The Redemption Of A Republican

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I have always been a loyal Republican. When I was 9 years old I wore a Dewey button to Oak School in Council Bluffs, Iowa. I cheered as Ike beat Adlai Stevenson in 1952 and again in 1956. In November 1960 I stood outside a polling place in Roxbury, Massachusetts urging voters to vote for Richard Nixon against Jack Kennedy, and I lauded Nixon's 1968 comeback win and his 1972 re-election. I raised money for Ronald Reagan, Pete Wilson, and Tom Campbell when they ran for governor of California. I voted for Ford, Reagan, Bush I, Dole, Bush II and, most

Thus, as it has happened, I have questioned some of the legal and economics principles and practices that are apparently held sacred by some of my fellow Republicans. For example, I have wondered aloud on a number of occasions whether economics concepts expressed in complex formulae featuring the greek alphabet are useful. Of course I am not the first to do this. Others, including NYU's Nouriel Roubini, have warned that those formulae are incomprehensible to most people. And none of the economics experts whom I used in trying antitrust cases to juries ever used such complex formulae. They (and I) felt it essential to explain their conclusions to laymen in words of one syllable.

Beyond that, I have questioned the basic tenets of orthodox Chicago School law and economics as those tenets were set forth by Judge Robert Bork in *The Antitrust Paradox*— that antitrust law is concerned with maximizing social welfare; that markets are generally perfect; that, if imperfect, they can and will correct themselves; that, accordingly, rational businesspeople will not engage in predatory conduct (because it is not profit-maximizing since markets will correct themselves). In December 2006, for example, I suggested in remarks to the New York City Bar Association that the purpose of the antitrust laws is not to maximize societal welfare but is instead to protect consumers. Since then I have mused that the Supreme Court has gone further than the European courts (and perhaps too far) in embracing Judge Bork's tenets.

I have also joined with my colleagues, Democrat Jon Leibowitz and Independent Pamela Jones Harbour, in suggesting that resale price maintenance (a practice in which a producer fixes its resellers' sale prices) might be considered "inherently suspect" under the antitrust laws; in challenging the Justice Department's endorsement of Judge Bork's views in its Report on Single-Firm Conduct and its recommendation to the Supreme Court that it bless so-called "price squeezes" (a practice in which a supplier with monopoly power sells to retail customers at prices

below that required for reseller rivals to make a profit); and in opining that Section 5 of the FTC Act is not coextensive with the Sherman Act but may extend to practices not covered by that antitrust statute. I did not consider these positions to be heretical. To the contrary, they echoed prior holdings of the Supreme Court, and in that respect they seemed to me to be consistent with the admonitions of Justice Scalia (arguably the Court's most conservative jurist) that those interpreting the law should not venture beyond the literal pronouncements of the law-givers.

Finally, in January remarks to the New York State Bar Association, referring to the words and deeds of Republicans Alan Greenspan and Hank Paulson, I said that orthodox Chicago School economics was on life support, if not dead. Referring to the current financial crisis, I took issue with the efforts of both federal antitrust agencies to sell to foreign antitrust enforcement

they have both asserted, on the one hand, that the current economic crisis says nothing about microeconomics as opposed to macroeconomics and on the same time have denied that any Chicago School economist has ever asserted that markets are perfect or self-correcting or that businesspeople are rational. They have also asserted that most of the decent post-Chicago School economics thinking has come from orthodox Chicago School economists.

After all of this criticism, I was starting to question whether I really was a loyal Republican.

But then a recent *Financial Times* article by Philip Blond was called to my attention. In that article Mr. Blond reports that George Osborne, who is the "shadow" Chancellor of the Exchequer for David Cameron's Conservative Party in the United Kingdom, has "signaled that the Conservatives are breaking with the neo-liberal absolutism of the past 30 years to forge a

Additionally, Mr. Osborne is reported to have said that since markets do not operate on the basis of complete and accurate information, they are "prone to speculative bubbles," which justify and indeed require control by "effective regulation." Read that as the kind of government intervention that Mr. Paulson and some members of Congress have proposed: "counter-cyclical capital requirements and the return of full discretionary macro-regulatory oversight to the Bank of England [Federal Reserve]."

Finally, Mr. Osborne is said to have asserted that banks that are "too big to fail" should be "broken up," rejecting the "Chicago School-inspired dictum that market-generated monopolies are the most efficient distributor of resources and price utility." The "dictum" to which reference is made is probably to the second part of the Supreme Court's Trinko decision. Authored by Justice Scalia in 2004, the Court essentially asserted that monopolies are beneficial in that they attract competition and innovation. It is "dictum" (as we lawyers are fond of saying) because the pronouncement was not needed to decide the case at all.

And Mr. Osborne is not alone. In his recent book on the financial crisis, Judge Richard Posner – considered to be a patriarch of Chicago School thinking – declared that the recent crisis demonstrates there is a need for more active government regulation and that deregulation of the financial industry went too far by "exaggerating the resilience – the self-healing powers – of laissez-faire capitalism."

Frankly, (except for "breaking up" banks that are "too big to fail" instead of just not letting them merge in the first place) I intended to communicate all of these things in my January New York remarks: that the "ideology of the free-market fundamentalists" is arguably "bankrupt"; that markets cannot be as efficient and self-correcting as orthodox Chicago School economists would have it because information is imperfect and human beings do not always act

rationally; that there is a need for government intervention to control speculative bubbles; and that monopolies are not the most efficient distributor of resources. I added that vigorous antitrust enforcement could and should play a substantial role in whatever government intervention is appropriate.

Mr. Osborne and Judge Posner, however, have articulated these ideas more powerfully than I did. Perhaps that is because, in the case of Mr. Osborne, the Labour Party's Gordon Brown is a better foil than anyone currently on the political scene in the United States. Or, perhaps it is just that the words of the shadow Chancellor of the Exchequer for the Conservative Party in the United Kingdom are entitled to special weight. In the case of Judge Posner, I suspect his words have captured the attention that they deserve because he is arguably one of the most – if not the most – eloquent and articulate members of the federal judiciary.

All of that said. I think Mr. Osborne and Judge Posner would agree that they did not answer all of the questions that we must ponder. We need to consider, for example, whether regulators – who, after all, are human beings capable of irrationality, too – are able to intervene effectively. Consider, for instance, the misdirected central state planning that occurred in the

More important, however, their “new approach” to the market economy” seems much more attractive politically than either clinging to arguably “bankrupt” economics or “just saying no.” But that is for the politicians in my party, not for me, to decide.