new EU integration in a conservative economic framework.

Thus far, consideration of the political economy of EU integration has been mostly European in focus. Consideration of the EU's competition policy and its foreign policy will introduce the external dynamic between the EU and its principal rival, the U.S. EU competition policy is comparable to U.S. antitrust policy. In the EU, antitrust policy is distinguished from merger policy, while in the U.S. antitrust policy is defined to include what the EU would call antitrust policy as well as merger policy. For clarity, the EU definition will be followed. Antitrust policy in both the EU and the U.S. is intended to identify, eliminate and punish monopoly and cartel pricing behaviour. Merger policy, on the other hand, is intended to prevent the combination of firms which would likely lead to the kinds of outcomes for which

antitrust policy was designed. In short, merger policy is *ex ante* competition policy, and antitrust policy is *ex post* competition policy.

The EU's competition policy has been characterized as converging/diverging from U.S. competition policy, depending on one's perspective. Officially, the U.S. Department of Justice (DOJ) and the EC favour the convergence interpretation, but Microsoft and GE would probably contest this view. In the most prominent and currently pending EU antitrust case, the EC found Microsoft guilty of anti-competitive behaviour and imposed what even the DOJ considers to be severe penalties. Microsoft has since appealed the EC's decision to the EU's Court of First Instance. Should Microsoft lose this appeal, it can then make an appeal to the European Court of Justice. It is not unheard of for the EU courts to reverse EC decisions,[1] so the *Microsoft* case is not over yet. However, it does reveal important differences of emphasis in the investigation of antitrust violations. The EC's decision is more damaging to Microsoft than was the recent DOJ settlement with Microsoft, although the first *Microsoft* decision rendered by the U.S. District Court in the controversial divestiture ruling of 2000 would have been far more damaging to Microsoft than the EC's judgment.

The most controversial case in Trans-Atlantic competition policy involved the planned merger between GE (U.S.) and Honeywell (U.S.) The DOJ approved the merger with nominal conditions, while the EU blocked the merger outright, much to the consternation of U.S. officials and business. Fundamental to the implementation of merger control policy is the definition of the markets and products impacted. The EU adopted a much narrower definition of the relevant markets and products, and the EU's analysis of post-merger outcomes indicated that the merger would negatively impact competition and consumer welfare. However, two other high-profile merger cases suggest that the EU's merger policy may not be immune to anti-competitive influence. The Big Pharma merger between Sanofi-Synthélabo (France) and Aventis (France), creating the third largest pharmaceutical company in the world, has been accompanied by suggestions that the French government interfered on behalf of the Sanofi-Synthélabo and at the expense of the Novartis (Switzerland).

In the second merger case, Sony (Japan) and Bertelsmann AG (Germany) proposed a merger that would combine their respective recording businesses. The EC initiated an in-depth investigation in February 2004, based on the preliminary finding that the merger could pose anti-competitive concerns since it would result in a four-firm concentration of 80 percent in the recording industry in the EU and in most national markets. In July, the EC decided not to oppose the merger between Sony and BMG, an indication that the EC's competition policy stance regarding market concentration and economies of scale versus competition and consumer welfare may be changing. In 2000, a similar merger proposal between Time Warner (U.S.) and EMI (U.K.) - a merger which would have also increased the four-firm ratio in the recording business to 80 percent - was withdrawn for fear that the EC would block the merger. Whether the Sony-BMG represents a shift in EU antitrust thinking towards a common Trans-Atlantic competition policy remains to be determined, although the EC's new Merger Regulation, mirroring U.S. merger guidelines, now allows merging firms to use economic efficiency arguments to counter the potentially harmful anticompetitive effects of the merger.[2]

Finally, there is no better example of the political divisions within the EU and between the EU's dominant member states, Germany and France, and the U.S. than recent foreign policy towards Iraq. There has been no common European position - Germany and France were vocal in their opposition to the Iraq War, while, the U.K., the Netherlands, Italy, Poland and Spain[3] demonstrated their support for the Iraq War by sending troops to Iraq, albeit in small numbers in comparison to the U.S. forces. One of the EU constitution's most significant institutional changes is the new portfolio of EU foreign minister, a position which will likely raise the visibility of national-supranational sovereignty, especially in foreign policy venues where Trans-Atlantic views are polarized - post-war Iraq seems to be the most likely testing ground for the new EU foreign minister should the EU constitution be ratified in the near term. It remains to be seen how EU foreign policy (broadly encompassing international economic policy, including competition policy) *vis-à-vis* the U.S. will develop. Will the EU-U.S. relationship in international politics and economics be characterized more by its competitive rivalry or its

collaborative partnership? How then will the two dominant political economic blocs, the EU and the U.S., respond to 21st century international challenges, such as the emergence of a third major political economic bloc in China, the anti-Western backlash of radical non-state actors (e.g., al-Qaeda), international aid and trade under the Western, post-World War II Bretton Woods institutions (International Monetary Fund, World Bank and World Trade Organization)? How effectively will the EU be in unifying the nationalist orientation and sovereign foreign policies of 25 European countries whose history is richer in conflict than cooperation? Will the EU be the means by which the former Great Powers of Europe will project power in international relations? The fundamental question is - will the 21st century witness the emergence of a cohesive United Europe?

Endnotes

[1] In 2002, in a significant display of judicial review, the EU's Court of First Instance overturned three EC merger prohibitions - the 1999 Airtours/First Choice merger proposal between two British firms, the 2001 Schneider/Legrand merger between two French firms and the 2001 Tetra Laval/Sidel merger between a Swiss and a French firm. The Tetra Laval/Sidel merger is currently under review by the European Court of Justice.

[2] The economic efficiency argument is largely due to the influence of the Chicago School of antitrust thought which displaced the Structuralist School as the dominant influence in antitrust policy and jurisprudence beginning in the 1970s. Structuralists generally maintain that greater market concentration is harmful to competition and tends to promote abuses of economic power. In contrast, according to the Chicago School market concentrating mergers may be beneficial, since firms will realize greater economies of scale and consumers will benefit from lower prices, higher quality, etc.

[3] The March 2004 general election in Spain, following a deadly terrorist attack on the Madrid rail system, produced a surprise victory for the Socialist party which had promised to recall Spanish troops from Iraq immediately. By the end of May 2004, the new

government's election promises had been honoured - all Spanish troops were recalled from Iraq.

The 20th century was a period in U.S. history that was filled with war and wartime emergencies. There were two world wars, two wars against communist regimes in Asia and one current, and open-ended, war against terrorism. Although not highly visible until after the September 11, 2001 attacks on New York and Washington, D.C., the war on terror was arguably 'on' in view of the 1993 World Trade Center attack, the 1998 East African embassy bombings and the 2000 attack on the U.S.S. Cole off the coast of Yemen. From World War I through the present, the U.S. has been engaged in a major war almost one out of every four years - a lot of wartime for the state to be allowed to exercise extraordinary powers.

During wartime, the state seeks to maximize its authority in an effort to unite the entire political, economic and military strength of the country against the enemy. In the U.S., the constitutional separation of powers grants war powers to the executive branch and the Congress, while the Supreme Court, on behalf of the third branch of government, the judiciary, arbitrates the constitutional exercise of these powers. It is the very essence of the American constitutional system of government that the power of the state be fragmented and opposed in order to prevent the consolidation of the entire state apparatus, however meritorious the objectives, reflecting the strongly held belief that the concentration of power is dangerous.

It is not always the case that the President and the Congress are on one side of the debate with the Supreme Court often on the other side. The 1st Amendment cases of World War I and the Japanese-American civil liberties cases of World War II stand out as examples where the three branches of government shared a common belief that the exceptional circumstances of war necessitated and justified the curtailment of individual liberties. The War Powers Act (1974) stands out, albeit temporarily due to the weakened state of the Watergate-stained Presidency, as a classic Congressional challenge of the President's power to wage an undeclared war. However, in the main, the principal configuration in the wartime powers' debate, to

the extent that there is a debate at all, puts the President and the Congress on one side and the Supreme Court on the other.

The Supreme Court played an important constitutional role during each of these war periods - sometimes endorsing, sometimes checking the powers of the other two branches of government, especially the Executive Branch. Each of the Supreme Court cases discussed in this essay arose during a time of war - a war that required a major undertaking on the part of the U.S. Government, both the executive and legislative branches, to rally troops and domestic production in the war effort to defeat a foreign enemy. Each case provides an insight into a time and place in American history when many in the U.S. felt threatened by forces from overseas - during World War I, it was the Imperial Germany Army threatening Europe and the Atlantic; during World War II, it was the Japanese threatening the U.S. West Coast; during the Korean War, it was the prospect of World War III with Communist China; during the Vietnam War, it was the domino effect scenario of Southeast Asian countries falling to communism; and most recently, during the war on terror, it is the global war on clandestine terror which has penetrated the Atlantic and Pacific ocean bulwarks of American defense.

From World War I, the principal civil liberty case, a 1st Amendment case, was *Schenck v. U.S.* (1919). In *Schenck*, the defendants' circulation of anti-war pamphlets was judged to be unprotected speech, since the material was intended to hinder the U.S. war effort by inciting draft dodging. This was the Supreme Court case where Justice Oliver Wendell Holmes enunciated his famous 'clear and present danger' doctrine in his opinion for the Court. Upholding the Congress' Espionage Act of 1917, the Court argued that freedom of speech was not absolute and that what might be acceptable during peacetime might be illegal and punishable by law during wartime. In another noteworthy World War I civil liberty case, *Abrams v. U.S.* (1919), Justice Holmes, this time dissenting from the Court opinion, established a place for himself as a defender of the 1st Amendment. In *Abrams*, the defendants were found guilty of obstructing the U.S. war effort, notwithstanding the claim, accepted by Holmes, that their propaganda efforts were intended to end U.S. support for the anti-Bolshevik counterrevolutionary forces and not to obstruct the U.S.

war against Germany. Counterbalancing his 'clear and present danger' doctrine, Justice Holmes articulated his famous free speech metaphor of the 'marketplace of ideas' wherein free speech would naturally, through the competition of ideas, lead to the emergence of truth. Despite Holmes' dissenting opinion in *Abrams* in which he alluded to the U.S. Government's abuses of wartime power through the 1798 Sedition Act, the Court came down on the side of wartime suspension of civil liberties. A third important 1st Amendment case under the Espionage Act, *Debs v. U.S*. (1919) solidified the Court's position on free speech during wartime. Eugene Debs, head of the American Socialist Party, was found guilty of obstructionist anti-war speech, which was therefore not protected by the 1st Amendment.

From World War II, the principal civil liberties challenge lay in the U.S. Government's forced evacuation and internment of Japanese-Americans (including U.S. citizens). In *Korematsu v. U.S.* (1944), the Court, in an opinion authored by Justice Hugo Black, upheld the evacuation of U.S. citizens of Japanese descent from military areas on West Coast. Justice Black went to some pains in his opinion to distinguish the relocation centers for Japanese-Americans from the Nazi's concentration camps; however, American guilt was finally, albeit belatedly, acknowledged by the apology and reparations provisions of the 1988 Civil Liberties Act. Justice Black later became one of the great champions of American civil liberties - like Justice Holmes, he had experience on both sides of the wartime emergencies question, but ultimately came down on the side of individual liberties versus the unlimited emergency powers of the state.

In *Youngstown Sheet and Tube Co. v. Sawyer* (1952), during the Korean War, the Court struck down the Truman Administration's seizure of the nation's steel mills. The 1952 steel seizure case developed within the context of wartime wage and price controls. The threat of a strike in the crucial steel industry prompted a radical response by the Truman Administration. In this crucial test of constitutional separation of powers during a wartime emergency, the Court decided, in an opinion authored by Justice Black, that the executive branch had exceeded its authority in expropriating the nation's steel mills, notwithstanding the wartime emergency and

perceived risks of war with China. *Youngstown* represents one of the most expedited of all Supreme Court cases - President Truman's executive order was struck down less than two months after it was issued. Incidentally, the steel seizure case is regarded as landmark victory for the constitutional separation of powers by Chief Justice William Rehnquist in his recently-updated, popular history of the Supreme Court.

Towards the beginning of the end of the Vietnam War, the U.S. Government, citing national security, attempted to suppress the publication of the classified History of U.S. Decision-Making Process on Viet Nam Policy (the Pentagon Papers). The *New York Times* and the *Washington Post* had received copies of the report and were preparing to publish excerpts. In *New York Times Co. v. U.S.* (1971), the Court issued a per curiam (i.e., an opinion of the entire Court as opposed to one or more members) denying the Nixon Administration's bid to enjoin publication of the Pentagon Papers. In a separate opinion in which Justice William Douglas concurred, Justice Black elaborated on the importance of a free press during national emergencies quoting at length from Chief Justice Charles Evans Hughes' opinion in *De Jonge v. Oregon* (1937):

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

Within the context of the post-9/11 war on terror, the Court, in *Hamdi v. Rumsfeld* (2004), asserted the due process rights of a U.S. citizen captured in Afghanistan, alleged to be in league with the Taliban and held as an 'enemy combatant.' In a mixed decision, the Court conceded the President's authority to detain U.S. citizens as 'enemy combatants' pursuant to the Congress' post-9/11 resolution

entitled Authorization to Use Military Force; however, it recognized the due process right of the defendant to an impartial hearing. Writing the judgment for the Court, Justice Sandra Day O'Connor, citing *Youngstown*, wrote "[w]e have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." Furthermore, in striking the appropriate constitutional balance between wartime powers and civil liberties, Justice O'Connor wrote that "[I]t is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." Decisions in two other 'enemy combatant' cases announced by the Court the same day (*Rumsfeld v. Padilla* and *Rasul v. Bush*) suggest a pattern in the Court's view regarding civil liberties of 'enemy combatants' - much like the *Schenck*, *Debs* and *Abrams* cases suggest more than an anomaly in the Court's upholding of the 1917 Espionage Act.

While the cases selected might suggest a progressive evolutionary path in the law pertaining to civil liberties, it would be unwise and dangerous to draw such an inference. The law, unlike some of the more rigorous physical sciences, does not claim to follow an ever-ascending path towards completion. Quite the contrary, the law simply reflects the politics, values and power sharing in a society at a particular point in time under particular circumstances. What can be drawn from the cases referenced above is that, as landmark cases in the history of the 20th century Supreme Court, the American constitutional system of separation of powers and checks and balances has been severely tested under wartime conditions and appears to have, in the main, demonstrated an uncommon respect for the rule of law as applied to individual liberties.

Every war, every depression, every national emergency will challenge the constitutional system. On the one hand, there is a natural response to rally the troops, rally the workers, rally the nation, to endure sacrifices in the short-term in order to defeat an enemy who seeks to impose a permanent end to peace, freedom and prosperity. During wartime and other such circumstances where the scale and

scope of imminent catastrophe threaten, it is the President and the Congress who make ready the nation's defenses. On the other hand, there is the counter response to maintain the rule of law, even under duress, for fear that temporary concessions made for the sake of the efficient prosecution of the war will become permanent. This advocacy role for the rule of law during exceptional circumstances ultimately resides with the Supreme Court - the final court of appeal regarding questions of the constitutional exercise of government authority. There is no guarantee that what has been characterized as, on balance, a successful protection of democracy against the encroachments of authoritarianism, will persist indefinitely. Each next national emergency will provoke an unpredictable response - unpredictable in the sense that the future is inherently unknowable and from the present looks to be filled with 'what-ifs,' e.g., what if anti-American terrorism on the U.S. mainland were to become a daily and graphically visual occurrence and not just a permanent and unsettling threat? Unfortunately, America's history of the power of the state during wartime may not be too helpful in predicting how the its constitutional system would stand up against such a murderous assault. Even reaching back into America's past another 50 years earlier than World War I to examine the constitutional crisis over President Lincoln's suspension of the writ of *habeas corpus* during the Civil War fails to produce a suitable parallel for the contemporary threat of a clandestine war waged according to no rules, on American soil and by martyrs of a foreign, non-state entity.

In Europe as in the U.S., the economic system is a hybrid of the state and the market. The system is state capitalism - neither pure free market capitalism nor absolute central planning but something in between. While generally regarded as capitalist economies, which they are relative to the economies in most of the rest of the world, the European Union (EU) countries and the U.S. have long integrated a government regulatory (and occasionally ownership) function. In fact, legal institutions such as private property and contracts, which are fundamental to free capital and product markets, exist because they are created and enforced by government. In addition to supporting the institutional infrastructure of the capitalist economy, governments influence and often manage the economy in a variety of contexts, including monetary policy, fiscal policy, trade policy, industrial policy, labour policy, environmental policy and competition policy. This is the case in the U.S. no less than in Europe, notwithstanding the greater degree of European state intervention. In this essay, only one of the many economic theaters of state action will be discussed - competition policy - and the focus will be on EU competition policy with attention to the political economy dynamic.

In the EU, competition policy is comprised of antitrust, merger control and state aid policies. In contrast, competition policy in the U.S. is limited to antitrust and merger control policy. Antitrust policy is directed towards monopolistic or collusive behaviour that threatens competitive market outcomes, generally at the expense of consumers. It is competition policy *ex post* in the sense that it focuses on actual anti-competitive effects and on the available remedies. In contrast, merger control policy is *ex ante* competition policy, i.e., it is intended to prevent the probable or likely anti-competitive effects of proposed mergers. State aid competition policy is unique to the EU - it applies within the 25-member economic union but not beyond.[1] For the purpose of this essay, the discussion of competition policy will be restricted to its more familiar antitrust and merger control components with emphasis on the higher profile, relatively straightforward and often contentious merger control policy.

As the executive and administrative branch of the EU, the European Commission is responsible for competition policy, which it enforces through the Competition Directorate-General (a Directorate-General is similar to a Department or Ministry). In the U.S., competition policy is enforced jointly by the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) - the former being attached to the Executive Branch and the latter being an independent federal agency. In the EU, the EC exercises considerably more upfront authority than does its counterparts in the U.S. The EC decides whether to allow or block a proposed merger, and its decision is binding unless it is reversed upon appeal to the European courts - the Court of First Instance (the first court of appeal) and the European Court of Justice (the highest court of appeal). For instance in the case of the Tetra Laval/Sidel merger, the EC blocked the merger in 2001. In 2002, Tetra Laval won a reversal of the EC's decision from the Court of First Instance. The EC's appeal of the lower court's decision is currently pending judgment by the European Court of Justice. The process is similar with respect to the EC's antitrust enforcement decisions, as illustrated in the high-profile *Microsoft* case, where the EC's judgment against Microsoft is scheduled for September review by the Court of First Instance. In contrast, in the U.S. both the FTC and the DOJ must go through the courts in order to enforce the prohibition of a merger. For example, the FTC in blocking the 1997 Staples/Office Depot merger had to obtain a federal court order to prevent the combination. Similarly, the DOJ must prosecute its case against a merger in the federal courts as in its lawsuit (*U.S. v. Oracle*) to prevent Oracle's proposed acquisition of rival PeopleSoft.

Thus far, the EU and U.S. competition policy regimes are comparable. Structurally, they are compatible. However, on substantive issues of competition policy, there has been cause for concern, at least from American quarters, that EU and U.S. competition policy may be incompatible with the further implication that EU competition policy may be biased. These concerns date back to 1997 when the EC reluctantly approved the Boeing/McDonnell Douglas merger that resulted in a two-firm market for large commercial jets - the American Boeing and the European Airbus. Arguably American defense

interests exerted considerable influence on the EC's decision, and the variation on the failing firm defense (McDonnell Douglas was not considered a viable long-term competitor) along with numerous assurances of future counter-anti-competitive conduct on the part of Boeing were little more than face-saving arguments to defend the EC's accession to U.S. demands. In the meantime, the 2001 GE/Honeywell case marked a decisive split between EU and U.S. competition policy officials, which continues to be a reference point for both convergence and non-convergence views of Trans-Atlantic competition policy.

In 2001, the GE/Honeywell merger was not the only merger blocked by the EC. Five mergers were blocked in 2001,[2] more than in any single year since EU merger control policy has been in existence. In fact there have only been 18 blocked mergers and none of them have occurred since 2001. Of the 18 mergers blocked by the EC, 12 were domestic mergers, only two of which were U.S. domestic mergers - MCI Worldcom/Sprint (also blocked by the DOJ) and GE/Honeywell. Furthermore, in 2002, three of the EC's merger prohibitions were annulled. In *Airtours v. Commission*, the Court of First Instance annulled the EC's 1999 decision to block the merger between the British holiday tour firms Airtours and First Choice. The EC had argued that three firms controlling 85 percent of the market would dominate short-haul package holiday tour market and that competition and consumer welfare would suffer. The Court countered that the creation or strengthening of an oligopoly was not inherently anti-competitive and that it was therefore incumbent on the EC to demonstrate, clearly and compellingly, the anti-competitive effects of collective dominance resulting from a merger. *Airtours v. Commission* is a classic example of the confrontation between structuralist and economic efficiency arguments in a European context.[3] In *Tetra v. Commission*, the Court of First Instance issued a similar judgment to the effect that anti-competitive effects had to be demonstrated and not presumed. As mentioned earlier, the *Tetra* case is pending before the European Court of Justice. Finally, in *Schneider v. Commission*, while the Court maintained that the EC had failed to make the case that the merger would have anticompetitive effects

across the EU, it ultimately relied on a technicality to annul the EC's prohibition of the merger between two French firms. Thus, the overall EU competition policy, comprising both its executive and judicial branch, has been favourably disposed towards mergers.

However, three high profile cases in 2004 raised doubts about the extent of the Trans-Atlantic convergence, notwithstanding the fact that EU antitrust and merger policy affecting U.S. firms post-GE/Honeywell has been otherwise uneventful. First, in March, the EC found Microsoft guilty of abusing its dominant position (i.e., monopoly power) in the personal computer (PC) operating system (OS) market and issued a record antitrust fine and an order for Microsoft to create a 'vanilla' Windows product. The DOJ had previously settled its lawsuit against Microsoft under terms more favourable to Microsoft and certainly more favourable to Microsoft than the initial 2000 divestiture judgment that was subsequently overruled by the U.S. Court of Appeals. Second, in April the EC approved the merger between the French pharmaceutical firms Sanofi-Synthélabo and Aventis amid charges that the French government interfered in order to secure a French merger instead of a French-Swiss merger between Aventis and Novartis. The new French pharmaceutical giant, Sanofi-Aventis, will be the world's third largest pharmaceutical firm behind American Pfizer and British GlaxoSmithKline. Third, in July the EC approved the music recording industry merger between BMG and Sony, creating the second largest music recording entity behind Universal and resulting in a four-firm concentration ratio of 80 percent in EU markets. The four firms' parent companies are the French Vivendi-Universal, the German-Japanese BMG-Sony, the American Time Warner and the British EMI. The BMG-Sony merger is particularly interesting given that four years ago Time Warner had withdrawn its bid for EMI, undoubtedly fearing that the EC during its in-depth Phase II investigation would reject the outcome of an four-firm 80 percent concentration ratio among Warner/EMI, Universal, BMG and Sony and opting to concentrate on the simultaneous AOL/Time Warner merger.

In examining the arguments for and against the emergence of uniform and uniformly enforced Trans-Atlantic competition policy, questions arise as to whether it is even possible to achieve unanimity

in what are fundamentally normative, not value-neutral, economic considerations. Economic policy is by its very nature normative, although economists have not and likely will never reach consensus on whether economic theory is normative (values-based adjudicated by conflicting interests) or positive (value-neutral adjudicated by scientific method). Clearly competition policy is a form of economic policy, which in turn is subject to political considerations, thus the term 'political economy.' It should therefore come as no surprise that EU competition policy is political and thus 'biased' in the sense that EU interests are rated higher than are non-EU interests. The foregoing historical sketch of EU competition policy decisions against the backdrop of the Boeing/McDonnell Douglas and GE/Honeywell merger cases provides the factual content for this thesis. It is ironic that competition policy regards firms as the principal actors whose behaviour is to be regulated when in fact nation-states and unions of nation-states have equally, if not more important, roles on the global stage.

Competition is nevertheless maintained not just in capital and product markets but also in ideological markets, since different schools of thought must be advanced to articulate and defend the conflicting political interests. The GE/Honeywell merger case and *Airtours v. Commission* provide fairly straightforward examples where two competing views of competition policy collide. In the case of the GE/Honeywell merger, the DOJ articulates the economic efficiency argument for market concentration, while the EC advances the argument that concentrated economic power tends to promote abuses of power. In *Airtours v. Commission*, the EC maintained essentially the same argument, while the Court of First Instance adopted a position consistent with the DOJ's economic efficiency rationale in the GE/Honeywell case. What *Airtours v. Commission* also reveals is that even within the EU, there is no monolithic view of competition policy. The best instance of the non-homogeneous view of competition policy in the U.S. is afforded in *U.S. v. Microsoft* antitrust case where the U.S. District Court found Microsoft guilty of anticompetitive monopolist conduct and ordered the radical remedy of a Microsoft breakup. The U.S. Court of Appeals subsequently rejected

the remedy as excessive and inappropriate and, in remanding the case back to the lower court, instructed the court to reconsider the previous judgments against Microsoft as well. The difference in *U.S. v. Microsoft* hinged on the different assessments of anticompetitive harm due to monopoly power. According to the initial District Court ruling, following the logic of the Structuralist School of antitrust thought, unregulated monopoly power entails anticompetitive harm. In contrast, according to the Court of Appeals' interpretation of the logic of economic efficiency, monopolies, especially those in the high-tech sector, are transitory and therefore limited in economic power owing to the nature of dynamic, innovation-based competition, wherein today's monopolist may very well become tomorrow's also-ran.

In conclusion, there are two principal divisions between EU and U.S. competition policy. One is ideological, and the other is nationalistic/regionalistic. The view that market concentration tends to promote the abuse of market power is ideologically opposed to the view that economic efficiencies resulting from market concentration may justify market power, at least in the short run. These opposing views are not unique to the European-American debate regarding competition policy. They have figured prominently in the post-World War II history of antitrust policy in the U.S. and have recently acquired greater visibility in the EU owing to key court rulings. National/regional preferences may be in some cases be muted by the transnational economic influence of large multinational firms; however, the GE/Honeywell merger shows that the influence of the state (in this case the EU) cannot be easily dismissed, at least where powerful economic nation-states are concerned. Furthermore, the Sony-BMG offers an interesting example of what is probably a combination of a change in EC thinking on merger control policy as well as an assertion of EC interests in promoting domestic-based firms. Certainly, the Sanofi-Synthélabo/Aventis merger case provides a clear reminder that nationalism can still be an assertive force in competition policy. Of course, Europeans would point to the Boeing/McDonnell Douglas merger case as vintage American national bias. Competition policy is susceptible to both ideological and territorial biases no less in Europe than in America. It is political

economy - the intersection of economic theory and the politics of power and competing interests.

Endnotes

[1] No such policy framework exists in the U.S., but if one did, it would likely address differential state and community tax and spending incentives offered to attract high-employment firms, e.g., economic incentives provided by many Southeastern states to attract automobile manufacturers.

[2] The five mergers blocked by the EC in 2001 were GE/Honeywell (both U.S. firms), Schneider/Legrand (both French firms), Tetra Laval/Sidel (Swiss and French firms, respectively), SCA/Metsä Tissue (Swedish and Finnish firms, respectively) and CVC/Lenzing (British and Austrian firms, respectively).

[3] In the history of American antitrust thought (antitrust policy is the American term for competition policy), the Structuralist School of thought maintained that market structure was a useful guide to market outcomes, i.e., concentrated markets would tend to produce producer-biased outcomes at the expense of consumers. In contrast, the Chicago School of antitrust thought introduced the logic of economic efficiency as the means and end of antitrust policy and argued that the market outcomes could not be deduced from market structure alone.

Many Canadians consider themselves to be legitimate dissenters from what they perceive to be a monolithic, dominant American worldview, and this has often manifest itself as condemnation not just of American foreign policy but of 'things Americans' in general. Often enough, anti-American sentiments reflect what can generously be described as an internationalized, anti-establishment reaction of the powerless against the powerful. On one hand, this Canadian reaction belies Canadian parallels, e.g., aggressive, materialistic, self-righteous, ignorant and self-absorbed attitudes and behaviour are all too common if you live in Toronto (as I have for the past 17 years). On the other hand, this Canadian reaction is valuable as dissent regardless of substance, so long as violence is not the means of delivery.

To an American in Canada, as no doubt in any other country, the image of the 'ugly American' is unpleasant (although not unfounded), especially when the ugliness so ascribed seems to transcend political boundaries. However, taking a larger view with due regard to history, an American should recognize and appreciate Canadian dissent insofar as it represents non-violent opposition to dominant power - a theme that is enshrined in the civil liberty protections and separation of powers doctrine of the U.S. Constitution. Acknowledging the value of Canadians' dissent neither entails agreeing with their criticisms nor accepting their motives. Dissent, in and of itself, is a check on power and has value on that basis alone.

Canada occupies a uniquely advantageous position in the world. Its comparative advantage in international trade and international relations is geographic proximity to the U.S. While not blindly following American foreign policy (as in the Vietnam War or the Iraq War), Canadians do benefit from the exercise of U.S. economic, political and military power. While Canadians are free to criticize what the rest of the world would cynically describe as their benefactor, it is nevertheless to their credit that Canadians choose dissent over sycophancy. And it is to the benefit of Americans, that non-violent, external dissent provides a further check against the abuse of power.

Free speech is generally recognized to be one of the fundamental civil rights in the American constitutional system. It is among the first of the civil rights (second only to freedom of religion) enshrined in the American Bill of Rights - the first 10 amendments of the U.S. Constitution and a descendant of the English Bill of Rights[1] – and by means of the 14th Amendment, its protections are extended beyond the federal government to include state and local governments as well. The principle of the circumscribed power of the State is a critical tenet for a majoritarian democracy that protects minority views and dissent. The free speech guarantee, like other civil rights' protections, delineates the power of the State and the rights of the individual, although that line of demarcation cannot be absolutely fixed as Justice Oliver Wendell Holmes observed in the World War I free speech case, *U.S. v. Schenck* (1919).[2] What was at issue then is at issue now in the civil liberties cases emerging from the post-9/11 war on terror and has been at issue for centuries ... even millennia. That issue is whether and to what extent individual civil liberties must give way to the collective right to self-defense. The 'State versus Individual' theme is not new to the world stage - it is a legacy dating at least as far back as the ancient Greeks and is vividly captured in Sophocles' 5th century B.C. wartime play, *Antigone*.[3]

While the civil libertarian gains have been significant, the classic mileposts do not disclose all. They do not reveal the property bias of the English Bill of Rights, the racial bias of the 1789 U.S. Constitution and Bill of Rights or the 'great man' bias of the ancients. Equally important, there are fundamental civil liberty issues that remain outside and beyond the historical and romanticized 'State versus Individual' context. In particular, it is clear that the State is not the only power centre against which people seek their freedoms. It is also clear that the silencing of free speech is made effectively benign and even legitimated by the concentrated control of access to venues and audiences and by saturation of these venues and audiences with mass-produced speech.

It is important to recognize the limits of free speech, since it is not by any means an absolute right. The speech content with which

this essay is concerned is political and non-violent but excludes obscenities, profanities, incitements to violence, intimidation, threats, slander and libel, all of which are arguably 'political' in a broader sense. The protection of free speech is usually applied to the interaction between the individual and the government. For example, a person writing an opinion piece in the local paper might not be imprisoned for criticizing the town council, Mayor, state legislature, Governor, Congress or the President, but then detention is not the only deterrent available to governments. Government is not the only form of organization intent on controlling free speech. One may suffer inconvenience from any number of other quarters where strongly held opinions are different and where power and influence are not negligible. For example, an employee (management or labour) would be ill advised to assume parallel free speech protections in the workplace before publicly criticizing the questionable behaviour of his/her employer. Whistleblowers and others who challenge business, industry, non-profits, unions and other established organizational interests are not completely unprotected; however, these protections tend to be remedies after the fact and only through the courts.

Freedom of speech does not provide freedom from all consequences. Nor does it provide freedom in all contexts. While freedom of speech protects the individual's freedom to speak or write something, it in no way guarantees that what is spoken or written will be heard or read. This can be quite frustrating for those who believe that freedom of speech is somehow connected with the right to have one's voice heard or message read. There is no such guarantee that assures everyone the same opportunity to express his or her opinions in a public forum. For instance, in many public policy discussions, such as Political Economy, credentials and expertise are used to filter what otherwise might be a veritable deluge of opinions. Weblogs, opinion/editorial columns and small-circulation magazines are important alternatives. Again, there is no guarantee that everyone who wants to be heard or read will be.

Actual freedom of speech is clearly connected with power (economic, political, religious, etc.) The U.S. Constitution addresses only the prohibitive powers of the State. Otherwise, it does not address

the connection between power and free speech. Media, business and government celebrities are able to influence American perspectives not just because they have a certain subject matter expertise and not just because they are protected under the 1st Amendment, but also, and significantly, because they are guaranteed audience access by the economic and/or political clout of their organizations. In contrast, among populists, the connection between power and free speech is important and relevant. According to the populist tradition, the concentration of economic and political power is inherently antithetical to civil liberties such as free speech.[4] "Power tends to corrupt; absolute power corrupts absolutely" is the populists' watch phrase.[5]

Free speech, then, is not an absolute. Within limits, there is a free speech guarantee, but even this guarantee is limited by the fact that while one can speak freely without fear of government reprisal, nobody has to listen. The right to be heard is not a right that is constitutionally protected; it is a right or privilege that accompanies power or influence. Unfortunately, Justice Holmes created, or at least perpetuated, the myth of the free and fair competition of ideas with his famous 'marketplace of ideas' metaphor, according to which truth necessarily wins the day.[6] Although rhetorically brilliant, the metaphor bears no resemblance to the real world where equal protection of free speech pales in comparison to the unequal promotion of free speech. The economic clout of AOL/Time Warner (owner of CNN), Disney (owner of ABC News) and GE (owner of NBC News) is a virtual guarantee that the opinions expressed in their respective news organizations will have currency regardless of their 'truth' status. Michael Moore's Fahrenheit 9/11, however valuable as wartime dissent, is hardly more promising, since it, too, represents nothing more than a different set of opinions whose access to the public stage has been purchased with the same currency. There is reason to believe that the best ideas, Justice Holmes' 'truths,' may often never see the light of day and not because they have been suppressed.

Endnotes

[1] In 1689, exactly one hundred years earlier, its historical antecedent, the English Bill of Rights, emerged from the 17th century conflict between the English Parliament and the Stuart kings, formally marking England's transition from divine right and absolutist monarchy to constitutional monarchy and the rule of law.

[2] In *U.S. v. Schenck* (1919) the defendants' circulation of anti-war propaganda aimed at new recruits was judged to be a hindrance to the U.S. war effort in violation of the Espionage Act. In writing the opinion of the Supreme Court, Justice Holmes enunciated the now famous 'clear and present danger' doctrine, whereby freedom of speech must be determined within the context of the times. What might pass as free speech during peacetime might be disallowed and even punished during times of war.

[3] Sophocles' play, *Antigone*, marks the end of the Theban trilogy centred on the Oedipus legend. Within the context of Thebes' successful war repelling Argos, Sophocles addresses the conflicting moral imperatives of loyalty to the State and loyalty to something higher. Antigone, daughter of Oedipus the King and sister of the traitor Polyneices, attempts to bury her brother in keeping with family and religious beliefs but confronts Creon, her uncle and the new Theban ruler, who insists that traitors cannot be buried with the dignity owing to loyal citizens. *Antigone* is Greek tragedy, so there is no unambiguous winner and no promise against a recurrence.

[4] Populism was a potent rallying force against the late 19th century trend towards greater industry concentration, in response to which Congress passed the first antitrust law in U.S. history - the Sherman Act (1890) aimed at anticompetitive monopolist and cartel behaviour. More than 100 years later, the Sherman Act is still the most important legal statute in U.S. antitrust policy, most recently visible in the high-profile *U.S. v. Microsoft* case.

[5] This quotation is attributed to the 19th century British historian, Lord Acton.

[6] In *U.S. v. Abrams* (1919), another wartime free speech case, Justice Holmes dissented from the majority opinion, advocating a more tolerant approach towards free speech - an apparent redaction of his pro-government views expressed in *U.S. v. Schenck* and *U.S. v. Debs* (1919).

Wartime tends to highlight the actors and issues engaged by the Constitution's separation of powers and checks and balances. The President, as the Commander in Chief, has the authority and responsibility to direct the nation's war effort. Congress, through its powers of taxation and appropriation, controls the purse strings for the war effort. In addition, Congress has the authority to grant wartime powers to the President, e.g., augmenting the President's powers to detain suspects by suspending the writ of *habeas corpus*.[1] The federal courts, chiefly the Supreme Court, provide judicial review over the authorization and exercise of wartime powers, particularly in light of their potential infringement on constitutionally protected civil liberties.

In a recent high profile Supreme Court case involving wartime civil liberties, *Hamdi v. Rumsfeld*, Justice Scalia, joined by Justice Stevens, delivered a lengthy dissenting opinion in which he reached back within the Anglo-Saxon legal tradition to 17th century England for historical precedents limiting the monarch's power to arbitrary imprison its citizens. Justice Scalia argued that the President did not have the legal right to detain Hamdi, a U.S. citizen, without charges since Congress had not suspended the writ of *habeas corpus*. Disagreeing with the Court on the extent of presidential wartime authority, Justice Scalia maintained that due process guarantees U.S. citizens the right to be formally charged if detained, unless Congress has declared such a emergency that the writ of *habeas corpus* is temporarily unavailable.

Because freedom from arbitrary detention is one of the great civil liberties and because Justice Scalia invoked the constitutional legacy of 17th century England, it is worth describing the context from which important historical *habeas* precedents issue. In his dissenting opinion, Justice Scalia refers to two specific historical precedents - the 1628 Petition of Right and the 1679 *Habeas Corpus* Act. To this list should be added the 1689 Bill of Rights, the predecessor, by exactly 100 years, of the U.S. Constitution's Bill of Rights. The three of these landmarks in British law emerged from a century of intense constitutional and political development - a not so peaceful period

considering England's wars against Continental powers (Spain, France and the Netherlands), its wars against neighbouring Scotland and Ireland and its wars against itself (English Civil Wars).

Broadly characterized, the 17th century was a time of great political conflict between the Stuart kings and Parliament. The Crown and Parliament struggled for power over taxation (the principal source of state revenue), the army (an important ally in both external and internal disputes), the duration and frequency of parliamentary sessions, religious freedom and divine right (as pertains to both the scope of royal prerogative and its succession). James I, ruling from1603-1625, and Charles I, ruling from 1625-1649, sought to make the English monarchy as strong as that of the European monarchies - a departure from the English tradition of strong monarchy in the direction of the more extreme royal absolutism of the Continent. During the first half of the 17th century, the Stuart kings controlled the army, convened and dissolved Parliament and maintained extralegal tribunals (e.g., Star Chamber and Court of High Commission, which were outside the bounds of English common law). However, Parliament controlled the power to tax and raise revenue, and this put power in the hands of Parliament to challenge the Stuarts on a broader range of issues. Standoffs between the king and Parliament over taxation and revenue matters led to two protracted periods during which no Parliament was in session - 1614-1621 under James I and 1629-1640 under Charles I. In the absence of Parliament to enact tax law to raise revenue, the Stuarts, in particular Charles I, levied direct taxes by royal proclamation in order to finance his wars against Spain and France on the Continent and against the Celtic nation of Scotland[2] to the north. Enforcement of Charles I's prerogative in taxation was dutifully managed in the extralegal courts where due process guarantees were conspicuously absent, facilitating the efficient management of dissent.

The Petition of Right was just such a case where the King and Parliament clashed over taxes. In order to persuade Parliament to pass his new taxes, Charles I formally acknowledged Parliament's demand for limitations on the powers of the monarch. The principal concessions concerned Parliaments' supremacy in taxation matters

and due process protections particularly in the extralegal courts. Charles I grudgingly acceded to the Petition of Right; however, failing to obtain Parliament's support for raising new taxes, he dissolved Parliament and ruled without legislation (i.e., by proclamation only) for 11 years - the so-called Personal Rule or the "eleven years' tyranny," depending upon whether one's sympathies were with the King or Parliament. While Charles had agreed to Parliament's Petition of Right, it was of little consequence for the next 30 years - during the 1630s there was no Parliament, during the 1640s the King and Parliament were engaged in civil war and during the 1650s, England was ruled by Oliver Cromwell and the army. Nevertheless, in the longer run the Petition of Right has become one of the many constitutional accretions (along with the 1215 Magna Carta, the 1679 *Habeas Corpus* Act, the 1689 Bill of Rights and the 1701 Act of Settlement) comprising the British constitution.

Seventeenth century England was a time and place when the principles of separation of powers and the rule of law were working themselves out in the context of almost universal (European) absolutist monarchy. Under James I and Charles I, political power was disproportionately held by the King, with Parliament an often-disagreeable body that could be readily dismissed. Then, during the Great Rebellion of the 1640s and 1650s, political power swung away from the monarch, but not so much in favour of Parliament as in favour of the army. This was especially true during the Protectorate, Cromwell's military administration, a period when Parliament existed in name only - the Long Parliament formally convened in 1640 and not dissolved until 1660 was no threat to Cromwell's authority. Ironically, Parliament seemed to fair no better under Cromwell than it did under the Stuart kings - perhaps not so ironic given Thomas Hobbes' defense of the non-ecclesiastical Leviathan published just two years prior to Cromwell's 1653 declaration of the Protectorate. Hobbes' thesis that absolute executive power was necessary and justifiable in order to restore civil peace was clearly conditioned by the violence and chaos of the long running English Civil Wars (1642-49), during which England had no strong executive - neither the absolutist monarch Charles I of the 1630s nor the military dictator Oliver Cromwell of the 1650s.

With the death of the military strongman, Oliver Cromwell, the end of the Great Rebellion against the Stuart kings was imminent given that no one else, not least Oliver's son Richard, was capable of dominating and uniting the army and Parliament. Royalist supporters in the army and Parliament engineered a reverse coup in 1660, inviting Charles II to succeed his father, Charles I, to the English throne, thus resuming the Stuart monarchy. The Restoration under Charles II lasted another 25 years and was considerably less confrontational than his father's reign. It was in 1679 that the *Habeas Corpus* Act officially recognized and banned the practice of arbitrary detentions, and in addition, the Star Chamber, notorious for punishing dissent under the early Stuart kings, was abolished. However, many of the old issues resurfaced under Charles II. For example, Charles II negotiated secretly with Louis XIV of France in order to secure financing for his war against Holland, which he feared, would not be forthcoming from Parliament. The last four years of his reign, Charles II renewed the Stuart trademark of personal rule, i.e., no Parliament in session. The Stuart Restoration was further complicated by the succession of James II, a Catholic, who was suspiciously regarded by the majority English Protestants and by Parliament. James II tested the limits of his power early and overstepped his bounds with his autocratic policies and pro-Catholic tendencies.

Fears that the Restoration would reverse Parliament's gains *vis-à-vis* the English monarchy precipitated the Glorious Revolution of 1688-89. Near the conclusion of the tumultuous constitutional conflict of 17th century England, Parliament staged its ultimate triumph over the English monarch and institutionalized its victory in the 1689 Bill of Rights, the forced abdication of the Catholic James II and the transfer of royal succession to the Protestant William and Mary (James II's daughter). Much of what was fundamental in the English Bill of Rights had been agreed to before, going as far back as the Magna Carta signed by King John in 1215. Due process rights had been agreed to in the Magna Carta, in the 1628 Petition of Right and in the 1679 *Habeas Corpus* Act. However, as long as the King's extralegal courts operated, *habeas corpus* rights could be flouted.

The Bill of Rights formally declared such courts to be illegal. Repeating its assertion from the 1628 Petition of Right, Parliament asserted its authority in taxation matters. Most importantly, Parliament established itself as the supreme legislator, thereby closing the chapter on the Stuart kings' personal rule. The coup de grace in the 17th century struggle between King and Parliament was delivered by John Locke's *Two Treatises on Government* in which the liberties long sought by Parliament are raised to the level of universal and inherent rights, the most fundamental of which is the absolute right to overthrow a tyrant. Locke's *Two Treatises* became the intellectual defense of the Glorious Revolution much like Hobbes' *Leviathan* set the stage for a return to autocratic rule after nearly a decade of civil war.

The English constitutional monarchy that emerged at the close of the 17th century bears slight resemblance to the modern American constitutional system of separation of powers among the executive, legislative and judiciary branches. In England, the power of the executive had been severely curbed, while Parliament's fortunes were ever after on the increase. Parliament's ascendancy ultimately led to complete marginalization of the monarch in governmental affairs, and over time, the Cabinet (prime minister and ministers), a parliamentary creation not only replaced the monarch in executive affairs of state but even came to challenge its creator. The modern British parliamentary system locates the executive and legislative branches in Parliament, and as long as there is a solid majority in Parliament, the executive and legislative branches converge on policy, with the Cabinet in the lead. Under the modern British parliamentary system, the Cabinet has replaced the King and has consolidated the powers of the executive and legislative branches of government.

In contrast, the American constitutional system is, on one hand, less efficient with its separation of powers among three potentially antagonistic branches of government, each with checks on the other two. On the other hand, the American constitution has institutional safeguards against excessive concentration of political power. It is in large part the legacy of 17th century England and the struggles against tyranny that gave rise to the American system of government characterized by the separation of powers, protected by a system of

checks and balances. Nowhere more does the importance of these principles obtain than during wartime. When national defense and civil liberties are in conflict, there is no better time to appreciate the checks and balances that are available[3] to prevent the executive branch, in its zeal to lead the war effort, from overstepping the bounds of civil liberties that have been defined in the statutes and case law of the legislative and judicial branches, respectively. A look back at 17th century England discloses a higher principle than efficient war management, and that principle is limited government.

Endnotes

[1] The writ of *habeas corpus*, the due process right to non-arbitrary imprisonment, dates back to Magna Carta (1215) and has been reaffirmed many times during the course of the development of Anglo-Saxon law. *Habeas corpus* rights were important enough to the framers of the American Constitution that they were among the civil rights embedded in the Constitution even before the Bill of Rights was added. Suspension of the writ of *habeas corpus* is also a constitutionally based, but rarely used, congressional concession to the emergency powers of the state. Perhaps at no time was the suspension of due process more controversially exercised than during the American Civil War, at first on the sole (and arguably unconstitutional) authority of President Lincoln but ultimately on the constitutional authority of the Congress.

[2] Although James I was the first English king to rule over Scotland, Scotland was politically independent of England until the 1707 Act of Union formally united England and Wales with Scotland to form Great Britain. Between James I accession to power and the Act of Union, both Charles I and Oliver Cromwell waged war on Scotland, which they regarded as a hostile foreign power.

[3] The American constitutional system of separation of powers and checks and balances does not provide an absolute guarantee against unanimity among the three branches of government - for good or ill. In World War I, the free speech cases under Espionage Act provided the context for solidarity among the President, Congress and Supreme Court in limiting free speech during wartime. In

World War II, the U.S. policy of interning Japanese-American citizens united the President, Congress and the Supreme Court in suspending wartime civil liberties.

The American constitutional system was not intended to facilitate the maximum efficient organization and administration of government authority. The rule of law, separation of powers, checks and balances and civil rights are the fundamental constitutional structures that were erected more than 200 years ago to prevent the concentration of government power and to protect against the arbitrary exercise of government power. The authors of the 1789 Constitution were strongly influenced by the, then, relatively recent history of England's 17th century constitutional struggles between the Stuart kings and Parliament, the natural law political philosophy exemplified by John Locke's 1690 *Two Treatises on Government*, the *laissez-faire* economic philosophy embodied in Adam Smith's 1776 *Wealth of Nations* and the increasing disparity between the economic prosperity and the political dependency of the American colonies.

The 17th century was as much a struggle against government infringement of economic rights as civil rights. Arbitrary taxation policies (i.e., taxes unilaterally proclaimed by the King without the consent of Parliament), feudal dispensation of monopoly privileges by the King, extralegal courts beyond the due process protections of the common law and the King's ultimate power to summon and prorogue Parliament were the principal grievances of Parliament against the absolutist designs of the Stuart kings and were therefore at the heart of the 17th century constitutional struggle between the King and Parliament. The English Revolution of 1688-89 was a watershed moment in England's constitutional development, culminating as it did in the 1689 Bill of Rights and the parliamentary-summoned accession of William and Mary to the throne. The Bill of Rights reaffirmed and further strengthened economic and civil rights earlier recognized in the 1215 Magna Carta, the 1628 Petition of Right and the 1679 *Habeas Corpus* Act. Parliamentary supremacy over the King was not lost on the framers of the American constitutional. From the perspective of the American colonists of the late 18th century, both Parliament and the King represented a danger through their exercise of power beyond the rule of law. In other words, the

King no longer held a monopoly on the abuse of power. Furthermore, the Americans claimed intellectual support from the emerging political and economic theories of natural law political philosophy according to which there are fundamental economic and civil rights (e.g., life, liberty and property) that inhere in the implicit contract between the ruler and the ruled and there are great advantages in freeing industry and trade from the arbitrary and self-serving interference of government.

Against this backdrop, the American Constitution was created, itself an institutionalization of principles discovered and won over many decades. Although American constitutionalism is tangibly linked to a single, critical document, it is nevertheless necessarily dynamic in response to the challenges of history unfolding. The constitutional principles of the rule of law and limited concentration of power have been most severely tested during wartime. Civil liberties, in particular, have not always fared well during times of war, and this curtailment of civil rights has often been facilitated by the deliberate consolidation of government power through congressional delegations of war powers and court-sanctioned exercise of such powers. The suppression of free speech during World War I and the internment of American citizens of Japanese descent during World War II stand out as recent and visible reminders of the vulnerability of constitutional civil liberties during times when checks and balances are inoperable. There is no greater justification for the suspension of civil liberties than the defense of the nation. However, there is also no greater excuse for the abuse of power than the defense of the nation. Vietnam and Watergate gave rise to the fear of the imperial Presidency - an Executive branch unchecked in foreign policy and cloaked in the secrecy of executive privilege and national defense. Three decades later, the fears of the imperial presidency have been re-ignited. The war on terror has created an enemy that is so pernicious in its invisibility that extraordinary measures, restricting civil liberties and increasing public surveillance, have been adopted. Wartime emergency is again the rallying cry of the Executive branch as it consolidates power willingly delegated by Congress and only hesitantly, and with great delay, challenged by the Supreme Court. History will be a better judge, but already there is reason to believe

that the Iraq War was a classic case of a fabricated national defense emergency used to screen the exercise of arbitrary power. American constitutionalism in the 21st century is no less immune to the wartime efficiency impulse than it was in the late 18th century when the 1798 Alien and Sedition Acts were passed to silence dissent - the wartime threat being posed by the French Revolution.

While wartime emergencies have consistently challenged the American constitutional system of the rule of law, separation of powers, checks and balances and civil liberties, there is another threat, which operates outside the bounds of the Constitution. The Constitution explicitly addresses the danger of concentration and arbitrary exercise of government power. However, the concentration and arbitrary exercise of economic power by non-governmental entities was not anticipated by the framers. It is true that the constitutional delegation of legislative powers to Congress was sufficiently broad to support the creation and expansion of governmental economic regulation, notably Congress' late 19th century assertion of power in interstate commerce and against monopolist practices. Notwithstanding the considerable network of regulatory agencies and volume of administrative, statutory and case law governing business and industry, there is nevertheless a danger in the concentration and abuse of economic power - danger that is heightened by familiar efficiency arguments. Today's antitrust law - a body of law intended to protect against the concentration and abuse of economic power - is enforced with a clear prejudice towards larger firms. In the new school of antitrust thought - the Chicago School, which dates back to the 1970s - larger firms and more concentrated industries are said to be necessary for America's economic survival in a world of intense international competition. Furthermore, economic consolidation is said to be in the immediate interest of consumers, employees and investors in that the extraordinary economy of scale opportunities allow prices to fall (due to lower costs), jobs to remain in America (due to the efficiency advantage) and profits to rise (due to international dominance). In view of the Chicago School's economic efficiency argument, there appears to be no downside to the consolidation of economic power. The economic checks and balances of the market

are still present - they are simply operating on an international level. What the economic efficiency advocates fail to acknowledge is that economic power is not limited to price and quantity movements, product innovation, sales, production and distribution. Economic power - if history teaches anything - spills over into the political realm, and to the extent that economic power is able to influence political power, the constitutional rule of law, separation of powers, checks and balances and civil liberties may become anachronisms and electoral power an illusion.

On September 9th the U.S. District Court for the District of Northern California denied the Department of Justice's (DoJ) request for an injunction against Oracle's propose hostile takeover of rival PeopleSoft. It was in June 2003 that Oracle made its initial bid for PeopleSoft. The initial and subsequent acquisition bids have been rejected out of hand by PeopleSoft's management, and both parties have attempted to exercise their relative influence over PeopleSoft's institutional shareholders. In February 2004, the DoJ launched a civil lawsuit against Oracle on the basis that the merger would violate U.S. antitrust law, specifically the 1914 Clayton Act that prevents mergers which threaten to substantially lessen competition in a well-defined market - a market defined in terms of a specific line of business (product market) and a specific area of the country (geographic market). The DoJ defined the relevant product market to include the combined offering of enterprise-scale (i.e., designed for large firms with complex business processes) Human Resource Management Systems (HRMS) and Financial Management Systems (FMS), and the geographic market was defined as the U.S. Using this market definition, there are three dominant software vendors in the U.S. HRMS and FMS market: SAP (German), Oracle (U.S.) and PeopleSoft (U.S.) According to the DoJ, upon culmination of the merger, only two vendors would remain, and the threat of post-merger collusion between Oracle and SAP would threaten increased prices, lowered product quality and reduced incentives for product innovation - i.e., a substantial lessening of competition in the market.

The court's decision last week does not necessarily settle the case, since there is a variety of scenarios that could unfold over the next weeks and months. First, PeopleSoft's management has been extremely defensive in response to Oracle's aggressive takeover tactics, and PeopleSoft's management would be expected to continue to resist the takeover. Second, the DoJ is not completely out of the game, since it retains the option of filing an appeal to have the court's decision reversed. Third, the European Union's (EU) antitrust agency, the European Commission's Directorate-General for

Competition, which has been on the sidelines pending the DoJ's lawsuit, may decide to reactivate its investigation.[1]

Notwithstanding the court's go-ahead signal to Oracle, the merger is anything but a *fait accompli*. However, even at this milepost in the development of the Oracle-PeopleSoft merger case and regardless of the eventual outcome, several noteworthy observations can be advanced with respect to U.S. merger policy and coordination of Trans-Atlantic (U.S.-EU) merger policy. First, it strikes one as odd that it is the DoJ under the pro-business Bush Administration that has attempted to block a large merger between U.S. firms. It would have been expected that the DoJ would have articulated the very case put forward by U.S. District Chief Judge Vaughn Walker. But in this case, the court came down on the side of Oracle and against the DoJ with a decision that would probably not obtain in every U.S. federal court. One is reminded of the controversial Microsoft divestiture decision of Judge Thomas Penfield Jackson in 2000, which was summarily reversed a year later by the U.S. Court of Appeals. In *U.S. v. Microsoft*, two different courts had very different ideas about both the extent of Microsoft's unlawful monopolistic behaviour and the punishment and remedies required. What this demonstrates is that antitrust thought in the U.S. federal court system is not uniformly monolithic, in much the same way that DoJ enforcement is subject to considerable shifts between presidential administrations and may be even susceptible to occasional surprises. That American antitrust policy is monolithically pro-merger is a myth - there may be an overall pro-merger bias, but it is not a rubber stamp. The DoJ and Congress do not always see eye to eye, nor do the federal courts see eye to eye with either the DoJ or Congress, and over the course of American antitrust history, there have been significant shifts in perspective within each of the three major branches of government. Such is the nature of an effective separation of powers and functional checks and balances - power is dispersed and tyranny is thereby checked, as is, to some extent, efficiency.

A second important observation that can be advanced at this stage of the Oracle-PeopleSoft case is that there is Trans-Atlantic coordination of competition policy as testified to by the EC's voluntary postponement of its investigation in deference to the DoJ's suit to

block the merger. Whatever decision the EC may choose to make in light of the court's ruling is subject to an appeal process through the EU courts, as demonstrated in the Tetra Laval/Sidel merger case.[2] Prior to 2002, the EU courts had not asserted their power of judicial review in competition policy matters, but in that year, the Court of First Instance reversed three EC merger prohibitions - a significant number given that the EC has only blocked 18 mergers its entire history of merger regulation. The EC may be reluctant to rule against the merger given that the last prominent U.S. merger that it blocked (GE/Honeywell in 2001) caused a Trans-Atlantic uproar and that the Court of First Instance seems to be emboldened by its recent pro-merger rulings. The EC has not blocked a single merger since 2001, and the Court of First Instance's decision in *Airtours v. Commission* reveals a new tension in EU competition policy – an intellectual/ideological tension between a somewhat structuralist-inclined EC and a court more inclined towards the economic efficiency logic of the Chicago School.

The real significance of the checks and balances described above is that they allow a political process to vet a business proposal, i.e., the political process engages multiple and conflicting perspectives where otherwise uniformity of opinion would ensure a more predictable and expedited result, but one that would likely cater to a more narrowly-defined set of interests. In American antitrust thought, there continues to be a struggle between Structuralists and the Chicago School. The former tend to correlate market concentration with anticompetitive behaviour - the argument being an economic variant of Lord Acton's famous warning: "power tends to corrupt; absolute power corrupts absolutely." The Chicago School, on the other hand, argues that competition, especially within the context of an increasingly barrier-free global market, may actually be promoted by increasing economic concentrations. The Chicago School is generally regarded as the dominant school of antitrust thought, but the arguments of the DoJ in *U.S. v. Oracle* show that the logic of the antitrust structuralism has not completely ceded the field.

In *U.S. v. Oracle*, the court, reflecting a position consistent with the Chicago School, rejected the DoJ's argument that the merger

would harm competition. The court found that the DoJ's definition of market was too narrow, and this decision essentially destroyed the DoJ's argument that the merger would create a duopoly, which would be inherently inimical to competition. The court argued that the DoJ's assessment excluded potential competitors and ignored the global nature of the market for ERP software. According to the court, not only did the DoJ fail to define the proper market (in effect fabricating a post-merger duopoly scenario), the court also judged that the DoJ had failed to provide sufficient evidence to support its claim that the merger would facilitate anticompetitive collusion between the two dominant rivals, Oracle and SAP. Unrelated to the court's ultimate decision, but of interest in the Structuralist/Chicago School debate, was the court's rejection of Oracle's efficiency arguments - not per se but because they were too vague. Under U.S. antitrust law, a merger that will substantially lessen competition may nonetheless be allowed in cases where demonstrations of resulting economic efficiency are shown to exceed anticompetitive effects of the merger. In this case, Oracle did not need the efficiency argument rebuttal, but it is nevertheless worth taking note of the prominence of economic efficiency in U.S. antitrust policy - even where market concentrations are concerned.[3]

Endnotes

[1] The EU has jurisdiction over the proposed Oracle-PeopleSoft merger, because the firms are significant players in the European market for Enterprise Resource Planning (ERP) software, such as the HRMS and FMS. In November 2003, the EC indicated that it would conduct an in-depth investigation of the proposed Oracle/PeopleSoft merger. The EC reserves Stage 2 investigations for those cases which require more than a prima facie evaluation. The EC's investigation has been on hold pending a decision in the U.S.

[2] In 2001, the EC blocked the merger between the Swiss firm Tetra Laval and the French firm Sidel. Tetra Laval appealed the EC's decision, and in 2002, the Court of First Instance annulled the EC's merger prohibition. The EC then appealed the lower court's decision,

and the case is presently before the Court of Justice, the final court of appeal.

[3] In January 2004, the EC published a new merger regulation which moves closer to the U.S. merger control policy by formally admitting the introduction of economic efficiency arguments in support of otherwise anticompetitive mergers.

References

Findings of Fact, Conclusions of Law and Order Thereon of September 9, 2004, U.S. District Court for the District of Northern California, U.S. v. Oracle, Civil Action No. 04-0807 (VRW).

According to many Canadians, Canada has had recent experience with one-party rule. The Liberal Party won majority governments in the last three federal elections leading up to the most recent election in June 2004. From 1993 - 2003, it seemed that there was no other federal party on the horizon that could challenge the Liberals. During this period of 'unchallenged' rule, the Liberals reminded Canadians that government is little better at self-regulation than is the market. The sponsorship scandal, involving government corruption in the promotion of federalism in post-referendum Quebec (Quebec narrowly voted against separation in 1995), galvanized public opinion in the 2004 election. The proximity of the scandal to the election was fortuitous for all but the Liberals. Opposition parties and the media took advantage. The heightened public perception of an arrogant and unaccountable Liberal Government was the principal reason for the Liberal's failure to win a fourth consecutive majority government.

The House of Commons, the elected and legitimate lawmaking body in the Canadian government, is presently divided among four parties. The Liberals have more seats than any other party, but they do not have a majority (even in coalition). The Liberals have been downgraded to a minority government. Extended one-party rule (Liberal's reign from 1993-2004) and the absence of a majority in the Commons (current minority government) are the extremes of the parliamentary system. However, neither is uncommon in Canadian history. Three times since Canada's independence in 1867, one party has won a majority of seats in the Commons in four or more consecutive elections (the Conservatives in four elections between 1878 - 1891, the Liberals in four elections between 1896 – 1908, and the Liberals again in five elections between 1935 and 1953). At the other extreme, in the 38 federal elections since independence, Canadians have on 10 occasions denied majority status in the Commons to any single party - the 2004 election being the latest.

Demographics are largely responsible for the recent 'one-party rule' phenomenon in Canada. In the last three federal elections prior to the June 2004 election, the Canadian Alliance (formerly the Reform Party) drew its support from Western Canada, the Bloc

Quebecois was strictly limited to Quebec, and the Progressive Conservatives and New Democrats were marginal national parties with no greater presence in the Commons than the regional parties. The 2004 election was made closer because of the Canadian Alliance/Progressive Conservative merger, which produced the largest official opposition party since 1980. While the 2004 federal election may not have been an outright revolt against the Liberals, it was a vote of very limited confidence. In view of this result and within the context of Canadian history, fears of one-party rule may have been exaggerated, although, these fears did fuel the Canadian electorate's reaction in 2004. Canadians have routinely extended the mantle of leadership to the governing party. Sixteen times Canadians have given the incumbent party a second majority in the Commons. However, Canadians have also routinely punished the governing party with votes of no confidence. Either the incumbent party has been completely removed from power (15 times), or it has had its power limited to minority government status (four times).

Two institutions that have figured prominently in protecting Canada's democracy are a multiparty system which ensures the competition of ideas in public debates and at the polls and a free press which always threatens to break a story exposing the abuse of government power. By challenging the government's self-assessment, by exposing the abuses of power and by offering alternatives, the multiparty system and the free press are crucial to the competitive election process and to democracy in Canada.

Since the election failed to produce a majority or a coalition government, the legislative agenda for this, the 38th, Parliament will be much less efficiently managed than usual. In British-based parliamentary systems like Canada's, the Cabinet (Prime Minister his/her ministers – the Executive branch) of the governing party can count on the loyal support of its fellow party members in the House of Commons when it proposes legislation, giving rise to an almost too efficient coordination of the legislative agenda between the Executive and Legislative branches of government. The reverse is true under a minority government, where the legislative agenda becomes much less certain, since cooperation with members from rival parties

is required. Nevertheless, the election result of a minority government is probably one of the most effective political checks and balances in a parliamentary democracy. It may be inefficient in terms of the getting a legislative agenda passed, but it is an effective check on the overextended and arrogant misuse of power.

And this is precisely what China will not have in the absence of a multiparty system and a free press.

The prominent rise to power of the world's major central banks and their successful anti-inflationary policies have brought central bankers to the forefront of economic public policy. Against the backdrop of persistently high inflation in the 1970s and 1980s, these central bankers appear to have staged a minor miracle in reversing the inflationary spiral and in creating a new era of persistently low inflation. The U.S. Federal Reserve Board (Fed) is the most widely recognized of the central banks, and it is also the most powerful, largely because it controls monetary policy for the globally-dominant U.S. economy. Other prominent central banks in the war on inflation are the Bank of England, the Bank of Canada, the Swedish Riksbank, the Reserve Bank of New Zealand (an island country of small population useful in economic regime-shifting tests) and, since 1999, the European Central Bank (ECB), which controls monetary policy for the 12-member European Monetary Union (EMU).[1]

The emergence to power of central banks with their army of bankers, economists and financial analysts has been facilitated by a number of mutually reinforcing developments. First, central banks had to be politically independent, especially in view of the likely public reaction to the inevitable rising unemployment associated with vigorous disinflationary monetary policy campaigns. Second, they had to establish credibility with and manage the expectations of the market's principal actors - investors, producers and consumers. Third, central banks had to demonstrate technocratic expertise to business, academia and government. Fourth, they had to develop communications strategies to strengthen their independence, credibility and expert standing. Fifth, they had to develop a consensus view explaining convincingly how economic theory supports monetary policy. Finally, central banks had to be given a mandate - a policy objective; and that mandate, was to control inflation.

In the U.S., in Canada and in the EMU, central banks have been granted the political independence to exercise monetary policy in pursuit of their respective politically determined mandates - inflation targeting and in the case of the Fed's dual objective mandate, inflation targeting and economic stimulus. The Fed and the ECB are the

most powerful central banks in the world, and the Fed, the ECB and the Bank of Canada are arguably the most powerful central banks within their respective jurisdictions. Along with the authority to make and implement monetary policy is the responsibility to achieve results - the most important being the maintenance of price stability defined, explicitly or implicitly, in terms of a very low inflation target range. Only the Fed has a second, often conflicting, monetary policy objective - full employment. However, there is increasing pressure for the U.S. to adopt inflation targeting as the primary monetary policy objective, despite the longstanding congressional precedent of treating both economic stimulus and inflation control as the legitimate and effective objects of U.S. monetary policy.

Common to all three policy regimes is a neoliberal economic policy bias not unlike the Washington consensus of the World Bank and the International Monetary Fund (IMF). In fact, central banks are to their respective countries what the IMF and World Bank are to credit-stricken developing and post-communist transitional economies. Neoliberal economic policy is characterized by strong *laissez-faire* instincts, especially where government intervention tends to raise the operating costs of business and industry, and by supply-side incentives, and particularly those designed to maximize profitability. The logic behind structural reforms (e.g., in labour markets and in social programs), free trade in goods, services and capital (the inputs and outputs of global production systems) and competition policy that exempts intellectual property rights and economy-of-scale mergers is to reduce producer costs, to increase efficiencies, to stimulate investment and, in the long run, to increase employment and incomes - supply-side economics updated for 21st century globalization. This is the economic policy regime found the world over in government, academia and business. Even more fundamental to the neoliberal economist is the positivist belief that economics can be scientific and value-neutral with respect to policy, hence the authoritative and objective aura of the monetarist pointing the way to the best of all possible worlds. Nowhere is this more evident than in the neoliberal mantra that monetary policy is too important to leave to the discretion of politicians - democracy being only marginally inconvenienced in the greater interest of efficient economic policy.

Central bankers and their economists have been more successful in monetary policy than anywhere else in establishing extra-democratic jurisdiction over economic public policy. In much the same way that the executive branch consolidates the nation's war powers during wartime, central banks have consolidated monetary policy authority over the course of the war on inflation and have yet to relinquish their newly discovered powers. Although inflation has not wreaked havoc on North American or European countries in nearly a generation, inflation continues to be the watchword not just for the central banks, their bankers, economists and analysts but also for their governments, businesses and consumers. It is the threat, which justifies their power and their often-harsh policy prescriptions. Compared with the objective of controlling inflation, all else pales. The Volcker disinflation of the early 1980s came with the highest unemployment levels since the Great Depression, but the Fed prescribed it as necessary medicine to expel inflation from the American system. The Bank of Canada staged its own disinflationary slump in the early and mid-1990s, allowing unemployment to reach double-digits from 1991-94 and above nine percent for the next three years, all as the price to pay in order to bring inflation under control. In Europe, unemployment levels remain higher than in North America and only slightly down from their double-digit highs in the late 1990s. Nevertheless, EU monetary policy, dictated by the ECB, is price stability at all costs. The ECB argues relentlessly that high levels of unemployment in countries like France and Germany are to be solved by structural reforms in the labour markets - the elimination of downwards wage rigidity, in economics parlance.

The Keynesian full employment policies based in part on the Phillips curve policy trade-off between inflation and unemployment have been discredited or so central bankers claim as they attempt to shift responsibility back to the politicians for anything other than inflation. However, the price of price stability is too high, and this is where the supply-side structuralist arguments of the neoliberal economic policy regime give central bankers an out regarding unemployment outcomes while still leaving them with influence on public policy which they do not wish to own. This is what is currently

taking place in the increasingly economically integrated EU, where the ECB has consolidated control over monetary policy - its sole accountability is price stability or inflation control. Unemployment is not a problem for the bankers in Brussels. Instead, it is a problem which belongs to the various EU national governments who must commit to structural labour market reforms, i.e., reforms intended to introduce downwards wage flexibility as the means of restoring market equilibrium at lower unemployment levels. The countercyclical (i.e., stimulative) fiscal policies of Germany and France are not considered acceptable solutions, since they have caused these two countries to breach the EU's limits on debt and deficit spending and threaten to undermine the supranational authority of the EU in economic affairs.

Over the past two decades, central banks have quietly built up an enormously important public policy portfolio. Granted, there are oversight mechanisms in place, such as legislative hearings and political appointments. However, the very idea that monetary policy should have only one goal (inflation targeting), when monetary policy clearly has effects on economic growth and employment, suggests that there is something wrong with monetary policy governance. Economists will argue that inflation targeting is sort of like free trade in that the benefits are diffuse (everyone benefits a little), while the costs are concentrated (only a few are net losers). Only in the short run will there be net losers, and these can be protected by a temporary social safety net, so the argument goes. In the long run, the argument continues, the certainty of future price stability will promote greater economic growth, rising incomes and profits, increased investment and innovation leading to that mythical 'best of all possible worlds' where market forces, when left to themselves, restore equilibrium and order and raise the level of general welfare (i.e., standard of living).

Few will argue with the success of central banks in the war on inflation; however, what is often overlooked is the economic hardship, borne by a few, that accompanies the war's successes. Unemployment is the price of recessions engineered to disinflate the economy and of negative output gaps (less than full employment growth) intended to control wages and thus costs and prices. It can

be further argued that the price of price stability in North America and in the EU is borne by other countries - the international shock absorbers in volatile global markets - especially developing and post-communist countries where Great Depression-scale crises are not distant memories.

It would not be surprising to hear from those who have a stake in the status quo that old refrain "if you're not part of the solution, then you're part of the problem," which is, of course, just another way to silence dissent. In a technocratic society, expertise is privileged and free speech is often only just tolerated. Conformity may be the primary virtue in a world where business values reign supreme, but it has no business in a democracy that respects individual liberties. Bankers may be efficient governors, but history teaches that what is efficient and what is democratic is by no means the same - a lesson learned from absolutist regimes and preserved in the constitutional limitations on the exercise of government power. Perhaps nowhere better is the principle of limited public power enshrined than in the U.S. Constitution's separation of powers, checks and balances and individual liberties - institutional safeguards against the consolidation and abuse of state-sanctioned power.

Endnotes

[1] The EMU excludes the U.K., Sweden, Denmark (all three of which rejected the referenda to transfer national monetary policy to Brussels) and the 10 new members of the European Union. Even so, the ECB is the second most important central bank in the world, controlling monetary policy for an economic bloc nearly the size of the U.S. economy. Prior to creation of the ECB and supranational monetary policy, the German Bundesbank, the national central bank responsible for German monetary policy, was highly regarded among central bankers as a successful and aggressive inflation-fighting central bank especially during the volatile 1970s. The focus of this essay will be North American and European monetary policy, although the Bank of Japan deserves mention in light of its increasing power *vis-à-vis* the Japanese Treasury (and its exchange rate

authority) during Japan's protracted deflation and in consideration of the magnitude of the Japanese economy. Similarly, the Bank of China may bear close examination in the near future, as the Chinese economy outpaces and outsizes the lower echelon G-7 countries and as rapid growth plans and capacity constraints make inflationary concerns more real and increasing independence and power for the Bank of China more likely.

Globalization, the extension of free market economics to all countries large and small, rich and poor, is one of the most divisive issues on the planet, arousing passions on both sides. At one level, the debate seems to be simply about realizing the economic efficiencies of unimpeded international trade and the natural economic laws that make free trade the logical best choice. More than 200 years after Adam Smith launched free trade economics into mainstream thought, economists are still the principal expert witnesses and lobbyists for free trade and the greater good which it is said to promote. Opponents of free trade may concede its tendency to improve aggregate general welfare, since the crux of their argument is that the economists' best of all possible worlds does not leave everyone better off than before. Economists from Eli Heckscher[1] to William Poole[2] have acknowledged that even in theory free trade may produce some net losers, but this negative outcome, they defer to the political system to devise redistributive policies to restore equity. Sounds fine except that redistributive policies (e.g., taxes and subsidies) require political clout and thus work to the further disadvantage of those already adversely affected by free trade policies. These are intranational income distribution issues – i.e., within a given country, there are winners and losers in free trade. The same income distribution issues arise between countries - this being the focus of the present essay. Although GDP in both countries may increase, each country will have economic winners and losers, and potentially the proportion of winners to losers will vary. Unlike the case of the single nation-state where domestic redistributive policies are available to counter inequitable trade outcomes, among nation-states there is no supranational authority to address the international equity issues arising from trade between nation-states.

In defenses of globalization, democracy is often linked to free trade - the idea being that during the short run during which there may be economic dislocation owing to trade-induced structural adjustments, the development of trade-compatible democratic rights will go a long way towards getting globalization accepted. While it is

not certain to what extent democracy facilitates economic growth, innovation and increasing standards of living, democracy is appealing to people in non-democratic countries for its own sake as well as for its perceived connection with economic well-being. For those most likely to suffer economic hardship from free trade policies, the endurance to withstand the short run and to hold out for the long run is strengthened by the promise of democracy. In other words, although the income and wealth of some may be negatively impacted by free trade, even they stand to benefit from democratic reforms - so the argument goes. Among the winners in the international game of free trade, in particular the majority of consumers, workers, investors and owners in the industrialized democracies, exporting democracy serves a variety of sometimes conflicting motives - philanthropic obligation (a variation on the 'white man's burden'), an investment in future political stability (a strategic business objective), a disguise for inegalitarian economic policy (a cynical marketing campaign), etc.

The strongest argument for the connection between free trade and democracy is that there is some threshold of political rights which is conducive to maximum consumption and thus maximum economic production. China may prove an interesting exception insofar as it can maintain its highly structured political and governmental system alongside an increasingly internationalized consumer society. Some would argue that even the U.S., the principal exporter of democracy, combines democracy and free markets more effectively in rhetoric than in reality. There does, nevertheless, seem to be a degree of democracy that is compatible with free markets. At a basic level, the democratic principles of free elections, civilian government, the rule of law and limited government are non-controversial. They are as good for business as they are for individuals. In the language of economic development and growth, these democratic rights are simply part of the infrastructure for the economic system. The role of political infrastructure is to secure and stabilize the market's environment and to provide forward-looking certainty for planning, investment, production and consumption decisions. A democratic political infrastructure may appear to be a concession to the forces of globalization that have raised the political expectations of newly-

emerging internationalist consumers, but it is really a quid pro quo in the sense that a transitioning democratic society is expected to become a consumer-driven market accessible to foreign producers and investors.

There is a limit to the compatibility between democracy and free markets. Equality is prominent in definitions of democracy - equality before the law, universal suffrage, representative government, checks and balances, civil liberties, etc. However, free markets say nothing about such equality in economic affairs. Free markets are not inconsistent with income and wealth inequality, power concentrations in individuals and corporations, translation of economic power into political realm and non-extension of democracy to economic affairs. Furthermore, in practice, free markets are often enough not even *laissez-faire*. *Laissez-faire* applies to government ownership and government regulation. It does not, however, apply to government incentives and subsidies for domestic producers, investors, workers and consumers. Just as in the real world of business where firms use all of their resources to get an edge on their competition, so too do countries use all of their resources to get an edge on their competition.

The economists' world of free trade is an illusion - a deliberate illusion to keep all the players at the table. There is no perfect competition; no nation-state will ever forego the use of its political and economic influence in order to benefit its domestic producers, investors, consumers and workers. There is no instantaneous market clearing at full employment; if less than full employment is a short run phenomenon, then the short run never ends. If freedom is the power to determine one's own choices, then it is hard to imagine how developing and post-communist economies can consider themselves equals in free trade among economic powers such as the U.S., the European Union or Japan.

The promise of democracy makes it easier to accept this economic power imbalance. Free trade advocates are made to appear generous ("not only do you get free trade but you also get democracy"), and the skeptical are made to believe that the short run will not last forever ("even if we lose our jobs, at least we will have gained

the right to vote"). It remains to be seen whether democratic reforms can indeed piggyback on free trade policies and whether these reforms will be limited to the rule of law (in particular, contract and property law), free elections (irrespective of single-party, civilian rule), separation of powers (albeit concentrated in a strong executive) and civil liberties (notwithstanding a politicized judiciary).

Free traders use democracy to sell their program, and it is not very credible that their adoption of democracy is anything less than a good business proposition. Bundling free trade and democracy makes good business sense. Not only do democratic principles of non-coercive political stability, popular legitimacy and the rule of law facilitate commerce, they also offset, at least rhetorically, some of the economic losses that accompany free trade. The implicit message is that democratic reform is most likely to be realized when tethered to the powerful economic forces of the market economy. Perhaps. But if taken too seriously, democracy will threaten the new global order (democracy abhors power concentrations, while free market economics inspires power concentrations), and forces will mobilize to moderate democracy's demands in the interests of global financial stability - the bigger picture.

Endnotes

[1] See Heckscher's "Effect of Foreign Trade on the Distribution of Income" (1919) in which the author, a Swedish economist and co-founder of the Heckscher-Ohlin theory of factor endowments and international trade flows, argued that international trade unambiguously improves the overall income of a country but that the trade-induced shift in productive resources between import and export sectors changes the distribution of income. According to Heckscher, if the change in income distribution increases income inequality, then the remedy should not be a restriction on trade but rather an income redistribution through taxation policy.

[2] See Poole's recent article "Free Trade: Why Are Economists and Noneconomists So Far Apart?" in the September/October 2004 issue of the St. Louis Federal Reserve Bank's *Review*, in which the author, the President of the St. Louis Fed, in another in a series of

recent pro-free trade pieces from the St. Louis Fed (see Poole's article "A Perspective on U.S. International Trade" in the March/April 2004 *Review* and Cletus Coughlin's article "The Controversy Over Free Trade: The Gap Between Economists and the General Public" in the January/February 2002 *Review*) acknowledges that there are winners and losers but concludes that the aggregate net gains justify the asymmetric distributional effects.

America's latest wars in Iraq and in Afghanistan have given rise to age-old democratic governance questions about the appropriate balance between national security and civil rights, the boundaries of executive branch power and the dangers inherent in the citizenry's wartime deference to government authority. In a 1987 paper[1] on wartime civil liberties in American history, former Supreme Court Justice William Brennan argued that the history of civil liberties in America has been less than exemplary during security crises. Justice Brennan cites as evidence the censorship and immigration bias of the Alien and Sedition Acts (1798) aimed at French Revolutionary sympathizers, President Lincoln's suspension of the writ of *habeas corpus* during the Civil War, prohibitions against and punishments for anti-war speech in violation of the World War I Espionage Act, the denial of due process to American citizens of Japanese descent interned during World War II and the communist witch hunts of McCarthyism in the early years of the Cold War.

The fundamental governance questions raised during wartime get to the very essence of the American experiment begun more than two centuries ago with the colonial rebellion that became the American Revolution and institutionalized anti-monarchist self-determination and republican ideals in the form of a written constitution defining the powers and limits of government authority. However, the American rebellion was not a complete repudiation of British governance as the parliamentary victories won during the constitutional crises of 17th century England were clearly reflected in the U.S. Constitution's separation of powers and checks and balances according to which the President was not be granted the powers of an absolute ruler. England had rejected royal absolutism in the tumultuous 17th century power struggles between the Stuart kings and Parliament. The 17th century was a period of great political and constitutional conflict in England. It was an era characterized by Charles I's 11-year rule without a sitting Parliament, the English Civil War and regicide, the military dictatorship of Oliver Cromwell, the Restoration of the Stuart monarchy and ultimately the Glorious Revolution. The parliamentary coup that forced James II to abdicate in

favour of the Protestant William and Mary and the 1689 English Bill of Rights that consolidated and codified the limitations on the exercise of royal power dating back to the 1215 Magna Carta marked a watershed in the evolution of parliamentary and constitutional democracy in England and in the rejection of the then common European monarchist model of arbitrary rule by royal prerogative.

The American colonists extended opposition to the tyranny of the British monarch to include the tyranny of the British Parliament inasmuch as Parliament represented Britons at home at the expense of the American (and other British) colonists. Therefore, it comes as no surprise that the Constitution drafted to replace the Articles of Confederation reflected the colonists' concerns that the powers of government be subject to institutional checks and balances to prevent the tyranny of the executive or the tyranny of the legislative branch, while at the same time avoiding the pitfalls of a weak confederation government. Suspicion of concentrated government power was strong among Americans in view of their belief that the British Government had disproportionately benefited British interests to the exclusion of colonial interests, and in the new American republic, the fear of concentrated government power persisted in view of the threats that the new government might show similar bias in favour of specific regions or economic interests.

Notwithstanding what by contemporary standards are the glaring contradictions between the principles of constitutional government, the rule of law and representative democracy and the facts of limited voter franchise and even more restricted class, race and gender-based self-selection of candidates for political office, the foundations were being laid for a more inclusive republic and greater extension of civil rights and freedoms. This expansion of democracy within the American republic is no doubt in part a consequence of the constitutional separation of powers and checks and balances insofar as one or more of the three branches of the federal government may at any given time take on the leading (dissenting) role in defending and extending civil rights and liberties.

It is here that wartime presents a unique challenge to the American constitutional system of government. Invariably, the President,

as Commander-in-Chief, assumes the leadership role in waging war and ensuring national security, and the Congress is a willing partner, since its power to raise and appropriate funds for the war effort gives it the ultimate veto over presidential war powers. The Supreme Court has the extraordinary power of judicial review of the constitutionality of congressional acts and presidential orders in support of wartime activities. In theory, Congress and the Court can check the President's wartime authority. However, in practice, this never results in opposition to the war itself, but only to some aspect of the conduct of that war. For example, the Court has never ruled a war unconstitutional, and Congress has never refused all monies for a war effort. As Justice Brennan wrote, the Court and Congress tend to rally behind the war effort – the fear of being labeled unpatriotic or treasonous being greater than the fear of acceding to the (hopefully) temporary concentration of separated powers and the suspension of constitutional checks and balances.

A reading (or for some a re-reading) of the Pentagon Papers is particularly apropos in the context of America's preemptive war against the Iraqi Baathist regime of Saddam Hussein and the retaliatory war on terror against al Qaeda and its Afghan sponsor, the Taliban. The Pentagon Papers[2], based on the Defense Department's secret "History of U.S. Decision-Making Process on Viet Nam Policy," is a record of internal, hence classified, government communications and decisions regarding America's involvement in Vietnam from the end of World War II and the Truman Administration through the Tet Offensive and the end of the Johnson Administration. The Pentagon Papers describe how four successive presidential administrations progressively committed the U.S. to a war in French Indochina – a war which eventually witnessed the withdrawal of American troops, the fall of Saigon to the communist government of North Vietnam, the refutation of the apocalyptic domino theory and the emergence of a deep-seated anger and mistrust among many Americans for their government. Themes emerging from the Pentagon Papers which find their parallel in the American war effort in Iraq and Afghanistan are America's hubris in self-appointed nation-building (albeit limited to the short run), the rhetoric of free market democracy (but not necessarily self-determination if the results are

not pro-American), the overestimation of the effectiveness of American military-technological power against indigenously-supported guerrilla forces (however unsympathetic these "terrorists" may be in American eyes), the manipulation of intelligence (the Gulf of Tonkin incident and the case for Iraqi weapons of mass destruction), the assertion of exclusive Presidential war powers (the Nixon Administration's attempted suppression of the publication of the Pentagon Papers by the *New York Times* and the *Washington Post* and the Bush Administration's attempt to suspend the writ of *habeas corpus* for detainees of the war on terror charged as enemy combatants).

The very fact that publication of the Pentagon Papers was resumed in 1971 on the orders of the U.S. Supreme Court in its decision against the Nixon Administration is testimony to the continuing vitality of the constitutional principles of separation of powers and checks and balances. The Court came down foursquare on the side of the First Amendment's guarantee of freedom of the press and against the executive branch's vaguely defined defense of national security interests. In the crucial wartime civil liberties case of the *New York Times v. U.S*., the Bill of Rights was reaffirmed, and government secrecy was exposed. A similar victory for wartime civil rights was won in 2004 in the case of *Hamdi v. Rumsfeld*, where the Court decided in a reaffirmation of the writ of *habeas corpus*, that the defendant, an American citizen accused of being an enemy combatant in Afghanistan, was entitled to due process protections, specifically the rights to counsel and to challenge the basis of his detention. Shortly after the Court's decision, Hamdi was released. The Patriot Act presents a similar set of challenges to American civil liberties, although as yet the Supreme Court has not ruled on the constitutionality of the post-9/11 surveillance and intelligence-gathering act. However, a recent federal district court in New York (*ACLU v. Ashcroft*) struck down the section of the Patriot Act which authorizes FBI agents to compel, without cause, communications businesses (especially Internet service providers) to release sensitive customer information and to prevent disclosure of these FBI investigations. The District Court for the Southern District of New

York ruled that the absence of judicial process in the FBI's collection of personal information violated the Fourth Amendment's protection against illegal searches and that the gag order intended to keep FBI activities secret violated the First Amendment's protection of free speech.

The Pentagon Papers case offers a reminder to Americans that government is not infallible, that it occasionally oversteps its boundaries and that the seemingly inefficient design of conflicting branches of government is in fact an ingenious design to protect the American republic from the excessive concentration of power in the Presidency – there shall be no absolute monarchs, neither elected nor hereditary. Furthermore, the Pentagon Papers case stands out as a shining counterexample, however lonely, to the history of the suppression of wartime civil liberties described by Justice Brennan. It is a reminder of the risks of waging war in a democracy where the exigencies of national defense may be invoked to justify extreme suspensions of democratic rights and freedoms, setting dangerous precedents for future 'emergencies.' The Pentagon Papers case is a high point in a longstanding tradition of American skepticism, dissent and challenge to the acquisition and exercise of unquestioned and limitless power, particularly by the executive branch of government. The Iraq War and the broader war on terror provide the contemporary setting for a renewed assertion of constitutional separation of powers and checks and balances – an assertion initiated by the Supreme Court's decision in *Hamdi v. Rumsfeld*.

Endnotes

[1] "The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crisis" by U.S. Supreme Court Justice William J. Brennan in 1987 paper prepared for the Law School of the Hebrew University in Jerusalem, Israel - a thesis of considerable relevance in Israel given the near permanent state of high security alert.

[2] The Pentagon Papers' edition referenced in this essay is that published by the *New York Times* in 1971 including articles by Neil Sheehan, Hedrick Smith, E.W. Kenworthy and Fox Butterfield.

What Have the Bankers and Economists Done to Argentina? (Dec 04)

On June 30th of this year, the International Monetary Fund's (IMF) Independent Evaluation Office (IEO) released its "Report on the Evaluation of the Role of the IMF in Argentina, 1991-2001." The report was initiated in response to the Argentine meltdown from 2000-02, and it was commissioned by the IMF and prepared by the IMF's "internal auditors" to ascertain whether and to what degree the IMF shared culpability for the crisis. The Argentine crisis was an extraordinary negative shock to the Argentines. In 2002 unemployment exceeded 20 percent, inflation surged above 40 percent, and real GDP contracted for the fourth consecutive year. The crisis was also quite a shock for the IMF, since the IMF had been intimately involved in Argentine economic affairs since 1991 and was arguably a mentor and patron of the dramatic Argentine turnaround in the 1990s - from hyperinflation to single digit inflation and positive economic growth albeit with double digit unemployment since 1994. It was necessary for the IMF to re-establish its credibility with governments and financial markets, and the report represented a significant public relations damage control exercise to restore confidence in the IMF, which the IMF did by means of isolating and quarantining Argentina and using the Argentine crisis as a defense for stricter enforcement of controversial IMF loan conditions.

The IMF, the World Bank and the General Agreement on Tariffs and Trade (GATT - replaced in 1995 by the World Trade Organization) were created in 1944 in order to promote international financial stability by providing liquidity to prevent/mitigate financial crises (IMF), to advance economic development in impoverished and undercapitalized countries (World Bank) and to reduce the barriers to the free trade among countries (GATT/WTO). From 1944 through 1971, the IMF operated according to wisdom of the day, which dictated fixed but adjustable exchange rates. The system of fixed exchange rates pegged to the U.S. dollar came undone in 1971, and thereafter, the financial/economic wisdom of the day came around to the idea of floating or flexible exchange rates. Argentina in 1991 was an exception. In response to chronic hyperinflation, Argentina pegged its currency to the US dollar and began a series of market-

oriented economic reforms. Hyperinflation was cured - inflation rates dropped to single digits by 1993, although as often seen in aggressive disinflationary campaigns,[1] unemployment levels moved in the opposite direction. Incidentally, it is the failure of Argentina to proceed vigorously with fiscal austerity measures and structural reform (especially in the contentious area of labour market reforms) that the IMF believes made an otherwise successful fixed exchange rate regime untenable.

In explaining the causes of the Argentine crisis, the IMF attributed responsibility to the confluence of underlying factors (fixed exchange rate regime combined with fiscal weakness and foreign currency-denominated borrowing) and triggering factors (unanticipated shocks to global supply/demand conditions). Having identified the factors that led to the crisis, the IMF proceeded to indicate ownership/responsibility. Argentina's fixed exchange rate, based on the convertibility regime introduced in 1991 to combat persistent hyperinflation, was judged to be adequate for the short run solution of the hyperinflation problem of the early 1990s. However, the IMF now considers that the fixed exchange rate was not the best medium term solution for Argentina given the country's high unemployment rate, the prominence of fiscal policy[2] as a countercyclical tool to address high unemployment and dependence on foreign currency-denominated borrowing (especially U.S. dollars - reminiscent of the debt crisis of the early 1980s when the Federal Reserve Board's disinflationary program sent interest rates soaring). In the absence of monetary policy autonomy, fiscal policy was the only government option available to deal with persistently high levels of unemployment. Argentina's weak fiscal situation required that it finance its deficits largely from foreign markets and in foreign currencies. According to the IMF account, the combination of a fixed exchange rate regime, government overspending and reliance on foreign borrowing made Argentina sufficiently unstable so that large, adverse shocks, such as those presented by the 1998 East Asian crisis, inevitably tipped the economy into a protracted and steep downturn.

Although a July 30th *New York Times*' article suggested that the "Report Looks Harshly at IMF's Role in Argentine Debt Crisis," the

IMF essentially faulted itself for not being harsh enough in enforcing fiscal discipline and structural reforms on Argentina. In this rather extreme defense of itself (or at least another department within itself), the IMF argued that the Argentine crisis demonstrates just why the often controversial IMF loan conditions must be rigidly enforced notwithstanding country pressures for national sovereignty, democratic accountability and social justice. Not surprisingly the IMF "internal audit" failed to address these broader issues - issues alien to the calculus of bankers and economists. It is doubtless true that Argentina has been governed poorly - even malevolently (the military's 'Dirty War' of the late 1970s and early 1980s seems to drown out the caudillo populism of Peron); however, the IMF must take responsibility for its advice if not governance, part of which is the legacy of 10 consecutive years of double digit unemployment.[3] If that is not a startling negative fact, imagine the U.S. in a position where it is financed by an international bank, which is also controlled by its largest creditor[4] and that the U.S. solved its hyperinflationary problems at the steep price of double digit unemployment for 10 years in a row with levels higher than any seen since the Great Depression. It would not be a stretch to suggest that these would be truly revolutionary times in the U.S.[5] and if that's the case then why should the IMF get off so easily in the 3rd World?

Endnotes

[1] During the Bank of Canada's campaign to bring inflation under control in the early 1990s, the national unemployment rate in Canada exceeded 10 percent from 1991 through 1994 and remained above 9 percent for the following three years.

[2] According to the notion of the impossible trinity, it is not possible for a country to adopt an economic policy portfolio of fixed exchange rates, monetary policy independence and free capital mobility. Only two of the three policies can be achieved at any given time. In Argentina's case during the 1990s, exchange rates were fixed, the Argentine currency being pegged to the U.S. dollar, and short- and long-term capital (bonds, equities, foreign direct investment, etc.) was free to move in and out of the country. Since the

Argentine central bank lacked the sort of freedom of movement that Americans have become accustomed to with the Federal Reserve Board, monetary policy was not available to stimulate/restrain economic activity by means of money supply and interest rate interventions.

[3] It is curious, since the report was published in mid-2004, that Figure 2-7 (Real GDP Growth and Unemployment, 1992-2000) on page 52 of the report fails to include the two worst years (2001 and 2002) of the Argentine crisis, and it is no less curious that Table 1-1 (Key Economic Indicators, 1991-2002) on page 17 includes real GDP growth and inflation but excludes unemployment data. These omissions suggest a failure among IMF staff to appreciate the significance of unemployment as a policy outcome.

[4] Not only is the U.S. the largest donor country to the IMF, but it is the only country that possesses independent veto power over IMF decisions. Under the IMF's rules, an 85 percent majority is required to approve key decisions, and the U.S. voting bloc is 17 percent of the total.

[5] Canada, not unlike some of the European countries, seems to have a higher tolerance for unemployment as demonstrated in the 1990s. The Canadian Government's longstanding bias against full-employment policies is nowhere better illustrated than in the fact that the province of Newfoundland and Labrador has experienced three decades of double digit unemployment.

America's post-9/11 war on terror, the war in Afghanistan and the second war in Iraq mark what future historians will describe as significant markers in the transition of American foreign policy away from the anti-communist positioning of the Cold War and towards a foreign policy directed at terrorist organizations and their state sponsors. The Taliban government in Afghanistan and Saddam Hussein's Baathist regime in Iraq were targets of U.S. foreign military policy (i.e., the military, as opposed to diplomatic or economic, dimension of U.S. foreign policy), because the U.S. regarded them as either active sponsors of international, especially anti-American, terrorism (Taliban) or as probable sponsors of international terrorism on a much grander scale by means of nuclear, chemical and/or biological weapons of mass destruction (Hussein).

In addition, the broader and vaguer war on terror directed against organizations and individuals abroad and at home has presented America with a not so unfamiliar set of issues - issues that tend to surface during times of heightened national security concerns. These issues are not unique to the Bush Administration. They are not new to the American Republic. In fact, they are not unique to America. These issues emerge, or become highly visible, during periods when the priority of national unity supersedes all else. Former Justice William Brennan suggested that civil liberties in particular have not fared well during times of national emergency, and as evidence he cites key, high profile instances drawn from American history, including the Alien and Sedition Acts of 1798, the suspension of the writ of *habeas corpus* during the Civil War, restrictions on anti-war dissent during World War I, the denial of due process to American citizens of Japanese descent interned during World War II and the communist witch hunts of McCarthyism in the early years of the Cold War.[2] Justice Brennan does not mention the Vietnam War and the Pentagon Papers case, but given the tenor of his concurring opinion in *New York Times v. U.S.*, it is reasonable to conclude that the Vietnam War and the constitutional issue of national security versus freedom of the press would fit the pattern he observed, even though the Supreme Court ultimately overruled the Executive Branch

in its assertion of the primacy of 1st Amendment freedom of the press over non-specific national security interests. Furthermore, in view of the civil liberties cases arising from America's prosecution of the war on terror (and its subsidiaries in Afghanistan and Iraq), it seems that America is in the midst of yet another national emergency conforming to Justice Brennan's observation.

Since America is engaged in yet another fundamental democratic and constitutional challenge where the absolute imperatives of national security and individual liberty are in conflict, this essay looks back to the Vietnam War's Pentagon Papers for a unique and detailed perspective on a classic, yet recent vintage, case of American wartime civil liberties. The Pentagon Papers provide a focal point for an extraordinary examination of wartime civil liberties and of the equally important assertion of presidential prerogative in the definition and execution of foreign policy. First, there are the conflicts surrounding the leaking and publication of the Pentagon Papers. In an important sense, these 'procedural' conflicts engaged the executive and judicial branches of the U.S. Government in a power struggle preordained by the centuries-old constitutional principles of separation of powers and checks and balances. No doubt Daniel Ellsberg and the *New York Times*/*Washington Post* newspapers provided the motive force for the courts' actions, it is nevertheless of critical importance that the Supreme Court exists as an actionable venue of last resort for redress of constitutional grievances. Then, there are the issues from the Pentagon Papers, themselves, about why and how America went to war in Vietnam. It is in the pages of the Pentagon Papers that the reader discovers the near totality of presidential prerogative in foreign affairs, or at least in the two decades of American foreign policy in Vietnam.

In 1971, the *New York Times* and the *Washington Post* began publishing leaked excerpts of the U.S. Department of Defense's classified "History of U.S. Decision-Making Process on Viet Nam Policy." The Defense Department's top secret history was commissioned by Defense Secretary Robert McNamara in 1967 to understand how and why the U.S. had become engaged in Indochina - the U.S.' second major land war in Asia in less than a generation. In 1969, Daniel

Ellsberg, a civilian analyst with the RAND Corporation who had collaborated with other Defense Department and civilian analysts in preparing the secret history of U.S. post-war policy in Vietnam, leaked copies of the documents to the Senate in the hope that the free speech protections afforded senators in chamber would enable the material to be read into the public record thereby becoming public information. However, no senator was willing to go public at that time, so in 1971 Ellsberg approached the *New York Times*, which after several months of its own analysis of the documents began publishing the Pentagon Papers. The Nixon Administration attempted to discredit Ellsberg and was subsequently implicated in illegal wiretapping as well as in the burglary of Ellsberg's psychiatrist's office - part of the broader Watergate scandal that brought down the Nixon Presidency - resulting in the federal judge's summary dismissal of the Government's criminal case against Ellsberg.

The Nixon Administration, in two separate federal district courts - one in New York City and the other in Washington, D.C. - attempted to prevent publication of the Pentagon Papers. The cases were expedited owing to the gravity of the constitutional issues involved. Within three weeks of the *New York Times*' first article on the Pentagon Papers, the cases were escalated from the federal district courts to the federal courts of appeal and finally to the Supreme Court, where the Court ruled in favour of the newspapers and the 1st Amendment's guarantee of freedom of the press and against the Government's bid to use the courts to censor the press based on vaguely-defined national security concerns. In one of the classic confrontations between the Nixon Administration and the Supreme Court, the Court's decision in *New York Times v. U.S*. (1971) checked what would otherwise have become a presidential abuse of power - a result that would be reaffirmed in *U.S. v. Nixon* (1974), where the Court denied the President's claim that executive privilege granted unconditional immunity against criminal investigations, viz. the right to refuse to comply with the independent prosecutor's subpoena of White House tapes in the criminal trial against White House officials.

In addition to the constitutional and criminal court proceedings and issues that emerged from the Pentagon Papers' leak, the

substance of the history raises issues of presidential prerogative, government secrecy and deception, institutional checks and balances (or lack thereof) and the duplicity of rule of law and democracy rhetoric in Great Power politics. The Pentagon Papers is a history of U.S. policy in Vietnam from the end of World War II through 1968. The end of the Second World War is a significant starting point since it represented a point in time where foreign power in Indochina (Vietnam, Laos and Cambodia) reverted from Japan back to France. The year 1968 is significant for the Tet Offensive and its shock effect on American policymakers and the general public and for the demise of President Johnson who announced that he would be withdrawing from the 1968 presidential election campaign - a campaign that saw Richard Nixon win the White House back for the Republicans. Covering a period of slightly more than two decades, the Pentagon study describes how four successive American presidents, three Democrats (Truman, Kennedy and Johnson) and one Republican (Eisenhower) steadily increased the American military presence in and commitment to Indochina. The Nixon Administration fought vigorously to suppress publication of the Pentagon Papers, because although the history was at most an indictment of previous administrations for their Vietnam policy, it was becoming clear that the Nixon-Kissinger Vietnam policy represented a further escalation of the American commitment to Indochina.

The Pentagon Papers begins with Fox Butterfield's article describing U.S. policy towards Vietnam during the Truman and Eisenhower years (1945-1960). Butterfield's summary of the analysts' history of this period indicates that the U.S. supported France's re-established control over its Indochinese colonial possessions until the French were decisively defeated in 1954 by nationalist Vietnamese forces led by the communists and Ho Chi Minh. The Geneva accords of 1954 (neither the U.S. nor South Vietnam signed the accords) recognized two separate yet interim Vietnams, excluded foreign military intervention and called for unification elections in 1956. After the French defeat and withdrawal from Vietnam, the U.S. assumed the role of Western guarantor of democratic freedom, and allied itself with the anti-communist (albeit corrupt and heavy-

handed) Premier (later President) Ngo Dinh Diem and his South Vietnamese government and positioned itself against the Geneva accords insofar as they left open the possibility of a communist electoral victory in the 1956 unification elections. In the following chapter, Butterfield ascribes the origins of the Vietcong insurgency in South Vietnam to the frustrated political aspirations of communist, nationalist and anti-Diem forces upon having the 1956 elections blocked by South Vietnam and the U.S.

In the third and fourth chapters of the Pentagon Papers, Hedrick Smith covers the Kennedy years, describing the escalation of non-combat advisory military forces in Vietnam and support for covert actions in North Vietnam and connecting America's hardening anti-communist position in Indochina with the larger geopolitical context of Cold War crises in Berlin and Cuba. Smith's summary of the Kennedy years also includes an indictment against the U.S. for its complicity in the coup that overthrew Diem in 1963 as well as for its role as accomplice to Diem's repressive and corrupt rule from 1954 to 1963. The remaining six chapters of the Pentagon Papers address the Johnson years, from the Tonkin Gulf incident of 1964, which provided a pretext for congressional support of Johnson's escalation, to the Tet Offensive, which marked a turning point in the boundless optimism of American military power to create the conditions for democratic government in Vietnam. Neil Sheehan summarizes the decision making that led to the intensive bombing of North Vietnam and the massive infusion of American combat troops that began in 1965. It is noteworthy that the bombing operations in and around Hanoi (the North Vietnamese capital) and Haiphong (the principal North Vietnamese port) were guided by consciousness of civilian casualties that appears not to have existed during America's World War II devastation bombing of Dresden, Hiroshima and Nagasaki.

In the final two chapters of the Pentagon Papers, the *New York Times*' journalists describe a growing disillusionment with the progress of the war and increasing dissent among the architects of the war policy. In Smith's summary article, Secretary of Defense Robert McNamara's disenchantment with the effectiveness of U.S. foreign military policy in Vietnam (which motivated the 18-month study in the

first place) is sharply contrasted with the view of the General William Westmoreland in Saigon and the Joint Chiefs of Staff in Washington that more vigorous prosecution of the war would ultimately produce the desired political objectives. In E.W. Kenworthy's concluding chapter, the 1968 Tet Offensive is characterized as a crucial psychological win for North Vietnam and the Vietcong insurgency in the south, since it demonstrated to the U.S. and the world that the insurgents could coordinate simultaneous surprise attacks throughout South Vietnam despite American attempts to destroy the insurgency at its source by extensive bombing of North Vietnam and to fight the counterinsurgency land war on behalf of the inept South Vietnamese army. Tet marked a pivotal point in U.S. foreign policy in Vietnam, intensifying dissent within the executive branch, polarizing anti-war and pro-war supporters, contributing to Johnson's decision not to stand for re-election later that year and arguably increasing the executive branch's sensitivity and aversion to external criticism of its prerogative in foreign policy.

The answer to the question why U.S. policy developed as it did from 1945 through 1968 is unquestionably complicated. However, U.S. support for a non-communist government in Vietnam increasingly escalated through four presidential administrations - both Democratic and Republican parties were on board with the anti-communist stand in Vietnam. The U.S. supported the corrupt, oppressive Diem regime for nearly a decade as an alternative to communist rule. The Americans overestimated the ability of a sophisticated, large-scale air war to force North Vietnam to sue for peace and to shut down the supply of men and materials fueling the Vietcong insurgency. American policymakers underestimated the importance of national liberation and anti-Diem sentiments in rallying support for the guerrilla insurgency. Notwithstanding the rhetoric of democracy and self-determination, American foreign policymakers came under the spell of imperial hubris that had brought down French colonialism in Indochina. Although the domino theory of communist contagion spreading from one country to the next gave a kind of intellectual coherence to U.S. foreign policy, fear of failure (as a precedent) and loss of face (credibility) seemed to lock American policymakers into

an ever-escalating involvement in Vietnam. Related to American foreign policymakers' image consciousness was the perceived obligation that America live up to its superpower status even at the risk of acting unilaterally. Finally, U.S. foreign policy in Vietnam was concentrated in the executive branch despite constitutionally delegated congressional war powers. Congress' passage of the War Powers Act in 1973 was too late for the Vietnam War and too little for the war on terror. The Supreme Court has often been a final venue for redressing the unconstitutional excesses of the Presidency as it was in the case of the Pentagon Papers case. However, the history of the Court shows that the future may hold in store decisions of the *Korematsu* or *Abrams* type as opposed to the *Hamdi* or *New York Times* type.[3]

The answer to the question how U.S. policy developed as it did from 1945 to 1968 is best provided in terms of the secret communications and decisions contained within the Pentagon Papers as well as in terms of lengths to which the Nixon Administration went to make sure that the secrecy of U.S. decision making policy on Vietnam remained secret, knowing full well that whatever indictment might be made against a prior administration based on the release of the Pentagon Papers, such an indictment would also be made against the incumbent President, since U.S. policy in Vietnam had not changed direction since Johnson but had escalated in its military dimension even further. Looking backwards, it may seem incredible that government secrecy could be so effective for so long, particularly in a well-educated and free society. However, it is even more incredible, in view of the not so distant past of Vietnam and the Pentagon Papers, that government secrecy and deception, this time with respect to the truth (i.e., accurate intelligence) about Iraq's weapons of mass destruction, have once again been used to promote and to justify, to a once cynical American public, a full-scale air and land war in Asia, while in the meantime, the instigator of the 9/11 terrorist attacks, which were the proximate cause for the war on terror, the Afghan War and the Iraq War, remains at large, despite the considerable curtailment of civil liberties enforced in the interest of capturing Osama bin Laden and his co-conspirators.

Endnotes

[1] References are to "The Pentagon Papers as Published by the *New York Times*" (1971). The *New York Times*' version of the Pentagon Papers is an abbreviated version of the Department of Defense's 47-volume study entitled "The History of U.S. Decision-Making Process on Viet Nam Policy." In addition to 4,000 pages of original government documents (memoranda, reports, cables, etc.), the study contained 3,000 pages of analytical commentary prepared by Department of Defense and civilian analysts. The *New York Times* further summarized this analytical commentary, with Neil Sheehan, Hedrick Smith, E.W. Kenworthy and Fox Butterfield each contributing to the *New York Times*' version of the Pentagon Papers one or more of 10 summary articles with selected government documents appended.

[2] "The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crisis" by U.S. Supreme Court Justice William J. Brennan in 1987 paper prepared for the Law School of the Hebrew University in Jerusalem, Israel.

[3] In the *Korematsu* and *Abrams* cases, the Supreme Court decided in favour of the temporary curtailment of civil liberties during wartime, while in the *Hamdi* and *New York Times* cases, the Court decided in favour of the protection of civil liberties during wartime. In *Korematsu v. U.S*. (1944), the Supreme Court supported the Government's internment of U.S. citizens of Japanese descent during World War II, and in *Abrams v. U.S*. (1919), the Court supported the Espionage Act's limits on anti-war free speech during World War I, despite Justice Oliver Wendell Holmes' famous 'marketplace of ideas' dissent. In *Hamdi v. Rumsfeld* (2004), the Court supported due process for U.S. citizens captured and detained as enemy combatants, and in *New York Times v. U.S.* (1971), the Court defended freedom of the press against government censorship.

On December 16, 2004, in the case of *A v. Home Secretary*, the British House of Lords rendered an 8 - 1 judgment against the British Government's[2] indefinite detention of terrorist suspects without charges or trial. On appeal, the House of Lords, the highest court of record in the U.K., denied the Government's arguments for a derogation from the *habeas corpus* rights of foreign nationals embodied in the European Convention on Human Rights (ECHR). Not only did the House of Lords quash the Government's Derogation Order, it also determined that the parliamentary legislation at issue was incompatible with the ECHR.

The appellants, all of whom are foreign nationals, were suspected of being linked to international terrorism, were regarded as a potential threat to the U.K. and were therefore detained under provisions of the post-9/11 Anti-Terrorism, Crime and Security Act (ATCSA) of 2001, which granted the Government emergency powers to detain foreign nationals who could not be deported (owing to the threat of torture in their home country) and who voluntarily remained in the U.K.

In 1998 the U.K. passed the Human Rights Act which gave domestic force to the ECHR. Of particular relevance to this case is the (ECHR) Article 5 right against arbitrary detention and denial of due process. The Government did not bring formal charges, which could be challenged in a court of law, arguing that under Section 23 of Part 4 of the ATCSA a suspected international terrorist may be detained even if s/he cannot be deported without violating Article 3 of the ECHR regarding human rights' protection against torture or inhuman treatment. In accordance with the ATCSA and the ECHR, the Government, addressing the incompatibility between domestic and international law on the issue of *habeas corpus* rights for non-nationals, sought a derogation from the ECHR's Article 5 on the grounds that the urgency of British national security interests post-9/11 warranted special consideration for foreign nationals suspected of international terrorism who either could not be deported or would not voluntarily leave the U.K.

The Special Immigration Appeals Commission (SIAC), a special administrative court created to hear appeals in immigration decisions, reviewed the Government's decision and concluded that the Government's attempt to obtain an exemption for *habeas corpus* suspension was invalid and that Section 23 of the ATCSA was incompatible with the ECHR. The Government appealed the decision to the Court of Appeal, which reversed the SIAC's order, ruling in favour of the Government and against the detainees. On appeal, the House of Lords reversed the Court of Appeal decision and reinstated the SIAC decision quashing the Government's Derogation Order and declaring Section 23 incompatible with Article 5 of the ECHR.

Considered one of most important constitutional law cases in the U.K. in recent years *A v. Home Secretary*, raised fundamental questions about the balance between national security and civil liberties, the efficacy of the separation of governmental powers in realizing this balance and the legitimacy of international law in the jurisprudence of sovereign nations. The national security of the U.K., in light of the 9/11 terrorist attacks against its principal ally, provided the impetus for stronger anti-terrorist measures. Before the end of 2001, Parliament had passed the ATCSA with specific provisions addressing foreign nationals suspected of international terrorism, and the Government, acting under the authority of the Human Rights Act, issued a Derogation Order, temporarily exempting British authorities from the ECHR's provisions protecting the due process rights of foreign nationals. These actions of Parliament and the Government were a direct and immediate response to the threat of international terrorism against U.K. In this case, the threat was posed by militant Islamists not the IRA - a point relevant to arguments advanced on behalf of the appellants and accepted by the majority of law lords in judging that the ATCSA legislation was both disproportionate and discriminatory in its violation of Article 5 of the ECHR. It was disproportionate and discriminatory in that denial of due process was applied only to foreign nationals who were not the sole and exclusive source of the international terrorist threat against the U.K.

The civil liberties at issue in *A v. Home Secretary* concerned the *habeas corpus* right of foreign nationals against arbitrary and

indefinite detention. *Habeas corpus* is at the very centre of a long-established tradition of civil liberties in the U.K. as indicated in Lord Bingham's reference to Magna Carta (1215) and the Petition of Right (1628) and Lord Hoffmann's suggestion that freedom from "arbitrary arrest and detention is a quintessentially British liberty." While acknowledging that there have been occasions where the U.K.'s libertarian tradition has been temporarily and regrettably rolled back - most memorably during the Napoleonic Wars and the two 20th century world wars as recollected in Lord Hoffmann's Opinion- there is nevertheless a strong presumption against the suspension of *habeas corpus* and it is the duty of the British courts to defend fundamental civil liberties against too easy an interruption. Furthermore, the extension of civil liberties to foreign nationals is a practical reality of the contemporary U.K. given its membership in an increasingly integrated European Union (EU). The U.K.'s destiny lies with the EU notwithstanding its history of empire and great power status independent of Europe, its consequent reluctance in conceding sovereignty to a supranational European government (e.g., in currency and monetary policy) and its historically strong bilateral relationship with the U.S. In a highly integrated economic union where products, capital and people move freely, national borders and distinctions of nationality will continue to be less important than they are between more traditional and fully-sovereign nation-states such as the U.S. and Japan.

Separation of powers, especially the power of judicial review with respect to civil liberties, emerges as a principal issue in *A v. Home Secretary*. In the U.K., independent courts, especially *vis-à-vis* the executive, are part of a longstanding constitutional heritage dating back to 17th century England and the conflicts between the Stuart kings and Parliament over star chambers, ecclesiastical and other royal courts not subject to rules and procedures of the common law. As the constitutional monarchy has evolved since, the British monarch has been replaced by the Prime Minister and his/her Cabinet as the executive branch of government. While the Human Rights Act gave the British courts the authority to declare domestic law to be incompatible with international human rights law, it did not give the courts the degree of judicial review exercised in U.S. courts

according to which legislation may be ruled unconstitutional and therefore invalid. Nevertheless, the courts' newly-acquired authority to declare an Act of Parliament incompatible with international law is significant in increasing the courts' power of judicial review and in buttressing the courts' traditional role as defender of civil liberties *vis-à-vis* the national security interests represented by both political branches of government - Cabinet and Parliament. The separation of powers among the Government, Parliament and the courts in the U.K. parallels that defined in the U.S. Constitution - not surprisingly since the American document is heavily indebted to the constitutional crises of 17th century England.

International law and national sovereignty, especially with respect to the ECHR, which was given domestic effect in the U.K. by the 1998 Human Rights Act, present important modern issues in *A v. Home Secretary*. In European law, the conflict between national and international law to be resolved with local deference in national security matters on the assumption that checks and balances exist among the legislative, executive and judicial branches. Thus, in this case involving a national security emergency, the British courts were likely to be granted considerably wide latitude. Given the judgment by the U.K.'s highest court, the European Court of Human Rights, theoretically available for final appeal, was not expected to rule against the House of Lords and a libertarian judgment and in favour of the Government and a suspension of human rights, although it might have been a final appeal venue had the law lords decided with the Government. Such an assertion of judicial review by the European Court would not be without precedent.[3]

A v. Home Secretary has its American counterparts in the two U.S. Supreme Court cases - *Hamdi v. Rumsfeld* and *Rasul v. Bush* both of which also involve overlapping and conflicting issues in national security, civil liberties, separation of powers and international law. *Hamdi v. Rumsfeld* and *Rasul v. Bush* (the Guantanamo Bay case) were wartime civil liberties cases decided by the Supreme Court in 2004. In *Hamdi v. Rumsfeld*, the Court was divided on two issues. On the first issue, the Court ruled that the due process rights of a U.S. citizen detained as 'enemy combatant' include the right to

challenge this status before an impartial body. On the second issue, the Court ruled in favour of the President's wartime authority to detain a U.S. citizen as 'enemy combatant,' in this instance drawing from powers conferred by Congress in its 2001 Authorization to Use Military Force resolution. In *Rasul v. Bush*, the Court ruled that foreign nationals, detained without charges by the U.S. military at Guantanamo Bay Naval Base in Cuba, are entitled to *habeas corpus* relief, i.e., due process through the U.S. federal courts. The U.K. and the American court cases were ultimately resolved in favour of judicial review as a critical component of the separation of powers and checks and balances and in favour of due process protections for civil liberties, although Lord Bingham suggests that since 9/11 U.S. courts, presumably in contrast to British courts, have shown a "heightened deference" to the "judgments of the political branches with respect to national security."

The current war on international terrorism is the latest serious challenge to the British (and American) constitutional systems of the rule of law, equality before the law and the protection of civil liberties during wartime or other such emergencies. British (and American) constitutional history reveals both victories and setbacks for civil liberties during national security crises, even though the libertarian tradition has been demonstrably superior to what one would find in other countries both now and in the past. Nevertheless, as Lord Hoffmann notes in his opinion, there have been occasions in British history where the suspension of *habeas corpus* has been "cruelly and unnecessarily exercised" - an assessment echoed on the other side of the Atlantic by former Supreme Court Justice William Brennan in a 1987 paper[4] prepared for the Law School of the Hebrew University in Jerusalem. In this context, *A v. Home Secretary* and its American counterparts, *Hamdi* and *Rasul*, are noteworthy defenses of civil liberties during periods of national security crisis - times when the temporary sacrifice of civil liberties for a few is set against the weighty concern for life and property in the face of existing or imminent national emergencies. Finally, these cases demonstrate that the adjudication of wartime civil liberties has been facilitated by the separation of powers, according to which the political branches of the executive and legislature represent the case for national security

interests of the majority while the courts represent the case for the protection of the rule of law for minorities. Separation of powers and judicial review are necessary for the preservation of the rule of law in democracies where it is a fundamental principle that majority rule must be complemented by the recognition and defense of minority interests in accordance with the principle of equality before the law.

Endnotes

[1] The source for the case information is the House of Lords' judgment entitled "Opinions of the Lords of Appeal For Judgment in the Cause *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent), X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department* (Respondent) on Thursday 16 December 2004." Subsequent references to the case will be abbreviated to *A v. Home Secretary*.

[2] References to the (British) Government are to the Prime Minister and his/her Cabinet (all members of Parliament) and the various ministries and administrative departments under the political direction of the members of Cabinet. The portfolio of the Secretary of State for the Home Department (Home Secretary) in the British Government is comparable to that of the Attorney General in the U.S. Government.

[3] In *Chahal v. United Kingdom* (1996), the European Court judged against the British Government's attempt to deport a foreign national, on the grounds that he was a threat to national security, to his home country where he faced probable torture and even death.

[4] Justice Brennan in "The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crisis" argues that American civil liberties have been dangerously compromised during wartime emergencies, citing the Alien & Sedition Acts (1798), the suspension of *habeas corpus* during the Civil War, the Espionage Act of World War I, the Japanese-American internment of World War II and the communist witch-hunts of the McCarthy era.

Does America rule an empire?

The question has acquired new relevance in the 21st century in light of, not one, but two foreign interventions that have brought about regime change and introduced nation building on the other side of the globe. Not since Vietnam in the 1960s has the US been as politically and militarily committed to controlling the destiny of a foreign government. At the height of the initial engagement and in response to America's rapid escalation of its military commitment to an anti-communist South Vietnam, Senator William Fulbright, Chairman of the Senate Foreign Relations Committee, published his famous dissent from the Vietnam policy of fellow Democrat, President Lyndon Baines Johnson. In *The Arrogance of Power* (1966), Fulbright challenged the US Government's unilateralist approach to Vietnam, its disregard for international agreements (specifically the Geneva accords and the 1956 re-unification elections) and its long-term support for corrupt and oppressive South Vietnamese governments (especially the Diem government from the 1954 French withdrawal through the 1963 military coup). Fulbright's most stinging charge - a charge that resonates throughout the world today - was that the US Government had become a reactionary global hegemon only interested in pro-American self-determination in foreign lands and thus radically and hypocritically departing from the principles of self-determination that grounded America's own revolution.

Foreign policy is the projection of power and influence in international political, economic and military affairs. It may take the form of domination (e.g., America's military and political role in the 2nd Iraq War), cooperation (e.g., America's support for the political and economic isolation of the South African apartheid regime) or resistance (e.g., America's political and economic arguments against the Kyoto Protocol on global pollution). Given its dominant political, economic and military power in the world, America, more than any other nation-state, has a greater range of choice in foreign policy, seemingly able to dominate, to cooperate or to resist at will while other nation-states are limited to cooperation (including coerced) and resistance. American foreign policy during the Cold War and

especially since the fall of the Soviet Empire has been characterized - and not always by enemies or estranged allies - as dominant, hegemonic and imperialistic. For example, the British historian, Niall Ferguson, in *Colossus: The Price of America's Empire* (2004), claims that America is an empire notwithstanding the reluctance on part of most Americans to acknowledge as much. Ferguson goes even further to argue that the American imperialist tendency dates as far back as the continental expansion from the original 13 Atlantic coast states. However, Ferguson, a defender of Pax Britannica, sees Pax Americana as an opportunity for benign and generally beneficial empire (making the world safe for democracy and free markets) insofar as America is willing to demonstrate the stick-to-it-iveness of an imperial power. In making the case that America is an empire, Ferguson refers to an article published in the *Economic History Review* by John Gallagher and Ronald Robinson, "The Imperialism of Free Trade" (1953), wherein the authors argue that it is misleading to think of empire solely in the context of colour-coded world maps, since indirect rule/influence is a form of empire which does not necessarily show up as colour-demarcated geopolitical boundaries. Based on the notion of indirect control, the authors claimed that the British Empire was expansionary throughout the 19th century, as much because of British free trade (although not necessarily symmetrical or fair) policies as because of British colonization (e.g., Africa during the late 19th century). The principal point to be drawn here is that since empire may be reasonably defined as the dominant projection of foreign policy power, by direct or indirect means, in international relations, the US and the Soviet Union were not only superpowers but also empires during the Cold War and after the fall of the Soviet Empire in 1991, the US became the sole superpower/empire.

Prominent examples of American foreign political, economic and military policy since World War II which suggest the exercise of imperial power would include Vietnam, Nicaragua and Iraq. In Vietnam, the US replaced French colonial rule, disregarded the 1954 Geneva peace accords and unilaterally supported successive corrupt South Vietnamese regimes under the auspices of American national

security and the defense of democratic capitalism against the imminent fall of Indochina to authoritarian communism. In Nicaragua, adhering to the 160-year old Monroe Doctrine that asserted American preeminence (vis-à-vis European powers) in Latin America, the US violated international law by mining the Atlantic and Pacific harbors of the communist Sandinista government in 1983 and (some) broke its own laws by selling arms to the anti-communist Contras using funds diverted from the sale of armaments to Iranian dissidents (Iran-Contra Affair). As in Vietnam, the US was acting in its national security interests by attempting regime change to reverse the communist revolution against the Somoza dictatorship thereby preventing the spread of communism among America's neighbours in Central America and Mexico. The US waged two wars in Iraq within a generation - the first was widely supported by the international community and the United Nations as a war against Iraqi aggression towards Kuwait, while the second was divisive in the extreme within the international community and even the NATO alliance and was more ambiguously defined as a preemptive war against potential aggression. In both cases, however, the common underlying war rationale was the defense of the economically strategic global oil market in which Iraq and the broader Middle East are major suppliers and therefore major powers as effectively demonstrated to the US during the 1973-74 Saudi oil embargo.

The American dilemma is how/whether to rule/lead/influence the world in a manner that is consistent with its constitutional principles of democratic and limited government under the rule of law as well as its post-Depression provisioning of a social safety net. Coterminous with the era of American empire was the expansion of civil rights in the US to address the unofficial apartheid system of segregation and voter disenfranchisement. Similarly, the specter of an imperial presidency that emerged from the secrecy and deception surrounding the exercise of presidential power in foreign policy (Vietnam) and in domestic policy (Watergate) reinvigorated the American system of the rule of law (e.g., freedom of the press in the face of government censorship as decided by the Supreme Court in the 1971 Pentagon Papers case) and the separation of powers (e.g., War Powers Act of 1973 intended to constrain Presidential wars) …

at least for a time. National security is the ultimate rationale for extreme measures, whether they involve waging war abroad or curtailing civil liberties at home, but the American experience since World War II demonstrates that the national security argument, especially when vague and evasive, does not always win. Finally, the fluid developments in domestic economic policy - deregulation beginning in the late 1970s, the 1980s supply-side economics of balanced budgets by means of tax cuts and despite defense spending hikes and the fortuitous long boom of the 1990s - did not fundamentally alter America's commitment to a mixed economy - an economic system somewhere in between the centrally planned economies of the Soviet empire and the idealized *laissez-faire* economy of classical economics.

American foreign policy is in part compatible and in part incongruous with American democracy in its domestic context. On the one hand, the exporting of democratic and free market ideology is nothing more than the expected, self-serving behaviour of a dominant nation-state, whose comparative advantage in political, economic and military power facilitates the imposition of values, institutions and trade agreements on lesser, dependent nation-states. On the other hand, the revolutionary ideologies of democracy and free markets are not necessarily antithetical to the interests of the citizens of foreign nation-states. However, they are most certainly a threat to the status quo power of authoritarian regimes as well as to the foreign policy objectives of external powers whose interests may be compromised by national self-determination - the fundamental precondition for democracy and free markets. Furthermore, the American foreign policy rhetoric of democracy and free markets is often contradicted by actual American foreign policy. Not only is self-determined democracy not always in the political or economic interests of the US, but America's packaged export of democracy-cum-capitalism is often quite different from what Americans themselves are willing to accept for themselves, e.g., freedom to dissent from government policy, guarantees of due process and equality before the law, separation of government powers with checks and balances and a form of capitalism whose worst abuses are constrained by

government regulation and ameliorated by a social safety net. As Fulbright claimed, no doubt with some controversy, the US is not a revolutionary nation-state, even though its ideologies of democracy and free markets can be quite revolutionary, to which Ferguson would add that America may fairly be characterized as an anti-imperialist empire, i.e., an empire that has yet to acknowledge the full implications of its dominant standing in the world. It is as if two of the most important democratic principles that drove the American Revolution more than two hundred years ago - self-determination and abhorrence of absolutist power - have lost some of their universality as the US has developed from its rebellious youth as a loose collection of British colonies to its maturity as the world's sole and undisputed superpower. None of this is to suggest that Canada or Germany or France would somehow be preferable superpowers - maybe they would maybe they would not. This would depend in large part on the degree to which they tolerated dissent, respected others' right to self-determination and checked the accumulation of absolute power and restrained the arbitrary exercise of dominant power.

Vietnam Association for Victims of Agent Orange/Dioxin (VAVAO) v. Dow Chemical is a product liability lawsuit, but it engages significant foreign policy, constitutional and international law issues.

On March 10, 2005, the US District Court for the Eastern District of New York (EDNY), with Jack Weinstein Senior District Judge presiding, dismissed a Vietnamese class action lawsuit against US chemical manufacturers involved in the production of Agent Orange during the Vietnam War.[1] Similar product liability lawsuits were launched in the US on behalf of Vietnam veterans in the late 1970s and early 1980s. In 1984, Judge Weinstein of the District Court (EDNY) presided over a class action settlement in which the chemical manufacturers, admitting no legal liability, agreed to create a $180 million fund for Vietnam veterans suffering and dying from Agent Orange-related illnesses. From the perspective of the chemical manufacturers, the Agent Orange settlement was intended to bring to an end, once and for all, a wave of US Agent Orange tort litigation. However, in 2003, the Supreme Court, in *Dow Chemical v. Stephenson*, reopened Agent Orange tort litigation, by upholding the right of Vietnam veterans to sue chemical manufacturers notwithstanding the latter's claim that the 1984 protected them from future Agent Orange product liability litigation. The Supreme Court decided that the 1984 class action settlement's prohibition against future lawsuits against the defendants constituted a denial of due process, thereby permitting the new Agent Orange cases to proceed in the courts. In 2004, the District Court (EDNY) granted defendants' motion for summary judgment based on the government contractor defense, which shields contractors from liability where government procurement has sanctioned the goods in question. In February 2005, the Court dismissed both cases (*Isaacson v. Dow Chemical* and *Stephenson v. Dow Chemical*) giving a victory to the defendant chemical manufacturers and a loss to the Vietnam veteran plaintiffs.

In *VAVAO v. Dow Chemical*, the Vietnamese plaintiffs (a Vietnamese association representing a large class of Vietnamese victims of Agent Orange and numerous other Vietnamese citizens)

sued the defendant chemical manufacturing firms for violating US and international law by manufacturing toxic herbicide Agent Orange and other chemical herbicides,[2] which were widely used, to the detriment of the people and land,[3] during the Vietnam War by the US from 1961 through 1971 and thereafter by South Vietnam until 1975. On a motion from the defendants for summary judgment and dismissal of the case, the Court rejected all claims - claims ranging from tort liability to genocide, war crimes and crimes against humanity - advanced by the plaintiffs. The lawsuit was dismissed for lack of an actionable claim based on the Court's finding that the defendants were immunized by the government contractor defense from any civil liability under US law and were not susceptible to prosecution under international law since there was none that specifically proscribed or criminalized the manufacture and use of Agent Orange and other chemical herbicides by the US during the Vietnam War. This result of the Vietnamese case is not inconsistent with that of the earlier US cases, since the Vietnam veterans' cases were won in an out-of-court settlement and not in the court's ruling. In the US, the Agent Orange manufacturers were willing to settle and bring an end to the negative publicity of the Agent Orange litigation, despite favourable prospects for their winning the class action lawsuit. Undoubtedly, the Vietnamese plaintiffs in *VAVAO* considered their out-of-court prospects to be advanced by the risk of negative international publicity for the chemical companies.

In reaching its decision to dismiss the Vietnamese class action lawsuit, the court addressed the domestic and international law claims separately. Predictably, based on the *Isaacson* and *Stephenson* decisions, the Court ruled that the defendant chemical companies were immune to liability under US law due to the government contractor defense. Since the US Government is protected by sovereign immunity from tort liability, plaintiffs were left with no agent against whom remedy could be sought through the courts. The domestic law claims were therefore null and void and easily dispatched. Most of the Court's 233-page judgment was devoted to the international law claims.

The Court denied the defendants' use of the government contractor defense against the international law claims and went to some

lengths to explain that this defense is an anomaly of US tort law and that it does not extend to international law as has been established by legal precedent from the post-World War II Nuremberg trials. Nevertheless, in considering the plaintiffs' claims, the Court failed to find an explicit international convention or agreement to which the US was a party which would have criminalized the US military's use of Agent Orange in Vietnam.[4] "Neither a treaty to which the United States was a party, nor a statute, nor a binding declaration of the United States, nor a rule of international or human rights law applied to limit spraying of herbicides by the United States in Vietnam during the period up to April of 1975." The plaintiff's international law claims were therefore rejected, on the basis that chemical herbicides were neither explicitly proscribed by international law nor even if they had been banned under the 1925 Geneva Convention (post-World War I agreement to ban the wartime use of poison and poisonous gases), the US was not obliged to adhere to 1925 Geneva Convention until it was ratified in 1975. Furthermore, based on the legal principle of retroactivity, the US' voluntary cessation of and subsequent prohibitions/restrictions[5] regarding the use of toxic chemical herbicides is not evidence of past crimes according to the Court. In fact, it remains an open question whether the US has unconditionally renounced (i.e., declared illegal) the military use of chemical herbicides. President Ford's 1975 executive order, the only legally binding proclamation from either political branch of the US Government specifically renouncing use of chemical herbicides such as Agent Orange, covers 'first use' of chemical herbicides, but an executive order of the President is non-binding on later presidents, unlike, for example, an act of Congress.

Despite the fact that its judgment favoured the defendants and the Executive Branch of the US Government, the Court asserted its right/responsibility to exercise judicial review in foreign policy matters, in particular in matters of war policy. This is significant in that while the doctrine of sovereign immunity protects the US Government from tort liability, the exigencies of war do not give the Executive Branch carte blanche in executing wartime foreign policy, a point reinforced by references and quotes from recent Supreme

Court decisions in *Rasul v. Bush* (2004) and *Hamdi v. Rumsfeld* (2004) as well as in the precedent-setting cases of *Youngstown Sheet and Tube Co. v. Sawyer* (1952) and *Baker v. Carr* (1962). In *Rasul* and *Hamdi*, the Supreme Court affirmed that the federal judiciary does have the power of judicial review to consider the due process rights of international terrorist suspects in detention (especially the ancient writ of *habeas corpus* or the right to defend oneself against charges in court) during wartime, notwithstanding the Commander-in-Chief authority of the President and even in a time of war against non-traditional combatants such as international terrorists. The Supreme Court's decision in *Youngstown*, in which President Truman's attempted seizure of the nation's steel mills in support of the Korean War effort was ruled unconstitutional, demonstrates, in the words of Justice Sandra Day O'Connor's opinion in *Hamdi*, that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens" and equally importantly that judicial review is a legitimate means to check the excesses of Presidential power against the infringement of constitutional civil liberties. The District Court (EDNY) relies heavily on *Baker v. Carr* to ground its position *vis-à-vis* the judicial review of the actions of the political branches. In *Baker*, the Supreme Court affirmed federal court authority to exercise judicial review in the apportionment for the state legislature since the issue concerned equal protection under the law and not a political question, which would have been off limits to the judiciary. The Supreme Court proceeded to expand its authority by denying that even issues arising within the domain of foreign relations were not prima facie beyond the jurisdiction of the federal courts. As long as the issues were legal, non-political questions, the political branches of government were not immunized from judicial review by the political question doctrine.

While the Court in *VAVAO* rendered a decision that was favourable to the chemical companies as well as to the US Government (which supported the defense) and unfavourable to the Vietnamese plaintiffs, the case does establish a strong argument for the judicial review of US military policy where that policy falls under the governance of either domestic or international law. In the case at hand, it appears that the defendants won largely because the US was not

party to any international law which would have made its military use of Agent Orange during the Vietnam War criminal or civilly liable. While legal liability, for both the Government and the chemical companies, is denied, the Court's judgment provides sufficient evidence of an ethical breach, which the plaintiffs may reasonably hope will assist them in politicizing the issue in the court of world public opinion and thereby securing an out-of-court settlement along the lines of the 1984 Agent Orange class action settlement. At a time when the US is engaged in a post-war nation-building in Iraq where the imminent threat of weapons of mass destruction (at one time) provided the *casus belli* for the US military intervention, the Vietnamese Agent Orange case may serve to highlight the apparent contradictions in US foreign policy attitudes towards large-scale chemical warfare. In addition, the inconsistencies between the prominence of the rule of law in the American constitutional democracy and the selective US support for the spirit, if not the letter, of the rule of law among nations amplify the perception of an American foreign policy double standard regarding chemical warfare.

Endnotes

[1] Memorandum, Order and Judgment of March 10, 2005, US District Court Eastern District of New York, *Vietnam Association for Victims of Agent Orange/Dioxin (VAVAO) et al. v. Dow Chemical et al.*, In re "Agent Orange" Product Liability Litigation, MDL No. 381 04-CV-400 (JBW).

[2] Chemical herbicides used in Vietnam include Purple, Pink and Green between 1962 and 1965; Orange, White and Blue between 1965 and 1970; and White and Blue between 1970 and 1971. Agents Purple, Pink, Green and Orange contained the toxic chemical dioxin, and Agent Orange, the most familiar, accounted more than 60 percent of the chemical herbicide used by the US in Vietnam between 1961 and 1971. Drawing on the British use of chemical herbicides during the 1950s against the communist insurrection in Malaya, the Defense Department's Advanced Research Project Agency (ARPA) was involved in the development of weaponization

of chemical herbicides that were developed and produced by the defendant chemical companies. Chemical herbicides were used to defoliate forests and mangroves, exposing enemy forces to US air surveillance and attacks, and to destroy crops used by enemy troops.

[3] According to Defense Department information obtained by the US House of Representatives, the US had sprayed approximately 10 percent of South Vietnam's landmass with chemical herbicide by July 1969. Based on a study by Professor Jeanne Mager Stellman, published in Nature in 2003, the US military sprayed nearly 20 million gallons of chemical herbicide in Vietnam between 1961 and 1971. Stellman's study and VAVAO's claims estimate as many as four million Vietnamese were exposed to these chemical herbicides.

[4] The Court's report of its judgment includes a table labeled "Historical Examples of Biological, Chemical and Other Methods of Mass Killings or Disablements" as part of its "summary of the history of harms to civilians and land during war" which includes the US and British firebombing of Dresden, the US atomic bombing of Hiroshima and Nagasaki, along with such infamous acts as the 146BC Roman destruction of Carthage and salting of the ruins, the chlorine (German and British) and mustard gas (German) attacks during World War I, Italian mustard gas bombs used during the Abyssinian War, Japanese chemical and biological attacks in China during World War II, genocide by Germans, Austrians and Japanese during World War II and Iraq's use of chemical weapons during the Iran-Iraq War and in its internal repression of the Kurdish population.

[5] US military use of Agent Orange ceased in 1971, and four years later, the 1925 Geneva Protocol (Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare), the 1972 Biological Weapons Convention (Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on Their Destruction) and President Ford's Executive Order 11850 (Renunciation of Certain Uses in War of Chemical Herbicides and Riot Control Agents) addressed the broader issue of the use of chemical and biological weapons during wartime. Only President

Ford's Executive Order explicitly addressed the military use of chemical herbicides.

Recent Examples from the European Central Bank (ECB)

It is a common view among mainstream economists in academia, business, government and think tanks that Economics, as a science, provides objective theoretical accounts of its subject matter. Within Economics, a distinction is made between theories of 'what is' (positivist economics) and theories of 'what ought to be' (normative economics). This demarcation between value-neutral and political economic theory is often used to marginalize and discredit political economic theories that characterize market phenomena in terms of interest politics and conflict and that propose to correct market failures such as inequitable income distribution, boom-bust business cycles and employment volatility, negative externalities of profitable economic activity (e.g., pollution), unfair trade practices (e.g., price-fixing) and corporate malfeasance (accounting fraud). In contrast, positivist economics represents itself as scientific economics, objective and apolitical, and therefore, above and beyond the political economy approach that dates back to the early classical economists (most famously Adam Smith and David Ricardo of the late 18th and early 19th centuries, respectively).

Positivist economics, while not taking responsibility for making public policy, does provide technocratic guidance for public policy. Thus, Economics is a science in the service of external objectives, a science used to validate/rationalize external objectives, a science employed in marketing public policy, a science merged with politics ... and ultimately, a political science where the illusory distinction between positive and normative has been removed. The scientific pretensions of Economics are merely (although importantly) rhetorical devices intended to limit debate to only legitimate critics, i.e., knowledge of economic theory is a prerequisite for entering the field of discourse on public economic policy. Furthermore, acceptance of mainstream economic theory defines the scope and nature of public economic policy debate, i.e., the problems and solutions are to be framed in terms of mainstream economic theory.

Two recent articles published by the European Central Bank (ECB) point to the politicization of Economics with respect to two of the most important and contentious economic issues facing the European Union (EU) - stabilization policy *vis-à-vis* price stability and structural labour market reform *vis-à-vis* economic growth. Stabilization policy refers to what economists call countercyclical policy or policies designed to smooth the boom and bust volatility of output (Gross Domestic Product) and employment during the business cycle - e.g., fiscal policies such as unemployment insurance and welfare and monetary policies such as interest rate adjustment. Structural labour market reforms in the EU are aimed at bringing down the cost of labour, increasing the EU's price competitiveness and reducing the unemployment rate. As noted by Musso and Westermann, the specific policy targets include generous unemployment insurance, high and downwardly rigid wages, high payroll taxes, job security legislation and centralized wage bargaining. Economic growth facilitated by price stability and labour market reforms is a high priority topic in countries around the world, and its prominence demonstrates the contemporary relevance of Economics as political economy and not objective, dispassionate science, for there are clearly interests at stake and to frame the debate otherwise would be disingenuous.

The EU's public policy debates regarding economic stabilization and labour market reform are taking place against the backdrop of increasing economic integration within the EU, persistent high unemployment and slow growth and demographic projections of a rapidly aging population. On the institutional front, economic integration may be the most important recent development. Most noteworthy is the ascendancy of the ECB as the supranational authority in monetary policymaking for the European Monetary Union (the 12 EU member states who have adopted the Euro and ceded monetary policy to the ECB - this excludes the UK, Sweden, Denmark and the 10 new member states.) Not only does the ECB control the important economic portfolio of monetary policy, it also exercises considerable influence, via moral suasion, on fiscal policy, particularly as it relates to the deficit and debt rules of the Maastricht Treaty and the Stability and

Growth Pact. The ECB is a strong advocate of economic integration in both monetary and fiscal policy. In its view, national sovereignty in monetary policy is not necessary, and national sovereignty in fiscal policy should be circumscribed and checked by existing EU law, which prescribes budget deficit and debt limits (3 and 60 percent of GDP, respectively) as well as oversight and sanctions where these limits have been exceeded. Germany and France, the dominant political and economic EU member states, have been at the centre of the recent controversy over excessive deficits, with both countries exceeding the Stability and Growth Pact's budget deficit limits for three consecutive years (2002-2004) owing to countercyclical fiscal policies targeted at high unemployment and slow economic growth. The entire EU government has taken up the issue of excessive budget deficits - the European Commission (the EU bureaucracy) recommending compliance, ECOFIN (the council of member state ministers of finance and economics) taking more conciliatory action, and the European Court of Justice (the EU's high court) judging that EU law cannot be suspended even for Germany and France - and the issue seems far from resolved, since both Germany and France may produce excessive deficits again in 2005 if recent projections are only slightly optimistic.

In terms of long run economic growth, labour market reforms are considered a fundamental part of the EU's strategy, with the US labour market providing a benchmark. A more flexible labour market - meaning downward wage flexibility and greater job insecurity - is generally accepted by economists as a key part of any long-term global competitiveness strategy, which means that it is crucial for both long-term growth and lower unemployment. In addition, in the EU, the Lisbon agenda's 70 percent employment rate target for 2010 is recognition that the long term fiscal solvency of the EU will require the re-balancing of intergenerational incomes, resulting in an increase in the tax/benefit ratio among working age citizens in order to compensate for a decrease in the tax/benefit ratio among the projected deluge of pensioners. The labour market reform agenda is part of an overall supply side economic approach that is very similar to what has been seen previously in the English-speaking world (in the US under President Ronald Reagan, in the UK under Prime Minister

Margaret Thatcher, in New Zealand under Finance Minister Roger Douglas and in Canada under Prime Minister Jean Chretien) as well as what the Washington consensus, through the IMF and World Bank, has promoted beyond the borders of the developed world. Mainstream economic theory now rallies behind the new economic world order where economies of scale (e.g., pro-merger policy) and geography (e.g., increased mobility of both financial and physical capital) and scaled back government intervention (e.g., monetary policy controlled by independent central banks biased towards low inflation and against full employment) sustain profits which encourage investment which promote growth which create jobs.

In "The (Un)reliability of Output Gap Estimates in Real Time,"[1] the ECB argues against reliance on estimates of the output gap due to model, parameter and data uncertainties. The output gap is the difference between potential and actual output. Negative output gap indicates slackness in economy; conversely, positive output gap indicates tightness (overheating). It is a contemporary proxy for economic activity, much like unemployment is in the, somewhat outdated, Phillips curve model of price and real effects, i.e., the output gap replaces the unemployment level on the x-axis of the Phillips curve, while inflation (rate of price level changes) remains on the y-axis. Potential output is always an estimate, and real-time actual output is subject to repeated revisions. Projections are tentative by nature. The conclusion of the unreliability of output gap estimates is useful in denying the economic basis for countercyclical monetary policy and in affirming the EMU's price stability bias (variation on inflation-targeting monetary policy regime in contrast to dual objective monetary policy mandates such as that given to the US Federal Reserve Board). From the ECB's perspective, the biggest threat of output gap uncertainty for monetary policymaking would be that a mistaken assessment of slackness in economic activity would produce an expansion of the money supply and a drop in interest rates, resulting in inflation beyond the ECB's targeted price stability level. The ECB's position regarding output gap estimates is therefore consistent with its preference for broad, complex and interpretative economic data versus simplified Taylor-like rules. Nevertheless, the

ECB's policy decisions with respect to Euro area interest rates seem to be reducible to a simple price stability rule as opposed to a balanced full employment and low inflation-type rule.

In their occasional paper, "Assessing Potential Output Growth in the Euro Area: A Growth Accounting Perspective,"[2] Musso and Westermann defend the usefulness of potential output estimates for policy development especially with respect to new economy issues (innovation, Total Factor Productivity growth[3]), the Lisbon agenda (growth and employment objectives for 2010) and demographic projections (declining and aging population). Their view represents an alternative to the conclusion presented in "The (Un)reliability of Output Gap Estimates in Real Time" article. In contrast to Musso and Westermann's article, the "(Un)reliability" article maintains that the output gap estimates are unreliable from which it follows that actual and/or potential output estimates are unreliable with potential output estimates being the least reliable. Musso and Westermann's confidence in measuring potential output is not without its reservations, but they are comparatively optimistic in their belief that potential output estimates can serve as useful guides for economic policymaking, e.g., in addressing output gap issues such as high and persistent unemployment through structural labour market reforms.

Growth accounting depends on the neoclassical aggregate production function, a supply side approach to economic growth with the standard breakdown into capital, labour and technological efficiency (alternatively called the Solow residual, total factor productivity, etc.) The Lisbon agenda calls for a 70 percent employment rate by 2010, and Musso and Westermann propose meeting the Lisbon employment target by focusing on labour - specifically by raising the labour participation rate and reducing the unemployment rate. The growth accounting framework is the means by which the authors have reached the conclusion that dramatically increasing labour supply will likely maintain, or even improve, longer term output growth. The growth accounting framework, in conjunction with the neoclassical aggregate production function, is thus used to support the Lisbon agenda and structural reforms. In advancing the structural reforms targeting TFP and labour components, the authors look to the US as

a model of innovation (and TFP growth), economic growth and a flexible-price labour market.

On one hand, potential output and output gap estimates are perceived to be impediments to inflation-focused monetary policy, notwithstanding the ECB's much-vaunted 'two pillars' approach (the two pillars being price stability and economic activity, i.e., output, employment, etc.), while on the other hand, potential output estimates via growth accounting seem to be a marketing device for rationalizing labour market reforms - also an ECB priority. Potential growth estimates via growth accounting are acknowledged to lack precision in long-run estimates. However, Musso and Westermann maintain that while the precise magnitude of the desired change on economic growth may be uncertain, the positive sign of the change on growth is beyond doubt. Thus, they regard the growth accounting framework as sufficiently credible to justify the EU's labour market reforms. In essence, the new world economic theory of supply side economics appears to be the point of convergence between the authors of the two articles.[4] Both focus on the economic growth (the economist's holy grail for rich and for poor); both identify labour costs as a fundamental obstacle to economic growth; both look to free market solutions; both ignore the political economy of reform-based income redistribution; and both accept the pre-Keynesian classical notion that supply creates its own demand, which is code for retrofitting the new economy to an earlier stage of capitalism. Perhaps most importantly, both sets of authors betray the arrogance of the economist technocrat - political issues are transformed into technical issues that are often beyond the comprehension of the electorate and thus require the intervention of professional, expert and value-neutral scientists.[5]

Endnotes

[1] "The (Un)reliability of Output Gap Estimates in Real Time," Box 5 in Economic and Monetary Developments section of the ECB's Monthly Bulletin for February 2005.

[2] Musso, Alberto and Westermann, Thomas. "Assessing Potential Output Growth in the Euro Area: A Growth Accounting Perspective" European Central Bank Occasional Paper No. 22, January 2005.

[3] Total Factor Productivity (TFP) is a construct of the neoclassical production function, which is a supply side output capacity equation in its simplest form based on labour and capital inputs and a residual term, TFP, that rolls up into an overall productivity term a variety of efficiency and intensity parameters, e.g., technological change, human capital development, organizational efficiencies, increased capacity utilization, increased hours of work, etc. Economic growth, according to the production function, is thus based on increases in the quantity of labour and capital employed as well as total factor productivity or the sum of qualitative improvements in inputs or input ratios. Technological change is considered to be the primary driver of long-run economic growth, and the conventional view is that TFP is a reasonably good proxy for technological change.

[4] The ECB's economic policy positions are routinely articulated in the Editorial prefaces to its Monthly Bulletins.

[5] One obvious interpretation of the results of the recent French and Dutch referenda on the EU Constitution is that the electorate was reacting against the perceived democratic deficit emerging from the increasing concentration of power in the hands of EU bureaucrats who by definition neither reflect particular national interests nor represent political constituencies.

In October 2004, the Federal Reserve Bank of St. Louis sponsored a two-day conference of central bankers and academic economists to mark the 25th anniversary of the US Federal Reserve Board's experiment in disinflation. The consensus view was that the disinflation, engineered by the Federal Reserve Board (the Fed) under the chairmanship of Paul Volcker between 1979-82, was based on a then emerging mainstream view that money matters and that the monetary policy tool of interest rate guidance is a powerful economic policy tool, equal to or better than the fiscal policy tools of taxation and government expenditures, for accelerating or decelerating the economy. In addition, conference participants shared the view that the Fed's aggressive anti-inflation campaign launched on the watershed date of October 6, 1979 was successful in taming inflation, although, predictably, it led to the double-dip recession between 1980 and 1982. In conclusion, the consensus view maintained that the costs of gaining control of inflation in terms of reduced output and lost jobs was worth the benefits of lower, sustainable inflation based on the belief that in the long run economic growth is optimized in an economy characterized by price stability.

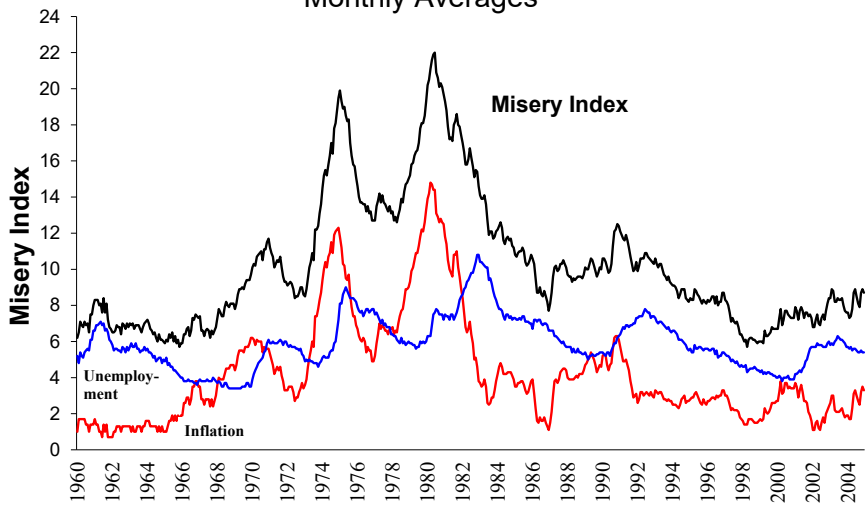
The context for the Fed's experiment in radical disinflation is the turbulent economic period of the 1970s – a decade generally marked by the sense that American power was in decline, a self-perception magnified in light of the American defeat in the Vietnam War, the Watergate scandal and forced resignation of a US President, the two externally-imposed oil crises, the seemingly endless ordeal of Americans held hostage during the Iranian Revolution and the Soviet invasion of Afghanistan and the threat it presented to American oil interests in the Persian Gulf. Arguably, the time was ripe for bold, decisive leadership, which is why President Carter appointed the known inflation hawk, Paul Volcker, to become the new Fed Chairman and to take the point in a full-scale counterattack on inflation in the belief that inflation was the real enemy that was responsible for American economic weakness. Equally assertive was the Carter Doctrine, which declared America's willingness and capability to defend its oil interests in the Persian Gulf by military means if

necessary. In waging war on inflation and threatening military intervention to ensure a stable global oil market in terms of both quantities and prices, America was attempting to regain and reassert its political, economic and military dominance.

On the domestic economic front, the monthly inflation rate (calculated on a year-over-year basis) was in double digits in October 1979 in what appeared to be a repeat of the inflationary bubble of 1973-75 that corresponded to the 1973-74 OPEC oil embargo. In addition to this second inflationary bubble, which in 1979 was attributed to global oil market distortions caused by the Iranian Revolution, the US economy experienced a protracted recession during 1973-75.[2] The developing nightmare for economists and the public alike was stagflation (i.e., stagnant or negative economic growth coupled with inflation) – a nightmare for economists because it was not supposed to happen[3] and for ordinary citizens for the obvious reasons that recessionary job losses were compounded by an even more broadly-based decline in the standard of living as measured by purchasing power.

The stagflationary 1970s presented a sharp contrast with the two previous post-war decades of the 1950s and the 1960s. While at the time, the disruption of oil supplies and the resulting price shocks was commonly blamed for the American economic decline of the 1970s, the past quarter century has given economists and policymakers the opportunity to speculate further on the causes, effects and responses as well as the hypothetical preventative and remedial measures that might have been more effective. The St. Louis Fed-sponsored retrospective includes mention of the productivity slowdown that began in the early 1970s, budget deficits as well as oil market instability, but a consensus view maintained that the economic malaise of the 1970s, in particular the so-called Great Inflation with which the St. Louis conference was most concerned, was simply attributable to poor monetary policy decision-making. Incidentally, the combination of post-war record highs in the 1970s misery index (the sum of inflation and unemployment referenced to measure stagflation – see Figure 1) and the vulnerability of the global oil market to political instability in the Middle East are important factors that have shaped recent US

Figure 1.



Bureau of Labor Statistics, US Department of Labor

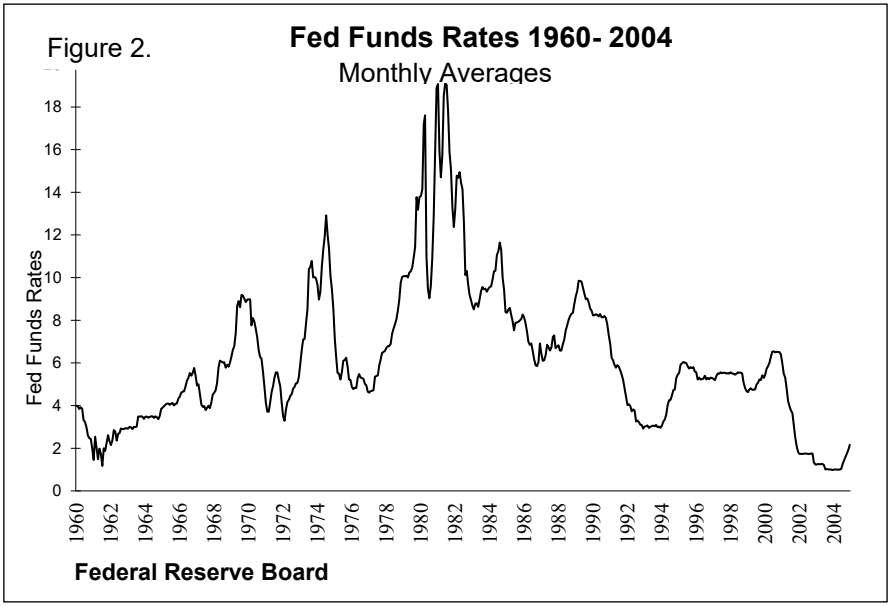
foreign policy in the Middle East and especially the Persian Gulf. For the economists and central bankers gathered in St. Louis, the international relations and foreign policy angle was a distraction. The real issues around the Great Inflation were economic – on both the theoretical and practical level. Therefore, the conference attendees were particularly well qualified to talk about what went wrong, why it went wrong and what can and should be done to prevent a recurrence.

From an economic policy perspective, 1979 represented a break with the policy of juggling two often-conflicting objectives – full employment and price stability. Inflation became the priority objective, with full employment (or at least optimal in terms of low inflation) being identified as an inevitable, albeit longer run, outcome of the Fed's experimental inflation-focused monetary policy. On a technical level, the experimental nature of the Fed's policymaking shift in 1979 was characterized by the introduction of money supply targets as the immediate object of policy decisions. Representing a deliberate move away from the more direct, more visible and more politically sensitive traditional approach of influencing market interest rates, the shift

towards controlling money supply facilitated greater upward flexibility in interest rates. The Fed funds rate, the Fed's trend-setting short-term rate for overnight lending within the banking system and the primary means by which the Fed influences market interest rates, peaked above 19 percent (monthly average) three times over the next two years, averaging above 15 percent for this two-year period – levels which were roughly 50 percent higher than those experienced after the first oil shock of the 1970s. (See Figure 2.)

The Fed's experiment appeared to be a switch to Milton Friedman's strict Monetarist[4] program of fixed (and rigidly rules-based) growth of the money supply to maintain stable prices and sustainable long-term growth. The difference was that US economy had to first

Figure 2.



purge inflation from the system before establishing a steady state of non-inflationary economic growth and employment.

For the short-medium term of the next year or so, money supply targeting was to provide the means for a steep rise in interest rates believed to be necessary for disinflating the US economy and for restoring steady-state prices, output and employment. The Fed's experiment with money supply targeting succeeded in driving inflation out of the US economy, and although the Fed abandoned money

supply targeting during the 1981-82 recession, its goals were nevertheless achieved both for the short-term and the longer term. In the short term, inflation was brought under control, while in the longer term, the Fed established the priority of its anti-inflation mandate (notwithstanding its legislated dual mandate for price stability, on one hand, and output and employment, on the other), its credibility with the markets and its independence from the political (i.e., elected) branches of government. The legacy of the Fed's experiment, then, is less about how the Fed did what it did (i.e., using a Monetarist approach to control prices by means of controlling the money supply) than about what the Fed did, viz. achieving and maintaining price stability by means of tight money policy despite considerable political pressure generated from the two back-to-back recessions of 1980 and 1981-1982.

Underlying the 'positive' reflections of the conference are several fundamental shared assumptions, which clearly influence the overall retrospective. First, there is an historical progress assumption, not unlike Francis Fukuyama's optimistic "end of history" thesis[5], which maintains that modern monetary theory and policy have become nearly infallible thereby justifying the transfer of public economic policy to non-political technocratic bankers and economists. Second, there is the related hubris of the technocrats in many ways reminiscent of the Vietnam era's 'best and brightest' foreign policy experts. Third, there is the reconstruction of history as opposed to the objective recollection of history, which is most apparent in the collective willingness to define the Volcker disinflation's success in terms of inflation management regardless of the consequences on employment.

The shared view with respect to the legacy of the Fed's 1979 experiment seems to indicate a common tendency among economists, whereby a policy that produces benefits for everyone is thereby justified despite the asymmetric distribution of costs. In other words, for an economist, what is important is that everyone benefited (to varying degrees) from a lower cost of living not that these benefits were swamped by income losses for the minority who lost their jobs during the recessions. The costliness in terms of jobs and income

was not disputed by the conference, but it was considered a price worth paying to regain control over inflation. In other words, disinflation was expected to have contractionary/recessionary effects, and it did. Beyond the US borders, the Latin American debt crisis of the 1980s, which ushered in the so-called lost decade (in terms of economic stagnation and increasing economic inequality) has also been attributed to the Fed's aggressive anti-inflation campaign. Latin American debt denominated largely in US dollars became unsupportable as the American dollar appreciated rapidly against local currencies. Measuring the success of the Volcker disinflation in terms of inflation but not in terms of employment is on par with the contemporary misrepresentations of US democracy, absent the extraordinary distortions of representative democracy that occur in between elections (i.e., during the normal mode of governance), or with misrepresentations of free market American capitalism, absent the extensive government sponsorship, subsidization and co-regulation of firms, industries and markets. The point of these comparisons is to illustrate that it is impossible to write public policy without injecting interest bias. Thus, monetary policy, including the much-vaunted monetary policy that conquered the Great Inflation and the descendant monetary policy regimes that appears to have kept inflation subdued the world over, is political economy and as such is subject to the inherently permeable boundaries between objective technocratic expertise and influence-driven public policy.

The conference and its topic were important for the Fed as an exercise in self-evaluation ('self' as opposed to 'peer,' based on the display of consensus among central bank and academic economists) and even self-criticism for which the opportunity was not missed to criticize Fed policy prior to the Volcker disinflation in order to distance the current Fed from a period when monetary policy seemed to lack credibility, independence and effectiveness. Thus, the evaluation and critique may be considered to be a strategic communication tool designed to enhance the legitimacy of the modern Fed – a central bank that acts independently and credibly in setting and exercising monetary policy. As such, the strategy is consistent with institutional instincts of bureaucratic, self-preservation and aggrandizement, which again raises doubts and concerns about the bankers' and

economists' claims of science-based and value-neutral monetary policymaking.

In conclusion, central bank independence (vis-à-vis the Congress and the President), one of the signal victories of the Volcker disinflation, certainly does appear to be in alignment with the American constitutional system of checks and balances. The Fed has demonstrated that an independent central bank is a check on the fiscal policy of the political branches of government, and the central bank, in turn, is constrained by the financial, stock, commodity, goods and labour markets (the powerful extraconstitutional arbiters of economic and political power in the American political economy). In addition, Congress has imposed on the Fed a dual mandate, in recognition of the equally important, yet sometimes conflicting, goals of low and stable prices and full and stable levels of output and employment. Nevertheless, since the Fed is essentially a monopolist in the field of monetary policy, and since modern macroeconomic theory generally regards monetary policy as capable of managing/influencing price stability, output and employment, considerable public policymaking power has been removed from the political domain. Thus, if the Fed were to go the way of many rich country central banks and adopt inflation-only targeting, then the internal checks and balances in the Fed's dual mandate would be compromised, and not only would US monetary policy no longer be a subject of political debate, but within the Fed a sort of conformity creep would likely establish the monetarism of inflation targeting as dogma.

Endnotes

[1] Federal Reserve Bank of St. Louis *Review*, "Reflections on Monetary Policy 25 Years After October 1979: Proceedings of a Special Conference of the Federal Reserve Bank of St. Louis," March/April 2005.

[2] This extended period of economic contraction is based on the recession-dating approach of the National Bureau of Economic Research (NBER), the US-based economic think tank that has dated

business cycle activity in the US since 1929. The NBER's definition of a recession is broader and subject to longer time lags (due to its more detailed and extended time series data requirements) than the rule-of-thumb definition of two consecutive quarters of negative growth. The NBER's definition of a recession ("a recession is a significant decline in economic activity spread across the economy, lasting more than a few months, normally visible in real GDP, real income, employment, industrial production, and wholesale-retail sales") is the more authoritative definition for researchers, but its popular usage is not widespread owing to extended time lags, as in the case of the 2001 recession, whose end in November 2001 was not officially dated until a year-and-a-half later in July 2003.

[3] Conventional Keynesian economic theory viewed the inflation rate and the unemployment level as economic statistics that tended to move in opposite directions (typified by the Phillips curve), which made it possible for one to be used as a lever to influence the other. Through the 1960s, the view was that fine-tuning the macroeconomy through government fiscal and coordinated Fed monetary policy could reach a balance between tolerable inflation and full employment. This view was shattered by the stagflation of the 1970s where inflation got stuck in double-digit territory for extended periods and unemployment levels doubled those of the 1950s and 1960s as they approached double digits. On the positive side, the long expansion of the 1990s showed convincingly that the inflation rate and the unemployment rate could move downwardly in the same direction. The previously announced death of the inflation-unemployment tradeoff may nonetheless have been premature, as a more comprehensive description of the inflation-unemployment relationship may explain why they sometimes move against one another (implying a tradeoff) and why they sometimes move in the same direction (implying no tradeoff).

[4] The Monetarism of Milton Friedman shares with contemporary inflation targeting (IT) Monetarism a bias towards the long run over the short run (unemployment is usually considered a short run problem while inflation is a long run problem), a preference for rules over discretion (rules are intended to prevent flexible anti-recessionary fiscal and monetary policy), a price stability bias *vis-à-vis*

output/employment stability (given that the former has long run consequences while the latter do not), a disposition towards non-intervention versus political intervention (confidence in the long run balancing of supply and demand) and a disbelief in the sustainability of any trade-off between inflation and unemployment (futility of improving the short term unemployment situation).

[5] In *The End of History and the Last Man* (1992), Fukuyama, writing at the end of the Cold War and after the fall of communism in the USSR and in Eastern Europe, suggests a correspondence between the emergence of Western capitalist democracies (especially the US) as the only legitimate and viable locus of politico-economic options and Hegel's historical dialectic towards the final and ultimate stage of political development.

Over the past year-and-a-half, I have written a number of essays covering a fairly well defined range of topics in politics and economics. For the most part, these essays have in common a focus on contemporary US issues. The essay topics fall under two general headings: political economy and actually existing democracy[1]. Essays under the heading of political economy deal with tensions between political economy and positivist economic views[2] in the policy areas of antitrust, international trade and monetary economics. Essays under the heading of 'actually existing democracy' describe the reality of wartime civil liberties, constitutional crises and foreign policy against the standards of American democratic principles.

The underlying theme running through these essays is that the exercise of power, whether economic, political or ideological, tends towards abuse unless it is restrained by another power, which itself must be kept in check. This notion is most famously recorded in the warning that "power tends to corrupt; absolute power corrupts absolutely." For an American audience, this distrust of excessive power, at least where government is concerned, is enshrined in the US Constitution in the form of checks and balances and the separation of powers. There is a similar constitutional basis for the limitation of religious power, and in the economic sphere, the federal government has, since the late 19th century, asserted its prerogative to take action against the abusive monopolization of economic power. Emerging from this common theme of the inherent dangers in excessive power are a number of variations. For example, the existence and exercise of asymmetrical power (as between rich and poor, majorities and minorities, etc.) produces distortions in free market economies and democracies. Economics is political by nature, and therefore neither economic thought nor policy is politically neutral or indifferent to the influence of economic actors. Public policy developed and administered by the technically expert, yet politically unaccountable, runs the risk of becoming efficiently anti-democratic. The fundamental tensions between egalitarian democracy and "winner-take-all" free market economics have produced a society which values the political

equality of “one man, one vote” but fears any significant lessening of income inequality, as if politics and economics can be so neatly separated.

The political economy essays concentrate on three key policy areas – antitrust, international trade and monetary policy, with economic thought being a fourth area of concentration implicitly targeted in the three policy areas. Antitrust policy is founded on the principle that government has the authority and responsibility to provide checks and balances in the sphere of economic relations. In particular, government antitrust policy is intended to block potentially harmful monopolies and to punish and break up anti-competitive monopolies and cartels. The discussion of antitrust policy addresses two fundamentally different schools of thought – the Chicago School and the Structuralist School. The Chicago School of antitrust, not surprisingly reflecting the *laissez-faire* tradition the University of Chicago (perhaps best known for the conservative monetary economics of Milton Friedman), is distinguished by its emphasis on increasing firm size as a source of economies, which translate into lower consumer prices and enhanced international competitiveness. In contrast, the Structuralist School, which has its roots in American populism, believes that permissive antitrust policy that promotes the concentration of market power may produce short-term economies of scale, but in the long run will lead to unchecked market dominance and abusive monopolist/cartel behaviour. In addition to the discussion of these two schools of antitrust thought, the antitrust-related political economy essays point to differences in the interpretation and enforcement of antitrust policy among the separate powers of government, especially the executive and judicial branches, where these differences often reveal an underlying ideological debate between the competing schools of antitrust thought. Finally, there is the division between American and European antitrust regulators – a division that sometimes reveals differences in ideology (as between the Chicago School and the structuralists) but that may also reflect differences in national/regional economic interests.

Considering international trade to be political economy is nothing new. It was the political economy of international trade that made

the two great classical economists, Adam Smith and David Ricardo, famous for their free trade views as expressed in *An Inquiry into the Nature and Causes of the Wealth of Nations* and *The Principles of Political Economy and Taxation*, respectively. Economic globalization is a contemporary form of international trade in which nearly all factors and outputs of production are allowed to move freely across national borders, constrained largely by the limits of modern transportation and communications technology. Goods and services have been increasingly freed from the restrictions of tariffs and quotas, and barriers to the movement of financial and physical capital have been lowered or removed. Only migration barriers have been retained largely intact – these being the politically sensitive immigration restrictions that limit the mobility of labour across national borders. A full-fledged global free trade regime that includes the free movement of people would truly represent a radical political economy, but it is not likely to materialize for the very reason that it would shock the rich country political and economic systems into paralysis. Even without the free movement of people, the present system of global free trade has its share of winners and losers, notwithstanding the almost universal chorus of economists who market free trade's benefits as universal and long lasting while downplaying its losses as isolated and short-lived. Furthermore, the historical record shows that in the case of dominant nation-states like the US, foreign economic policy (whether free trade, mercantilist, imperialist/colonialist, etc.) is inevitably promoted by the broader range of foreign policies – diplomatic, economic and military – in securing stable and reliable resource and consumer markets around the world. From the perspective of the dominant nation-state, free trade flourishes when competition is not quite perfect, i.e., when its dominant market position is unchallenged.

As the preceding indicates, the boundary between international trade (a subject taught in university Economics departments) and international relations (a subject taught in university Political Science departments) is sometimes blurred. History and contemporary events illustrate how effectively the broad range of nation-state powers can be deployed to penetrate, to develop and to maintain foreign markets. Given this comprehensive foreign policy support for free

trade policy, it should not be surprising that international trade is eminently political. Within the boundaries of a single nation-state, free trade creates winners and losers, and the same is true in the global economy. Whenever there are winners and losers, politics is at play. The blurring of the boundaries between free trade and geopolitics is a problem for positivist economists. In a similar way, the real world of international relations plays havoc with the democratic principles of liberty and self-determination. In the American case, liberty and self-determination were essential founding principles of the young revolutionary republic; however, their extension to other potential revolutionary republics has been severely constrained in consideration of American (economic) interests. As a mature nation-state operating on the international stage, America is guided by a different view of international relations than when it was a rebellious colonial possession of the British Empire – America once rejected the Establishment, now it has become the Establishment.

Monetary policy has come into its own in the past two-and-a-half decades since the energy crises and inflation episodes of the 1970s. In 1979, the Fed began a radical disinflationary program that brought double-digit inflation under control, but only after exacting considerable economic hardship in the form of double-digit interest rates and back-to-back recessions in 1980 and 1981-82. More or less coinciding with the wave of conservative political and economic thought that began to sweep across the globe, most visibly in Thatcher's Britain and Reagan's America, central banks, starting with Reserve Bank of New Zealand in 1989, were given unambiguously inflation-focused mandates, political independence from government and a virtual monopoly in monetary policymaking. Inflation not unemployment became the primary, and in many cases, the only, concern of central banks. Monetarist thinking replaced Keynesian thinking. The long run became more important than the short run. Technocratic expertise in monetary policymaking superseded politically-motivated decision making, based on the assumptions that economists and central bankers are politically neutral and that economic thought progresses logically, preserving truth and eliminating error. Inflation has been brought under control in North America and in Europe, and pro-

employment policies have switched from a Keynesian bias to a supply side bias, according to which full employment objectives are linked to a flexibly priced labour market. In response to the democratic deficit attributed to depoliticization of public economic policy, economists and central bankers argue that public accountability has improved as central banks have become more independent, more predictable and more focused on a single, manageable objective.

Essays in the more abstract area of economic thought have pointed to fundamental biases of mainstream economists and economics. The economic theory that underlies public policy advice is not politically neutral, and economists are advocates in all cases and advisors in some. However, the impossibility of value-neutrality in political economy is contrary to what economists believe about themselves and their science. The accepted view of Economics as a scientific discipline, in which knowledge progresses by means of a competitive process (evoking Justice Holmes' famous metaphor of the marketplace of ideas), is incomplete, since it fails to take into account the fact that no economic theory or policy has ever been neutral with respect to the interests of those affected. There have always been winners and losers and as well as different gradations within each category, and the beneficiaries are inclined to be more favourably disposed to those theories and policies that maintain or increase their benefits. From the perspective of the dominant school of thought, the competition of economic ideas tends towards intellectual and social anarchy rather than freedom, and so the competition of ideas is viewed differently depending on the ascendancy of one's school of thought.

The competition of ideas within the history of economic thought leads into the next and final set of essays dealing with the constitutional principles of limited government, democratic values and individual rights. Constitutionalism, democracy and civil rights are presented in the context of an historical and ongoing struggle against occasionally superior national security interests. In other words, the founding principles of American democracy are not eternally fixed in American institutions. They are often challenged by national emergencies, and sometimes they give way as in the cases of civil liberties denied (from the immigration and censorship restrictions of

the wartime Alien and Sedition Acts of 1798 down through the due process restrictions of the current war on terror), of presidential war-making powers unquestioned (as during the Vietnam War or, again, the current war on terror) and of democratic values betrayed (as with the denial of foreign self-determination in the American interest of defeating communism or international terrorism). The rhetoric of American democracy, not unlike that of any dominant viewpoint, is judged differently according to the politics of interest. For those that benefit, the prima facie evidence is sufficient. For the rest, both 'good' (e.g., innocent victims) and 'bad' (tyrants and terrorists), there is something irredeemably perverse in the discrepancy between the language of democracy and the behaviour of democracy.

What is missing in these essays is a more literary philosophical critique of power … a critique of the power's pursuit followed by power's abuse … a critique that will not limit itself to the authorities of today, but will always target the authorities of the day. Such a critique will even have to examine itself in order to avoid falling into the same conceit that trapped Nietzsche and a generation of post-moderns into believing that they had escaped tyranny all the while becoming what they had opposed. Alternatively, drawing from the recent history of the 20th century and the death of Soviet communism, it is all the more important to actively remember that the dictatorship of the proletariat was no liberation – it was quite simply a change in masters and not a positive one at that. The extraordinary value that can be taken from the communist experiment is that the critique of power cannot be exterminated.

Endnotes

[1] The term 'actually existing democracy' is a variation on the East European dissident term 'actually existing socialism,' which was intended to draw attention to the discrepancies between socialist rhetoric and socialist reality.

[2] According to the political economy view, economic theory and policy are largely dictated from a position of power - political, economic, military, etc. - while the positivist economic view maintains

that science-based economic theory can be value-neutral and that economic policy can therefore be based on optimal theory, i.e., 'the best of all possible theories.'

Appendix – 2004-05 Essays

"Does the US Have a Double Standard in International Trade?," March 2004.
"The GE/Honeywell Merger and The Laws of Competition as Competition of the Laws," April 2004.
"US and European Union (EU) Antitrust: Convergence or Divergence in the *Microsoft* Case?," April 2004.
"Big Pharma: Consolidation and Antitrust," April 2004.
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“Facing American Empire," February 2005.

“*Vietnam Association for Victims of Agent Orange/Dioxin (VAVAO) et al. v. Dow Chemical et al*.," March 2005.

“Political Economy or Where Economic Theory Meets Public Policy: Recent Examples from the European Central Bank (ECB)," April 2005.

“On the Fed’s Reflections on the Volcker Disinflation," May 2005.

Senator J. William Fulbright, Democrat from Arkansas, was Chairman of the Senate Foreign Relations Committee in 1966 when *The Arrogance of Power* was published. *The Arrogance of P*ower is a valuable defense of dissent in a democratic society, especially against the 1960s backdrop of profound national security issues created by the threat of nuclear war. Fulbright defends the right to dissent even though alternative solutions may not yet be known based on a belief that critique precedes discovery in the sense that a problem must first be identified before a search for its solutions can be initiated.

The occasion for Fulbright's writing *The Arrogance of Power* was the escalation of the US military commitment in Vietnam, specifically the intensification of bombing in North Vietnam and the rapid buildup of US combat forces as documented in the Pentagon Papers. In response to the imminence of a quagmire situation in Vietnam, Fulbright proposes that the US either (1) bring the war to an end with a cease-fire between South Vietnam and the Viet Cong, end the US bombing campaign, stabilize US force levels, neutralize Vietnam (and all of Indochina if possible) along the Swiss model, recognize South Vietnam's right to self-determination and allow for possible reunification of Vietnam or (2) failing to bring an end to the war, maintain US forces in defensible holding positions for the long run, i.e., until a permanent, i.e., indefinitely sustainable, US military presence in Vietnam forces a stalemate result like (1).

Fulbright was critical of US interference with the 1954 Geneva accords (especially the joint South Vietnamese and US opposition to the 1956 unification elections), US support for the corrupt and undemocratic Diem regime (and its unpromising successors following the 1963 coup) and the US failure to recognize Vietnam's right to self-determination. He argues that US foreign policy towards revolutions (such as the nationalist and anti-colonial movements emerging from the 2nd World War) is reactionary and that in the nearly two centuries since the American Revolution, America has become unrevolutionary. Referring to Crane Brinton's "Anatomy of a Revolution" (1965) with respect to the stages of revolution, Fulbright suggests

that the anti-democratic and often violent stages of Soviet, Chinese and other communist revolutions will eventually give way to a return to normalcy and that US foreign policy ought to be designed accordingly (less confrontational and more accommodative). Thus, Fulbright was essentially voicing opposition to the Cold War as well as the 'hot war' in Vietnam.

Fulbright's principal thesis is that US political, economic and military power since World War II (notwithstanding, but perhaps in part because of, Soviet power) has too often been exercised unilaterally and with hubris. Fulbright cites the Asian Doctrine, the US foreign policy that wrongly assumed the monolithic nature of communism, the relative unimportance of nationalism in Cold War strategy and the inevitability of the domino theory despite the contradictory facts of the anti-communist counter-coup in Indonesia in 1966, the persistence of tensions from the Sino-Soviet rift of the early 1960s and the uncommon combination of nationalism and communism in Vietnam dating back to post-World War II French Indochina. He also points to the examples provided by US foreign policy *vis-à-vis* Latin America (e.g., Marines sent to Dominican Republic to put down a revolution), East-West relations (ideological rigidity preventing compromise on commerce and immigration), the developing world (US aid linked to Cold War geopolitics) and the Western alliance (US unilateralist action).

Thirty-nine years after it was first published, *The Arrogance of Power* continues to be of contemporary relevance, particularly because of the multilateralist-unilateralist foreign policy debate. Fulbright was clearly an advocate of multilateralism, constructive competition (i.e., neither cutthroat nor monopolistic), cooperation not confrontation and leadership by example rather than by dictate. Against the foreign policies of Ronald Reagan and George W. Bush, those of Fulbright would appear to be idealism at best and appeasement at worst. This raises the counterfactual question which future historians should debate: would Fulbright's approach to the communist world have achieved a better result than that achieved by the aggressive containment and military competition foreign policy of the Reagan Administration?

Surveying some of the more prominent announced mergers over the past eight months of 2005 raises the question whether US antitrust policy has become unambiguously favourable towards mergers, including those which can be expected to reduce the number of competitors holding large shares of the market. The following are selected high profile mergers announced in 2005, none of which have received final approval from the US antitrust authorities in either the Department of Justice's Antitrust Division or the Federal Trade Commission's Competition Bureau: Whirlpool/Maytag (home appliances), Chevron Texaco/Unocal (oil and gas), SBC/AT&T (telecommunications), Verizon/MCI (telecommunications), Proctor & Gamble(P&G)/Gillette (consumer products) and Adidas/Reebok (athletic footwear). All of these mergers are billion dollar deals, and all demonstrate the phenomenon of growth by acquisition (in antitrust policy, acquisitions are considered mergers). These mergers combine competitors who provide distinctive product/service alternatives and produce a consolidated firm with a larger market share of consumer spending and with a predisposition towards increasing economies of scale at the expense of preserving competing product/service lines. These types of mergers are essentially justified as promoting economic efficiency by eliminating the inefficiencies of competition, where economic efficiency is measured in terms of lower producer costs and consumer prices and inefficient competition is the unnecessary production of alternate lines of goods/services.

Chicago School v. Structuralism - Competing Antitrust Worldviews

Richard Posner's 2001 *Antitrust Law* is representative of the Chicago School of antitrust thought - Posner, himself, being a leading jurist and scholar in the Chicago School's law and economics tradition. The tension between the Chicago and Structuralist schools comes down to argument about economic efficiency (as determined by producer costs and consumer prices) and economic power (as determined by market concentration). Basically, the Chicago School is *laissez-faire* with a primary focus on economic efficiency, while the

structuralists are regulatory interventionists with their primary focus on curbing excess economic power. Posner disparages non-economic populist tradition of antitrust, a tradition which would include the Structuralist School. According to Posner, the objective of antitrust policy is to promote economic efficiency, and since collusion and monopolization are not necessarily economically inefficient, cartels and monopolies are not inherently bad. However, where collusion and monopolization are harmful, i.e., thought to contribute to economic inefficiency, they are valid targets of antitrust enforcement, but anticompetitive harm must be determined relative to economic efficiency not the structure of the market.

In *US v. ALCOA* (1945), heard by 2nd District Court owing to the recusal of several Supreme Court justices with potential conflicts of interest, the court ruled that monopoly is itself a per se violation of antitrust law. Although ALCOA's conduct was not illegal, if was found to be anticompetitive in that ALCOA's accumulation of excess capacity effectively forestalled entry of new competitors. Justice Learned Hand's *ALCOA* opinion[1] is a landmark ruling and representation of the structuralist view of antitrust, according to which monopoly is regarded as inherently harmful even if obtained and maintained lawfully. Posner and the Chicago School reject the *ALCOA* precedent arguing that ALCOA was not accused of anticompetitive behaviour and that simply being a monopolist does not entail anticompetitive behaviour and that potential anticompetitive behaviour, as determined by market structure, is therefore nonjusticiable.

Structuralists and the Chicago School also differ with respect to their respective preferences for per se and rule of reason applications of antitrust law - structuralists have generally accepted a 'black-and-white,' 'no exceptions' per se approach, while Chicago School has preferred the more flexible, open-ended rule of reason approach, not least of which because it allows efficiency arguments to counteract perceived dangers of market power. This is visible in the DOJ/FTC's "Horizontal Merger Guidelines" (1997) according to which HHI (Herfindahl-Hirschman Index of market concentration), used independently, would be a per se rule, reflecting a structuralist

assessment, however, used in conjunction with broader efficiency-related assessments becomes part of a rule of reason guideline.

The costs of monopoly or other anticompetitive behaviour or conditions is typically defined in terms of market inefficiencies associated with the economic power to restrict output and charge higher than competitive prices. However, to the extent that excess capacity in an noncompetitive industry cannot be redirected to other industries already operating at full-employment and high capacity utilization, there will not only be a consumer loss of welfare due to higher prices, but there will also be a consumer loss of welfare due to unemployment. Not only would unemployment be excluded from a Chicago School economist's calculations of the costs of anticompetitive conditions, but another populist concern, concentrated political influence mirroring concentrated economic power, would be excluded.[2]

The costs of monopoly, according to microeconomic theory, include reduced output, higher prices and transfer of income from consumers to producers. Inefficiencies, due to idle capacity and waste, and absence of innovation are not entailed by monopoly, so they may be costs of monopoly, or their opposites, efficiency and innovation, may be benefits of monopoly, e.g., Schumpeter's creative destruction. The key to understanding the Chicago School is recognizing that economic efficiency is the goal of antitrust law and that competition is merely a means to an end. Efficient market power is counterposed to a competitive market of inefficient, non-innovative, price-taking firms.

Posner notes that *ALCOA* is no longer case law, a fact that has been shown to be significant in *US v. Microsoft* and may prove to be equally significant in the AMD v. Intel case (see below). Monopoly is no longer illegal per se (see *US v. Microsoft*) and divestiture is no longer an necessary remedy, e.g., injunctive relief being regarded as sufficient by the US Court of Appeals as it overturned the District Court's judgment and order to break up Microsoft into two separate companies. While *ALCOA* is strictly speaking a case involving *ex post* antitrust violations, it is clearly consistent with a more suspicious view of market concentrating mergers. In other words, preventing antitrust violations *ex ante* by means of merger policy may be preferable to prosecuting actual antitrust violations after the fact.

Notwithstanding the claim of the now-ascendant Chicago School that economic analysis introduces objectivity as well as optimality to antitrust policy, politics can be seen to be guiding the logic of the Chicago School of antitrust thought. For example, politics is involved in the analytical concept of economies of scale, where the objective is the profitability of the firm for owners and management and where the rationale is the imperative of international competition (i.e., expanding foreign markets and protecting domestic markets). Politics is also at play in the interaction of corporate stakeholders, where the priority of the owners (usually large or institutional shareholders) and management is often at the expense of employees and customers. Thus, not only does increasing size of the consolidated firm strengthen the position of the firm *vis-à-vis* its remaining competitors but also *vis-à-vis* suppliers, employees and customers. Lower costs are not obtained through an economically neutral tradeoff let alone a politically neutral tradeoff.

In addition to the conflict between the Chicago School and structuralists over antitrust policy, there is within the context of global economic integration a conflict between worldwide economic efficiency and the economic power of the nation-state. What could be described as the mercantilist-free trade paradox was made particularly evident in the case of the Chinese National Offshore Oil Corporation's (CNOOC) bid to acquire Union Oil of California (Unocal), where national security was raised as a defense for blocking the Chinese takeover in favour of the US Chevron Texaco bid. This paradox will likely be tested in the Whirlpool/Maytag, P&G/Gillette and Adidas/Reebok merger cases where the issue will be whether US antitrust policy will reflect a bias for a US national champion, i.e., a decision favourable for the enhancement/preservation of globally dominant US competitor (Whirlpool, P&G and Nike, respectively).

Antitrust *ex ante* - Mergers

In June 2005, CNOOC made a bid to acquire the US oil and gas company, Unocal. Less than two months later, CNOOC withdrew its bid in response to intense political resistance in Congress to Chinese

takeover of US oil company. Ostensibly a national energy security issue for some in the Congress, it nevertheless appeared to be a case where free market rhetoric was trumped by a modern-day instance of mercantilist foreign economic policy only thinly veiled by US national security interests. Two days after the CNOOC bid was withdrawn, the Chevron Texaco/Unocal merger was announced, its way having been paved by the FTC's earlier decision resolving its 2003 monopolization complaint against Unocal and by resolving its 2005 complaint regarding merger's likely anticompetitive impact on California low emissions gasoline market. As quoted in an August 11th *New York Times* article entitled "Foiled Bid Stirs Worry for U.S. Oil," Daniel Yergin of Cambridge Energy Research Associates summed up the situation as follows: "It's a tremendous precedent-setter for a government to interfere and declare that national security is at stake."

Against the backdrop of the failed CNOOC/Unocal merger, the Chicago School and its economic view of antitrust seems to be seriously threatened by a non-economic competitor (the national security imperative), and Posner's distinction between economic and non-economic schools of antitrust seems to have lost credibility in a world where all antitrust views are fundamentally both political and economic. Eight years ago, the Boeing/McDonnell Douglas merger raised the same issues as EU antitrust authorities reluctantly acceded to the American's ultimate merger defense - national security. Four years later in 2001, the European Commission (EC) flexed its antitrust muscle and blocked Jack Welch's bid to merge Honeywell with General Electric. Since then though the EU courts have demonstrated an affinity for the economic efficiency doctrine. However, a year later, in 2002, in what would prove to be an important demonstration of judicial review in EU antitrust policy as well as of an efficiency-based pro-merger antitrust approach, the Court of First Instance overruled the EC's merger prohibition in three separate cases, and earlier this year, the EU's highest court, the European Court of Justice, rejected the EC's appeal and upheld the lower court's ruling in the *Tetra Laval/Sidel* case. Since the 2001 trans-Atlantic divide over the GE/Honeywell merger case, there have been no major upsets in the area of merger policy, although the EC's anti-

monopolization case against Microsoft has exposed differences in antitrust perspectives. The EC's sanctions against Microsoft, post *US v. Microsoft,* were viewed critically by US antitrust authorities, but the final verdict in *Microsoft v. EC* remains outstanding, pending a decision by the Court of First Instance and possibly a final appeal to the Court of Justice.

Reversing the 1984 Ma Bell Breakup?

Two announced telecommunications mergers, SBC/AT&T and Verizon/MCI, if approved, would represent a de facto reversal of the 1984 court ordered breakup of Bell into long distance and regional local carriers. The mergers would consolidate telecommunications industry such that two of the four remaining Baby Bells (regional telecommunications companies), SBC and Verizon would each combine with one of the two largest telecommunications firms serving US corporate market, AT&T and MCI, respectively. If these mergers are approved by the FCC and the US antitrust authorities, then 2005 will mark a decisive point in the reversal of US antitrust policy from 1984 - 2005. The 1984 divestiture decision was premised on the notion that a concentrated market, in this case the Bell telephone monopoly, was inimical to the American system of competitive free enterprise. Comments submitted to the FCC with respect to the two proposed mergers by the American Antitrust Institute (con) and Competitive Enterprise Institute (pro) reflect structuralist and Chicago School perspectives, respectively. The upshot of a 'Bell' reassimilation would be that current merger policy (one side of antitrust) would be the undoing of previous anti-monopolization policy (the other side of antitrust). It would also demonstrate the non-linear development of antitrust policy, a characteristic feature of public policy exercised in a multi-party (Republican and Democrat), constitutional system of checks and balances (Congressional laws, executive enforcement and judicial review). Although private parties can sue to enjoin mergers, the federal government is usually the plaintiff seeking a court injunction to block the merger, which makes control of the Presidency and the Executive Branch a factor in US

merger policy. Essentially the same applies to *ex post* violations of antitrust policy, e.g., the DOJ's suit against Microsoft, which, by the way, clearly revealed the diversity of antitrust opinions as the case was handed off by the Clinton Justice Department to the Bush Justice Department and as the US District Court's initial divestiture decision was summarily annulled by the US Court of Appeals.

Antitrust *ex post* - Monopolization

In June 2005, Advanced Micro Devices filed its second antitrust lawsuit against Intel. Its first antitrust lawsuit against Intel was filed in 1991 in the US District Court for Northern California. It was settled in 1995. The current antitrust lawsuit has been filed with the US District Court for the District of Delaware, presumably based on the belief that different courts and courts and judges interpret antitrust law differently. Since US v Microsoft reaffirmed that monopoly power is not illegal per se but that it must cause anticompetitive harm, AMD seeks to prove anticompetitive harm caused by Intel's monopoly. Furthermore, AMD's filing seeks an injunction against Intel's abusive monopolist behaviour as well as punitive and restorative damages - a lesser remedy than divestiture and thus less likely to be denied. The AMD case against Intel has been and will be affected by antitrust developments overseas, e.g., the Japanese Fair Trade Commission's sanctioning of Intel for its abuse of dominant market power in the Japanese market and ongoing EC investigation into Intel. In view of the scaled back judgment against Microsoft (Judge Jackson's 2000 divestiture order was reversed a year later by the US Court of Appeals) - a case in which numerous state governments joined the federal government's lawsuit and which paralleled numerous other private antitrust lawsuits - proof of the allegations of anticompetitive harm will be difficult, not least because of the secrecy imposed by Intel nondisclosure and confidentiality agreements. It is curious that despite the obvious similarities with the *Microsoft* case, AMD chose *Standard Oil* (1911) and *Alcoa* (1945) as its precedents (both of which involved divestitures, which do not apply in the Intel case).

Politics v. Economics - Unmasking Positivist Economics as Political Economy

John Ralston Saul, Canadian novelist and political writer, charges in *The Collapse of Globalization* that national foreign economic policies are never purely pro-market, always revealing an incongruous mix of free trade and mercantilist ideas. Saul attributes the decline of globalism to resurgence of nationalism, not least of which is unilateralism of American foreign policy. Globalization - seeing the world through the lens of economics - as a transnational political and economic force standardizing the world of politics, production and trade collapses at the hands of nation-states unwilling to relinquish sovereignty to the purported inevitability and all encompassing rule of self-regulating economic forces. This is as true of India and China's political economic models, Malaysia and its controversial capital controls during the Asian Crisis, Brazil's AIDS program for producing and subsidizing drugs despite Big Pharma patent objections as it is of US foreign policy in the Persian Gulf. Saul's overarching thesis is that the transnational ideology of globalism has been toppled by the ideology of the resurgent nation-state. Antitrust policy, as political economy, is similarly caught between free market and nationalist objectives. Would it have mattered to the DOJ if Microsoft had been a French company? By the same token, would it have mattered to the EC if Microsoft was a French company? Was it national security or the mercantilism of domestic favouritism that determined the outcome of the Boeing/McDonnell Douglas merger case and most recently the CNOOC/Unocal merger proposal, and why did the EU give in the former case and China in the latter?

Endnotes

[1] Excerpts from Justice Learned Hand's opinion in *US v. ALCOA* (1945) downloaded from www.clt.astate.edu/crbrown/ alcoa.htm.

> It would completely misconstrue 'Alcoa's' position in 1940 to hold that it was the passive beneficiary of a

monopoly, following upon an involuntary elimination of competitors by automatically operative economic forces.

'Alcoa' avows it as evidence of the skill, energy and initiative with which it has always conducted its business; as a reason why, having won its way by fair means, it should be commended, and not dismembered. We need charge it with no moral derelictions after 1912; we may assume that all it claims for itself is true. The only question is whether if falls within the exception established in favor of those who do not seek, but cannot avoid, the control of a market. It seems to us that that question scarcely survives its statement. It was not inevitable that it should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel.

[2] In the realm of politics, the US constitutional system of separation of powers and checks and balances is based on the structuralist premise that power corrupts and absolute power corrupts absolutely, hence the *ex ante* constitutional provisions. In contrast, the election system is essentially based on the notion that power can be granted and revoked as voters choose, i.e., elections provide a more broadly based and effective *ex post* check on power. Thus, the American system of government blends per se and rule of reason checks on political power and applies these checks in both *ex ante* and *ex post* situations. What both approaches share is a suspicion of unregulated or self-regulating political power.

History of *Habeas Corpus*

Habeas corpus, the freedom from arbitrary imprisonment, is one of the oldest civil rights in the Anglo-American legal tradition. Essentially, it provides those detained/imprisoned with the right to appear in court in order to hear and to rebut the charges against them. In the constitutional history of the UK and the US, *habeas corpus* dates back as far as the 1215 Magna Carta, which provided a temporary truce between the Norman King John and the rebel barons. But it was in 17th century England, within the context of the constitutional struggles between the Stuart kings and Parliament, the English Civil War and Cromwellian Republic and the ensuing Restoration, that *habeas corpus* developed into a fundamental bulwark of civil liberty in English law. From the constitutional crises of 17th century England, the Petition of Rights (1628), *Habeas Corpus* Act (1679) and Bill of Rights (1689) established the precedent which the rebel Americans followed by enacting their own Constitution (including Article I *habeas corpus* guarantee) and Bill of Rights in 1789 and 1791, respectively. However, the *habeas corpus* guarantee has not always been unassailable, most egregiously violated in the instances of President Lincoln's unconstitutional suspension of *habeas corpus* during the American Civil War and in the US Government's unconstitutional internment (with the Supreme Court's sanction) of Japanese-Americans during World War II.

21st Century Context

The wartime context for the most recent US constitutional struggle over *habeas corpus* is the ongoing war on terror against al Qaeda, in general, and the wars of regime change in Afghanistan and Iraq, in particular - both targeted as state sponsors of international terrorism. These wars, in turn, represent the US military response to the al Qaeda attacks on New York City and Washington, D.C. on September 11, 2001. Since al Qaeda is not a traditional military adversary in the sense that its army is hidden and widely

dispersed, much like a guerilla force operating worldwide, the US Government (i.e., the Bush Administration) has argued that a relaxation of *habeas corpus* where enemy combatants are concerned is necessary. As a consequence, several *habeas corpus* petitions have originated from both US citizens and foreign nationals, claiming that their constitutional rights have been unlawfully denied. The recently decided case of *Padilla v. Hanft* represents the latest court challenge on the question of the wartime civil liberty of *habeas corpus*.

Padilla v. Hanft (2005)

The US Court of Appeals for the 4th Circuit (Richmond, Virginia) reversed the South Carolina District Court's ruling in favour of Padilla's *habeas corpus* petition. The Court of Appeals maintained that the President has the authority to detain Padilla, a US citizen, as an enemy combatant, which means that he can be denied access to the US criminal justice system and its due process rights. However, the court did not address the question whether Padilla can challenge his enemy combatant status. The *Padilla* case appears to be a repeat of the *Hamdi* case, in which the District Court for the Eastern District of Virginia ruled in Hamdi's favour, only to have the Court of Appeals for the 4th Circuit reverse the decision. The *Hamdi* case went on to the Supreme Court, where in 2004 the Court ruled in favour of Hamdi's due process right to challenge his enemy combatant status, but also ruled in favour of the President's authority to detain enemy combatants. With the *Padilla* case headed for Supreme Court, and in the absence of Chief Justice Rehnquist and Justice O'Connor, key supporters of the Court's two rulings in *Hamdi v. Rumsfeld*, the *Padilla* case provides an opportunity for a re-test of the Court's *Hamdi* decision.

Key Wartime Civil Liberties Cases Decided by the Supreme Court

Hamdi v. Rumsfeld (2004)

In the case of *Hamdi v. Rumsfeld*, the Supreme Court was divided on two issues: the first issue concerned the due process rights

of a US citizen detained as enemy combatant, and the second issue concerned the presidential wartime authority to detain US citizens as enemy combatants. In a plurality opinion (Justice O'Connor, Chief Justice Rehnquist, Justice Kennedy and Justice Breyer), the Supreme Court concluded: first, that Hamdi had been denied due process and should be allowed to challenge his enemy combatant status before an impartial body (note that this is not necessarily an Article III court in the judicial branch, i.e., it may be a military court in the executive branch); and second, that the presidential wartime authority, derived from Congress' 2001 Authorization to Use Military Force resolution, includes the detention of U.S. citizens as enemy combatants. Justices Souter and Ginsburg joined the plurality on the first issue in order to grant Hamdi the opportunity to challenge his detention, but denied the legal basis of his detention. Justice Thomas argued that due process had been adequately provided and that the detention was authorized. Justices Scalia and Stevens ruled that the detention was unauthorized but did not join the majority on the due process issue. The Court voted 6-1-2 on the issue of Hamdi's due process rights (8-1 if Justices Stevens and Scalia's 'charge or suspend' opinion is counted) and 5-4 on the issue of presidential wartime powers of detention.

Rasul v. Bush (2004)

Rasul v. Bush, the Guantanamo Bay case, involved a foreign national detained as an enemy combatant in the war on terror, in contrast to the *Hamdi* case which involved a US citizen. In both cases, the Supreme Court ruled in favour of the petitioners with respect to due process relief. The Court's 6-3 decision in *Rasul* extended *habeas* relief to foreign nationals detained without charges by the US military at Guantanamo Bay Naval Base in Cuba - not sovereign territory but fully under jurisdiction of US. The key facts in the case were Rasul's non-citizen status, the legality of wartime detention, denial of due process and the jurisdiction of US federal courts. (NB: the jurisdiction of the federal courts was assumed and therefore not at issue in the case of *Hamdi*, a US citizen.) The Court

took the side of civil liberties over national security in this wartime civil liberties case, judging that equal treatment under the due process laws of the US applies to US citizens and foreign nationals alike (cf. *A v. Home Secretary* on the application of the European Convention of Human Rights to domestic law in the UK, where the House of Lords recognized the *habeas corpus* rights of foreign nationals in British courts). Justice Scalia's dissenting opinion charges the Court with judicial activism in breaking with Court precedent and in overreaching its authority to curb presidential war powers - this in contrast to his pro-libertarian position in *Hamdi*.

Rumsfeld v. Padilla (2004)

The wartime civil liberties issues in *Rumsfeld v. Padilla* were deferred on a legal technicality in the Supreme Court's 5-4 ruling that the *habeas* question cannot be answered until the case is brought before the proper court, i.e., the court having *habeas* jurisdiction. Chief Justice Rehnquist in writing the opinion of the Court completely bypassed the question whether the President has the authority to detain Padilla, a US citizen, militarily. Justice Stevens in a dissenting opinion argued that the Court's ruling is a procedural technicality that frustrates the spirit of *habeas corpus*. Nevertheless, Chief Justice Rehnquist stated in the opinion of the Court that the *habeas* petition had been wrongly filed in the District Court for the Southern District of New York and until it was filed in the appropriate district court the substantive question regarding presidential wartime powers to detain US citizens militarily could not be addressed. The case wound its way back through the federal judiciary, beginning with a *habeas* petition to the District Court for the District of South Carolina which was granted and then reversed by the Court of Appeals for the 4th Circuit in the previously discussed case of *Padilla v. Hanft* (2005).

Watershed Opportunity for Supreme Court re: Wartime *Habeas* Corpus

The Court of Appeals in *Padilla v. Hanft* followed the Supreme Court's precedent in *Hamdi v. Rumsfeld* with respect to the

presidential authority to detain US citizens as enemy combatants; however, it chose not to address Padilla's right to challenge his enemy combatant status, thus ignoring the Supreme Court's *Hamdi* and *Rasul* decisions on this point. The *Padilla* case will provide an opportunity for the new Supreme Court to put its stamp on wartime civil liberties. The incoming Chief Justice, likely John Roberts, will replace the recently deceased Chief Justice, William Rehnquist, who had voted with the plurality in *Hamdi* but had dissented in *Rasul*. At this point, it is unknown how Chief Justice Rehnquist's replacement would vote in the case of *Padilla v. Hanft* if it were appealed to the Supreme Court. Additionally, Justice Sandra Day O'Connor, initially the associate justice whom John Roberts was nominated to replace, may no longer be on the Court if and when the *Padilla* case is granted certiorari, and if so it is unknown whether her replacement will maintain or depart from her vote on behalf of the petitioners in the *Hamdi* and *Rasul* cases.

Parallel/Divergent Libertarian Evolution in Anglo-American Law?

In the case of *A et al v. Secretary of State* (2004), the British House of Lords, Britain's highest court of appeal, decided 8-1 for the appellants (detainees/prisoners) and against the government regarding the detention of terrorist suspects for an indeterminate length and without trial. The key issues in the case were: whether the writ of *habeas corpus* should equally extend to citizens and non-citizens; whether wartime civil liberties were necessarily less than peacetime civil liberties owing to the exigencies of waging war and in particular of waging war against an enemy with global reach and guerrilla methods; the durability of Britain's constitutional traditions with respect to the rule of law and limited government; and the primacy of national versus international law, i.e., British law focused on protecting national security versus the European Convention on Human Rights' (ECHR) focus on protecting the rights of individuals, whether citizens or foreign nationals.

The House of Lords found that the government was not entitled to a derogation from the ECHR; that national security, in light of 9/11

terrorist attacks, was not justified in breaching the fundamental British civil liberty of freedom from arbitrary and indefinite detention; that the British Government was duly constrained by the principle of the separation of powers, in this case the power of judicial review with respect to civil liberties even though the British courts, unlike their US counterparts, cannot go so far as to invalidate unconstitutional acts; and that international law of the ECHR, given domestic effect in Britain by the 1998 Human Rights Act, is as effective and binding as any other domestic law.

It is important to note that this case was decided before the British Parliament passed the Constitutional Reform Act (2005), which transferred the Law Lords' (House of Lords) judicial function to an independent (i.e., non-parliamentary) Supreme Court, and before the July London subway bombings, which increased pressure on the British Government to press ahead with more restrictive anti-terror legislation. Earlier this year, the British Government modified its demands for detention of foreign nationals suspected of terrorism, introducing control orders, or restrictions on the movements of suspects, to replace indefinite detentions without trial. Most recently, and clearly in the context of the July London subway bombings, the British Government and the Parliament have been considering extending the maximum period of detention without charges from two weeks to three months and amending Britain's Human Rights Act to allow for exceptions to the ECHR, e.g., Article 3's proscription against deporting detainees/prisoners to countries known to torture prisoners.

In conclusion, the continuing and indefinite war on terror, the imminent changes in the personalities and viewpoints of the new Supreme Court, and possibly, international precedents (at least from US' allies who have a common legal and political history) will factor into the evolution of wartime civil liberties in the 21st century US.

In politics, in economics, in religion, (we) Americans hold tenaciously to truths about democracy, free markets and Christianity, respectively. This does not mean that we are uniformly and rigorously committed to the details of these creeds. We do, however, share for the most part a common worldview, e.g., democracy versus dictatorship, free markets versus central planning and Christianity versus other world religions.

We are not alone in the certainty - often excessive - with which we hold to our truths. However, these American certainties and the tenacity with which we hold them are highly visible in a world dominated by the US ... a world in which American democracy, American capitalism and American Christianity are prominent and pervasive. Having emerged from the Cold War nearly a generation ago as the only political, economic and military superpower, American ideological supremacy is increasingly viewed with concern, fear and anger that these American certainties will drown out all competitors throughout the rest of the world.

Generally speaking, certainty, as a human attitude towards truth, represents a kind of arrogance and, at the same time, a sort of fear ... a fear of disorder, weakness, the unknown. The political, the economic and the religious spheres are arguably the most important in terms of their immediate and profound impact on human society, hence the importance of order, strength and certainty in pushing back the frontier of fear. The arrogance of certainty lies in the promotion of what is believed to have successfully quelled fear and chaos.

The purpose of great thoughts is to persuade, motivate, unify, organize and pacify prospective members of a group (community, nation) in order to establish order within and protection from without. The acclaimed truth of great thoughts gives the group a sense of legitimacy - a legitimacy that is ultimately backed by the reality of physical power, coercion, and punishment. While the theme of freedom is central to American political, economic and religious certainties, in reality freedom is compromised by the consolidation of

power found in actually existing democracy, capitalism and Christianity.

In view of the exportation of American ideals, it needs emphasizing that in America our political system suffers from the democratic deficits of excessive bureaucracy and technocracy, from the reality that most of our institutions are avowedly non-democratic (corporate, religious, non-profit) and from the fact that economic power remains the strongest basis for political power. Similarly, our economic system suffers from 'free market' deficits due to the systemic collusion among major institutional stakeholders, despite Galbraith's optimistic assessment of countervailing powers providing checks and balances in the economy.[1] Finally, our religious community suffers from 'spiritual deficits' owing to the dangerous mixture of religion with politics and economics ... dangerous in the sense that religion tends to provide legitimacy to human political and economic institutions.

What we really know about democracy, free markets and Christianity is in fact quite limited. This is not unlike the divergence of actually existing socialism in East Europe and the USSR from the utopian principles of theoretical socialism. Unfortunately, it seems that with the end of the Cold War and the incontrovertible supremacy of things American that some very important and universal truths about the struggle against tyranny have disappeared into the irrelevant past. Who any longer cares that the East was characterized by privilege, social stratification and elite rule; who cares that the universally-acknowledged long-term socialist goals of political and economic equality had been betrayed; who cares that the end of the Cold War marked yet another human failure to create a heaven on earth? What we seem to have understood and accepted as our legacy from the US/Western victory in the Cold War is that good ultimately wins out, that history really is marked by a progress towards a better world and that some nations are 'chosen' to lead.

So much the worse if we fail to appreciate the warnings that power corrupts and absolute power corrupts absolutely. Solzhenitsyn, for all of his hatred of the Soviet regime and its human rights abuses, remarked in Dostoyeskyan fashion that we human beings all have a bit of God and a bit of the Devil in our souls and that it is in this human condition that we should pause before exercising

power over other human beings.[2] Jesus put it another way, suggesting that before offering to remove the mote from another's eye one should first remove the beam from one's own eye.[3] Hypocrisy, double standards, mendacity and posturing clearly have been a persistent and pervasive aspect of the human condition supporting our delusions about having discovered the ultimate truths of politics, economics and religion.[4]

In politics, our great thoughts are centered on democracy, representative government with multiparty elections, limited government with constitutional checks and balances and the separation of powers and the primacy of the rule of law. These ideas are continuously challenged, perhaps nowhere more critically than in the case of America's one-leader bias during national emergencies. American civil liberties, sacred in rhetoric as the ultimate check on arbitrary government, are perennially challenged during wartime. The President seeking maximum efficiency in the conduct of war has historically suspended dissent, potential or actual, as in the unofficial suspension of *habeas corpus* in the current war on terror, attempted censorship in the Vietnam War (Pentagon Papers), forced evacuation of American-Japanese during World War II, suppression of antiwar speech during World War I. The suspension of dissent is only part of the executive's plan to consolidate governmental power. More crucial is the co-optation of the Congress and the mobilization of the public relations apparatus of war. As in the case of weapons of mass destruction in 2003 Iraq and the Tonkin Gulf incident in 1964 Vietnam, the case for war requires careful and prolonged orchestration and again for the sake of efficiency is best provided from a single source.

In economics, our great thoughts are clustered around capitalism with its ideals of free markets, free trade, consumer and producer autonomy and private property. As in the political realm, these ideas are far from realized in the real world of economic actors and phenomena - a world where government often intervenes. In the real world, when it suits their interests, economic actors of all political stripes, i.e., with varying degrees of loyalty to capitalist ideals, are remarkably accommodating to government economic intervention.

From the very beginning of capitalism, merchants and manufacturers from the private sector have sought government support in the form of subsidies, monopoly rights, favourable regulation and protection from foreign competition. Perhaps nowhere is private/public sector collusion more evident than in the case of American antitrust policy that not only reveals a nationalist/mercantilist bias in global competition but also supports the concept of concentrated market power as the means to maximum economic efficiency. The Department of Justice' Antitrust Division and the Federal Communications Commission's recent decisions to approve the SBC/AT&T and Verizon/MCI tele-communications mergers is widely regarded as a significant development in the evolutionary reversal of the 1984 decision that broke up the Bell monopoly. Curiously, the logic of the Chicago School (the preeminent school of antitrust thought in the US at present) maintains that the goal of economic efficiency (minimum costs, maximum profits) does not require active and actual competition. Potential competition is sufficient, as in the case of the telecommunications industry where the dynamic nature of technology development and deployment is what creates and destroys market leaders.

In religion, our great thoughts are concentrated on the ideals of freedom of religion, which is understood to mean that religious persecution is not to be tolerated and that no religion is to be favoured over all of the others. The 1st Amendment to the US Constitution was specifically designed to protect minority religious groups from being persecuted by the government and to prevent any religious group from merging its religious agenda with the powers of government. Christianity is generally opposed to the notion of perpetual competition among religions - it being fundamental to Christianity that it is the only true religion and that it is the obligation of its followers to convert others. It is therefore not surprising that there are those who believe that Christianity ought to be promoted by the state both in domestic and in foreign affairs. Today, we hear how there are those who would extend the dominance of Islam throughout the world. To an American this is frightening, but in a way it should prompt a self-examination of the American idealization of Christian missionaries. In much the same way that American politics is supposed to be competitive

among a variety of viable political parties and that the American economy is supposed to be competitive among a variety of viable businesses, religion in America is supposed to be competitive among a variety of viable religious groups. Modern American government is supposed to be a guarantor of competition in each of these realms, but this is not always reassuring since governments have historically not been inclined to check the very power which they must exercise in checking the power of others - *quis custodiet ipsos custodes*? (who will keep the keepers themselves?)

What bears remembering, particularly at this time when America stands head and shoulders above the rest of the world, when talk of American empire seems more real than ever before, when American ideals seem to have won the day is that all things human are finite. This is not to introduce the relativity of truth and knowledge for the sake of absolute intellectual freedom (anarchy), rather it is to expose the tentative and finite nature of human understanding in order to keep alive the challenge to transcend what only appears to be 'unimprovable.' So much the better if America's great thoughts do not eliminate all competition worldwide. *Quis custodiet ipsos custodes*? applies as much to America and its role in international relations as it does to government and its role in 'intranational' relations.

Endnotes

[1] See John Kenneth Galbraith's *American Capitalism: The Concept of Countervailing Power* (1956) where countervailing power is described as economic (bargaining) power that is developed on one side of a market (buyer or seller) in response to concentrated market power on the other side of the market, e.g., trade unions created to counterbalance the employment practices of powerful corporations or retailers pooling their purchasing power to win better terms with market-dominant manufacturers. Galbraith seems to regard countervailing power as a natural, market-driven response to conditions of imperfect competition, i.e., a self-regulatory feature of the market.

[2] See page 168 in the chapter entitled "The Bluecaps" in Alexander Solzhenitsyn's *Gulag Archipelago* published in 1973.

[3] See Luke chapter 6, verses 41-42.

[4] See Friedrich Nietzsche's "On Truth and Lies in a Nonmoral Sense" from 1873 where the young Nietzsche wrote, before he too fell under the hypnotism of his own gods, that

> Once upon a time, in some out of the way corner of that universe which is dispersed into numberless twinkling solar systems, there was a star upon which clever beasts invented knowing. That was the most arrogant and mendacious minute of `world history,' but nevertheless, it was only a minute. After nature had drawn a few breaths, the star cooled and congealed, and the clever beasts had to die.

Much has been written about the new world order of American global dominance, the victory of capitalist democracies over centrally planned totalitarian regimes, a world flattened by the tidal wave of Western political and economic ideologies, a world where the unquestioned supremacy of capitalist democracies marks the end of history, a world where the only alternatives to capitalist democracy are various forms of barbarism.

From such accounts, one gets the overwhelming sense that the future belongs to the West, in particular the US. Under the guise of natural law, the West and the Americans are attempting to remake the world in their own image. Capitalism, usually a purer form than that seen in the mixed economies of the West, and democracy, at least some form of electoral democracy, are promoted, exported or preached as the universal ideologies that transcend national, ethnic and religious differences. The outcome is predicted to be higher living standards and declining worldwide poverty on the economic level and greater freedom and less arbitrary governmental repression on the political level.

Insofar as the political economy of the West promises a lessening of poverty and arbitrary governmental violence, the attraction of its ends is compelling. However, something that ideologies of all flavours have in common is a long run bias ("in time we'll get there") and a preoccupation with aggregates "on the whole, things are better"). Few would argue against the abstract goals of eliminating poverty worldwide and putting an end to government repression and corruption wherever they exist. These are long run goals, whose realization lay only in some theoretical future infinity and whose authority over the short run of the present and immediate future is thereby undiminished by time. The 20th century gives many instances where better worlds have been promised somewhere out in the future but where these promises have not only been infinitely postponed but have sanctioned short term attitudes and behaviour that are antithetical to an ever receding utopian future. Such is the typical Western assessment of the grand communist ideologies of

Marx, Lenin and Mao and more recently the radical Islamist crusade of Osama bin Laden.

With Marxism-Leninism and Maoism marginalized in the sphere of international relations and with radical Islamism unable to command the policies of anything close to a bloc of significantly powerful nation-states, the Western political economy of Smith and Jefferson, for example, seems by all accounts to have won the day in the worldwide struggle for power. The ideologies of capitalism and democracy, like most ideologies or programs for social management, stress the difference between the ends and the means, the long run and the short run. Globalization, as economic integration and as political integration, is a contemporary manifestation of capitalism and democracy as the basic organizing frameworks of societies worldwide - no longer just in the West but also in the beyond, in what was once called the 2nd and 3rd Worlds or communist and poor countries, respectively.

Critics of globalization are quick to point to the double standards, hypocrisy and deception that are inextricably linked with the means of reaching its ends. "What is it that you are giving, other than dependency, of both a political and economic nature, on the established centres of power in the West, both government and corporate," they ask. To which globalization's advocates answer that the great principle of self-determination (or consumer choice in the vernacular of the economist) is itself at risk if the critics are able to deny the spread of capitalist and democratic ideals to countries where even the economic inequalities and the democratic shortcomings of the US are acceptable in comparison to local conditions.

With respect to global poverty, conservative globalization's answer is that the only way to fight poverty is to increase incomes across the board. Basically, there are two ways to address poverty: one is raise the standard of living of everyone by means of vigorous economic growth facilitated by perpetual technological innovation and the free trade in goods, services and investment capital and the other is to smooth the gross income inequalities between the rich and the poor. According to the conservative globalization argument, income redistribution on any significant scale would be politically unacceptable to those from whom income would be taken and would

be revolutionary, destabilizing and therefore unsupportable to those who are generally comfortable with the status quo. Far better that the poor at home and abroad not be held hostage to the charitable instincts of others but to be allowed to benefit from the opportunities created by a global economy expanding due to the natural economic forces of innovation and free trade.

From the perspectives of liberal globalization and anti-globalization, this is a cynical economic argument, since it is based on the premise of incorrigible human selfishness. According to these views, it is possible to for human societies to share the existing wealth more equitably. These views claim some success in the social safety net programs of the rich countries and the international aid packages arranged by the rich countries for the poor countries. However, poverty persists and not just in the lesser-developed and poorest countries. A demonstration of the true community consciousness that has captivated the imaginations of many social reformers and that would silence the cynical conservative might be given if, for example, the free trade in goods and services were accompanied by the far more radical proposal of the free movement of people (the labour input as economists see it) so that people in poor countries could migrate to rich countries, and not just as guest workers, but as residents with full standing. This, of course, is highly unlikely in the near term. Witness the US position on Mexican immigrants, the German position on its largely Turkish guest worker population and the French position on its accommodation of migrants from its former North African colonies.

While the cynical economic argument seems to be more realistic, it too, suffers a serious defect in that it does not distinguish between increases in aggregate income (national GDP) and in across-the-board income (distributions of individual income). In other words, the income and wealth effects of economic growth and free trade may be grossly biased toward preserving or exaggerating economic inequality which cannot help but be an obstacle to the introduction of political equality. Conservative globalization's variation on 'trickle down economics' may only marginally improve worldwide poverty . . . enough to represent an improvement but not

enough to constitute a triumph except perhaps in the long run and according to the aggregated data that feed the statistical projections.

In much the same way that communism never really was able to resolve the deadly contradiction between the dictatorship of the proletariat and the goal of social equality, Western liberal capitalism has not yet convincingly harmonized the notions of democratic political equality and capitalist economic inequality. Is there then something fundamentally different about the post-Cold War world, something on one hand optimistic and promising and on the other hand restrictive and suffocating? Are there legitimate reasons to fear that a world where democracy and capitalism, especially in their American variants, do not promise the best of all possible worlds and that if left unchallenged may become a monolith of the status quo worldwide, never attempting to resolve the contradictions inherent in the political economy of democratic capitalism?

Furthermore, at the time of this writing, the American foreign policy towards Iraq illustrates what appears to be the anti-utopian reality of democracy expanded by empire. Iraq's dictatorship was militarily overthrown by the US in 2003, but Iraq has since become a country in civil war, with electoral democracy in progress, but ultimately constrained by an American refusal to allow complete self-determination, i.e., no Islamic state is to be permitted. Maybe that is for the better. Germany and the world would have probably been better off if Hitler had not been elected to power, and the peoples of the Balkans would probably have been better off if Milosevic had not been elected to power. Yet other contradictions emerge from the West's utopian vision for a universal political economy in the 21st century and beyond. Can democracy be imposed on other countries or is self-determination as fundamental to democracy as the ballot box? If the imposition of democracy is justified on humanitarian grounds, i.e., for the sake of the victims of violent, authoritarian regimes, then what are the boundaries of utopia, for they did not include Rwanda or Cambodia?

At the end of 2001, the Argentine-IMF partnership collapsed. Argentina was unable/unwilling to comply with the IMF's loan conditions, in particular as they limited the Argentine government's ability to use the fiscal policy of deficit spending to stimulate an economy already in the third year of recession. Soon after the IMF refused to release additional funds, pending Argentina's compliance with the terms of the loan, the economy went into free fall. Inside Argentina, that set the stage for the presidential succession crisis, the official declaration of sovereign debt default (bankruptcy) and the termination of the peso-dollar currency peg which had rescued Argentina from hyperinflation a decade earlier. All of this while the recession deepened, unemployment rose and poverty levels escalated. Both inside and outside Argentina, the world was looking for an explanation of the Argentine Crisis.

In his recent book, *And the Money Kept Rolling In (and Out): Wall Street, the IMF, and the Bankrupting of Argentina*, Paul Blustein portrays Argentina as a victim of its own naivete and small country standing (despite having the fourth largest population and the third largest economy in Latin America), poor advice from the IMF, the shortsighted self-interest of its politicians and the irrevocable logic of financial panics. Blustein takes care not to lay all the blame on the IMF and even charitably regards the IMF's internal review (*Report on the Evaluation of the Role of the IMF in Argentina, 1991-2001*) as a sort of *mea culpa*, although a more accurate interpretation is that IMF's internal audit was intended to defend and justify an even more harsh, more distanced IMF. In addition to the IMF, there is plenty of blame for Argentina's elected officials as well as for Wall Street, although blame for the latter is somewhat tempered on account of the natural and incorrigible instincts of capital. Without letting anyone completely off the hook, it is as if Argentina were a small boat unable to weather a catastrophic storm in the deep ocean of international finance - a common metaphor for international financial crises. The table below summarizes selected macroeconomic indicators that provide a glimpse of the magnitude (unemployment and poverty

statistics are even more grim than GDP per capita) and the duration of Argentina's economic hardships over the past decade-and-a-half.

Year	Real GDP per capita (% change)	Inflation (% change)	Unemployment (%)	Poverty (%)
1989	-8.8	4923.5	7.1	47.3
1990	-3.7	1343.9	6.3	33.7
1991	11.2	84.0	6.0	21.5
1992	10.5	17.5	7.0	17.8
1993	4.5	7.4	9.3	16.8
1994	4.4	3.9	12.1	19.0
1995	-4.1	1.6	16.6	24.8
1996	4.2	0.1	17.3	27.9
1997	6.7	0.3	13.7	26.0
1998	2.5	0.7	12.4	25.9
1999	-4.6	-1.8	13.8	26.7
2000	-1.7	-0.7	14.7	28.9
2001	-7	-1.5	18.3	38.3
2002	-10.8	41.0	23.6	57.5

Source: Table 1. Economic Indicators for Argentina, 1989-2002 from Joint Economic Committee's (US Congress) report, *Argentina's Economic Crisis: Causes and Cures* (June 2003).

While GDP has exceeded 8 percent in each of the last three years since 2002, unemployment levels remain in double digits, and poverty continues to hover at around 40 percent. At the nadir of the Argentine Crisis when Argentina officially declared itself to be in

default of its sovereign debt, the Argentine presidency was like a high stakes game of musical chairs, with five presidents coming and going over a period of less than two weeks in December 2001 and January 2002. The first was Fernando de la Rúa of the Radical party (a centrist party and the main opposition of the Peronist party) who won the 1999 election ending 10 years of the Peronist presidency of Carlos Menem. De la Rúa's resignation marked the second occasion in less than a generation that economic breakdown forced a change in government – from the Radical to the Peronist party, but more importantly from one civilian government to another. De la Rúa's second replacement, Adolfo Rodríguez Saá, formally announced Argentina's default, and then he was replaced. Ultimately, the Peronist Eduardo Duhalde emerged as the Argentine Congress' choice for president to serve out the remainder of de la Rua's term in 2003 when the next presidential elections were scheduled. Among the first acts of the Duhalde government was the termination of the convertibility regime in January 2002 – a development not unwelcome by the IMF although it had hedged its bets in favour of the currency board for several years during the crisis. The Peronist Néstor Kirchner was elected president in 2003, and he remains in power until the next scheduled presidential elections in 2007. Even more radical action has been taken by President Kirchner in the form of restructuring Argentina's sovereign debt (writing down approximately 75 percent of its outstanding bonds) and of announcing plans to repay IMF loans in January 2006 and then to sever contact with the IMF – the chief villain in the Argentine Crisis from the Argentine perspective.

What is truly remarkable, and beyond the scope of Blustein's book, is that since political power was taken away from the generals following the Dirty War and the military debacle of the Falkland Islands War, Argentina has maintained a civilian democracy, and this through the 1980s debt crisis, the hyperinflation of the 1980s, 12 consecutive years of double-digit unemployment since 1994 and most recently a four-year recession that saw poverty rates soar above 50 percent. Nevertheless, the danger exists that quarantining of Argentina, whether externally imposed or self-imposed, could produce the political and economic conditions and the worldview that would

spawn civilian and democratically elected, yet authoritarian monsters along the lines of Hitler in 1930s Germany or Milosevic in 1990s Yugoslavia.

While various academics, policymakers, government officials and bond traders attempt to provide the definitive *post mortem* along with responsibility for the Argentine economic collapse, there is a risk of yet another massive international policy failure, viz. the demise of democratic civilian government in the fifth largest economy in the Western Hemisphere (behind the US, Canada, Brazil and Mexico). Argentina's independence from Spain (1816) dates back nearly as far as the US independence from Great Britain, and while the democratic tradition in Argentina has been interrupted by military dictatorships, most recently from 1976-1983, democratic civilian government has since weathered some fierce economic storms or, allowing for the use of wartime metaphor, has held its own against the economic machinations and interventions of foreign governments and foreign capital. In the real world in which Argentines find themselves, the long run is hard to imagine from the inside of an extended recession characterized by high unemployment and hyperpoverty; perfect competition is non-existent in a market where high income giants and low income dwarfs trade; and the notion of apolitical economy is a ruse that conceals the mercantilist impulses of rich country governments and their domestic producers and capitalists.

For the last 60 years, the IMF has been charged with the responsibility of monitoring and promoting international financial market stability, based on the Allied countries' World War II experience that financial instability in one country can be contagious and should therefore be contained and that financial instability can give rise to anti-democratic and politically threatening regimes. Containment of the Argentine Crisis appears to have been successful, at least in comparison to the East Asian Crisis; however, the continuing hostility between the IMF and Argentina seems fundamentally at odds with the spirit of 1944 Bretton Woods in the sense that Argentina's going it alone may turn the country more inwards, isolationist and potentially anti-democratic. American history affords sobering examples of how democracy can be compromised during times of external threat or civil war. For example, the American record of suspending

constitutionally protected civil liberties during wartime emergencies runs through all four centuries of the American Republic - the 1798 Alien and Sedition Acts, the suspension of *habeas corpus* during the Civil War, the Espionage and Sedition Acts of World War I, the internment of American citizens of Japanese ancestry during World War II, the attempt to nationalize the country's steel mills during the Korean War, the attempt to suppress publication of the Pentagon Papers during the Vietnam War and denial of due process to enemy combatants during the 21st century war on terror.

Understanding and appreciating the historical context for the IMF's creation, its mandate regarding international financial stability, the record of anti-democratic successes during national emergencies in the world's longest-running democracy (US), and the danger of economic isolation and desolation provoking militant nationalism, the importance of assisting Argentina towards financial sustainability and thereby preempting any opportunistic military or other authoritarian (including populist and/or nationalist) takeover must run about even or even ahead of the importance of democratizing the Persian Gulf states.

Blustein, Paul. *And the Money Kept Rolling In (and Out): Wall Street, the IMF, and the Bankrupting of Argentina* (2005).

International Monetary Fund. Report on the Evaluation of the Role of the IMF in Argentina, 1991-2001 (2004). This report was prepared by the Independent Evaluation Office of the IMF in order to provide an objective assessment of IMF policy towards Argentina in the decade leading up to Argentina's default. The Argentine Crisis is explained in terms of Argentina's fixed exchange rate, fiscal weakness, dependency on foreign currency-denominated borrowing and large, adverse shocks (from the East Asian Crisis onwards). The IMF is faulted for not being tough enough with respect to the fiscal discipline and structural reforms considered vital to make a fixed exchange rate regime viable. The report is an extreme defense of the IMF's programs in Argentina, endorsing as it does the contentious proposition that IMF loan conditions should be rigidly enforced notwithstanding domestic pressures.

Eichengreen, Barry. "Financial Instability" in Lomberg, Bjorn (ed.) *Global Crises, Global Solutions* (2004). Eichengreen identifies financial instability as a high priority problem in terms of output and income losses that result from currency and banking crises. In a brief discussion of the causes of financial instability, Eichengreen includes unsustainable macroeconomic policies (e.g., Argentina and other Latin American countries deemed to be vulnerable to populist excesses), fragile financial systems (e.g., Latin American currency mismatches where assets are denominated in local currency and liabilities in US dollars) and flaws in international financial markets (e.g., asymmetric risks to small countries that allow free movement of capital in and out).

Kletzer, Kenneth. "Resolving Sovereign Debt Crises with Collective Action Clauses" in *Federal Reserve Board of San Francisco Economic Letter*, February 2004. Kletzer describes the IMF's proposed Sovereign Debt Restructuring Mechanism (SDRM) and US-backed Collective Action Clauses (CACs) in the context of the recent emerging market crises and the future management of sovereign debt crises. The SDRM is a proposed form of international

bankruptcy, which would in some cases take precedence over national bankruptcy laws, but its progress has been opposed by the US whose veto power in the IMF is absolute. CACs provide a contract-based solution to debt restructuring according to which a majority of bondholders, e.g. 75%, can enforce a restructuring agreement. Under the terms of unanimous action clauses (UACs), which are common in Germany, Japan and New York, a single minority bondholder block a restructuring agreement.

European Central Bank, "Crisis Resolution in Emerging Market Economies - Challenges for the International Community in *ECB Monthly Bulletin*, (November 2003). Referring to the financial crises of East Asia (1997-98), Russia (1998), Brazil and Turkey (1999-2001) and Argentina (since 2001), authors characterize these crises in emerging markets as capital account crises arising from to the sudden outflow of foreign and domestic capital

Brookings Institution. "The IMF's Dilemma in Argentina: Time for a New Approach to Lending," Policy Brief #111 (November 2002). This brief addresses some of the shortcomings of the IMF, e.g., the democratic deficit of a non-elected, non-representative international bureaucracy and the encroachment on national sovereignty of bank loan conditionality agreements that affect the broader macroeconomic and political landscape. The views mentioned range from Alan Meltzer's proposal to eliminate the IMF on the grounds that it is a moral hazard liability (i.e., it creates a safety net of financial bail-outs for high risk investing and borrowing) and Jeffrey Sachs' view that the IMF's financial resources should be expanded in order to more effectively prevent, contain and recover from global financial crises.

Feldstein, Martin. "Argentina's Fall" in *Foreign Affairs* March/April 2002. Feldstein endorses Washington Consensus' market-oriented approach to economic integration, although he notes that rapid inflows and outflows of capital do not provide a stable basis for economic growth. He takes issue with the IMF's decision to support Argentina's fixed exchange rate regime and argues that moral hazard of bail-outs produces reckless behaviour on the part of investors (bondholders) and borrowers (Argentina).

Blustein, Paul. *The Chastening: Inside the Crisis that Rocked the Global Financial System and Humbled the IMF* (2001). Blustein covers five separate crises from 1997-99 (Thailand, South Korea, Indonesia, Russia and Brazil) and describes how and why the IMF, the G-7 and the US were unable to prevent currency crises (including Russia's default) and were challenged in providing rescues.

Brennan, William J. "The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crisis," paper prepared for the Law School of the Hebrew University in Jerusalem, Israel (1987). US Supreme Court Justice Brennan argues that American civil liberties have been dangerously compromised during wartime emergencies, citing the Alien & Sedition Acts (1798), the suspension of *habeas corpus* during the Civil War, the Espionage Act of World War I, the Japanese-American internment of World War II and the communist witch-hunts of the McCarthy era.

Limited government is a fundamental principle of contemporary liberal democracies. Governments should not have too much power, nor should they abuse their power. In Britain, the principle of limited government dates back to the 1215 Magna Carta, and in the US, it goes back to the 1776 Declaration of Independence and the 1789 Constitution and Bill of Rights. As the dominant power centre in society, government is capable of much good, but its potential for causing great harm makes it necessary to restrain the power of government.

In liberal democratic societies, it is reasonable and acceptable to debate the limits of government authority. To varying degrees, citizens of the modern liberal democratic state seek far more than just protection from the physical violence and property loss of Hobbes' anarchical state of nature. For example, a liberal democratic government is expected to tolerate dissent, to respect the rule of law (including judicial due process), to regulate the activities of business and industry, to maintain an economic safety net for the disadvantaged and to provide the means for socioeconomic mobility through education and training. However, it is also recognized that government authority should not be absolute as it was under state socialism in the USSR and its Warsaw Pact dependencies - societies where civil liberties were viewed as giving license to dissenters and nonconformists (a.k.a. enemies of the state and enemies of the people).

With the sudden and dramatic failure and termination of the European communist experiment nearly a generation ago, the historical reality of such an overwhelming Leviathan seems anachronistic with the exceptions of the globally significant China and North Korea and minor states like Myanmar and Zimbabwe. In the absence of the perpetual anti-authoritarian rhetoric of the West during the Cold War era, there is the danger of forgetting the excesses and abuses of power by state socialism and totalitarian regimes and losing this important frame of reference with respect to dominant, intolerant governing institutions in general. In addition, 21st century international terrorist successes on the sovereign soil of Western liberal democracies have dramatically changed the West's worldview from anti-totalitarian to

anti-terrorism. There has been a profound shift in focus from concerns about the excessive and abusive power of communist regimes to support for the consolidated and efficient exercise of government power against terrorism. In the new post-9/11 world, the guardianship role of government is again in the ascendancy.

So, who guards the guardians? The simple answer seems to be a sort of balance of power among different and competing interests. This could be the free marketeers' invisible hand, the law of the jungle, survival of the fittest - but then the whole Anglo-American political tradition of checks and balances, separation of powers and rule of law would be unnecessary. It seems rather that structural and institutional restraints on power are the best insurance against political tyranny. If it is possible for government, or a political party, to become too powerful, then for the sake of the future of democracy, it is necessary to prevent and roll back the expansion of government or party power. Free and fair, multiparty elections are part of the answer, but so too is the fragmentation and overlapping of independent government authority among executive, legislative and judicial branches and across national, regional and local boundaries.

Centralization, however it may improve the efficiency of government, especially, but not just, in times of national emergency, runs counter to the fundamental principles of constitutional democracy. Gridlock between Congress and the President or an independent-minded Supreme Court may be extremely frustrating, but it is frightening to imagine what the US would be like if, for example, Congress and the courts yielded all of the emergency war powers requested by the executive branch. Ironically, such a monolithic US government would look a lot like the Soviet monolith of the Cold War era and a lot different from the government envisaged by the framers of the American Constitution. The success of limited government lies in the design of checks and balances that acknowledge and put to good use the acquisitive and domineering aspects of human nature, that restrict the consolidation of power by promoting institutional competition and discouraging collusion, and that provide various means - such as elections, the courts and the legislative/executive rivalry - of challenging the aggrandizement and misuse of power.

Since government is only part of the social universe, albeit a large part, and since the concentration of power is inherently dangerous, it seems reasonable to believe that concentrations of power elsewhere in society may be dangerous as well. Not unlike government departments, corporations tend to be anti-democratic in governance and operation - hierarchically ruled, secretive, intolerant of dissent, cult-like in shaping the thoughts and behaviour of insiders and manipulative in influencing the thoughts and behaviour of outsiders. This description fits many commercial, religious and other non-governmental institutions, and it has long characterized government, which is why limited government has become such a crucial principle in liberal democracies. The point is that there are power centres in society - in addition to government - whose accumulation and abuse of power is real, dangerous and inconsistent with the principle of limited power that informs democratic constitutions.

Frank and commonsense observation of human nature reveals that those in power or those aligned with power wish to maintain or enhance their status, and so as long as they find security, privilege and meaning in their group, dissent and nonconformity are counterproductive. In the same way that structural safeguards and external oversight are essential in preventing single party rule or authoritarian technocracy, non-governmental institutions require safeguards against their secretive, collusive, conformist and anti-democratic instincts. The freedom to speak freely in dissent may never really exist within government departments, in corporate America, in evangelical conventions, at union headquarters and in other top-down conformist institutions, but the freedom to vote with one's feet must be preserved. And in order for this freedom to mean anything, there must be alternatives from which to choose. As a case in point, if corporate America demands absolute compliance in thought and behaviour, then in a free society different ways of earning a living (e.g., more than just entrepreneurial shopkeeping) must exist, and the government subsidization and regulatory bias towards large corporations must be re-examined. For example, contrary to the current pro-merger bias of US antitrust law, government should re-evaluate the broader socioeconomic benefits of promoting economic competition

and of limiting market power. Parallel to the political checks and balances of the US Constitution, the structuralist view of antitrust policy represents a check on excessive and abusive economic power. Based on a skeptical regard for concentrated power, antitrust structuralists maintain that the consolidation of economic power in commercial markets tends to express itself not only in the abuse of market power *vis-à-vis* competitors, customers and employees but also in the exaggerated distortion of political influence. Such an industrial policy is neither socialist (state ownership of economic resources) nor state capitalist (state underwriting of firms and industries). On the contrary, it is a deliberate balancing of market power that is equally averse to nationalization and private sector monopoly.

Not only should government be constrained by law and by structure, but it should also promote the same sorts of limitations on other social monopolies, whether commercial, political, religious, etc. Since government and all of these institutions tend towards ever-greater power and influence, the safeguards for freedom and democracy will always be at risk. Government is often put forward as society's counterweight to excessive and abusive dominant power; however, government itself must be held in check by the rule of law, judicial due process, regular contested elections and separate and independent branches of government. In addition, the daily activities of government, which are often beyond the scope of an electoral democracy, must be in the open for constant surveillance by the media, political action and other non-governmental institutions, so that the risks of successful government propaganda are minimized.

According to the social contract view, government and the governed live within the context of a quid pro quo arrangement - support in exchange for protection. One of the protections sought by the governed is defense against tyranny of whatever kind, e.g., political, economic, religious, racial, ethnic, etc. Where the guardian, i.e., government, becomes the tyrant or becomes complicit in the tyranny of another, providing no ordinary recourse to the rule of law, then, as the 17th century English political philosopher, John Locke, put it, in defense of the Glorious Revolution of 1688, the citizenry has the natural law right to withdraw its support,[1] i.e., to change the government. The demise of the former communist governments of

East Europe and the Soviet Union provides the most recent dramatic evidence of such a democratic revolt against the tyranny of the all-powerful and malevolent state.

Endnotes

[1] There is another competing tradition from Anglo-American political thought, and that is the pragmatic authoritarianism of Thomas Hobbes. Writing during the time of the 17th century English Civil War, Hobbes argued the case for the strongman rule of Oliver Cromwell, the military dictator of the interregnum, on the grounds that civil disorder, violence and foreign intervention requires a greater and unrestrained response on the part of government. This is the tradition that is implicitly invoked during times of national emergency, whether imminent and substantial in reality or only in thought.

Hamdan v. Rumsfeld

The notion of civil liberties conjures up an almost mythical image of the American Bill of Rights and its list of freedoms against which government dare not encroach. So important were these rights of individuals *vis-à-vis* their new government that the ratification of the US Constitution was made contingent upon acceptance of the limits of government power. The familiar list includes the five famous 1st Amendment civil liberties (freedoms of speech, press, assembly, religion and petition), but beyond these are the procedural safeguards against the arbitrary removal of one's life, liberty or property. These latter safeguards can be traced back to the Petition of Rights, the *Habeas Corpus* Act and the Bill of Rights that emerged from 17th century England and the power struggles between the Stuart kings and Parliament. England in the 17th century was not a peaceful place and time for the emergence of individual civil liberties. There was the Thirty Years War in Europe, the English wars against the Scots and the Irish, the English civil war between the Roundheads (Parliamentarians) and the Cavaliers (monarchists), the Anglo-Dutch naval wars and King William's war against Louis XIV. In consideration of the relationship between civil liberties and national security, the excesses of the Stuart kings and Oliver Cromwell during times of war and unrest arguably created the backlash that led to the gradual institutionalization of civil liberties. It is the question of freedom from arbitrary and indefinite imprisonment (detention), particularly during a time of war or other national emergency that is the topic of this essay.

The early 21st century war on terror may prove to be a watershed for wartime civil liberties in the US. It may cause a reversion to the arbitrary rule of a powerful executive. It may be just another temporary inconvenience for the civil liberties of some. Or, it may provoke a backlash against the abuse of power by a wartime executive. The federal courts have decided and still have in their dockets a number of cases that will serve as legal precedents in the ongoing and open-ended war on terror. Of interest in this essay are those cases which focus on the fundamental right of *habeas corpus*, i.e., the right to be

free from arbitrary and indefinite detention without recourse to a proper court of law to confront and challenge formal charges. The principal case to be considered here is that of *Hamdan v. Rumsfeld*, a case that was decided in favour of the petitioner, Hamdan, in district court, only to be reversed by the appeals court and subsequently granted a hearing by the Supreme Court.

In the case of *Hamdan v. Rumsfeld*, the alleged role of Hamdan as chauffeur and bodyguard for Osama bin Laden has created an almost insurmountable *prima facie* case against Hamdan. However, the rule of law and the presumption of innocence dictate that even such a defendant be granted due process rights of lawful imprisonment and a fair trial. Where violence, murder and mayhem are the alleged results of the defendant's actions, emotions run high and shortcuts to justice may seem justified. However, it is the duty of the law to channel these emotions through a good faith examination of the legal and factual aspects of the case before dispensing society's lawful punishment.

On November 8, 2004, Judge James Robertson delivered the opinion and order of the federal district court for the District of Columbia in the case of *Hamdan v. Rumsfeld*. This was only a few months after the Supreme Court had ruled on three other *habeas corpus* cases arising from the war on terror. Judge Robertson ruled that the military commissions at Guantanamo Bay were not competent military tribunals for the purpose of assessing Hamdan's prisoner of war (POW) status. He therefore ordered that Hamdan not be tried before one of these military commissions until his POW status had been determined by a competent military tribunal. Furthermore, Judge Robertson argued that a military commission would not be capable of acting as a competent military tribunal as long as it denied Hamdan's procedural rights. In particular, Hamdan must be given the right to confront government witnesses and evidence, consistent with the Uniform Code of Military Justice (UCMJ) and courts-martial procedures, i.e., military law as created by Congress. Thus, in the opinion of the district court, Hamdan's POW status is presumed until it is proven otherwise in accordance with the principle of presumed innocence. In finding the double standard in

the military courts' due process guarantees to be unacceptable, there is a hint in Judge Robertson's opinion, although attributed to Hamdan's counsel, that the Guantanamo Bay military commissions have unfortunate and regrettable similarities with the 17th century English Star Chamber of the Stuart kings.

On July 15, 2005, the federal appeals court for the District of Columbia reversed the judgment of the lower court in the case of *Hamdan v. Rumsfeld*. The opinion of the court was written by Judge Randolph, with judges Williams and Roberts concurring in the judgment to reverse. Judge John Roberts, later nominated by President Bush and confirmed by the US Senate to replace the recently deceased Chief Justice William Rehnquist, recused himself from the case once it appeared on the Supreme Court's docket. Judge Randolph, writing for the court, argued that military commissions and courts-martial are not required to be identical, since they are separately treated in the UCMJ. Therefore, there is no expectation that the procedural safeguards explicitly guaranteed in the case of courts-martial should be implicitly understood to apply in the case of military commissions. Furthermore, since military commissions are lawfully created by the President, consistent with authority delegated by Congress, they are competent military tribunals for the purpose of assessing Hamdan's POW claim. The separate treatment of military commissions and courts-martial under the UCMJ demonstrates that the two are not intended to be identical in nature or procedure except where explicitly stated. With respect to the application of the Third Geneva Convention (1949 convention respecting the treatment of POWs), Judge Randolph notes that the Third Geneva Convention, as international law, does not give individuals the legal standing to sue contracting parties (e.g., states). Furthermore, in the opinion of the court, the President should be given great deference in determining how broadly to apply US obligations under the convention. Hamdan, as an al Qaeda detainee, is considered to be beyond the scope of the Third Geneva Convention, for the following reasons: he is not a soldier of any state; al Qaeda, the non-state actor to which he belongs, does not abide by the Third Geneva Convention; and he is not a participant in a localized civil war but in an international terrorist conspiracy. Judge Randolph, looking back to recent case law

on wartime detentions, notes that with respect to the Supreme Court's 2004 decision in *Hamdi v. Rumsfeld*[1] Hamdan was given the opportunity to challenge his detention as an enemy combatant before the newly created Combatant Status Review Tribunal. Referring to the Supreme Court's 2004 decision in *Rasul v. Bush*, Judge Randolph observes that the *Rasul* decision affirms that the federal courts have *habeas corpus* jurisdiction over foreign nationals at Guantanamo Bay but that it says nothing about the application of the Third Geneva Convention to Guantanamo Bay detainees.

The *Hamdan* case now sits squarely before the Supreme Court, which is scheduled to hear arguments on March 28, 2006. This is a Court with two recent appointments by the Bush Administration – Chief Justice John Roberts replacing Chief Justice William Rehnquist and Justice Samuel Alito replacing Justice Sandra Day O'Connor – both changes subsequent to the June 2004 announcement of the Supreme Court's opinions in the *Hamdi v. Rumsfeld*, *Rasul v. Bush* and *Padilla v. Rumsfeld* cases. In terms of case law, *Hamdi v. Rumsfeld* supports the presidential authority to detain enemy combatants outside of the criminal justice system and grants detainees the opportunity to challenge enemy combatant status (although not necessarily in civilian courts). However, the Supreme Court was vague on the authorization of indefinite detention in open-ended non-traditional conflicts, which suggests that further litigation on this point will be necessary. *Rasul v. Bush* supports the federal courts' jurisdiction in considering *habeas* petitions by foreign nationals detained as enemy combatants. *Padilla v. Rumsfeld*, having been rejected on a jurisdictional technicality by the Supreme Court in 2004, now finds its way back to the Court under the name *Padilla v. Hanft*, where *certiorari* (order to grant an appeal) is pending. In its September 2005 decision, the Court of Appeals for the Fourth Circuit reversed the lower court's ruling in favour of Padilla's *habeas corpus* petition. Consistent with *Hamdi*, the court of appeals found that the President has the authority to detain Padilla as an enemy combatant, but it chose not to address the question whether Padilla can challenge his enemy combatant status. Subsequently, the government indicted Padilla on criminal charges and filed a motion with the

appeals court, requesting that it withdraw its September judgment in *Padilla v. Hanft*. In December 2005, the court of appeals denied the government's motion and criticized the government's maneuver as an apparent attempt to avoid Supreme Court review of the *Padilla* decision and to manipulate the judiciary and the power of judicial review. Earlier this month, the Supreme Court resisted another challenge to the independence of the federal judiciary. The government, armed with congressional support in the form of the Graham-Levin Amendment to the 2005 Detainee Treatment Act, petitioned the Court to dismiss the *Hamdan* case. The government argued that Graham-Levin limited federal court jurisdiction over foreign nationals detained at Guantanamo Bay to a strictly appellate jurisdiction, effective only after all other legal relief through the Combatant Status Review Tribunal and military commissions had been exhausted.

The issues before the Court, narrowly construed are first, whether the Guantanamo Bay military commissions are duly authorized by Congress and second, whether the application of international law, specifically the POW protections of the Geneva Convention, is consistent with the authority of the federal courts. However, the broader import of the Court's ultimate rulings involve the separation of powers and the independence of the federal judiciary, the rule of law in the US under emergency conditions and the validity of international law in the US, especially under emergency conditions.

The significance of the *Hamdan* case for American jurisprudence in the field of wartime civil liberties is foreshadowed in Justice William Brennan's 1987 paper entitled "The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crisis." In this paper, prepared for presentation to the Law School of the Hebrew University in Jerusalem, Justice Brennan argues that American civil liberties have been dangerously compromised during wartime emergencies. He cites examples in the Alien and Sedition Acts of 1798, the suspension of *habeas corpus* during the American Civil War, the World War I Espionage Act, the internment of Japanese-Americans during World War II and the McCarthy 'witch hunts' of the early years of the Cold War. The question for the Court is whether it will decide *Hamdan* in a manner that confirms Brennan's thesis or whether it will

assert its judicial independence in a manner that is not only consistent with the constitutional principles of separation of powers and checks and balances but also that is, most importantly, informed by the fundamental constitutional principles of limited government and the rule of law. At the end of the 21st century, how will Americans look back on the war on terror and the handling of wartime civil liberties issues after September 11th? Will it be with the embarrassment that is commonly felt by Americans looking back on the inquisitorial McCarthy hearings, the internment of Japanese-Americans during World War II or the fanatical anti-free speech of all three branches of government during World War I?

Beyond the significance of the wartime civil liberties cases to American political culture, there is yet another impact, which owes to the fact that the US post-Cold War status presents America with the opportunity to behave as a hegemon for nationalism (unilateralism) or to behave as a leader for internationalism (multilateralism). America has the opportunity to shape the future world order beyond its reign as sole superpower and to imprint the principle of institutional checks and balances at the international level so that future abuses of power by dominant or rogue states can be restrained, thereby lessening the dangers of extreme *realpolitik*, imperial hubris and missionary idealism. Since the late 21st century may be dominated by a different constellation of great powers, of which the US will simply be one among equals, it behooves Americans to anticipate this possibility and to influence the future in a direction that preserves the values of liberty and justice.

Endnotes

[1] Of the four wartime civil liberties cases mentioned in this essay, *Hamdi v. Rumsfeld* and *Padilla v. Hanft* (previously *Padilla v. Rumsfeld*) involve the rights of US citizens, while *Hamdan v. Rumsfeld* and *Rasul v. Bush* address the rights of foreign nationals.

Philippe Sands is a British lawyer with international law experience in the negotiations for the 1992 Climate Change Convention and the 1998 Rome Statute of the International Criminal Court as well as in international law cases such as the Pinochet extradition case and the Guantánamo Bay and Belmarsh detainee cases. Sands' thesis is that while the US and the UK led the effort to create a rules-based international system during the 1940s (1941 Atlantic Charter, 1945 Bretton Woods Agreements and 1949 Geneva Conventions), this is in sharp contrast to the post-Cold War era, and especially the post-9/11 era, during which the US has declared itself above the law of nations and the UK has struggled with its divided loyalty between Europe and US. The Atlantic Charter, signed by President Franklin Delano Roosevelt and Prime Minister Winston Churchill before the US entered World War II, was a declaration of political and economic liberalism, self-determination, respect for human rights, enmity towards Nazi Germany and collective security. Bretton Woods represented the beginning of a new international economic order under the International Monetary Fund (responsible for economic stability), the World Bank (responsible for economic development) and the General Agreement on Tariffs and Trade (responsible for free and open trade). The four Geneva Conventions were adopted in order to prevent future wartime abuses with respect to the victims of war, e.g., prisoners of war and civilians.

In making the case that the US has moved away from the liberal internationalist principles of the Atlantic Charter, Sands moves through a number of high profile international law issues ranging from Pinochet to the 'war on terror.' In the Pinochet cases of 1998 and 1999, the British House of Lords ruled that former Chilean President Augusto Pinochet did not have immunity from the English courts with regard to the 1984 Convention against Torture. Spain had requested that the UK extradite Pinochet for crimes that he had committed as President of Chile from 1973-1990. Although a political solution was ultimately reached rendering moot the House of Lord's judgment in terms of Spain's extradition request, Sands nevertheless considers

the Pinochet judgment to be precedent-setting in that it limited the once absolute sovereignty of the state and denied absolute immunity to a former head of state.

The ICC (not to be confused with the International Court of Justice which aroused US ire with its 1986 ruling on the US' illegal war against the Sandinista Government in *Nicaraugua v. US*) has jurisdiction over war crimes, crimes against humanity and genocide. Sands argues that since the special international criminal tribunals established to investigate such crimes in Yugoslavia and Rwanda were politically dependent upon the UN Security Council and thus subject to veto by any permanent member, including the US, these special international criminal tribunals were acceptable to the US. He notes that the US continues to oppose the ICC for fear that US military personnel may be political victims of the court, which is why the US insists that the criminal prosecutions under the ICC be subject to the veto power of the permanent members of the UN Security Council. In other words, according to Sands, the US does not support the idea of an independent judiciary at the international level.

In the field of environmental international law, Sands points out that the Bush Administration's opposition to the 1997 Kyoto Protocol to the UN Framework Convention on Climate Change is in marked contrast to the Reagan Administration's leading support for the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer. Whereas the US had been willing to accommodate differential environmental standards with respect to the ozone layer, now the US has expressed strong disagreement with the two-tier system that sets targets and deadlines only for industrialized countries to reduce their greenhouse gas emissions. According to Sands, the US view does not give due regard to the fact that the industrialized world is responsible for most of the global warming to date and the prospect that the developing countries' industrial revolution will gradually move beyond dirty, cheap and unsophisticated manufacturing processes as did the West's own industrial revolution.

With respect to international law pertaining to the free trade in goods and services and the free movement of capital, Sands states that since the benefits of multilateralism in the form of global

economic integration are generally consistent with US economic interests, there is no perceived threat to US sovereignty and therefore no reason for the US to exempt itself from the rules of the game. According to Sands, as long as the World Trade Organization (formerly GATT), the World Bank's International Centre for Settlement of Investment Disputes (ICSID), NAFTA and other international and regional economic institutions continue to advance American economic interests, the US will comply with international economic law. Sands does, however, highlight the fact that US foreign economic policy reveals a double standard regarding international law. On one hand, the US generally accepts the rule of international law governing global trade and investment, while on the other hand, the US is unwilling to sacrifice its wartime sovereignty in order to comply with international law respecting humanitarian rights under the laws of war.

It is in that part of international law that concerns war, the treatment of victims of war and human rights that Sands finds US unilateralism to be most offensive and dangerous. It is also here that the UK has shown its greatest loyalty to its Atlantic alliance, especially in supporting the US war against Iraq. According to Sands, the US, in waging its 'war on terror' has suspended humanitarian international law as it applies to victims of war. Detainees at the US naval base at Guantánamo Bay have been denied protection under the 1949 Geneva Convention III relative to the Treatment of Prisoners of War, the 1966 International Covenant on Civil and Political Rights and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The prisoner abuse scandals at Abu Ghraib in Iraq demonstrate US violations of the 1984 Convention against Torture. And then there is the dubious legality of the US war against Iraq in 2003. Sands believes the US case for preemptive war of self-defense to be unfounded in fact and in law. First, there was no imminent threat of Iraq's use of weapons of mass destruction, and there was no alliance between Iraq and al-Qaeda. Second, the United Nations, the collective security organization foreshadowed in the Atlantic Charter, recognizes the right of one country to wage war against another country either as a matter of self-defense or in accordance with a UN Security Council authorization.

Sands notes a third justification – response to humanitarian emergency – is very recent and still contentious but may represent an evolving point of international law. However, none of these justifications applies in the case of the Anglo-American decision to wage war against Iraq – a decision that clearly violates the spirit of the Atlantic Charter. Paraphrasing Sand's book title, where World War II revealed the US to be a constructive and leading force in expanding the rule of law in international relations, the 'war on terror' has revealed the US to be a destructive force in international affairs insofar as the rule of law is sacrificed to rule of *Machtpolitik*.

Economic growth seems to be the economist's solution for all of society's ills. Economic growth brings prosperity, and prosperity for an economist means more income, more spending, more savings and more investment. But the benefits of prosperity do not end with the economist's calculus. More widespread prosperity also means less poverty, less malnutrition, less disease, less property-related crime and violence, less ignorance, less racism and less of whatever else ails society. These are what economists call positive externalities, i.e., benefits that fortuitously appear as a result of some economic decision by some economic agent. For the economist, reality is entirely explicable in economic terms. Now even democracy is regarded as a benefit of economic growth and prosperity. Democracy, itself, is the economist's choice among imperfect and suboptimal political systems, because its political freedoms are consistent with and supportive of the economic freedoms in market-based economies.

Economic growth may never be out of vogue with economists. Every economic policy seems to place great importance on economic growth. More money is always preferred to less money. As more people arrive on the planet (six-and-a-half billion and counting) and join one of the many human communities, each community will set out to find a way to provide not only for the new and future arrivals but also for the growing appetite of its existing members. That is the anti-Malthusian optimism that underlies the argument for economic growth from the perspective and within the legacy of Western market-based economics.

The wealth of nations is tied to economic growth. For Adam Smith, David Ricardo and the early classical economists, economic growth needed a boost from a heavy dose of free trade. This meant that mercantilist governments needed to stand aside to free the invisible hand of market supply and demand so that it could work its harmonic magic on the larger market of the international economy. In the post-Cold War world dominated by the US, Europe and Japan, liberal democratic capitalism (i.e., state-sponsored capitalism) has captured the imagination of business and government leaders and

their economists (“we’re all mainstream, market-based economists now”). The central planning of communism is passe, and a world of millions of autonomous economic cooperatives is the stuff of science fiction. The rhetoric of 21st century free markets may hearken back to the mythical days of Adam Smith. However, the reality of free markets is characterized by the private sector’s ceaseless solicitation of government subsidies (tax incentives, grants, contracts and bailouts), protections from foreign competition (tariffs and quotas) and favourable regulation (antitrust and merger exceptions, pollution exemptions and labour market flexibility).

The point of departure for this essay is the coincidence of three recent articulations of the importance of economic growth by three influential contemporary economists. First is Benjamin Friedman's recent book *Moral Consequences of Economic Growth* (2005). Second is Jessica Einhorn's article entitled "Reforming the World Bank" in the January/February 2006 issue of *Foreign Affairs*. Third is Anne Krueger's February 2006 speech "Evolution not Revolution: The Changing Role of the IMF in the Global Economy" presented at Stanford University's Graduate School of Business.

Friedman's book title suggests an appreciation that political economy and moral philosophy continue to be relevant to economics – a 21st century update of Adam Smith's *Theory of Moral Sentiments* where economics is placed in the broader context of its moral prerequisites as well as its moral consequences. Friedman, Professor of Political Economy at Harvard University, joins a growing chorus of economists as he proposes not only that economic growth and political development tend to be highly correlated but also that economic growth appears to predispose societies towards political development. As evidence, Friedman cites Freedom House's research, which presents a positive correlation between political rights and higher per capita income levels as well as between political rights and higher rates of economic growth.

It is important to understand that when Friedman talks about economic growth, he is not limited by the definition used by the business press, viz. the year-over-year changes in national income (GDP). Instead, Friedman's proposal considers economic growth to

imply a broad-based increase in the standard of living as opposed to the perpetuation of diverging incomes between rich and poor. With Marxism-Leninism-Maoism no longer viable and no other political economy competitor on the world stage, Frances Fukuyama's thesis that free markets and democracy mark 'the end of history' almost seems credible. However, there is still a schism in Western political economy between the classical tradition of *laissez-faire* economics and the Keynesian tradition of interventionism. Friedman (not to be confused with Milton Friedman, whose noninterventionist views were antithetical to those of John Maynard Keynes) assumes a Keynesian-like approach to macroeconomic policy. According to Keynesians, the forces of market supply and demand cannot produce social and political outcomes, except as unintended consequences, so government intervention in the marketplace is required in order to address market failures and to promote non-marketable ‘goods’ such as democracy, justice and liberty.

Einhorn, former Managing Director of the World Bank and currently Dean of the School of Advanced International Studies at Johns Hopkins University, argues that the World Bank should be reformed and made relevant to the new geopolitical landscape and the new realities of global finance. As one example, Einhorn proposes that the World Bank’s International Bank for Reconstruction and Development, which provides market-based loans to middle income countries, be gradually replaced by international capital markets. Perhaps most significant is what Einhorn recognizes as a shift in World Bank philosophy with respect to economic growth. Noting that public policy moves in cycles, she endorses the World Bank’s return to a more direct emphasis on economic growth as the most effective means of achieving sustainable poverty reduction and political reform. Einhorn also regards this change in emphasis as a shift away from the World Bank’s anti-poverty strategy under President James Wolfensohn, where education and health were emphasized at the expense of economic growth, infrastructure and trade. The reemphasis on economic growth may signal a dramatic shift in World Bank policy over the next five to 10 years during the tenure of the new World Bank President, Paul Wolfowitz, former Assistant Secretary of Defense to Donald Rumsfeld and former Dean of the School of

Advanced International Studies at Johns Hopkins University. It is accepted practice, and perhaps another anachronism, that the governance of the Bretton Woods institutions be split between the Americans and the Europeans, with the Americans getting the World Bank and the Europeans getting the IMF. There is irony in the Einhorn's reference to the cyclical nature of public policy what with Wolfowitz's role in developing the Bush Administration's Iraq policy being reminiscent of former World Bank President Robert McNamara's role in directing an aggressive Vietnam policy as Secretary of Defense under presidents Kennedy and Johnson.

Krueger, First Deputy Managing Director of IMF, recites the standard neoliberal view of global economics, a view that has come to be characterized as the Washington consensus, so-called because of the physical proximity and the institutional similarities of the World Bank, the IMF and US Treasury. Krueger's description of the IMF's now-familiar agenda highlights macroeconomic stability and growth and the facilitating role played by flexible exchange rate regimes, monetary policy autonomy (emphasis on inflation targeting), fiscal conservatism, structural reforms (flexible labour markets) and institutional reforms (the rule of law in property and contracts). (NB: Incidentally, this combination of political economy objectives corresponds fairly closely to that of the post-euro European Union.) Brazil and Turkey are held up as examples of successful borrowers, and the secret of their success is described in terms of their responsible take-charge attitude with respect to introducing flexible exchange rates, demonstrating fiscal discipline and adhering to the IMF program. Not surprising, the Argentine Crisis is not mentioned. Argentina, once an IMF star pupil, is now a blemish on the IMF's record, even though the IMF mounted a vigorous limited liability defense on its own behalf. (Cf. the IMF Policy Development and Review Departments 2003 report *Lessons From the Crisis in Argentina* and in the IMF Independent Evaluation Office's 2004 *Report on the Evaluation of the Role of the IMF in Argentina, 1991-2001.)* The sovereign debt restructuring mechanism is not mentioned either, although Krueger had at one time been a strong supporter of Chapter 11 bankruptcy-type provisions for insolvent countries before the US

intervened and, as the IMF's dominant shareholder, prevented any further discussion. Economic growth as prescribed by the Washington consensus seems to be again in the ascendancy, especially in emerging markets – the Argentine Crisis and the East Asian Crisis being relegated to a past beyond the memory of the markets.

An increasingly important theme in the discussions of economic growth, not least because of the implications for the prosperity-democracy thesis, is whether economic growth dictates that incomes converge or diverge. Does a 'rising tide lift all boats,' do benefits trickle down from the richest to the poorest or do 'the rich get richer and the poor get poorer'? Are there different types of economic growth that favour one or other of the above outcomes? Does the conjoining of economic growth and democracy mean that political economy – the rejoining of the normative (value-based) and the positivist (policy neutral) – is being resurrected? If aggregate economic growth is positive, does it matter whether the economic inequality gap shrinks as long as a broader distribution of economic progress above poverty threshold leads to broader access to political rights? Does democracy imply political equality beyond common access to a minimum level of political rights? Is political equality feasible where no limits exist for the divergence of incomes and wealth? How does this fit into the globalization debate in terms of the trade-off between the environment, local culture and human rights, on one hand, and efficiency, profits and employment, on the other? These are the kinds of questions that caused economists to run for the cover of a positivistic, objective and scientific discipline where truth could be more easily managed. They are questions of political economy, and unlike the questions investigated by objective and scientific economics, they admit of no easy and precise answers. Here, then, the expertise of the economist may be questioned, and this is not altogether for the worse, since the notion of absolute and unassailable wisdom and expertise is out of place in a democratic society.

Therefore, in an attempt to open up the discussion of economic growth, representative contributions from a broader base of 21st century economists are introduced for consideration. First, Nancy Birdsall, President of Center for Global Development, in her paper "A Stormy Day on an Open Field: Asymmetry and Convergence in the

Global Economy" presented at a 2002 Reserve Bank of Australia conference, argues that market failure at the international level requires non-market interventions similar to those seen in industrialized countries over the course of 200-plus years of capitalism. Birdsall makes the point that unlike in the theory of perfect competition, markets do not clear instantaneously, market prices reflect the distortions of concentrated markets, and information asymmetries and transaction costs limit market access in favour of insiders. Therefore, since global markets are imperfect, non-market interventions are necessary to remedy the suboptimal conditions produced by imperfect markets. Birdsall also makes the argument that openness to trade does not entail growth, since openness for some countries may simply increase their vulnerability to the vagaries of international capital markets and to the dominant market power of foreign-sponsored multinationals. Thus, Birdsall concludes, an unfair playing field on the international scene may perpetuate income and wealth gaps between developed and developing countries, presumably with additional negative implications for the distribution of global political power.

Second, Amartya Sen, Professor of Economics and Philosophy at Harvard University and 1998 Nobel Prize laureate in Economics in his book *Development as Freedom* (1999) argues that development as a strictly economic phenomenon is too narrow. Sen argues that whether economic growth meets its targets or not, freedom from poverty, famine, disease, contagion, war and civil war are worthy goals in themselves. Furthermore, Sen believes that free market extremism, as the means of development, is not only hypocritical, but it is also impractical. He notes that in the West, markets are mixed – blending public and private sectors – for good reasons. First, a mixed economy can provide a social safety net for chronic and cyclical economic casualties, as much to preserve social stability as to promote a humanitarian and humane vision of society. Second, a mixed economy provides a check against unlawful and socially harmful business practices through the regulation of stock markets, financial institutions, anticompetitive practices and natural monopolies, again not just out of a sense of fairness but to restrain behaviour

that can precipitate economic crises. According to Sen, the American experience with the abuses of monopoly and cartel power and with financial manias, panics and crashes provides the context for anti-trust policy, legislated automatic fiscal stabilizers, discretionary fiscal policy and monetary policy flexibility, all of which represent deviations from pure free market economics. American capitalism, Sen concludes, is not the free market capitalism peddled to the developing and transition economies, but it is the version of capitalism that should be 'exported' and not free market extremist version advanced by the Washington consensus.

Third, Jagdish Bhagwati, Columbia University Professor of Economics and Law, in his book *In Defense of Globalization* (2004) supports globalization against protectionist and anti-globalization protestors, but he is critical of the Wall Street-Treasury version of globalization. Bhagwati is regarded as a free trader, but he is a proponent of managed globalization as opposed to *laissez-faire* globalization. For Bhagwati, globalization is the best means available of addressing poverty and advancing democracy in the developing world, since it is only by means of economic growth that poverty and maldistributions of income can be effectively addressed. Income redistribution schemes are inherently infeasible, since no country would levy an international income tax to support victims of poverty in other countries. Furthermore, Bhagwati argues that the expansion of economic well being is a precondition for expanding democratic rights and principles, based on the idea that political rights must be won and economic power makes it possible to win these rights. Thus, anti-poverty and democracy objectives are tied to economic prosperity, which, in turn, is linked to freer international trade and the resulting efficiency gains in production and pricing. While Bhagwati endorses freer trade, his support does not extend to free capital flows. In fact, he attributes the East Asian crisis of 1997-98 to the sudden, massive outflow of short-term capital, which was made possible by the introduction of capital account liberalization in countries lacking adequate financial regulatory controls and safeguards. Similarly, Bhagwati is critical of rapid globalization (contrasting Russia's failed 'shock therapy' with China's more successful gradualism), and he argues that developing countries are no

less entitled to globalization safeguards, such as social safety nets (funded through World Bank or other aid agencies) and regulatory oversight, than are rich countries. Bhagwati is no less critical of rich country NGOs and labour unions whose anti-globalization views regarding environmental and labour standards belie a hypocritical self-interest – a point where ardent free traders and anti-free traders have something in common.

Fourth, Amy Chua, Professor of Law at Yale University, in her book *World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability* (2003) presents a pessimistic view of globalization in sharp contrast to the optimism of Francis Fukuyama's 'End of History' optimism regarding liberal democracy. Chua argues that free markets and democracy exports to the 3rd World tend to be destabilizing insofar as economic liberalism (privatization, deregulation, free trade, etc.) disproportionately benefits market-dominant minorities while democracy arms the economically disadvantaged majority with political power. The consequence is civil strife between economic and political power centres as seen in Zimbabwe, Venezuela, the Philippines, Indonesia, Rwanda and Yugoslavia. Chua regards free markets and democracy to be inherently dissonant. In Chua's view, this dissonance between free markets and democracy explains why in the West free markets are constrained by social safety nets and government regulation and why majoritarian democracy is restrained by civil rights and liberties. Chua concludes that this dissonance is also why the export of crude free market and democracy ideas to the 3rd World is harmful.

Fifth, Martin Wolf, Associate Editor and Chief Economics Commentator, The Financial Times, in his book *Why Globalization Works* 2004 makes the case for global economic integration. Wolf shares with Bhagwati a strong support for free trade but only conditional support for capital account liberalization owing to the special vulnerability of developing countries to capital flight as seen in the South American debt crisis of the 1980s and the East Asian crisis of 1997-98. Wolf is keenly aware of the political economy of globalization and trade liberalization in which conflicting interests emerge both within and among countries. He acknowledges the unequal outcomes due

to asymmetries in power, citing rich countries' hypocrisy in supporting free capital mobility while blocking free labour/immigration mobility, in protecting domestic agriculture while forcing open markets in developing countries, in consigning developing countries to a limited portfolio of export commodities marked by highly volatile prices and in controlling the globalization and development agenda in international organizations. Nevertheless, Wolf presents a strong defense of globalization, linking economic integration with economic growth and prosperity as well as democracy and freedom. Like Bhagwati, Wolf believes that globalization is the best bet for expanding prosperity and that a generally rising level of prosperity is the best bet for reducing global poverty and for promoting political rights and freedoms. In what could only come from an EU perspective, Wolf suggests that the political fragmentation of the world into numerous sovereign states is a principal reason for the degree of economic fragmentation shown in country studies on income inequality and poverty. The potentially revolutionary implication seems to be that some sort of social safety net implemented at the international level may be in order.

The idea that economic conditions determine political developments is not new. It is fundamental to the story told of the transition from feudalism to capitalism. As the emerging bourgeois class accumulated greater economic power, it demanded a corresponding increase in political power. And so emerged the prototype for democracy as a means of replacing the more hierarchical monarchist/feudal system of government. This is the standard statement of economic-driven political reform. If economic growth can be assumed to serve as a proxy for the increasing purchasing power that seems necessary to support rising living standards and if greater purchasing power and improved living standards correspond to increased economic power, then greater economic growth should be attended by greater political reform. Obviously, the target is the developing world, but the argument can be applied to the great asymmetry of income in developed countries. It is a revolutionary argument in the sense that political power tends to follow economic power, and whenever and wherever the distribution of political and economic power is shifting, there is a threat to the status quo. No

doubt that is why dissent, sometimes a precursor of change, goes against the grain of conformity and offends the respectful deference to authority. Finally, if freedom has any part of the political and economic program that the experts have promised, then it must be obvious that once the genie has been released, ‘the best of all possible worlds’ had better make way for ‘the quest for more possible worlds.’

Two European utility merger cases[1] are posing the latest challenge to the European Union's (EU) authority in the political economy of what some are predicting is the emerging United States of Europe. In the first case, two French utilities, Gaz de France and Suez, have announced plans to merge, having been encouraged by the French Government to consummate a French solution. In the meantime, an Italian energy group, Enel, has gained the support of the Italian Government in raising objections to the French merger, which is claimed to be in defiance of the EU's jurisdiction over mergers with an EU dimension. Gaz de France is the state-owned and dominant gas utility in France, Suez is a French water and power utility that only recently completed an acquisition of Electrabel, Belgium's largest electricity utility. The French Government contends that its promotion of a French national champion in the strategic energy sector derives from its rights as a sovereign state. The task for the EU is to expand the notion of economic allegiance to the supranational government of the EU in Brussels.

The second European merger case involves the Spanish gas utility, Gas Natural, and the Spanish electricity utility Endesa. The Spanish Government is accused of passing protectionist legislation to prevent the German energy group, E.ON, from acquiring Endesa, in order to promote a Spanish national champion through Gas Natural's takeover of Endesa. In another twist in the case, Endesa is fighting Gas Natural's hostile takeover through the Spanish courts. The Spanish Government, like the French Government, argues in defense of economic nationalism - economic independence, economic security and political accountability.[2] The EU position reflects a multilateralist approach to economic issues that have an EU dimension. Americans will recognize that the term 'EU dimension' is the European variant of the US federal government's 'interstate commerce' clause, by which Washington asserted its primacy over individual States in regulating the economic affairs of the nation.

The strategic importance of the energy sector, underscored by record high oil prices following the Iraq War, the magnitude of the mergers and the nationalist alliance of governments and firms have added substance to a new round of debates on EU governance.

Once again the sovereign states of Europe are resisting the expansion of the centralized power of the EU. Last year the battle lines were drawn on the Stability and Growth Pact and the EU Constitution, and last year the sovereignty of the European state trumped the sovereignty of the supranational and treaty-based EU. Early in 2006, the EU is again being tested by some of its member states that are becoming increasingly impatient with the ability of multilateralist and long run thinking to deal with their immediate concerns of sluggish growth and high unemployment. The European Commission (EC) is the administrative authority of the EU, and as such, it is responsible for representing and enforcing the EU's political will. Its defense of the EU agenda is closely, although not necessarily, aligned with the contemporary forces driving globalization. The Lisbon strategy, the Stability and Growth Pact, the EU Constitution, the European Central Bank and EU competition policy reflect a common belief that a consolidated Europe will be more prosperous in a global economy. For example, while a French, Spanish or German national champion is unacceptable to the EU, an EU champion in the global market is an entirely different matter. Not only would an EU champion, like Airbus, reap the benefits of greater economies of scale, but it would also shift the locus of industrial policy to Brussels.

An important context in the current battle for control of merger policy in the EU is the ongoing power struggle between Brussels and the national capitals for control of European economic policy. The European Central Bank (ECB) stands as the European's greatest success to date, at least in terms of price stability. However, the ECB's monetary policy has controlled inflation at the expense of economic growth and employment, and the 12 eurozone members, having ceded monetary policy authority to Brussels, are no longer able to act independently through their respective national banks to stimulate a sluggish economy. The UK, Denmark and Sweden have so far been unwilling to give up their freedom to make their own monetary policy – a continuing reminder that even one of the EU's greatest achievements remains incomplete owing to economic nationalism. Not surprisingly, the ECB, as a successful European institution, has been an ardent supporter of EU initiatives, such as

the Lisbon strategy and the Stability and Growth Pact, which were designed to promote economic policy consolidation and to advance a neoliberal market-based economic agenda.

The 2000 EU Lisbon Summit established the goal of making the EU the most dynamic and competitive knowledge-based economy in the world by 2010. Relatively speaking, the Lisbon agenda represents an economic policy for the long run, i.e., beyond the ups and downs of the business cycle. The most recent development in the unfolding of the Lisbon agenda is the European Council's 2005 decision to relaunch Lisbon's structural reforms through individual National Reform Programs comprising three-year targets for economic growth and employment. The EU's economic plan has been devised to address three major economic issues: first, the continuing sluggish economic growth; second, the persistently high level of unemployment; and third, the rapidly ageing population. Structural reforms, which generally require a long run outlook, are still at the centre of EU economic policy, and labour market reforms are at the centre of the structural reforms. The objective of the EU's labour market reform is to introduce the flexible employment and pricing of labour. The EU/corporate argument maintains the supply-side economist's argument that EU employers will be globally competitive if wages and benefits can be negotiated downwards, as necessary, and if employment laws can be rolled back to facilitate more efficient downsizing. As EU firms become more competitive in world markets, so the argument runs, the EU economy will grow, unemployment will decline, national income will rise and successfully reformed social security, pension and health care systems will be able to support Europe's demographic age shift.

Unlike the Lisbon strategy, the Stability and Growth Pact (SGP) has a more immediate focus. The SGP was designed to be an agreement among the members of the eurozone to conform to a conservative fiscal policy framework, so that member states would not be allowed to become excessively indebted at the expense of the community as a whole. The SGP has become a high profile battleground where economic nationalists and EU supranationalists are in contention for control of macroeconomic policy. Germany and France, the two largest economies in the EU, have been the EU's

most recalcitrant members in conforming to the three-percent deficit rule. The economic nationalist argument is that prolonged and/or severe economic downturns may justify a country's decision to temporarily suspend the SGP's deficit limits. This argument from the EU's two largest economies has so far carried the day as both France and Germany have avoided sanctions for violating the SGP. In addition, the June 2005 reforms to the SGP regulations formally recognized a greater role for the use of flexible and discretionary judgment in assessing compliance with deficit and debt limits. For example, earlier this month the EC, taking notice of Germany's "still fragile economic recovery," requested that Germany be given until 2007 to remedy its fourth consecutive and most recent excessive budget deficit for 2005. France, on the other hand, appears to be in the clear after three consecutive years of excessive deficits. Its budget deficit in 2005 was three percent of GDP and therefore within the bounds established in the SGP.

In early 2006, the EU and the European unionists/federalists are still looking for a decisive victory over their nationalist adversaries in Europe's capitals. The ECB, arguably the EU's premier achievement to date, is still incomplete. The Lisbon strategy to overtake the US is at risk in no small part because of the political turbulence that will likely occur in response to major labour market reforms, as seen in recent nationwide protests against the French Government's plan to limit the employment rights of young workers. France and Germany's economic nationalism, backed by their combined economic clout, won concessions from the EU with respect to the enforcement of the deficit and debt ceilings fixed by the SGP. The EU was dealt a devastating blow in the summer of 2005, when over the course of four days, the ratification process for the new EU Constitution was brought to a screeching halt with the French and Dutch citizenry voting in their respective national referenda to reject the proposed constitution. It is against this background that the EU is challenging the merger authority of its member states. To what extent the current political battle for control of EU merger policy will figure in the future history of the United States of Europe project is to be determined,

but for the present, the political conflict seems to have the character of a significant moment in EU history.

Endnotes

[1] Two other high profile mergers – one in the financial services sector and the other in manufacturing – are proceeding alongside the European utility mergers. In Poland, the merger at issue involves Unicredit, an Italian bank, and HVB, a German bank. Last year, the European Commission (EC) approved the Unicredit/HVB merger. The Polish government subsequently insisted that Unicredit divest its shares of BPH, the Polish subsidiary of HVB, before the merger is finalized. The EC has taken the position that the Polish Government, by blocking the Unicredit/HVB merger, has violated the EU's Merger Regulation, which grants exclusive jurisdiction to the EC in merger cases that have an EU dimension. The second non-utility merger case is Mittal/Arcelor. Mittal Steel, the world's largest steel producer, has bid to take over Arcelor, a European steel producer formed four years ago from the merger of Luxembourg's Arbed, Spain's Aceralia and France's Usinor. France, Luxembourg and Spain are attempting to block the merger deal, which is different in one very important respect from the other three mergers discussed so far. Mittal/Arcelor will not produce a pure EU champion in the global market for steel, since Mittal is a global steel producer whose headquarters happen to be in the Netherlands but whose production facilities are distributed around the world.

[2] The economic nationalist arguments advanced in the European merger cases find their parallel across the Atlantic in two prominent merger cases involving strategic US interests. Last year, citing national security concerns, members of Congress threatened to block the China National Offshore Oil Company's (CNOOC) attempted acquisition of Unocal, a US oil company. After CNOOC withdrew its bid, Chevron-Texaco stepped in to take over Unocal. Again this year, national security concerns were invoked to prevent Dubai-owned DP World from gaining control of terminal operations at six American East Coast ports as part of the merger deal between DP World and the British firm P&O. Under pressure from Congress, DP World will divest itself of the US ports acquired during the

takeover of P&O. As in the case of the CNOOC/Unocal, DP World's acquisition of US ports was blocked for reasons of economic nationalism.

Two recently completed and one pending mega-merger in the US telecommunications sector suggest that American antitrust has reversed course since the 1984 breakup of AT&T's monopoly of long distance and local telephone service. Last year the Department of Justice and the Federal Communications Commission approved the SBC/AT&T and Verizon/MCI mergers, marking a sharp break with the antitrust policy that forced the Bell breakup. Each of these mergers pairs one of the two largest US regional (local) phone companies (SBC and Verizon) with one of the two largest US long distance carriers (AT&T and MCI).[1] And already this year, the new AT&T has announced plans to acquire BellSouth, subject to the review of the antitrust authorities in the US and in Europe, neither of which put up much resistance to last year's mergers.

If the AT&T/BellSouth merger is approved, then Verizon, AT&T and Qwest will be all that remains of the original Baby Bells created by the Bell monopoly breakup. The seven independent regional Bell operating companies created from the Bell divestiture will have been re-assimilated since the 1996 Telecommunications Act, with regional telephone service parceled out among Verizon (NYNEX and Bell Atlantic), AT&T (Southwestern Bell, Ameritech, Pacific Telesis and BellSouth) and Qwest (US West). In addition to dominating local telephone service markets, the remaining Baby Bells will have also reversed the 1984 separation of local and long distance ownership, with Verizon, AT&T and Qwest (along with Sprint) now dominating the long distance market.

The American Antitrust Institute (AAI) has expressed its opposition to the AT&T/BellSouth merger on grounds that competition in the intermodal broadband market of fiber, cable and wireless telecommunications will be harmed.[2] The AAI speculates that the new post-merger AT&T will have sufficient market power in both fiber and wireless–based services to manipulate supply and demand conditions in broadband markets by suppressing the development of wireless broadband services at the expense of existing fiber optic broadband infrastructure.

Two experts from The Brookings Institution counter this argument by pointing to the global nature of contemporary business competition and the dynamically competitive nature of telecommunications, which have, in their view, rendered antitrust policy obsolete.[3] According to their view of unfettered, self-regulating free enterprise, competition in telecommunications services is guaranteed by the current range of intermodal options and by the promise that continuous technological innovation will prevent the appearance of the monopolist bogeyman.

Somewhere in between these two views, but closer to the Brookings authors, is that of US antitrust authorities at the Department of Justice and the Federal Trade Commission. In approving the Verizon/MCI and SBC/AT&T mergers, the Department of Justice's Antitrust Division argued that in each case the merging firms were in complementary not competing lines of business and that each merger promised substantial efficiencies. Similar arguments will likely be used in defense of the AT&T/BellSouth merger. The government can argue that industry consolidation is positive as long as consumer welfare is enhanced, or at least not harmed, and that merger-related efficiencies will translate into greater profits for the merging firms and their corporate customers, many of whom compete in international markets. This view, like that of the anti-antitrust lobby, is optimistic in its assessment that there is no imminent threat of a price-maximizing, innovation-minimizing monopolist.

One problem with the law and economics approach to antitrust (the dominant contemporary school of antitrust thought, also known as the Chicago School) is that there is no place for the analysis of non-economic effects of antitrust policy. A second problem with the law and economics approach is that it gives pseudo-scientific cover for the old mercantilist view of government as the underwriter, facilitator and promoter of free enterprise and downgrades the government's role as adversarial regulator in the political economy of checks and balances.

According to the law and economics view, if the impact of antitrust policy cannot be quantified and predicted, however mysteriously, by the science of economics, then the usefulness of

such policy is limited. Apparently the structuralist critique is passe as is its presumption that market power (the power to act unilaterally in a market and not necessarily as a monopolist) invariably leads to the abuse of power and not just limited to the allegedly separate and discrete world of economic phenomena. The arguments of the structuralist critique have been overwhelmed by the credentials of technical economics.

The most prominent recent example of a successful application of the structuralist antitrust approach is the initial divestiture judgment in the *Microsoft* case (*US v. Microsoft*, 2000). However, it was not a merger case, and it was also later overturned by the DC court of appeals. Unlike antitrust policy targeted at the abuse of market power as in the *Microsoft* case, the intention of antitrust merger policy is to identify and then prevent or, at least, mitigate the merger's probable harmful effects and the conduct producing those effects. The intention is to preempt market power before harm has been done rather than to punish the already merged firm after the damage has been done. The complication arises when market power is given the benefit of the doubt.

In a classic example of structuralist antitrust thought, Judge Thomas Penfield Jackson, of the DC federal district court, ordered that Microsoft be split into an operating systems firm and an application software firm in order to remedy the situation where Microsoft was using its market power in one market to gain market power in another. This decision reflects a fundamental skepticism about self-regulating competition in markets where market distortions caused by monopoly or by a few dominant firms are the norm not the exception. Underlying the logic of the structuralist argument is the belief that power corrupts and absolute power corrupts absolutely. In addition, the structuralist does not believe that there is such a thing as the natural harmony of *laissez-faire* markets, which regulates free and fair competition. Instead, the structuralist believes that economic power is conditioned by political power, just as political power is conditioned by economic power. In other words, the political and the economic cannot be separated as easily as the law and economics school of antitrust would have it.

This leads to the thesis of this essay, which is that market power – concentrated economic power – is more than just an economic phenomenon. It also has repercussions in the political realm. The case in point is the Bell consolidation within the context of the Bush Administration's war on terror. The April 2006 issue of The Atlantic Monthly features a background story[4] on the National Security Agency's (NSA) domestic eavesdropping capabilities in light of the December 2005 discovery that the NSA was again (as in the Vietnam War era) engaged in illegal domestic espionage. The NSA's authorized jurisdiction is foreign espionage, and Foreign Intelligence Surveillance Act (FISA) courts, established in 1978 in response to domestic spying abuses as documented by the Church Committee's post-Watergate investigations, are intended to protect Americans from arbitrary surveillance.

Advances in telecommunications technology and the increasing concentration of ownership over telecommunications assets provide the government with sophisticated means to preempt terrorist attacks. However, the national security benefits of advancing technology and market concentration may be realized at the expense of unpriced civil liberties. The ACLU has filed a lawsuit against the NSA (*ACLU v. NSA*, 2006) challenging its domestic program of eavesdropping on telephone and Internet communications as unconstitutional violations of the First and Fourth Amendments.

From the structuralist's perspective, *ACLU v. NSA* and *Doe v. Ashcroft* (2004) give a hint as to how market concentration in the telecommunications sector can have spillover effects in the political realm of civil liberties. The NSA domestic spying case raises serious concerns about the danger of highly concentrated telecommunications markets making it easier for government agencies to develop symbiotic relationships with the dominant firms. As a hypothetical example, the price for supporting a merger might be complicity in a nationwide program of illegal domestic eavesdropping.

In "Big Brother is Listening," Bamford states that "the NSA maintains a very close and very confidential relationship with key executives in the telecommunications industry," which really should not be a surprise to anyone who has worked in a corporate

environment, whether in business, industry or government. This is not the stuff of conspiracy theory. It is simply how modern corporations work – acting as a stakeholder in some relationships and as a coordinator of stakeholder interests in other relationships. Obviously, corporations identify key individuals to manage these strategic relationships, and perhaps less obviously, the public or the media are not always notified of the important happenings in these relationships, which makes them de facto confidential.

In *Doe v. Ashcroft*, Judge Victor Marrero of the Manhattan federal district court ruled that the FBI's issuance of a National Security Letter (NSL) to an Internet service provider (ISP named Doe) demanding the personal subscriber information was unconstitutional. The court noted that NSLs are a special type of administrative subpoena issued by the FBI and that they are not subject to judicial review to determine whether probable cause has been demonstrated. Therefore, the court judged, the plaintiff's Fourth Amendment rights respecting search and seizure were infringed by the NSL. The court also noted that an NSL comes with a gag order, which makes the NSL a legally binding non-disclosure directive. On this point, too, the court found the NSL to be unconstitutional – in this instance an infringement of the plaintiff's First Amendment freedom of speech. *Doe v. Ashcroft* has since been consolidated with *Doe v. Gonzalez* (Connecticut library case[5]) and is pending appeal before the 2nd Circuit Court of Appeals.

Doe v. Ashcroft provides an interesting contrast in that an Internet service provider, competing in a less concentrated market, refused to go along with the FBI's gag order and instead filed suit in federal court to have the gag order lifted and the subpoena quashed. Presumably many other ISPs have complied with the FBI's NSL orders. The point being that the greater the number of potential players with whom a government agency has to develop close ties, the less likely it will be that all of the players will have the same relationship with the agency. In other words, collusion is much more difficult among numerous collaborators. It is for that reason an example of a useful market-based check against government abuse of power … and a reason why non-economic factors should have a place in US antitrust policy.

It is the tendency towards secrecy and the devastating harm of technically sophisticated but extralegal eavesdropping that must be factored into antitrust policy. The standard pro-merger economy of scale and global competition arguments must be judged against the grave consequences of promoting too close and too efficient a relationship between the government's intelligence agencies and telecommunications firms. The law and economics approach is too limited to recognize and protect the non-market value of democratic civil liberties of free speech and privacy.

Endnotes

[1] In 1998, MCI and WorldCom merged, but two years later, the MCI WorldCom/Sprint merger was blocked by antitrust authorities in the US and in the EU.

[2] See American Antitrust Institute Press Release, "ATT-Bell South Merger: AAI Says Merger Threatens Inter-Modal Broadband and Private Line Competition," April 10, 2006 at http://www.antitrustinstitute.org .

[3] See "The AT&T/BellSouth Merger: The Breakdown of 'Breakup'" in The Wall Street Journal, March 9, 2006 by Robert W. Crandall and Clifford Winston of The Brookings Institution. Article downloaded from http://www.brookings.org on April 17, 2006.

[4] See "Big Brother is Listening" by James Bamford in The Atlantic Monthly , April 2006.

[5] The Department of Justice has withdrawn its legal challenge to maintain the gag order on the Connecticut library that was served with an NSL. In the Connecticut federal district court's Sep 2005 ruling in *Doe v. Gonzalez* , Judge Janet Hall ruled that NSL's gag order provision was unconstitutional, since it violated the plaintiff's First Amendment right to free speech. The ACLU regards the Department of Justice's concession to be of limited value, since the Connecticut plaintiff is no longer in a position to contribute to the USA PATRIOT Act debate – a debate closed off with Congress' reauthorization of the act earlier in this year.

Does This Sound Familiar?

A divisive war in mainland Asia, domestic surveillance and eavesdropping, oil prices at record highs - it sounds like "déjà vu all over again."

"No," we are told. This is the 21st century, and America has won the Cold War and resurgent globalism is spreading democratic and market values across the world. Two generations beyond the hapless 1970s, we are told that we have progressed far beyond our weakness and ignorance then.

However, America, democracy and free markets are under attack from a different enemy, as most compellingly demonstrated in the September 11th terrorist attacks on the World Trade Center and the Pentagon. In response, President Bush has launched a massive counteroffensive known as the 'war on terror.' In this war, it is said that the ghosts of Vietnam, Watergate and the Arab oil embargo will not weaken American resolve.

In Iraq, we are told that the fate of democracy in the Islamic world lies in the balance and that if we stay the course, we can win another great historical clash as great as the Cold War. With respect to wartime civil liberties, we are told that the civil liberties of some must be temporarily curtailed for the greater good and the future of the Bill of Rights, especially because the enemy could be anywhere, planning anything at anytime against anybody. Then, too, although oil prices are at record high levels (at least in non-inflation-adjusted terms), we are told that our central bank can render harmless the effects of an oil shock and that we therefore no longer need fear being held hostage by foreign oil-exporting powers.

In other words, everything is under control. Everything is going according to plan. "Trust us!"

Consideration of monetary policy alongside foreign policy may appear to be a strange juxtaposition. However, just imagine the impact of a 20 percent misery index (e.g., double-digit inflation and double-digit unemployment) on the Bush Administration's Iraq foreign policy and its foreign and domestic 'war on terror.' The 1973-74 oil embargo was a large cause of the stagflation of the mid-1970s,

and so it is clearly in the White House's best interest that the Fed put to rest any fears that there might be a 21st century American stagflation.

As an independent central bank, the Fed is not controlled by the White House. However, as a banker, the Fed is naturally concerned with image and risk, and so the Fed does not engage the government openly and directly on political issues but instead acts to manage political risks by means of its technical expertise.

For its part, the Fed says that the post-Iraq invasion oil shock will not automatically trigger either an inflationary spiral or a recessionary plunge. As the new Fed Chairman, Ben Bernanke, puts it monetary policy stands between the oil shock and the American economy, which means that if monetary policy is done right the experience of the 1970s and 1980s will be ancient history.

The mismanaged monetary policies of the 1970s are now far enough in the past to give the present-day Fed the opportunity to discredit the mostly forgotten monetary policies of the 1970s. Against the failed full employment, low inflation policies of the 1970s, today's Fed claims to be following a different and thus far more successful tradition of anti-inflationary monetary policy, which is now into its second quarter-century.

Chairman Bernanke's views appear to be those of the modern central banker of the post-Great Inflation era. Low and stable inflation are the watchwords of this central banker. Full employment is still important - although mostly with politicians who face an electorate at some point - but it has been made a function of low and stable inflation. Central bankers have solved the puzzle of 1970s stagflation. The solution is low and stable inflation, which meets both of the Fed's statutory obligations - low inflation and full employment.

Since the early 1990s, many rich country central banks have moved towards a more explicit and rigid formulation of the inflation objective. Inflation targets have been set to control upwards inflationary spirals as well as downwards deflationary spirals (as in 1990s Japan). On the downside, so to speak, one of the characteristics of the inflation-focused monetary policy regime is the combination of either disinflation or price stability with high or rising unemployment.

It is a pattern that has been repeated in New Zealand, the Eurozone and Canada - all formal inflation targeting regimes - and, it has been seen in the last three US recessions, even though the US is formally guided by a dual employment-inflation mandate.

Watch for the Fed to pressure Congress into formally endorsing explicit inflation targeting. The current oil shock may present an opportunity for inflation hawks to push for hard-wiring US monetary policy to a strict inflation targeting regime, thereby removing monetary policy from the political realm where recessions matter. Depoliticizing monetary policy sounds appealing until it becomes apparent that the technical optimization calculations of bankers and economists are not as politically neutral as the complex mathematical formula might suggest.

Regardless whether the Fed ever gets official legislative authority to pursue the single monetary policy objective of price stability, the Fed seems likely to be strongly inclined towards acting as though price stability were the primary policy objective. To hear the Fed speak, one gets the impression that credibility, predictability, transparency, etc. are some sort of liturgical expressions intended to bring the arcane art of monetary policy down to the level of common understanding.

What remains hidden, though, is the fact that not all macroeconomic outcomes can be simultaneously promoted. For instance, price stability (desired outcome #1) may be incompatible with full employment (desired outcome #2) and income stabilization/growth (desired outcome #3). Or in some cases, price stability and full employment may be compatible with one another but incompatible with the across-the-board improvement, or at least maintenance, of income levels.

A highly flexible labour market that encourages high participation rates through more controlled access to unemployment insurance and welfare assistance and that promotes more flexible employment standards through temporary, part-time and self-employment has contributed to the achievement of what were once thought to be the contradictory goals of low inflation and high employment. However, labour market flexibility, while keeping unemployment levels down, has not promoted this third, and often

ignored, macroeconomic objective of increasing or at least stabilizing individual and household incomes.

So, when the Fed says that the present oil shock oil will not send the US economy into the stagflation of the 1970s, it should be borne in mind that there is more going on behind the scenes than one is being led to believe.

According to Gregory Mankiw's assessment of US monetary policy in the 1990s (made prior to his serving as Chairman of the Council of Economic Advisers under President George W. Bush), we may have just been lucky with low inflation and high employment, benefiting from positive productivity shocks and from the absence of negative energy shocks. Add to this the impact of globalization and labour market adjustments, and it is not surprising that reduced employment costs have translated into not only price stability but also higher levels of sustainable employment.

In any event, we seem to have attained neoclassical nirvana - a macroeconomy that can be stabilized by downwardly flexible wage rates, which will absorb any shock and clear any market. So, there is no need to fear a repeat of the 1970s inflationary and recessionary response to oil shocks, since the Fed is committed to keeping inflation under tight control and government-business leaders have committed to structural policies that provide controlled access to unemployment protections.

Again, we are encouraged to trust those who lead, because it is said to be too dangerous not to do so. However, it is becoming increasingly difficult to defer to their greater judgment when we see that our nominally democratic government can fabricate the case for war, strip away the Bill of Rights and manufacture an oil crisis and then say that it isn't a crisis.

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... What happens when political discourse is hi-jacked by turns of phrase? (Arts & Opinion ed.)

Although Professor Samuel P. Huntington's "Clash of Civilizations?" was published in 1993 and his follow-up, *Clash of Civilizations and the Remaking of World Order*, was published a decade ago, these writings may be more relevant now in the context of the war on terror than they were in the aftermath of the collapse of communism. This could explain why the editors of Foreign Affairs continue to market Huntington's 1993 classic, comparing it with George Kennan's famous Soviet containment article, "The Sources of Soviet Conduct."

At the beginning of his 1993 article, Huntington observed that he was not alone among "intellectuals [who] have not hesitated to proliferate visions of what [the new phase of world politics] will be – the end of history, the return of traditional rivalries between nation states, and the decline of the nation state from the conflicting pulls of tribalism and globalism." It is clear that the end of the Cold War and the collapse of European communism created a huge opening for students and scholars of international relations to project their favourite hypotheses about how the new world order would look. In fact, the opening is still huge, and intellectuals are still trying to fill it.

So far, so good. It sounds like Justice Oliver Wendell Holmes' metaphor of truth in the marketplace of ideas. However, the search for truth may not be as simple as the metaphor suggests. The hypothesis that emerges as dominant may not be the best hypothesis but the one that corresponds best to the predisposition of the government of the day. On one hand, this does not seem inappropriate in a representative democracy where it is the responsibility and prerogative of the government to act (as trustees) on behalf of the majority (their wards). On the other hand, American history is filled with examples – and the Bush Administration has provided its share of them - where democratically elected governments have clearly acted wrongly and in violation of the spirit and letter of the American constitutional system.

It is this latter, more sinister use of ideas by power that seems to characterize the relationship between Huntington's hypothesis and the Bush Administration's war on terror. In other words, the clash of civilizations thesis appears to be a unifying principle for much of the Bush Administration's war on terror. If we create an enemy in Islam, then it seems likely that policies designed around that conclusion will improve the chances of proving the clash of civilizations hypothesis.

The second Iraq War – this one clearly fabricated even in the eyes of many in the West as well as in the view of the Islamic world – certainly gives the appearance of a clash of civilizations where the rhetoric and reality of weapons of mass destruction, terrorism, oil and democracy often get confused. The illegal and the extralegal treatment of detainees from the war on terror has further undermined the notion of the universal application of the rule of law (e.g., Magna Carta-based *habeas corpus*). This is regarded as an abandonment of Western principles in defense of Western principles. And then, the arbitrary and extra-judicial suspension of free speech and privacy protections – by means of administrative subpoenas, gag orders, domestic surveillance and eavesdropping – has further provoked suspicion that government secrecy and deception have been turned against the American people ostensibly to preempt anti-American terrorism by effectively fostering a domestic climate that encourages thinking in terms of the clash of civilizations.

"The Clash of Civilizations?" predicted that in the post-Cold War international relations, the fault lines would run along cultural and civilizational lines instead of political and economic lines. According to Huntington, since civilization represents the highest level of human community and is, therefore, a fundamental social grouping – even more fundamental than ideological, political or economic groupings – the clash of civilizations promises continuing geopolitical tension and conflict for the foreseeable future. The West, as the dominant civilization, can expect to have its global political, economic and military reach challenged and must therefore be prepared with a hard-headed, pragmatic foreign policy in anticipation of the potential threats originating from Islamic and Confucian (e.g., China) countries.

The Cold War provided a geopolitical equilibrium between the two post-World War II superpowers, but this equilibrium was upset by the fall of East European communism and the breakup of the Soviet Union. In Huntington's view, that equilibrium can be restored in the short term either by a reassertion of Western hegemony or by striking a new balance of power among conflicting civilizations. Over the longer term though, the West must be prepared to strike a balance of power with civilizations whose political, economic and military influence increasingly constrain Western-based unilateralist foreign policies.

In *The Clash of Civilizations and the Remaking of World Order*, Huntington elaborates on his 1993 essay. Against the optimistic arrogance that predicts in the post-Cold War world the universality of Western civilization will unite mankind, Huntington offers a bleaker outlook of perpetual conflict originating from the fundamental incompatibility of the world's civilizations, in particular those of the West and Islam.

He describes the principal assumptions that have been used to defend the notion of the superiority and universality of Western civilization. First, the end of history thesis, popularized by Francis Fukuyama, sees the failure of communism in Eastern Europe and the USSR as a necessary stage in the dialectic of history that inevitably gives way to the ascendancy of Western liberal democracy as the highest form of political economy. Second, globalization provides the confidence that commerce – economic integration, free trade and market systems – will overcome cultural and civilizational differences. Third, universal progress into modernity – industrialization, urbanization, education, living standards – will unite humanity across all cultural and civilizational divides.

For Huntington, conflict is fundamental to human politics. In fact in the chapter entitled The West and the Rest, Huntington could be interpreted as invoking, as opposed to describing, a new political rivalry to fill the void created by the fall of East European communism. And for Huntington, the post-Cold War conflict is not abstract. Acknowledging what he considers the most contentious statement from

his 1993 article, "Islam has bloody borders," Huntington goes even further in arguing that Islam creates a propensity to violence.

In 1990 before the first Iraq War and before American soldiers were stationed in Saudi Arabia, Bernard Lewis, the highly acclaimed Western scholar of Islam, observed, in The Roots of Muslim Rage, that Muslim rage is seen by many to be traceable to provocative Western, especially American foreign policy, e.g., support for Israel, support for repressive and corrupt Middle Eastern governments and the imperialist subjugation of Muslim peoples by Christian civilization.

So why – 13 years after the fact – target Huntington's clash of civilizations hypothesis? First, the Council on Foreign Relations, an influential foreign policy think tank and publisher of Foreign Affairs, seems intent to keep the hypothesis relevant through its marketing of Huntington's original statement of the clash of civilizations.

Second, there appears to be a strong correlation between Huntington's hypothetical new world order and that imagined by the Bush Administration with its war on terror at home and abroad.

Third, in retrospect, Kennan's 1947 assessment of Soviet communism appears to have been uncannily prophetic. But could this have been partly because subsequent American foreign policy made it so? Was the containment approach really the best of all possible foreign policy frameworks? Might there have been some set of policy options in between the extremes of appeasement at one end and nuclear confrontation on the other end? The clash of civilizations as public policy must face these same questions.

Fourth, bearing in mind the uncertainty of the future including the prospect of getting it wrong, is some sort of clash of civilizations approach the doctrine that Americans want to be remembered by 50 years from now?

Finally, might there be hidden agendas behind the clash of civilizations hypothesis, which make it more appealing than it should be? For example, a familiar and easily marketed 'us versus them' worldview would be an effective diversion from divisive domestic policy debates, e.g., those pertaining to the increasing asymmetries in political as well as in economic power among America's socio-economic classes.

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Background

On May 30, 2006, in the case of *Garcetti v. Ceballos*, the Supreme Court ruled 5-4 that the speech of a public employee is not protected by the First Amendment when that speech is made pursuant to the employee's duties. In the Opinion of the Court, Justice Kennedy, wrote that,

> We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. (J. Kennedy, 9)

Justice Kennedy was joined by Justices Scalia and Thomas, as well as by the two most recent Court appointees, Chief Justice Roberts and Justice Alito[1]. Justices Stevens and Breyer filed separate dissenting opinions, and Justice Souter filed a dissenting opinion joined by Justices Stevens and Ginsburg.

In the facts of the case, Ceballos, deputy district attorney for Los Angeles County, after finding irregularities in the government's prosecution of a case, prepared a disposition memo for his supervisors recommending that the case be dismissed. Ceballos claimed that he was punished for taking a position at odds with his own office. Ceballos filed suit in federal district court challenging his employer's retaliation as a violation of his First Amendment right to free speech. The district court denied Ceballos' claim to First Amendment protection, but the appeals court reversed the decision and recognized the constitutional protection of Ceballo's speech in keeping with Circuit precedent. The Supreme Court's decision reversed the appellate court judgment and remanded the case to the Court of Appeals for the Ninth Circuit.

Common Ground

Among the four Supreme Court opinions written in the case, there was common ground on the point that some degree of employee speech protection is necessary in order to expose dangerous, wasteful, corrupt and otherwise illegal activities in the public domain. Thus, the social benefits of free speech in the workplace include providing a check against the abuse and misuse of government power and allowing evidence to be brought forward for the prosecution of wrongdoing. Justice Kennedy wrote that "[e]xposing governmental inefficiency and misconduct is a matter of considerable significance" (J. Kennedy, 13), while Justice Souter was more expansive.

> But I would hold that private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection. (J. Souter, 1)

Similarly, there was unanimity, in principle, that free speech in the workplace of a public employer is not an absolute right and may, therefore, on occasion, need to be curtailed when it is in conflict with the greater public good of an efficiently and effectively delivered public service. As Justice Kennedy put it in the majority opinion:

> Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. (J. Kennedy, 7)

This view was echoed in the dissenting opinion written by Justice Souter:

> [T]he risks to the government are great enough for us to hold from the outset that an employee commenting on

> subjects in the course of duties should not prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it. (J. Souter, 8)

Justice Breyer added that the government's interest in efficiency is closely tied to the workings of a representative democracy, which must be carefully weighed against the preservation of individual civil liberty.

> Where the speech of government employees is at issue, the First Amendment offers protection only where the offer of protection itself will not unduly interfere with legitimate governmental interests, such as the interest in efficient administration.… [B]ecause efficient administration of legislatively authorized programs reflects the constitutional need effectively to implement the public's democratically determined will. (J. Breyer, 1-2)

With respect to employee speech that is not of an official nature, First Amendment protections apply as they would in the case of any other citizen.

> Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. (J. Kennedy, 12)

The Court, then, expressed general agreement that neither absolute freedom of speech nor absolute suppression of dissent is warranted in the workplace of a public employer. The balance is to be struck between the anarchy of the trivial and the despotism of blind conformity. Locating the point of balance is where the Court divided.

Contrary Opinions

Where the Court divided was on whether constitutional protection applied to speech made pursuant to the exercise of a public employee's official responsibilities. On this question, the majority provided a bright line test when it stated that such official speech should never be afforded constitutional protection under the First Amendment.

> Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. (J.Kennedy, 10)

In the majority's opinion, on one side of the bright line, the public employer enjoys absolute control of employee speech. On the other side of the bright line, the majority declared that "[r]efusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate." (J. Kennedy, 10) Presumably, then, speech content that is unprotected if made in the context of one's daily work functions may nevertheless be protected if made in a different context.

All three dissenting opinions converged in agreeing that the majority opinion's bright line test was too black and white, disallowing constitutional protection for official speech in all instances. This absolute prohibition on the First Amendment protection of official speech was rejected as excessive and inconsistent with the Court's precedents for balancing the interests of free speech in the workplace on one hand and of discipline and conformity in promoting government efficiency on the other hand.

> The majority answers the question by holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not

> insulate their communications from employer discipline." Ante, at 9. In a word, the majority says, "never." That word, in my view, is too absolute. (J. Breyer, 2)

> The majority accepts the fallacy propounded by the county petitioners and the Federal Government as amicus that any statement made within the scope of public employment is (or should be treated as) the government's own speech, see ante, at 10, and should thus be differentiated as a matter of law from the personal statements the First Amendment protects. (J. Souter, 10)

According to the minority, even in the case of official speech, the competing interests of employee free speech and government efficiency must be weighed. There should be no automatic and unappealable denial of free speech as argued by the majority. Justice Breyer, writing separately, argues further that First Amendment protection to official speech should be conditioned according to whether existing non-constitutional remedies already exist (e.g., whistle-blower legislation).

> I conclude that the First Amendment sometimes does authorize judicial actions based upon a government employee's speech that both (1) involves a matter of public concern and also (2) takes place in the course of ordinary job-related duties. But it does so only in the presence of augmented need for constitutional protection and diminished risk of undue judicial interference with governmental management of the public's affairs. (J. Breyer, 6)

In other words, according to all three dissenting opinions, freedom of speech in the workplace is sufficiently important to be protected by legislative acts, professional codes of conduct, the Bill of Rights and judicial intervention.

Conclusions

In writing the opinion of the Court, Justice Kennedy disqualified speech of a public employee from First Amendment protection where that speech is found to be part of the employee's exercise of his/her official duties. However, Justice Kennedy indicates that such official speech may be protected by other whistle-blower statutes, labour codes or professional codes of conduct. Therefore, in the concluding paragraph, the respondent is directed to seek redress of grievance elsewhere, e.g., California code of professional conduct for government attorneys, and not the First Amendment of the US Constitution.

Justice Souter's dissenting opinion offers one more avenue for the respondent, noting that the way has been left open for the respondent to claim First Amendment protection for speech made outside his official duties. In other words, the respondent could argue in the case remanded to the Court of Appeals that while First Amendment protection might be denied regarding his official speech (disposition memo), it might be granted for his unofficial speech, e.g., Ceballo's speech at the Mexican-American Bar Association.

A major unresolved issue remains in determining just when employee speech is deemed pursuant to official duties. Justice Souter stated that he is "… pessimistic enough to expect that one response to the Court's holding will be moves by government employers to expand stated job descriptions to include more official duties and so exclude even some currently protectable speech from First Amendment purview." (J. Souter, 4, n.2) Justice Kennedy, on the other hand, stated that "the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." (J. Kennedy, 13)

While not explicitly acknowledged by the Court, there is one final practical limitation on claiming First Amendment protection for speech in the workplace. In seeking judicial redress of a violation of constitutional civil liberties, the petitioner must be able to overcome a threshold of costly litigation. Where a civil liberties sponsor cannot be found, the petitioner may be denied the opportunity to pursue a favourable ruling from a higher court. The case at hand demonstrates

just how the judgment of the court can change as a case makes its way through the federal judiciary.

This absence of uniformity in the judgment of cases is one of the reasons why the appeals process exists and why the appeals process is fundamental to due process.

* Citations refer to the slip opinion and therefore follow an informal style – (J. "author," "page number," n. "footnote number"), e.g., (J. Souter, 4, n.2). The slip opinion for *Garcetti v. Ceballos* was downloaded from http://www.supremecourtus.gov/opinions/05pdf/04-473.pdf on June 6, 2006.

Notes

[1] In 2005, President Bush nominated John Roberts to replace recently-deceased Chief Justice William Rehnquist and Samuel Alito to replace retiring Justice Sandra Day O'Connor. Chief Justice John Roberts was confirmed by the Senate just before the beginning of the Court's 2005 term, and Justice Alito was confirmed in January 2006.

At War … with Civil Liberties

The object of this essay is to highlight the threat that the present war on terror presents for American democracy and civil liberties. What is of interest here is America's reaction to the terrorist threat and what that reaction means for the future of the American republic. The American republic is a standard for democratic liberal ideals, and its ideals are under threat not so much from outside as from within. The notion of an Islamic Republic centered in Washington, D.C. is absurd; the terror threat from radical Islamists is to force changes in American foreign policies not to overthrow the American system of government. The point is that the future of the American republic depends very much on Americans and the value we attach to our form of government. This essay will focus on democratic principles and civil liberties, recognizing, but deferring for another time, the important influence of US foreign policy on the national security – civil liberties debate.

First, what is democratic liberalism? It is a form of government characterized by electoral democracy and limited government. Electoral democracy means that government is comprised of elected representatives where elections are regularly scheduled and contested and where the right to vote is broad-based and non-coercive. Limited government means that there are institutional checks that limit the arbitrary acquisition and exercise of power. The familiar rule of law, the separation of powers and the Bill of Rights are the fundamental and characteristic American constitutional checks on arbitrary power.

Second, what is the threat and why is it internal? National emergencies, such as war, are often used to justify the curtailment of individual liberties and the exaggerated deference to presidential prerogative. In the present case, the war on terror has been defined broadly, in order to sanction the encroachment on civil liberties, but it has also been managed through deception and secrecy – deception in the case of the Iraq War and secrecy in the case of domestic spying. In accordance with the standard wartime civil liberties

paradigm, America's 21st century war on terror places civil liberties – in particular speech, privacy and due process – in confrontation with national security, presidential supremacy, executive privilege, state secrecy and emergency powers.

Third, why describe the threat as 'recurring'? Former Supreme Court Justice William Brennan, in "The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crisis,"[1] draws upon American history to make the point that civil liberties have often been compromised during wartime. The question for today is whether we Americans will look back on the war on terror as we now do with respect to past abuses such as Watergate, McCarthyism, World War II Japanese-American internment, World War I anti-free speech, Civil War suspension of *habeas corpus* and the turn of the 18th century anti-Republican Alien and Sedition acts.

Finally, in highlighting the internal threats to democratic liberalism, why are court cases so important? First, the judiciary is constitutionally charged with the task of maintaining a last line of defense for the Bill of Rights. The courts are the last check, until the next election, on a rogue President and a complicit Congress. Second, as part of the separation of powers doctrine, the courts have the authority to guard against unconstitutional changes in the balance of power. Third, the American legal system is founded on the presumption of innocence until proven guilty in accordance with due process and thus in opposition to arbitrary imprisonment. Fourth, the court as guardian of civil liberties is charged with preserving the right of dissent in a free society against majoritarian democratic society's instinct for majority rule and absolute conformity. Fifth, the court, as guardian, is responsible for preventing the wholesale loss of civil liberties – avoiding the slippery slope along which the liberties of some are sacrificed today but all are compromised tomorrow. While history shows that the abridgment of civil liberties during wartime is not irreversible, this should not be accepted as a defense for abridging liberties. To do so would be as absurd as citing the internment of Japanese-Americans during World War II as a precedent for another temporary internment, which could be paid for later, with belated apologies.

Supreme Court Guidance

Before proceeding to recent developments in wartime civil liberties jurisprudence in the US,[2] it would be worthwhile citing guidance from Supreme Court cases decided during wartime or other times of national crisis. First, in *New York Times v. US*, the Pentagon Papers case in which the Nixon Administration attempted, but failed, to suppress the *New York Times*' and *Washington Post*'s publication of classified material from *The History of U.S. Decision-Making Process on Viet Nam Policy*, Justice Hugo Black wrote that

> The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.[3]

Second, in *US v. Nixon*, the Watergate tapes case in which President Nixon claimed to be above the law, arguing that executive privilege gives the President immunity from the subpoena power of a criminal court, Chief Justice Warren Burger wrote

> [N]either the doctrine of separation of powers nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.[4]

The Supreme Court decided against the President, the subpoenaed tapes were ordered released, and within three weeks of the Supreme Court's decision, the President resigned from office.

Third, in *Hamdi v. Rumsfeld*, the case of an American citizen named an 'enemy combatant' in the war on terror and denied the right of *habeas corpus* (the ancient right, dating back to 1215

England, to challenge the basis for one's detention before an unbiased body), Justice Sandra Day O'Connor wrote

> We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.[5]

In a plurality opinion, the Supreme Court, acknowledged the President's authority to detain, as an enemy combatant, a US citizen captured on a foreign battlefield. However, the Supreme Court drew a line at due process when it concluded that Hamdi had been denied due process and should be allowed to challenge his enemy combatant status before an impartial body, not excluding the possibility of a military court.

The Bill of Rights … before the courts

Habeas Corpus – the basic right to due process

Habeas corpus was the issue in *Padilla v. Hanft*. The question was whether the President has the authority to detain a US citizen, apprehended on US soil, as an enemy combatant for an indefinite period of time and without formal charges? This is a case that the Supreme Court has twice decided not to decide. In 2004, when the Supreme Court issued its *Hamdi* and *Rasul* decisions, it sent the case (*Rumsfeld v. Padilla*) back on a jurisdictional technicality before reaching any conclusion on the question whether the President has the authority to detain Padilla militarily. A year later the same case now named *Padilla v. Hanft* came up through the federal judiciary, following the jurisdictional path laid out by the Supreme Court. The South Carolina District Court ruled in Padilla's favour. On appeal, the 4th Circuit reversed the ruling, holding that the President does have the authority to detain a US citizen as an enemy combatant even if the US citizen is arrested on American soil as opposed to a foreign battlefield. The 4th Circuit based its argument on Congress' grant of authority to the President in its 2001 Authorization for Use of Military Force Joint Resolution and on the Supreme Court's subsequent

validation of this Congressional delegation of wartime powers to the President in *Hamdi v. Rumsfeld*.

While the 4th Circuit ruled in the government's favour, it nevertheless made it clear that the case was of sufficient constitutional importance for the Supreme Court to clarify its position on the President's wartime authority to detain US citizens. In its December 2005 Order, the 4th Circuit even went so far as to take the government to task for its apparent attempt to manipulate the federal judiciary. It appeared to the court that by transferring Padilla from military custody to civilian custody, the government was trying to avoid a less advantageous verdict from the Supreme Court. Undoubtedly, the 4th Circuit was also keen to have the new Supreme Court (Chief Justice John Roberts and Justice Samuel Alito replacing Chief Justice William Rehnquist and Justice Sandra Day O'Connor, respectively) reveal its interpretation of the 2004 *Hamdi* decision, specifically in terms of the President's wartime authority to limit the due process civil liberties of American citizens.

However, in April 2006, the Supreme Court refused to grant *certiorari*, i.e., appeal, and so the 4th Circuit's ruling stands. In a 6-3 decision, the Supreme Court accepted the government's argument that Padilla's transfer from military custody to civilian custody rendered the appeal unnecessary. Thus, for the second time in three years, the Supreme Court managed to avoid deciding the *habeas corpus* case of the American, Jose Padilla. That left *Hamdan v. Rumsfeld* as the key case for assessing the new Supreme Court's views on the President's expanded wartime powers in the war on terrorism.

Unlike the *Padilla* case, the case of *Hamdan v. Rumsfeld* involved the due process rights of a foreign national who, as in the *Hamdi* case, had been captured on a foreign battlefield. In American jurisprudence, it is not 'a given' that the civil liberties owing to American citizens will be accorded to non-citizens. Another way of putting it is that the Bill of Rights is not considered to be a legal statement of universal human rights. In addition to the distinction between American citizens and foreign nationals, the issues in *Hamdan* are whether the Guantanamo Bay military commissions violate detainees' due

process rights and whether the Geneva Convention's POW provisions apply to Guantanamo Bay detainees.

On June 29, 2006, two years and one day after the Supreme Court first challenged the President's exercise of war powers to deny *habeas corpus* to enemy combatants detained during the war on terror, the Supreme Court again marked the constitutional limits of presidential wartime power. In a decisive and somewhat surprising 5-3 vote, the Supreme Court ruled in *Hamdan v. Rumsfeld*, that President Bush's military tribunals at Guantanamo Bay are illegal. Justice Stevens wrote the opinion of the Court and was joined by Justices Souter, Ginsburg and Breyer. Justice Kennedy concurred in part, while Justices Scalia, Alito and Thomas dissented. Chief Justice Roberts did not join the case based on his having heard the case as a judge on the DC Circuit, which a year earlier ruled in the government's favour. Another significant development in the *Hamdan* case saw Justices Kennedy and Stevens who had previously voted against hearing the similar *Padilla* case, now joining Justices Ginsburg, Breyer and Souter in a majority opinion against the President.

In what is expected to become a landmark wartime civil liberties decision, the principal significant judgments, as presented in Justice Stevens' opinion of the Court, are as follows. First, in pending *habeas* applications, the Supreme Court denied Congress' attempt, by means of the Detainee Treatment Act, to restrict federal courts' *habeas* jurisdiction to Guantanamo Bay detainees. Second, the Supreme Court challenged the President's authority to create ad hoc military tribunals, with limited due process safeguards, to prosecute enemy combatants whose legal rights were ambiguously in between Geneva Convention protections for POWs and rights available to defendants in the US criminal justice system. Third, the Supreme Court recognized the place in American jurisprudence for international law protecting human rights (1949 Geneva Conventions on war). Fourth, the Supreme Court judged that Geneva Conventions (in particular, Common Article 3) apply to the current war on terror and to non-state actors such as al Qaeda.

There is yet another important *habeas corpus* case making its way through the federal court system, and that is the case of *Turkmen v. Ashcroft*. Earlier this month, the District Court for the Eastern

District of New York, dismissed the plaintiffs' due process claims regarding detention but allowed their claims of mistreatment during detention. The plaintiffs had been arrested post-9/11, detained on immigration violations, and also held without charges pending investigation of possible links to terrorism. The court's judgment is consistent with the plaintiffs' suspicion that the government was using the deportation process to provide legal cover for otherwise unconstitutional deprivations of due process for illegal aliens suspected of terrorist links.

The case of *Turkmen v. Ashcroft* provides a segue into recent developments in wartime civil liberties jurisprudence from the UK. In the last few years, the UK has had its own rows over wartime civil liberties – in the House of Commons, between the Commons and the Lords and between Prime Minister Tony Blair's government and the courts. The UK is of particular interest for the US given the common liberal democratic heritage, a common foreign policy in war on terror, especially in Afghanistan and in Iraq and a common direct experience with radical Islamist terrorism at home (9/11 in the US and 7/7 in the UK). Two particular cases from the UK are instructive: *A v. Home Secretary* (2004) and *MB v. Home Secretary* (2006). In each case, foreign nationals were the targets of special forms of detention and control, in which no charges are required, liberty is indefinitely suspended and recourse to challenge ones' detention is limited.

In 1998, the UK adopted international law governing human rights. By act of Parliament, the European Convention on Human Rights (ECHR) is the law of the land in the UK. In the matter of wartime civil liberties, perhaps the most contentious aspect of the ECHR is its recognition of foreign nationals' rights to due process. For example, the UK cannot deport terrorist suspects to countries known to torture prisoners. In *A v. Home Secretary*, the British House of Lords, ruled against the government's policy of indefinitely detaining, without charges and without trial, terrorist suspects who cannot otherwise be deported owing to the risk of torture upon leaving the UK. Then in two recent cases before Justice Sullivan, in the High Court for England and Wales, the government's Prevention of Terrorism Act of 2005 has been found to be incompatible with the

European Convention on Human Rights. Specifically, the government's control orders, which were introduced in the PTA in order to get around the illegal practice of indefinite detention without trial as identified in *A v. Home Secretary*, were found to be incompatible with the ECHR on two counts. First, control orders do not respect the ECHR's guarantee of the due process right to obtain a fair hearing. Second, these control orders do not respect the ECHR's guarantee of liberty, since they represent illegal detention without formal charges and without the due process right to challenge their detention. Control orders specify a detainee's residence, describe travel restrictions even within the UK and authorize surveillance and search and seizure activities to enforce compliance.

The Right to Free Speech and Freedom from Arbitrary Invasion of Privacy

Arbitrary (i.e., no formal charges) and indefinite detentions, secret CIA interrogations and confinement in foreign prisons, prisoner torture under US military command are all part of the story of America's wartime civil liberties in the 21st century. However, there is more to it than detention and treatment while in detention, where the immediate effects appear limited to a targeted minority whose rights have been curtailed for the benefit of society. At times like these, the majoritarian impulses of democracy may occasionally ride roughshod over the rights of minorities, whether classified as such by race, religion or political dissent.

The war on terror has also given rise to government controls not altogether different from Britain's control orders. And secret surveillance and monitoring in America are not limited to foreign nationals. The PATRIOT Act case of *Doe v. Gonzalez* and the domestic spying case of *ACLU v. NSA (National Security Agency)* have forced the government to publicly acknowledge and defend its hitherto secret spying operations. *Doe v. Gonzalez* challenged the government's authority under the PATRIOT Act to issue secret and nonjusticiable subpoenas (the infamous NSLs or National Security Letters) to libraries and internet service providers for their clients' personal information and to compel secrecy, i.e., non-disclosure, regarding

the existence of the subpoenas. *ACLU v. NSA*, pending before the federal District Court of Eastern Michigan, challenges the constitutionality of the NSA's secret, presidentially-authorized domestic spying program involving extrajudicial monitoring and surveillance of Americans' telephone and Internet communications.

In May, the 2nd Circuit Court of Appeals decided *Doe v. Gonzalez*, the consolidated case of the New York Internet Service Provider (Doe I) and the case of the Connecticut library (Doe II). At the federal district court level, both Doe I and Doe II were decided in favour of the plaintiffs and against the government. While the case was pending before the 2nd Circuit, Congress passed the PATRIOT Improvement and Reauthorization Act of 2005, and the court responded with a mixed judgment. Ruling for the government, the court accepted the view that the Reauthorization Act significantly changed the nature of the Doe I case by granting pre-enforcement judicial review of the secret subpoenas and by removing the gag order on access to legal counsel. The judgment was not an unequivocal success for the government. Doe I has been remanded to the lower court for fuller consideration of the 1st Amendment implications of the NSL gag order, and the Doe II ruling has been allowed to remain on the books, as precedent, despite government's bid to have the ruling vacated.

Unlike the *habeas corpus* cases, the Supreme Court has yet to take up the free speech and privacy issues presented by the PATRIOT Act and the NSA domestic spying program. As these cases wind their way through the federal judiciary, another battleground for wartime civil liberties is developing around the Bush Administration's secret and unchecked (by either Congress or the courts) government surveillance program targeting the international movement of money. Perhaps even more significant than the outing of this joint Treasury-CIA financial surveillance program, which is separate from the NSA's telephone and Internet surveillance program, is the 1970s-style confrontation between the President and the press. Reminiscent of the early 1970s, President Bush and Vice-President Cheney have criticized the press, in particular the *New York Times*, for its irresponsible and unpatriotic behaviour. In a

recent editorial, the *New York Times* wrote that "[e]ver since Sept. 11, the Bush administration has taken the necessity of heightened vigilance against terrorism and turned it into a rationale for an extraordinarily powerful executive branch, exempt from the normal checks and balances of our system of government."[6] And the *Los Angeles Times*, defending its own decision to run the story on the government's secret bank surveillance program, invoked the Pentagon Papers case and observed that "[h]istory has taught us that the government is not always being honest when it cites secrecy as a reason not to publish."[7]

Conclusion

The Supreme Court's decision in *Hamdan v. Rumsfeld* is a landmark ruling, but the war over civil liberties is still on. The President and Congress may have yet another go at military tribunals beyond the purview of the courts. As a *Washington Post* editorial recently pointed out, even if the internationally-condemned Guantanamo Bay prison is closed, there remains the issue of judicial oversight at the Bagram prison in Afghanistan and at the secret CIA interrogation and detention facilities.[8] And, the freedoms of speech, privacy and the press remain ambiguous for the duration of the war on terror, complicated by the appearance of a predictable yet unseemly collusion between government and business. For example, with reference to the pending AT&T/Bellsouth merger and "[t]he NSA domestic spying case raises serious concerns about the danger of highly concentrated telecommunications markets making it easier for government agencies to develop symbiotic relationships with the dominant firms."[9]

The PATRIOT Act case, the domestic spying case and the extralegal detention cases are premised on the belief that individual civil liberties are at the essence of American democracy. These cases are about the right to enjoy privacy, i.e., freedom from arbitrary and clandestine investigations and eavesdropping, the right to speak freely in public debate without an FBI gag order and the right to confront and challenge the reasons for one's imprisonment. They are more than international human rights, which are only vaguely and occasionally guaranteed; they are American civil rights, which are

underwritten by the US, the self-proclaimed standard-bearer of liberal democracy for the world and for history. These rights – these civil liberties – are what distinguish and have distinguished America from its enemies, and so to compromise, even during times of war, is to become like the enemy that we fight, and if we are like them, it does not matter who wins, because we will have lost.

Endnotes

[1] "The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crisis" by U.S. Supreme Court Justice William J. Brennan in 1987 paper prepared for the Law School of the Hebrew University in Jerusalem, Israel.

[2] For more discussion of *Hamdi v. Rumsfeld* (2004), *Rasul v. Bush* (2004), *A et al. v. Secretary of State for the Home Department* (2004), and *Hamdan v. Rumsfeld* (2005), see the following essays in this volume: “The Power of the State During Wartime Emergencies; “Wartime Separation of Powers and the Legacy of 17th Century England”; “Wartime Civil Liberties in Post-9/11 U.K; Wartime *Habeas Corpus* in the 21st Century US; and “Wartime Civil Liberties – A Test of Faith?"

[3] *New York Times v. US*, Supreme Court of the United States, June 30, 1971.

[4] *US v. Nixon*, Supreme Court of the United States, July 24, 1974.

[5] *Hamdi v. Rumsfeld*, Supreme Court of the United States, June 28, 2004.

[6] Editorial, “Patriotism and the Press,” *New York Times*, June 28, 2006.

[7] Editorial, "Why we ran the bank story,” *Los Angeles Times*, June 27, 2006.

[8] Editorial, "Close Guantanamo? Yes, but keep in mind: It's not the main problem,” *Washington Post*, June 22, 2006.

[9] “Antitrust Beyond Economics: Telecommunications Mergers and Civil Liberties” (April 2006). Unpublished.

On July 13, 2006, the Court of First Instance, the second highest court in the 25-nation European Union, delivered its judgment in the case of *Impala (Independent Music Publishers and Labels Association) v. Commission*. In a surprising and unprecedented decision, the Court reversed the European Commission's (EC) 2004 approval of the Sony/BMG merger. The merger, already completed, has been suddenly and awkwardly pushed back into the antitrust queue so that the EC can correct its previous decision. It remains to be seen whether that correction will be a more substantive review with the same result, a conditional approval linked to the sell-off of some Sony BMG lines of business or an outright prohibition of the merger fait accompli.

This could be a defining moment in the history of EU antitrust policy. In 2001, the EC's rejection of the GE/Honeywell merger was the big news as the EU asserted its political autonomy from US antitrust policy – a fractious departure from the EC's reluctant acquiescence in the 1997 Boeing/McDonnell Douglas merger. Then in 2002, the Court of First Instance, in a demonstration of judicial independence as well as pro-merger sympathy, rejected three separate EC merger prohibitions – a rare event itself but not so rare as the Court's annulment of a merger after the fact. Now, in the 2006 case of *Impala v. Commission*, the Court has, for the first time, overruled the EC by blocking an approved merger.

Adding to the interest of an already interesting institutional struggle for power between the executive and judicial branches of the European Union is the dramatic reversal of pro-merger/anti-merger roles on the part of the Court and the EC. The role reversal is especially remarkable in the EC's case. In 2000, when EMI and Warner announced plans to merge, the EC's resistance to the merger was a significant factor in the companies' decision to withdraw their proposal. Then, over the course of the recent Sony/BMG merger case, the EC made a complete about-face. In May 2004, five months into the merger review, the EC raised objections to the merger to the effect that the merger would strengthen a collective dominant position and promote collusion in the recorded music industry. But two

months later, in July 2004, the EC reversed course and cleared the merger.

In a lengthy judgment in the case of *Impala v. Commission*, the Court basically faulted the EC for failing to conduct a thorough investigation and analysis of the oligopolistic structure and behaviour of the recorded music market – a market where the four-firm concentration (Universal, Sony BMG, EMI and Warner) accounts for approximately 80 percent of the revenue. At odds with the current EC, the Court seemed to be in agreement with the earlier EC and its inclination towards a structuralist antitrust view that is skeptical about the benign effects of market power. In addition to finding conflict with the EC, the Court found itself caught in its own about-face, since it (although not the same judges) had issued a decidedly more merger-friendly judgment in the 2002 case of *Airtours v. Commission*.

The Court was compelled to refer to its definition of collective dominance in *Airtours v. Commission*, since it was a similar case of alleged oligopolistic market concentration. Collective dominance is like a monopoly except that the dominant market power is shared and coordinated among two or more firms. The proposed merger of Airtours and First Choice was expected to change the four-firm 80 percent concentration to a three-firm 80 percent concentration. The EC blocked the merger in 1999, and three years later the Court reversed the EC and supported the merger. The Court challenged the EC's merger prohibition on the grounds that the strengthening or creation of an oligopoly is not inherently anti-competitive and therefore a decision to block such a merger must be supported by a demonstration of likely anti-competitive harm. Now, in the *Impala* case, the Court appears to be taking a much less merger-friendly position.

Despite the appearance of contradictory case law regarding mergers in highly concentrated markets, the Court of First Instance attempts to demonstrate the consistency of its present decision with the antitrust case law. In the part of the judgment where the Court defines the concept of collective dominance, the Court first refers to Court of Justice precedent according to which

> the Commission is obliged to assess, using a prospective analysis of the reference market, whether

> the concentration which has been referred to it leads to a situation in which effective competition in the relevant market is significantly impeded. (*Impala v. Commission* [2006], paragraph 245)

This is a reminder that the EC is obliged to conduct predictive economic analysis of the post-merger effects notwithstanding the fact that anti-competitive harm remains hypothetical during the course of merger reviews.

Next the Court cites *Gencor v. Commission* to establish the structuralist view that the potential abuse of market power is a threat to effective competition whenever collective dominance (e.g., cartels and other informal types of oligopoly) is furthered by industry-concentrating mergers. The following extended quotation illustrates the structuralist perspective, according to which the potential for implicit collusion in price-fixing may be sufficient to determine a situation where collective dominance will significantly impede effective competition.

> [T]here is no reason whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly within which, in a market with the appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those parties are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximize their joint profits by restricting production with a view to increasing prices. (*Gencor v. Commission* [1999], paragraph 276)

It is not necessary to prove actual collusion or even to predict the inevitability of post-merger collusion. The EC's prospective analysis of the post-merger market is expected to be a reasonably reliable prediction of post-merger economic effects based on accurate, complete and relevant evidence. Nevertheless, as the Court points out, even the EC's economic analysis is subject to the judicial

review of the EU courts as the Court of Justice recently reiterated in the case of *Commission v. Tetra Laval* (2005).

The Court of First Instance concludes the section on the concept of collective dominance by looking back to its decision in *Airtours v. Commission*. The Court reaffirms its commitment to the definition of collective dominance therein presented but rejects the EC's argument that since the Sony/BMG merger does not fit that definition, the merger does not represent a threat of oligopolistic collusion and anti-competitive price-fixing. Elaborating on its definition of collective dominance in *Airtours v. Commission* in which transparent pricing and retaliation for breaking with cartel policy figure prominently, the Court declares that the EC failed to make a plausible case for its position that the Sony/BMG merger would neither strengthen nor create a collective dominant position in the market for recorded music. Additionally, the Court signaled its evidentiary flexibility in its statement that the necessary conditions for collective dominance as per *Airtours v. Commission*

> may, however, in the appropriate circumstances, be established indirectly on the basis of what may be a very mixed series of indicia and items of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant position. (*Impala v. Commission* [2006], paragraph 251)

In the Court's view, the EC has not made a compelling case that the conditions for collective dominance fail to apply to the recorded music market. The market is highly concentrated and the three conditions for effective collusion among the dominant firms – transparent pricing to prevent cheating, retaliation to punish cheating and market power to deny entry to newcomers and to dictate prices to consumers – have not been demonstrated to be inapplicable to the recorded music market. According to the Court, the EC approved the Sony/BMG merger without conducting the thorough predictive analysis that is required in the case of an alleged dominant market position, i.e., an anti-competitive cartel. Because the EC's merger

review process was flawed, its decision to clear the Sony/BMG merger is likewise discredited.

There are a number of important developments following in the wake of the Court's judgment in the Sony/BMG merger case. First, the Court of First Instance has issued a strong restatement of the European courts' authority to exercise judicial review in the case of antitrust policy even where matters of economic analysis are concerned. Second, the Court has demonstrated that it is willing to reach back and overrule merger decisions notwithstanding the potential disruption to the relevant market and to the EC's credibility in the business community. Third, the Court has shown that European antitrust policy is subject to changes of emphasis, for example, with respect to the evaluation of mergers in highly concentrated markets. Fourth, the resurgence of economic nationalism in Europe and the US raises questions whether the EC's strong antitrust position *vis-à-vis* the monopolist Microsoft is consistent with its promotion of an increasingly concentrated market, which happens to be well represented by European firms. Finally, perhaps the key development to watch over the near term is the EC's response to the Court's decision. That response will factor into Sony BMG's response, and it will likely factor into the response of EMI and Warner with respect to their rumored merger proposal.

Nietzsche is a familiar reference for young, anti-Establishment, postmodern humanities/liberal arts students, but his name is not generally associated with liberal democracy. Beyond the familiar aberrations of his anti-feminism and anti-Semitism is his somewhat confusing dual legacy as anarchist on one hand and authoritarian on the other hand. It is in this latter duality which lay Nietzche's contribution to contemporary political thought and, remarkable as it may seem, liberal democratic thought.

In this, the first post-Cold War, generation, we have heard enough of Hobbes, enough of Locke, enough of Jefferson, Madison, Hamilton. On the other hand, we have not heard much from Nietzsche, an outsider to the Anglo-American tradition of political thought, but arguably a significant and underrated political philosopher. Furthermore, his influence has experienced a resurgence as part of the postmodern wave of European philosophy that has for more than a generation inundated the humanities/liberal arts programs in American and Commonwealth universities. The beauty and insight of Nietzsche’s program of skepticism, which occasionally belies an otherworldly disdain for human arrogance and deception, nevertheless makes a compelling case for the role and value of political dissent in society. In this respect, the Nietzschean/postmodern critique of established/Establishment power is a worthy successor to the Socratic dialogue as a method of critical inquiry.

The contradictions between destroyer/liberator and creator/tyrant are essential for making the case that any critique of political philosophy must itself be subject to critique. In a phrase, no philosophy is above critique. Nietzsche’s writings reveal the ever present tension between humanity's greatest strivings – for freedom to escape the tyranny of others, and then, once free, for the power to command others. One aspect of Nietzsche – the anarchist, the rebel, the non-conformist – is intent on exposing the lies, hypocrisy and violence that have created and form the structure of civilized society. A second aspect of Nietzsche – the lawgiver, the creator, the superman – is driven to break all the old idols and to replace them with the new gods.

Both aspects of the 19th century Nietzsche have found their the proper place in the academic postmodernism of the late 20th century. Outside the academy, the language of Nietzsche and postmodernism sounds like the language of political revolution, which it is. As such, it is language with real consequences. Inside the walls of the academy, academic postmodernism's simulated rebellion seems harmless enough. But once outside, these shortcomings have consequences, and they are very real.

The great danger of unleashed postmodernism is that what today it liberates tomorrow it will enslave. And it is precisely in recognition of this that Nietzsche and postmodernism can contribute to contemporary political thought. What postmodernism in the world needs is a self-awareness of its own potential to become what it sets out to overthrow. The Nietzschean critique – a critique of origins, of how things came to be the way they are – is the real contribution of postmodernism. But neither Nietzsche nor postmodernism have immunity from the critique of origins. If the Nietzschean critique ever ceases fire and makes exception for some assertion of unchallenged power and authority, then it will have descended into the meaningless chorus of the powerful.

To Anglicize the point, "power tends to corrupt; absolute power corrupts absolutely." The critique of dissent and opposition will always be necessary to recognize, to question and to challenge the capricious and the malevolent abuse of power. Power will always defend itself, often by stifling dissent and opposition, irrespective of who and what came to power and how it came to be.

Neither extreme of anarchy or of absolute power are viable. Each is required, not just for its own sake but in order to limit the other. Without criticism and dissent, power would tend to its absolute limits. Without order, the values of life, liberty and property lose their significance in a "solitary, poor, nasty, shortish and brute" struggle for existence. This is the pessimism that has left its mark on the constitutional system of government in the US. Reflecting a fundamental suspicion that it is in human nature to seek maximum power and to abuse that power, the US Constitution was drafted with the

safeguarding principles of separation of powers, checks and balances and bill of rights

However, as if confirming the pessimistic view of human nature that informs the Constitution, the universal principles of "Life, Liberty and the pursuit of Happiness," have been compromised over and over throughout the history of the American Republic. For the record, the most egregious example of American lying, hypocrisy and violence is the constitutionally sanctioned political and economic degradation of African-Americans for nearly two centuries.

Notwithstanding the miserable failures of the American constitutional system to defend and promote Jefferson's 1776 statement of basic human rights, there continue to be victories over rogue power as well as the power of the mob. In the context of checking the accumulation and abuse of power, the gridlock in Congress, the judicial assertiveness of the federal courts and the inability of the President to run Washington single-handedly are signs that the system of American government is working to plan.

Insofar as it checks an overzealous majoritarian yet democratically-elected Congress or a President who secretly suspends the rule of law under the exigencies of war, the plan is confirmed in its pessimism regarding human nature and power and in its optimism that the institutionalized division of power tends to avoid the Scylla of anarchy and the Charybdis of the tyrant. Finally, since history gives evidence of societies going towards one extreme or the other, there is reason to believe that it can happen again, which means that institutional safeguards like those of the separation of powers, checks and balances, and bill of rights should not be easily compromised even during wartime.

Clearly, in this essay, Nietzsche and postmodernism have been used, in large part, as foils in the defense and promotion of liberal democratic values in the Anglo-American tradition. However, there is a radical edge to the Nietzschean/postmodern critique that is reminiscent of the kind of political dissent that helps keep going the Anglo-American democracy experiment. There is, then, both a positive and negative legacy bequeathed by Nietzsche and his postmodern successors.

Globalization, as broadly understood, is a fairly recent phenomenon. Economic historians note that you have to go back to the years leading up to the Great War (World War I) to find anything similar in terms of the freedom and volume of international trade and capital flows. In other words, globalization has happened before. More precise meanings of globalization range across a spectrum of views, from economic integration of otherwise diverse countries to the standardization of political economy according to the Western model of democratic capitalism. That disputed meaning and the limits of globalization will be examined in the following three questions and case study.

Three questions about the meaning of globalization

Does globalization require a capitalist economic base and a democratic political base? The rhetoric from the established rich industrial countries gives the impression that the Western political economy of democratic capitalism is a prerequisite for a country to enjoy the full benefits of globalization. There may be something to the notion that worldwide economic integration would be optimal in a world where all countries are uniformly democratic and capitalist. However, globalization neither requires nor entails such a world where all countries enjoy the political freedoms of liberal democracy and the economic freedoms and safeguards of mixed capitalism. Too often the democratic capitalism is packaged for export only where regime change is the foreign policy objective and only to the extent that markets are opened to Western trade and capital. As long as Western commerce and investment are facilitated and protected, the nature of the political or economic system is irrelevant.

Is globalization inevitable? Since the fall of European communism in the late 20th century, there has been a lot of discussion about whether history moves along a linear path of human progress, whether it has reached its apex in the Western liberal democratic state and capitalist economy, or whether history is carving out yet another cyclical variation of the political past albeit with noticeable

technological and material improvements. From the perspective of history in the making – not the most reliable indicator – there are signs of resurgent nationalism, which could force the issue of globalization and international cooperation versus national sovereignty and national security.

Is globalization progressive? In other words, is it a win-win game for all participating countries, or are there winners and losers, at the country level as well as within countries? Rising levels of national income and per capita income are often used to measure globalization's success, but by themselves these statistics fail to disclose what is happening to income inequality and poverty, both of which are indicators of the asymmetries of economic and political power. Insofar as globalization is linked to democratic principles of political equality and economic principles of free and fair competition, extreme concentrations of income and wealth (economic power), especially where created and sustained with the assistance of government (political power), are impossible to reconcile with the widespread trickle-down economic dependence that is unimproved by the limited political power of an electoral democracy characterized by 'one man, one vote, for one day only.'

So, globalization is not new even within the 20th century. Its apparent newness seems to owe much a shift in the epicenter from Europe to the US … still in the West, but on the western shores of the Atlantic. Globalization does not require, nor does it consistently and unambiguously promote a worldwide conversion to Western liberal democracy and mixed capitalism. Democracy and capitalism are on the increase, but there are different grades – in part subject to the principle of sovereign self-determination and in part subject to the external political and economic influence of powerful states and commercial interests – and not all of these conform to Western models or Western ideals. For the time being, globalization seems to be here to stay, and it does not seem likely that another European civil war looms threateningly on the horizon to destroy it. History does, however, take dramatic and surprising turns as demonstrated in recent times by the collapse of European communism and the end of the Cold War. Finally, globalization, insofar as it is a phenomenon of self-regulating markets, does not give assurances that it will

improve the material lot of everyone and all countries who participate in worldwide economic integration.

A test for globalization – competition policy

Among globalization's many coordination challenges, the field of competition policy (commonly referred to as antitrust policy by Americans) is one of the more vigorous and is the subject of the remainder of this essay. Competition policy in the US is broken down into merger policy and antitrust (anti-monopoly/anti-cartel) policy. Merger policy, at the front-end of competition policy, addresses potential anti-competitive business combination issues before the merger is even approved, while antitrust policy, at the back-end of competition policy, targets alleged anti-competitive conduct of the monopolist or cartel. The Europeans have added a third competition policy jurisdiction – state aid – whose primary purpose is to break down national market barriers that stand in the way of the European Union's objective of creating a single European market.

Competition policy in the US dates back to the late19th century, and its significance lay in the fact that it is a modification of real-world capitalism where unmitigated and unchecked concentrations of economic power tend to distort both the economic and political landscape. Even in today's world of so-called free market globalization, the constraints and restraints of competition policy are at work … up to a point. Microsoft and Intel, two high tech monopolists in their respective markets of operating system software and microprocessors, have been investigated by antitrust authorities in Europe and Asia and, in Microsoft's case, the US. The US Department of Justice has successfully prosecuted a number of international cartels – vitamins, DRAM (dynamic random access memory), graphite electrodes, synthetic rubber, rubber chemicals, lysine and citric acid, etc. always excluding crude oil – for illegal collusion in the manipulation of market quantities and prices. With respect to state aid, in October 2004, the US complained to the World Trade Organization (WTO) that the EU and member states (Germany France, UK, Spain) are unfairly subsidizing Airbus. On the same day, the EU responded with

a counter-complaint alleging that local, state and federal governments in the US were themselves engaged in illegally and unfairly subsidizing Boeing. The WTO's Dispute Settlement Board is expected to issue its long awaited ruling in this politically complex case sometime in 2007.

The *Microsoft* and *Intel* monopoly cases, the vitamin, rubber and DRAM price-fixing cases and the government subsidy case of Boeing-Airbus demonstrate competition policy at work checking, to some extent, the excessive accumulation and abuse of economic power. Nevertheless, recent news headlines on both sides of the Atlantic suggest that competition policy is under threat from resurgent protectionism. In the US, it has been called national security, and in Europe, it has been called economic nationalism. Either way, protectionism, when used by the state to justify the creation or strengthening of monopoly or cartel power, flatly contradicts not only competition policy but also globalization. Whatever industry can be classified as essential to the economic security of the nation can make the case for special exemptions from competition policy and competition itself. And so, in 2005 Chevron Texaco was able to pick up Unocal, because Congress was threatening to block the Chinese CNOOC takeover of an American oil company. And so, in 2006 the European antitrust authorities struggle to assert the primacy of EU antitrust law *vis-à-vis* the economic nationalism of gas and electric utilities, particularly in France and Spain.(1)

Now, when most people think about globalization, they think big … as in big multinational corporations whose domain extends across international boundaries, time zones and continents and whose economic influence is felt in international political forums and in the domestic politics of their multiple host countries. However, the very idea of competition policy is antithetical to this big picture of big multinationals. First, competition policy implies the power of the state over the marketplace. Second, competition policy implies the natural tendency of the unregulated marketplace to reach equilibrium in the monopoly of a single firm or the collective dominance of multiple firms in formal or informal collusion to monopolize the market. Third, competition policy implies that competition in the marketplace, not the absence of competition, promotes a reasonable balance among

profits, prices, quality and innovation. Fourth, competition policy implies that the state can in some instances intervene in the marketplace to promote competition. Competition policy, then, is a classic example of government recognizing that the laws of supply and demand are not occult forces of nature beyond the public domain.

On the limits to globalization – too much or too little?

In view of the tension between globalization and competition policy, the obvious question is whether the two can be made compatible. The answer is 'with difficulty.' This is the same answer that is given to a similar question: "Does globalization require that the citizens of some countries assume hugely disproportionate risks to fickle markets, and can economic safety nets be integrated into globalization?" The point is that globalization, like capitalism, does not come out of the box with a human face. Application of the human face comes later, and an overwhelming majority of the world's population would probably say that it should come sooner rather than later. What the West has learned about the shortcomings of the political economy that drives actually existing globalization should be openly shared and built into the precautionary regulation of globalization. For example, there should not be another Argentina, i.e., a case where the Western-run International Monetary Fund advises, subject to its limited liability provisions, a developing country down the path of economic and political ruin.(2)

Endnotes

[1] See "Utility Mergers in the European Union (EU): One More Obstacle on the Way to the United States of Europe?" (March 2006).

[2] See "Argentina and the IMF: Partners or Adversaries in the Age of Global Democratic Capitalism?" (December 2005).

On August 1st, *The Guardian* reported that British Home Secretary John Reid's appeal of two recent High Court control order judgments won one in the case of *SSHD v. MB* and lost one in the case of *SSHD v. JJ*.[1] The Government reportedly intends to appeal the decision in *SSHD v. JJ* to the House of Lords. *The Guardian* described the two Appeal Court cases as part of a larger and continuing battle between the British Government and the British courts over human rights and anti-terror laws.

Also, on August 1st, Liberty, a leading human rights NGO in the UK issued a press release reporting the Court of Appeal's judgments that control orders deny an individual's right to liberty (*SSHD v. JJ*) but not his right to a fair trial (*SSHD v. MB*). The press release predicted that both decisions – one for and one against the Government – would likely be appealed to the House of Lords.

The decisions of the courts are posted on BAILII (British and Irish Legal Information Institute at http://www.bailii.org). Each Court of Appeal judgment is linked to its corresponding High Court judgment of the same name. Thus, in *SSHD v. MB*, the Court of Appeal's August 1st judgment is linked to the High Court's April 12th decision, just as in *SSHD v. JJ* the Court of Appeal's August 1st judgment is linked to the High Court's June 28th decision. Justice Sullivan delivered both High Court decisions, and Chief Justice Phillips delivered both Court of Appeal decisions. And so, in these two control order cases, the High Court speaks through one author, while the Appeal Court speaks through another.

Taking Exception to the European Convention on Human Rights

Unlike the US Supreme Court, which can strike down Congressional legislation as unconstitutional, the British courts cannot invalidate an act of Parliament. With respect to the European Convention on Human Rights (ECHR), which was adopted as British law by Parliament in the Human Rights Act of 1998, the British courts can, however, rule that an act of Parliament is incompatible with the

ECHR. Nevertheless, it remains the prerogative of Parliament to modify the law and bring it into conformity with the ECHR.

In the precedent-setting wartime civil liberties case of *A v. SSHD* (2004), which found its way to the House of Lords by way of the Special Immigration Appeals Commission and the Court of Appeal, the Law Lords decided 8-1 that Section 23 of the Anti-Terrorism, Crime and Security Act (2001) is incompatible with articles 5 (right to liberty) and 14 (right to non-discrimination based on national origin) of the ECHR and quashed the Government's derogation order. The derogation order had been issued to qualify UK compliance with ECHR Article 5 so that foreign nationals suspected of terrorism who could not be otherwise deported could be held indefinitely without charges being laid and without recourse to the courts. The indefinite detention provided for in Section 23 of the Anti-Terrorism, Crime and Security Act and the derogation order were judged to be disproportionate to the threat (since the punishment but not the threat was limited to foreign nationals who cannot be deported) and discriminatory against foreign nationals.

The British Government responded by passing the Prevention of Terrorism Act (2005), which addressed the Law Lords' critical judgment in *A v. SSHD* by removing the indefinite detention provision and replacing it with provisions for control orders that restrict movement, communication and privacy. In two separate rulings, the High Court found that the Government's system of control orders was incompatible with the ECHR. In *SSHD v. MB*, the court found that the control orders were incompatible with the guarantee of fair trial under Article 6 of the ECHR, and in *SSHD v. JJ*, the court found that the control orders were incompatible with the guarantee of liberty under Article 5 of the ECHR.

In exceptional circumstances, the ECHR allows signatory nations to suspend the Convention's rights (except for Article 3 protections against torture and other inhuman or degrading treatment) as per Article 15.1, which reads:

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this

> Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

In the UK, derogation from the ECHR requires the consent of both houses of Parliament, and the control orders emanating from the derogation must be issued by the courts. In contrast, non-derogating control orders are considerably easier for the Home Office to administer, requiring neither Parliamentary scrutiny nor prior court review. Both *SSHD v. MB* and *SSHD v. JJ* involved non-derogating control orders.

In *SSHD v. MB*, Justice Sullivan ruled that the Prevention of Terrorism Act, by limiting the judicial review of the courts, prevented the courts from ensuring that respondents receive a fair hearing to challenge a non-derogating control order and was therefore incompatible with the ECHR. The Court of Appeal subsequently reversed the High Court's decision on the grounds that the control order in question did not derogate from the ECHR and that as a non-derogating control order the less rigorous standard for judicial review as determined by Parliament was appropriate.

In *SSHD v. JJ*, Justice Sullivan did not directly challenge Parliament but instead targeted the Government and its control orders. The Government did not advance the argument for derogation from Article 5, since it regarded the control orders as restrictions on, not deprivations, of liberty and therefore, as non-derogating control orders, not in conflict with Article 5. The High Court found differently. The High Court found these control orders excessive and incompatible with ECHR's liberty guarantee, and in the absence of derogation from Article 5 of the ECHR approved by Parliament and contained in a control order issued by a court, the High Court revoked the Government's control orders. In this case, the Court of Appeal upheld the High Court's judgment that the Government was masking derogation from the ECHR as a non-derogating control order.

The Control Order Cases

Although the two cases are not identical, they have in common the following set of facts. Control orders have replaced detention for

the terrorist suspects named as respondents in the lawsuits. No formal charges were required to serve as the basis for the control orders, and respondents have no access to the courts to challenge the control orders issued by the Home Office. The 12-month control orders are open-ended in the sense that they are subject to indefinite extension.

The issues before the courts are, however, different. In the case of *MB*, the legal question is whether the Prevention of Terrorism Act provides the due process right of a fair hearing with respect to control orders. In the case of *JJ*, in view of the considerably more restrictive control orders, the legal question is whether the control orders constitute a deprivation of liberty comparable to detention.

In each case, the relevant laws are the European Convention on Human Rights (ECHR) and the 1998 Human Rights Act, by means of which the British Parliament adopted the Convention as legally binding in the UK. The article of law at issue in *MB's* case regarding the right to a fair hearing is ECHR Article 6.1, which reads

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The article of law at issue in *JJ's* case regarding the right to liberty is ECHR Article 5(1), which reads

> Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.

Secretary of State for the Home Department v. MB

Justice Sullivan notes in his opinion that MB is a British citizen, that police had insufficient evidence to prosecute MB as a terrorist and that control orders are valid for 12 months with no limit on the number of renewals. At issue was whether MB was given fair hearing in keeping with Article 6 of the European Convention on Human Rights (ECHR). Justice Sullivan ruled that MB's rights under Article

6 were violated by control order procedures in the Prevention of Terrorism Act. Justice Sullivan concludes

> That controlees' rights under the Convention are being determined not by an independent court in compliance with Article 6.1, but by executive decision-making, untrammelled by any prospect of effective judicial supervision.

The Court of Appeal overruled Justice Sullivan, rejecting his judgment that the Government's control order procedures deny one's right to a fair trial under Article 6 of the European Convention on Human Rights. In reversing the High Court's decision, Chief Justice Phillips found that there was no denial of a fair hearing, since Parliament had legislated that formal charges are unnecessary, that "reasonable grounds for suspicion" is the standard of proof, that judicial review is limited to considering whether control order decisions conform to the standard of proof and that evidence can be kept secret on national security grounds. According to Chief Justice Phillips,

> Article 6 is concerned with procedural fairness, not the fairness of substantive law. If an English statute restricts a civil right by reference to criteria which operate in a manner which is unfair, it will not follow that legal proceedings that give effect to that statute will be unfair so as to infringe Article 6.

On this interpretation, the Court of Appeal ruled that the Prevention of Terrorism Act's provisions for a fair hearing with respect to control orders are not incompatible with Article 6.

Secretary of State for the Home Department v. JJ et al.

Justice Sullivan notes in his judgment that all six respondents are foreign nationals, five of whom were arrested under the Terrorism Act 2000 and released without charges. All respondents were then detained under immigration law for deportation on national security grounds, but deportation proceedings were terminated with the issue of control orders. The following summarizes the terms of the control orders for suspects who were not charged with a crime and who were denied the opportunity to challenge the Home Secretary's orders in a court of law:

- 18-hour-a-day curfews restricting controlees to their respective one-bedroom flats
- daily reporting to the monitoring company
- 24-hour monitoring by means of electronic tags
- random searches and seizures by the police or the monitoring company
- travel limited to a fixed geographic area (ranging from 32 to 72 square kilometres)
- visitors to provide name, address, birth date and photograph
- one bank account monitored by the Home Office
- one telephone
- no access to Internet
- no money, documents or goods to be sent outside UK without prior Home Office approval
- surrender of passport and
- no unapproved physical presence at airport, seaport or railway station with international access.

Justice Sullivan ruled that the control order obligations infringed upon the respondents' rights to liberty under Article 5, even going so far as to suggest that the 18-hour curfew alone would likely be an infringement of the European Convention on Human Rights' liberty guarantee.

In this case, Chief Justice Phillips agreed with the High Court that the obligations described in the control orders "amounted to a deprivation of liberty contrary to Article 5." The Court rejected the Government's argument that control orders were a restriction, not a deprivation, of liberty and were therefore not contrary to Article 5. Chief Justice Phillips cited Justice Sullivan at length, as follows:

> The collective impact of the obligations in Annex I could not sensibly be described as a mere restriction upon the respondents' liberty of movement. In terms of the length of the curfew period (18 hours), the extent of the obligations, and their intrusive impact on the respondents' ability to lead anything resembling a normal life, whether inside their

residences within the curfew period, or for the 6-hour period outside it, these control orders go far beyond the restrictions in those cases where the European Court of Human Rights has concluded that there has been a restriction upon but not a deprivation of liberty.

Next Stop: House of Lords?

In view of the constitutional issues raised in the control order cases, it seems appropriate and realistic that the House of Lords, as the highest court in the UK, will hear the cases. The constitutional significance and urgency of these cases has undoubtedly increased in light of the very recent preemption of a terrorist plan to use liquid explosives to blow up multiple US airliners departing from UK airport en route to US destinations. As the *New York Times* reported on August 10th, the day the news story broke, both the UK and US governments are already engaged in public and controversial debate over the suspension of civil liberties as the domestic policy counterpart to the foreign policy of a global war on terror. As the world's longest-standing liberal democracies, this is not the first time that the UK and US have had to address wartime civil liberties, but it bears remembering that not all precedents are equal and Anglo-American democracy is under a global microscope like never before.

Endnotes

[1] *Secretary of State for the Home Department v. MB and Secretary of State for the Home Department v. JJ, KK, GG, HH, NN, & LL*. In terrorism-related cases in the UK, the names of the respondents are suppressed so as not to compromise ongoing investigations.

The Supreme Court on Trial in Canada

The point of departure for this essay is Kent Roach's *Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (2001), where the focus is the Supreme Court of Canada and its constitutional role as arbiter of Canada's 1982 Charter of Rights and Freedoms. The Canadian *Supreme Court on Trial* discusses some of the significant issues in the ongoing debate concerning judicial activism versus democratic dialogue, judicial versus legislative supremacy and universal human rights versus majoritarian interests. While these issues are important in the context of Canadian public policy, their discussion is especially timely with respect to the present-day politics of American wartime civil liberties.

In the *Supreme Court on Trial*, Roach argues that in Canada, there is a structural bias towards legislative supremacy, which imposes a democratic check on judicial review. In contrast, in the US, he finds structural vulnerability to the excesses of liberal judicial activism unconstrained by ordinary legislative override. For Roach, American judicial activism is viewed negatively insofar as it represents a threat to democracy – a democratic deficit. Roach defends the Supreme Court of Canada against the charge of judicial activism, regardless whether the charge comes from progressives or conservatives. In making his defense, he draws attention to several high profile cases of the American Supreme Court's judicial activism and the inherent dangers of judicial supremacy. These include the infamous *Dred Scott* case (1857), which sanctioned slavery just four years before civil war broke out; *Plessy v. Ferguson* (1896), which contributed to the maintenance of American segregation for another half-century; *Lochner v. NY* (1905), which defended an extreme *laissez-faire* economic policy'; and *Schechter Poultry v. US* (1935), which struck down Roosevelt's New Deal legislation governing wages and prices.

In Roach's view, the American Supreme Court has near absolute and therefore excessive authority over Bill of Rights issues. The

danger is that the Court can move too far either to the left or to the right without sufficient democratic checks. Roach argues that presidential appointment powers and congressional authority to limit Bill of Rights freedoms by circumstance or jurisdiction may be inadequate to reverse a controversial and anti-majoritarian Court decision. Similarly, the constitutional amendment process is regarded as an unacceptable check on the Court because of the extreme difficulty of successfully amending the Constitution.

In contrast, Roach argues that the Canadian Charter provides for legislative activism to counter judicial activism. In Section 1, Parliament is given the authority to limit Charter freedoms, and in Section 33, Parliament is granted authority to override Charter freedoms. The override provision is similar to the derogation provision that allows the British Parliament to pass laws incompatible with the European Convention on Human Rights, which has been the subject of considerable political debate in the UK with respect to the human rights of suspected terrorists detained in the war on terror. Based on the claim that Canadian Charter rights are not absolute unlike the US Bill of Rights, Roach marks the distinction as one between democratic judicial review, where the elected legislative assembly has the final word, and liberal judicial review, where the Supreme Court's interpretation of the Bill of Rights cannot be appealed. Accordingly, in Canada judicial review is democratic in that Parliament can limit or override Charter freedoms. However, in the US, judicial review is liberal in the sense that government encroachment on the liberties in the Bill of Rights is prohibited, except in the case of constitutional amendment or change in the political views of the Supreme Court.

Judicial Activism or Separation of Powers in the US Supreme Court?

What is judicial activism? Is it essentially a political reaction to an unfavourable court decision? Does the US court system permit excessive judicial activism? Is democracy thereby compromised? Does judicial power trump legislative power? Would the US be better served by a legislative override provision as in Canada's Charter of Rights and Freedoms? With respect to Roach's criticism of the US Supreme Court's judicial activism, who should take the lead in

advancing civil rights (voting rights, desegregation, etc.) and civil liberties (free speech, free press, free assembly, etc.) – Congress or the President? Who tends to lead in implementing reform? Does it matter whether reform is progressive or regressive? Do the courts lead, or do they reflect the spirit of the times? Why did the courts take so long to address America's segregation problem? And when they did address the segregation issue, were they creating or reflecting a new view of race relations?

Roach examines the conflict between the legislature and the courts but largely ignores judicial activism as it pertains to the executive branch carrying out the laws of the legislative branch. The American and Canadian systems accord different roles for and relationships between the executive and legislative branches of government. In addition, wartime civil liberties are not a significant topic in Canadian Charter jurisprudence unlike in the US. If the US Supreme Court rules against the President, then the President can go to Congress for support in overriding the Court's ruling, as in the case of *Hamdan v. Rumsfeld* (2006). While this may be a roundabout way of limiting the Supreme Court, it is nonetheless effective insofar as Congress is aligned with the President's agenda. The real difference in Canadian politics is that the Prime Minister and Parliament act in sync when a majority government is in power – strict party discipline being an important characteristic of Canadian politics and a virtual guarantee of executive-legislative "oneness" in a majority government.

How does Roach's assessment of American judicial activism square with the US Supreme Court's role in the constitutional struggle over war powers and wartime civil liberties? First, the principle of separation of powers is not a fundamental characteristic of the Canadian parliamentary system, and Parliament has long been the principal locus of power in the Canadian system of government. Also, in contrast to the American tripartite system of government, the Canadian parliamentary system, based on the British model, is characterized by strong party discipline in which a majority government controls two of the three branches of government – the executive branch, directed by the Prime Minister and Cabinet, and

the legislative branch of Parliament, excluding the appointment-based Senate. In Canada, an unpopular rights-related Supreme Court decision can be reversed by Parliament through an override procedure, which temporarily overrides a court decision for five years but is renewable.

Second, notwithstanding Roach's claims about the absolute authority of the US Supreme Court with respect to the Bill of Rights, the wartime civil liberties case of *Hamdan v. Rumsfeld* reveals the limits of judicial review in the US. The following August 2nd ACLU press release entitled "ACLU Urges Senate to Reject Draft White House Proposal on Detainees" reports that

> The White House has circulated draft legislation that would essentially ratify the illegal military commissions, and fail to meet the standards prescribed by the Supreme Court. Specifically, the White House proposal would: gut the enforceability of important Geneva Convention protections; allow the use of evidence obtained through cruel, inhuman, and degrading treatment during interrogations; take the unprecedented step of allowing the federal government to convict a defendant based on secret evidence; bar a defendant from being present at his own trial; and allow the use of the types of hearsay evidence banned from every military and civilian court in America.

In response to Roach's criticism of the American Bill of Rights, first, they are not absolute as Roach claims. In a classic separation of powers conflict between the President and the Supreme Court regarding the constitutional rights of enemy combatants, the President's response to an unfavourable decision in *Hamdan* was to seek congressional authorization for the curtailment of enemy combatant rights. Second, the Bill of Rights was drafted to provide a safe haven from the reach of arbitrary government, and it is no less important now to curb the arbitrary rule of government regardless whether the government is acting on behalf of the majority. This principle of limited government – classical liberalism – thus incorporates

the principle that the rule of law is a constraint on majoritarian government.

Arguably, in keeping with Roach's criticism of American liberal judicial review, the Supreme Court decisions against the government in the war on terror cases would be considered examples of judicial activism. Looking back over 20th century wartime civil liberty cases, there have been those where the Court ruled in conformity with the President and/or Congress and those where the Court dissented. The list of cases where the Court has supported the President and/or Congress would have to include the World War I anti-free speech cases of *Debs v. US* (1919), *Schenck v. US* (1919) and *Abrams v. US* (1919) and the World War II Japanese-American internment cases of *Hirabayashi v. US* (1943) and *Korematsu v. US* (1944). On the other side, the case list of key Court dissents from presidential abuse of power would have to include the Korean War-era steel mills seizure case of *Youngstown Sheet & Tube v. Sawyer* (1952), the Vietnam War-era *New York Times v. US* (1971) and the war on terror cases of *Hamdi v. Rumsfeld* (2004), *Rasul v. Bush* (2004) and *Hamdan v. Rumsfeld* (2006),

If judicial activism expressing dissent is viewed as anti-democratic and harmful, then judicial conformity as per World War I and World War II may be the consequence. Judicial dissent is only achievable where an independent judiciary jealously guards its powers *vis-à-vis* the legislature and the executive and functions as a check against an overzealous and impatient majority, which check can nevertheless be overridden through deliberate and patient process. The US Constitution was written against the backdrop of 18th century British imperial tyranny and 17th century English monarchial pretensions to Continental-style absolutism, and its Article III creation of an independent supreme court was intended to balance separately the powers of both the legislature and the executive.

Granting Roach's criticism of the democratic deficit in American judicial review, what if the Supreme Court showed greater deference toward Congress and President? The Court would then be seen to be acting in the interest of the electorate who chose Congress and President. However, there would no longer be anyone to hold

Congress and the President to the high-sounding rhetoric of constitutional democracy. Roach's greatest fear seems to be that an activist and unchecked Supreme Court might one day make another decision like *Dred Scott*, *Plessy* or *Korematsu*. However, looking back on these cases, was the Court acting independently or was it reflecting the spirit of the times? In *Korematsu*, the latter seems to be the case. So the real threat would seem to be limited to those cases where the Supreme Court stakes out a position that neither Congress nor the President are able to reverse. A couple of cases come to mind, viz. the New Deal case of *Schecter Poultry v. US* and the abortion case of *Roe v. Wade* (1972). The New Deal did eventually become law, undoubtedly in response to the spirit of the times during the Great Depression, and the extremely contentious *Roe v. Wade* has stood so long, because the country itself has been divided. It is also worth recalling the Supreme Court's recent track record *vis-à-vis* a strong executive branch – the Pentagon Papers case (*New York Times v. US*) and the Vietnam War, the Watergate tapes case (*US v. Nixon*) and Nixon's resignation and the enemy combatant cases (*Hamdi v. Rumsfeld*, *Rasul v. Bush* and *Hamdan v. Rumsfeld*) and the war on terror – and the testimonial that this provides for the constitutional principle of limited government.

For many Americans, Roach's caution that democracy is vulnerable to an activist judiciary may be exaggerating the need to limit the power of the third branch of government. The greater danger for democracy is not so much whether the courts occasionally check the majoritarian impulses of the Congress or the President but whether the three branches of government act in concert, as if in tacit collusion, to override the constitutional principles of checks and balances and separation of powers in order to deny the constitutional civil liberties of a minor constituency. This would be a decidedly unfortunate development in what is sometimes characterized as the progressive evolution of Anglo-American democracy. The danger of excessive consolidated government power, even if ultimately grounded in free and fair elections, is that in times of national emergency, what happens in between elections may happen all too efficiently and with negative consequences for those who fail to conform.

The strongest argument for the American separation of powers and strong judicial review seems to be that a Supreme Court that is the co-equal of Congress and the President gives the best chance for exposing the dangers of an America headed down the slippery slope of excessive Presidential authority. It may be that in the future the Supreme Court will behave with even greater deference to the Chief Executive, although there is some hope that the institutional jealousy and sense of history will keep the justices from allowing their court to become a Star Chamber.

Finally, the view that Roach has of an absolutist American Bill of Rights is completely off base as the case of *Hamdan v. Rumsfeld* illustrates. In the war on terror, the Congress granted extensive war powers to the President in the 2001 Authorization of Military Force. As cases challenging the President's interpretation of his delegated and inherent war powers percolated up through the federal judiciary, the Supreme Court has seized the opportunity to exercise its prerogative of judicial review on the constitutional questions involved. In the case of *Hamdi v. Rumsfeld*, the Court acknowledged the President's right to detain enemy combatants, but it took issue with the President's denial of due process to American citizens detained indefinitely without formal charges and without the right to challenge their detention. Then, in *Hamdan v. Rumsfeld*, the Court ruled decisively against the President's military tribunals as violating the due process rights of the accused to a fair trial. Having lost the case in the Supreme Court, the President has since proposed legislation to Congress, which if passed would give congressional authority for the military commissions that were struck down by the Court. The President's gambit is that the Supreme Court may have denied his authority to create such military commissions but that it would require another lengthy wait before the Supreme Court would hear a case involving congressionally-authorized military tribunals and that the result would not necessarily be the same as in *Hamdan*.

Thoughts suggested from reading Amartya Sen's *Identity and Violence*

Identity politics v. pure democracy

Identity politics is a means of collective political action intended to increase the social, political and economic influence of a group often defined in terms of race, ethnicity, religion, nationality, social background, or other common identifier. Notwithstanding the individualism espoused in America's founding documents, politics by collective bargaining is a characteristic feature of the American political landscape. The politics of groups, based on common interest and/or identity is the reality; the notion that 'one man, one vote' disperses political power evenly is a fiction. In other words, political equality is no more a part of American democracy than economic equality is a part of American capitalism.

Minimum threshold of universal rights

The democratic ideal of political equality is out of the question, since political and economic power are mutually reinforcing and since economic equality is not and likely never will be an ideal in the American democratic capitalist system. The threat posed by identity politics and interest groups is that separately negotiated political and economic legislation and regulation will continue to fragment American society and risk undermining its imperfect yet broadly based system of political rights and economic opportunity. In order to prevent this, interest politics must be normalized according to the constitutional principle of checks and balances, which regards monopolies and cartels of political and economic power as intrinsically harmful. In addition, it is crucial for the American experiment in freedom and democracy to maintain a humane and respectful socioeconomic and legal safety net for those who do not belong to powerful interest groups. Clearly, there is a difference between those groups that seek to remediate the government's failure to protect the

basic civil rights and liberties of everyone and those groups whose objectives are beyond this threshold and apply to a limited membership.

Challenges to American democracy – domestic and international

The real challenge for American democracy, whether within the context of domestic politics or international relations, is whether asymmetric power justifies the more powerful in asserting privilege over the law. Does great political or economic power guarantee immunity from the law? The American experiment in democracy has generally moved towards more uniform and universal rule of law, although the movement has been slow and delayed as seen in the case of civil rights (anti-segregation, voting rights, etc.) Civil liberties, on the other hand, are often curtailed during times of war, and the two current Asian wars and the war on terror are no exception. In foreign affairs, American political, economic and military power have often successfully tempted America to project a foreign policy that is anti-democratic, against self-determination and fundamentally incompatible with the suspicion that Americans from the very beginning of the American Republic have had towards government. America's dominant global position makes the temptation that much greater.

Primacy of foreign policy

Due in large part to the war on terror and America's land wars in western Asia, geopolitics has swamped domestic politics, so questions of democracy are largely framed in debates of global proportions. Granted, the American wars of the 21st century have provoked more constitutional struggles than have been seen since the Nixon-Vietnam War-Watergate era. Nonetheless, in this second decade of the post-Cold War world, political theorists and commentators continue to speculate on how the new world order should be understood in the absence of the bipolar American-Soviet world order.

Sen v. Huntington

Last year, Professor Amartya Sen, Nobel laureate in Economics, published a book entitled *Identity and Violence: The Illusion of Destiny* in which he challenged the clash of civilizations thesis made famous by Professor Samuel Huntington. Sen's *Identity and Violence* is noteworthy, because it offers a break from wartime conformity as well as a break from the multicultural conformity. These breaks with conformity are necessary and timely for the American Republic, in order to advance the progress of liberal democracy towards the ideal of democratically-elected majority governing, constrained by the rule of law and the Bill of Rights. Regardless of the simplistic worldviews that may be offered by the Bush administration, by academics, by businessmen, by news organizations and by clerics, it is important to question what it is about democracy that we want to share, why we are willing to go to war to do it and why we rally around our national icons to show the world a united front.

Optimism v. pessimism

Sen's personal point of departure is his experience of the massive scale of violence of the Hindu-Muslim riots in British India during the 1940s through independence in 1947. In the spirit of Ghandi, Sen opposes violence in general and the use of identity politics to promote violence in particular. Sen's view is less inclined to the pessimism of perpetual conflict than is Huntington's. This optimism is based on the notion that the overlapping complexity of human identity (e.g., the fact that one can be a scientist, a father, a classical music enthusiast, a chess player, a social democrat, a Canadian, a Turk and a Unitarian) would result in less violent confrontation than if the world were polarized into multiple singular identities. Sen's idea is that if the world is not grossly misrepresented and distorted by simplistic dichotomies and if people are not thereby miniaturized and put into little boxes crudely labeled Hindu, Muslim, Christian, communist, capitalist, American, Chinese, Arab, black, etc., then the chances are good that affiliations and affinities can replace, or at least lessen the magnitude and frequency of, violent divisions,

confrontations and crises, in realistic, yet affirmative, response to Rodney King's question during the 1992 Los Angeles riots, "People, I just want to say, you know, can we all get along?"

Conformity as a threat to freedom

At the same time, Sen takes on multiculturalism distinguishing between mandated diversity (compulsory cultural conformity) and freedom to choose from diversity. His advocacy of the latter is illustrated by his criticism of the British education policy of creating religious schools to advance multiculturalism, an approach that he believes ensures diversity of religious schooling in Britain at the expense of the freedom of children to experience and choose from religious diversity.

Similarly, in the political and economic debates on globalization, Sen rejects the 'all or nothing' approach of both the extreme pro- and anti-globalization camps. He argues that globalization and the conformity to capitalist norms that this entails should be moderated for the protection of vulnerable countries and population groups just as Western capitalism has been moderated from the abstract *laissez-faire* model. In the case of globalization, conformity is the *laissez-faire* economic straitjacket. Ironically, it is not so much that the developed world wants the underdeveloped world to be just like it – same political system, same economic system, same laws, etc. It is as if the rich countries want the middle income and poor countries to be open not so much to Western ideas and institutions but to Western influence.

Against the inevitability of clash of civilizations

Sen argues that an emphasis on multiple group commitments can downplay and reduce the risk of clash of civilization-type confrontations. Sen's intention is to remove the notion of inevitability that seems to be attached to Huntington's thesis. The key premises that can be extracted from Sen's views are that: 1) simplified group mappings create opportunities for conflict by representing the world in a

manner that is amenable to mass marketing and mobilization of conformity; 2) conflict, at least on a large scale of civil or international warfare, can be mitigated if not avoided; and 3) rational peaceful coexistence is not fundamentally at odds with human nature. It is the third premise that seems so difficult to accept and that sets Sen apart from those of us who are fundamentally pessimistic not only about human nature but also about its incorrigibility. From Anglo-American political theory, we have been led to believe that institutions are necessary to control human behaviour; however, the problem is that these institutions themselves are human constructions, and so the imperfections in human nature are transmitted to human institutions.

Curbing arbitrary violence within the nation-state and among nation-states

If conflict is inevitable, then it is a question of whether conflict is subject only to the rules of power or whether the wild beast can be tamed and conflict constrained by human institutions, and whether these latter can be kept under control, i.e., prevented from bringing about new forms of tyranny. In international affairs, the stage is thus set for the international rule of law. For the same reasons that the rule of law is fundamental to liberal democratic society, the rule of law at the international level is essential. The rule of law must exist if the arbitrary and violent exercise of power is to be checked and if basic civil rights and liberties are to be recognized as universal human rights. At the national level, i.e., in domestic politics, the stage has been set for granting national minorities the civil liberties and civil rights that are designed to protect against the arbitrary violence of the state as well as of other members and groups acting independently of the state. However, since the rule of law is itself fundamentally based on the power to define and enforce the law, and since a liberal democracy depends upon more than force and coercion – viz. the consent of free citizens – it is to be expected that there will be constitutional conflict among competing economic and political interests. Americans know this from the early history of their republic, and Europeans are learning this first-hand as the European Union attempts to create the European version of the United States.

The legitimacy and durability of an international version of the rule of law require that no country be above the law, that the rules for political and economic sovereignty apply equally to all countries, and that poor countries be given the incentives and means for upward mobility.

Dangers of conformity from literature, philosophy and history

Although Sen and Huntington represent two different perspectives on groups and identities, both would acknowledge that group membership shapes one's worldview. There is nothing new in the notion that groups provide individuals with a sense of belonging, reinforcement of what is right and wrong and greater power from the collective – and not always for the better. From Fyodor Dostoevsky's representation in *The Brothers Karamazov* of the choice between groupthink (offered by the Grand Inquisitor) and freedom (offered by Jesus), we see the complexity of freedom and the ease of conformity. That Dostoevsky's bias towards things Russian made Roman Catholicism a large and easy target for this critique should not diminish the universality of what he had to say, although it should provoke reflective questioning of one's own group commitments. From Friedrich Nietzsche's philosophical anthropology, we see the dubious origins of tradition, authority and all things human – a realization that seems to support the case of questioning and dissent. Nietzsche also teaches, albeit unwittingly, that the critical genius is indeed all too human and is not immune from his own critique. And finally from Hannah Arendt's reporting of the 1961 Adolf Eichmann trial in Jerusalem, we see conformity giving rise to unspeakable evil. From Arendt's background reporting, we see identity politics taken to its (il)logical conclusion, proceeding as follows: identify your enemy, blame your enemy and establish the threat that he represents, strip away your enemy's rights, physically expel your enemy, concentrate your enemy where expulsion is inadequate and then kill your enemy.

Danger of simplistic identity politics, groupthink and conformity

Finally, the great potential evil of conformity and the dangers of identity politics are convincingly demonstrated by the complicity between German industry (e.g., I.G. Farben, Krupp and Siemens) and the Third Reich in the Final Solution as well as in the complicity of the Spanish crown and the Catholic church in the Spanish Inquisition. Similarly, numerous examples are available from the history of 20th century communism in Europe and Asia, which support the claim that abuses of power by government, business and religion provide damning testimony against monolithic institutions that dominate their surroundings (whether local, national or international) and threaten freedom, liberty and dissent. In America's case, it would surely be against the revolutionary ideals upon which the American Republic was founded to replace one form of tyranny with another and to deny safe haven to ideas and beliefs that challenge the prevailing views and customs. Following Sen, we might be better off thinking of ourselves as bound by a complex of multiple and overlapping identity commitments … a view that may not be as naively optimistic as it seems to incorrigible Anglo-American pessimists and skeptics. It is a view that should not be confused with simple-minded optimism and pacifism and best-of-all-possible worlds' resignation. Rather, it should be placed in the context of the great non-violent, freedom struggles led by Ghandi in India and Martin Luther King, Jr. in the US.

Thomas Humphrey's article "Ricardo versus Wicksell on Job Losses and Technological Change," published in the Fall 2004 edition of the Federal Reserve Bank of Richmond's *Economic Quarterly*, defends the practice of offshoring, i.e., outsourcing 'overseas' or beyond US borders.

An important underlying premise, suggested by John Weinberg's introductory remarks on the occasion of Humphrey's retirement as editor of *Economic Quarterly*, is that economic policy debates are replayed in different times and circumstances and for different audiences. Weinberg observes that "[Humphrey's] notable contribution has been to make clear that the debates that took place during his career as a Federal Reserve economist were in fact not new … to the 20th century."

In "Ricardo versus Wicksell," Humphrey juxtaposes the early 19th century English classical economist, David Ricardo, and early 20th century Swedish neoclassical economist, Knut Wicksell, in order to present the contemporary offshoring debate against the backdrop of economic history and the history of economic thought. The first point to be made about Humphrey's article, then, is that he introduces an historical perspective in order to consider the post-Cold War globalization issue of US job losses due to offshoring within the larger context of the history of Western industrialization. For Humphrey, the similarity between technological innovation of the early industrial age and offshoring in the present age of globalization demonstrates the relevance of history to current economic events and trends.

In addition, the comparison between Ricardo and Wicksell supports Humphrey's argument that innovation, labour-saving technology and efficiency all tend to promote an aggregate improvement in living standards and an absolute improvement for most. With respect to the issue of job losses and technical change, Ricardo's views seem to be relegated to the fringe of leftist political parties and unions, while Wicksell's views correspond to those commonly seen and heard in business, government, academia and the media. In accounting for Ricardo's views, particularly his about-face on labour

and mechanization, Humphrey notes that Ricardo wrote during the post-Napoleonic years, which were characterized by high unemployment and labour unrest, a time when

> the opinion entertained by the labouring class, that the employment of the machinery is frequently detrimental to their interests, is not founded on prejudice and error, but is conformable to the correct principles of political economy." (*Principles*)

On the other hand, the title of Wicksell's 1923 unpublished manuscript, "Ricardo on Machinery and the Present Unemployment," indicates that he, too, wrote during times in which the issue of labour-saving automation was more than academic. However, as Humphrey points out, Wicksell was strongly influenced by the neoclassical marginalist revolution of the late 19th century – a revolution that also emphasized the scientific over the political as the proper basis for approaching economics.

According to Humphrey, Wicksell's view is more consistent with the historical record of machinery investment, employment and wages over the course of the industrial age. It is, therefore, not surprising that Humphrey's comparative analysis of Ricardo and Wicksell on job losses and technical change comes down on the side of Wicksell. And so the superiority of Wicksell's theory and its compatibility with the offshoring argument provide the basis for Humphrey's assertion that offshoring is as beneficial to employment and wages as is technological innovation.

However, an alternative and conflicting perspective maintains that celebrating the victory of Wicksell's view (as a proxy for the mainstream neoclassical view) is premature. First, Ricardo's political economy perspective regarding job loss is still valid at least in the short run, which can last for years, and for those households (small business units in the language of entrepreneurial capitalism) whose economic livelihood is not just threatened but often destroyed. Second, Wicksell's compensation principle is arbitrary, revealing a bias towards market outcomes, which are regarded as inevitable and legitimate. According to Wicksell's compensation principle, income

redistribution is necessary to redress economic inequities created by the market, but it can only be realized, after the fact and either by (voluntary) charity or by government taxes and subsidies, which must be worked out through the political process. Third, the majoritarian principle of 'the good of the many versus the good of the few' is used to justify the aggregates of economic efficiency and maximum output. However, it is worth noting how inconsistent it is to have a charity-based social safety net, as opposed to a universal entitlement, in view of the universal political rights defined in the American Bill of Rights. Nevertheless, Wicksell's words, as quoted by Humphrey, indicate at least a rhetorical willingness to recognize basic economic rights

> the only completely rational way to achieve the largest possible production [is] to allow all production factors, including labour, to find their equilibrium positions unhindered, under free competition, however low they may be, but at the same time to discard resolutely the principle that the worker's only source of income is his wages. He, like every other citizen, ought rather to be entitled to a certain share of the earnings of the society's natural resources, capital, and (where they cannot be avoided) monopolies. ("Protection and Free Trade")

Comparing economic rights with guaranteed constitutional rights is useful to emphasize the difference between rights and charity. Additionally, the dogma of free and perfect markets is a highly politicized doctrine, which should be critiqued for its shortcomings. Its followers should be criticized for their slavish, yet self-aggrandizing, adherence to the notion of a just *laissez-faire* market and for their hypocrisy in accepting democracy (at least electoral democracy) in politics but not in economics, as if the two are not connected.

Understanding the connection between job losses and technological innovation, outsourcing, offshoring and various types of business combinations requires a recognition of the fundamentally political nature of economics and the fundamentally misleading

characterization of economics as a science governed by inevitability, optimality and infallibility. In Humphrey's account, on one side is Ricardo's pessimism, and on the other is Wicksell's optimism – the best of all possible worlds. However, even the optimists allow that during the short run, economic hardship is to be expected while the massive system of the market readjusts to technological, organizational and political changes, although the short run is made to seem of short duration with only temporary dislocations. Then, there is the tension between economic outcomes, which are positive in at least a small way for almost everyone, even though these broad-based benefits are swamped in the cases of many. The remedy for this latter localized hardship is incapable of market remedy and therefore must be addressed through individual or collective acts of charity. But it is these latter collective acts of institutionalized charity – unemployment insurance, welfare, Medicaid and other government tax credits and subsidies – that often become targets for those who have been better done by in the market.

Notwithstanding the indefatigable presence of its longstanding challenger – the critical theory of harmful industrialization – Humphrey claims that the forward-thinking progressive industrialization has won the day again, this time in the globalization debate over offshoring. Humphrey's staging of the current debate regarding job loss and offshoring is presented against an historical backdrop, itself part of a broader and recurring debate concerning increasing production efficiency under capitalism. By bringing together the history of economic thought and economic history, Humphrey makes the case for *his* selection of the fittest theory.

Introduction

In February 2007, three courts in the three largest English-speaking democracies issued rulings on the wartime civil liberty issue of due process rights against arbitrary executive detention. The wartime reference is based on the US, UK and Canada's mutual support through domestic and foreign policy in the global war on terror and in their joint military campaigns in Afghanistan and in Iraq (excluding Canada in the case of Iraq). The civil liberty reference is based on the fact that in each case foreign nationals were detained, without charge and without trial, in prison or under house arrest (control orders in the UK).

Summaries of Key February 2007 Court Decisions

a) Secretary of State for the Home Department (SSHD) v. E

The opinion of the court in the case of *SSHD v. E*, delivered on 16 February 2007, was written by Justice Jack Beatson of the High Court for England and Wales. The High Court found that the Secretary of State was duly empowered to issue a control order, since there were reasonable grounds for suspecting, although not prosecuting, terrorism-related activity and the control order was a necessary precaution to protect public safety. However, the court found that the control order, as issued, violated Article 5 of the European Convention on Human Rights (ECHR). Last year in *SSHD v. JJ*, both the High Court and the Court of Appeal found that the Secretary of State's control order was excessive and constituted "a deprivation of liberty contrary to Article 5." In the case of *E*, the High Court again found that the control order imposed by the government was severe enough to represent a violation of the ECHR's guarantee of the right to liberty absent due process.

Judge Beatson notes that this case is the third supervisory hearing under section 3 of the Prevention of Terrorism Act (PTA). The

first was MB's challenge in *SSHD v. MB* (2006) regarding the right to a fair trial in accordance with Article 6 of the ECHR – a challenge that was rejected by the Court of Appeal. And the second was JJ's challenge in *SSHD v. JJ* (2006) regarding whether the terms of the imposed control order constituted a violation of Article 5 of ECHR – a challenge, as mentioned, that was upheld by the Court of Appeal. What is new in *SSHD v. E* is the second part of the High Court's judgment. More by way of a warning to the government, the court states that the Secretary of State's decision to continue the control order regime after having received evidence from the Belgian courts, which might have justified launching a criminal prosecution, was flawed. According to the court, where criminal prosecution is a possibility, this possibility must be explored before engaging the control order regime. In other words, control order detention is not to be used as a substitute for criminal prosecution, a view previously expressed by the Court of Appeals in *SSHD v. MB*.

b) *Charkaoui v. Canada*

The opinion of the 9-0 majority in *Charkaoui v. Canada*, delivered 23 February 2007, was written by Chief Justice Beverley McLachlan of the Supreme Court of Canada. The Court, overruling both Federal Court and Federal Court of Appeals, finds sections of the Immigration and Refugee Protection Act (IRPA, 2001) to be unconstitutional and therefore of no effect. However, the Court suspends its declaration for one year to allow Parliament time to amend the legislation. The Court judges the IRPA against the Charter in order to determine whether the limitation on rights prescribed – obstruction of due process and arbitrary detention – are reasonable limits that can be "demonstrably justified in a free and democratic society" in accordance with Section 1 of the Charter.

Under the IRPA, the government can issue security certificates designating a foreign national or permanent resident inadmissible to Canada on national security grounds and therefore subject to detention and deportation. In a classic separation of powers challenge, the Court struck down sections of the IRPA, in effect declaring a law passed by Parliament to be inconsistent with the Charter and

therefore unconstitutional. First, the Court challenged non-disclosure provisions of the IRPA, which in its view compromise the judicial review of the certificate's reasonableness and continued detention. The Court's view is that the individual's right to a fair trial under Section 7 of the Charter is not properly balanced against the national security interest given the extraordinary secrecy and the feasibility of finding an alternative. For example, the Court suggests that the special advocate system used in the UK's Special Immigration Appeal Commission would protect both national security and the defendant's right to a fair trial. According to Chief Justice McLachlan, "[t]he overarching principle of fundamental justice that applies here is this: before the state can detain people for significant periods of time, it must accord them a fair judicial process." And, Chief Justice McLachlan continues, a fair judicial process includes the right to a hearing before an independent and impartial magistrate, the right to a decision based on the facts and the law, the right to know the charges against one and the right to answer the charges. In *Charkaoui*, the Court found that the IRPA denied fair judicial process insofar as a person named in a certificate, detained for extended periods without charges and threatened with deportation may be denied access to the government's case, which means that his defense will be incomplete and that the presiding Federal Court judge will be hearing a largely one-sided debate.

Second, the Court notes that the 120-day waiting period for foreign nationals to have their certificates confirmed by a Federal Court judge is, in view of the 48-hour turnaround for permanent residents, a denial of the Section 9 right against arbitrary detention and the Section 10(c) right to a prompt hearing. In defending the right of foreign nationals to a prompt review of the legality of their detention, the Court points to *Rasul v. Bush* (the US Supreme Court case that recognized the *habeas corpus* rights of foreign nationals detained at Guantanamo Bay) as one of the examples of the international recognition of this right. Third, although not given high billing, is the tacit acknowledgement that the current IRPA certificate scheme does not provide the ongoing judicial review of extended detentions. In the concluding sentence of the judgment, the Court directs Parliament to

remove the qualification that six-month reviews be conducted for permanent residents whose certificate status is pending, thereby providing for ongoing detention reviews for both classes of foreign nationals.

c) *Boumediene v. Bush*

The opinion of the 2-1 majority in the case of *Boumediene v. Bush*, delivered 20 February 2007, was written by of Judge Raymond Randolph of the US Court of Appeals for the DC Circuit, and a dissenting opinion was written by Judge Judith Rogers. The appeals court decision in the Guantanamo Bay detainee *habeas corpus* case is the latest development in the recent constitutional conflict over *habeas corpus* rights during wartime.

This case is probably headed for the Supreme Court. It follows a long and convoluted post-9/11 constitutional struggle among the three branches of government, marked by key battles such as the Authorization for Use of Military Force (2001), Supreme Court decisions in *Hamdi v. Rumsfeld* (2004) and *Rasul v. Bush* (2004) and, the Detainee Treatment Act (2005), Supreme Court decision in *Hamdan v. Rumsfeld* (2006) and the Military Commissions Act (2006). Judge Randolph sums up the developments as follows: the Detainee Treatment Act reversed the Supreme Court's decision in *Rasul* regarding the *habeas* rights of foreign nationals but was itself reversed (at least for pending cases) by the Supreme Court's decision in *Hamdan*. Congress then reversed the Supreme Court's decision in *Hamdan* by passing the Military Commissions Act, and the DC Court of Appeals in *Boumediene* has ruled in favour of Congress and the President as it did before in the cases of *Al Odah v. US* (renamed *Rasul v. Bush*) and *Hamdan v. Rumsfeld*.

Judge Randolph rejects the notion that *habeas corpus* is a universal human right and argues that Congress can limit the federal courts' jurisdiction to hear *habeas* applications from foreign nationals. He argues that *Hamdan* extends *habeas* to foreign nationals based on a legal technicality and not a fundamental constitutional right. If Judge Randolph's interpretation is accepted, then *Rasul v. Bush* may not be used as precedent given the jurisdiction-stripping

Detainee Treatment Act enacted a year later. Under this act, federal courts can review decisions made by Combatant Status Review Tribunals and military commissions, but only within limits. The *Boumediene* case reveals the back and forth between the President and Congress and the Supreme Court in determining the scope of wartime civil liberties (*habeas corpus* and due process). As the legislation stands, the Detainee Treatment Act and Military Commissions Act threaten to limit these rights of foreign nationals as seen in *Boumediene*, where the two-class approach (US citizen and foreign national) to basic civil liberties is espoused by the DC Circuit Court

Constitutional dimensions re separation of powers

One of the two most important themes running through *E*, *Charkaoui* and *Boumediene*, is that of a constitutionally-limited government where the structural separation of powers in government is intended to balance society's national security interests against the individual's rights to be free from the arbitrary exercise of government power.

In the UK, the courts have challenged both the government (executive) and Parliament. In the cases of *JJ* and *E*, the courts acknowledged the Secretary of State's authority to issue control orders but rejected the specific control orders that were fashioned. In the third Prevention of Terrorism Act case (*MB*) and the case that ushered in the control order regime as a replacement for indefinite detention (*A v SSHD*, 2004), the British courts challenged Parliament's legislation itself, characterizing it as inconsistent with the ECHR. The British courts are not given the prerogative of striking down Parliament's laws, so these challenges are without the invalidation declarations seen in US and Canadian federal court decisions. However, the judicial review power of the courts is not as limited as it may seem, as confirmed in *A v. SSHD*, where the House of Lords' ruling triggered a rewriting of the 2001 Anti-Terrorism Crime and Security Act.

In *Charkaoui*, the Supreme Court of Canada directly challenged Parliament, declaring an act of Parliament to be unconstitutional and directing Parliament to rewrite the law to conform to the Court's decision. In contrast, recent wartime civil liberty cases in the US reveal a much less assertive US Supreme Court *vis-à-vis* Congress, especially when contrasted with the Canadian Supreme Court's bold assertion of its authority to sit in judgment on the constitutionality of laws passed by Parliament. It is therefore ironic that in Professor Kent Roach's *Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, the author's defense of the Supreme Court of Canada relies on a comparison with the US Supreme Court's judicial activism, particularly in cases engaging the Bill of Rights.

In the US, the cases of *Hamdi*, *Rasul*, *Padilla*, *Hamdan* and now, *Boumediene*, have been court challenges to the President and his interpretation and implementation of the acts and resolutions of Congress. With *Boumediene* likely to join the queue of cases to be heard by the Supreme Court, there will be an opportunity for the Court to directly challenge Congress and consider the constitutionality of an act of Congress. The nearest challenge to Congress so far has come from *Hamdan v. Rumsfeld*. The Court carefully limited Congress' jurisdiction-stripping language in the Detainee Treatment Act and suggested that even if the Guantanamo Bay military tribunals were properly authorized by Congress they would be judged against the due process safeguards of international law, specifically the Geneva Conventions, which apply to foreign nationals. Now that the Military Commissions Act has clarified Congress' intention to remove *habeas* review in the case of foreign nationals at Guantanamo Bay and has legislated military commissions comparable to those that Court struck down in *Hamdan*, the Court has an opportunity, and arguably a responsibility, to respond.

International civil right of *habeas corpus* and due process

The other important theme running through *E*, *Charkaoui* and *Boumediene*, is whether the basic civil rights of *habeas corpus* and due process are fundamentally human rights, international in scope

and based on natural law or whether they are privileges reserved for the citizens of democracies such as the UK, the US and Canada.

The UK is bound by the 1998 Human Rights Act to adhere to the ECHR where the distinction between British national and foreign national no longer applies with respect to basic human rights, such as the right to due process before being deprived of one's liberty. The House of Lords made this point clear in its landmark ruling, *A v. SSHD*. In the case of *A*, the British House of Lords ruled against the government's policy of indefinitely detaining, without charges and without trial, foreign nationals identified as terrorist suspects who could not be deported under the ECHR owing to the risk of torture upon leaving the UK. It was this decision that forced the government to replace the indefinite detention with control orders. The current control order decisions are therefore a further refining of Britain's new universal human rights policy as constrained by the ongoing war on terror, shockingly brought home by the July 2005 London bombings, and the continuing wars in Iraq and Afghanistan.

The Supreme Court of Canada's decision in *Charkaoui* defends the principle of non-discriminatory access to the Charter's liberty guarantees and brings home, to North America, the natural law principle that due process, including a fair trial, is a universal human right against the arbitrary deprivation of life and liberty. The Court's affirmation of a single standard of basic civil liberty, applicable to Canadian citizens and foreign nationals, is probably the most important precedent coming from the *Charkaoui* decision, not to overshadow too much the Court's proper, but nonetheless remarkable, exercise of judicial review over acts of Parliament.

In the US, it is not generally recognized that foreign nationals enjoy same rights to due process as do US citizens. In fact, the Military Commissions Act clearly and specifically denies *habeas corpus* to foreign nationals (aliens). It is up to the Supreme Court to bring the US up to the level of legal evolution reached in the UK and in Canada by recognizing at least some universal human rights, especially those that the English-speaking world dates back to the 1215 Magna Carta.

What to watch for next

In the UK, the case of *E* may be appealed to the Court of Appeal, and after that judgment has been rendered, there may be three control order cases pending possible review by House of Lords – *SSHD v. E*, *SSHD v. MB* and *SSHD v. JJ*. In the meantime, the High Court's decision in *E* supports the High Court's in *JJ*, upheld by the Court of Appeal, regarding the illegality of control orders that deprive a detainee (even a foreign national) of Article 5 liberty under the ECHR. In addition, the High Court in *E* warns that if criminal proceedings are feasible, then Secretary of State should not abuse the control order regime as a detention alternative to criminal trial. In a recent development, Parliament, at the request of Prime Minister Tony Blair's government, has re-issued the Prevention of Terrorism Act, so the control order regime remains in place to be challenged in the courts.

In Canada, the decision by the Supreme Court of Canada, the highest court in the land, is not subject to further judicial appeal. However, the *Charkaoui* decision will be subject to parliamentary review as Parliament responds to the Court's directive to rewrite sections of the IRPA. An additional complication in having Parliament comply with the Court's judgment is that Canada has a minority government, under Prime Minister Stephen Harper of the Conservative Party, with no guaranteed majority support for controversial legislation.

In the US, the case of *Boumediene* is expected to reach the Supreme Court. In the meantime, the DC Circuit Court decision adds support to Congress' legislated denial of *habeas corpus* review to foreign nationals detained as enemy combatants at Guantanamo Bay whose status is neither that of prisoner of war nor of criminal defendant. It is also possible that the present Congress, returned with a Democratic majority in the November 2006 Congressional elections, partly in reaction to President Bush's failed foreign policy in Iraq, will reconsider the Military Commissions Act passed in the last days of the previous Republican-controlled Congress.

Because of the high profile of the Guantanamo Bay prison and its prisoners, developments in the US will be the most widely covered. Because of the polarized views among the three branches of government, these developments will be easily dramatized. Because

the US has asserted its worldwide ideological leadership on political and economic questions, these developments within the American constitutional system will reverberate throughout the world.

In Consideration of Hobbes' *Leviathan* and the Current Iraqi Civil War (Mar 07)

The March/April 2007 cover of *Foreign Affairs* declares that "The United States Can't Win Iraq's Civil War." This is the headline introducing Stanford Professor James Fearson's essay "Iraq's Civil War" in which he argues that the war in Iraq has spun out of control and has become a full-fledged civil war. This contention itself will engender no small controversy. Even more controversy will surround the more radical claim that the civil war in Iraq cannot be stopped until it has run its course.

If Fearson is right, then the US may one day be vilified in many histories as having provoked, fueled and abandoned what we Americans are beginning to call the Iraqi Civil War. In a cruel irony that is profoundly felt on the other side of the world, the US promised democracy but delivered civil war.

Power intoxicates, and in our intoxication with the unprecedented global power of the US, we sometimes forget our own history, which has had its own tragedies. In the historical development of democracy and limited government in the Anglo-American experience, the English Civil War figures prominently. Diane Purkiss writes in *The English Civil War: A People's History* (2006) that the civil war from 1642-1649 is "perhaps the single most important event in our [English] history." Arguably the English Civil War, as part of the longer running 17th century constitutional struggle between King and Parliament, was at the centre of the crucible in which Anglo-American, not just English, democracy was forged.

Three-and-a-half centuries ago, Thomas Hobbes, one of the most familiar names in Anglo-American political thought, wrote *Leviathan* (1651), a treatise defending absolute rule. He wrote *Leviathan* against the backdrop of the civil war, regicide, wars against foreign insurgents, wars among religious factions, wars between parliamentarians and royalists and in prescient justification of the authoritarian military rule of Oliver Cromwell. This was a time of anarchy and violence approaching the absolutely negative human condition outside the commonwealth that Hobbes characterized as "solitary, poor, nasty, brutish, and short" owing to a state of unremitting "war of every one against every one."

Hobbes' *Leviathan* is an allusion to the fearsome monster of the state that through power and terror creates and maintains the law and order commonwealth. For Hobbes, the commonwealth of Leviathan – ruled with authoritarian harshness in respect of the civil laws – was the only solution to end the anarchy of arbitrary and unmitigated violence. In Hobbes' view, the authoritarian commonwealth was necessary to bring order to the chaos, to punish the transgressors of the law and to severely limit the hitherto unrestrained freedom of individual action.

As if by implicit social contract, the subjects of Leviathan sacrifice much of their freedom in exchange for physical protection. Leviathan's command of its subjects' loyalty is absolute as long as its subjects continue to enjoy relative peace and security. However, the legitimacy of its absolute authority breaks down entirely once Leviathan ceases to be able to guarantee its subjects' safety of person and property. It is in this respect that Hobbes' *Leviathan* takes on a contemporary relevance in the case of the postwar civil war in Iraq.

This is the situation into which Iraq has been forced by the Bush administration. Postwar Iraq is a country where the autocratic rule of Saddam Hussein – the prewar Leviathan in Iraq – was overthrown. And the vacuum has since been filled, not by a new law and order commonwealth, but by an insurgency and civil war. Despite US nation building efforts, including a period of direct American rule under the Coalition Provisional Authority, no democratic successor to Leviathan has emerged to put an end to the wanton and intensifying violence. The carefully planned and executed military campaign of the Iraq War – infamously celebrated as a "Mission Accomplished" – has given way to an uncontrollably escalating war in a country fractured by the internal divisions of religion, ethnicity, and tribe and by the external interference of foreign insurgents, occupiers and neighbours.

And now, as the US contemplates withdrawing from Iraq, the risk is great that instead of moving forward along the path of political development from authoritarianism to representative democracy, Iraq will move even further backward than under the authoritarian regime of Saddam Hussein. It seems likely that another even more ruthless

Leviathan will assert itself in order to end the wars and restore some livable level of peace and security. In the meantime, the Iraqi quest for democratic self-governance will have to lie semi-dormant in the background.

The moral of this Hobbesian detour is that a democratic evangelist state behaves irresponsibly when it deposes an autocrat, promises nation-building, democracy and free markets and then, unable to deliver quickly and easily, retreats to its home shores, leaving the liberated country worse off than before.

Under these circumstances, the people of Iraq may understandably be tempted, at least for the moment, to look away from the retreating democratic idealism preached by Washington and towards the heavy-handed rule of Leviathan.

The following miscellaneous thoughts were suggested from reading the evolutionary biologist Richard Dawkins' recent contribution to the evolution-intelligent design debate in *The God Delusion* (2006). The author focuses his critique on religion and the 'God' that humans create, but an equally important critique involves looking not so much at what 'God' is but what creates 'God' in the first place.

In *The God Delusion*, science is used to free the deluded from the tyranny of the God of Abraham, i.e., the God of Judaism, Christianity and Islam.

However, the prospect of freedom is not that great, given a pessimistic view that humanity, liberated from religion, will nevertheless end up being enslaved by something or someone else, perhaps even by the liberator.

Dawkins is self-perceived and self-portrayed as an enlightened and optimistic humanist, and this is presented in sharp contrast to the darkly pessimistic master-slave religions and believers of Judaism, Christianity, and Islam. The fundamental controversy raised by Dawkins' anti-proselytizing goes beyond religion and science and comes down to a question of whether man/woman can ever really be free and capable of self-determination without killing his/her neighbours. This is a matter for politics, where right and wrong are less absolute and more in line with the interests of those in power; unlike what either religion or science would lead us to believe.

By avoiding the political dimension, Dawkins ignores his own reflected image of the arrogant liberator who wants to control the thoughts and behaviour of others by means of special knowledge that he mediates for the masses. To his credit, Dawkins is appropriately circumspect enough to demarcate a region of the unnamable, the unknowable, and the infinite, which lies beyond the reach of his rational critique of religion. Nevertheless in exposing the God delusion, he, himself, appears to suffer from the delusion of being an iconoclast of great importance.

However, Dawkins is a timid iconoclast compared with the likes of Nietzsche, the 19th century philosopher genealogist and destroyer

of gods and idols. But even the great iconoclast, Nietzsche, came undone through his own doing.

His undermining of reason, religion, morals, philosophy, law, history, truth, and knowledge is so complete that even his own creations, e.g., Zarathustra, *amor fati*, the will to power, eternal recurrence – rattle on the shelves during stormy weather.

What we can take away from Nietzsche is that it is one thing to bring down the gods, but it is another thing entirely to leave them broken and the shelves empty.

Reading Dawkins evokes the image of the club. In one reading, the club suggests an exclusive membership in a community of like minds, while in another reading, the club suggests a weapon tooled and wielded to inflict conscious-raising pain and ultimately cringing subservience.

After reading *The God Delusion*, it would be quite natural to ask: "What is it to exchange one certainty for another, or to exclude those who disagree or refuse to take sides?" Do we make progress when, through some sort of Hegelian phenomenological *Zeitgeist*, we evolve, however slowly, along a secular incline? Does it matter that we no longer (commonly) torture and kill our opponents but only punish them through social, political, and economic exclusion? Have we just "civilized" our tribal instinct to conquer and to discipline? For those who are neither for nor against, was Dante right when he sent to hell those who refused to take sides, damning them to an eternity chasing a banner, through endless pain, in the vestibule of hell?

Maybe this either/or is too restrictive.

Instead, we may choose simply to be watchful that in liberating today we do not become or support the oppressive lawgivers of tomorrow. This author, the next and so on will proclaim a new "unacceptable" – the irrational, the superstitious, the uneducated, the simple, the primitive, the non-Western, the unscientific, and the spiritual – and we will be expected to conform ourselves and others to the new truth. For us to live otherwise would be to live in open rebellion or in quiet resistance and to look for a community to provide food, shelter, clothes and comfort or to live alone.

Much of the criticism of Abraham's religions is warranted insofar as it targets people who through their lust for power have directly

benefited from their perpetuation of lies and deception. However, take away their religion, and will they be any less harmful?

The problem is not with God so much as with those who create God to legitimize their projection of authority and expectation of unquestioning loyalty. If the problem is not so much with the God club as with the people behind the God club, what's to be done to prevent substitute God clubs?

There is no shortage of ideologies that can be called upon by those who need to rule over others. For those of us who care nothing for rule – assuming such human beings exist – maybe we can turn the tables on our rulers and would-be rulers and force them to battle away like gladiators so that their "religious zeal" can be rendered harmless into entertainment and catharsis for those of us who have grown tired of our masters.

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Hockey speaks to the soul of Canada. It is what Canadians do best, and it is a useful metaphor that captures Canada's recently surfaced territorial assertiveness in the North. Long recognized as the most respected peacekeeper in international affairs, Canada, led by the Conservative government of Stephen Harper, is projecting its anticipated military might to defend Canadian energy claims in the Arctic. The timing of the Canadian announcement coincides with Russia's high profile midsummer flag-planting expedition, in which Russia staked its claim to a vastly expanded economic zone in the Arctic under international maritime law. Not surprisingly, that law, the 1982 United Nations Convention on the Law of the Sea, which defines international property rights to the Arctic seabed and its mineral and fossil fuel resources, has been ratified by all of the Arctic players except the US.

Canadians are widely regarded as a peaceful people, especially in contrast to their neighbors to the south. And they are . . . until they find the right leader. And Stephen Harper is the right leader, even though he heads a minority government in a country that seems to have been demoted to a minority role in world affairs. Despite their reputation as peace-brokers and peacekeepers, Canadians are not, on principle, averse to war. As long as there is sufficient Canadian content, local support will follow. It was there in both world wars, in Korea, in Kosovo and in Iraq (the first time). But Canada was absent from Vietnam. That was an American war.

The current setting and backdrop is perfect for a Canadian war, or at least a step to the brink, in defense of its great white north. The Russian ex-communists cannot be trusted. The Scandinavians are pushovers, and the first to push them will be Russia. The Americans will not dare cross the 49th parallel for Canada's oil whether it is in Alberta's tar sands or in the Arctic seabed. This is not the Persian Gulf, and the whole edifice of the NATO alliance would fall to pieces if the Americans tried. Besides, like it or not, the Americans will watch Canada's back where Russia is concerned.

Since the Conservative government commands fewer than half of the seats of Parliament, on any major piece of legislation, the

Liberals, New Democrats and Bloc Quebecois can vote together to bring down the government and force new parliamentary elections. However, the Liberals, the most likely party to replace the Conservatives, have been unwilling so far to challenge the government for fear that the next election might give the Conservatives an even stronger position, perhaps even a majority government. So, the Conservatives govern Canada, and true to form, they govern Canada according their party's values, which include a stronger military and a more forceful projection of Canadian power overseas.

Having turned out the corrupt Liberals who, between 1993-2004, seemed to have established de facto one-party rule over regional and otherwise marginalized parties at the federal level, the Conservatives now seem to be reaching back to capture the glory and power of Canada's past, particularly its wartime past in the two world wars. In the early 21st century, the Canadian military is convalescing after a humiliating recent history of ageing and inadequate equipment and insufficient troops. Canada's resurgence in global affairs is being mapped to maintain its seat at the G-8 table of Western industrial and nuclear powers and to offset the rapidly growing economic power of China and India.

Canada's Liberal government chose not to join the American-British invasion of Iraq in 2003, and by the time the Conservatives came to power in 2006, the prospects of joining the Anglo-American coalition and coming out on the winning side were growing dimmer by the day. So Canada stayed out of Iraq. Canada had, however, joined the broader NATO effort to overthrow the Taliban regime in Afghanistan and continues to stand by that mission, although for how much longer is unknown, as rising body counts and anti-war feelings raise the political stakes. There is a tragic irony in Canada's Afghanistan mission. For the second consecutive century, Canadians will have fought a war memorialized by the red poppy – one the relatively innocent corn poppy of Belgium's Flanders Fields and the other the insidious red opium poppy of Afghanistan's Helmand Province.

Canada's early military posturing over its Arctic energy claims may seem hard to square with its opposition to the Anglo-American resource war in the Persian Gulf. Insofar as there is an obvious

linkage between military force and economic security, Canada's opposition to the US-UK approach to Gulf oil will be somewhat undercut. There remains, of course, the substantial difference that Canada does not represent an invasion threat to any of its Arctic neighbours nor would it be even if the Arctic oil rush came to some sort of a shooting war across the bows of the great ice-breakers.

Since Canadians are well-informed and critical citizens, they will need to be convinced that this is, or could become, a Canadian war. If it is seen as a cover for the Americans or for the American oil companies, it will not work. It will need to be sold as "not your average war," not like a typical American war of political and economic aggression, as Noam Chomsky might put it. Canadians can go along with the freedom, liberty and democracy line. That is, after all, what makes the poppies bloom on Remembrance Day. But in the Arctic, there is nobody to liberate, so that argument will not work. Canadians will need a straight pitch – Canada must militarily defend its Arctic borders and zones of economic influence for the sake of an affordable and secure source of energy well into the 21st century. Even though Canadians have been hit with a huge price spike on gasoline since the US-UK coalition invaded Iraq, they believe that if Canada or Canadian firms are in control, there will be less volatility and price-gouging in energy markets.

The fortuitous irony in Canada's abstention from the 2003 Iraq War is that the Anglo-American invasion and the ensuing chaos created so much uncertainty in global energy markets that a premium – call it the Iraq War surtax – was added to offset the political and economic instability. This surtax has raised energy prices and profits so much that it has promoted the economic feasibility of oil exploration and production in Canada's Alberta tar sands and in the Arctic Ocean seabed. For green people, the irony of global warming and Arctic oil drilling has mixed benefits. The consensual shift away from the view that climate change is just a liberal conspiracy hoax is now partnered with the emerging view that climate change presents a real business opportunity to be exploited with a large state aid component.

Canada's recently announced preparations for an Arctic military defense – between 6 and 8 new naval ice-breakers, a deepwater port and an army training base in the Arctic – was advanced by the Tories

during the 2005-2006 parliamentary election campaign. While the Russians have opened with the Lomonosov gambit, Canada needs a different game – one it can win. The Canadian Arctic defense game plan will be marketed most effectively as a Canadian national effort, along the lines of a Team Canada bid for the Olympic gold medal in hockey. Economic nationalism is emerging around the world as a powerful counterweight to global economic integration (globalization), and now it is Canada's turn to assert its economic sovereignty. Economic nationalism in the US blocked Chinese ownership of Unocal and Dubai ownership of port facilities on the eastern seaboard of the US. It has figured prominently in the European Union's energy mergers, especially in France with the government endorsing the all-French Gaz de France-Suez merger over an Italian utility's bid for Suez and also in Spain with the government's emergency antitrust legislation blocking a German takeover of Endesa. Economic nationalism is what Canadian philosopher His Excellency John Ralston Saul has predicted will lead to the collapse of globalization, as national loyalties forge government and corporate partnerships that resist and eventually overwhelm the nationality-neutral forces of globalization, country by country.

On September 17th, the Court of First Instance (CFI), the European Union's second highest court, issued its long-awaited judgment in the case of *Microsoft v. Commission*. Microsoft initiated its appeal in June 2004 in response to a European Commission finding that it (Microsoft) had abused its dominant market position in violation of EU antitrust law.

Specifically, the Commission charged Microsoft with causing anticompetitive harm by using its *de facto* standard operating system, Windows, to extend market control over application software by denying competing software makers the access rights needed to develop their own competitive Windows-compliant applications.

Fundamentally, the issue came down to conflicting antitrust views. The *Microsoft* case already appears to be one of those dramatic, polarizing cases in recent trans-Atlantic antitrust, comparable to the 2001 GE/Honeywell merger that the Europeans blocked. One important difference between the two cases is that in the GE/Honeywell merger case, the EU acted to preempt probable antitrust violation, while in the *Microsoft* case, the EU responded to alleged antitrust violations. Aside from that, the reactions on either side of the Atlantic appear unchanged.

On the European side is the antitrust belief, which parallels a once-prominent American school of antitrust thought, that competition policy should prevent/roll back market dominance (whether monopolistic or collusive) in order to safeguard competition, which will, in turn, promote price and quality benefits for consumers.

On the American side is the contemporary mainstream belief that competition is the means to the ends of sustainable economic growth and dynamic innovation. Market dominance is relatively benign as long as consumers benefit from lower prices and unlimited product development. Nineteenth century trust busting is obsolete in the 21st century where globalization dictates that competitive success requires economies of scale and the momentum of technological progress ensures that market dominance is transitory.

Beneath the surface of ideas, the US and the EU may not be so far apart. There is an economic nationalist undercurrent that

globalization occasionally hides from view. It is there in French and Spanish economic nationalism demonstrated by government interventions in the high-profile Suez and Endesa energy mergers. It is there in the EU's energy market reforms intended to replace highly concentrated national energy markets with a competitive single EU energy market, meanwhile safeguarding EU energy producers and distributors from the predatory acquisitions of foreign energy giants like Russia's Gazprom. It is there in America's proclamation of economic sovereignty by reason of national security over its oil companies (v. Chinese National Offshore Oil Corporation), its port facilities (v. Dubai Ports) and its foreign oil supplies (v. Iraq and possibly Iran).

The antitrust battle between the EU and Microsoft is not over yet. It took three years to get the latest court verdict affirming the Commission's decision against Microsoft in 2004, and a final appeal to the European Court of Justice has not been ruled out. It is important to note that uniformity of views across institutions cannot be guaranteed on either side of the Atlantic. In the US in 2000, it looked as though a federal district court was about to force Microsoft to break up into two separate companies – one developing operating system platforms and the other developing applications to run on those platforms. But that changed dramatically with an appeals court reversal and a new Justice Department.

The CFI has not been afraid of challenging the Commission's decisions in the past. In 2002 – a particularly bad year for the Commission – the Court annulled three separate Commission merger prohibitions and most recently the Court ruled that parties in the once-prohibited Schneider/Legrand merger case can sue the Commission for damages caused by a wrongful decision.

The Commission itself was apparently of a different mind in 2004 when it approved the Sony/BMG merger (four years after opposing the EMI/Warner merger) and the Sanofi-Synthélabo/Aventis pharmaceutical merger. Although neither the music recording industry nor the pharmaceutical industry are controlled by a monopoly firm, market concentration is high and anti-competitive collusion would seem to be more likely in markets characterized by a few very large firms.

On the Western shores of the North Atlantic, Americans do not always side with the 'national champion.' Some fear that that market dominance produces adverse effects, not all of which are economic. For example, consolidation in the telecommunications sector – the law of small numbers – makes it easier for a government that uses surveillance on its citizens to do so. This would not be the position of the Bush administration or the boards and management teams of AT&T or Verizon, and unfortunately any evidence of a *quid pro quo* will probably be suppressed by the blanket of 'state secrecy.'

At three different levels there seem to be competing views about competition policy. At one level, there is the European view, a structuralist view that is suspicious of business combinations, and the American view, a view that looks to the long run for non-human market forces to maintain a dynamic and optimal equilibrium. At a second level, national interests on both sides of the North Atlantic demand that economic power not be competitively allocated to foreigners, particularly where sovereignty is at stake. And at the third level, the government and the courts do not always conform to the same antitrust views. Nevertheless, while courts may break ranks with the government from time to time, formal judicial independence is no guarantee of substantive independence as the judicial appointment process demonstrates.

In 2002 Professor Joseph Stiglitz wrote *Globalization and Its Discontents*, providing a lay audience with an insiders' analysis of globalization just as protests in Seattle, Prague and Genoa were stimulating a broader interest in international economics among the citizens of the rich countries in North America and Europe. Stiglitz brings to the debate the academic credentials of a Nobel Prize laureate in Economics as well as the policymakers' credentials of chair of President Clinton's Council of Economic Advisors and chief economist with the World Bank during the late 1990s. The purpose of Stiglitz's book is to critique the current form of globalization and then to identify why and how it should be changed.

In the opening chapter, The Promise of Global Institutions, Stiglitz traces the International Monetary Fund (IMF) and the World Bank back to their roots in late World War II. In 1944 at the famous conference in Bretton Woods, New Hampshire, the Allies laid out their plans for a new international economic world order to prevent the recurrence of a globally-devastating depression. Adhering to a new post-Depression Keynesian philosophy, the architects of the new system created the IMF to maintain economic stability by helping countries avert crises and the World Bank to induce economic development in poor countries through targeted loans and grants. Stiglitz mentions the World Trade Organization, created in 1994, with its roots in the Bretton Woods-era General Agreement on Tariffs and Trade, but despite its high public profile in Seattle, he concentrates his critique on the IMF and the World Bank, with the IMF being the more frequent target, in large part owing to the greater difficulty of its mandate (Stiglitz 11).

Stiglitz's critique uses the momentum of the anti-globalization protests and draws on the salient failures of international economics in the post-Cold War – increasing poverty, starvation and treatable disease, the East Asian financial crisis and the political and economic instability of capitalist shock therapy on post-communist countries (Stiglitz 5-6). The key issues identified by Stiglitz, broadly stated, concern income/wealth distribution (have versus have-nots),

economic stability (preventing/mitigating financial crises and recessions), political representation at the international level (removing the unilateral veto of the U.S. in the IMF and the World Bank), and global governance (instead of market self-regulation).

While critical of actually existing globalization, Stiglitz does not propose withdrawing from further economic integration, because, he maintains, the potential benefits to the currently politically and economically disenfranchised are too great (Stiglitz 20). The task, then, is to reform the system so that its failures and shortcomings are remedied, and towards that end, Stiglitz advances a Keynesian view of political economy (Stiglitz 249-50). According to this view, globalization, like capitalism, if properly managed by political institutions, is not inherently harmful (Stiglitz 21-22).

The summary chapter, The Way Ahead, opens with a brief summary of the shortcomings of globalization (Stiglitz 214) and proceeds to describe the alternatives – abandon globalization or reform it. The status quo is assumed to be unviable. Reform is clearly what Stiglitz has in mind, as the problem is with how globalization has happened rather than that globalization has happened.

There are two types of change for Stiglitz, and one seems to lead to the other. The first is a change in view. The present Washington Consensus, which places a premium on *laissez-faire* economic policy, must be replaced by a Keynesian perspective, which recognizes that markets do sometimes fail and that governments should sometimes intervene (Stiglitz 16). As during the Great Depression, Stiglitz notes, the market is not always self-correcting in a reasonable time frame, and so public institutions must make up for the system failure during times of persistent and high unemployment (Stiglitz 249).

Stiglitz proposes that the same mixed capitalism that the U.S. has had since the Great Depression should be something that global institutions should work towards extending to developing countries (Stiglitz 240). The reforms that Stiglitz enumerates in his summary are targeted at regulation, safety nets, and the redistribution of political power (Stiglitz 226, 236-39). Financial institutions and money flows should be better regulated to prevent large firms and market forces from overwhelming relative small and vulnerable economies.

Fiscal stabilizers (e.g., unemployment insurance) should be promoted to protect workers negatively impacted by globalization. The IMF and the World Bank should be restructured so that voting rights are not disproportionately biased towards rich countries.

Stiglitz argues that when conservative Economics (*laissez-faire*, Washington Consensus) is exposed as ideological and critiqued as political instead of scientific, then the reforms that he advocates seem less far-fetched for an economist (Stiglitz 220-21). Much like Keynes, Stiglitz makes the case for international, political and economic reforms that will maintain capitalism by making it more sustainable and equitable. Economic power can be shared without committing to socialism, and political power can be shared across national borders without compromising sovereignty.

The reader will recognize that the problem for Stiglitz (as for Keynes) is how to convince the people or countries who presently enjoy disproportionate economic or political power to give up a share of their influence. Would the U.S. give up voting rights at the IMF or the World Bank if it meant that domestic bankers, producers, or workers would be a little more vulnerable to decisions south of the Equator? Would a plant manager or a regional vice-president voluntarily, i.e., independent of corporate fiat, raise wages and benefits or allow a union? Would an ordinary employee, if facing corporate downsizing, vote for the free trade candidate or the protectionist candidate?

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On May 1, 2004, the European Union added 10 new member states – eight (Poland, Slovakia, Czech Republic, Slovenia, Hungary, Latvia, Lithuania, Estonia) from the former Soviet Union and Warsaw Pact and two (Malta and Cyprus) from the eastern Mediterranean. With the accession of the AC-10, the former six-member European Coal and Steel Community expanded from 15 member countries to 25, increasing population by 20 percent and Gross Domestic Product (GDP) by 5 percent. As an economic bloc, the EU's US dollar share of global GDP grew to 28 percent, still below the 32 percent share of the US, but nearly two-and-a-half times the size of Japan (ECB 50)

The European Central Bank (ECB), one of the most important and consistent supporters of a strong, central government at the EU level, sums up the rationale behind the economic integration of the EU into a single market as one characterized by the free movement of goods, services, capital and labour, facilitating greater economies of scale and more profitable allocation of products, capital and labour, resulting in lower costs of production and greater global competitiveness and in lower prices and higher consumer and in increased economic growth, incomes and standard of living (ECB, 55).

On January 21, 2008, the International Monetary Fund (IMF), in its role as international economic advisor to nation-states, issued a preliminary set of conclusions from its Article IV consultations with Poland. The IMF team praises Poland's economic performance, observing that its macroeconomic indicators are moving in the right direction (IMF).

Data from Eurostat, the EU's economics and statistics agency, reveal that Poland is doing comparatively better than Hungary and the Czech Republic, the second and third largest economies that joined the EU in 2004. Poland is also converging on the euro area average – the euro area being the relevant benchmark for Poland as it moves towards meeting the strict fiscal criteria required of EU countries that use the euro as common currency and submit to the monetary policy of the Frankfurt-based ECB.

The tables in Appendix A show that Poland's real GDP growth has been double that of the euro area for each of the past four years. While unemployment is still nearly in double-digits, it has declined by nearly 50 percent since accession. Poland's inflation rate has fluctuated around two percent, and most recently is slightly above the euro area average but is still below the inflation rates of the Czech Republic and Hungary. Since 2004 the Polish zloty has steadily appreciated against the U.S. dollar and the euro, reflecting a more sound macroeconomic position in Poland and making imports more affordable although making exports less competitive to dollar- and euro-based markets.

The IMF report takes it as a given that Poland will be moving towards the euro, an outcome that recent events in Hungary have suggested might face resistance, particularly during an economic downturn. However, the IMF, while acknowledging the likely contractionary impact of the sub-prime mortgage crisis on the Polish economy, expects inflation, rather than recession, to be Poland's greatest economic threat (IMF). The IMF's view is, thus, comparable to the view expressed by the ECB, which is much more inflation-sensitive than the American Fed, which is sensitive to both inflation and unemployment, as required by law.

As Poland moves into its fifth year as a member country of the EU, its transition from the East bloc to the West will be marked by political and economic challenges. The debate over the Lisbon Treaty, the Charter of Fundamental Rights, and Poland's sovereign right to opt out, as in the case of the U.K., is one example of a national discussion that Poles can have because they are now in the EU. The concept of a single market will add to the list of new EU issues, such as whether and to what extent Polish antitrust regulators can protect Polish businesses, formerly state-owned, from foreign buyers, as in the 2006 case of the Unicredit/HVB merger.

Perhaps nowhere will Polish economic sovereignty be more severely tested than in the debate over whether Poland should join the 13 EU member states that have adopted the euro, transferred monetary policy to Frankfurt, and complied with the Stability and Growth Pact's (SGP) deficit and debt constraints. Poland is unlikely to have

enough clout to gain exemptions from the 3 percent deficit/GDP and 60 percent debt/GDP ceilings of the SGP, unlike Germany and France, both founding members and dominant members of the EU, when faced with persistently high unemployment in recent years.

Appendix A
Economic Data Tables

Table 1

Real GDP Growth Rate				
	2004	2005	2006	2007
Euro area	2.1	1.6	2.7	2.6
Czech Rep	4.5	6.4	6.4	5.8
Hungary	4.8	4.1	3.9	1.3
Poland	5.3	3.6	6.2	6.5

Source: Eurostat

Table 2

Unemployment Rate				
	2004	2005	2006	2007
Euro area	8.8	8.9	8.3	7.4
Czech Rep	8.3	7.9	7.1	5.3
Hungary	6.1	7.2	7.5	7.4
Poland	19.0	17.7	13.8	9.6

Source: Eurostat

Table 3

Inflation Rate				
	2004	2005	2006	2007
Euro area	2.1	2.2	2.2	2.1
Czech Rep	2.6	1.6	2.1	3.0
Hungary	6.8	3.5	4.0	7.9
Poland	3.6	2.2	1.3	2.6

Source: Eurostat

Table 4

Exchange Rate (Zloty: USD/EUR)				
	2004	2005	2006	2007
USD	3.6540	3.2348	3.1025	2.7667
EUR	4.5340	4.0254	3.8951	3.7829

Source: Bank of Poland

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Thailand is a Southeast Asian nation of more than 65 million people, predominantly Buddhist in religion and Thai in ethnicity, although there is a large Chinese minority (Columbia). Unlike its neighbors to the east in Indochina and to the west in India and Bangladesh, Thailand does not have a European colonial legacy, nor does it have the attendant history of a violent independence struggle. It has, however, been a stout U.S. ally during the Cold War in general and the Vietnam War in particular.

Since 1932, Thailand has been officially a constitutional monarchy, but the stability of the monarchy with the king as the head of state has not protected Thailand from the political instability of 17 coups, the most recent being the military coup of 2006 that ousted prime minister Thaksin Shinawatra (Columbia). Prior to this latest coup, Thailand had not experienced a coup since 1991, a fact that added to its image as a rapidly advancing democracy as well as a rapidly developing economy. The generals have since relinquished power after a general election in December 2007 returned a civilian government. Embedded in the struggle between military and civilian rulers is the ongoing struggle between Thailand's elites and a large population of urban and rural poor, which may intensify as soaring global food prices add pressure to the populist agenda.

The International Monetary Fund (IMF) along with its Washington D.C. neighbor, the World Bank, are the two principal Bretton Woods institutions that were created by the World War II Allies in 1944 to manage international economic stability and economic development. The roots of the IMF and the World Bank lay in the Great Depression from a decade earlier and from the Keynesian economic prescription of state intervention to prevent and counteract market instability. The connection between economics and politics was clear. Strong, stable economies are less susceptible to dangerous political ideologies (Communism and Fascism) and more likely to develop strong democratic traditions, which in turn facilitate positive economic outcomes such as growth, development, and trade.

The IMF is more than a lender of last resort. It also acts as an economic advisor to nation-states through its Article IV consultations. The IMF even advises the U.S., although the U.S. is under no obligation to listen to the advice of this international institution. The intention of the bilateral economic consultations is basically to ensure that subsidized lending is used for legitimate economic goals, which is where controversy often arises. Borrowing countries have their own political constituencies, which introduce a set of economic goals that are not always in sync with the IMF's conditions. High unemployment following the 1997 East Asian crisis motivated the affected countries to intervene and lessen the impact of the financial crisis. However, in the IMF's view, high unemployment was sometimes a necessary and temporary by-product of high interest rates and budget deficit reduction needed to restore sound principles of fiscal management.

The Thai economy is in transition towards becoming an industrialized economy. However, at present, it is what is sometimes referred to as emerging industrialized country or a second-tier newly-industrializing economy behind the first tier countries of Hong Kong, Korea, Singapore, and Taiwan. Agriculture remains vital to the Thai economy and to a large number of Thais who live in rural areas. Rice is the principal agricultural commodity, an important staple in the Thai diet, and a substantial export commodity, whose global price can fluctuate dramatically. For example, the current global price for rice is at post-World War II record levels, which benefits Thai exports, given a relatively inflexible demand for this commodity, and thereby adds value to the Thai baht. Conversely, when commodity prices collapse, then export earnings will fall, the currency will depreciate under Thailand's post-crisis flexible exchange rate regime, farmers' incomes will decline, and financial crisis may threaten. One of the IMF's early programs was designed to give countries a cushion against volatile commodity prices, especially in those countries that were most vulnerable to price fluctuations due to lack of economic diversity and development. In theory as Thailand develops its industrial potential to the point where agricultural products comprise a shrinking portion of overall Gross Domestic Product as well as export

earnings, it will be better able to manage its own economic stability in a global economy.

Thailand's relationship with the IMF reached a climax in 1997 when the Thai baht collapsed and foreign capital that had been flowing into the economy reversed course and began flowing out of the country, undermining the currency, the stock market and the general level of economy activity. Following the East Asian crisis that swept through Thailand, the economy contracted by more than 10 percent in 1998 (IMF 2000), marking "a dramatic end to the forty-year 'development' era during which the Thai economy had averaged 7 per cent growth and never fallen below 4 per cent" (Baker 254). In a classic case of financial panic spreading like contagion from country to country, the Thai crisis spread on to the Philippines, Indonesia, Malaysia and Korea as investors panicked and international capital withdrew. The collapse of the Thai baht in the summer of 1997 led to "the beginning of the greatest economic crisis since the Great Depression—one that would spread from Asia to Russia and Latin America and threaten the entire world" (Stiglitz 89).

The IMF helped raise a loan in the amount of $17.2 billion, mostly from Thailand's Asian neighbors. As part of the bail-out the IMF imposed conditions on the government of Thailand, which included fiscal austerity measures, such as higher taxes and higher interest rates designed to cover government deficits and to retain foreign investment, respectively. The IMF also insisted on Thailand's departure from fixed exchange rate system to a flexible exchange rate system, so that constant foreign exchange rate interventions by the Thai Bank would not be necessary. By the middle of 1998, the IMF had abandoned its austerity program for Thailand, and Thailand set about introducing Keynesian countercyclical policy to redress output, income, and unemployment shortfalls (Baker, 254-255).

Due to improving economic circumstances, Thailand announced in 1999 that it would not draw on the full amount of the IMF loan package, and a year later the IMF's stand-by arrangement for Thailand expired (IMF 2000). The IMF's 2006 Article IV consultations with Thailand report that inflation-adjusted GDP growth rate has averaged above 5.5 percent for each of the years from 2002 – 2006,

with no growth rate falling below 4.5 percent. As of the IMF's latest summarized Article IV consultation, Thailand appears to be so successful on all fronts that the IMF has taken the uncommon step of urging Thailand to cut interest rates in order to stimulate demand and maintain strong economic growth and economic stability (IMF 2007).

With the East Asian crisis in the background, the IMF has returned to its role of international economic advisor, emphasizing macroeconomic stability, fiscal conservatism, low inflation, free movement of capital, and privatization. These are the essentially the same themes that the IMF articulated nearly a decade earlier at the close of the crisis – inflation-sensitive monetary policy, financial sector restructuring, accountable and market-oriented governance, and prudent fiscal policy (IMF 1998).

The IMF's fundamental mission remains intact, although it has struggled against its critics some of whom feel that it failed and then abandoned its clients during the East Asian crisis – failed to provide sufficient early warning of the crisis and its contagion effect and abandoned to impose harsh macroeconomic discipline on their citizens. Other critics prefer to point to the moral hazard defect of the IMF's bail-out provisions, noting that speculative investors and irresponsible government officials who tend to be important contributing factors leading to crises are often the ones who get the best part of the bail-outs. The principle is not different from the one said have protected Bear Stearns investors when the Fed helped J.P. Morgan design an acquisition strategy for the sub-prime mortgage compromised investment bank.

The IMF soon after the East Asian crisis took to defending its relevance and its performance. It maintains the importance of providing international economic advice to member countries, alerting them to internal as well as external economic threats and advising them on macroeconomic policy issues. In the Bretton Woods tradition, the IMF represents itself as the most viable international institution to facilitate international economic stability through a combination of expert advice and financial assistance. Not only does the IMF serve as an emergency fundraiser during financial crises, but it also has a lot of influence with global investors and other

governments who have fairly high regard for IMF assessments when it comes to placing their money in foreign countries.

Poverty in Thailand is reported to have decreased from 21 percent in 2000 to less than 10 percent, or approximately 6 million people, in 2006 (World Bank 16), and unemployment has been reported to be under 2 percent during each of the past two years (World Bank 55). These are important macroeconomic indicators, but not often cited in IMF reports. As mentioned earlier the economic conditions that these indicators point to can have an important effect on a government's ability to implement an IMF loan program. Right now, Thailand's economy is performing well. The political system appears to be back on track with a new, democratically-elected civilian government. There seems to be no need for IMF financial support, which means that Thailand can be more selective in the economic advice it decides to act upon.

Going forward, there is reason to believe that Thailand will continue to rely upon the IMF to provide expert macroeconomic and international economic advice, to give foreign investors confidence in Thailand, and to stand by as a lender of last resort in the event that another crisis shocks the Thai economy. The 2004 tsunami that devastated much of the Eastern Indian Ocean, including Thailand, was apparently not such an economic shock notwithstanding its shocking human toll in dead and missing. So, Thailand did not need the IMF after the tsunami.

Another relevant development coming out of the East Asian crisis was the emergence of the Asian Development Bank as a potential rival to the IMF. The IMF managed the bail-out in 1997, but the Asian Development was operating in the background, which suggests that it may have role in future Asian crises. Nevertheless, Thailand does rely heavily on foreign investment, and so far the IMF is one of the most credible references for a country seeking foreign investment. Therefore, Thailand does continue to have a stake in a positive relationship with the IMF, even though the dependency relationship may not be as strong in the age of global economic integration and increasing economic and financial power of East Asia.

In conclusion the relative size of the Thai economy (about 5 percent of the U.S. economy), its transitional status to an industrialized country, its reliance on international trade, and its political oscillations between military and democratically-elected governments are vulnerabilities, which Thailand can mitigate by using the IMF as a lender of last resort, an economics advisor and a credit rating institution.

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By 1967 U.S. military escalation in Vietnam was in its third year. America was at war with North Vietnam and its Viet Cong allies in the south. The U.S. government maintained that it was a war to contain the spread of communism throughout Southeast Asia. The communist regime in North Vietnam countered that having defeated the Japanese and the French, it was now fighting a war of independence against the U.S. Forty years later in 2008, on the other side of the Asian continent, America has been at war in Iraq for five years. Initially the U.S. military invaded Iraq to eliminate weapons of mass destruction, but over time the more credible rationale has alternated between democratizing the Arab world and fighting anti-American terrorists. While the U.S. military deposed its one-time ally, Saddam Hussein, ending decades of authoritarian rule, the postwar nation-building never happened. Instead Iraq has descended into civil war where the U.S. military tries to provide basic civilian security against Sunni insurgents, rival Shia militias and al Qaeda terrorists. For the people of Iraq, America's military intervention has traded tyranny for civil war, and the civil war has diminished the immediate need for political rights and economic freedoms.

In "Beyond Vietnam" King spoke about how and why the U.S. should get out of Vietnam. King believed that the time had come to end the silence, to dissent from U.S. government policy and to criticize the hypocrisy of war. "Beyond" was a reference not just to "what comes after" but also to the issue of re-evaluating America's priorities. U.S. foreign policy in Vietnam was a moral failure. The war diverted attention and resources away from America's domestic problems of poverty and civil rights. The war exposed the hypocrisy of a sovereign, democratic and free nation opposed to self-determination overseas that is not aligned with U.S. interests. More fundamentally the war revealed how a nation with Christian values and beliefs could be manipulated into supporting a foreign war and the destruction of a foreign land and people (both foreign and American).

Among the reasons why King felt so strongly about the failure of U.S. foreign policy in Vietnam were the extraordinary contradictions of domestic poverty policy giving way to the financing of massive bombing campaigns against a Third World country and former colony seeking independence from the West. There was also the irony of an army comprised of draftees, told they were fighting for democracy in Indochina but aware that America was still racially and economically divided and that inalienable civil rights were not available to all U.S. citizens. Then there was the contradiction between King's nonviolence platform and the U.S. government's foreign policy in Vietnam, which raised the question why American civil rights protestors had to avoid violence in their quest for change, when their own government used guns, bombs and chemical weapons to bring about change in Vietnam. King believed that in a nation where the pervasiveness of Christianity has spread the view that God does not value human beings for their nationality or their ideology, that nation should not be so quick to use deadly force on such a massive scale.

King's speech supports the contemporary argument that the Iraq War and the Vietnam War have much in common. Many of King's points remain valid, but it is important to keep in mind that King was not making geopolitical statements. He was talking about the need to align public foreign policy with individual morality. The similarities between Vietnam and Iraq would include the following. First, American society continues to be plagued by the desperation of poverty and by the polarization between haves and have-nots. America in 2008, just like America in 1967, has obligations at home, which are only evaded by foreign wars like Vietnam and Iraq. Second, America is losing its place in the world as the standard-bearer of democratic rights and freedoms as its government bypasses international institutions that it helped create in order to go to war, lies about the reasons for going to war, and denies civil rights, at home and at Guantanamo Bay, in its prosecution of the larger war on terror. Third, U.S. foreign policy in Iraq is the policy of a powerful military machine supported by the world's dominant economy. It is not, therefore, likely to reflect simple humanitarian values that King preached. That King's views are still relevant is disconcerting in the sense that forty years later not much has changed.

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Antitrust economics is the academic discipline concerned with the economic analysis of government antitrust regulation. Like energy economics, labour economics and trade economics, it falls in the category of microeconomics rather than macroeconomics, since its focus is on individual industries and firms and not aggregate national statistics. Also, like other microeconomic disciplines, antitrust economics presupposes a capitalist system, albeit with modifications.

Antitrust law is part of the state side of the modern system of mixed capitalism, under which economic functions are divided between the state and the market in an arrangement somewhere between *laissez-faire* capitalism and socialist central planning. Since the late 19th century, the state has developed its antitrust regulatory authority in order to protect markets from the economic domination of monopolies and cartels. Historically, anti-competitive markets have been regarded with suspicion due to the belief that concentrated market power tends to produce higher prices, lower quality and choice, less innovation, inefficient resource use, and inadequate long-run growth. The underlying assumption is that in markets dominated by one or a few large firms, pricing and production decisions can and often do extort profits and undermine competition. The huge industrial trusts that developed during the American Industrial Revolution following the Civil War and were the original targets of the Sherman Antitrust Act were considered to be aberrant manifestations of *laissez-faire* capitalism. The trusts provided evidence that American capitalism needed to be repaired but not destroyed, and antitrust law was intended to prohibit and remedy the excesses of monopoly power.

Under contemporary forms of capitalism, the simple free market system has been modified so that the state can intervene in markets where competition appears to be threatened. Only the state has both the authority to check the power of the monopolist and the civic responsibility to promote competitive markets. Antitrust regulation generally breaks down into two components: merger control, which is preventive, and antitrust, which is remedial. In the U.S. the term 'antitrust,' is a reference to the 19th century conglomerates or trusts

that were targeted by America's first antitrust laws, and it refers to the regulation of potentially harmful anti-competitive behaviour and of actually harmful anti-competitive behaviour. In the European Union, a relative newcomer to the field of antitrust regulation, 'competition policy' is the term used to refer to merger control, antitrust, and state aid or protectionist policies such as subsidies.

There are two principal schools of thought in the antitrust literature and in its practice. The older structuralist view emphasizes the political economy of antitrust based on the economic and political effects of market power. According to the structuralist view, market power is a potential threat to competition, and potential threats must be eliminated before actual harm has been produced. The newer Chicago School emphasizes economic efficiencies and the price and profit benefits to consumers and investors, respectively. Its bias is in favour of market power because of the economies of scale that can be realized. In addition, the Chicago School is more generous in giving the benefit of the doubt to potentially harmful mergers, preferring to engage antitrust litigation after anti-competitive harm has been demonstrated.

These schools influence the way we look at the economic world. However, it is not completely clear which comes first – our antitrust view or economic reality. In fact it doesn't really matter, because neither the Structuralist nor the Chicago School is scientific in the sense that it is a value-neutral and non-interfering observer. Each view creates and justifies economic conditions, both of which are political. Structuralists would not dispute the political nature of their antitrust agenda, but Chicago School followers probably would. Structuralism has its roots in populism, and the Chicago School is based in corporate head offices. The former is unmistakably political, while the latter is political behind an academic façade. The Chicago School of antitrust marks a return to natural capitalism, meaning less government interference and regulation and greater market self-determination.

For the last couple of decades, the Chicago School has been in the ascendancy and the prospects remain good for that to continue. One of the reasons is that the Chicago School is more compatible

with globalization. Structuralism is better suited to an economy where competition comes mainly from within, but America's economic history has taken it well beyond the late 19th century. A turn to protectionism could influence a shift in antitrust views, but for the global present, economies of scale within national borders are politically acceptable especially when the alternative presented is a huge foreign multinational company.

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You don't really care about all that academic stuff. You just want a good price. You don't care if that means buying from a retailer whose suppliers use cheap labour from the *sans collet* in North America or overseas. As an undocumented or temporary worker, you can't afford socially conscious shopping. I sympathize, because if I could figure out how to make a living opposing labour exploitation, then maybe I would boycott these retail giants and their supply chains. But it's also possible that I'd become just another vanguardist in search of a following….

Should we really care that the Baby Bells are merging back into the telecommunications monopoly that was split up nearly 25 years ago? Maybe, but I don't know what more the new giant AT&T can do to you. You can likely never find a pay phone, and I imagine that not too many people would let you use their cell phones. So, you really need to have your own cell phone – a disposable phone or a prepaid plan – for emergencies.

You've probably heard that the new AT&T will be even more dangerous to your civil liberties than the government and that it may even undermine American democracy. It's plausible that if AT&T were to monopolize telecommunications there would be more widespread secret and illegal intelligence gathering. But that's not likely to affect you, because you don't have a phone or even a cell phone or a computer not to mention a computer with high speed Internet access. So, your civil rights are safe. As for the argument that AT&T may subvert American democracy, you probably don't need to care about that either, since there won't be a noticeable difference. Your America will not be predictably worse than it is now. There'll still be

a Vietnam or an Iraq; the rich will get richer and the poor poorer and barriers, fences, and walls will enforce segregation; identity papers will be mandatory and checks frequent; and federally-supervised communities for the rehabilitation of debtors will be introduced.

Should we be afraid of the oil companies, too? They're consolidating behind national borders reversing the 1911 break-up of Standard Oil. Their political influence extends beyond domestic energy policy to foreign policy. Were they behind the Iraq War? Are they behind the latest energy crisis? Will the American oil companies' rivalry with the Chinese one day lead to a Sino-American war?

Should we be afraid of the banks and other financial institutions that buy and sell re-packaged mortgages and other debts to anyone willing to gamble on a higher return? Will they have to be bailed out like Bear Stearns to avoid a general bank panic? Are we, as Eric Janszen believes, beyond the business cycle and into a new cycle of asset bubbles and asset collapses – the Internet boom and bust, followed by the sub-prime mortgage securitization boom and bust, followed by the …. Do you have to believe in conspiracies to believe that big companies need to be constrained and not enabled by antitrust regulation?

It depends.

Conspiracy sometimes connotes paranoia and dissatisfaction. If you're unhappy as a customer, employee or citizen with the way things are, then conspiracy theorizing may be appealing. Large companies in concentrated industries with complicated vertical supply chains and with foreign and domestic policy clout – there's a *prima facie* case of conspiracy but that's not enough to win even if you can find a sympathetic court to hear the case. You'll need evidence, and that will be hard to come by with whistleblowers in short supply, judges reluctant to take on large companies the way Judge Jackson did with Microsoft, and courts more favourably disposed to the new antitrust economics of scale. The hopelessness of the case and the powerlessness to change things reinforce the belief in conspiracy.

On the other hand, if income, as an investor and/or employee, is tied to the way things are, the concentration of market power will not be as threatening. Prices may climb, but earnings and earned

income will offset losses. ‘Conspiracy’ would not be the word used. ‘Commonsense’ would be used instead. For example, the commonsense approach to antitrust economics recognizes that globalization requires a different perspective on economies of scale and that the war against terrorism requires a different take on public-private sector collaboration. Globalization means that markets are no longer confined within national borders, so a monopoly or cartel in one country would not necessarily be in the same position globally. Preventive and punitive antitrust actions may be deferred, since the domestic monopolist is no longer seen to be the Darwinian capitalist threat to competition but rather the national champion and the provider of jobs, taxes and exports. Moreover, a perpetual war against terrorism means that antitrust will always take a backseat to national security, and the national security defense means that state secrets privilege will hide sensitive public-private sector cooperation.

Is antitrust economics irrelevant in a global economy where the competition between nations is what counts?

It depends.

Will we be able to find everyday low prices at Wal-Mart?