Brian R. Cheffins*

Getting Antitrust and History in Tune

https://doi.org/10.1515/ael-2021-0084
Published online March 2, 2022

Abstract: Antitrust is high on the reform agenda at present, associated with calls to "break up big tech." Proponents of reform have invoked history with regularity in making their case. They say reform is essential to reverse the baleful influence of the Chicago School of antitrust, which, in their telling, disastrously and abruptly ended in the 1980s a "golden" era of beneficially lively antitrust enforcement. In fact, antitrust enforcement was, at best, uneven, from the early 20th century through to the end of the 1970s. As for the antitrust "counter-revolution" of the late 20th century, this was fostered as much by fears of foreign competition and skepticism of government regulation as Chicago School theorizing. The pattern helped to ensure that the counter-revolution was largely sustained through the opening decades of the 21st century. This article, in addition to getting antitrust and history in tune by drawing attention to the foregoing points, provides insights regarding antitrust's future direction.

Keywords: antitrust, Chicago School, monopoly, oligopoly, foreign competition, deregulation

JEL Classification: K21, L12, L13, L40, L41, N42

Table of Contents

The author would like to thank Yuri Biondi, two anonymous referees and participants in an Oxford Business Law Workshop Series seminar for valuable feedback.

***Corresponding author: Brian R. Cheffins**, SJ Berwin Professor of Corporate Law, Faculty of Law, University of Cambridge, Cambridge, UK, E-mail: brc21@cam.ac.uk

1 Introduction

Antitrust is a venerable feature of business regulation in the United States, with the first federal law being the Sherman Act of 1890.[1] In 1964, William Orrick, then head of the Department of Justice's Antitrust Division, remarked, "Antitrust is like the Mississippi. It just keeps rolling along."[2] Law professor Daniel Sokol observed similarly in 2020 "In a world of continuous change, antitrust is what remains constant."[3] Nevertheless, historically there have been major bends in the antitrust river. Amidst calls to "break up big tech",[4] one of those major bends could be in prospect. This could be "antitrust's moment, with Big Tech in the crosshairs,"[5] with that "moment"[6] possibly translating into an "antimonopoly movement" that permanently reconfigures antitrust.[7]

1 26 Stat. 209.

2 *Flights of Fancy*, Barron's, June 29, 1964, 1.

3 D. Daniel Sokol, *Antitrust's Curse of Bigness Problem*, 118 Mich. L. Rev. 1259, 1281 (2020).

4 Tim Wu, *The Utah Statement: Reviving Antimonopoly Traditions for the Era of Big Tech*, OneZero, November 18, 2019.

5 Lawrence J. White, *Rethinking Antitrust*, Milken Institute Rev.: J. Econ. Policy, First Quarter 2021, https://www.milkenreview.org/articles/rethinking-antitrust?IssueID=39.

6 On this characterization, see Thomas A. Lambert, *The Limits of Antitrust in the 21st Century*, 43 Reg. 20, 20 (2020); David Streifeld, *Antitrust Regulators Size Up Tech* Giants, N.Y. Times, June 23, 2019, 1 (quoting Hal Singer – "We're at one of those antitrust moments"); David McCabe & Cecilia Kang, *Tech Critic Faces Limits At the F.T.C.*, N.Y. Times, June 17, 2021, Business, 1 (quoting Representative David Cicilline – "this monopoly moment.")

7 David Dayen, Monopolized 13 (2020).

With the latest potential bend in the antitrust river, as would be expected, perceptions of present-day market conditions play a key role. There is a growing sense that market forces are incapable of reining in powerful firms,[8] particularly with giant tech firms apparently "creating a rather extreme version of global economic monopoly."[9] The invocation of antitrust law, with its focus on maintaining competition, seems to be an obvious solution.[10]

Current debates about antitrust have by no means focused exclusively on the present. Instead, given the venerable nature of antitrust, history has, not surprisingly, been invoked with some regularity. History has thus been providing the mood music for potentially major change on the antitrust front. As this article shows, commentators have struck a considerable number of false notes as part of this process. This article seeks to get antitrust and history in tune. In so doing, the article provides insights regarding whether antitrust's current "moment" is likely to translate into meaningful lasting change, indicating in so doing this seems quite likely.

Antitrust is high on the reform agenda at present. Numerous antitrust-related bills have been proposed in Congress recently, including Senator Amy Klobuchar's "sweeping" 56-page Competition and Antitrust Law Enforcement Act.[11] In July 2021, President Biden signed a 72-point executive order encouraging federal agencies to promote competitive markets.[12] This followed on from Lina Khan, a

8 Sharla A. Paul, *Market Values*, U. Chi. Magazine, Fall 2019, https://mag.uchicago.edu/economics-business/market-values#%20%E2%80%94%20Fall/19.

9 Tim Wu, The Curse of Bigness: How Corporate Giants Came to Rule the World 10 (2018).

10 White, *supra* note 5. See, though, Ramsi A. Woodcock, *Big Data, Price Discrimination, and Antitrust*, 68 Hastings L.J. 1371, 1375 (2017) (arguing that the ability of powerful firms to use "big data" to price discriminate could soon "render ineffective the current antitrust system.")

11 Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement, 4 February 2021, https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement. On legislation proposed, see infra note 22; *Congressional Antitrust Reform: State of Play*, Brownstein, July 8, 2021, https://www.bhfs.com/insights/alerts-articles/2021/congressional-antitrust-reform-state-of-play-2021.

12 The White House, *Executive Order on Promoting Competition in the American Economy*, July 9, 2021. The order called for the establishment of a White House Competition Council and "introduced more than 70 sector-specific policy priorities in technology, Internet service, healthcare, banking and consumer finance, agriculture, transportation, and labor, which affect more than a dozen agencies" – Sheila Adams, Christopher Lynch & Margaret Tahyar, *President Biden's Executive Order on Promoting Competition*, Harv. Law School Forum Corp. Gov., July 20, 2021, https://corpgov.law.harvard.edu/2021/07/20/president-bidens-executive-order-on-promoting-competition/.

leading advocate for antitrust reform[13] and "a potentially transformative figure"[14] being appointed as chair of the Federal Trade Commission (FTC), which enforces federal antitrust laws in tandem with the Department of Justice's Antitrust Division.[15] Khan caught the eye of the White House because of scholarship of hers advocating the break-up of Amazon and other tech giants.[16] The *Wall Street Journal* has warned "American business should get ready. The Khan FTC is coming after you."[17] Jonathan Kanter, President Biden's choice to head the Department of Justice's Antitrust Division, has said "we and our law enforcement partners are committed to using every tool available to promote competition."[18] Such trends have prompted speculation that President Biden is charting a "transformational course with regard to antitrust" that could "prove to be one of the defining achievements of his tenure as president."[19] Tim Wu, special assistant to the president for technology and competition policy, indeed suggested in a November 2021 speech that the Biden administration "is just getting started" on the antitrust front.[20]

But what will the legacy of antitrust's current moment actually be? Orchestrating meaningful change likely will mean having to overcome substantial potential inertia in Congress, the FTC and the courts, reinforced by business lobbying in favor of the status quo.[21] According to GovTrack, a website that tracks bills in the U.S. Congress,

---

13 Eric Posner, *Biden's Antitrust Revolutionaries*, Project Syndicate, June 18, 2021, https://www.project-syndicate.org/commentary/new-brandeisians-antitrust-for-big-tech-by-eric-posner-2021-06.

14 David McCabe & Cecilia Kang, *Tech Critic is Named F.T.C. Chair*, N.Y. Times, June 16, 2021, Business, 1.

15 Federal Trade Commission, *Guide to Antitrust Laws – The Enforcers*, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers (accessed July 23, 2021).

16 Irwin Steltzer, *Antitrust Alone Will Tame Big Tech*, Sunday Times, July 18, 2021, Business, 7. See, for example, Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710 (2017).

17 *Lina Khan's Power Grab at the FTC*, Wall St. J., July 6, 2021, A16.

18 *Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section*, January 24, 2022, https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york.

19 David Dayen & Alexander Sammon, *The New Brandeis Movement Has Its Moment*, Am. Prospect, July 21, 2021.

20 Chris Matthews, *Biden Antitrust Adviser Tim Wu Says a "Supermajority of American Citizens" Support Crackdown on Monopolies*, MarketWatch, November 9, 2021, https://www.marketwatch.com/story/biden-antitrust-advisor-tim-wu-says-a-supermajority-of-american-citizens-support-crackdown-on-monopolies-11636478183?mod=mw_more_headlines.

21 McCabe & King, *supra* note 6; Richard Waters, *Biden's New Trustbuster Faces a Battle to Rein in Big Tech*, Fin. Times, June 18, 2021, 9; *Khan Brings a Chance to Reshape Antitrust Policy*, Fin. Times, June 23, 2021, 22; *Anti-Trust in Me*, Economist, July 17, 2021, 38; *Antitrust Redux*, Economist, January 15, 2022, Special Report, 7.

as of early 2022 only one bill it categorized as dealing with "competition and antitrust" had a better than 50:50 chance of being enacted, this being a measure on drug pricing.[22] With the FTC, a commissioner complained a few months after Khan became chair that the current leadership had "sidelined and disdained our staff."[23]

If a major bend in the antitrust river is going to occur, this will likely be associated with the displacement of what Khan referred to in a 2020 law review article as "the relative stability of (an) antitrust consensus."[24] For her it is about time. She claims, "Highly concentrated markets in the contemporary United States are not the product of impersonal economic forces – rather they are the product of conscious legal and political decisions in the late 1970s and early 1980s. These decisions severely undermined the antitrust laws, crippling what had been a major congressional safeguard against monopoly and oligopoly."[25]

President Biden agrees. When signing the July 2021 executive order concerning competitive markets he said "Forty years ago, we chose the wrong path, in my view, following the misguided philosophy of people like Robert Bork, and pulled back on enforcing laws to promote competition."[26] Bork, a University of Chicago law graduate prior to becoming a law professor at Yale, solicitor general and federal judge, was a pivotal figure in what is known as the Chicago School of antitrust.[27] This market-friendly school of thought associated with the University of Chicago achieved intellectual pre-eminence in the closing decades of the 20th century[28] and helped to foster a late 20th century reinvention of antitrust that has been sustained to the present day.[29]

---

22 *Competition and Antitrust*, GovTrack, https://www.govtrack.us/congress/bills/subjects/competition_and_antitrust/5920, indicating that the Preserve Access to Affordable Generics and Biosimilars Act (S. 1428) had a 61% chance of enactment (accessed January 26, 2022).

23 Brent Kendall, *New FTC Chief Khan Faces Disgruntled Staff Early in Her Tenure*, Wall St. J., November 17, 2021, A4.

24 Lina M. Khan, *The End of Antitrust History Revisited*, 133 Harv. L. Rev. 1655, 1656 (2020).

25 Lina M. Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 Harv. J.L. & Pub. Pol'y. 235, 268–69 (2017).

26 White House, *Remarks by President Biden At Signing of An Executive Order Promoting Competition in the American Economy*, July 9, 2021.

27 Charles R. Geisst, Monopolies in America: Empire Builders and Their Enemies from Jay Gould to Bill Gates 252 (2000); George L. Priest, *Bork's Strategy and the Influence of the Chicago School on Modern Antitrust Law*, 57 J.L. & Econ. S1, S1-S-2, S-4 (2014).

28 Roger Parloff, *Behind the Big Tech Antitrust Backlash: A Turning Point for America*, Yahoo! Finance, Dec. 11, 2019, https://uk.finance.yahoo.com/news/amazon-facebook-google-antitrust-backlash-152518336.html; William E. Kovacic, *The Chicago Obsession in the Interpretation of US Antitrust History*, 87 U. Chi. L. Rev. 459, 462–63 (2020); Daniel A. Crane, *The New Crisis in Antitrust (?)*,83 Antitrust L.J. 253, 253–55, 268 (2020).

29 Khan & Vaheesan, *supra* note 25, 275; Michael Isikoff and Merrill Brown, *Baxter's Reign: Evolution, Not Revolution*, Wash. Post, Dec. 11, 1983, F1.

Currently, the case for antitrust reform is to a substantial extent data focused. Those advocating an antitrust overhaul have drawn heavily upon "evidence from economic studies … pouring in like a flood" reputedly conveying an "unmistakable" message: "the U.S. has become a lot less competitive."[30] History, however, is doing much to set the tone for reform. All the talk of change means that antitrust is not just "cool". Instead, a "musty corner of American jurisprudence aimed at curtailing monopoly power"[31] is "cool again."[32] Hence, the brewing revolution in the antitrust field "is a blast from antitrust's past in many ways."[33]

The nickname of the most vocal advocates for change betrays the influence history is having on antitrust debates. They like to be known as "New Brandeisians,"[34] harkening back to a distinguished jurist, Louis Brandeis, who was warning of "the curse of bigness" more than a century ago.[35] Critics of the New Brandeisian camp also invoke a historical moniker when making their points. They reference a 1940s jazz sub-culture, labelling the proposals for reform "hipster antitrust" to underscore the backward looking logic reputedly afflicting antirust "progressives" advocating an overhaul.[36] "Hipster Antitrust," in other words, is dismissed as "old wine in new bottles."[37]

Not surprisingly, given their historical moniker, New Brandeisians have themselves regularly invoked past trends to defend their arguments for present-day reform. They harken back to an era when antitrust enforcement ostensibly

---

30 Jonathan Tepper & Denise Hearn, The Myth of Capitalism: Monopolies and the Death of Competition xvi, 13 (2019). See also Parloff, *supra* note 28.

31 Robinson Meyer, *How to Fight Amazon (Before You Turn 29)*, Atlantic.com, July/August 2018, https://www.theatlantic.com/magazine/archive/2018/07/lina-khan-antitrust/561743/.

32 *Antitrust is Cool Again*, N.Y.L.J., Jan. 22, 2018, 2.

33 Joshua D. Wright, Elyse Dorsey, Jonathan Klick & Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 Ariz. St. L.J. 293, 294 (2019). See also William E. Kovacic, *The Roots of America's Competition Revolution*, ProMarket, Sept. 21, 2021, https://promarket.org/2021/09/21/the-roots-of-americas-competition-revolution/("The transformationalists have relied heavily upon a reinterpretation of America's competition policy history.")

34 Michael Tennant, *Monopolies: Fears, Facts and Fallacies*, New Am., March 5, 2018, 10, 11; Seth B. Sacher & John M. Yun, *Twelve Fallacies of the Neo-Antitrust Movement*, 26 Geo. Mason L. Rev. 1491, 1493 (2019).

35 Louis D. Brandeis, *A Curse of Bigness*, Harper's Wkly., Jan. 10, 1914, at 18; Greg Ip, *Latest Antitrust Approach Has Its Own Risks*, Wall St. J., July 8, 2021, A2.

36 David Streitfeld, *Be Afraid Jeff Bezos, Be Very Afraid*, N.Y. Times, Sept. 9, 2018, 1 (quoting a tweet by Konstantin Medvedovsky, an antitrust lawyer).

37 Joshua Wright & Aurelien Portuese, *Antitrust Populism: Towards a Taxonomy*, 25 Stan. J.L. Bus. & Fin. 131, 149 (2020). See, though, Kovacic, *supra* note 33 (arguing that "transformation" is the key ambition of advocates of antitrust reform, whether known as "New Brandeisians" or antitrust "hipsters.")

posed a real threat to powerful corporations.[38] When Lina Khan was appointed FTC chair law professor David Singh Grewal maintained, "What she's doing is really just returning antitrust and market policy to the status quo ante, of the 20s through the 60s, even the 70s."[39] Senator Amy Klobuchar, the proponent of the recent "sweeping" antitrust enforcement bill,[40] has fortified her case for reform with a 624-page book on antitrust where a majority of the chapters focus on history.[41] The White House likewise has drawn on the past to push the case for reform. A briefing accompanying President Biden's July 2021 executive order encouraging agencies to promote competitive markets said "When past presidents faced similar threats from growing corporate power, they took bold action" and cited antitrust enforcement his predecessors Theodore Roosevelt and Franklin Delano Roosevelt (FDR) pursued.[42]

For the New Brandeisians history revolves around the Chicago School's alleged corruption of an American anti-monopoly tradition.[43] Under Chicago School logic, antitrust should forsake trying to protect competitors from dominant rivals and seeking to safeguard democracy from concentrated private power. The focus instead should be on what the Chicago School treats as closely related goals, enhancing consumer welfare and increasing economic efficiency.[44]

According to the New Brandeisians, in the 1980s the market-friendly administration of Ronald Reagan drew heavily on Chicago School reasoning while greatly downscaling antitrust enforcement.[45] Fast forward to today and antitrust ostensibly "hasn't been enforced in decades."[46] And the consequences have reputedly been disastrous: "Starting in the Reagan administration, the Chicago school's capture of antitrust theory has brought us to a period of market concentration unrivaled since the Gilded Age."[47] Now "a group of antimonopoly" academics and policymakers – primarily the New Brandiesians – are seeking to

38 Tennant, *supra* note 34, 11.

39 James Politi and Lauren Fedor, *The New Antitrust Chief Taking on Big Tech*, Fin. Times, June 19, 2021, 11.

40 *Supra* note 11 and accompanying text.

41 Amy Klobuchar, Antitrust: Taking on Monopoly Power from the Gilded Age to the Digital Age (2021).

42 White House, *Fact Sheet: Executive Order on Promoting Competition in the American Economy*, July 9, 2021.

43 Parloff, *supra* note 28; Crane, *supra* note 28, 253–55, 268; Kovacic, *supra* note 28, 462–63.

44 Wu, *supra* note 9, 113–18; Khan & Vaheesan, *supra* note 25, 268–69, 276.

45 Khan & Vaheesan, *supra* note 25, 294; Klobuchar, *supra* note 41, 136–37, 144–45, 148.

46 Dayen, *supra* note 7, 281.

47 David Dayen, *This Budding Movement Wants to Smash Monopolies*, The Nation, April 4, 2017. See also Sandeep Vaheesan, *How Robert Bork Fathered the New Gilded Age*, ProMarket, Sept. 5, 2019, https://promarket.org/2019/09/05/how-robert-bork-fathered-the-new-gilded-age/; Marc Jarsulic, *Antitrust Enforcement for the 21st Century*, 64 Antitrust Bull. 514, 525–26 (2019).

revamp antitrust and in the process are "rediscovering our traditions and updating them for the age in which we live today."[48]

The New Brandeisians have not yet won the day intellectually. Conservative-minded descendants of the Chicago School maintain talk of a monopolization crisis is overhyped,[49] and dismiss the "big is bad" logic underpinning "hipster" antitrust as the recycling of discredited ideas.[50] Middle-of-the-roaders recoil at what they contend would be an unadministrable "wild west" approach to antitrust.[51] Despite disagreement on the right path for antitrust, however, the New Brandeisians' invocation of history has gone largely unchallenged. The Chicago School, as they maintain, is widely thought of as providing the catalyst for the antitrust makeover that has thus far been sustained through to the present day.[52]

While history has done much to set the tone of current debates about antitrust, the mood music has been out of tune in various ways. At least three facets of the historical account underpinning hipster antitrust are of doubtful provenance. The first is the state of play prior to Chicago School adherents ostensibly declaring "their intent to overthrow our antitrust laws."[53] The New Brandeisians are nostalgic for a mid-20th century era of beneficially lively antitrust enforcement Bork and the Chicago School brought to an unfortunate halt. Market power, this version of events implies, did not have the baleful influence during this enlightened era it has currently. But was antitrust really as potent (and beneficial) as advertised?

The second difficulty with the version of history the New Brandeisians rely on is that it fails to account adequately for the economic and political context accompanying the antitrust counter-revolution of the 1970s and 1980s. The New Brandeisians treat that change of direction with antitrust purely as a battle of ideas that went awry, as "Bork led an intellectual revolution that sacrificed citizens at the altar of efficiency and cheap goods."[54] Sometimes a difficult economic environment is

48 Matt Stoller, Goliath 453 (2019).

49 Jacob M. Schlesinger, Brent Kendall & John D. McKinnon, *Hunting for Giants*, Wall St. J., June 8, 2019, B1.

50 Parloff, *supra* note 28. *Cf*. Posner, *supra* note 13 (maintaining that "The right seems to be sitting on the sidelines").

51 Parloff, *supra* note 28. The demarcation between the schools of thought is not always clear. See, for example, Hal Singer, *Fixing a Broken Antitrust Regime*, ProMarket, May 26, 2021, https://promarket.org/2021/05/26/amy-klobuchar-antitrust-monopoly-ovation-review/(indicating that while Senator Amy Klobuchar was a centrist reform "incrementalist" she was "sympathetic to the pleas of the progressives.")

52 Kovacic, *supra* note 28, 459–63.

53 Barry C. Lynn, Cornered: The New Monopoly Capitalism and the Economics of Destruction 143 (2009).

54 Tepper & Hearn, *supra* note 30, 158.

referenced, as is the popularity of deregulation in the late 1970s and 1980s.[55] Much is left unexplained, however. Most crucially, why did the Chicago School's critique of antitrust find a receptive audience amongst policymakers, especially for a set of ideas that New Brandeisians now condemn as totally misguided?

The third difficulty relates to the post-Reagan era. Why, despite Reagan's departure from office in 1989, did the antitrust counter-revolution his administration did much to foster evolve into a stable antitrust consensus?[56] It is true that U.S. Supreme Court jurisprudence citing Bork and other Chicago School theorizing served as binding case law precedents.[57] Surely more is required, however, to set the scene for what appeared until recently to be "the end of antitrust history,"[58] supposedly oriented around the forsaking of meaningful enforcement. By addressing these three facets of antitrust history and related points this article offers the historical context thus far lacking and thereby gets history and antitrust in tune. Insights as to whether a new age of antitrust is in prospect follow in turn.

While antitrust enforcement may have been more robust in the mid-20th century than it was before or after, the fact that oligopolies comprised of domestic firms featured prominently in corporate America at the time casts doubt on whether this was the golden era of antitrust New Brandeisians assume. In contrast with widespread mid-20th century assumptions that the corporate economy was oligopolistic, as the 20th century drew to a close various observers remarked upon the intensity of market forces. This could hardly have been due to antitrust, given the ostensible Chicago School/Reagan era retreat. Fears American businesses were losing ground to foreign competitors instead was the primary driver.

During the concluding decades of the 20th century overseas firms made substantial headway in the United States. This trend simultaneously compromised market power of America's corporate titans that otherwise might have attracted antitrust scrutiny and prompted concerns that antitrust enforcement was imposing a counterproductive burden on American business. A belief that market forces tempered substantially the sway of incumbents would remain pervasive until major U.S. tech companies began to fall out of favor in the late 2010s. These global leaders went from admired to feared as they came to dominate a corporate America much less troubled by direct challenges by foreign rivals.

At the same time that pressure from foreign rivals came to the fore, doubts about the efficacy of regulation – including antitrust – mushroomed in the United

55 See, for example, Jonathan B. Baker, The Antitrust Paradigm: Restoring A Competitive Economy 47, 203 (2019).

56 *Supra* note 24 and related discussion.

57 Daniel Kishi, *Robert Bork's America*, American Conservative, March 1, 2018.

58 Khan, *supra* note 24.

States due to political scandals and perceived government mismanagement of the economy. Misgivings about regulation were sustained from the late 20th century through to the early 21st century, which fortified the antitrust consensus the Chicago School had helped to usher in. Skepticism of regulation appears, however, to be on the wane currently. Given this, and given growing fears regarding the market dominance America's largest firms enjoy, antitrust has emerged – perhaps more accurately re-emerged – as a theoretically desirable check on corporate power.

This article is organized as follows. Part I focuses on what has been described as the golden age of antitrust, the mid-20th century, and more precisely the 1950s through to the 1970s. This era features in the New Brandeisian narrative because it is from this ostensible antitrust peak that the Chicago School laid low a proud anti-monopoly tradition. Parts II and III cast doubt on the golden age account. Part II indicates that antitrust enforcement was uneven in the 1950s and 1960s, which likely contributed to large corporations being able to exercise substantial market power akin to that which New Brandeisians chastise today. Part III explains why 1960s Supreme Court jurisprudence provided an easy target for antitrust skeptics as the late 20th century antitrust counter-revolution began to take shape. Parts IV and V identify additional reasons why this counter-revolution that New Brandeisians abhor occurred. Part IV draws attention to growing concerns about the efficacy of government regulation, focusing on the impact on antitrust. Part V highlights how increasingly robust foreign competition shaped antitrust discourse. Part VI explains why the late 20th century antitrust counterrevolution associated with the Chicago School would provide the basis for an enduring consensus. Part VII draws attention to insights history can provide regarding the outcome of the current antitrust moment. Part VIII concludes.

2 The Golden Age of Antitrust

In June 2016, Elizabeth Warren headlined an event organized by the Open Markets Institute, a pioneering advocate of antitrust reform with which current FTC chair Lina Khan was affiliated.[59] Senator Warren declared in her speech "today, in America, competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our

59 Sheelah Kolhatkar, *How Elizabeth Warren Came Up with a Plan to Break Up Big Tech*, New Yorker, Aug. 20, 2019, https://www.newyorker.com/business/currency/how-elizabeth-warren-came-up-with-a-plan-to-break-up-big-tech; Nancy Scola, *How a Liberal Think Tank is Driving 2020 Dems to Crack Down on Big Tech*, Politico, June 14, 2020, https://www.politico.com/story/2019/06/14/open-market-institute-silicon-valley-monopolies-1507673.

democracy."[60] Warren's 2016 speech "gave a prominent voice" to those then advocating antitrust reform,[61] and has been described as "famous"[62] and "a watershed."[63]

Senator Warren's Open Markets Institute speech is instructive for present purposes because it indicates neatly how history informs the New Brandeisian narrative. In particular, her remarks underscore the crucial role a supposed mid-20th century antitrust golden age plays in that narrative. To provide necessary context, we begin with a summary of the New Brandeisian analysis of what went wrong with antitrust after that golden age.

2.1 The Chicago School's Supposedly Woeful Legacy

Senator Warren, in her 2016 speech, argued that antitrust, as it had developed in the closing decades of the 20th century, deserved much of the blame for dismal present-day market conditions. Warren, as President Biden later did,[64] attributed a decisive role to Robert Bork. In 1978, Bork published *The Antitrust Paradox*,[65] which has been described as a "far-ranging",[66] "acerbic"[67] and ultimately "path-breaking"[68] critique of antitrust law. According to Warren's 2016 speech, "Bork's framework limits antitrust thinking even today. When coupled with the deregulatory ideology of the Reagan era, the Bork approach to antitrust law meant that government largely stepped out of the way and let companies grow larger and larger."[69] For Warren there was an unfortunate legacy: "Now the country needs more competition – and more competitors."[70] She posed the logical follow up question – "So how do we get more competition?"[71] And she provided the answer: "reinvigorate antitrust law."[72]

60 Elizabeth Warren, *Reigniting Competition in the American Economy, Keynote Remarks at New America's Open Markets Program Event*, June 29, 2016, 1, https://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf.

61 Brent Kendall, *Elizabeth Warren Says Competition "Dying", More Scrutiny Needed*, Dow Jones Institutional News, June 29, 2016.

62 Dirk Auer & Nicolas Petit, *Two Systems of Belief About Monopoly: The Press vs. Antitrust*, 39 Cato J. 99, 125 (2019).

63 Parloff, *supra* note 28.

64 *Supra* note 26 and related discussion.

65 Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself (1978).

66 Robert M. Bleiberg, *The Bigger, the Better?*, Barron's, March 6, 1978, 10.

67 Geisst, *supra* note 27, 252.

68 Stephen Calkins, *Antitrust Modernization: Looking Backwards*, 31 J. Corp. L. 421, 436 (2006).

69 Warren, *supra* note 60, 5.

70 *Ibid*.

71 *Ibid*.

72 *Ibid*.

New Brandeisians concur fully with Warren's diagnosis of what went wrong with the corporate landscape. The culprit, according to the New Brandeisians, was the Chicago School's radical antitrust philosophy that Robert Bork did much to influence.[73] Antitrust, Chicagoans said, should keep consumer prices low, not seek to protect competitors from successful dominant firms or try to constrain economic and political power large corporations wield. [74]

How did the Chicago School sweep all before it? The answer, according to the New Brandeisians: the presidency of Ronald Reagan. Reagan "appointed Chicago School apostles and acolytes to key courts of appeals, and installed another to head the antitrust division at Justice."[75] A reinterpretation of antitrust law quickly ensued, prompting courts and regulators to adopt a counterproductively restrained approach when applying the rules.[76] Hence, in 1980 "Ronald Reagan would win election and put Bork's theories into practice. And the rest was history."[77]

Lina Khan summarizes the history as follows: there was a "counterrevolution in antitrust-originating as an intellectual movement led by the Chicago School, stamped into policy by the Reagan administration."[78] And the outcome was disastrous:

> Highly concentrated markets in the contemporary United States are not the product of impersonal economic forces – rather they are the product of conscious legal and political decisions in the late 1970s and early 1980s. These decisions severely undermined the antitrust laws, crippling what had been a major congressional safeguard against monopoly and oligopoly.[79]

Senator Amy Klobuchar has argued similarly "The Chicago School rose to prominence in the courts – and in the country's antitrust enforcement agencies – in the

73 On Bork's influence see Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. Pa. L. Rev. 925, 933 (1979) ("By 1969, then, an orthodox Chicago position (well represented in the writings of Robert Bork) had crystallized").

74 Dayen, *supra* note 47; Vaheesan, *supra* note 47; Benjamin C. Waterhouse, *A History of America's Fight Against Monopolies*, Wash. Post, December 6, 2019, https://www.washingtonpost.com/outlook/a-history-of-americas-fight-against-monopolies/2019/12/06/ce34b360-da3c-11e9-ac63-3016711543fe_story.html.

75 Parloff, *supra* note 28.

76 Khan, *supra* note 16, 727; Chris Hughes, *It's Time to Break Up Facebook*, N.Y. Times, May 12, 2019, Harry Lambert, *Matt Stoller's Goliath: The Rise of Big Tech*, New Statesman, December 4, 2019, https://www.newstatesman.com/goliath-matt-stoller-review; Ariel Katz, *The Chicago School and the Forgotten Political Dimension of Antitrust Law*, 87 U. Chi. L. Rev. 413, 414 (2020).

77 Dayen, *supra* note 7, 6.

78 Khan & Vaheesan, *supra* note 25, 275.

79 *Ibid*. at 268.

1980s after the publication of Bork's *Antitrust Paradox* and Ronald Reagan's election."[80] The legacy: "Given how American courts have narrowly interpreted the country's antitrust laws in an ahistorical, Borkian manner, competitive harms are occurring more and more frequently in America's economy."[81] And the cure, echoing Warren's: "What the U.S. needs now is a renewed antitrust movement."[82]

2.2 The Golden Age of Antitrust as Part of the New Brandeisian Narrative

Elizabeth Warren cites with antitrust the need to "reinvigorate."[83] Amy Klobuchar talks of "renewed."[84] Similarly, Lina Khan has argued, "antitrust laws can be restored to promote competitive markets once again."[85] All of these advocates of reform are thus looking backward in time for the appropriate reference point. More precisely, underpinning the New Brandeisians' historically oriented logic is the assumption that pre-Chicago School antitrust was robust and competitive vigor correspondingly featured prominently in the American economy. As an analysis of the New Brandeis movement says, its adherents "believe there once was a golden age of antitrust enforcement in which the U.S. government's expert regulators had the wisdom" to address "unfair, anticompetitive practices that harmed not just consumers but society as well."[86] Amy Klobuchar indeed refers in her 2021 book on antitrust to "(t)he golden age of antitrust enforcement."[87]

When was this era when antitrust ostensibly fulfilled its potential? The answer is the period immediately prior to the ostensibly Bork-inspired antitrust counter-revolution – the mid-20th century. Elizabeth Warren made the point in her speech. She referred nostalgically to an era when "(a)ntitrust law was real—and American corporations knew it."[88] This era began, according to Warren, with a dramatic escalation of antitrust enforcement by the Department of Justice (DOJ) between 1938 and 1943 under the leadership of Thurman Arnold, Assistant Attorney General in charge of the Antitrust Division. At that point "antitrust enforcement took off," and "the Justice Department's Antitrust Division grew from 18 lawyers to 500 and

80 Klobuchar, *supra* note 41, 136; Bork, *supra* note 65.
81 Klobuchar, *supra* note 41, 301.
82 *Ibid*., 351.
83 *Supra* note 72 and accompanying text.
84 *Supra* note 82 and related discussion.
85 Khan & Vaheesan, *supra* note 25, 237.
86 Tennant, *supra* note 34, 11.
87 Klobuchar, *supra* note 41, 239.
88 Warren, *supra* note 60, 5.

ramped up litigation."[89] The White House drew attention to the same chronology when putting into context President Biden's July 2021 order regarding promoting competition in the American economy. According to the White House, "In the late 1930s, FDR's Administration supercharged antitrust enforcement, increasing more than eightfold the number of cases brought in just two years—enforcement actions that saved consumers billions in today's dollars and helped unleash decades of sustained, inclusive economic growth."[90]

New Brandeisians concur. Khan, in a 2017 *Yale Law Journal* article described as the manifesto of hipster antitrust,[91] says in mid-20th century America there was "recognition that excessive concentrations of private power posed a public threat, empowering the interests of a few to steer collective outcomes" and courts and antitrust enforcers applied the law accordingly.[92] Wu, the White House adviser on technology and competition policy, wrote in his 2018 book *The Curse of Bigness*, "the postwar era was characterized by bold efforts to tame capitalism" as part of "a deliberate attempt to limit private power."[93] According to Wu "(t)he American enforcement of anti-monopoly laws reached its zenith in the 1960s" and "(t)he peak of anti-monopoly enforcement coincided with a period of extraordinary gains in prosperity."[94]

2.3 What About Before the Golden Age?

The antitrust river had been flowing for quite some time prior to the mid-20th century golden age, with the Sherman Act being 60 years old in 1950. Did the glory years for antitrust extend further back? While Warren singled out Thurman Arnold's late 1930s contribution,[95] she acknowledged in her 2016 speech that there were some earlier antitrust highlights. She drew attention to the beginning of the 20th century, saying of the three presidents who served from late 1901 to early 1921 "reformers like Teddy Roosevelt, William Howard Taft, and Woodrow Wilson were trust-busters, people who fought the power that monopolies wield in the economy and in politics."[96]

89 *Ibid*.
90 White House, *supra* note 42.
91 Thomas W. Hazlett, *The New Trustbusters Are Coming for Big Tech*, Reason, Oct. 2019, https://reason.com/2019/09/05/the-new-trustbusters-are-coming-for-big-tech/.
92 Khan, *supra* note 16, 742.
93 Wu, *supra* note 9, 82.
94 *Ibid*., 81, 82.
95 *Supra* note 89 and accompanying text.
96 Warren, *supra* note 60, 5.

The White House invoked the same early 20th century era when putting into context the July 2021 executive order regarding promoting competition in the American economy. According to the White House, "In the early 1900s, Teddy Roosevelt's Administration broke up the trusts controlling the economy—Standard Oil, J.P. Morgan's railroads, and others—giving the little guy a fighting chance."[97] President Biden, for his part, linked Teddy Roosevelt with Franklin Roosevelt, president from 1933 to 1945, in his remarks on the July 2021 executive order, saying "Between them, the two Roosevelts established an American tradition — an antitrust tradition."[98] The *Economist* concurred pithily with the president's assessment of his antitrust idols[99] when reporting on the executive order, saying, "Teddy and Franklin enjoyed a trust bust."[100]

Even if there were some antitrust highlights prior to the ostensible mid-20th century golden age of antitrust enforcement, the golden age did not extend back to the opening decades of the century. Herbert Hovenkamp, a leading expert on antitrust, maintains that while "The early decades of federal antitrust enforcement were characterized by popular outcries against monopoly and big business," "(t)he fervor" yielded "a stunning lack of visible achievement."[101] A whirlwind tour of early 20th century antitrust history bears out this assessment.

While the Sherman Act became law in 1890, "Prior to World War I, no substantial progress was made in breaking up great industrial combinations."[102] Antitrust prosecutions were, at best, sporadic, which is not surprising given that the Antitrust Division of the Department of Justice was not established until 1903 and then was modestly funded.[103] As president, Theodore Roosevelt used forceful antitrust rhetoric but did not back systematic, vigorous antitrust enforcement.[104] Antitrust proceedings were brought against corporate giants such as Standard Oil

97 White House, *supra* note 42.

98 White House, *supra* note 26.

99 Jim Tankersley & Cecilia Kang, *Biden Brings in Antitrust Team to Test Titans*, N.Y. Times, July 25, 2021, A1.

100 *Anti-Trust in Me*, *supra* note 21.

101 Herbert Hovenkamp, *Antitrust After Populism*, The Making of Competition Policy: Legal and Economic Sources 221, 222 (Daniel A. Crane & Herbert Hovenkamp eds., 2013). See also Gene M. Gressley, *Thurman Arnold, Antitrust, and the New Deal*, 38 Bus. Hist Rev. 214, 214 (1964) (antitrust enforcement was "especially" "vacillating and sporadic" in the opening decades of the 20th century).

102 Walter Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 Ind. L.J. 1, 2 (1951).

103 Brian Cheffins, *The Development of Competition Policy, 1890–1940: A Re-Evaluation of a Canadian and American Tradition*, 27 Osgoode Hall L.J. 449, 459–60 (1989).

104 *Ibid*., 460.

and American Tobacco but the overall economic impact of the litigation was modest.[105]

Antitrust was a high-profile issue in the 1912 presidential election, which Woodrow Wilson won.[106] The enactment of the Clayton and Federal Trade Commission Acts in 1914 was the primary legacy, with these measures expanding the range of anti-competitive conduct deemed unlawful and providing for the creation of the Federal Trade Commission as an antitrust enforcer.[107] Antitrust, however, had a low profile thereafter during the Wilson administration, partly due to close relations between industry and government during World War I.[108]

"Nothing much happened" with antitrust from the early 1920s through until Thurman Arnold's appointment as Assistant Attorney-General for antitrust in 1938.[109] The Supreme Court interpreted statutory antitrust laws restrictively during this period and the executive branch evinced little enthusiasm for antitrust enforcement.[110] Indeed, the administrations of Calvin Coolidge, Herbert Hoover and FDR each took steps to help businesses escape from competition, with the motive under Roosevelt being to give industry a boost to end the Depression.[111] Hence, during the 1920s "the antitrust laws were barely enforced, if at all," and were "all but abandoned" during the opening years of Roosevelt's presidency.[112]

---

105 *Ibid*.; Adams, *supra* note 102, 2. Antitrust enforcement in the early 20th century did affect, however, prospects for sizeable horizontal mergers. See Brian R. Cheffins, *Mergers and Corporate Ownership Structure: The United States and Germany at the Turn of the 20th Century*, 51 Am. J. Comp. L. 473, 484 (2003); Richard B. Baker, Carola Frydman & Eric Hilt, *Political Discretion and Antitrust Policy: Evidence from the Assassination of President McKinley*, NBER Working Paper No. 25237, 22–26 (2018).

106 Daniel A. Crane, *All I Really Need to Know about Antitrust I Learned in 1912*, 100 Iowa L. Rev. 2025 (2015).

107 38 Stat. 730; 38 Stat. 717.

108 Cheffins, *supra* note 103, 467; Richard M. Steurer & Peter A. Barile II, *Antitrust in Wartime*, 16 Antitrust 71, 71–72 (2002); Spencer Weber Waller, *The Antitrust Legacy of Thurman Arnold*, 78 St. John's L. Rev. 569, 571 (2004).

109 Donald Dewey, The Antitrust Experiment in America 8 (1990).

110 Cheffins, *supra* note 103, 471–73.

111 *Ibid*., 472, 474–75; Waller, *supra* note 108, 571; Alan J. Meese, *Competition Policy and the Great Depression: Lessons Learned and a New Way Forward*, 23 Cornell J.L. & Pub. Pol. 255, 280–83, 286, 289–94 (2013).

112 Waller, *supra* note 108, 577. See also Patrice Bougette, Marc Deschamps & Frédéric Marty, *When Economics Met Antitrust: The Second Chicago School and the Economization of Antitrust Law*, 16 Enterprise & Soc. 313, 326 (2015) (on the Roosevelt administration's stance).

In the late 1930s, the Roosevelt administration changed tack and abandoned explicitly trying to temper market forces.[113] Litigation forced the federal government's hand with the U.S. Supreme Court striking down in 1935[114] a federal law that exempted from antitrust scrutiny federally approved codes of fair competition.[115] Roosevelt himself remained ambivalent about antitrust.[116] Nevertheless, Arnold, consistent with praise Senator Warren bestowed,[117] capitalized on his appointment as head of the Antitrust Division to publicize its work, to lobby successfully for increased funding and to step up enforcement activity.[118]

Arnold has been described as "the very model of the aggressive antitrust enforcer."[119] Indeed, according to a 2004 study of his antitrust legacy, without him "there would be no modern antitrust law or government antitrust enforcement."[120] However, "(j)ust as Arnold's program was producing dramatic results, he was effectively undermined."[121] As early as 1940, it seemed likely there would "be practical nullification of antitrust in the face of the war planning and production leading up to the United States entry into World War II."[122] The antitrust program was, in effect, suspended in 1942 and in early 1943 Arnold accepted an appointment to the United States Court of Appeals for the District of Columbia.[123]

---

113 Gressley, *supra* note 101, 215–16; Cheffins, *supra* note 103, 474–75; Laura Phillips Sawyer, American Fair Trade Proprietary Capitalism, Corporatism, and the "New Competition," 1890–1940 297 (2018).

114 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). On the case, see Meese, *supra* note 111, 300–4; Sawyer, *supra* note 113, 291–93.

115 Meese, *supra* note 111, 291–92, discussing the National Recovery Act of 1933, Pub. L. 73–67, 48 Stat. 195.

116 Wilson D. Miscamble, *Thurman Arnold Goes to Washington: A Look at Antitrust Policy in the Later New Deal*, 56 Bus. Hist. Rev. 1, 2–5 (1982).

117 *Supra* note 89 and related discussion.

118 Waller, *supra* note 108, 580–84; Bougette, Deschamps & Marty, *supra* note 112, 327–29; Sawyer, *supra* note 113, 297–99, 307–8.

119 Lawrence A. Sullivan & Wolfgang Fikentscher, *On the Growth of the Antitrust Idea*, 16 Berkeley J. Int'l. L. 197, 202 (1998). See also Dayen, *supra* note 7, 282 ("the most aggressive antitrust enforcer in history"); Meese, *supra* note 111, 304 ("zealous trustbuster"). Some antitrust enthusiasts criticize the late 1930s revival of antitrust, however, on the basis that policymakers prioritized benefitting consumers at the expense of challenging malign economic power. See Binyamin Applebaum, *Paying Attention to Monopoly's Bad Cousin*, N.Y. Times, November 16, 2021, 23, citing Alan Brinkley, The End of Reform: New Deal Liberalism in Recession and War (1995).

120 Waller, *supra* note 108, 613.

121 Gressley, *supra* note 101, 227.

122 Waller, *supra* note 108, 603.

123 Gressley, *supra* note 101, 227–28.

2.4 The Golden Age – A Precis

While systematic antitrust enforcement was very much the exception to the rule until the brief Thurman Arnold interlude, various observers concur with the New Brandeisian view that antitrust was an important force during the mid-20th century. This era has been indeed been described outside New Brandeisian circles as "golden"[124] and "antitrust's most interventionist period,"[125] implementing "the most expansive antitrust agenda in the history of the antitrust laws."[126] Whatever momentum there was, private lawsuits reinforced it. Private antitrust actions were essentially unknown prior to 1940 but by the mid-1950s such lawsuits outnumbered those government trustbusters brought.[127]

The mid-20th century business community certainly did not think it could or should ignore antitrust. While before the 1950s law firms rarely had a separate antitrust practice, by 1958 the *Christian Science Monitor* was telling readers "These are good years for corporation lawyers whose clients are distressed by antitrust jitters."[128] Economist Jesse Markham, having hailed in 1965 the "vigor and vigilance that has been injected into antitrust policy," noted that antitrust "received considerable attention from the business community."[129] In 1968, law professor Thomas Kauper said "Businessmen now commonly talk about antitrust; internal compliance programs have been initiated and carried out."[130]

To the extent that the mid-20th century was a golden era for antitrust, the Supreme Court was a key contributor. During the 1960s, the Supreme Court adopted in relation to a wide range of conduct antitrust law regulated an inflexible "per se" standard where a court was to presume conclusively a practice or type of agreement was unreasonable and therefore illegal.[131] According to Kauper, "the

124 Sam Peltzman, *The Decline of Antitrust Enforcement*, 19 Rev. Industrial Org. 49, 50 (2001); Ramsi A. Woodcock, *The Hidden Rules of a Modest Antitrust*, 105 Minn. L. Rev. 2095, 2115 (2021).

125 Sacher & Yun, *supra* note 34, 1500.

126 Hovenkamp, *supra* note 101, 222.

127 Cheffins, *supra* note 103, 485.

128 Vartanig G. Vartan, *Antitrust Lawyers Hit Hard at Big Business*, Christian Sci. Monitor, July 21, 1958, 3. On the situation before the 1950s, see Spencer Weber Waller, *Corporate Governance and Competition Policy*, 18 Geo. Mason L. Rev. 833, 842 (2011).

129 Jesse W. Markham, *The New Antitrust Policy and the Individual Business Firm*, 30 Law & Contemp. Probs. 607, 607, 611 (1965). See also *Sharper Teeth for U.S. Trustbusters*, Fin. Times, Apr. 22, 1964, 3 ("The Sherman Antitrust Act…has acquired new vigour").

130 Thomas E. Kauper, *The Warren Court and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 Mich. L. Rev. 325, 335 (1968).

131 Sokol, *supra* note 3, 1268; Priest, *supra* note 27, S3–S4; Thomas E. Kauper, *The Report of the Attorney General's National Committee to Study the Antitrust Laws: A Retrospective*, 100 Mich. L. Rev. 1867, 1872–73 (2002). On the nature of per se rules, see Northern Pacific Ry. v. United States, 356 U. S. 1, 5 (1958).

rulings…rested on concerns over the straits of small entrepreneurs" and were "more consistent with civil rights thinking than economic analysis."[132] Whatever the precise ideological underpinnings, with cases that came before the Supreme Court there was "a common belief….the result is preordained. Defense lawyers expect to lose."[133] With justification; when Earl Warren was chief justice of the U.S. Supreme Court (1953–1969) the Department of Justice and the FTC won virtually all of the antitrust cases they brought.[134] Justice Potter Stewart confirmed this via an "acid comment"[135] in his dissent in a 1966 case, *United States v. Von's Grocery Co.*, saying that in merger appeals coming before the court "(t)he sole consistency" he could find was that "the Government always wins."[136]

In *United States v. Arnold, Schwinn & Co.*,[137] a 1967 case, the U.S. Supreme Court applied a per se rule to declare illegal non-price restraints Schwinn, a bicycle manufacturer, imposed on distributors to whom Schwinn had sold bicycles. Within a decade, the case had "already achieved the dubious distinction of being probably the most harshly criticized decision in the history of the antitrust laws."[138] Nevertheless, the most striking and publicized line of antitrust case law authority the mid-20th century Supreme Court marked out related to mergers.[139] Law professor Milton Handler, a leading antitrust academic, remarked, for instance, on "the Court's proclivity to find illegality in every merger that the ebb and tide of litigation brings before it."[140]

In *Brown Shoe Co. v. United States*, a 1962 ruling, the Supreme Court struck down a merger under the Clayton Act, as amended in 1950, between a shoe manufacturer with a 4% national market share and a small retail network and a shoe retailer which accounted for just 1.2% of U.S. retail shoe sales.[141] Chief Justice Warren, delivering the judgment of the court, acknowledged that the intention

---

132 Kauper, *supra* note 131, 1873. See also Nicola Giocoli, *Old Lady Charm: Explaining the Persistent Appeal of Chicago Antitrust*, 22 J. Econ. Methodology 96, 100 (2015) (citing "the Supreme Court's egalitarian impulse toward the dispersion of economic power").

133 Kauper, *supra* note 130, 336.

134 *Ibid.*; Richard A. Posner, *The Antitrust Decisions of the Burger Court*, 47 Antitrust L.J. 819, 820 (1979).

135 Milton Handler, *Twenty-Five Years of Antitrust (Twenty-Fifth Annual Antitrust Review)*, 73 Colum. L. Rev. 415, 456 (1973).

136 United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966).

137 388 U.S. 365 (1967).

138 Earl E. Pollock, *Schwinn Per Se Rule: The Case for Reconsideration*, 71 Nw. U. L. Rev. 1, 1 (1976).

139 Kauper, *supra* note 130, 326; Rudolph J. R. Peritz, Competition Policy in America, 1888–1992: History, Rhetoric, Law 210 (1992).

140 Handler, *supra* note 135, 456.

141 Brown Shoe Co. v. United States, 370 U.S. 294 (1962); Robert A Skitol & Kenneth M. Vorrasi, *The Remarkable 50-Year Legacy of Brown Shoe Co. v. United States*, 26 Antitrust 47, 47 (2012).

underlying the relevant statutory measure was to protect competition rather than competitors.[142] He also said, however, that the Clayton Act, as revised, gave the courts the power to stop mergers when the lessening of completion "was still in its incipiency" and acknowledged "Congress' desire to promote competition through the protection of viable, small, locally owned business."[143] The *Washington Post* praised the ruling in a 1962 editorial, saying the court had "accurately and expertly read the mind of Congress" and had interpreted the law "with deft consideration of economic realities."[144]

The populist emphasis on the desirability of fragmentation of the corporate sector and preservation of small business that was evident in *Brown Shoe* would prevail in the Supreme Court through the remainder of the 1960s.[145] The court correspondingly vetoed in 1963 a 1958 acquisition of the 18th largest brewery in the United States by the 10th largest.[146] It did the same in 1966 with a 1960 merger between large Philadelphia banks the defendants maintained would foster greater competition nationally.[147] Ditto with *Von's Grocery Co.*, which involved a 1960 merger of two Los Angeles supermarket chains that together had a modest 7.5% of the relevant market share but reputedly constituted a "threatening trend toward concentration."[148]

The Warren Court merger jurisprudence apparently supplied antitrusters with "the leverage to stop any and all horizontal mergers."[149] This was known at the time. The *New York Times* observed just after *Von's Grocery* was decided, "These court opinions, if acted upon fully, would practically eliminate from the American business scene the horizontal merger."[150] The relevant antitrust laws in fact were administered with considerable caution, an important point to bear in mind in putting into perspective the ostensibly golden mid-20th century antitrust era. We pick up on this point next.

---

142 370 U.S. 294, 320 (1962).

143 370 U.S. 294, 317, 344 (1962).

144 *Buttress for Competition*, Wash. Post, June 27, 1962, A16.

145 Skitol and Vorrasi, *supra* note 141, 49.

146 United States v. Pabst Brewing Co., 384 U.S. 546 (1966); Hazlett, *supra* note 91.

147 United States v. Philadelphia Nat'l. Bank, 374 U.S. 321 (1963); Roger Lowenstein, *Antitrust Enforcers Drop the Ideology, Focus on Economics*, Wall St. J., February 27, 1997, A1.

148 United States v. Von's Grocery Co., 384 U.S. 270, 277 (1966).

149 Arthur Austin, *Antitrust Reaction to the Merger Wave: The Revolution versus the Counterrevolution*, 66 N.C. L. Rev. 931, 936 (1988).

150 Eileen Shanahan, *Antitrust Chief With a Sophisticated View*, N.Y. Times, June 29, 1966, 61. See also *Antitrust Turns Tougher*, Bus. Wk., Sept. 12, 1964, 98; Fred P. Graham, *Court Toughens Rule on Mergers*, N.Y. Times, June 1, 1966, 18.

3 How "Real" was Antitrust in the Mid-Twentieth Century?

We now have in place the New Brandeisian narrative. There were early antitrust heroes such as Theodore Roosevelt. Antitrust only began to hit its stride, however, once Franklin Roosevelt appointed Thurman Arnold. A post-World War II golden era for antitrust ensued – antitrust, as Elizabeth Warren said in her 2016 speech, was "real".[151] But then the Chicago School, enabled by the Reagan administration, disastrously intervened.

The New Brandeisian account seems to tie together the relevant history tidily and thereby provides the mood music for a reversal of the ill-judged Chicago School + Reagan antitrust counter-revolution. The New Brandeisian narrative presumes, as Thomas Kauper said of Chicago School critics in 2008, the Chicago School was akin to the villain in a well-known children's book, "the 'Grinch Who Stole Christmas,' rejecting tradition and stealing away decades of antitrust development with a kind of single swoop down the mountain."[152] Monopoly – or at least oligopoly – duly thrived.[153] As Lina Khan has said, "It is important to trace contemporary antitrust enforcement and the philosophy underpinning it to the Chicago School intellectual revolution of the 1970s and 1980s, codified into policy by President Reagan."[154]

The New Brandeisian account, while neat, is out of tune with historical reality in important ways. The Chicago School and the Reagan administration did have a major impact on antitrust. There is, however, much more to the story. For instance, the assumption New Brandeisians and various other commentators make that the mid-20th century was a golden era for antitrust is questionable. A well-known 1964 article on antitrust by historian Richard Hofstadter indicates this.[155] He maintained that with the "growing public acceptance of the large corporation," antitrust was "a faded passion" that had become "specialized, and bureaucratized."[156] Hofstadter was hardly the lone antitrust pessimist at the time. The well-known

151 *Supra* note 88 and related discussion.

152 Thomas E. Kauper, *Influence of Conservative Economic Analysis on the Development of the Law of Antitrust* in How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust (Robert Pitofsky ed., 2008). 40, 42; Dr. Suess, The Grinch Who Stole Christmas (1957).

153 Wu, *supra* note 4; Tepper & Hearn, *supra* note 30, 158; Dayen, *supra* note 47; Hazlett, *supra* note 91.

154 Khan & Vaheesan, *supra* note 25, 294.

155 Richard Hofstadter, *What Happened to the Antitrust Movement? Notes on the Evolution of an American Creed* in The Business Establishment (Earl F. Cheit ed., 1964), 113.

156 *Ibid*., 113, 115, 151.

economist John Kenneth Galbraith acknowledged in 1967 that antitrust enforcement curbed "on occasion, the rapacity of individuals and firms who survive in the entrepreneurial mode" but maintained that absent special circumstances "to the large firm the antitrust laws are harmless."[157]

Other features of the New Brandeisian antitrust history narrative merit a closer look. It might have been thought, for instance, that drawing the curtain on the golden age of antitrust, such as it was, would have been controversial, wracked by partisan bickering. Not so. Serious doubts had arisen regarding the veracity of antitrust by the time Ronald Reagan was elected in 1980. This vulnerability meant changes the Reagan administration made were accepted with relative equanimity. Moreover, the basic direction of travel with antitrust remained undisturbed for more than a quarter-century after Reagan, a Republican, left office, despite Democrats Bill Clinton and Barack Obama both serving two full terms as president.

At least three factors worked in tandem with Chicago School analysis to foster the late 20th century antitrust counter-revolution and contribute to its durability. These were: 1) concerns about the nature of mid-20th century antitrust law jurisprudence 2) doubts about the efficacy of government regulation 3) a belief that even the largest American corporations were facing considerable, often foreign, competitive pressure, which implied antitrust was superfluous and perhaps counterproductive as a check on market power. We will consider these factors in Parts III to V after we assess just how "real" antitrust was during its ostensible mid-20th century golden age.

3.1 Mid-20th Century Market Conditions

To the extent that the mid-20th century was the golden age of antitrust, a logical supposition would be that market forces operated in a robust manner that is foreign today, given the market power supposedly on display currently is due to the antitrust counter-revolution the Chicago School and the Reagan administration launched. Indeed, Matt Stoller, in his 2019 book *Goliath*, says after describing the antitrust culture Thurman Arnold initiated as "entrenched" during the 1950s and 1960s, "There was more competition, and increasing competition, in the economy at large."[158] In fact, it is open to question how potent market forces actually were during the mid-20th century.

Herbert Hovenkamp maintains many mid-20th century "antitrust economists and lawyers had come to believe that, given expansion in firm size and growing

157 John Kenneth Galbraith, The New Industrial State 193, 194 (1967).

158 Stoller, *supra* note 48, 187–88.

market concentration, oligopoly performance was inevitable."[159] Victor Hansen, one of Arnold's successors as head of the Antitrust Division in the DOJ, indeed said in 1957 "Economic concentration is increasing,"[160] a claim substantiated at least to some degree by empirical evidence.[161] *Barron's* acknowledged in 1965 a "widely held view today that a few sellers will inevitably conspire to act like a coercive monopoly."[162] A.D. Neale, in the 1969 edition of a monograph on American antitrust law, suggested "(t)he typical market structure in which big business operates is oligopoly."[163] Humorist Art Buchwald made the point in a whimsical way in his *Washington Post* column in 1966.[164] He said that by 1978 all corporations west of the Mississippi River would have merged into a single corporation, that the same would have happened east of the Mississippi and that the two companies would soon be looking to merge so there would be only one corporation in the United States.[165]

If mid-20th century antitrust was, as Elizabeth Warren suggested, "real", why was there a widespread belief that oligopoly was "typical" and perhaps "inevitable"? The pessimism about market forces may have been overdone. In 1957, *Barron's* labelled monopoly in the American economy as one of the "myths of socialism" and asserted that "every enterprise, no matter how big or affluent, must meet the continual test of consumer choice."[166] Another possibility is that the 1950s and 1960s were not the golden era of antitrust that has been supposed. Art Buchwald's punchline in the 1966 column where he speculated that America might, due to a merger, have only one corporation by 1978 lends credence to this conjecture. He suggested that the Antitrust Division not only would have cleared that merger but that its response if that corporation sought to buy the United States

159 Herbert Hovenkamp, *Antitrust's Error Costs*, Univ. of Pennsylvania Institute for Law and Economics, Research Paper Series, No. 21–32, 18–19 (2021).

160 James A. Reynolds, *Antitrust Hustle*, Wall St. J., Jan. 16, 1957, 1.

161 Mark J. Green, The Closed Enterprise System: Ralph Nader's Study Group on Antitrust Enforcement 8 (1972) (reporting a "slight increase" in market concentration – the market share of the largest firms in an industry between 1947 and 1966 – and a "dramatic" increase in aggregate concentration); Willard F. Mueller & Larry G. Hamm, *Trends in Industrial Market Concentration, 1947 to 1970*, 54 Rev. Econ. & Stat. 511 (1974) (reporting that the predominant trend was stability, with a slight bias in favor of increased concentration); Naomi R. Lamoreaux, *The Problem of Bigness*, 33 J. Econ. Perspectives 94, 106 (Figure 2) (2019) (indicating concentration increased from 1947 to the early 1970s).

162 Elizabeth Gillett, *Cry Wolf: Kefauver's Case Against Monopoly Is Bunk*, Barron's, April 12, 1965, 8.

163 A.D. Neale, The Antitrust Laws of the U.S.A.: A Study of Competition Enforced by Law 449 (2nd ed., 1969).

164 Art Buchwald, *Capitol Punishment… Everyone Is Merging*, Wash. Post, June 2, 1966, 21.

165 *Ibid*.

166 *Myth of Monopoly*, Barron's, Jan. 21, 1957, 1.

would have been nothing more than to "study this merger to see if it violates our strong anti-trust laws."[167] We correspondingly will assess now how "real" antitrust enforcement actually was during the mid-20th century, adopting a chronological approach in so doing. We will see enforcement was considerably patchier than the New Brandeisian account implies.

3.2 The Truman Administration

With antitrust the administration of Democrat Harry Truman had "at best…an uneven enforcement program."[168] After Truman won the 1948 presidential election, momentum built in favor of reviving antitrust activity from a post-Thurman Arnold World War II lull.[169] *Business Week* referred in 1950, for instance, to federal antitrusters' "drive to break up big business."[170] The primary legacy, however, was legislative. In 1950, Congress passed the Celler-Kefauver amendment of the 1914 Clayton Act, thereby strengthening the scope for regulation of mergers.[171] Truman said when signing the Celler-Kefauver law that it was a priority of his administration "to prevent the growth of monopoly and greater concentration of economic power."[172]

During the rest of the Truman administration, antitrust was "relatively quiescent."[173] Cases launched during Thurman Arnold's energetic tenure often remained active but the Korean War, which ran from 1950 to 1953, hindered the development of a coherent approach to enforcement.[174] For instance, an economy drive the conflict prompted resulted in the slashing of appropriations to the Antitrust Division.[175] One by-product was that antitrust enforcers did not launch proceedings based on the 1950 Celler-Kefauver amendments when Truman was president.[176]

---

167 Buchwald, *supra* note 164.

168 Theodore P. Kovaleff, Business and Government During the Eisenhower Administration: A Study of the Antitrust Policy of the Antitrust Division of the Justice Department 11 (1980).

169 Tony Freyer, Regulating Big Business: Antitrust in Great Britain and America, 1880–1990 298 (1992).

170 *Big-Business-Busting Enters New Era*, Bus. Wk., June 10, 1950, 19.

171 64 Stat. 1125; Daniel A. Crane, *A Premature Postmortem on the Chicago School of Antitrust*, 93 Bus. Hist. Rev. 759, 761 (2019).

172 Harry S. Truman, *Statement by the President Upon Signing Bill Amending the Clayton Act*, Dec. 29, 1950, https://www.presidency.ucsb.edu/documents/statement-the-president-upon-signing-bill-amending-the-clayton-act.

173 Freyer, *supra* note 169, 300.

174 *Ibid*.

175 Kovaleff, *supra* note 168, 11.

176 Theodore P. Kovaleff, *The Antitrust Record of the Eisenhower Administration*, 21 Antitrust Bull. 589, 602 (1976).

3.3 The Eisenhower Administration

While the Truman administration's approach to antitrust was "relatively quiescent", *Business Week* told readers in 1959 "from the beginning of the Eisenhower Administration, Republican antitrusters have acted as though they believed in competition and the antitrust laws."[177] Theodore Kovaleff, in a 1980 study of business/government relations during the Eisenhower presidency (1953–61), concurred: "The Eisenhower administration incontrovertibly oversaw a period of vigorous and innovative enforcement of the antitrust laws…."[178]

The Eisenhower administration's approach to antitrust cut against conventional political wisdom. As the *Economist* explained in the final full year of Eisenhower's presidency:

> A surprising aspect of the Eisenhower Administration from the very beginning has been its anti-trust policy. As the 'party of big business' the Republicans were expected to deal gently with monopoly and anti-competitive practices. The dis- appointment of businessmen at the way things have turned out has been manifest. The Anti-trust Division of the Justice Department – the agency chiefly responsible for the enforcement of the anti-trust laws – has been tougher and more aggressive than its immediate predecessors under a Democratic Administration. Even the congressional Democrats most concerned with anti-trust matters have found little to criticise.[179]

The primary antitrust emphasis during the Eisenhower years was on mergers, with the greatest contribution being energetic enforcement of the revised Clayton Act.[180] When the U.S. Supreme Court interpreted the legislation liberally in its judgments in the 1960s, the roots of many of the cases could be traced back to the Eisenhower antitrust program.[181]

3.4 The Kennedy Administration

It initially appeared the Eisenhower antitrust momentum would be sustained when Democrat John F. Kennedy became president. Lee Loevinger told Attorney General Robert Kennedy in his successful interview to become chief of the DOJ's Antitrust Division that he believed "in antitrust almost as a secular

177 *Where Are Antitrusters Headed?*, Bus. Wk., February 21, 1959, 30. See also *Eisenhower's Antitrusters Have a Busy Four Years in Store*, Bus. Wk., December 15, 1956, 60.
178 Kovaleff, *supra* note 168, 155.
179 *Mergers on Trial*, Economist, February 20, 1960, 717.
180 Kovaleff, Antitrust, *supra* note 176, 602, 609; *Eisenhower's Antitrusters*, *supra* note 177.
181 Kovaleff, *supra* note 168, 158.

religion."[182] The *Wall Street Journal* said in 1961 that "(s)urgeons of the Kennedy administration are sharpening their antitrust scalpels" and were itching "to swing into offensive action to assault more existing corporate structures."[183]

In fact, "antitrust enforcement lagged" under Kennedy.[184] The Kennedy Antitrust Division brought cases challenging price-fixing schemes of modest economic import (e.g. Venetian blinds, kosher hot dogs and touring ice shows) in lieu of cracking down on large corporations seemingly exercising quasi-monopoly power.[185] Robert Kennedy's close monitoring of the Antitrust Division, motivated by concerns his brother's administration was thought of as unjustifiably "anti-business", helps to explain the caution.[186]

3.5 The Johnson Administration

The Kennedy administration's cautious approach to antitrust enforcement was sustained under his Democrat successor Lyndon Johnson. The *Wall Street Journal* indeed suggested in 1965 that it was impossible Johnson's "consensus brand of politics would welcome a spirited campaign to break up big business."[187] The appointment of Donald Turner, a Harvard law professor, as Assistant Attorney General in charge of antitrust that year, implied differently. He reputedly "grew apoplectic at the sight of big business getting bigger" as a professor[188] and referred to himself as a "renegade economist" when he was appointed to run the Antitrust Division.[189] The Johnson administration, however, circumscribed Turner's room to maneuver.

The *Wall Street Journal* said when Turner became head of the Antitrust Division that "if he grows bold and attempts to expand the antitrust range, he can expect a lasso from the White House."[190] By 1967, "traditional, crusading trustbusters" had concluded, "Turner's brand of antitrust is namby pamby."[191] The *Wall Street Journal* was even referring to "gentle trustbusters", saying that despite the misgivings of "old-time Washington liberals, gray haired survivors of the New Deal era

182 Wu, *supra* note 9, 75.

183 William Beecher, *Antimonopoly Attack*, Wall St. J., April 13, 1961, 1.

184 Green, *supra* note 161, 73. See also Kovaleff, *supra* note 168, 146–47.

185 *Ibid*., 77; Drew Pearson, *Monopoly Crackdown Forgotten?*, Wash. Post, December 16, 1962, E7.

186 Green, *supra* note 161, 74; Marc Allen Eisner, Antitrust and the Triumph of Economics: Institutions, Expertise, and Policy Change 124–25 (1991).

187 James Harwood, *Antitrust's Mr. Turner*, Wall St. J., July 12, 1965, 14.

188 *Ibid*.

189 Monroe W. Karmin, *Antitrust Overhaul*, Wall St. J., December 16, 1965, 1.

190 Harwood, *supra* note 187.

191 *Taking the Crusade Out of Antitrust*, Bus. Wk., May 20, 1967, 59.

when trustbusting was in vogue and business bigness was all bad….antitrust enforcement is becoming an anachronism in this era of the Great Society….”[192]

The juxtaposition between the Supreme Court’s 1960s antipathy toward mergers and the Johnson administration’s cautious stance was particularly striking. Antitrust proponents could not understand why the Johnson Antitrust Division “let some of the biggest mergers in history slip by unchallenged— especially in an age when the Supreme Court has struck down nearly every merger it has got its hands on.”[193] There was no appetite, however, for a thoroughgoing assault on mergers. Attorney General Nicholas deB. Katzenbach, commenting in 1965 on the jurisprudence, acknowledged “we could block five times the mergers we do”, meaning “(w)e have quite tremendous power” but cautioned “we have to think through how we are going to use it.”[194] To the ire of antitrust proponents, Turner concurred, acknowledging he would “not necessarily file every case he knows he could win.”[195]

The Johnson administration’s lukewarm approach to antitrust continued after Donald Turner stepped down in 1967. An antitrust task force Johnson set up secretly in December 1967 handed him in July 1968 a report on reform that recommended numerous changes to the law, most notably increasing the scope to address market concentration and oligopolies.[196] Johnson declined even to release what was known as the Neal Report,[197] named for Phil Neal, the head of the task force and Dean of the University of Chicago law school.[198] The *Wall Street Journal* explained why in 1969 when the Nixon administration made the Neal Report public, saying “The recommendations apparently weren’t to the liking of Johnson, whose Administration displayed little enthusiasm for vigorous enforcement of antitrust statutes and none for new antitrust laws.”[199]

---

192 Louis M. Kohlmeier, *Gentle Trustbusters*, Wall St. J., March 7, 1967, 18.

193 *Taking the Crusade*, *supra* note 191. *Business Week* cited five examples: Continental Oil Co. + Consolidation Coal Co. ($2.1 billion combined assets as the time of the merger), Union Oil Co. + Pure Oil Co. ($1.7 billion), Atlantic Refining Co. + Richfield Oil Co. ($1.4 billion), Douglas Aircraft + McConnell Co. ($1.2 billion) and American Tobacco Co. + Sunshine Biscuits ($959 million).

194 *Antitrust Policy Gets a Long, Hard Look*, Bus. Wk., May 8, 1965, 45.

195 Shanahan, *supra* note 150.

196 White House Task Force on Anti-trust Policy, *Task Force Report on Anti-trust Policy*, 91st Congressional Record, first Senate session, May 27, 1969, 13890, https://www.govinfo.gov/content/pkg/GPO-CRECB-1969-pt11/pdf/GPO-CRECB-1969-pt11-1-1.pdf. For a summary, see Calkins, *supra* note 68, 433–36.

197 Eileen Shanahan, *Trust-Law Shift Urged*, N.Y. Times, May 22, 1969, 1.

198 Herbert J. Hovenkamp, *The Neal Report and Crisis in Antitrust*, University of Iowa Legal Studies Research Paper 09-09, 1 (2009).

199 *Sweeping Reform of Antitrust Laws Urged In Report That Was Submitted to Johnson*, Wall St. J., May 22, 1969, 4.

Bearing in mind the antitrust record of the Kennedy and Johnson administrations, Theodore Kovaleff's verdict on antitrust in his 1980 study of business/government relations during the Eisenhower administration seems fair: "the Democratic record pales when compared to that of the preceding administration."[200] Kovaleff added "(i)n the 1960s, antitrust was all but forgotten." That hardly sounds like the golden era to which the New Brandeisians harken. Here, however, Kovaleff overstates matters, as his assessment insufficiently credits the key role U.S. Supreme Court jurisprudence played in shaping the understanding of antitrust.[201] After all, "(t)he Warren Court era was the zenith of the socio-political model of antitrust."[202] This did much to ensure antitrust was "real" during the mid-20th century even if enforcement was uneven. Indeed, it seems likely that in the 1960s the business community was "chafing more at the Supreme Court than at administrative trustbusters."[203] As we will see next, however, judicial enthusiasm for antitrust would provide one of the departure points for the antitrust counter-revolution that occurred as the 20th century drew to a close.

4 The Jurisprudential Vulnerability of Antitrust Law

While enforcement in the 1950s and the 1960s was patchier than might have been expected in the "golden era" of antitrust, the antitrust stance of the Warren Court helped to ensure antitrust operated on a different plane than its late 20th century Chicago School-influenced counterpart. As we will see now, trends in the 1970s were mixed. On one hand, the Warren Court's antitrust stance took a substantial jurisprudential battering, with Chicago School reasoning ultimately playing an important role. At the same time, antitrust enforcement was perhaps never more robust and a toughening of applicable laws seemed likely before the Chicago School + Reagan antitrust counter-revolution gained full momentum in the 1980s.

200 Kovaleff, *supra* note 168, 157.
201 Eisner, *supra* note 186, 121.
202 Carl T. Bogus, *The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust*, 49 U. Mich. J.L. Reform 1, 80 (2015).
203 Roger Lane, *Mergers, U.S. Policy On Them in Transition*, Wash. Post, September 13, 1964, 2.

4.1 Criticism of 1960s Supreme Court Antitrust Jurisprudence

Thomas Kauper, having summarized the consensus view of the late 20th century antitrust counter-revolution by invoking the children's story villain the Grinch, suggested, "(t)he antitrust of the fifties and sixties…was simply waiting for the Grinch to take and never to be returned."[204] He had in mind here primarily mid-20th century Supreme Court antitrust jurisprudence. Kauper suggests that for the Chicago School the Supreme Court's approach to antitrust "was its immediate target" and maintains the case law "was a target that was not hard to hit."[205]

Bork was a strong critic of the Warren Court antitrust jurisprudence, which is hardly surprising given his much-heralded role in the antitrust counter-revolution of the late 20th century.[206] He led off an 1967 *American Economic Review* article where he argued that consumer welfare should be antitrust law's benchmark by arguing "The life of the antitrust law…is, in contrast to (Oliver Wendell) Holmes's dictum about the common law, neither logic nor experience but bad economics and worse jurisprudence."[207] Bork had plenty of company as a critic. For instance, Harvard's Phillip Areeda, an antitrust giant not associated with the Chicago School[208] subsequently chided 1960s Supreme Court merger cases for "phony market definitions, mistaking increased efficiency for anticompetitive effect, and loose reasoning about potential anticompetitive effects."[209] Even New Brandeisians have acknowledged mid-20th century Supreme Court antitrust jurisprudence had flaws. Jonathan Tepper and Denise Hearn say

> Like any revolution, the movement against monopolies and oligopolies went too far at times. The two landmark cases that became rallying cries against antitrust regulation were the *Brown Shoe* case and *Von's* (the Los Angeles supermarket case). Both stood out as poor decisions that then justified the counter-revolution to come.[210]

Bork remarked in the early 1980s "When I first started teaching and writing, people thought I was a crackpot."[211] In fact, 1960s Supreme Court antitrust jurisprudence was drawing criticism from various quarters at the time. Donald Turner

---

204 Kauper, *supra* note 152, 42.

205 *Ibid*., 43.

206 *Supra* notes 26, 53–54, 69, 73, 77, 80–81 and related discussion.

207 Robert H. Bork, *The Goals of Antitrust Policy*, 57 Amer. Econ. Rev. 242, 242 (1967).

208 Kovacic, *supra* note 28, 464; Barak Orbach, *Was the Crisis in Antitrust a Trojan Horse?*, 79 Antitrust L.J. 881, 882 (2014).

209 Phillip Areeda, *Monopolization, Mergers, and Markets: A Century Past and the Future*, 75 Calif. L. Rev. 959, 976 (1987).

210 Tepper & Hearn, *supra* note 30, 153.

211 Ronald J. Ostrow, *New "Anti Antitrust" Trend Could be Pro Profit*, L.A. Times, June 28, 1981, G1.

believed when he was head of the Antitrust Division that "(i)n some cases…the courts were jeopardizing efficiency— even hurting the economy— by overzealously protecting small competitors."[212] The *Wall Street Journal* said of a 1966 Supreme Court decision that expanded the Federal Trade Commission's scope to regulate franchising arrangements that "the most regrettable effect of the decision is the new confusion it injects into antitrust law, an area that was already baffling enough."[213] Milton Handler, who had initially "applauded the rationale of *Brown Shoe*,"[214] had adopted a strikingly different tone by 1967. He maintained that in antitrust cases the Supreme Court tended to start with "the answer rather than with a question, thus placing its own policy predilections above statutory language and legislative history."[215] Hence, recent rulings advanced "extreme views against which I cavil – all restraints are unlawful; all reciprocity is evil; all horizontal mergers are improper; all consignments with price agreements are anticompetitive; all exclusive dealing arrangements are unfair."[216] Supreme Court antitrust jurisprudence thus was indeed proving to be a vulnerable target for those with antitrust misgivings.

4.2 The Judicial Counter-Reaction

In the mid- and late-1970s, the U.S. Supreme Court went a considerable distance toward reversing what Areeda would refer to as "(t)he worst excesses"[217] of its 1960s jurisprudence. *Continental Television v. GTE Sylvania*, a 1977 case, "is widely considered a turning point in modern antitrust,"[218] primarily due to the Supreme Court invoking explicitly for the first time Chicago School commentary.[219] The

212 *Taking the Crusade*, *supra* note 193.

213 *Franchises Under Fire*, Wall St. J., June 13, 1966, 18.

214 Handler, *supra* note 135, 455.

215 Milton Handler, *The Supreme Court and the Antitrust Laws (from the Viewpoint of the Critic)*, 34 Antitrust L.J. 21, 35 (1967).

216 *Ibid*., 40.

217 Areeda, *supra* note 209, 976.

218 Continental Television v. GTE Sylvania, 433 U.S. 36 (1977); Camden Hutchinson, *Law and Economics Scholarship and Supreme Court Antitrust Jurisprudence, 1950–2010*, 21 Lewis & Clark L. Rev. 145, 190 (2017).

219 Bougette, Deschamps & Marty, *supra* note 112, 332, 340, 343; William Davies, *Economics and the Nonsense" of Law: The Case of the Chicago Antitrust Revolution*, 39 Economy & Soc. 64, 78 (2010). See also Priest, *supra* note 27, S6, acknowledging the importance of *Sylvania* but saying as well that United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977) provided "indelible evidence of Chicago school influence on the Court's change." In contrast with *Sylvania*, though, the Supreme Court, per Justice Stevens, did not cite Chicago School literature in this decision.

Supreme Court, however, had begun to forsake the Warren Court's approach to antitrust a few years beforehand.

The scene was set for the Supreme Court to pivot away from the Warren Court approach to antitrust when Warren E. Burger became Chief Justice in 1969 and other Richard Nixon Supreme Court nominees began replacing antitrust "hawks" who had set the tone in the 1960s.[220] A 1973 ruling telegraphed the shift when a split court failed to uphold the government's lawsuit against a merger of two Colorado banks.[221] In the wake of *United States v. General Dynamics*,[222] a 1974 case where the U.S. Supreme Court rejected the government's challenge to a merger of two coal producing companies, Thomas Kauper, who was then the Justice Department's antitrust chief,[223] acknowledged "we're dealing with a different court."[224] The following year, the *Wall Street Journal* suggested, "Business appears to be just about unbeatable in disputes with government antitrusters on mergers," explaining this partly in terms of "pure, pro-business conservatism among the majority."[225]

It is possible that the Supreme Court justices were aware of and were taking on board Chicago School antitrust literature on an unattributed basis prior to *Sylvania*.[226] Robert Bork wrote the pieces of his the Supreme Court cited in *Sylvania* a decade or so before that judgment was handed down.[227] Richard Posner, another prominent Chicago School antitrust commentator the Supreme Court cited in *Sylvania*,[228] began publishing in the antitrust field in 1969.[229] Still, given the

220 Posner, *supra* note 134, 819; Warren Weaver, *Court is Watched for Merger Shift*, N.Y. Times, March 24, 1974, 118.

221 United States v. First Nat. Bancorporation, 410 U.S. 577 (1973); Warren Weaver, *High Court Lets Bank Link Stand*, N.Y. Times, March 1, 1973, 57; Mergers: A More Permissive View, Time, July 8, 1974, http://content.time.com/time/subscriber/article/0,33009,943923,00.html.

222 United States v. Gen. Dynamics Corp. 415 U.S. 486 (1974).

223 Department of Justice, *Two Former Antitrust Division Heads Receive Justice Department's 1996 John Sherman Award*, October 3, 1996, https://www.justice.gov/archive/atr/public/press_releases/1996/0984.htm (indicating Kauper headed the Antitrust Division between 1972 and 1976).

224 Wayne E. Green, *Tipping the Scales*, Wall St. J., May 21, 1974, 1.

225 Wayne E. Green, *Tipping the Scales*, Wall St. J., July 1, 1975, 1.

226 Davies, *supra* note 219, 78 ("From the mid-1970s onwards, the opinions of judges began to lean towards the Chicago School approach.")

227 Continental Television v. GTE Sylvania, 433 U.S. 36, 56, 66, 69 (1977), citing Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division [I]*, 74 Yale L. J. 775 (1965); Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division [II]*, 75 Yale L. J. 373, 403 (1966); Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. Law & Econ. 7 (1966).

228 Continental Television v. GTE Sylvania, 433 U.S. 36, 49, 51, 56–57, 65, 69–70 (1977).

229 Richard A. Posner, *The Federal Trade Commission*, 37 U. Chi. L. Rev. 47 (1969); Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 Stan. L. Rev. 1562 (1969).

citation pattern, contrary to the Chicago School as Grinch antitrust narrative, the Supreme Court seemingly had done much to forsake the Warren Court approach to antitrust before drawing explicitly on Chicago School logic.[230]

Even though the Supreme Court started to forsake its populist antitrust posture prior to 1977, *Sylvania* was a landmark ruling.[231] The Supreme Court did not turn around in the case and overrule a host of the Warren Court's case law precedents.[232] The Supreme Court, explicitly abandoned, however, the egalitarian impulse that had been guiding its antitrust jurisprudence. As Posner wrote in 1979 "The underlying notion, that the antitrust laws express the political values of Jeffersonian democracy rather than economic values rooted in efficiency, also is gone, rejected in the *Sylvania* decision."[233] The case also set the stage for what would become a "successful effort to refocus antitrust on purely economic concerns,"[234] which in turn compelled antitrust lawyers to examine in detail the economic aspects of the cases they brought.[235]

4.3 1970s Antitrust Enforcement as a Counter-Balance to Judicial Trends

Robert Bork acknowledged in the early 1990s "*Sylvania* presaged a new economic sophistication in antitrust."[236] He was initially considerably more cautious about the Supreme Court's 1970s change of heart. In the 1978 edition of *The Antitrust Paradox* he acknowledged that the Supreme Court had "recently taken a significant step toward reforming a part of antitrust."[237] He characterized *General Dynamics*, however, as a fact-specific ruling that did "not reform existing doctrine."[238] As for *Sylvania*, he cautiously endorsed it as "a hopeful development" that "may presage a general reformulation of a policy gone astray."[239]

---

230 See Hutchinson, *supra* note 218, 192 (saying Justice Powell, who wrote the *Sylvania* opinion, "needed little convincing to overrule *Schwinn*").

231 Bougette, Deschamps & Marty, *supra* note 112, 232, 240; Eisner, *supra* note 186, 143.

232 William H. Page, *Legal Realism and the Shaping of Modern Antitrust*, 44 Emory L.J. 1, 48 (1995).

233 Posner, *supra* note 134, 821.

234 Charles F. Rule, *Setting the Record Straight: The Present is Prologue, Remarks for the 22nd New England Antitrust Conference*, October 28, 1988, 14, https://www.justice.gov/atr/speech/setting-record-straight-present-prologue

235 Eisner, *supra* note 186, 144.

236 Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself 436 (rev. ed., 1993).

237 Bork, *supra* note 65, 5.

238 *Ibid.*, 218.

239 *Ibid.*, 287, 419.

Trends outside the courtroom explain Bork's caution. As he noted in *The Antitrust Paradox* "the courts are of course not the sole generators of antitrust policy,"[240] and on other counts he was pessimistic. He said "the machinery of antitrust enforcement grinds steadily on", a situation that seemed unlikely to change because "there is some intellectual but almost no political opposition to (antitrust's) main features."[241] Bork even expressed concern that "A new era of antitrust expansion seems likely to begin in Congress."[242]

Given that Ronald Reagan was elected very shortly after the publication of *The Antitrust Paradox* Bork's pessimism seems quixotic. However, Charles Geisst, in his 2000 book *Monopolies in America*, said "(t)he 1970s were a period of intense antitrust activity."[243] Amy Klobuchar similarly characterized the decade as the "heyday" of antitrust enforcement, citing DOJ case filing data to make the point.[244]

Politicians in the 1970s indeed were favorably disposed towards antitrust. Shortly after replacing Richard Nixon as president, Gerald Ford pledged "a return to the vigorous enforcement of antitrust law."[245] To that end, Ford signed into law in 1974 the Antitrust Procedures and Penalties Act, which changed the status of criminal violations of the antitrust laws from misdemeanors to felonies and stiffened fines and jail sentences that could be meted out.[246] Two years later Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act, which required with sizeable corporate acquisitions the filing of premerger notifications with the FTC and the DOJ to give them time to assess the antitrust ramifications.[247] The Ford administration also increased the Antitrust Division's budget and staff levels markedly.[248]

Ford's antitrust vigour was not lost on contemporaries. Mark Green, who assailed the weakness of antitrust enforcement in a lengthy 1972 study,[249] said as 1974 drew to a close "I'm sort of encouraged."[250] Louis Kohlmeier, a *Boston Globe* columnist, christened the president "trustbuster Ford."[251] *Business Week* reported in

240 *Ibid*., 5.
241 *Ibid*., 3–4.
242 *Ibid*., 5.
243 Geisst, *supra* note 27, 278.
244 Klobuchar, *supra* note 41, 137, 150.
245 Carole Shifrin, *Climate Now Right for Antitrust Revival*, Wash. Post, December 22, 1974, E1.
246 P.L. 93–528; Bleiberg, *supra* note 66.
247 P.L. 94–435; Geisst, *supra* note 27, 270.
248 B. Dan Wood & James E. Anderson, *The Politics of U.S. Antitrust Regulation*, 37 Amer. J. Pol. Sci. 1, 18 (Figures 1, 2), 20 (1993); Paul Sturm, *The Lull Before the (Antitrust) Storm*, Forbes, August 15, 1977, 25 (indicating that the Antitrust Division's budget had doubled since 1974).
249 Green, *supra* note 161.
250 Shifrin, *supra* note 245.
251 Louis M. Kohlmeier, *Ford, The Shy Trustbuster*, Boston Globe, November 9, 1975, D1.

1975 that "As the federal government gets tougher on corporations and corporate executives caught up in antitrust cases….(a)ntitrust compliance is just about the most important responsibility that a corporate law department has to discharge."[252]

When Democrat Jimmy Carter became president in 1977 *Forbes* warned the business community it could "be in for a rough time on the antitrust front," quoting Mark Green as saying "one of the most aggressive antitrust administrations in decades" could be in prospect.[253] Geisst's verdict that "Antitrust activity hit its stride during Jimmy Carter's presidency" implies the potential was fulfilled.[254] The Antitrust Division's budget and staff levels indeed continued to increase.[255] President Carter nevertheless saw room for further bolstering, declaring in 1978 that "there is a great need for reform" of federal antitrust laws as he established a national commission to study possible beneficial changes to the law.[256]

When Carter's national antitrust commission reported in 1979, one high-profile recommendation was that Congress should amend the Sherman Act to deal more effectively with persistent monopoly power. The commission suggested to that end introducing by statute a "no fault" approach where violations could be established without proof of culpable conduct.[257] There also were numerous substantial antitrust bills making the rounds in Congress, often generated by the Senate Judiciary Committee prominent liberal Democratic Senator Edward Kennedy was chairing.[258] Given such trends, it is understandable that when Bork published *The Antitrust Paradox* in 1978 he was cautious about the direction of travel with antitrust even though the antitrust counter-revolution that he influenced was just around the corner. What were the additional ingredients that set the scene for that counter-revolution? We consider these in Parts IV and V.

5 "Government is the Problem"

For New Brandeisians explaining how Bork's cautiously "hopeful" 1970s trends were translated into an antitrust counter-revolution is easy – Ronald Reagan was

252 *How to Avoid Antitrust*, Bus. Wk., January 27, 1975, 84.
253 Sturm, *supra* note 248.
254 Geisst, *supra* note 27, 278.
255 Wood & Anderson, *supra* note 248, 18 (Figures 1, 2), 21; Arthur D. Austin, *National Commission for the Review of Antitrust Laws and Procedures: Reports on Symptoms but Ignores Causes*, 54 Notre Dame L. Rev. 873, 873 (1979).
256 *Carter Starts Antitrust Study*, N.Y. Times, June 22, 1978, D13.
257 James H. Wallace Jr., *Another Year of Significant Congressional Initiatives*, 48 Antitrust L.J. 1519, 1523–24 (1979).
258 *Ibid.*, 1519.

elected president in 1980.[259] In fact, there were non-Chicago School variables evident prior to the Reagan presidency that put antitrust as it then operated on shaky ground that became more potent in the 1980s, thereby fortifying the counter-revolution that would ensue. Diminished faith in government was one of these. Indeed, noted economist F. M. Scherer has suggested that a belief that "government is the problem" was a more important root cause of late 20th century antitrust counter-revolution than Chicago School theorizing.[260]

University of Chicago law professor Frank Easterbrook formalized the ramifications of regulation skepticism in an antitrust context in a widely cited 1984 law review article.[261] Easterbrook argued that antitrust enforcement errors did much to explain why "the history of antitrust is filled with decisions that now seem blunders."[262] To elaborate, Easterbrook "famously adopt(ed) an error-cost framework"[263] that put regulatory mistakes in the spotlight and favored non-enforcement of antitrust law.[264] Easterbrook downplayed the adverse effects of governmental failures to take action against potentially deleterious anticompetitive conduct, reasoning that market forces would marginalize such practices over time.[265] He emphasized instead the hazards of wrongful condemnation of pro-competitive behavior on the basis that the forsaking of such beneficial conduct would generate a significant social cost.[266] Such anti-regulation logic had in fact gained substantial traction in the antitrust context before Easterbrook formalized it,[267] and did so in a way that contributed to the antitrust counter-revolution New Brandeisians attribute to the Chicago School and the Reagan administration.

The 1970s were a dismal decade for government. America's troubles in Vietnam, the Watergate political scandal, chronic federal budget deficits and bungled efforts to control inflation and unemployment all helped to drive anti-government sentiment from 32% in 1964 to 50% in 1972 and 67% in 1980.[268] Influential 1970s

259 *Supra* notes 45, 47, 69, 75–78, 80, 154 and related discussion. See, though, Eisner, *supra* note 186, 140, 146–49, 171–72, 185, 225–26, 231 (maintaining that Chicago school reasoning had taken hold in the Antitrust Division and the FTC in the 1970s).

260 F.M. Scherer, *Conservative Economics and Antitrust: A Variety of Influences*, in How the Chicago, *supra* note 152, 30, 36.

261 Frank H. Easterbrook, *Limits of Antitrust*, 63 Tex. L. Rev. 1 (1984). As of early 2022, according to Google Scholar, the article had been cited just over 1800 times.

262 *Ibid*., 3.

263 Baker, *supra* note 55, 73.

264 Hovenkamp, *supra* note 159, 3.

265 Easterbrook, *supra* note 261, 2–3.

266 *Ibid*., 2–3, 5–7.

267 Hovenkamp, *supra* note 159, 10 (suggesting "the theoretical and empirical foundations for an anti-enforcement error cost bias were crumbling already by the 1980s.")

268 Brian R. Cheffins, The Public Company Transformed 137 (2018).

politicians who, as Democrats, might have been expected to favor increased state involvement in the economy responded to the cue. Jimmy Carter acknowledged in his 1978 State of Union address that "(g)overnment cannot solve our problems."[269] Ted Kennedy said in a 1979 interview "there is no reason we can't get the government off the back of American industry in the area of economic regulation."[270] Such sentiments yielded a substantial reform legacy. In the mid- and late-1970s, route and rate restrictions were relaxed for airlines, trucking and railways and controls on natural gas prices were loosened.[271] Joe Biden, then a Democrat Senate colleague of Kennedy, voted in favor of the relevant legislative measures.[272]

Various accounts of the late 20th century antitrust counterrevolution acknowledge deregulatory sentiment was a contributory factor.[273] Antitrust, however, initially seemed to be a beneficiary of the "government is the problem" impulse, given that unlike with other forms of regulation a key goal is to foster market-based competition.[274] As Howard Metzenbaum, a Democrat senator, suggested in a 1987 speech, "If you are for free enterprise, then you must be for antitrust. You just can't be for one and against the other."[275] This logic was accepted in Washington D.C. in the 1970s. As president, Gerald Ford denounced "the dead hand of government" while calling for "an antitrust policy that validates our commitment to competitive markets."[276] Kennedy pressed in the late 1970s for stronger antitrust laws in tandem with deregulation, arguing for the abolition of antitrust immunities permitting anticompetitive activity in heavily regulated sectors such as transportation.[277] Similarly, when Carter announced in 1978 the launch of the national antitrust commission to bolster antitrust law John H. Shenefield, the chair of the commission and chief of the Antitrust Division, said a major objective of the study would be to "lighten the hand of government" on business and consumers.[278]

---

269 Kim Phillips-Fein, Invisible Hands: The Businessmen's Crusade Against the New Deal 198 (2009).

270 Larry Kramer, *U.S. Regulators View Corporate Mergers as Big Trouble*, Wash. Post, January 14, 1979, H8.

271 Cheffins, *supra* note 268, 140.

272 Phil Gramm & Mike Solon, *Biden Turns Back the Progressive Clock*, Wall St. J., July 15, 2021, A19.

273 Klobuchar, *supra* note 41, 148; Peltzman, *supra* note 124, 50; Giocoli, *supra* note 132, 106; Crane, *supra* note 171, 766.

274 Eisner, *supra* note 186, 145.

275 Howard M. Metzenbaum, *Address*, 56 Antitrust L.J. 387, 387 (1987).

276 Kohlmeier, *supra* note 251.

277 Kramer, *supra* note 270; Peter C. Carstensen, *Replacing Antitrust Exemptions for Transportation Industries: The Potential for a "Robust Business Review Clearance"*, 89 Oregon L. Rev. 1059, 1061 (2011).

278 *Carter Starts*, *supra* note 256.

In the 1980s, the pattern changed for antitrust, with antipathy toward government regulation helping to foster the counter-revolution for which the Regan administration is credited (or blamed). The *Economist* noted in a 1981 article entitled "Trustbusters Busted" that American antitrust statutes "supposed to underwrite competition have perversely become confused by conservatives with government regulation."[279] The *Washington Post* noted the same year that politicians who thought deregulation should be accompanied by a tough antitrust policy were "starting to express their fears" that antitrust was in retreat as compared to "(w)ay back in 1979."[280] The *Post* indicated, however, that "(t)he hullabaloo…should come as no surprise since candidate Reagan…criticized big antitrust cases and big government in the same breath."[281]

The mentality remained similar throughout the Reagan presidency. In the 1980s, antitrust enforcers typically assumed that "traditional antitrust law" – antitrust as enforced during the mid-20th century "golden era" – imposed substantial efficiency costs.[282] As David Blato, a senior FTC official, explained in 1999: "A major part of that administration's economic program was to reduce government regulation. Antitrust enforcement was perceived as being overly intrusive, out of control, and highly regulatory."[283]

Sufficiently deep skepticism regarding government intervention implies not just deemphasizing antitrust but mothballing it. In 1986 Ralph Nader, a veteran consumer activist, suggested indeed that "(t)he rise of Ronald Reagan meant the demise of antitrust enforcement."[284] The *Economist* maintained likewise in 1991 that "President Reagan virtually suspended the nation's antitrust laws by cheerfully failing to enforce them."[285]

The idea that with antitrust "(e)nforcement ceased"[286] in the 1980s quickly took hold as the conventional wisdom and would remain highly influential.[287] In fact, "(c)ontrary to popular wisdom, Reagan did not kill off antitrust

279 Economist, April 18, 1981, 17.

280 Merrill Brown, *Antitrust: More Boom Than Bust*, Wash. Post, August 23, 1981, G1.

281 *Ibid*.

282 Peter C. Carstensen, *How to Assess the Impact of Antitrust on the American Economy: Examining History or Theorizing?*, 74 Iowa L. Rev. 1175, 1176 (1989). See also Sullivan & Fikentscher, *supra* note 119, 207.

283 David A Balto, *Antitrust Enforcement in the Clinton Administration* 9 Cornell J.L. & Pub. Pol'y. 61, 62 (1999).

284 Ralph Nader & William Taylor, The Big Boys: Power and Position in American Business 93 (1986).

285 *America's Timid Trustbusters*, Economist, April 27, 1991, 16.

286 Sullivan & Fikentscher, *supra* note 119, 206.

287 Crane, *supra* note 171, 767; Eisner, *supra* note 186, 185.

enforcement."[288] Charles Rule, head of the Antitrust Division during the final years of the Reagan administration, maintained "the Reagan Administration's overall enforcement record has been as vigorous as any in the past, and in the area of criminal enforcement – the heart and soul of effective enforcement – no other Administration was able to put together a record that even comes close to ours."[289] The DOJ indeed launched more antitrust criminal prosecutions between 1981 and 1988 than had been brought between 1890 and 1980, and, at least as measured by the number of DOJ antitrust cases summarized in the *CCH Trade Regulation Reporter*, more cases were on the go during the Reagan presidency than during the 1950s, 1960s, and 1970s (Figure 1).[290] Nevertheless, concerns about governmental error costs with which Rule, as a recent University of Chicago law school graduate,[291] no doubt would have been familiar, did mute antitrust enforcement at least to some degree.

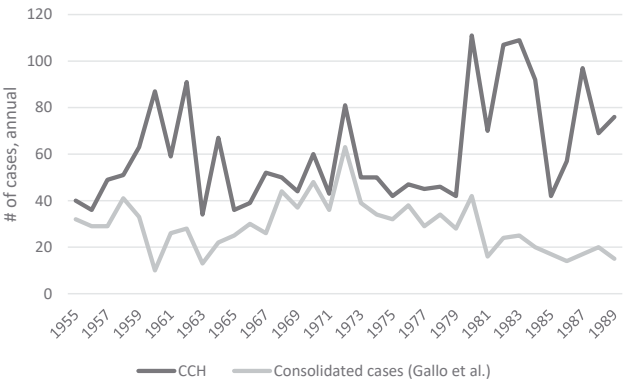

Figure 1: Department of Justice Antitrust Cases, 1955–89.
Source: Gallo, Dau-Schmidt, Craycraft and Parker (2000)

288 Crane, *supra* note 171, 770. See also J. Paul McGrath, *Merger Policy Today*, March 8, 1984, 13, https://www.justice.gov/atr/speech/file/1235601/download (saying, when serving as the head of the DOJ's Antitrust Division, a "policy of no action would…sap our economy and harm consumers by allowing the aggregation of market power that would seriously impair the efficient allocation of society's scarce resources.")

289 Rule, *supra* note 234, 1.

290 William E. Kovacic, *The Modern Evolution of US Competition Policy Enforcement Norms*, 71 Antitrust L.J. 377, 420 (2003) (criminal prosecutions); Joseph C. Gallo et al., *Department of Justice Antitrust Enforcement, 1955–1997: An Empirical Study*, 17 Rev. Ind. Org. 75, 78–79 (2000) (CCH cases).

291 Ruth Marcus, *Rule Defends Antitrust Enforcement*, Wash. Post, September 4, 1987, F1.

Rule said the Reagan Antitrust Division was "exceedingly careful to ensure that we prosecute only conduct that is unambiguously anticompetitive and clearly illegal", primarily horizontal restraints such as such as price-fixing, bid rigging and market allocation among competitors.[292] Rule maintained there were "strong economic reasons" for refraining from attacking other classes of commercial conduct, namely the chilling of "some legitimate, efficient business practices."[293] Concomitantly, it would have been "irresponsible in the extreme….to bring the misguided cases that passed for civil antitrust fifteen years ago."[294]

Rule, in making the case against the "know-nothing, attack-everything" antitrust policy that had prevailed previously,[295] had in mind not only governmental error costs but a factor that did as much, if not more, to reshape late 20th century antitrust policy. This was foreign competition that had revealed, according to Rule, "(t)he price society had to pay for misguided, at times silly, antitrust policy."[296] We consider foreign competition's impact on late 20th century antitrust policy next, beginning with an explanation how and why foreign competition grew in prominence in the American context.

6 Foreign Competition

6.1 The Rise of Foreign Competition

In 1991, the *Economist* explained why America's trustbusters were "timid" with nary a reference to the Chicago School. The key variable instead was foreign competition:

> America's economy is more open today, exposing many big firms to foreign competition. This does not make it impossible for a domestic market to be dominated and then abused, but it is far less likely to happen. If General Motors, Ford and Chrysler were foolish enough to conspire to fix prices, they would quickly lose market share to Toyota, Volkswagen and Hyundai, at home as well as abroad.[297]

292 *60 Minutes with Charles F. Rule – Assistant Attorney General, Antitrust Division* 57 Antitrust L.J. 257, 259, 261 (1988).

293 *Ibid*., 269.

294 Rule, *supra* note 234, 14. See also McGrath, *supra* note 288, 6, saying of antitrust regulation of mergers, "bad merger decisions are simply business mistakes, and the normal discipline of profit and loss provides adequate deterrence to these kinds of acquisitions. The market is the best mechanism for determining dumb mergers – not the Paul McGraths of this world."

295 Rule, supra note 234, 11.

296 *Ibid*., 10–11.

297 *America's Timid*, *supra* note 285.

The Chicago School did have a considerable impact on antitrust as the 20th century concluded despite the *Economist* failing to mention it. The rise of foreign competition powerfully reinforced intellectual trends, however. As law professor Daniel Crane has said "The Chicago School arose at a time when foreign competition was flooding the U.S. market as never before. Its generally laissez faire policy recommendations for antitrust resonated with realities that many markets were becoming intensely more competitive as a result of foreign entry."[298]

The *Wall Street Journal*, in a 1962 editorial criticizing the Supreme Court antitrust ruling in *Brown Shoe Co. v. United States* [299] on the basis the court had given "over-eager enforcers a still bigger bludgeon," noted "(t)he challenge of foreign competition…may well require attitudes toward industrial organization and size that are far removed from the horse-and-buggy attitudes of 1914."[300] The basic logic was sound; there is empirical data indicating that foreign competition makes an industry more difficult to monopolize.[301] However, with approximately 95% of steel, automobiles, televisions, radios and other consumer products Americans bought being domestically sourced as the 1960s got underway,[302] foreign competition hardly seemed to constitute a serious check on the market power leading American firms were thought to exercise.[303] Vigorously enforced antitrust law appeared to be the logical corrective. Or, from a more skeptical perspective, as Thomas Kauper argued in 2008, "highly interventionist antitrust policy was a luxury we could afford."[304]

In the 1970s and the 1980s, foreign competition moved from the periphery of American corporate life to center stage. Reasons included the full recovery of countries devastated economically by World War II and a drastic reduction in the costs of moving things around due to widespread deployment of shipping containers and other transportation innovations.[305] Trade policy was also important. Motivated in large measure by a desire to aid economies potentially vulnerable to

298 Crane, *supra* note 106, 2037.

299 370 U.S. 294 (1962).

300 *A Still Bigger Bludgeon*, Wall St. J., June 28, 1962, 14.

301 Ning Gao, Ni Peng & Norman Strong, *What Determines Horizontal Merger Antitrust Case Selection?*, 46 J. Corp. Fin. 51 (2017). See, however, Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are US Industries Becoming More Concentrated?*, 23 Rev. Fin. 697, 699, 722–23 (2019).

302 Robert Reich, Supercapitalism: The Transformation of Business, Democracy, and Everyday Life 43 (2007).

303 Paul A. London, The Competition Solution: The Bipartisan Secret Behind American Prosperity 44 (2005).

304 Kauper, *supra* note 152, 43.

305 Cheffins, *supra* note 268, 111.

Soviet expansionism, the United States agreed to cut tariffs that had sheltered domestic industries from an average of 32.2 percent ad valorem on dutiable goods in 1947 to 8.5 percent in 1972.[306] A by-product of these trends was that the percentage of goods that Americans used that were imported increased from 8% in 1969 to 21.2% in 1979, a figure that likely would have been higher if there had not been restrictive trade policies in place curtailing imports in industries such as apparel, consumer electronic products, footwear and steel.[307] By the end of the 1970s, over 70% of goods produced in the United States were actively competing with foreign-made goods.[308] In turn, "(c)ompetition from overseas was undercutting many of the country's largest, most important businesses."[309]

With Europe and Asia rebounding from World War II and with transportation costs and tariffs falling, it was foreseeable that for American companies foreign competition would intensify.[310] As the 1970s drew to a close, however, concerns were growing that American business was falling short badly in responding to the foreign challenge. The United States suffered substantial competitive declines in various major industries, including automobiles, footwear, shipbuilding, steel, televisions and textiles.[311] The *Washington Post* told readers in 1978 that "From boardroom to research lab, there is a deepening sense that something has happened to the once unchallengeable Yankee ingenuity."[312] Likewise, according to a 1979 *US News & World Report* article focusing on American companies losing ground to international rivals,"(o)nce a giant among pygmies in world trade, the US now looks like an aging champion whose dominance is threatened by a growing field of shrewd competitors."[313]

---

306 Alfred E. Eckes, *Trading American Interests*, Foreign Affairs, Fall, 1992, 135, 135–39; Judith Goldstein & Robert Gulotty, *America and Trade Liberalization: The Limits of Institutional Reform*, 68 Int'l. Org. 263, 270–71 (2014).

307 Ira C. Magaziner & Robert R. Reich, Minding America's Business: The Decline and Rise of the American Economy 32–33, exhibits 17 and 18 (1982), indicating imports as a percentage of consumption were 10% in 1979 in apparel, 50.6% in consumer electronic products, 37.3% in footwear and 14% in steel.

308 *Ibid*., 32; Robert Reich, *The Next American Frontier*, Atlantic Monthly, March 1983, 44.

309 Louis Galambos & Joseph Pratt, The Rise of the Corporate Commonwealth: United States Business and Public Policy in the 20th Century 227 (1988).

310 Thomas McCraw, American Business, 1920–2000: How It Worked 146 (2000); John Steele Gordon, An Empire of Wealth: The Epic History of American Economic Power 386 (2004).

311 Magaziner and Reich, *supra* note 307, 203.

312 Bradley Graham, *Something's Happened to Yankee Ingenuity*, Wash. Post, September 3, 1978, G1.

313 *As America Loses Its Sway in World Markets*, US News & World Report, April 23, 1979, 45.

6.2 Impact on Antitrust

The rapid rise of foreign competition in the 1970s prompted concerns that antitrust was playing a counterproductively outsize role in regulating American corporations. In 1971, the *Wall Street Journal* argued in an editorial on antitrust that "the United States government, in trying to prevent large corporations from gaining monopoly power…can no longer think in purely national terms."[314] Instead, "(w)hat is relevant so far as antitrust policy is concerned is not bigness but whether there is sufficient competition in the United States market."[315] The same newspaper cited the rise of foreign rivals in arguing against enactment of the Antitrust Improvements Act of 1976,[316] saying "There is less concentration of industry today than when the Sherman Act was passed. The U.S. market is more fully integrated with foreign markets than ever before."[317]

The *Washington Post* advanced similar reasoning more forcefully in 1978 via an op-ed column. According to the *Post*, "the American fear of concentrated power" that underpinned antitrust law seemed "outmoded in today's world."[318] Correspondingly, "(w)hat is called for is a new policy that reflects the reality of a U.S. market open to foreign competition."[319] *Time* struck a similar chord. In a 1979 article discussing a major conference on antitrust the magazine had organized, it posed the question "Is the function of antitrust to enhance economic efficiency or to ensure the dispersal of economic power into many hands?"[320] Its answer: "At a time when the U.S. is struggling to curb inflation, create jobs and sharpen its competitiveness in world markets, the purpose of antitrust policy should be to enhance efficiency."[321]

While foreign competition surged in the 1970s and while there was support for concomitant adjustments to antitrust, antitrust enforcement was perhaps never more robust than it was then.[322] As *Time* noted in its 1979 article, "the American Captain of Industry" was "under fresh attack from trustbusters in the Justice Department, the Federal Trade Commission and the Congress."[323] Matters changed

314 *Busting the Wrong Target*, Wall St. J., June 11, 1971, 6.
315 *Ibid*.
316 P.L. 94–435.
317 *The Senate's Antitrust Follies*, Wall St. J., June 2, 1976, 18.
318 Marshall I. Goldman and Louis T. Wells Jr., *Save the Business Baronies*, Wash. Post, September 17, 1978, B1.
319 *Ibid*.
320 *New Thrust In Antitrust*, Time, May 21, 1979, 62.
321 *Ibid*.
322 *Supra* notes 243–44, 254–55 and related discussion.
323 *New Thrust*, *supra* note 320.

as the 1980s got underway. *Time* observed in 1981 that for trustbusters the fact "bigness can boost U.S. competitiveness abroad" was "sinking in."[324]

Foreign competition clearly was a factor influencing antitrust enforcement during the Reagan administration.[325] When J. Paul McGrath took over as head of the Antitrust Division in 1983 he acknowledged "there has been a rather broad shift in thinking about antitrust law over the past decade" and elaborated in a 1984 speech, saying "faced with increasing competition from abroad, the same public and bar, joined by antitrust enforcers, started to ask hard questions….What should be the appropriate role of antitrust?"[326] In 1986, Commerce Secretary Malcolm Baldrige defended a proposal to relax antitrust restrictions on mergers on the basis that "We are living in an era of intense worldwide competition, and we think American companies should merge if it is going to increase their competitiveness."[327]

As McGrath's reference to a "broad shift in thinking" implied, foreign competition-driven antitrust skepticism extended well beyond the Reagan administration in the 1980s. This was a decade where there was a sense antitrust was "fading away" because "increased international trade has eroded the power of companies in concentrated industries"[328] and it was "the fashion in Washington… to attack the nation's antitrust laws as stultifying, outmoded, and unfair."[329] Democrats as well as Republicans thought of foreign competition as an antitrust game-changer. Robert Katzmann, in a 1984 study of "The Attenuation of Antitrust," identified "concerns about the increasing rigors of international competition" as an important cause of the rollback of antitrust, acknowledging in so doing the bipartisan nature of those concerns:

> The Reagan administration has been peppered with a generous sprinkling of Chicago-style academics and has therefore probably been more receptive to those changes than some other administration might have been, but the new perspectives on antitrust that are evident in this administration are by no means confined to the Republican party or to the conservative portion of the political spectrum.[330]

Others picked up on the same bipartisan theme with foreign competition and antitrust. Economists Walter Adams and James Brock wrote in 1986 "American

324 John S. DeMott, David Beckwith & Evan Thomas, *The Little Stick of Antitrust*, Time, April 20, 1981, 72.

325 Robert A. Katzmann, *The Attenuation of Antitrust*, Brookings Rev., Summer 1984, 23, 26.

326 Isikoff and Brown, *supra* note 29 (1983 remarks); McGrath, *supra* note 288, 3 (1984 speech).

327 John Greenwald & Gisela Bolte, *Plans to Make Mergers Easier*, Time, January 27, 1986, 38.

328 Robert J. Samuelson, *Antitrust's Long Slide*, Wash. Post, February 26, 1986, G1, G2.

329 *Save What's Left of Antitrust*, Bus. Wk. December 9, 1985, 142.

330 Katzmann, *supra* note 325, 27.

antitrust is under renewed fire. Cast as an economic anachronism in the 'new' age of global competition, it is attacked by critics all along the political spectrum-left and right, liberal and conservative, neoliberal and neoconservative."[331] *Business Week*, in making the case that it would not make much difference to antitrust policy if the Democrats or the Republicans won the presidency in 1988, said, "The Reaganites have won the battle. Even many Democrats, concerned about America's ability to compete internationally with Japan Inc., are having second thoughts about the restrictive merger policies they espoused in the 1970s."[332] Thus, as a *Washington Post* columnist argued in 1987, antitrust enforcement under Reagan seemed to be "geared for the times," noting that while in the 1960s the U.S. "could tolerate a merger policy that frustrated more efficient use of industrial resources….the growing internationalization of world markets eliminated the competitive cocoon."[333]

7 The Counter-Revolution Sustained

The title of the *Business Week* article that argued that the results of the 1988 presidential election would not have a material impact on antitrust policy was "The Reagan Revolution in Antitrust Won't Fade Away."[334] This would prove to be prescient. The antitrust counter-revolution of the 1970s and the 1980s would indeed evolve into "the relative stability of (an) antitrust consensus",[335] a consensus the New Brandeisians are now seeking to disrupt. After considering antitrust continuity post-Reagan, we will assess the extent to which the factors that fostered the 1970s/80s counter-revolution – the Chicago School, doubts about the efficacy of regulation and foreign competition – helped to sustain the enduring antitrust consensus. We will see that each did play a role, even if their importance evolved over time.

7.1 Continuity

The idea of an antitrust consensus operating from the present day uninterrupted back to the Reagan era implies cross-party continuity. But what about Democratic

331 Walter Adams & James W. Brock, *The New Learning and the Euthanasia of Antitrust*, 74 Calif. L. Rev. 1515, 1516 (1986). See also Katzmann, supra note 325, 26.
332 Paula Dwyer, *The Reagan Revolution in Antitrust Won't Fade Away*, Bus. Wk., April 18, 1988, 29.
333 Ernest Gellhorn, *An Antitrust Policy Geared for the Times*, Wash. Post, August 26, 1987, A23.
334 Dwyer, *supra* note 332.
335 *Supra* note 24 and related discussion.

administrations that might have been expected to depart from the Republican Reagan playbook? Some current advocates of reform suggest post-Reagan Democratic presidents pursued antirust with greater vigor than their Republican counterparts did. Tim Wu maintains in his 2018 book *Curse of Bigness* that the application of "Bork-Chicago thinking…ran into a speed bump during the years in which Bill Clinton was president (1993–2001)" but this was "just a delay" because "during the (George W.) Bush years (2001–09), the anti-monopoly provisions of the Sherman Act went into a deep freeze from which they have never really recovered."[336] Likewise, Amy Klobuchar says in her 2021 *Antitrust* book "During the Clinton administration there was an effort to reverse the lax antitrust enforcement of the Reagan and George H.W. Bush administrations (1981–89, 1989–93)" and maintains that "antitrust enforcement once again emerged as a priority during Barack Obama's administration (2009–17)."[337]

Other advocates of antitrust reform offer a more caustic verdict on the Clinton and Obama administrations. Lina Khan has said, "The Reagan-initiated antitrust counterrevolution – perpetuated by subsequent Republican administrations and never seriously questioned by Democratic ones – has permitted powerful firms across sectors to control markets."[338] Jonathan Tepper and Denise Hearn maintain in their 2019 *Myth of Capitalism* book that "Since Reagan no president has enforced the spirit or letter of the Sherman and Clayton Acts" and said that with "George W. Bush and Barack Obama….there was absolutely no difference in policy when it came to monopolies and oligopolies."[339] Likewise, according to Matt Stoller, during the Clinton presidency "(t)he Democratic Party embraced…the ideology of the Chicago School" and the Clinton administration oversaw "nonenforcement of antitrust laws."[340] Similarly, "Obama's antitrust officials," influenced by Chicago thinking, "helped to engineer another merger boom."[341]

Regardless of whether antitrust had a higher profile during the Clinton and Obama administrations than it did during the Bush presidencies, there was no full-scale reversal of the Reagan counter-revolution. NYU business school professor Lawrence White acknowledged in a 2003 analysis of antitrust during the Clinton years that the Antitrust Division brought cases that likely would not have been

336 Wu, *supra* note 9, 118.

337 Klobuchar, *supra* note 41, 149, 154. See also Waller, *supra* note 128, 850; Paul Krugman, *Robber Baron Recessions*, N.Y. Times, April 18, 2016, A21.

338 Khan & Vaheesan, *supra* note 25, 269.

339 Tepper & Hearn, *supra* note 30, 160, 161.

340 Stoller, *supra* note 48, 422. See also Lynn, *supra* note 53, 26.

341 Stoller, *supra* note 48, 437.

launched in the 1980s.[342] He emphasized, though, there "was no revolutionary overturning of major direction of the previous regimes, and there was no return to the populism and enthusiasm for protecting small business that had sometimes colored antitrust policy before the 1980s."[343] Likewise, Bill Baer, who headed up the FTC between 1995 and 1999 and the Antitrust Division between 2013 and 2016, said in 2017 of the Obama years, "There was not a fundamental change in enforcement philosophy. For the past 20 years or so there has been a rough consensus among antitrust enforcers about what is problematic…."[344] This meant that "since the Reagan era…antitrust fights were mainly waged over a relatively narrow range of options, far from the broader political arena."[345] Antitrust thus became a technocratic affair left to lawyers and economists thoroughly versed in antitrust nuance.[346]

The apolitical, technocratic orientation of antitrust substantially influenced antitrust enforcement. Daniel Crane, a leading proponent of the technocratic characterization of late-20th and early 21st century antitrust,[347] observed in 2011 "(f)ederal antitrust enforcement remains well supported and active despite its low political profile."[348] This was because "political elites have accepted that antitrust is an important but largely technical matter that should be administered vigorously but without great public fanfare."[349] He illustrated the point by drawing attention to an antitrust lawsuit the DOJ brought against Microsoft in the late 1990s alleging abuse of monopoly power where the courts ultimately upheld partially the case the DOJ advanced.[350] This was "the most celebrated antitrust action in

342 Lawrence J. White, *Antitrust Activities During the Clinton Administration* in High-Stakes Antitrust: The Last Hurrah 11, 12 (Robert W. Hahn, ed., 2003).

343 *Ibid*.

344 Bill Baer, *Conclusion: A Final Note on Antitrust Enforcement During the Obama Administration* in The Obama Trials: The US Antitrust Agencies in the Courtroom, 2009–2017 365, 365 (Ron Knox, ed., 2017).

345 Schlesinger, Kendall & McKinnon, *supra* note 49. See also Ron Knox, *Preface* in The Obama Trials, *supra* note 344, vii, ix.

346 Noam Scheiber, *As Americans Take Up Populism, Supreme Court Embraces Business*, N.Y. Times, March 12, 2016, B1; Barak Orbach, *The Present New Antitrust Era*, 60 William & Mary L. Rev. 1439, 1443, n. 17 (2019) (citing authorities who characterized antitrust enforcement in technocratic terms).

347 Daniel A. Crane, *Technocracy and Antitrust*, 86 Texas L. Rev. 1159 (2008).

348 Daniel A. Crane, The Institutional Structure of Antitrust Enforcement 86 (2011).

349 *Ibid*.

350 United States v. Microsoft Corp. 253 F. 3d 34 (2001); A. Douglas Melamed & Daniel L. Rubinfeld, U.S. v. Microsoft: *Lessons Learned and Issues Raised*, in Antitrust Stories 286, 294 (Eleanor M. Fox & Daniel A. Crane eds., 2007).

decades,"[351] dominating headlines[352] in the manner that would be expected for a case involving the most valuable company in the world.[353] President Clinton nevertheless "expressed complete neutrality."[354] He said in a 2000 interview "because it is a legal proceeding, I had nothing to do with what the Antitrust Division did, and I certainly can't have anything to do with what the judge does."[355]

7.2 The Chicago School Endures (Partially)

The Chicago School's emergence as the pre-eminent school of thought in antitrust in the 1980s contributed substantially to the demise of the supposed mid-century golden age of antitrust,[356] even if mistrust of regulation and the challenges foreign competitors posed for large domestic firms also played a significant role.[357] The Chicago School would subsequently remain influential, if not as dominant. This helped to sustain the 1970s/80s antitrust counterrevolution, with its ultimately technocratic flavor.

Richard Schmalensee, Dean of MIT's business school, argued in a 2008 collection of essays on the Chicago School's antitrust legacy "Chicago has decisively carried the day as regards the objective of antitrust."[358] Thomas Kauper maintained in the same volume that "Chicago's influence is virtually conceded", with most in the antitrust community identifying with "an antitrust policy based on 'consumer welfare,' a phrase…that has generally come to mean allocative and productive efficiency."[359] Hence, the Chicago School did much to define antitrust well after its tenets initially disrupted the status quo.

---

351 Yochi Dreazen, Greg Ip & Nicholas Kulish, *Why the Sudden Rise In the Urge to Merge And Form Oligopolies?*, Wall St. J., February 25, 2002, A1. See also *Antitrust on Trial*, Economist, November 13, 1999, 122 ("the biggest case of its kind since the break-up of AT&T"); Melamed & Rubinfeld, U.S. v. Microsoft, *supra* note xx, ("from the public's perspective US v Microsoft was the antitrust case of the 1990s and perhaps for decades before that.")

352 Crane, *supra* note 347, 1170.

353 Paul Van Slambrouck, *A Monopoly Game with New Rules*, Christian Sci. Monitor, April 5, 2000, 1 (Microsoft became the largest company measured by stock market capitalization in 1998 and was displaced from the #1 spot in 2000).

354 Crane, *supra* note 348, 80.

355 *Ibid*.

356 *Supra* notes 29, 43, 45, 52, 73, 75–78, 154 and related discussion.

357 *Supra* notes 260, 273, 279–83, 297–98, 325–33 and accompanying text.

358 Richard Schmalensee, *Thoughts on the Chicago Legacy in U.S. Antitrust* in How the Chicago, *supra* note 152, 11, 12.

359 Kauper, *supra* note 152, 41. See also William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix, [2007] Colum. Bus. L. Rev.* 1, 6.

While the Chicago School would influence antitrust for decades after it helped to end what the New Brandeisians think of as the golden age of antitrust, as early as 1990 there were signs Chicago School dominance was subject to qualification. The *Washington Post* reported, "Justice Department and FTC officials have taken pains to publicly and explicitly reject the free-market theories of the Chicago School that had informed the Reagan era policy."[360] Before the decade ended, the media was citing the substantial influence of a "post-Chicago School" on antitrust thinking, including amongst government trustbusters.[361] The judiciary proved to be somewhat reticent regarding adoption of post-Chicago insights.[362] However, by the late 2000s, according to law professor Daniel Crane, "much of the antitrust scholarship in the academy over the last decade ha(d) taken a post-Chicago tilt."[363]

The growing influence of post-Chicago thinking reflected to some degree uneasiness with the efficiency-driven model of antitrust the Chicago School advocated.[364] Nevertheless, as the *New York Times* said in 1998, "the post-Chicago thinkers are firm believers in market forces," even if "they say the market doesn't always come to the rescue and therefore government intervention may be needed."[365] The "Post-Chicago literature generally define(d) a broader zone for antitrust intervention" than the Chicago School.[366] Still, the rise of post-Chicago reasoning did not herald "a return to the pre-Chicago days when bigness itself was deemed to be an evil." [367] Hence, "so-called post-Chicago scholarship ha(d) far more in common with traditional Chicago School scholarship than with present-day populism" that underpins New Brandeisian thinking.[368] Certainly, there was too much intellectual continuity to suit the New Brandeisians. According to Lina Khan, "Where the Post-Chicago School absorbed the Chicago School's ideological commitments, the New Brandeisians reject them – holding that the major problem we face today is not just a lack of enforcement, but the current theory of antitrust."[369]

---

360 Steven Mufson, *Return of the Trust-Busters?*, Wash. Post, June 17, 1990, H1.

361 *The Trustbusters' New Tools*, Economist, May 2, 1998, 94; Steven Pearlstein, *Applying the Brakes to Mergermania*, Wash. Post, March 10, 1998, C1; Laurence Zuckerman, *How the Antitrust Wars Wax and Wane*, N.Y. Times, April 11, 1998, B7.

362 Giocoli, *supra* note 132, 102, 105.

363 Daniel A. Crane, *Obama's Antitrust Agenda*, 32 Reg. 16, 16 (2009).

364 Kauper, *supra* note 152, 41.

365 Zuckerman, *supra* note 361.

366 Kovacic, *supra* note 359, 22.

367 *The Trustbusters' New*, *supra* note 361.

368 Timothy J. Muris & Jonathan E. Nuechterlein, *Chicago and Its Discontents*, 87 U. Chi. L. Rev. 495, 521 (2020).

369 Khan, *supra* note 24, 1676.

7.3 The Efficacy of Regulation

President Bill Clinton, as a Democrat, might have been expected to favor activist government. Indeed, the *New York Times* said in a 1997 article that characterized Clinton as "temperamentally adjustable," "he actually does believe in something: Government."[370] Nevertheless, Clinton proclaimed in his 1996 State of the Union address "the era of big government is over."[371] This matched the mood of the times. America experienced in the 1990s a "nearly complete evacuation of trust and confidence in virtually every part of the federal government."[372] According to polling data, as of 1995 nearly three-quarters of Americans believed the federal government created more problems than it solved.[373] Congress enacted deregulatory legislation at an energetic pace throughout much of the 1990s, with areas affected including energy, banking, transportation and telecommunications.[374]

In the 2000s, antipathy toward government waned somewhat.[375] Still, President Bush was referred to as an "arch-de-regulator"[376] and the *Wall Street Journal* noted in 2008 that "(t)he idea that less regulation is better for the economy has held sway in Washington since the Reagan administration."[377] As for Barack Obama, he was labelled the "regulator-in-chief" just before leaving office because of a large volume of executive orders his administration issued.[378] He did not displace, however, the Reaganite free-market orthodoxy as an influence on debates regarding the role of government.[379] Instead, he expressed his admiration for

370 Garry Wills, *The Clinton Principle*, N.Y. Times, Jan. 19, 1997, Sunday Magazine, 28.

371 President William Jefferson Clinton, *State of the Union Address*, January 23, 1996, https://clintonwhitehouse4.archives.gov/WH/New/other/sotu.html.

372 Nick Gillespie, *Everyone Agrees Government is a Hot Mess*, Reason, April 2019, 50.

373 Everett Carll Ladd & Karlyn H. Bowman, What's Wrong: A Survey of American Satisfaction and Complaint (1998) 101 (1998).

374 Cheffins, *supra* note 268, 255–56.

375 *Ibid*., 322; John Cioffi, Public Law and Private Power: Corporate Governance Reform in the Age of Finance Capitalism 109 (2011); Jonathan B. Baker, *Preserving a Political Bargain: The Political Economy of the Non-Interventionist Challenge to Monopolization Enforcement*, 76 Antitrust L.J. 605, 640 (2010) ("The Democratic electoral sweep in 2008 confirmed that popular support for criticism of government regulation had faded.")

376 *Let the Reforms Begin*, Bus. Wk., July 22, 2002, 26.

377 Elizabeth Williamson, *Political Pendulum Swings Toward Stricter Regulation*, Wall St. J., March 24, 2008, A1.

378 Sean Hackbarth, *New York Times Declares President Obama "Regulator in Chief"*, U.S. Chamber of Commerce, August 16, 2016, https://www.uschamber.com/series/above-the-fold/new-york-times-declares-president-obama-regulator-chief.

379 Paul Krugman, *Ending the End of Welfare as We Knew It*, N.Y. Times, March 12, 2021, 23.

Ronald Reagan's political gifts[380] and declared in his 2013 State of the Union address that "(i)t is not a bigger government we need, but a smarter government."[381] This all made good political sense when, as of 2015, only 19% of Americans trusted the government in Washington always or most of the time, as compared to 77% in 1964.[382] In sum, then, continued antipathy toward government helped to sustain the antitrust consensus that took hold in the 1980s.

7.4 Foreign Competition

Foreign competition, which influenced substantially the way Americans thought about market forces and antitrust in the 1970s and 1980s,[383] continued to shape perceptions in the 1990s and the opening years of the 21st century. Michael Mandel, editor of *Business Week*, wrote in 1996 that "Americans are angry and worried", citing growing economic insecurity, and observed "In an era of intense international competition no one can foretell which countries will dominate."[384] Barack Obama, in a 2006 speech as a Senator, said, "The forces of globalization have changed the rules of the game," including "how we compete with the rest of the world."[385] Awareness of the challenges foreign rivals posed for American companies in turn tempered enthusiasm for antitrust. The *Christian Science Monitor* said, for instance, in a 1997 article on a massive 1990s merger wave America was experiencing, "Globalization of the US economy means more American companies face foreign as well as domestic rivals. Seeing the new competition, antitrust officials do not challenge as many mergers and acquisitions."[386]

Pessimism was a hallmark of discussions of foreign competition in the 1970s and 1980s, with concerns being expressed that American corporations were losing out to international rivals.[387] From this vantage point, encumbering corporate America with rigorous antitrust enforcement seemed unwise.[388] Pessimistic

380 Richard W. Stevenson, *In an Age of Spending Cuts, Making the Case for Government, N.Y. Times*, February 13, 2013, 19; *Nick Bryant, Biden Isn't FDR. He is the Anti-Reagan*, Wash. Post, April 23, 2021, A21; Lisa Lerer, *Biden, the Reverse Ronald Reagan*, N.Y. Times, May 2, 2021, 21.

381 *Remarks by the President in the State of the Union Address*, February 12, 2013, https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/remarks-President-state-union-address.

382 Gillespie, *supra* note 372.

383 *Supra* notes 314–21, 324–30 and related discussion.

384 Michael Mandel, The High-Risk Society 3 (1996).

385 Stoller, *supra* note 48, 432–33.

386 *Big Business Gets Bigger, Record Pace*, Christian Sci. Monitor, June 4, 1997, 8.

387 *Supra* notes 311–13 and related discussion.

388 *Supra* notes 319–21, 324, 326–28, 332–33 and accompanying text.

foreign competition sentiment continued to exist as the 2000s got underway. For instance, noted economist Luigi Zingales bemoaned in a 2012 book "the lost genius of American prosperity" in circumstances where "(g)lobal progress has shrunk America's comparative advantage."[389] However, the 1970s and 1980s gloom did pass to a considerable extent. By the mid-1990s there was a growing sense "American companies are enjoying a huge comeback,"[390] with the *New York Times* labelling "(t)he United States as No. 1 and soaring" in 1997.[391]

To the extent that large American corporations were taking on global competitors and winning, antitrust enforcement plausibly began to look increasingly appealing. According to a 1998 *Wall Street Journal* article on possible antitrust targets, a by-product of American corporate success was said to be that "(g)lobal brands that carry with them at least a modicum of pricing power now have a distinctly American flavor."[392] A *Time* columnist suggested in 2014 "We need a rethink of antitrust logic that takes into consideration a more complex, global landscape in which megamergers have unpredictable ripple effects."[393] American corporate success failed, however, to re-ignite support for antirust in any meaningful way in the 1990s or the early years of the 21st century. The fact robust domestically-based competition was thought to be a key corrective against excessive accumulation of market power does much to explain this.

A 1994 *Newsweek* column on "Reinventing Corporate America" noted "(p)opular rhetoric dwells upon foreign threats: Toyota menacing General Motors. In truth, the more common threats are homegrown. Microsoft and Compaq menace IBM. Southwest Air menaces American. MCI and Sprint menace AT&T."[394] A 1998 study of corporate governance likewise hailed the robustness of domestic market forces, suggesting "Business analysts will likely come to view 1980–1995 as a turning point in the history of American enterprise. The days when firms could develop a competitive advantage that they could then maintain for years are long gone."[395] Gary Hamel, an influential management thinker, echoed the same sentiment in a 1996 *Harvard Business Review* essay, saying "Never has the world been more hospitable to industry revolutionaries and more hostile to industry incumbents."[396]

389 Luigi Zingales, A Capitalism for the People: Recapturing the Lost Genius of American Prosperity 112 (2012).

390 Ralph T. King, *No, Thanks*, Wall St. J., June 19, 1995, R16.

391 Josel Joffe, *America the Inescapable*, N.Y. Times, June 8, 1997, Sunday Magazine, 38.

392 Greg Ip, *Dominant Firms Attract Antitrust Probes and Investors*, Wall St. J., May 12, 1998, C1.

393 Rana Foroohar, *Call in the Trustbusters*, Time, Aug. 18, 2014, 16.

394 Robert J. Samuelson, *Reinventing Corporate America*, Newsweek, July 4, 1994, 53.

395 Hugh Sherman & Rajeswararao Chaganti, Corporate Governance and the Timeliness of Change ix (1998).

396 Gary Hamel, *Strategy as Revolution*, Harv. Bus. Rev., July-August 1996, 69, 70.

Globalization, which can put downward pressure on profit margins of domestic firms where it is a driving force,[397] was one explanation Hamel provided for the crumbling of the "fortifications that protected the industrial oligarchy."[398] Deregulation was another.[399] He also cited "technological upheaval."[400] In making this point, he did not mention the Internet. Harvard Business School's William Sahlman picked up the story in a 1999 article, also in the *Harvard Business Review*.[401]

Sahlman used as his historical departure point "the old days…about 25 years ago" (i.e. the mid-1970s), when "the U.S. economy was characterized by relatively inefficient bloated companies that were protected by carefully constructed entry barriers."[402] He noted that "(f)oreign competition poured cold water on the party" and said that deregulation "made it possible for newcomers…to enter the field" in "several large markets."[403] Technological advances, such as the microprocessor, and improved access to finance (e.g. venture capital) also fostered "a virtuous circle of entrepreneurship and investment."[404] Finally, "Enter the Internet, circa 1994. This advance continued to fuel the trend toward a more entrepreneurial economy. If new companies were working assiduously to cut out inefficiencies before, the Internet made the cuts deeper and faster. It also lowered or eliminated entry barriers in dozens of industries."[405]

New Brandiesian proponents of antitrust reform[406] and more recently Biden administration officials[407] have cited in support of their case for antitrust reform "a torrent of recent studies"[408] implying that from 2000 onward competition waned substantially. These studies indicate there was in the early 21st century a growing concentration of the market share of leading firms within industries, rising markups (companies charging prices above their own costs) and persistently high

397 Thomas Philippon, The Great Reversal: How America Gave Up on Free Markets 55 (2019).
398 Hamel, *supra* note 396, 70.
399 *Ibid*.
400 *Ibid*.
401 William A. Sahlman, *The New Economy is Stronger Than You Think*, Harv. Bus. Rev. November-December 1999, 99.
402 *Ibid*. 100.
403 *Ibid*.
404 *Ibid*.
405 *Ibid*.
406 Sacher & Yun, *supra* note 34, 1494. For an example, see Khan, *supra* note 16, 739, n. 148.
407 Tankersley & Kang, *supra* note 99.
408 Robert Harding, *How Buffett Broke American Capitalism*, Fin. Times, September 13, 2017, 11.

returns on equity capital in publicly traded firms.[409] To the extent that such data accurately reflected the actual operation of market forces,[410] the scene appeared to be set for an antitrust rethink. Under such circumstances, antitrust plausibly could have been thought of as a beneficial counterweight to the increased risk of counterproductive accumulation of market power. No such reasoning gained traction, however. Instead, the consensus remained that market forces were robust for the most part.

Robert Reich, a well-known economist and Secretary of Labor from 1993 to 1997,[411] suggested in 2007 that "supercapitalism" had taken hold in the U.S., characterized by "ever more intensifying competition among businessmen."[412] A 2008 survey of "hypercompetition" observed, "A growing number of organizations and industries are faced with intense competition."[413] As late as 2016, analysts from the influential management consultancy McKinsey were noting that "(i)ncumbents that have long focused on perfecting their industry value chains are often stunned to find new entrants introducing completely different ways to make money", which meant "many business leaders live in a heightened state of alert."[414]

In this "state of alert" competitive milieu, where pressure from rivals appeared to be holding in check the accumulation of problematic market power, antitrust seemed to be something of an anachronism. *Forbes* indeed invoked such logic in 2011: "(t)he thought behind antitrust is that if a company gains dominance in a field it will keep that dominance forever, and do so at the expense of the consumer. Experience demonstrates just how preposterous this idea is…. Competition and far-reaching innovation always undercut any entity's dominance."[415] This all meant, according to *Forbes*, that antitrust should be

409 Grullon, Larkin & Michaely, *supra* note 301, 698–700. Other studies documenting similar evidence include *Benefits of Competition and Indicators of Market Power*, Council Econ. Advisers Issue Brief, Spring 2016; Matias Covarrubias, Germán Gutiérrez & Thomas Philippon, *From Good to Bad Concentration? US Industries over the Past 30 Years*, 34 NBER Macroeconomics Annual 1 (2019); Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. Econ. 561 (2020).

410 The point cannot be taken for granted – Sacher & Yun, *supra* note 34, 1494–98.

411 U.S. Department of Labor, *Hall of Secretaries: Robert B. Reich*, https://www.dol.gov/general/aboutdol/history/reich.

412 Reich, *supra* note 302, x.

413 Thomas Biedenbach & Anders Söderholm, *The Challenge of Organizing Change in Hypercompetitive Industries: A Literature Review*, 8 J. Change Mgmt. 123, 126 (2008).

414 Angus Dawson, Martin Hart & Jay Scanlan, *The Economic Essentials of Digital Strategy*, McKinsey Q. (2016), issue #2, 32, 33, 41.

415 Steve Forbes, *These Dinosaurs: Time to Tank Them*, Forbes, September 26, 2011, 13.

consigned to the Smithsonian Museum.[416] As we will see next, the fate of antitrust was looking much different a decade later.

8 The Counter-Revolution Under Threat

Given that in the late 2000s it was assumed there was nothing left of pre-Chicago antitrust thinking,[417] the potential arrival of a new antitrust movement that harkens back to a pre-Chicago past[418] has been a striking turn of events. Antitrust crusaders alarmed that America is afflicted with what Louis Brandeis called a "curse of bigness" more than a century ago have been turning the intellectual tide in their favor,[419] perhaps presaging "a new, progressive era in antitrust."[420] Lina Khan, the prominent New Brandeisian, argued in 2020 "the relative stability of the antitrust consensus has yielded to a sharp rupture"[421] and her appointment as FTC chair has been interpreted "as a victory for progressive activists who want Mr. Biden to take a hard line against big companies."[422] Barry Lynn, executive director of the Open Markets Institute, an early advocate of antitrust reform,[423] said in 2021 "people were laughing at me" regarding antitrust as recently as 2017 but was vowing that with respect to judges "We're going to get them into the 21st century. We're going to get them out of Bork's garage."[424]

What has changed? What is undermining the consensus arising from the 1970s/80s antitrust counter-revolution? A "flood" of economic studies implying the market power of dominant firms has increased markedly is one factor contributing to an antitrust moment that could yet translate into a fully-fledged antitrust movement.[425] Data has not been decisive in isolation, however. After all, there was empirical evidence available at the start of the 2010s indicating an

416 *Ibid*.

417 *Supra* note 58, 335, 358 and accompanying text. See also John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 Notre Dame L. Rev. 191, 207 (2008) (saying there was "nothing left of the old pre-Chicago, social/political, big business is bad, small business is good, rationale for antitrust.")

418 *Supra* notes 38–39, 42, 83–85 and related discussion.

419 Zach Carter, *The Power of Ideas and the Idea of Power*, Am. Prospect, December 4, 2020, https://prospect.org/culture/books/the-power-of-ideas-and-the-idea-of-power/.

420 Steve Lohr, *A New Outlook on Antitrust Is Taking Shape*, N.Y. Times, December 23, 2019, Business, 3. See also *supra* notes 11–19, 48 and related discussion.

421 Khan, *supra* note 24, 1656.

422 McCabe & King, *supra* note 14.

423 *Supra* note 59 and related discussion.

424 *Anti-Trust in Me*, *supra* note 21.

425 *Supra* notes 30, 408–9 and related discussion; Gary Rolnik, *Editor's Introduction*, in Is There a Concentration Problem in America? iii, iii (2018).

accelerating trend in favor of oligopoly that was "not commonly acknowledged"[426] and failed to change the tenor of debate. Instead, other factors that historical trends highlight have enhanced receptivity to arguments that there is a present-day monopoly problem in America antitrust can do much to fix.

Evolving attitudes regarding regulation are one such factor. Antipathy toward government intervention contributed to the Reagan era antitrust counter-revolution.[427] Such misgivings currently are on the wane, perhaps presaging a new era of big government.[428] In 2018, 58% of those responding to a poll asking whether government should "do more" said "yes", an all-time high to that point.[429] The Biden administration has picked up on the cue. With the president's 2021 State of the Union address in "virtually every section of his speech there was an idea recasting the long-standing taboos of American political debate as virtuous opportunities for government reform."[430] Hence, the Biden administration may be aiming to reverse Reaganite preconceptions of counterproductive state intervention to foster a revival of faith in government.[431] History suggests that to the extent the Biden administration succeeds, the odds of an antitrust revival along New Brandeisian lines would improve considerably.

The situation is similar with foreign competition. The fact that large American corporations were confronting major challenges from abroad in the 1970s and 1980s fostered misgivings about antitrust enforcement.[432] Between 1992 and 2012 in U.S. manufacturing industries there was increased concentration amongst domestic firms but a significant increase in the number of foreign firms operating in the American market meant once the sales of foreign exporters was accounted for market concentration was stable overall.[433] By the mid-2010s, however, foreign firms that had formerly piled into the United States had reputedly "lost their

426 John Bellamy Foster, Robert W. McChesney & R. Jamil Jonna, *Monopoly and Competition in Twenty-First Century Capitalism*, Monthly Rev., April 2011, 8, summarizing the data at 4–8.

427 *Supra* notes 280–83, 292–94 and related discussion.

428 Justin Lahart, *A New Era of "Big Government" Begins*, Wall St. J., June 26, 2021, B6.

429 Dante Chinni, *Poll: Americans Want Government to do More*, NBC News.com, January 28, 2018, https://www.nbcnews.com/politics/first-read/poll-americans-want-government-do-more-n841731.

430 Edward Keenan, *Joe Biden Thinks Big Government is the Answer. Will Americans Agree?*, Wash. Post, May 1, 2021, https://www.therecord.com/ts/news/world/2021/05/01/joe-biden-thinks-big-government-is-the-answer-will-americans-agree.html.

431 Bryant, *supra* note 380; Doyle McManus, *Biden 100 Days In*, Duluth News Tribune, May 1, 2021, https://www.duluthnewstribune.com/opinion/columns/7005653-Biden-100-days-in-National-View-In-short-order-president-has-become-the-anti-Reagan.

432 *Supra* notes 319, 321, 324–27, 330, 332–33 and related discussion.

433 Mary Amiti & Sebastian Heise, *U.S. Market Concentration and Import Competition*, Federal Reserve Bank of New York Staff Reports, no. 968 (2021).

mojo,"[434] with "many foreign firms" having fallen "out of love with America years ago."[435] Sustained becalming of foreign competitors might well help to set the scene for a present-day reinvigoration of antitrust.

To the extent that foreign firms are a sideshow at present, in contrast with the 1980s and 1990s, Americans wary of corporate power may well conclude, "it's our own giants that we have to fear."[436] Whereas the number of American companies ranked among the world's 20 largest by revenue fell from 17 in 1962 to six in 1994, there were eight such firms in 2019 (Walmart, Amazon, Exxon, Apple, CVS, Berkshire Hathaway, United Health and McKesson).[437] Partly because the Chinese government owned outright three of the four largest corporations ranked by revenue for 2019,[438] American dominance of the list of world's largest publicly traded firms is even more extensive. Currently, 13 of the top 20 companies ranked by stock market capitalization are American.[439] With American firms dominating the global corporate spotlight, bolstering antitrust could well be thought of as an increasingly essential mechanism for containing the market power such firms have at their disposal.

Changing public perceptions of major tech companies are highly salient as foreign challenges recede.[440] American tech giants have rapidly evolved from public relations heroes to zeroes, and have done so in a manner relevant to an antitrust rethink. Through to the mid-2010s, leading tech firms were "portrayed in the news media as forces of innovation and delight, as the best that American capitalism had to offer."[441] In 2015, President Obama implied that European Union regulators were jealously hounding American technology companies because European firms could not keep up.[442]

By the end of the 2010s, the circumstances were much different. "Big Tech" had become "a pejorative term….And the men who run these companies (were) viewed as the robber barons of a new capitalist age."[443] As a former Alphabet

434 *Too Much of a Good Thing*, Economist, March 26, 2016, 23.
435 *They've Lost That Loving Feeling*, Economist, January 14, 2017, 64.
436 Farhad Manjoo, *The Upside Of Bowing To Big Tech*, N.Y. Times, November 2, 2017, B1.
437 Gary Hoover, *The Biggest Companies in the World*, American Business History Center, September 18, 2020, https://americanbusinesshistory.org/the-biggest-companies-in-the-world/.
438 *Ibid*.
439 *Biggest Companies in the World by Market Capitalization 2021*, Statista, https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-capitalization/ (listing, in order, these 13 American companies: Apple, Microsoft, Amazon, Alphabet, Facebook, Tesla, Berkshire Hathaway, Visa, JP Morgan Chase, Johnson & Johnson, Walmart, NVIDIA, and Mastercard).
440 Farhad Manjoo, *Frightful But Not Invincible*, N.Y. Times, January 5, 2017, B1.
441 *Ibid*.
442 Robert Levine, *Can Antitrust Rein in This Giant?*, Boston Globe, June 17, 2018, K1.
443 Lambert, *supra* note 76.

(a.k.a. Google) lobbyist said in 2021, "In the last four or five years, the pendulum has swung in an overly dramatic fashion from 'tech can do no wrong' to 'tech can do no right.'"[444] Increasingly, those who follow the fortunes of powerful tech firms are "unable to perceive the possibility of viable substitutes or competitors to the firms at a similar scale either now or in the future."[445] Support may correspondingly grow for "restructuring mandated by traditional antitrust policy."[446] Amy Klobuchar, for instance, says "the sheer size and dominance" of the Big Tech companies allows them to "scare away their closest or nascent competitors." That means, she reasons, that "(n)owhere do the modern-day competition issues come into sharper focus."[447] Big Tech skepticism thus could be a key catalyst for an antitrust rethink.

9 Conclusion

A late 20th century eclipsing of reputedly "real" mid-20th century antitrust was one of the most dramatic historical bends in the lengthy antitrust river. Currently, a cohort of "New Brandeisians" are aiming to reverse that late 20th century antitrust counter-revolution. History has featured prominently in this latest attempt to change the direction of the antitrust current. The New Brandeisians focus on a supposed mid-20th century antitrust golden era and the Chicago School critique of that era to explain what went wrong with antitrust and to outline how to correct things. As this article shows, the historical account on offer is misleadingly partial, both with respect to the nature of that golden era and the Chicago School's influence. History thus may be providing the mood music for antitrust reform, but various false notes have been struck. This article has sought to get history and antitrust in tune.

One point this article has made in aligning history and antitrust is that antitrust's mid-20th century golden era may not have been as golden as many suppose. Oligopoly featured prominently amidst uneven antitrust enforcement and U.S. Supreme Court rulings invoked problematic logic while ruling in favor of antitrust enforcers with unnerving regularity. As for the Chicago School, it became influential in the courts but a pro-antitrust jurisprudential pattern was unravelling in

444 Brody Mullins and Julie Bykowicz, *Tech Gets a Chillier Reception in D.C.*, Wall St. J., June 18, 2021, A7.

445 Ryan Bourne, *Is This Time Different? Schumpeter, the Tech Giants, and Monopoly Fatalism*, Cato Inst., June 18, 2019.

446 Steltzer, *supra* note 16.

447 Klobuchar, *supra* note 41, 12. See also Posner, *supra* note 13 ("In the new antitrust debate, Big Tech is the flashpoint.")

the U.S. Supreme Court before that court began citing Chicago School reasoning. Moreover, antitrust enforcement continued in earnest in the 1970s despite Chicago School logic gaining a foothold in the Supreme Court. During the 1980s, antitrust enforcement changed but did not cease in the way some critics alleged. Moreover, skepticism regarding the efficacy of government and a potent dose of foreign competition meant there was reasonably broad and sustained support for the basic contours of the late 20th century antitrust counter-revolution that occurred even as post-Chicago thinking gained influence at the expense of Chicago School theorizing.

The additional contextualization this article offers regarding antitrust history provides insights regarding progress the New Brandeisians have made recently. Continuing doubts about regulation and ongoing awareness of corporate America's foreign rivals meant any sort of fundamental antitrust rethink was unlikely until recently. Over the past few years, however, increased faith in government and the becalming of foreign competition have combined with empirical evidence implying market power is on the rise to set the scene for robust debate on the future of antitrust. Luigi Zingales has argued, "If the world around you changes, you should change your prescriptions."[448] To the extent that those who set the tone with antitrust in the United States think along these lines, a significant and sustained new bend in the antitrust river is in prospect.

References

60 Minutes with Charles F. Rule– Assistant attorney general, antitrust division (1988). *Antitrust Law Journal*, *57*, 257.

Adams, W. (1951). Dissolution, divorcement, divestiture: The pyrrhic victories of antitrust. *Indiana Law Journal*, *27*, 1.

Adams, W., & Brock, J. W. (1986). The new learning and the euthanasia of antitrust. *California Law Review*, *74*, 1515.

Adams, S., Lynch, C., & Tahyar, M. (2021). President Biden's executive order on promoting competition. *Harvard Law School Forum on Corporate Governance*.

Amiti, M., & Heise, S. (2021). U.S. market concentration and import competition. *Federal Reserve Bank of New York Staff Reports*, no. 968.

Areeda, P. (1987). Monopolization, mergers, and markets: A century past and the future. *California Law Review*, *75*, 959.

Auer, D., & Petit, N. (2019). Two systems of belief about monopoly: The press vs. antitrust. *Cato Journal*, *39*, 99.

448 Paul, *supra* note 8.

Austin, A. D. (1979). National commission for the review of antitrust laws and procedures: Reports on symptoms but ignores causes. *Notre Dame Law Review*, *54*, 873.
Austin, A. (1988). Antitrust reaction to the merger wave: The revolution vs. the counterrevolution. *North Carolina Law Review*, *66*, 931.
Baer, B. (2017). Conclusion: A final note on antitrust enforcement during the Obama administration. In Ron Knox (Ed), *The Obama trials: The US antitrust agencies in the courtroom, 2009–2017* (p. 365).
Baker, J. B. (2010). Preserving a political bargain: The political economy of the non-interventionist challenge to monopolization enforcement. *Antitrust Law Journal*, *76*, 605.
Baker, J. B. (2019). *The antitrust paradigm: Restoring a competitive economy*.
Baker, R. B., Frydman, C. & Hilt, E. (2018). *Political discretion and antitrust policy: Evidence from the assassination of President McKinley*. NBER Working Paper No. 25237.
Balto, D. A. (1999). Antitrust enforcement in the Clinton administration. *Cornell Journal of Law and Public Policy*, *9*, 61.
Barron's (various issues).
Benefits of Competition and Indicators of Market Power. (2016). *Council Econ. Advisers Issue Brief*. Spring.
Biedenbach, T., & Söderholm, A. (2008). The challenge of organizing change in hypercompetitive industries: A literature review. *Journal of Change Management*, *8*, 123.
Bogus, C. T. (2015). The new road to serfdom: The curse of bigness and the failure of antitrust. *University of Michigan Journal of Law Reform*, *49*, 1.
Bork, R. H. (1965). The rule of reason and the per se concept: Price fixing and market division [I]. *Yale Law Journal*, *74*, 775.
Bork, R. H. (1966a). Legislative intent and the policy of the Sherman Act. *Journal of Law and Economics*, *9*, 7.
Bork, R. H. (1966b). The rule of reason and the per se concept: Price fixing and market division [II]. *Yale Law Journal*, *75*, 373.
Bork, R. H. (1967). The goals of antitrust policy. *American Economic Review*, *57*, 242.
Bork, R. H. (1978). *The antitrust paradox: A policy at war with itself*.
Bork, R. H. (1993). *The antitrust paradox: A policy at war with itself* (revised edition).
Boston Globe (various issues).
Bougette, P., Deschamps, M., & Marty, F. (2015). When economics met antitrust: The second Chicago School and the economization of antitrust law. *Enterprise and Society*, *16*, 313–326.
Bourne, R. (2019). *Is this time different? Schumpeter, the tech giants, and monopoly fatalism*. Cato Inst.
Brinkley, A. (1995). *The end of reform: New Deal liberalism in recession and war*.
Brown Shoe Co. v. United States. (1962). 370 U.S. 294.
Business Week (various issues).
Calkins, S. (2006). Antitrust modernization: Looking backwards. *Journal of Corporation Law*, *31*, 421.
Carstensen, P. C. (1989). How to assess the impact of antitrust on the American economy: Examining history or theorizing? *Iowa Law Review*, *74*, 1175.
Carstensen, P. C. (2011). Replacing antitrust exemptions for transportation industries: The potential for a "Robust Business Review Clearance". *Oregon Law Review*, *89*, 1059.
Carter, Z. (2020). The power of ideas and the idea of power. *The American Prospect*, December 4. https://prospect.org/culture/books/the-power-of-ideas-and-the-idea-of-power/.

Cheffins, B. (1989). The development of competition policy, 1890–1940: A re-evaluation of a Canadian and American tradition. *Osgoode Hall Law Journal*, *27*, 449.
Cheffins, B. R. (2003). Mergers and corporate ownership structure: The United States and Germany at the turn of the 20th century. *American Journal of Comparative Law*, *51*, 473.
Cheffins, B. R. (2018). *The public company transformed*.
Chinni, D. (2018). *Poll: Americans want government to do more*. NBC News.com.
Christian Science Monitor (various issues).
Cioffi, J. (2011). *Public law and private power: corporate governance reform in the age of finance capitalism*.
Clinton, W. J. (1996). *State of the union address*.
Competition and Antitrust (2021). *GovTrack*.
Congressional Antitrust Reform (2022). State of play. *Brownstein*.
Continental Television v. GTE Sylvania. (1977). 433 U.S. 36.
Covarrubias, M., Gutiérrez, G., & Philippon, T. (2019). From good to bad concentration? US industries over the past 30 years. *NBER Macroeconomics Annual*, *34*, 1.
Crane, D. A. (2008). Technocracy and antitrust. *Texas Law Review*, *86*, 1159.
Crane, D. A. (2009). Obama's antitrust agenda. *Regulation*, *32*, 16.
Crane, D. A. (2011). *The institutional structure of antitrust enforcement*.
Crane, D. A. (2015). All I really need to know about antitrust I learned in 1912. *Iowa Law Review*, *100*, 2025.
Crane, D. A. (2019). A premature postmortem on the Chicago school of antitrust. *Business History Review*, *93*, 759.
Crane, D. A. (2020). The new crisis in antitrust (?). *Antitrust Law Journal*, *83*, 253.
Davies, W. (2010). "Economics and the nonsense" of law: The case of the Chicago antitrust revolution. *Economy and Society*, *39*, 64.
Dawson, A., Hart, M., & Scanlan, J. (2016). The economic essentials of digital strategy. *McKinsey Q* (2), 32.
Dayen, D. (2017). This budding movement wants to smash monopolies. The Nation.
Dayen, D. (2020). *Monopolized*.
Dayen, D., & Sammon, A. (2021). The new Brandeis movement has its moment. American Prospect.
De Loecker, J., Eeckhout, J., & Unger, G. (2020). The rise of market power and the macroeconomic implications. *Quarterly Journal of Economics*, *135561*.
Department of Justice. (1996). Two former Antitrust Division heads receive Justice Department's 1996 John Sherman Award.
Dewey, D. (1990). *The antitrust experiment in America*.
Dow Jones Institutional News.
Duluth News Tribune.
Easterbrook, F. H. (1984). Limits of antitrust. *Texas Law Review*, *63*, 1.
Eckes, A. E. (1992). Trading American interests. *Foreign Affairs, Fall*, 135.
Economist (various issues).
Eisner, M. A. (1991). *Antitrust and the triumph of economics: Institutions, expertise, and policy change*.
Federal Trade Commission. (no date). *Guide to antitrust laws – The enforcers*.
Financial Times (various issues).
Forbes (various issues).
Foster, J. B., McChesney, R. W., & Jonna, R. J. (2011). Monopoly and competition in Twenty-First century capitalism. *Monthly Review*, *62*(11), 1.

Freyer, T. (1992). *Regulating big business: Antitrust in Great Britain and America*: *1880–1990*.
Galambos, L., & Pratt, J. (1988). *The rise of the corporate commonwealth: United States business and public policy in the 20th century*.
Galbraith, J. K. (1967). *The new industrial state*.
Gallo, J. C., Dau-Schmidt, K., Craycraft, J. L., & Parker, C. J. (2000). Department of Justice antitrust enforcement, 1955–1997: An empirical study. *Review of Industrial Organization*, *17*, 75.
Gao, N., Peng, N., & Strong, N. (2017). What determines horizontal merger antitrust case selection? *Journal of Corporate Finance*, *46*, 51.
Geisst, C. R. (2000). *Monopolies in America: Empire builders and their enemies from Jay Gould to Bill Gates*.
Gillespie, N. (2019). *Everyone agrees government is a hot mess*. Reason.
Giocoli, N. (2015). Old Lady Charm: Explaining the persistent appeal of Chicago antitrust. *Journal of Economic Methodology*, *22*, 96.
Goldstein, J., & Gulotty, R. (2014). America and trade liberalization: The limits of institutional reform. *International Organization*, *68*, 263.
Gordon, J. S. (2004). *An empire of wealth: The epic history of American economic power*.
Green, M. J. (1972). *The closed enterprise system: Ralph Nader's Study Group on antitrust enforcement*.
Gressley, G. M. (1964). Thurman Arnold, antitrust, and the New Deal. *Business History Review*, *38*, 214.
Grullon, G., Larkin, Y., & Michaely, R. (2019). Are US industries becoming more concentrated? *Review of Finance*, *23*, 697.
Hamel, G. (1996). Strategy as revolution. *Harvard Business Review*, July-August 69.
Handler, M. (1967). The Supreme Court and the antitrust laws (from the viewpoint of the critic). *Antitrust Law Journal*, *34*, 21.
Handler, M. (1973). Twenty-five years of antitrust (twenty-fifth annual antitrust review). *Columbia Law Review*, *73*, 415.
Harper's Weekly.
Hazlett, T. W. (2019). *The new trustbusters are coming for big tech*. Reason.
Hofstadter, R. (1964). What happened to the antitrust movement? Notes on the evolution of an American creed. In Earl F. Cheit (Ed), *The business establishment* (p. 113).
Hoover, G. (2020). *The biggest companies in the world*. American Business History Center.
Hovenkamp, H. J. (2009). The Neal report and crisis in antitrust. *University of Iowa Legal Studies Research Paper 09-09*.
Hovenkamp, H. (2013). Antitrust after populism. In Daniel A. Crane, & Hovenkamp Herbert (Eds), *The making of competition policy: Legal and economic sources* (p. 221).
Hovenkamp, H. (2021). *Antitrust's error costs*. Research Paper Series, No. 21–32. Univ. of Pennsylvania Institute for Law and Economics.
Hutchinson, C. (2017). Law and economics scholarship and Supreme Court antitrust jurisprudence, 1950–2010. *Lewis & Clark Law Review*, *21*, 145.
Jarsulic, M. (2019). Antitrust enforcement for the 21st century. *Antitrust Bulletin*, *64*, 514.
Kanter, J. (2022). *Assistant attorney general Jonathan Kanter of the antitrust division delivers remarks to the New York state bar association antitrust section*. https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york.
Katz, A. (2020). The Chicago School and the forgotten political dimension of antitrust law. *University of Chicago Law Review*, *87*, 413.

Katzmann, R. A. (1984). *The attenuation of antitrust* (p. 23). Brookings Rev. Summer.
Kauper, T. E. (1968). The Warren Court and the antitrust laws: Of economics, populism, and cynicism. *Michigan Law Review*, *67*, 325.
Kauper, T. E. (2002). The report of the Attorney General's national committee to study the antitrust laws: A retrospective. *Michigan Law Review*, *100*, 1867.
Kauper, T. E. (2008). Influence of conservative economic analysis on the development of the law of antitrust in Robert Pitofsky ed., How the Chicago School overshot the mark: The effect of conservative economic analysis on U.S. antitrust (p. 40).
Khan, L. M. (2017). Amazon's antitrust paradox. *Yale Law Journal*, *126*, 710.
Khan, L. M. (2020). The end of antitrust history revisited. *Harvard Law Review*, *133*, 1655.
Khan, L. M., & Vaheesan, S. (2017). Market power and inequality: The antitrust counterrevolution and its discontents. *Harvard Journal of Law and Public Policy*, *11*, 235.
Kirkwood, J. B., & Lande, R. H. (2008). The fundamental goal of antitrust: Protecting consumers, not increasing efficiency. *Notre Dame Law Review*, *84*, 191.
Kishi, D. (2018). *Robert Bork's America*. American Conservative.
Klobuchar, A. (2021). *Antitrust: Taking on monopoly power from the gilded age to the digital age*.
Knox, R. (2017). Preface. In Ron Knox (Ed), *The Obama trials: The US antitrust agencies in the courtroom, 2009–2017* (p. vii).
Kovacic, W. E. (2003). The modern evolution of US competition policy enforcement norms. *Antitrust Law Journal*, *71*, 377.
Kovacic, W. E. (2007). The intellectual DNA of modern U.S. competition law for dominant firm conduct: The Chicago/Harvard Double Helix. *Columbia Business Law Review*, *1*.
Kovacic, W. E. (2020). The Chicago obsession in the interpretation of US antitrust history. *University of Chicago Law Review*, *87*, 459.
Kovacic, W. E. (2021). The roots of America's competition revolution. *ProMarket*. https://promarket.org/2021/09/21/the-roots-of-americas-competition-revolution/.
Kovaleff, T. P. (1976). The antitrust record of the eisenhower administration. *Antitrust Bulletin*, *21*, 589.
Kovaleff, T. P. (1980). *Business and government during the eisenhower administration: A study of the antitrust policy of the*. Antitrust Division of the Justice Department.
Ladd, E. C., & Bowman, K. H. (1998). *What's wrong: A survey of American satisfaction and complaint*.
Lambert, T. A. (2020). The limits of antitrust in the 21st century. *Regulation*, *43*, 20.
Lamoreaux, N. R. (2019). The problem of bigness. *Journal of Economic Perspectives*, *33*, 94.
London, P. A. (2005). *The competition solution: The bipartisan secret behind American prosperity*.
Los Angeles Times (various issues).
Lynn, B. C. (2009). *Cornered: The new monopoly capitalism and the economics of destruction*.
Magaziner, I. C., & Reich, R. R. (1982). *Minding America's business: The decline and rise of the American economy*.
Mandel, M. (1996). *The High-Risk Society*.
MarketWatch.
Markham, J. W. (1965). The new antitrust policy and the individual business firm. *Law and Contemporary Problems*, *30*, 607.
McCraw, T. (2000). *American business, 1920–2000: How it worked*.
McGrath, J. P. (1984). *Merger policy today*.
Meese, A. J. (2013). Competition policy and the Great Depression: Lessons learned and a new way forward. *Cornell Journal of Law and Public Policy*, *23*, 255.

Melamed, A. D., & Rubinfeld, D. L. (2007). U.S. v. Microsoft: Lessons learned and issues raised. In Eleanor M. Fox, & Daniel A. Crane (Eds), *Antitrust stories* (pp. 286).
Metzenbaum, H. M. (1987). Address. *Antitrust Law Journal*, *56*, 387.
Meyer, R. (2018). *How to fight Amazon (before you turn 29)*. Atlantic.com.
Miscamble, W. D. (1982). Thurman Arnold goes to Washington: A look at antitrust policy in the later New Deal. *Business History Review*, *56*, 1.
Mueller, W. F., & Hamm, L. G. (1974). Trends in industrial market concentration, 1947 to 1970. *Review of Economics and Statistics*, *54*, 511.
Muris, T. J., & Nuechterlein, J. E. (2020). Chicago and its discontents. *University of Chicago Law Review*, *87*, 495.
Nader, R., & Taylor, W. (1986). *The big boys: Power and position in American business*.
Neale, A. D. (1969). *The antitrust laws of the U.S.A.: A study of competition enforced by law* (2nd ed.).
New Statesman.
New York Law Journal.
New York Times (various issues).
New Yorker.
Northern Pacific Ry. v. United States (1958). 356 U.S. 1.
Orbach, B. (2014). Was the crisis in antitrust a Trojan horse? *Antitrust Law Journal*, *79*, 881.
Orbach, B. (2019). The present new antitrust era. *William and Mary Law Review*, *60*, 1439.
Page, W. H. (1995). Legal realism and the shaping of modern antitrust. *Emory Law Journal*, *44*, 1.
Parloff, R. (2019). *Behind the big tech antitrust backlash: A turning point for America*. Yahoo! Finance.
Paul, S. A. (2019). *Market values*. U. Chi. Magazine. Fall.
Peltzman, S. (2001). The decline of antitrust enforcement. *Review of Industrial Organization*, *19*, 49.
Peritz, R. J. R. (1992). *Competition policy in America, 1888-1992: History, rhetoric, law*.
Philippon, T. (2019). *The great reversal: How America gave up on free markets*.
Phillips-Fein, K. (2009). *Invisible hands: The businessmen's crusade against the new deal*.
Pollock, E. E. (1976). Schwinn per se rule: The case for reconsideration. *Northwestern University Law Review*, *71*, 1.
Posner, R. A. (1969a). Oligopoly and the antitrust laws: A suggested approach. *Stanford Law Review*, *21*, 1562.
Posner, R. A. (1969b). The Federal Trade Commission. *University of Chicago Law Review*, *37*, 47.
Posner, R. A. (1979a). The antitrust decisions of the Burger court. *Antitrust Law Journal*, *47*, 819.
Posner, R. A. (1979b). The Chicago School of antitrust analysis. *University of Pennsylvania Law Review*, *127*, 925.
Posner, E. (2021). *Biden's antitrust revolutionaries*. Project Syndicate.
Priest, G. L. (2014). Bork's strategy and the influence of the Chicago School on modern antitrust law. *Journal of Law and Economics*, *57*, S1.
Reich, R. (2007). *Supercapitalism: The transformation of business, democracy, and everyday life*.
Remarks by the President in the State of the Union Address. (2013). February 12.
Rolnik, G. (2018). Editor's introduction. In Gary Rolnik (Ed), *Is there a concentration problem in America?* (p. iii).
Rule, C. F. (1988). *Setting the record straight: The present is prologue, remarks for the 22nd New England Antitrust Conference*.

Sacher, S. B., & Yun, J. M. (2019). Twelve fallacies of the neo-antitrust movement. *George Mason Law Review*, *26*, 1491.
Sahlman, W. A. (1999). The new economy is stronger than you think. *Harvard Business Review*, *99*.
Sawyer, L. P. (2018). *American fair trade proprietary capitalism, corporatism, and the "New Competition," 1890–1940*.
Schechter, A. L. A. (1935). *Poultry corp. v. United States*. 295 U.S. 495.
Scherer, F. M. (2008). Conservative economics and antitrust: A variety of influences. In Robert Pitofsky (Ed), *How the Chicago School overshot the mark: The effect of conservative economic analysis on U.S. antitrust* (Vol. 30).
Schmalensee, R. (2008). Thoughts on the Chicago legacy in U.S. antitrust. In Robert Pitofsky (Ed), *How the Chicago School overshot the mark: The effect of conservative economic analysis on U.S. antitrust* (Vol. 11).
Scola, N. (2020). *How a liberal think tank is driving 2020 dems to crack down on big tech*. Politico.
Senator Klobuchar introduces sweeping bill to promote competition and improve antitrust enforcement. (2021). 4 February.
Sherman, H., & Chaganti, R. (1998). *Corporate governance and the timeliness of change*.
Singer, H. (2021). Fixing a broken antitrust regime. *ProMarket*. https://promarket.org/2021/05/26/amy-klobuchar-antitrust-monopoly-ovation-review/.
Skitol, R. A., & Vorrasi, K. M. (2012). The remarkable 50-year legacy of Brown Shoe Co. v. United States. *Antitrust*, *26*, 47.
Sokol, D. D. (2020). Antitrust's curse of bigness problem. *Michigan Law Review*, *118*, 1259.
Statista.
Steurer, R. M., & Barile, P. A., II (2002). *Antitrust in Wartime. 16 Antitrust 71*.
Stoller, M. (2019). *Goliath*.
Suess, Dr. (1957). *The Grinch who stole Christmas*.
Sullivan, L. A., & Fikentscher, W. (1998). On the growth of the antitrust idea. *Berkeley Journal of International Law*, *16*, 197.
Sunday Times.
Tennant, M. (2018). *Monopolies: Fears, facts and fallacies*. New American.
Tepper, J., & Hearn, D. (2019). *The myth of capitalism: Monopolies and the death of competition*.
Time (various issues).
Truman, H. S. (1950). *Statement by the president upon signing Bill Amending the Clayton Act*.
United States v. Microsoft Corp. (2001). 253 F. 3d 34.
United States v. General Dynamics Corp. (1974). 415 U.S. 486.
United States v. First Nat. Bancorporation. (1973). 410 U.S. 577.
United States v. Von's Grocery Co. (1966). 384 U.S. 270.
United States v. Philadelphia Nat'l. Bank. (1963). 374 U.S. 321.
United States v. Pabst Brewing Co. (1966a). 384 U.S. 546.
United States Steel Corp. v. Fortner Enterprises, Inc. (1977). 429 U.S. 610.
US News & World Report (various issues).
U.S. Department of Labor, "Hall of Secretaries: Robert B. Reich".
Vaheesan, S. (2019). How Robert Bork fathered the new Gilded Age. *ProMarket*. https://promarket.org/2019/09/05/how-robert-bork-fathered-the-new-gilded-age/.
Wall Street Journal (various issues).
Wallace, J. H. (1979). Another year of significant congressional initiatives. *Antitrust Law Journal*, *48*, 1519.
Waller, S. W. (2004). The antitrust legacy of Thurman Arnold. *St. John's Law Review*, *78*, 569.

Waller, S. W. (2011). Corporate governance and competition policy. *George Mason Law Review*, *18*, 833.
Warren, E. (2016). *Reigniting competition in the American Economy, keynote remarks at New America's open markets program event*.
Washington Post (various issues).
White, L. J. (2003). Antitrust activities during the Clinton administration. In Robert W. Hahn (Ed), *High-stakes antitrust: The last hurrah* (p. 11).
White, L. J. (2021a). Rethinking antitrust. *Milken Institute Review: Journal of Economic Policy*. First Quarter.
White House (2021b). *Executive order on promoting competition in the American economy*.
White House (2021c). *Fact sheet: Executive order on promoting competition in the American economy*.
White House (2021d). *Remarks by President Biden at signing of an executive order promoting competition in the American economy*.
White House Task Force on Anti-trust Policy (1969). *Task force report on anti-trust policy*. 91st Congressional record, first Senate session, 13890.
Wood, B. D., & Anderson, J. E. (1993). The politics of U.S. antitrust regulation. *American Journal of Political Science*, *37*, 1.
Woodcock, Ramsi. A. (2017). Big data, price discrimination, and antitrust. *Hastings Law Journal*, *68*, 1371.
Woodcock, Ramsi. A. (2021). The hidden rules of a modest antitrust. *Minnesota Law Review*, *105*, 2095.
Wright, J. D., Dorsey, E., Klick, J., & Rybnicek, J. M. (2019). Requiem for a paradox: The dubious rise and inevitable fall of hipster antitrust. *Arizona State Law Journal*, *51*, 293.
Wright, J., & Portuese, A. (2020). Antitrust populism: Towards a taxonomy. *Stanford Journal of Law, Business and Finance*, *25*, 131.
Wu, T. (2018). *The curse of bigness: How corporate giants came to rule the world*.
Wu, T. (2019). *The Utah statement: Reviving antimonopoly traditions for the era of big tech*. OneZero.
Zingales, L. (2012). *A capitalism for the people: Recapturing the lost genius of American prosperity*.

Supplementary Material: The online version of this article offers supplementary material (https://doi.org/10.1515/ael-2021-0084).