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# Antitrust Reform For Joint Production Ventures

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## ANTITRUST REFORM FOR JOINT PRODUCTION VENTURES<sup>1</sup>

Joel B. Eisen<sup>2</sup>

### I. PICKING “WINNERS AND LOSERS” AND A LESSON FROM “BAMBI”

This January, the U.S. Memories consortium dissolved when it failed to attract a sufficient initial investment. U.S. Memories would have brought together America's largest computer and semiconductor manufacturers, at a start-up cost of approximately \$1 billion, to manufacture 4-megabit dynamic random access memory (DRAM) semiconductor chips with IBM-licensed technology. Some commentators argue that antitrust concerns led to U.S. Memories' demise and could frustrate the rise of additional joint production ventures (JPVs). Should the government intervene and relax the antitrust laws to support JPVs? That was the question posed in hearings before a congressional subcommittee in 1989 on four antitrust reform bills.<sup>3</sup>

In another development last year, millions of Americans saw “Bambi,” released for the first time on videocassettes. For those who missed it, a brief review is in order. In the forest, Bambi blossoms under his mother's care, but loses her to a hunter's rifle. Bambi's powerful father, the king of the forest, takes the young fawn under his tutelage. Bambi grows rapidly into a strong young deer, ready to assume leadership of the forest. As the movie closes,

<sup>1</sup>© 1990 by Joel B. Eisen.

<sup>2</sup>Republican Counsel, Subcommittee on Investigations and Oversight, Committee on Science, Space, and Technology, U.S. House of Representatives. This article would not have been possible without the generous assistance of James Paul, Jim Turner, Christine Wegman, Fran D'Amico, Anne Marie Sweeney, and especially Tamar R. Schwartz, my editor for life. The views represented in this article are my own, and should not be construed as reflecting the views of the House Science, Space, and Technology Committee. I am responsible for any errors of fact and omissions or misstatements.

<sup>3</sup>*Pending Antitrust Legislation on Production Joint Ventures: Hearings Before the Subcommittee on Economic and Commercial Law of the House Committee on the Judiciary*, 101st Cong., 1st Sess. (1989) [hereinafter, respectively, *May 17 Judiciary Hearing*, *July 26 Judiciary Hearing*, and *Sept. 28 Judiciary Hearing*] (unpublished testimony on file with the author).

Bambi stands beside his father on a knoll overlooking the forest. Heroic music swells in the background.

The forest's prosperity depends, apparently, on maintaining a "deerocracy." Bambi's father, after all, grooms him, not any other animal, to take over the forest. The average "Bambi" viewer hardly stops to wonder whether that's desirable. We're so teary-eyed that we cannot contemplate that Bambi's father could be doing something wrong. I don't mean to alienate America's children. "Bambi" should end as it does: everything turns out fine in Hollywood. But if we should learn anything from "Bambi," it's that only in the movies should we encourage picking the leader in advance.

Few would imagine that "Bambi" bears any relationship to America's industrial policy. Yet substitute "the modern marketplace" for the forest, "American companies" for the forest animals, "the Japanese and other well-equipped competitors" for the hunters, and "prosperity, jobs, and national security" for the warm ending of the film. The threat of the "hunters" is real. Since 1980, the Japanese market share in the semiconductor industry has doubled. By 1988, Japanese firms had tripled their world market share of sales of one-megabit DRAMs, a central component of computers and television sets, and sold 73.3 percent of world production.<sup>4</sup>

For decades, policymakers have argued over the scope of the federal government's response, whether it takes the form of direct support or indirect assistance (e.g., tax credits) to high-technology companies. The sharpest debate today is over proposals in new technologies such as high-definition television (HDTV) and superconductivity, which favor funding consortia with "seed money." For example, Reps. George Brown (D-Cal.), Don Ritter (R-Pa.), and Norman Mineta (D-Cal.) amended H.R. 3042, which authorizes technology programs in the Department of Commerce, to fund \$100 million for each of the next three years in HDTV. Reps. Brown and Ritter had introduced separate legislation, H.R. 1516 and H.R. 1267, respectively, calling for funding for HDTV.

In current Washington-speak, opponents term such assistance "industrial policy," and say the government is "picking winners and losers." There is some appeal to their arguments. Washington may bolster critical industries. It should refrain as much as possible, though, from deciding in advance which firms in the industry will succeed. This is a better job for the private sector, where the crucible of competition weeds out unsuccessful firms. Washington bureaucrats are rarely familiar enough with the nuts and bolts of an industry to make decisions that determine individual firms' success.

The prevailing response is apparent. Increasingly, policymakers are adopting the view that the federal government should play a greater role in halting America's decline in industrial leadership. As Clyde Prestowitz, the

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<sup>4</sup>Telephone conversation with Ms. Eva Jack, Semiconductor Industry Association (Jan. 19, 1990).

former trade negotiator, notes, "Continued American power is critical for world peace, prosperity, and stability."<sup>5</sup> Perfect free trade is no longer possible, given current global competition. Our competitors take actions that protect their high-tech industries at the expense of free trade. Even now, our federal government aids ailing industries. It may protect an entire industry with a tariff. It spends tens of billions of dollars each year on research that may resuscitate an industry, or create an entire new one, such as artificial intelligence, largely a creation of research sponsored by the Defense Department. It may provide a market for an industry's products, which may ensure the success of individual companies. One notable example is the aerospace industry, which benefits tremendously from defense-oriented procurement.

Some fear, however, that government subsidies and assistance groom individual firms for success, repressing others. The argument is that benefits extended to consortia give them a leg up on other startup firms.<sup>6</sup> Several witnesses at the Science, Space, and Technology Committee hearing in March on HDTV proposals implied that assistance for U.S. television makers would give a windfall to Zenith, the only remaining "U.S. manufacturer."<sup>7</sup> Rep. Mel Levine (D-Cal.) and Rep. Ritter, two proponents of funding consortia, respond that "industry-led" strategy resembles other governmental actions that influence outcomes in high-tech industries less than competition between firms. Individual aerospace companies, for instance, succeeded as a result of government policies. These policies do not target a specific company. The competitive bidding process theoretically enables all to participate, and in the beginning, the Boeings and Lockheeds (the eventual "winners") competed with other companies.

Picking "winners" before the fact would be another story altogether, one that would resemble Bambi's father's actions in anointing Bambi as the forest leader. Of course, "Bambi" is a limited model. In the movie, the hunters' first threat was not an invasion of the forest—they shot Bambi's mother in the open field. Our hunter-competitors are already in the forest and shooting. There's another critical difference between "Bambi" and the debate over American industrial policy: the other firms, unlike the forest animals, are banding together, without Washington's help, to produce high-tech products. Should the antitrust laws encourage this activity? The ultimate answer depends on whether antitrust reform, like "Bambi," picks winners in advance.

<sup>5</sup>C.V. PRESTOWITZ, JR., *TRADING PLACES: HOW WE ALLOWED JAPAN TO TAKE THE LEAD* 315 (1988).

<sup>6</sup>*See, e.g.,* Barfield, *It's Still High-Definition Intervention*, Wall St. J., May 8, 1989, at A10 ("The problem is that while industry may 'pick the winners,' the government is still expected to provide the resources and policies to ensure that the winners are winners").

<sup>7</sup>*High Definition Television: Hearing Before the House Committee on Science, Space, and Technology*, 101st Cong., 1st Sess. (1989) [hereinafter *HDTV hearing*]. Designating Zenith a U.S. company plays fast and loose with the definition, because Zenith assembles television sets in Mexico, whereas several "foreign" television companies maintain plants in the U.S. *See* the discussion of what constitutes a "United States company," *infra* note 62, and accompanying text.

## II. THE ANTITRUST LAWS: HOSTILE OR NEUTRAL?

Professor Tom Jorde, among others, argues that American companies do not form "strategic alliances," meaning ventures working together toward joint production, because of "a reluctance due to hostile U.S. antitrust laws."<sup>8</sup> Those laws might impose a penalty of treble damages and attorneys' fees on a JPV, under the "rule of reason" test, if a court finds that the benefits to competition do not outweigh the harm done.<sup>9</sup> Prof. Jorde and others propose partial or complete relief for JPVs from those penalties. But antitrust reform could give us paternalism, not competition. In that case, the reform proposals, arising from the rallying cry of "competitiveness" and a perception of the need for antitrust reform, could be costly.

The National Cooperative Research and Development Act of 1984<sup>10</sup> extended limited protection from the antitrust laws under a "notification" approach. Research joint ventures that notify the Justice Department of their planned activities cannot be held *per se* illegal, and are only liable for actual, not treble, damages in antitrust suits. Approximately 130 ventures have filed registrations, including Sematech, the Austin-based semiconductor consortium. In 1984, Congress recognized that JPVs were beyond the scope of this protection. Section 2(b)(2) of the NCRA excludes agreements regarding production or marketing, other than those regarding dissemination of proprietary information that ventures generate. There are bills pending before the House Judiciary Committee to close that gap. Rep. Tom Campbell (R-Cal.) and Rep. Rick Boucher (D-Va.) struck first with H.R. 1024, the "National Cooperative Innovation and Commercialization Act of 1989." H.R. 1024, in part a product of Prof. Jorde's work, adopts the "certification" approach of the Export Trading Company Act of 1982.<sup>11</sup>

Under H.R. 1024, a "cooperative innovation arrangement" would apply to the Justice Department for a certificate of approval. With this certificate, a JPV could produce a product and market it without fear of incurring an antitrust

<sup>8</sup>Jorde & Teece, *Innovation, Cooperation and Antitrust: Balancing Competition and Cooperation*, HIGH TECH. L.J. 25 (1989). The relevant laws include section 1 of the Sherman Act, which prohibits contracts, combinations or conspiracies in restraint of trade, and section 2 of the same Act, which prohibits monopolization of markets. 15 U.S.C. §§ 1, 2 (1982). Certain activities, such as price-fixing, are *per se*, or automatic Sherman Act violations. No court has held a JPV illegal *per se*. The court would apply a second test, the "rule of reason" test, unless it is implausible that the venture will have any procompetitive impact. *See, e.g.*, National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984); Jorde, *supra*, at 38-39 ("the [recent Supreme Court cases] permit a confident conclusion that rule of reason analysis rather than *per se* illegality should apply if there is a plausible claim that cooperation is needed for innovation and its commercialization."). The "rule of reason" requires a weighing of the relevant circumstances of a case, including the structure of the market involved, to decide whether a JPV restrains competition unreasonably. *See, e.g.*, F.T.C. v. Indiana Federation of Dentists, 476 U.S. 447 (1986).

<sup>9</sup>15 U.S.C. § 15 (1982).

<sup>10</sup>15 U.S.C. § 4301 *et seq.* (1982).

<sup>11</sup>15 U.S.C. § 4001 *et seq.* (1982). I leave for another day the intriguing question of the desirability of the ETCA as a model for antitrust reform.

suit. The other bills retain the availability of judicial relief. Rep. Don Edwards (D-Cal.), who introduced the original NCRA, launched H.R. 1025, which would extend the NCRA's protection to ventures that engage in "the production, marketing, or distribution of any product, process, or service" and that register with the Justice Department.<sup>12</sup> Rep. Hamilton Fish (R-N.Y.), the Ranking Republican Member of the Judiciary Committee, weighed in with H.R. 2664, which also extends the NCRA, but not to marketing (as does H.R. 1025). Rep. Ron Wyden (D-Or.), who chairs a subcommittee of the House Small Business Committee, introduced H.R. 423, the "Joint Manufacturing Opportunities Act of 1989," which targets smaller ventures. Debate in the Judiciary Committee focuses on H.R. 1024 and the two "notification" bills.<sup>13</sup>

Antitrust reform is, however, only part of the "competitiveness" agenda. Reps. Ritter and Campbell, among others, have advanced broad "competitiveness" legislation. A bipartisan coalition has also advanced an "emerging technologies" bill that is under consideration in the Science, Space, and Technology Committee. These bills feature initiatives to change the tax and intellectual property laws, fund consortia, and create a civilian "Department of Science and Technology" or its equivalent. Both the Administration and Congress view antitrust reform as one of the less controversial items on this list.<sup>14</sup> The recent battle over the capital gains tax, for example, has been far more nasty and divisive than the debate over antitrust reform.

Bundling antitrust reform with other initiatives is not bad, unless it is something industry would "settle" for if other initiatives fail. If American businesses cannot compete because they pay a high price for investment capital, as some suggest, and because prevailing wage rates are too high, then "competitiveness" packages should focus on deficit reduction, lowering interest rates, and labor reform, not antitrust reform. Last May, Rep. Jack Brooks (D-Tex.), the Chairman of the House Judiciary Committee, put it acerbically: "I, for one, have had my fill of watching the antitrust laws used by some as the 'whipping boy' for all the failed trade and fiscal policies of the past few years."<sup>15</sup> Columnist Robert Samuelson calls corporate complaints about Washington's policies a defeatist message of "blaming others for our problems."<sup>16</sup> This is an exaggeration, yet Samuelson may have a point: despite complaints to

<sup>12</sup>H.R. 1025, 101st Cong., 1st Sess., § 2(b)(4)(E) (1989).

<sup>13</sup>There may eventually be more bills; Senators Patrick Leahy (D-Vt) and Strom Thurmond (R-S.C.) have introduced a bill that is identical to Representative Fish's bill. In the House, it is uncertain whether the Science, Space, and Technology Committee would also consider these measures. However, the Committee would probably have joint jurisdiction over the bills that amend the NCRA, since it has jurisdiction over civilian R&D and joined the Judiciary Committee in passing the original Act.

<sup>14</sup>See, e.g., *Easing of Antitrust Law is Sought*, Washington Post, Oct. 18, 1989, at A10 ("There is consensus on the approach . . .").

<sup>15</sup>May 17 Judiciary Hearing, *supra* note 3, at 1 (statement of Committee Chairman Jack Brooks). In fairness, there is little evidence that proponents view antitrust reform as anything other than a desirable component of "competitiveness" packages.

<sup>16</sup>Samuelson, *The Excuse Industry*, NEWSWEEK, Dec. 11, 1989, at 74.

the contrary, it may be true that the antitrust laws do not prevent American firms from competing. Rep. Mike Synar (D-Okla.), a Judiciary Committee member, says, "There is no evidence that the alleged decline in the competitiveness of American business can be traced to the antitrust laws."<sup>17</sup>

### III. FEAR OF ANTITRUST: AVOIDING TECHNOLOGY BY ACCLAIM

Some groups are trying to persuade members of Congress otherwise. Lobbies such as the National Association of Manufacturers, Chamber of Commerce and seven other groups that issued a joint statement,<sup>18</sup> stress industry's "fear of antitrust." In their speeches, some Members of Congress have stated that businesses do not form JPVs for fear of violating the antitrust laws. In September, Attorney General Thornburgh asked whether fear of antitrust has kept American companies from attempting JPVs, and concluded that indeed it had.<sup>19</sup>

These claims deserve to be examined with a bit of skepticism. Inside the Beltway, words cascade through the information pipeline as if by Brownian motion, and today's speech is tomorrow's fact. This is especially likely with subjective issues: "Do firms shy away from joint ventures for fear of the antitrust laws?" is more vulnerable to pronouncements embodying several shades of meaning than "What was Pennsylvania's agricultural output last year?"

Prof. Jorde's extensive and well-documented article cites no evidence for the "fear of antitrust." I doubt that venturers think of antitrust implications before they wade through their plans for product, profit, and marketing.<sup>20</sup> Antitrust considerations figure far less prominently in business decisions than basic

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<sup>17</sup>*Easing of Antitrust Law is Sought*, *supra* note 14.

<sup>18</sup>American Electronics Assn., *et al.*, Antitrust Reform for Production Joint Ventures (Sept. 18, 1989); *see also* Sept. 28 Judiciary Hearing, *supra* note 3.

<sup>19</sup>Remarks of Attorney General Richard Thornburgh at the Sixth Annual General Counsels Briefing, Washington, D.C. 7 (Sept. 20, 1989). In 1983, some of those testifying before Congress made the same claim. *See Japanese Technological Advances and Possible United States Responses Using Research Joint Ventures: Hearing Before the House Committee on Science and Technology*, 98th Cong., 1st Sess. 23 (1983) [hereinafter *1983 Hearing*] (statement of John Lacey, Executive Vice President for Technology and Planning, Control Data Corporation) ("[a] reason for the lack of cooperation in U.S. research and development [is] the fear of inadvertently violating our century-old antitrust laws . . .").

<sup>20</sup>Witnesses before Congress sometimes advance a possible explanation for this: executives are too reticent to disclose their fears. For example, during a hearing in 1983 on the bills that resulted in the NCRA's passage, Mr. Steven Olson, the Associate General Counsel of Control Data Corp., told Congress that polling executives on the "fear of antitrust" would not yield much information. *1983 Hearing*, *supra* note 19, at 255-56 (testimony of Steven J. Olson). Yet then-Rep. Albert Gore, Jr. (D-Tenn.) responded to Mr. Olson that the antitrust laws, while something to consider, are not as important as Mr. Olson would have one believe. *Id.* at 257 ("It was possible to create MCC without violating the antitrust laws. I did not try to make the point that it was going to be easy.").

free enterprise mechanics. Even reform proponents such as Dr. Jack Kuehler, President of IBM, acknowledge that "the primary activity of the competitive battlefield" is the effort of "companies, driven by the new competitive realities, [to] concentrate their individual efforts on speeding new products to market. . . ." <sup>21</sup>

The U.S. Memories saga suggests that antitrust impacts do not make things easy for a JPV, but have less bite than considerations of the bottom line. Until U.S. Memories, the General Motors-Toyota automobile venture was the most visible JPV in America. The notoriety of U.S. Memories would have virtually guaranteed heightened antitrust scrutiny. <sup>22</sup> U.S. Memories' President, Sanford Kane, told the House Judiciary Committee last September 28 that "U.S. Memories should be able to go forward even in the absence of new antitrust legislation." <sup>23</sup> Mr. Kane added that it was harder to attract investors because of the antitrust laws, but summarized his main problem as, "convinc[ing] a significant number of companies to undertake what is, after all, an inherently risky venture, against entrenched foreign competitors, in an industry that is notoriously cyclical and rapidly evolving." <sup>24</sup>

In the end, Mr. Kane was unable to overcome this obstacle. Although seven powerhouses announced their intentions to join, others including Apple Computer and Sun Microsystems did not. The stated reasons for the opt-out had nothing to do with the antitrust laws: there was speculation, for example, that fluctuating conditions in the DRAM market had persuaded some companies that the venture would not turn a profit. Some blamed the venture's goal. Scott McNealy, Sun's Chairman, argued that existing companies were better positioned to improve U.S. competitiveness in the DRAM market, and said that U.S. Memories was like "pouring water on a desert in the hopes of regenerating a forest." <sup>25</sup> Also, some companies apparently did not wish to offend their Japanese partners. <sup>26</sup> On January 15, 1990, Mr. Kane called off the venture for lack of sufficient financial commitments. In the wake of U.S. Memories' demise, should we believe other companies that say they're not joining to-

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<sup>21</sup>Sept. 28 Judiciary Hearing, *supra* note 3, at 8 (testimony of Dr. Jack D. Kuehler, President, IBM Corporation).

<sup>22</sup>In fact, T. J. Rodgers, CEO of the Silicon Valley firm Cypress Semiconductor, Inc., had threatened U.S. Memories with an antitrust suit if it expanded into the static random access memory ("SRAM") market. Hill & Miller, *Computer Firms Make Bold Pitch to Retake Market Lost to Japan*, Wall St. J., June 22, 1989, A1 [hereinafter, *Re-Entry Vehicle*].

<sup>23</sup>Sept. 28 Judiciary Hearing, *supra* note 3, at 2 (statement of Sanford L. Kane, President and Chief Executive Officer, U.S. Memories).

<sup>24</sup>*Id.* at 12 (statement of Sanford L. Kane).

<sup>25</sup>*U.S. Memories Folds Up, Cites Lack Of Interest*, Los Angeles Times, Jan. 16, 1990, at D1. See also *Contrasts On Chips*, N.Y. Times, Jan. 16, 1990, at D20 ("From a short-term viewpoint, the falling prices made U.S. Memories appear unnecessary").

<sup>26</sup>See *This Will Surely Come Back To Haunt Us*, BUSINESS WEEK, Jan. 29, 1990, at 72-73 ("Some computer makers said privately they feared retaliation, particularly from Japanese chip-makers, if they bought into the chipmaking consortium"); *High Technology Firms Seek New Directions for 1990s*, Washington Post, Nov. 20, 1989, at A3.

gether because of a perceived antitrust challenge, when the real concern is the bottom line?<sup>27</sup>

Because the NCRA does not protect JPVs, some say the damages in an antitrust lawsuit could be substantial. So even though the "fear of antitrust" may not be on the tip of a CEO's tongue, is it legitimate? The government's behavior suggests otherwise. The Justice Department has never challenged a JPV . . . not even the mammoth GM-Toyota venture.<sup>28</sup> The 1988 version of its "Antitrust Guide For International Operations" states as a "general conclusion" that "a very large proportion of international business transactions involving American firms and/or American markets usually will not involve violations of U.S. antitrust laws. . . ."<sup>29</sup> Unless the JPV dominates a product market, or sets prices or markets its products jointly, the Justice Department will not intervene.<sup>30</sup>

As for private lawsuits, courts view horizontal agreements (those between competitors) with suspicion. The Supreme Court has concluded that even a venture that does not control enough of a market to monopolize it is not immune from antitrust liability.<sup>31</sup> Moreover, the "rule of reason," like any other "reasonableness" standard, seems to be a vague signal of potential liability. But in recent years, the appellate courts have adopted a market power "filter" for horizontal agreements. There is an emerging "safe harbor" for firms possessing roughly the market share permitted by the Justice Department's Merger Guidelines for horizontal mergers, approximately 20-25 percent of the relevant market.<sup>32</sup>

U.S. Memories planned to capture about 5-8 percent of the world DRAM

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<sup>27</sup>Intel Corp., which had joined U.S. Memories, dramatically underscored the fact that firms are not afraid of the antitrust consequences of JPVs. On January 22, one week after U.S. Memories collapsed, Intel formed a joint venture with a Japanese firm to make and sell DRAMs. Its spokesperson, Mr. Michael Maibach, indicated that the venture would have gone forward whether or not U.S. Memories failed. See *Intel Links with Japanese to Secure DRAM Market*, Washington Technology, Jan. 25, 1990, at 1.

<sup>28</sup>A recent article chronicles the rise of JPVs. Since 1988, Merck & Co. and Johnson & Johnson have formed a venture to make over-the-counter medicines, Dow Chemical Co. and Eli Lilly & Co. have joined to operate an agricultural chemical venture, and General Electric Co. and Ford Motor Co. have agreed to develop automobile lighting systems. The Justice Department did not challenge any of these ventures. See *Bush Aides Urge Antitrust Restrictions Be Eased for U.S. Firms' Joint Ventures*, Wall St. J., Jan. 22, 1990, at A4. On February 7, 1990, Chrysler Corp. and General Motors Corp. announced the formation of New Venture Gear, Inc., a joint venture to manufacture automobile and truck transmissions. The proposal sailed through the Justice Department's review, prompting Chrysler Vice Chairman Gerald Greenwald to note that, "It [antitrust considerations] no longer is a question that it was 15 to 20 years ago." See Standish, *Joint Transmission Venture to Begin Production Next Year*, Associated Press, Feb. 7, 1990.

<sup>29</sup>U.S. DEPT. OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 4-5 (1988).

<sup>30</sup>According to Professor Robert Pitofsky, Dean of the Georgetown Law School, "[JPVs] don't bother antitrusters as long as when you get down to the marketing phase, the consumers have a choice." *Re-Entry Vehicle*, *supra* note 22, at A7.

<sup>31</sup>See, e.g., *NCAA*, 485 U.S. 85.

<sup>32</sup>Jorde, *supra* note 8, at 43-45, and cases cited therein. Prof. Jorde adds that commentators have been heavily critical of the "rule of reason" for its lack of certainty. *Id.* at 39-41. Yet in the same discussion, he mentions the wide variety of cases demonstrating the "safe harbor" trend. *Id.*

market, which projects roughly to a 6–15 percent share of the American DRAM market.<sup>33</sup> The lower number is more likely, because U.S. makers have captured a smaller market share in each succeeding generation of DRAMs. Even that may have been an overly ambitious projection that did not take into account the qualms of computer industry executives about purchasing chips from an untried source.<sup>34</sup> But assuming that U.S. Memories did what it said it would do, its share of the DRAM market would not have come close to being an antitrust violation under the “safe harbor” interpretation.<sup>35</sup>

Consequently, a \$1 billion investment, which looms large to smaller firms, is not always the grubstake of a monopolist. Whether or not Congress changes the antitrust laws, small—and even large—firms can band together now to make substantial investments in many industries without a high likelihood of incurring antitrust liability. The antitrust laws are remarkably flexible in permitting joint activity. It is not true that our system claims that “it is best that we keep companies apart from one another,” as Prof. Jorde states.<sup>36</sup>

The antitrust laws, therefore, are not a large barrier to consortia formation. It is possible, as Professor Edward Rock of the University of Pennsylvania told Congress last year, that firms fear the antitrust laws because they fear everything but absolute certainty.<sup>37</sup> The NCRA permits firms to work together in R&D, and proscribes activities beyond that. The courts and the Justice Department are refining the standards applying to JPVs. In one way or another, all four reform bills would “clarify” these standards: the notification bills codify the existing rule of reason, and H.R. 1024 replaces it with a new standard. This

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<sup>33</sup>The data on U.S. Memories’ business plan is outlined in Sanford L. Kane, Remarks at the National Research Council Institute of Electrical and Electronics Engineers Workshop on the Role of a U.S. DRAM Consortium in Revitalizing the U.S. Electronics Base 14 (June, 1989) [hereinafter Workshop]. In 1988, American chipmakers sold 16.6 percent of world DRAMS, and 32 percent of the DRAMs sold in America, but only 20 percent of 1-megabit DRAMs. Assume that U.S. Memories would have the same relative impact on the American market as other American makers. In other words, assume that if U.S. Memories sold 16.6 percent of world 4-megabit DRAMs, it would account for 20–32 percent of the American market for 4-megabit DRAMs. If all else remained unchanged, and U.S. Memories sold 5–8 percent of world DRAMs, its share of the American market would be approximately 6–15 percent. Telephone conversation with Mr. Doug Andrey, Director of Industry Statistical Programs, Semiconductor Industry Association, Jan. 29, 1990 (data from the research firm Dataquest).

<sup>34</sup>Mr. Andrey quotes an industry “rule of thumb” that a chipmaker must spend \$200 million for each 1 percent of the world DRAM market that it wishes to obtain, which translates to a market share for U.S. Memories at the bottom end of Mr. Kane’s estimate. Telephone conversation with Mr. Doug Andrey, *supra* note 33. For a discussion of computer executives’ fears, see *This Will Surely Come Back to Haunt Us*, *supra* note 26, at 73.

<sup>35</sup>U.S. Memories’ backers did not assume that the venture would dominate the DRAM market. Indeed, the assumption was quite the opposite, that the venture’s production of DRAMs would catalyze that of existing makers, not replace it in monopolistic fashion. See Workshop, *supra* note 33, at 4.

<sup>36</sup>Jorde, *supra* note 8, at 18 (internal quote omitted). This, of course, is what Rep. Gore had in mind in 1983 when he told Mr. Olson that MCC could form without violating the antitrust laws. See note 20 *supra*.

<sup>37</sup>May 17 Judiciary Hearing, *supra* note 3, at 5–6 (testimony of Prof. Edward R. Rock, Univ. of Pennsylvania).

would reward corporations for their inability to understand standards that are not all that ambiguous.

Rep. Campbell, a former antitrust law professor, offers a more sophisticated argument. If two firms seek to merge, they can learn in advance whether their conduct is permissible. They would apply to the Justice Department and the Federal Trade Commission, which decide whether the venture may proceed. If we can decide that in advance, says Campbell, why can't we decide whether firms can co-manufacture? After all, joint production unites firms less than an outright merger. Why should it be subject to the flexible "rule of reason" analysis, which makes firms squeamish?<sup>38</sup>

Beside the fact that the emerging "safe harbor" analysis would treat JPVs like mergers, there are problems with the analogy. Estimating a JPV's impact in advance relies heavily on input from the venturers themselves about their business plans, which is more uncertain and suspect than data that merging firms submit. The government would have to set up a new bureaucracy to review the filings, leading to concerns about fairness and efficiency, although expanding the Department of Justice Antitrust Division to do the review would produce some economies of scale. Companies that feared a JPV, but that were unaware of the Justice Department proceedings, would have no input. Even if the process worked, would it be anything more than a rubber stamp? The 1980s saw few challenges to mergers. In the transportation industry, for example, airline mergers have led to a high degree of industry concentration, and higher fares.<sup>39</sup>

In a comprehensive analysis of the need for strategic coordination, Prof. Jorde makes an excellent point: firms need to work together in ways that encourage creativity and innovation.<sup>40</sup> Yet these "alliances" have different impacts on the marketplace. Mergers and joint ventures are different. Typically, mergers bring together two firms with established products and known market shares. It is feasible to calculate the merger's quantitative effect by using the Herfindahl-Hirschmann Index calculation. JPVs bring firms into new markets, or make an unquantifiable splash in existing markets. The antitrust standards should be somewhat different because we must wait to assess a venture's impact.<sup>41</sup>

Because the courts are treating joint ventures like mergers already, the standards are not all that different, except that joint venturers cannot get a green light in advance.<sup>42</sup> That cautionary approach is appropriate. "Streamlining"

<sup>38</sup>See *id.* at 2 (statement of Hon. Tom Campbell).

<sup>39</sup>*Id.* at 11 (testimony of Prof. Edward R. Rock).

<sup>40</sup>Jorde, *supra* note 8, at 20-26. See also the discussion of "technology by diversity," *infra* notes 57-63 and accompanying text.

<sup>41</sup>Courts have begun to recognize that joint ventures are separate enterprises that create new productive capacity, new technology, new products, or that enter new markets. See, e.g., *COMPACT v. Metropolitan Government of Nashville*, 594 F. Supp. 1567, 1574 (M.D. Tenn. 1984).

<sup>42</sup>See, Jorde, *supra* note 8, at 65, n. 182 (discussing the converging approaches to mergers and joint ventures).

the antitrust laws, in Rep. Campbell's words, to make a decision in advance whether a JPV may proceed resembles looking at the scoreboard before the buzzer sounds to end the game. Handing out antitrust immunity to JPVs would make the government determine whether conduct is appropriate, without the benefit of marketplace feedback. There is some evidence that consortia might have a negative impact on the marketplace. In their testimony before Congress, several small firms' CEOs stated that the competitive threat might be new ventures themselves.<sup>43</sup> One must take this with a grain of salt; remember, in the forest, the lowly worm fears not the tiger, but the bird. Still, a consortium could engage in proscribed conduct.

H.R. 1024 would allow aggrieved parties to seek injunctions to stop JPVs at any time. Prof. Jorde says that would be sufficient, because, "The effects of most cooperative innovation arrangements, which rarely involve price or territory agreements, are not ordinarily difficult to detect."<sup>44</sup> But his conclusion that there is "no reason" why firms should not be able to "agree on many things" rings hollow. It may be too late by the time competitors wake up and smell the coffee. JPVs will inevitably discuss pricing and marketing.<sup>45</sup> The potential for price-fixing and market domination grows as a company moves closer to the marketplace. It is impossible to manufacture television sets without making decisions about their selling price and potential market. That's why the NCRA stopped short of extending protection to JPVs. Recognizing the danger of monopolization, Congress excluded marketing and pricing activities not "reasonably required to conduct the research and development" from the NCRA's protection.<sup>46</sup>

#### IV. WHEN THE HUNTERS ARE ALREADY IN THE FOREST . . .

Balanced against the potential negative impacts is the possibility that anti-trust reform would encourage American firms to form beneficial strategic alliances, which they presently do far less often than do their counterparts in other countries, particularly those in Japan and Western Europe. Prof. Jorde points out that in Japan, "cooperation and competition are inextricably linked," and

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<sup>43</sup>See *Sept. 28 Judiciary Hearing*, *supra* note 3, at 2 (testimony of David R. Coelho, Chairman and Founder, Vantage Analysis Systems, Inc); *id.* (testimony of Louis R. Tomasetta, President and CEO, Vitesse Semiconductor Corp). A former Justice Department official recently asked, "Are we better off in the long run with mavericks, or are we better off circling the wagons? . . . The downside is that whoever has got the maverick technology has lost out." Lipsky, *More Competitors Turn to Cooperation*, Wall St. J., June 23, 1989, at B1.

<sup>44</sup>Jorde, *supra* note 8, at 49.

<sup>45</sup>See, e.g., *U.S. v. Container Corp. of America*, 393 U.S. 333 (1969); Brodsky, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1523, 1552 (1982), quoted in *May 17 Judiciary Hearing*, *supra* note 3, at 8 (testimony of Prof. Edward R. Rock) ("if the arrangement is allowed to operate at all, the parents, through their representatives in the joint venture, will necessarily agree on prices and output. . . .").

<sup>46</sup>15 U.S.C. § 4301(b)(1) (1982).

he provides a detailed outline of the catalytic role of the Ministry of International Trade and Industry (MITI) in targeting industries for expansion and coordinating research and development. MITI, says Jorde, "acts simultaneously as cheerleader, champion, and coordinator" in R&D.<sup>47</sup>

Many believe this targeted approach alters free market dynamics. Jack Kuehler told Congress that it gives Japanese companies freedom to value long term objectives over superior quarterly results. "Japanese companies," he said, "are allowed—even encouraged—to pursue the kinds of long term strategies that justify these massive investments."<sup>48</sup> In 1989, technology publications featured articles on long-term Japanese partnerships in new technologies such as superconductivity and HDTV. There's no doubt that the Japanese are participants in many of these technologies for the long haul.

In the U.S., the NCRA has yielded relatively few joint ventures, the largest of which are Sematech and two electronics consortia, the Microelectronics and Computer Technology Corporation (MCC) and Semiconductor Research Corporation (SRC).<sup>49</sup> The MCC has trouble attracting key technologists from its member companies, and earned a low grade from Fortune in June, 1989, for its scaled-down projects. It has made progress since then in areas such as computer software, but has yet to demonstrate a synergy that would justify its existence. Even Sematech, although an initial success, may not get its 4-megabit chip production line on track ahead of global competitors; its projected completion date has already slipped by six months.

Prof. Jorde claims our relative lack of cooperation is largely attributable to the antitrust laws, which are arguably more restrictive than those of Japan and Western Europe. I think it stems more from our societal preference for competition and short-term positive results. American firms may consider the antitrust laws when they decide whether or not to cooperate, but the driving force is competition. As Prof. Rock states, we are not the Japanese, and we have followed the competitive "model" for many years.<sup>50</sup> We should not do what the Japanese do merely because it's successful. When the hunters are in the forest and shooting, it's not the best time to be wondering where they got their rifles.

And the rifles, whatever their origin, are expensive. A new semiconductor chip factory may cost as much as \$500 million. As noted above, U.S. Memories estimated that its start-up costs would have been approximately \$1 billion. IBM says it spent at least that much in developing and building its new "Advanced Semiconductor Technology Center" in East Fishkill, New York. Small companies may find it hard to raise that kind of capital, meaning that companies must work together in new technologies. Does that mean that we should follow

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<sup>47</sup>Jorde, *supra* note 8, at 27-30.

<sup>48</sup>Sept. 28 Judiciary Hearing, *supra* note 3, at 4 (testimony of Jack D. Kuehler, President of IBM).

<sup>49</sup>Although approximately 130 ventures have registered under the NCRA, many did so just after the law was passed, and many of those were existing ventures. Even Prof. Jorde calls the number of joint ventures "disappointing." Jorde, *supra* note 8, at 53.

<sup>50</sup>May 17 Judiciary Hearing, *supra* note 3, at 9 (testimony of Edward R. Rock).

the Japanese model of central planning by the government? Except in wartime, our experiments with it have been abject failures. The more appealing route is for the government to act as a promoter, spurring on industries.

To deal with our competitors, we must solve our own problems first. Mr. Prestowitz, Rep. Campbell, and others say the antitrust laws, now over one hundred years old, were tailored to promote domestic competition, and are thus outdated. Under today's exigencies, they say, the federal government should tailor its antitrust laws to the problem at hand. As Rep. Campbell states, "What is needed is a streamlined procedure to give American competitors the assurance they need to compete effectively in the production and marketing of products in America and around the world."<sup>51</sup> Yet even he acknowledges that a central goal of the antitrust laws, curbing the impact on American consumers of price-fixing and joint marketing, is as valid today as it was in 1890.<sup>52</sup>

This reflects an ongoing tension in the antitrust laws. Courts have moved toward emphasizing economic efficiency as a goal of the antitrust laws.<sup>53</sup> Many horizontal and vertical agreements that do not result in concentrations of market power are, as a result, virtually exempt from antitrust scrutiny.<sup>54</sup> A JPV that results in a concentrated market may even be "efficient," in the economist's sense, particularly in an industry characterized by production scale economies and high entry costs. But a theoretically "efficient" arrangement may not distribute its benefits to the group that presumably is the center of the "competitiveness" fuss: America's consumers. Pricing and marketing decisions made without the spur of competition would leave consumers worse off. Consumers must have a choice, and there is no reason to abandon the historic focus of the antitrust laws on prohibiting price-fixing and joint marketing.<sup>55</sup>

Therefore, Washington cannot respond on the basis of "competitiveness" alone. That tells us little about the impact of its policies on the marketplace.

<sup>51</sup>*Id.* at 1 (testimony of Hon. Tom Campbell).

<sup>52</sup>*Id.* (testimony of Hon. Tom Campbell) ("The mere claim of joint production of an invention should not be used as a cover for price-fixing or other anticompetitive behavior.").

<sup>53</sup>*See, e.g.*, 15 U.S.C. § 4301 et seq. (1982).

<sup>54</sup>*See, e.g.*, *Rothery Storage and Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. den.*, 107 S. Ct. 880 (1987) (opinion by Bork, J., holding that a horizontal combination that led to a market share of 6 percent was efficient). There is a vigorous minority that argues economic efficiency should not be a paramount aim of the antitrust laws. *See, e.g.*, *Rothery*, 792 F.2d at 230 (Wald, J., concurring). Given the present makeup of the federal bench, there is no reason to expect that the balance of power will shift in the near future.

<sup>55</sup>Since many JPVs would not dominate the American market, it is also unnecessary to change the "relevant market" for innovation. H.R. 1024 provides that the market for high-tech products is global. Rep. Campbell argues since high-tech competition is global, its market is as well. The "relevant market" concept is based on the ease of substitution. *See generally*, L. SULLIVAN, ANTI-TRUST, § 12.41 (1977). Some high-tech products are not globally interchangeable. Redefining the "relevant market" does have political appeal: Dr. Solomon Buchsbaum of AT&T Bell Labs told Congress that, "Companies don't compete; countries compete." *HDTV Hearing, supra* note 7, at 227. Assuming a global market for innovation would give JPVs an advantage that might be downright pernicious: if the "relevant market" is global, a JPV could legally monopolize the American market.

Even the most ardent proponents of economic efficiency imply that some ventures may fix prices or manipulate output.<sup>56</sup>

## V. TECHNOLOGY BY DIVERSITY: A LOOK AT THE BILLS BEFORE CONGRESS

One can view JPVs as a uniquely American response to Japanese central planning and coordination. Mr. Prestowitz said of U.S. Memories that, "In a sense [it] is a way of replicating the lower risk and lower cost of capital that the Japanese gain through their integration. . . ." <sup>57</sup> American innovation has taken that path often, with entrepreneurs mimicking the successes of foreign firms in an American way. The rise of the American textile industry in the 1800s is one historical example.

Besides the tendency toward "replication," another characteristic of American firms is a deep-seated preference for competition and independence. If there are substantial advantages to cooperation, some American firms will resist it nevertheless. Some firms will think that JPVs are appropriate, but some will believe it best to control their own destiny. Americans are proud individualists. It is uncommon for us to put all our eggs in one basket. When it comes to innovation, we are a nation of hens: we lay a lot of eggs, sit on top of them, and see which one hatches first.

It is not that small is always beautiful. Upon hearing of the demise of U.S. Memories, Mr. Rodgers said it was a victory for smaller companies, which he believes innovate faster, cheaper, and better. But that may not be true. Although small companies are flexible innovators on a small scale, they face financial and other hurdles to competing in the high-tech arena on a broad scale. The antitrust laws, therefore, should not draw the limit of market power to favor smaller firms at the expense of larger firms, or vice versa. Rather, they should encourage diversity. We need to nurture a lot of eggs (both small and large) in order to hatch the best chickens. This, it seems, is something the emerging "safe harbor" trend is already encouraging.<sup>58</sup>

H.R. 1024 discourages diversity. Its certification procedure, which assesses the outcome on the basis of early evidence, will deter other entrants in a technology sector. Once a JPV with antitrust immunity enters the picture, other

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<sup>56</sup>See, e.g., *Rothery*, 792 F.2d at 217.

<sup>57</sup>Re-Entry Vehicle, *supra* note 22, at A1.

<sup>58</sup>In view of the changing law, "diversity" no longer means that firms must work in a decentralized and uncoordinated industry. Small firms and larger joint ventures may co-exist, and indeed, that may be the most desirable way to proceed. Our limited experience with joint ventures suggests that brilliant breakthroughs are not always the product of consensus. See the discussion of joint ventures under the NCRA, *supra* note 10 and accompanying text; see also *No Thanks for Memories*, Wall St. J., Jan. 22, 1990, at A14 ("Consortia rarely are very nimble"). Also, as Professor Rock notes, the one joint venture that led to a Supreme Court case ended in failure. *May 17 Judiciary Hearing*, *supra* note 3, at 9 (testimony of Prof. Edward R. Rock) (citing *U.S. v. Penn-Olin*, 378 U.S. 158 (1964)).

entrants will find it difficult to proceed. In the third Judiciary Committee hearing, a Silicon Valley CEO asked why "any venture capitalist [would] want to put this money behind a start-up in any technology" in which a JPV was a player.<sup>59</sup> Certification, as its proponents intend, would eliminate the antitrust risks of entry into new technologies. Those firms either left out or voluntarily opting out of a JPV "blessed" by the Justice Department still face those risks, and one wonders whether they would assume them. The result would be a decrease in the number of firms, small or large, trying to make something of a new technology.

By contrast, extending the NCRA's protection to JPVs would not deter new entrants. Under a notification regime, a registrant's advantages are not substantial; the most significant advantage would be the detrebling of damages in a lawsuit. Our experience to date with the NCRA shows that when one venture registers, it hardly inhibits others from doing so. In areas such as electronics, there have been multiple registrations. In addition, judicial relief is still available to curb excesses, so a notification system has none of the trappings of "picking winners and losers." Extending the NCRA's notification process would not punish firms if they choose not to enter a JPV, as they can still sue it for damages.

Certification, besides deterring entry, may inhibit the formation of JPVs. Companies may not take advantage of certification, because they do not want to deal with the bureaucracy and paperwork. It is not the hassle that is the real fear; it's that companies would have to yield their secrets, both trade secrets and others. Rep. Campbell argues that the ventures will put up with that publicity. That's true; some will. However, other companies used to "going their own way" are likely to be uncomfortable with the idea of displaying their wares for the world to see before they're even produced.<sup>60</sup> In a notification system, by contrast, a registrant discloses little about its activities, and there is no barrier to joint venture formation.

Because firms can form JPVs of a considerable size already, extending the NCRA's protection to them is not absolutely necessary. Still, the NCRA's tradeoff of detrebling damages in return for the information revealed by registering does make sense, if price-fixing and joint marketing remain illegal. The treble damages provision gives plaintiffs an incentive to ferret out anticompetitive conduct.<sup>61</sup> A registrant makes it public knowledge that it will engage in joint production. Anticompetitive conduct, although neither unlikely (as noted earlier) nor simple to detect, would be easier to find. Plaintiffs would not need the incentive of treble damages, as the venture

<sup>59</sup>Sept. 28 Judiciary Hearing, *supra* note 3, at 2 (testimony of David R. Coelho).

<sup>60</sup>*See, e.g.,* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. den.*, 100 S. Ct. 1061, 1062 (1980) (opinion by Justices Rehnquist and Powell denying certiorari) ("To one not schooled in the niceties of antitrust litigation, the notion that a statute designed to foster competition requires one competitor to disclose to another, in advance of marketing a product to the general public, its plan to introduce the new product, is difficult to fathom.")

<sup>61</sup>Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972).

would already be scrutinized. Rep. Campbell and others argue that ventures would still spend time, money, and effort defending their conduct in antitrust lawsuits. In the first five years under the NCRA, to the best of my knowledge, few if any research ventures have been challenged. The spectre of "strike suits" by plaintiffs hoping to "put ventures out of business" is illusory. Antitrust suits are expensive to prosecute for all but the most well-heeled plaintiffs, making the availability of treble damages almost mandatory for a plaintiff to be able financially to proceed.

The act of notification should give no blessing to price-fixing and joint marketing. Of the three major reform bills, only H.R. 2664 (Rep. Fish's bill) prevents joint marketing, and if H.R. 1025 is the legislative vehicle, it should be modified accordingly. In their current form, however, all four bills have another problem. None of them limits participation in JPVs to American companies, so foreign companies could participate just as easily. If one goal of antitrust reform is to improve America's "competitiveness," Congress should remove that loophole. Yet in this decade of internationalization, the lines between "American" companies and others have become blurred. Foreign companies own much of the stock of some "American" companies. Some "foreign" companies produce their products in the U.S., and some "American" companies go offshore to do so. The result is a tangle of definitions of a "United States company."<sup>62</sup> A better solution is for any legislative vehicle on antitrust reform to confine its application to companies, American or not, that are willing to produce some products in the U.S. with American labor.

The political reality is that a notification-based bill has the best chance of success.<sup>63</sup> It is also the best policy. More extensive changes to the antitrust laws are unnecessary because many ventures can produce together legally. If we revise the antitrust laws because businesses perceive the need for it, or because we cannot reduce the deficit, or even because we want to have an industrial policy that tilts in favor of emerging joint ventures, we move away from our

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<sup>62</sup>In a lengthy hearing last fall, a subcommittee of the Science, Space, and Technology Committee heard conflicting testimony on this subject. *What Is a U.S. Company?: Hearing Before the Subcommittee on Science, Research, and Technology of the House Committee on Science, Space, and Technology*, 101st Cong., 1st Sess. (1989).

<sup>63</sup>The Bush administration has resolved its internal conflict, agreeing recently to promote a notification approach to antitrust reform. See "Bush Aides Urge Antitrust Restrictions Be Eased for U.S. Firms' Joint Ventures," *supra* note 28, at A4. Any approach to antitrust reform will have to pass muster with Rep. Brooks, who is both the chairman of the full Judiciary Committee and of the subcommittee that is considering the reform bills. While he has chaired the three hearings to date, Rep. Brooks has not yet begun to mark up a reform bill. He may also favor a bill that limits its application to "American" companies. Moreover, Sen. Howard Metzenbaum (D-Oh), who chairs the Senate Judiciary Committee's antitrust subcommittee, is known to oppose reform. Recently, the team of business lobbies that originally backed H.R. 1024 retreated, putting out a paper supporting the notification approach. Rep. Campbell understands this. He is a freshman member of the minority party, with an idea that, while provocative, has not garnered wide support. It has, however, received a more thorough hearing than the legislative proposals of most first-term Representatives, demonstrating Rep. Campbell's promise as a legislator.

traditional focus on innovation by diversity toward the paternalism of “Bambi” (and the likelihood of concentrated market power). If ventures are willing to publicize their activities, then they should be able to avail themselves of the detrebling of damages in antitrust lawsuits. Any more change than that would be unnecessary and counterproductive.

