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US Antitrust Law and Policy in Historical Perspective

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Summary

The key pieces of antitrust legislation in the United States—the Sherman Antitrust Act of 1890 and the Clayton Act of 1914—contain broad language that has afforded the courts broad latitude in interpreting and enforcing the law. This article chronicles the judiciary's shifting interpretations of antitrust law and policy over the past 125 years. It argues that jurists, law enforcement agencies, and private litigants have revised their approaches to antitrust to accommodate economic shocks, technological developments, and predominant economic wisdom. Over time an economic logic that prioritizes lowest consumer prices as a signal of allocative efficiency—known as the consumer welfare standard—has replaced the older political objectives of antitrust, such as protecting independent proprietors or reducing wealth transfers from consumers to producers—known as the total welfare standard. Today, however, a new group of progressive activists has again called for revamping antitrust so as to revive enforcement against dominant firms, especially in digital markets, and to refocus attention on the political effects of antitrust law and policy. This shift suggests that antitrust may remain a contested field for scholarly and popular debate.

Keywords: antitrust, trusts, restraint of trade, competition policy, vertical integration, horizontal agreement, merger, acquisition, cartel, New Deal, Harvard school, Chicago school of law and economics, post-Chicago

Introduction

Competition policy, also known as **antitrust**, originated in the United States in the late nineteenth century in response to the rise of *trusts*, a term that became a euphemism for big business. Technically, a trust is a legal device used to coordinate multiple property owners through a unified management structure. Business owners combine their interests into a single legal entity—the trust. The various owners appoint a trustee (or multiple trustees) to act in the interest of the collective owners, and the individual owners retain dividend shares in the trust. A trust can be established within a single firm—a form known as a voting trust—to unite majority shareholders for the purpose of controlling management decisions. Alternatively, a trust can be set up to coordinate multiple, separately owned firms, operating like a combination or cartel. In 1882 S. C. T. Dodd, an attorney for John Rockefeller's Standard Oil Co., created the first trust to facilitate a tight combination of oil refiners that could dictate price and supply while also avoiding state-level taxes and corporate regulations. The use of trusts for industrial consolidation multiplied throughout the 1880s, and in response, several states and the federal government passed antitrust laws to regulate business competition, focusing on coordination among firms and business tactics used to monopolize industries.[1]

This essay is arranged chronologically. It begins with late nineteenth-century competition policy as it developed to counterbalance concentrated economic power, which reformers feared might be wielded to influence political outcomes or trammel independent proprietors with unfair business tactics.[2] Ensuring market competition had once been the province of judges through their enforcement of common law prohibitions against "restraints of trade," as well as state corporation laws regulating business actions and internal governance. However, as new communication and transportation technologies facilitated business combinations that traversed state lines, state laws appeared increasingly inadequate. States retained their regulatory power over corporations, but the Sherman Antitrust Act of 1890 promised to "rein in the trusts" through federal prosecutions.[3] The second section explains that over the next century, observers often asserted that the Sherman Act provided inadequate relief against anticompetitive behaviors, and consequently, amendments to the antitrust laws followed. Progressive Era state building contributed to the formation of the Federal Trade Commission in 1914 and the passage of new laws against unfair competition that dictated industry-specific rules and regulations to govern trade practices.

The third section, on the New Deal state, chronicles the exceptional experience of America during the Great Depression, explaining how previous policies enacted under President Herbert Hoover contributed to President Franklin D. Roosevelt's state-sanctioned cartelization of the national economy. The failure of those policies to stem the Depression led to their reversal by the late 1930s, leading some historians to declare the "end of reform"; however, antitrust regulation and enforcement did not disappear from political debate or court dockets.[4] Postwar antitrust policy initiated stringent antimerger guidelines, even as protecting independent proprietors faded as a popular political priority. Additionally, Congress and the Department of Justice focused on exporting American antitrust by foisting antitrust regulations on foreign countries and applying US laws against foreign firms whose business dealings effected American markets.

The fourth section argues that perhaps the most significant change in antitrust jurisprudence occurred in the 1970s when stringent antitrust enforcement triggered a backlash that transformed law and policy. In an attempt to remove political preferences from antitrust legal analysis, new economic thinking associated with the Chicago school of law and economics argued that maximizing *consumer welfare* should be the sole goal of antitrust law. As a result, many business practices once considered anticompetitive became legal. The applications of antitrust law narrowed, and the judiciary became less interventionist in policing market transactions. Contemporary US competition policy is generally explained as the attempt to maximize consumer welfare—or put differently, the attempt to get the greatest number of goods to customers, reliably, at the lowest cost. The older concerns with safeguarding against undue political influence or preserving a high threshold of market competitors has largely disappeared.

Generally, the American public has exhibited a long-standing popular faith in competition and free market principles. Yet the meaning of *competition*—much like the meaning of marketplace *fairness*—has changed over the years.[5] Changing technologies and distribution systems, recurring economic recession and depression, interventions abroad, and evolving economic and legal theories have reshaped antitrust law and policy. At times antitrust has been a lightning rod for popular protest, but at other times it has reflected a public consensus on general principles. Yet one notable trend has been the movement toward technocracy in the domestic application of antitrust law. Especially since the 1970s, economic expertise—embedded in administrative agencies and specialized law firms—has largely vanquished the political content of US antitrust that had protected competitors through stringent merger policies, for example. Most recently, some economists have called for jurists to pay greater attention to market imperfections, which the Chicago school has overlooked. This so-called post-Chicago analysis has encouraged renewed attention to anticompetitive conduct and consumer harms. Perhaps building on the post-Chicago momentum, other political reformers hope to revive the political ideology of antimonopoly in contemporary domestic politics, as the final section argues. This new progressive movement argues that the Chicago school’s interpretation has turned antitrust jurisprudence into a shell of its former self and displaced important concerns that concentrated economic power affects not only market competition but also democratic political participation.

The Formative Era: Gilded Age Beginnings (1880s–1900)

Although the American antimonopoly tradition can be traced back to the Founding Era, the modern antitrust movement emerged during the late nineteenth century in response to the growth of large-scale firms. Technological advancements in industrial and agricultural production, improvements in transportation and communication networks, and deflationary cycles (1873–78; 1883–86) undermined weaker firms and encouraged corporate consolidations that attained greater economies of scale and scope.[6] The Second Industrial Revolution had created a tumultuous economic and political environment. Americans enjoyed ubiquitous consumer goods, falling prices, and rising real wages, yet many people feared that the rise of big business might affect democratic political participation and entrepreneurship. Most mainstream economists at the time opposed a national antitrust law because they saw it as a threat to those gains. A popular faith in competition animated both sides of the debate, but how to protect this abstract idea of competition remained contested.

The late-nineteenth century populist movement—which is closely identified with the Grange, an agrarian political movement in western and midwestern states—led opposition to railroad privileges specifically and corporate capitalism more generally. Populism borrowed from some longstanding American political traditions and contributed to a reform agenda that precipitated the first railroad rate regulations and later antitrust legislation. Those traditions included a deep hostility to both political corruption and state-granted special privilege, problems that they intended to remedy by enacting legal reforms and forming their own equally powerful agricultural cooperatives and a third party. The Populist Party proved short lived, but populist political preferences remained a vital part of antimonopoly sentiment in America, even as it became increasingly clear that industrial corporate consolidations were not the result of state-granted special privileges.

The antecedents of antitrust regulation lie in the common law doctrine of “restraint of trade,” which was itself an aspect of the common law of contracts. This doctrine focused primarily on coercion—actions or agreements that affected the freedom of certain parties to act—and as such, was generally concerned with covenants, such as indefinite non-compete clauses, and price-fixing agreements.[7] Around the turn of the century, there was a significant rise in private litigation aimed at leveraging the common law on restraint of trade to challenge anticompetitive behavior.[8]

State corporate law complemented common law competition policy and provided regulatory content governing corporate behavior, such as a corporation's size and scope as well as its rules of internal governance.[9] Even as ever-more states passed general incorporation laws, which replaced special charter legislation, corporation law remained a powerful tool to regulate corporate behavior, such as prohibiting mergers through trusts or combinations. Between 1889 and 1895, five states successfully leveraged corporate law to prosecute well-known industrial trusts.[10] State attorneys general brought *quo warranto* suits (literally meaning "by what authority"), arguing that activities like owning shares of other corporations constituted an *ultra vires* ("beyond the power or legal authority") violations of state corporate charters and were therefore illegal and void.[11] *Quo warranto* was a blunt instrument; a successful suit revoked the corporate charter and dissolved the corporation. Additionally, when jurists applied this area of corporate law, they did not consider the economic effects of such business arrangements or the economic impact of their judgments. Thus *quo warranto* had limited utility because state officials feared impairing employment opportunities, production possibilities, or state tax revenues.

Additionally, in 1889 New Jersey exacerbated these shortcomings of state corporate law and *quo warranto* policing by passing a liberal incorporation law that allowed corporations domiciled in its borders to own stock of foreign (i.e., out-of-state) corporations, *contra* the position in all other states.[12] This law created a safe haven for holding companies and diminished other states' regulatory authority because corporations are governed by the state in which they are domiciled. As a result, the trust largely fell out of favor as a device for interstate mergers and acquisitions. Nevertheless, even as large-scale corporations moved their headquarters to New Jersey, many of these companies did not relocate their production, distribution, or marketing facilities to that state, and thus those aspects of their businesses remained subject to the laws of the state in which they operated.[13] Although federal officials believed that state responses to anticompetitive activity were adequate to limit the power of the trusts, it gradually became clear that state efforts were insufficient.[14]

In response, Congress employed its constitutional power to regulate interstate commerce by enacting the Sherman Antitrust Act.[15] Section 1 of the Sherman Act prohibited “every contract, combination or conspiracy” that restrained interstate or foreign commerce; section 2 banned individual firms from monopolizing or attempting to monopolize markets. Under the act, the Department of Justice (DOJ) could prosecute firms and seek criminal penalties and treble damages awards. Significantly, private litigants could also bring civil suit under the law, recoup treble damage awards, and shape legal precedent. This “fee-shifting” incentivized the use of private litigation to police competitive practices.

Dissatisfied with the states’ ability to effectively and predictably regulate corporations engaged in monopolistic business practices, national political parties seized the opportunity to draft antitrust legislation. Both Republicans and Democrats vowed to ensure competitive markets across state lines, but the final bill simply codified common law prohibitions without clarifying how the courts should apply the law. As a result, the problem of congressional intent—and thus the scope and precise nature of the Sherman Act—has been a perennial issue. One question that cropped up in the decade after its passage was to what extent the Sherman Act simply restated common law restraint of trade principles and to what extent it targeted activity beyond the traditional doctrine.

The problem of congressional intent has attracted widespread academic commentary. Writing in the 1960s, legal scholar Robert H. Bork argued that Congress intended the Sherman Act primarily to protect consumer welfare, not the interests of small competitors, because the act’s overarching aim was to increase economic efficiency.[16] Critics of this view, notably Robert Lande, have maintained that Bork misrepresented Congress’s legislative intent in order to favor his ideological preference for judicial restraint and to elevate economic efficiency as the sole objective of antitrust. These critics argue that the Sherman Act was enacted to prevent wealth transfers from consumers to cartels and combinations and that the protection of independent or proprietary firms was an ancillary goal in pursuit of a larger, distributive aim.[17] Because significant evidence shows that Congress was concerned with preventing injuries to competitors as a means to maintain a competitive marketplace, legal scholar Herbert Hovenkamp and others have concluded that the economic concerns leading to the Sherman Act had a competitor-protection focus in addition to a consumer-protection focus.[18]

Initially, the US Supreme Court relied on older nineteenth-century precedent to enforce the law, limiting its utility as a trust-busting device. In the infamous *E. C. Knight* case of 1895, the Court refused to apply the law against the "sugar trust," a holding company that controlled more than 90 percent of the nation's sugar refining capacity.[19] The Court held that the Sherman Act concerned interstate commerce and not manufacturing, which was instead a legal issue for state corporation law. Thus E. C. Knight did not violate the Sherman Act through its "mere existence"; prosecutors must provide evidence of a specific action in restraint of trade. Similarly, without further guidance from Congress, the Court applied a *literalist interpretation* of the law to *horizontal agreements* (i.e., agreements among competitors in the same industry), striking down any such contract that fixed prices.[20] In 1897 the Court held that an agreement by eighteen railways to fix rates for the transport of goods constituted an illegal restraint of trade. The Court refused to hear arguments that horizontal price fixing could be "reasonable" if its intent was to avoid price wars or "destructive competition." While the Court had aimed to protect "small dealers and worthy men," in reality its strict interpretation of the Sherman Act incentivized *vertical integration* (i.e., a corporation's use of mergers or acquisitions to expand its control over its supply chain) and further economic concentration. For example, integrating backwards in the supply chain, a manufacturer might purchase raw materials production facilities, and integrating forward, it might open marketing or sales offices. Firms could avoid antitrust prosecution by vertically integrating under the same corporation, whereas contracts among independent firms raised suspicion from federal authorities.[21] As a result, more than 1,800 firms consolidated into larger, more efficient corporations in the "great merger movement" (1895–1904).[22] Additionally, the Court applied the act against labor unions, quashing strikes and boycotts.[23]

The Court's interpretation of the Sherman Act made it a good tool for targeting multi-state cartels but less useful for combatting monopolization. Nevertheless, as *quo warranto* cases failed to materialize and as the great merger movement stoked public discontent, President Theodore Roosevelt initiated several antitrust suits against well-known titans of industry, earning him the moniker of "trust-buster." Perhaps most significantly, Roosevelt initiated the prosecution of the Northern Securities Company, a New Jersey holding company that controlled multiple railroad lines, for creating a combination that violated the Sherman Act's section 1 prohibition on restraints of trade and section 2 restriction on monopolization or intent to monopolize. Holding that the merger unlawfully created a monopoly, the Supreme Court dissolved the company, requiring the railroad lines to be managed independently.[24] Justice Oliver Wendell Holmes Jr. wrote a strong dissent, arguing that because the Sherman Act dealt only with restraint of trade, it did not apply to a merger, which involved the creation of a new company and was thus the domain of state law.[25] This decision likely dampened some of the merger enthusiasm of the previous decade.

Progressive Era Reforms: Adopting the Rule of Reason and Building an Administrative State (1904–1929)

The indeterminacy of the first two decades of the Sherman Act led the Court to alter its strict, literalist interpretation of the act in favor of the more flexible *rule of reason*, which allowed it to weigh the competitive effects of particular business practices. Yet antitrust reform remained on the political agenda because of widespread public condemnation of industrial concentration and the Court's use of injunctions against organized laborers and independent proprietors. The Progressive Era ethos of institution building and expert-led governance encouraged the construction of public administrative agencies to reform and govern antitrust policies. That ethos also resulted in the establishment of private business associations whose purpose was to lobby and litigate to change the law in their favor. As a result, the long Progressive Era produced political reforms that altered administrative law and encouraged some experimentation in government-business attempts to manage competitive markets.

In the early years of the twentieth century, the courts adapted the common law rule of reason to antitrust cases. The first hint of this analysis appeared in *United States v. Addyston Pipe* & *Steel Co.* (1898), when the Sixth Circuit Court of Appeals argued that some restraints of trade could be permitted if they were reasonable—meaning that they were ancillary to the contract and their main purpose was not to restrain trade.[26] The *Addyston* case concerned an association of six Tennessee pipe manufacturers who had agreed not to bid against one another on certain projects to ensure that one designated pipe manufacturer would win the contract. The court held their agreement to be collusion that violated the Sherman Act. Although the Supreme Court affirmed the lower court's decision,[27] it did not explicitly endorse a rule of reason analysis until its decision in *Standard Oil Co. of N.J. v. United States* (1911).[28] There the Court ruled that Standard Oil restrained trade through its preferential contracts with railroads, its control of distribution pipelines, and its price-cutting tactics against independent refineries. Those restraints, however, violated the Sherman Act only if they "unreasonably" restrained trade. To determine whether the restraints violated the act, the Court weighed the likely competitive impacts of the agreement in question. The Court broke the holding company into thirty-four parts, yet many commentators at the time believed that this test of reasonableness applied the law too narrowly and thereby favored large-scale firms. On the same day, the Court again affirmed the rule of reason analysis in a case ordering the dissolution of American Tobacco into four competing firms.[29]

Despite the Court's adoption of the rule of reason, it continued to strictly prohibit certain business agreements, such as horizontal contracts among competitors to divide territory or set prices, as well as vertical contracts between a manufacturer and distributor to set prices. For instance, in *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (1911), decided only a short time before *Standard Oil*, the Court held that price fixing was a per se violation of the Sherman Act.[30] The problem with this decision is that it conflated the competitive effects of vertical and horizontal restraints of trade. The price-fixing arrangement in *Dr. Miles* involved a vertical contract between producer and retailer that set price schedules, among other sales priorities. However, the Court treated the arrangement as if it were a horizontal agreement that incentivized a cartel-like agreement among retailers and thus required a per-se prohibition.[31] The legacy of the *Dr. Miles* case hobbled on for nearly a century, until the Supreme Court formally overruled it in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (2007), holding that vertical price restraints were to be judged according to a rule of reason analysis.[32] In other words, the Court decided that some pro-competitive effects of these agreements, such as protecting specialty producers and independent retailers, warranted consideration by the Court.[33]

Although the Supreme Court took a firm stance in *Dr. Miles* on explicit price-fixing agreements, significant uncertainty still remained in 1911 about how the Court would interpret more ambiguous agreements that could affect downstream pricing and how political reformers might amend the law. The US Chamber of Commerce (USCC), in partnership with the Department of Commerce, was established in 1912, in part, to try to bring greater stability to the business community in the wake of antitrust rulings that created uncertainty about US competition policy, as well as to facilitate information sharing among companies and government agencies. Chamber documents and litigation records reveal a push by private parties toward a more permissive rule of reason analysis, an effort that led the chamber to endorse the creation and expansion of government agencies to regulate competition policy.[34] By bringing together various associations, agencies, and businesses, the USCC helped facilitate a wave of information exchange and standardization across various markets. In turn, these efforts helped establish a technocratic approach to managing competitive markets.

The presidential election of 1912 was a watershed moment for antitrust policy. In a four-way race between Woodrow Wilson, William Howard Taft, Theodore Roosevelt, and Eugene Debs, each candidate promised a different form of antitrust policy for America.[35] Ultimately, Woodrow Wilson won the election, to some extent as the result of his promise to "regulate competition" by prosecuting monopolies versus Roosevelt's promise to "regulate monopoly" by bringing them under administrative supervision. Wilson's campaign rhetoric and policy prescriptions borrowed from Louis D. Brandeis, a campaign advisor, who advocated dismantling monopolies to protect independent proprietors and maintain decentralized economic power. Brandeis, a Boston lawyer and activist, publicly decried the "curse of bigness" and testified before Congress on the perils of corporate consolidations, which he said would create undue economic power. That power could later be used to raise prices and collect supracompetitive profits, giving corporations undue political influence and creating a corrupting influence within a liberal democracy.[36] While Wilson tempered Brandeis's language in his presidential campaign, Brandeis emerged as the historical figure most closely identified with the progressive politics of antitrust activism. His political writings, Congressional testimonies, and opinions as a Supreme Court Justice remain influential today.

The Wilson administration passed two important amendments to the Sherman Act in 1914—the Federal Trade Commission Act, which created the Federal Trade Commission (FTC), and the Clayton Antitrust Act[37]—both widely seen as a compromise between the orthodox prohibitive model that Wilson had argued for in his campaign and the growing push toward an administrative and technocratic model of antitrust law.[38] Nonetheless, Wilson's victory in the antitrust domain was short lived, with the reintroduction of tariffs in the 1920s and the onset of the Great Depression derailing antitrust enforcement. In fact, some scholars have concluded that over the long term, it was Theodore Roosevelt's vision for regulating monopolies, or enforcing oligopoly market divisions, rather than Wilson's vision for regulating competition, that eventually came to dominate antitrust thinking in the United States.[39]

During the 1920s the Supreme Court's adoption of the rule of reason analysis allowed greater flexibility for business associations to manage competitive markets through industry-based rules. For example, in *Chicago Board of Trade v. United States* (1918), the Department of Justice (DOJ) argued that the Chicago Board of Trade's "call rule," which froze the price of grains at the time of the exchange's closing until the next trading day, constituted price fixing and thus violated the Sherman Act.[40] Writing for the Court, Justice Brandeis took a flexible approach, analyzing the nature and scope of the rule plus its effect on the market, and concluded that by regulating a public market for grain, the rule promoted competition and was therefore lawful. In *United States v. Colgate & Co*. (1919), the Court narrowed the scope of the *Dr. Miles* rule.[41] Rather than applying a per se prohibition of price management through the distribution chain, the Court adopted a rule of reason analysis, allowing a company the freedom to choose the parties with whom it does business—and the right to refuse to deal with retailers and wholesalers who failed to adhere to the prices it had set for its products. Moreover, in *United States v. United States Steel Corp.* (1920), the Court rejected the government's argument that the mere size of U.S. Steel, which controlled half the steel and iron market, was sufficient to unduly restrict competition.[42] The law could impose a sanction only if a company engaged in overt acts that demonstrated an anticompetitive intent or effect. These rulings, especially when coupled with wartime experiments in nationalized railroads and coordinated markets under the War Industries Board, represented the culmination of a progressive ethos that embraced both public and private regulation of competitive markets.[43]

The institutional reorganization of public agencies and private associations that occurred during these two decades facilitated new proposals for business information sharing that depended on the Court's belief that certain types of collaborative efforts to manage competitive markets could yield pro-competitive effects.[44] The Court explicitly expressed this view in *Maple Flooring Mfrs. Ass'n v. United States* (1925), when it held that sharing information on average costs of production, freight rates, and other trade statistics did not necessarily constitute restraint of trade "as long as such information sharing did not result in explicit price-fixing agreements."[45] This ruling overturned the Court's decisions in *Eastern States Retail Lumber Dealers' Ass'n v. United States* (1914) and *American Column & Lumber Co. v. United States* (1921), which had both held that information sharing among competitors was anticompetitive.[46] Nonetheless, despite its growing flexibility, the Court still maintained that price fixing was per se illegal, reaffirming that view in *United States v. Trenton Potteries* (1927), when it held that explicit price-fixing arrangements violated the Sherman Act regardless of the reasonableness of the fixed prices.[47]

The confluence of these rulings, in conjunction with the partnerships between federal agencies and trade associations, has led some legal scholars to mark the 1920s as the nadir of antitrust enforcement.[48] If we define antitrust enforcement as the prosecution of large-scale firms, then this conclusion might hold true. It can also be argued, however, that this era was characterized by its liberal experimentation in business-government relationships, interfirm information sharing practices, and robust private antitrust litigation.[49]

The New Deal State: From an Antitrust Hiatus to State Intervention (1933–1960s)

The onset and deepening of the Great Depression in 1929 turned public opinion against the competitive model of economic organization50 and fueled a demand for new political leadership to address rising unemployment, widespread business closures, and continued economic uncertainty. Although President Herbert Hoover had attempted to stem the crisis by extending federal programs like the Reconstruction Finance Corporation (RFC), which provided loans to businesses and banks, his efforts failed to curb downward pressures on prices and employment and also failed to reassure consumers and businesses.[51] As consumption and investments plummeted and unemployment rose, many citizens began to demand that the federal government take more effective action to coordinate markets. Franklin D. Roosevelt's landslide victory in 1932 cemented his mandate to enact policies that would reflate prices, curb unemployment, and restore market confidence. While the most extreme version of New Deal coordinated market capitalism proved short lived, the enhanced regulatory authority and capacity of the federal government defined a longer era.

The first iteration of New Deal policies—often referred to as the First New Deal—abandoned antitrust prosecutions in favor of cartel-led price-reflation efforts through the National Industrial Recovery Act (NIRA) of 1933.[52] The NIRA gave Roosevelt "unprecedented peacetime powers to reorganize and regulate an obviously ailing and defective business system" through such measures as new business taxes to fund public works projects, codes of fair competition that exempted businesses from antitrust regulation, and protections for collective bargaining rights for unions.[53] The NIRA established the National Recovery Administration (NRA), an agency tasked with approving codes of fair competition submitted by industry trade groups. Almost immediately, the NRA became a lightning rod of controversy for approving overlapping and contradictory codes and for raising consumer prices without ensuring higher wages.[54] The Supreme Court struck down the NIRA, however, in *A. L. A. Schechter Poultry Corp. v. United States* (1935) on two grounds: as an unconstitutional delegation of congressional authority and as an overreach of interstate commerce powers.[55] According to Roosevelt, the decision relegated federal powers to the "horse-and-buggy definition of interstate commerce."[56] In response, he proposed a "court-packing plan" that would add a new Supreme Court justice for each of the six sitting justices over the age of seventy and would provide a generous pension for any justice who chose to retire. Although Roosevelt's plan failed, many commentators believe that the president's political pressure caused the Court's swing voter, Justice Owen Roberts, to decide in favor of approving a Washington State minimum wage law.[57] Other historians have questioned the timing of that political pressure and point instead to internal doctrinal changes to explain the Court's gradual approval of greater state police powers over prices and wages.[58] Regardless, by 1941 five justices had retired, allowing Roosevelt to appoint new justices. These appointments all but ensured a new constitutional interpretation that reoriented the Court toward upholding democratic legislative processes and away from judicial interventions against majoritarian protective legislation.

What emerged from the constitutional crisis over the First New Deal experiment in coordinated market capitalism was an affirmation of the power of states either to set prices for goods and services deemed to be necessities or to allow administrative boards to set those prices. Carving out exemptions to antitrust laws, the Supreme Court affirmed the police powers of states to intervene in private markets to protect the public interest. In *Nebbia v. New York* (1934), the Court affirmed New York State's power to regulate the prices of milk and other necessary items for dairy farmers, dealers and retailers.[59] The Court went further in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.* (1936), affirming the states' police powers to create fair trade laws that allowed price fixing even for non-necessities.[60] This decision was reinforced by the Miller-Tydings Act of 1937, which legalized interstate fair trade contracts when they were made between fair trade states.[61] Roosevelt reaffirmed his political promises to small-business owners by signing the Robinson-Patman Act of 1936, which outlawed price discrimination and predatory pricing by producers favoring national retail chains; however, the act has seldom been enforced.[62] In addition to this wave of decisions affirming state laws regulating prices and exempting certain businesses from state-level antitrust rules, the Court loosened its restrictions on similar federal regulatory powers a few years later in *Wickard v. Filburn* (1942).[63] There the Court decided that the Constitution allows the federal government to regulate economic activity even if that activity is only indirectly related to interstate commerce.[64] This ruling implicitly created a federal police power that could then be exercised to regulate prices.[65]

In the second phase of New Deal policies—often referred to as the Second New Deal—Roosevelt revived antitrust law with the appointment of Thurman W. Arnold to the Department of Justice Antitrust Division in 1938. Arnold's first step was to increase his division's budget and legal staff, which both grew by more than 500 percent in just two years.[66] Not only was he able to dramatically expand the number and range of the DOJ's prosecutions, investigations, and complaints, but under his leadership the department was successful in almost every case it brought to trial.[67] Arnold led the administration's efforts to reverse earlier New Deal policies that had frozen antitrust prosecutions in favor of administrative governance of economic activity. The first big case that marked a departure from the rule of reason analysis of the previous two decades was *United States v. Socony-Vacuum Oil Co.* (1940), in which the Supreme Court affirmed that all price-fixing agreements were per se illegal—and that protecting against ruinous competition was not a good defense.[68]

Arnold brought one of the most important cases during this period against the Aluminum Co. of America (Alcoa).[69] The original case began in 1937 with a complaint that Alcoa had attained a monopoly position in the manufacture of virgin aluminum ingot within the United States, and it was heard before the Second Circuit Court of Appeals because the Supreme Court could not reach a quorum.[70] Alcoa argued that if it was a monopoly, it had become one through legitimate rather than coercive means—and indeed had actually helped competitors instead of discouraging them. It further argued that competition did in fact exist in the form of imported virgin ingot and through a secondary market of recycled scrap aluminum.[71] Judge Learned Hand concluded, however, that the relevant market should be construed narrowly to comprise only the manufacture of virgin ingot, thereby assigning Alcoa market control of around 90 percent.[72] He also held that the arrangement should be judged using a per se prohibition against monopoly rather than a rule of reason analysis.[73] Although Alcoa was found to have violated the Sherman Act, the company was never broken up. Judge Hand remanded the case to the lower court to determine the remedy, but the onset of World War II paused the proceedings. By the end of the war, new competitors had entered the aluminum market, thus ending Alcoa's monopoly—and the need to break up the company. Nonetheless, the case was crucial insofar as it reduced the burden of proof on the government to establish liability for monopolization or attempted monopolization under the Sherman Act.[74] In addition, the *Alcoa* case made it clear that, in a marked departure from the previous era, the courts were much more willing to render decisions against a dominant firm simply because of its market power rather than any proven coercive acts.[75] Finally, the case is credited with establishing antitrust law's extraterritorial application, extending antitrust liability to non-nationals if an "effect" on American commerce could be demonstrated.[76]

Arnold's efforts at the Justice Department have been critiqued by both the left and the right.[77] The former has lamented that he did not do more to revive the public spirit of antimonopoly sentiment in America and instead helped insulate antitrust prosecutions from public debate. The latter—generally more favorable to market-oriented solutions rather than to state-led interventions—has lambasted Arnold as someone who stymied economic development by ushering in an era that unnecessarily restricted the market share of firms that had grown through their own skill or talent. As with any historical debate, there may be truth to both critiques, though which side one takes may ultimately reflect an ex post facto preference. Nevertheless, Arnold undoubtedly restructured, professionalized, and expanded the DOJ Antitrust Division, allowing the department to successfully prosecute large-scale corporations at a time when the market capitalization of the biggest firms was still growing and when these firms were increasingly represented by lawyers who specialized in antitrust law and policy, corporate law, and economics. However, this professionalization and concomitant legal specialization may have rendered antitrust the domain of ever-fewer interlocutors, limiting popular participation.

The institutional and legal precedents begun under Arnold's tenure at Justice extended through the 1960s, contributing to what some historians have termed the New Deal order and constituting the peak period of antitrust enforcement.[78] This era took place against the backdrop of a new economics movement known as industrial organization, led by Harvard economics professor Edward S. Mason and his doctoral student Joseph Bain, whose relatively interventionist approach to antitrust policy emphasized how courts might construct rules to protect against anticompetitive conduct, such as creating barriers to entry. Bain developed the Structure-Conduct-Performance analytical framework, which argued that dominant firms manipulated these barriers to protect their incumbent market position, thereby creating oligopolies and allowing supracompetitive pricing. Joint ventures, for example, might alter the boundaries of a firm and prevent new competitors from entering the market. At the same time, restraints on the number of competitors might raise consumer prices, encouraging the judiciary to implement a tight market power screen when evaluating potential mergers and acquisitions.[79] Broadly, this approach became known as the Harvard school.

Within the deluge of cases brought in the late 1940s, the government suffered a prominent defeat in its case against Columbia Steel, in which the Supreme Court held that asset acquisition and vertical integration were exempt from the reach of the Clayton Act.[80] As a direct response to this decision, Congress passed the Celler-Kefauver Act, which further expanded the regulatory reach of the government by amending the language of the Clayton Act to cover essentially any merger or acquisition, even if it fell short of creating dominance.[81] The first significant case decided under this new language was *Brown Shoe Co. v. United States* (1962), in which the Court invalidated a merger between two shoe producers because it would have created a market share of 5 percent that might have tended to "lessen competition substantially in the retail sale of men's, women's and children's shoes in the overwhelming majority" of the relevant markets.[82] In reaching this conclusion, the Court noted that it had taken into account "the trend toward vertical integration in the shoe industry" that if left unchecked would reduce competition among smaller firms.[83] Two points emerged from the decision: First, the Court interpreted the rationale for the Cellar-Kefauver Act to be preserving small businesses and encouraging competition. Second, the area of effective competition was judged by reference to both a product market and a geographic market. The Court expanded on this argument in *United States v. Continental Can Co.* (1964), holding that interindustry competition also fell within the ambit of the Clayton Act.[84]

One of the best-known mergers and acquisitions cases of this era denied a merger between two of the three largest banks in Philadelphia at the time, even though their overall market share was low and competing banks and economists alike welcomed the merger because it would allow the newly formed bank to compete with other, larger banks, particularly those in

New York.[85] In essence, *Philadelphia National Bank* (1963) created a parallel to the per se rule in the form of a rebuttable presumption that a merger between large companies was deemed unlawful unless there was clear evidence that it would not have anticompetitive effects. In *United States v. Von's Grocery Co.* (1966), the Court invalidated a merger between grocery firms that would have led to a meager 7.5 percent market share—a decision that underscored just how high the justices had set the bar for companies to prove that a merger would not lead to anticompetitive effects.[86] The outcry following these decisions paved the way for the DOJ and the FTC to jointly issue their Horizontal Merger Guidelines (1968), which gave clear guidance on the maximum percentages of market share considered acceptable when evaluating potential mergers.[87] Notably, these figures indicate that the *Von's Grocery* merger would likely have been allowable under these guidelines. Yet in *Fortner Enterprises, Inc. v. United States Steel Corp.* (1969), the Supreme Court seemed to reduce the threshold for gauging market power. The case concerned the legality of a tying agreement, an arrangement in which a seller ties the sale of one product (the tying product) to the purchase of another product (the tied product). Here the Court held that a standard of "sufficient economic power," rather than of market dominance or monopolistic power, could render a tying agreement unlawful—and ruled that U.S. Steel had illegally tied its offer of lower-rate loans (the tying product) to the purchase of prefabricated steel houses (the tied product). Even if the company did not have market dominance, the uniqueness and desirability of its tying product gave the firm sufficient economic power to induce its customers to buy its less desirable tied product.[88]

During this era, the Court reversed course from its previously permissive interpretation of so-called fair trade contracts in the 1930s. In *United States v. Parke, Davis & Co.* (1960), the Court reaffirmed the *Dr. Miles* ruling (1911) that resale price maintenance (RPM) contracts were per se illegal, and it also narrowed the *Colgate* doctrine (1919) to hold that a manufacturer could not induce wholesalers or retailers to accept suggested pricing policies.[89] *Parke, Davis* was a particularly important case because it had the potential to lower retail drug prices. The pharmaceutical industry had been the main proponent of RPM contracts through the 1930s, but its pro-competitive arguments about protecting retailer networks of independent pharmacists now seemed increasingly antiquated and had lost public support. In *United States v. Container Corp. of America* (1969), the Court narrowed its earlier *Maple Flooring* decision to hold that in an oligopolistic market, the exchange of pricing information proved sufficient to find a restraint of trade violation.[90]

By the end of the 1960s, the Court continued to approach the market power of firms with caution and seemed to be rolling back some of its more permissive rulings from the earlier New Deal era, such as those intended to protect competitors by enabling cooperative or collusive agreements on price restrictions or price information. Yet while the Court remained wary of facilitating market power, which could be leveraged for anticompetitive purposes, it increasingly accepted market competition rather than regulatory policies as the best mechanism to ensure dynamic markets and consumer-oriented outcomes.

The Chicago School Revolution and Reform (1970s–1990s)

By the 1960s, criticism of active antitrust enforcement had begun to mount. This critique, which argued for minimal government intervention into economic activities, found a home at the University of Chicago. What would become known as the Chicago school of antitrust policy held that markets were more robust and self-correcting than existing antitrust policy allowed—and moreover, that government interventions often exacerbated market inefficiencies rather than making them more competitive. Thus antitrust policy should prohibit naked price fixing or market division, but otherwise it should allow markets to function independently.

The best-known libertarian scholars working on competition policy, such as Robert Bork, Richard Posner, and Frank Easterbrook, taught there. They were the beneficiaries of two influential law professors who spearheaded the fundraising and faculty recruiting that created the Chicago school of law and economics. Aaron Director, an economist who also happened to be Friedman's brother-in-law,[91] and Edward H. Levi, who served as dean of the law school and later US attorney general under President Gerald R. Ford, founded the field of law and economic.[92] They supported the work of economist Milton Friedman, who helped launch a critique of state planning and price regulation that has inspired generations of legal and political reformers. In *Capitalism and Freedom* (1962), Friedman argued that political freedom and economic freedom were inextricably linked.[93] In 1963 he and Anna Jacobson Schwartz expanded on his critique of state planning, arguing that the Federal Reserve's expansionary monetary policies during the 1920s had caused the Great Depression, criticizing the New Deal for its distortionary economic regulation, and advocating instead for a laissez-faire US economic policy.[94] The following year, another prominent Chicago economist, George Stigler, provided a more specific antitrust analysis, arguing that in the absence of collusion, market competition ensured that no single firm would be able to exercise market dominance for very long especially if it attempted to raise prices to a supracompetitive level.[95] Together, these economists provided efficiency explanations for the industrial concentration and contract agreements that the Court then considered violations of antitrust law.

These easily accessible ideas proved influential on Supreme Court opinions during the mid-1970s, in part because President Richard M. Nixon's appointments altered the composition of the Court, replacing New Deal era appointees with those more favorable to narrow applications of antitrust law that privileged market outcomes over regulatory interventions.[96] Additionally, widespread criticism of the Court's antitrust rulings exacerbated sentiment in the business community that US firms were becoming less competitive in international markets.[97]

The Court's per se rule against vertical restraints of trade underwent notable revision as contemporary economists emphasized the pro-competitive effects, such as enhanced customer service or improved brand quality, of some vertical agreements. This economic analysis built on Ronald Coase's theory of the firm, which argued that efficient firms contracted out certain business activities rather than handling them internally if those activities could be conducted more efficiently by other firms that had comparatively lower transaction costs.[98] In the pivotal case of *Continental T.V., Inc. v. GTE Sylvania, Inc.* (1977), the Court upheld a franchise agreement that restricted the sales territory for Sylvania TV sets. The Court ruled that some vertical nonprice agreements could have economic utility, and thus the per se rule should not apply.[99] Writing for the majority, Justice Lewis F. Powell Jr., explained that nonprice vertical restraints could stimulate interbrand competition and ensure retail services—and moreover, did not necessarily facilitate cartelization. Over time, the Court applied similar economic logic to vertical restraints imposing RPM contracts that explicitly stated retail price policies. Initially, overt RPM contracts remained illegal per se, but the Court narrowed the prohibition by raising the evidentiary standards for prosecution.[100] In 2007 the Court directly applied the rule of reason test to a specialty manufacturer's RPM contract with its retailers and enforced the contract, overturning the *Dr. Miles* precedent.[101]

The Court also began to take a more permissive view of dominant firm conduct, with a few important exceptions—most notably, the breakup of AT&T. Dominant firms, usually as defendants against DOJ or FTC prosecutors, gained greater leeway in their pricing policies as the Court raised the evidentiary standard to prove a conspiracy to restrain trade or monopolize under sections 1 and 2 of the Sherman Act.[102] For example, in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.* (1986), the American firm Zenith accused a consortium of twenty-one Japanese-owned consumer electronics manufacturers of conspiring to lower prices on televisions exported to the US market so that they could drive out American competitors. The Court reasoned that this explanation of predatory pricing was "implausible" because such a scheme appeared difficult to execute and maintain and because the alleged conspiracy did not appear to have been successful over the two decades in question.[103]

Two noteworthy exceptions to this trend away from the strict enforcement of antimonopolization rules occurred during this period. The most significant exception was that in 1982 the Department of Justice issued an agreed-upon consent decree that broke apart AT&T, separating the so-called Bell system into three parts: local service providers; long-distance service providers; and its equipment supplier, Western Electric.[104] The original suit had been initiated in 1974, and fearing a loss at trial, AT&T proposed the divestiture plan. In 1984 the numerous parts of the Bell system merged into eight regional holding companies.[105] The other notable exception was that the Court continued to enforce certain obligations on dominant firms that controlled facilities essential to their rivals' ability to do business. The *essential facilities doctrine* states that a dominant firm has a duty to give rival firms access to any resources over which it possesses a natural monopoly.[106] For example, in 1973 the Court ruled that Otter Tail Power Company must sell power to up-start municipal power companies because it controlled local transmission lines.[107] In a similar case in 1985, the Court ruled that a dominant ski company in Aspen, Colorado, could not terminate a joint-venture contract with a rival ski company absent a legitimate business purpose.[108] While lower courts have articulated a test to show liability under this doctrine, the Supreme Court has been less definitive.[109]

The Court also relaxed its previously stringent screening of corporate mergers. In 1974 the Court rejected a DOJ case brought under the Celler-Kefauver Act against General Dynamics Corporation's acquisition of United Electric.[110] The Justice Department argued that the conglomerate's control of one-fifth of US coal production violated section 2 of the Sherman Act.

The Court found no violation, however, and allowed the merger, holding that it had no foreseeable effect on competition because most of the nation's coal reserves were tied up in long-term contracts. Moreover, industry concentration could be attributable to new competition from alternative sources of energy rather than to monopoly control. In 1976 Congress passed the Hart-Scott-Rodino Antitrust Improvements Act, which mandated the prescreening of proposed mergers and acquisitions for potential antitrust violations, a process that slowed down the completion of major deals.[111]

Employing the Court's new economic logic, federal court judges adopted more permissive rules toward mergers and acquisitions. In *United States v. Waste Management, Inc.* (1984), the Second Circuit Court of Appeals reasoned that the ease of entry for potential competitors reduced the likelihood that mergers would create a monopoly; thus the courts began allowing mergers to capture greater market share than they had previously sanctioned.[112] In 1990 the DC Circuit Court of Appeals lightened the defendant's burden of proof to disprove the anticompetitive effects of a merger. In *United States v. Baker Hughes Inc.* (1990), the Department of Justice argued that Baker Hughes's purchase of an American machine tool company would lessen competition, a violation of section 7 of the Sherman Act. The court of appeals found that because the industry was so small, it was necessarily concentrated, and thus the merger would have little effect on competition. Moreover, the defendant need respond only to the plaintiff's specific evidentiary claims, which in this case emphasized market share and not other anticompetitive effects.[113] The revised 1982 *Merger Guidelines* also reflected this trend away from the Court's 1960s era of stringent merger enforcement.[114] The Court's adoption of Chicago law and economics analysis facilitated more permissive rulings in antitrust—yet this new economic logic was not without its detractors, then or now.

Post-Chicago and the New Progressive Movement (1990s to the present)

Since the 1990s the Court has acknowledged some of the limitations of Chicago-style antitrust policy, which has trusted markets over government interventions. This newer analysis—often referred to as post-Chicago—has relied on behavioralism, game theory, and economic modeling to uncover market imperfections that previous models ignored. In turn, it urges the Court to more closely evaluate dominant firm conduct, mergers and acquisitions, and vertical restraints for anticompetitive market effects. However, these labels should be used with care. Post-Chicago economics draws upon the theoretical and empirical work of Chicago economics, and the two schools should not be thought of as entirely separate.[115] Some legal scholars, however, argue that contemporary antitrust doctrine reflects a balance between the seemingly ascendant Chicago school and a "chastised Harvard School" of the late 1970s.[116]

Game theory economic analysis has also encouraged the Supreme Court to weigh the competitive effects of the strategic business decisions made by dominant firms, rather than disregarding claims of monopolization or vertical restraints, as the Court might have done according to Chicago-style analysis. In *Eastman Kodak Co. v. Image Technical Services, Inc.* (1992), the Court employed game theory economic analysis to evaluate whether lower trial courts should weigh the competitive effects of after-market restraints on parts and services agreements.[117] The lower court had issued a summary judgment dismissing the charges against Kodak for exclusionary conduct in aftermarket sales of repair parts, employing an economic analysis similar to the Court's reasoning in *Sylvania* and *Matsushita*. The Supreme Court, however, held that consumers' imperfect information and product lock-in might render a customer dependent on Kodak products and services, as well as explain why Kodak's restraints were monopolizing. Thus the Court ruled that a trial court would have to determine those facts and examine Kodak's explanation of its business decisions. This new economic analysis appeared to widen the scope of antitrust liability for dominant firms and harken back to older structuralist interpretations of economic harms that relied on jury fact finding rather than judge-made summary judgments.[118]

Despite the *Kodak* ruling, the Court has not abandoned Chicago economic analysis more generally in antitrust suits.[119] In fact, the year after the *Kodak* decision, the Court ruled that a plaintiff alleging predatory pricing (i.e., below cost) must prove that the defendant would be able to recover those costs after the plaintiff exited the market.[120] Thus while the Court would now consider allegations of predatory pricing, these charges remained difficult to prove, even as new economic literature demonstrated that predatory pricing could reasonably occur and present anticompetitive effects.[121] Moreover, lower courts have narrowly construed the *Kodak* ruling in cases of alleged lock-in, supracompetitive pricing, or refusal to deal.[122]

The courts' approach to evaluating dominant firm conduct changed little even as new product markets emerged. In *United States v. Microsoft Corp.* (2001), the DC Circuit Court of Appeals held that Microsoft had illegally tied its operating system (Microsoft Windows) to its web browser (Internet Explorer).[123] When Netscape, a rival web browser, threatened Microsoft's monopoly over operating systems by enabling multiple systems to be compatible, Microsoft attempted to keep the new technology from entering the market by entering into exclusive licensing agreements with computer manufacturers. The court, employing existing doctrine, found that Microsoft's business conduct demonstrated an intent to monopolize the industry. Microsoft settled with the Department of Justice, agreeing to share its programming interface with third parties so that they could develop compatible software for browsers. While *Microsoft* was an important case, it has not signaled the return of aggressive antitrust policing and enforcement against dominant firm conduct.

Most recently, a group of progressive, politically active reformers has called for reviving antitrust enforcement against dominant firms, particularly those in the digital economy.[124] With their aspirations to stem market concentration and reinvigorate democratic political participation, this group has been called the New Brandeisians.[125] One of the leading articles by one of these reformers argues for antitrust intervention against Amazon.com Inc., the world's largest e-commerce retailer.[126] The New Brandeisians have focused on internet platforms like Amazon to argue that these businesses employ predatory pricing strategies to capture market share, expand into new industries, and achieve market dominance. Amazon, for example, began in 1994 as an online book retailer, offering steep discounts. In 2005 it introduced Amazon Prime, a membership program that provides free two-day shipping to lock in customers, and in 2007 it introduced the Kindle e-reader, which Amazon sold (along with e-books) below cost. The company also expanded into an array of consumer durables, and it now offers a video streaming service and operates in consumer financing, cloud computing, web hosting services, cinema production, grocery retailing, and marketing. Yet despite years of only small profits and no dividends, Amazon posted record-high profits ($2.5 billion) in the second quarter of 2018, with net sales of $52.9 billion.[127] Critically, the New Brandeisians argue that because dominant digital platforms—including Google, the dominant internet search engine—provide essential facilities (i.e., services) for their business rivals, regulators must scrutinize their competitive practices, viewing them in effect as public utilities.[128] Calling into question the economic logic of the previous generation of antitrust scholars, this nascent movement aims to reinsert the older political logic of antitrust into contemporary regulation. This effort would require expanding antitrust interventions beyond consumer welfare or economic efficiency concerns to consider the goal of *total welfare*.[129]

Conclusion

American antitrust law and policy since the late nineteenth century has responded to technological advances that have transformed business structures, to political imperatives that have reformed regulations and informed prosecutorial discretion, and to economic theories that have reshaped the boundaries of government interventions into the economy. In turn, the judiciary's antitrust rulings have shaped future business decisions, policymaking, and economic studies. Keeping in mind these crosscurrents of cause and effect, this essay has focused largely on how the courts have used economic theories to support doctrinal changes and fashion antitrust regimes. While some economic consensus has persisted over time about certain areas of antitrust—such as the need to rely on market competition to allocate ordinary goods and services—the courts have for the most part responded to shifting political imperatives and economic theories. And because new economic thinking often responds to changes in both economic conditions and political preferences, we might rightly conclude that the antitrust wheel will continue to turn.

Primary Resources

This article has relied almost exclusively on court opinions and secondary literature; however, a wealth of primary sources are available to researchers. Legal cases and supporting case files provide a first look at developing legal opinion. Readers might also consult the Department of Justice files from the Antitrust Division, Federal Trade Commission files at the National Archive, Supreme Court justices' personal papers at the Library of Congress, and company archives, if available and open to the public. Additionally, syllabi and course notes from antitrust and economics courses offer a glimpse into critiques of legal doctrines as they occurred. Similarly, legal treatises and contemporary law review articles and commentary offer insights into the pressures for doctrinal change—internal and external to the Supreme Court.

Further Reading

1. Naomi Lamoreaux, *The Great Merger Movement in American Business, 1895–1904* (New York: Cambridge University Press, 1985).
2. Herbert Hovenkamp, *Enterprise and American Law, 1836–1937* (Cambridge, MA: Harvard University Press, 1991).
3. Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978).
4. Robert Pitofsky, ed. *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (New York: Oxford University Press, 2008).
5. Ariel Ezrachi and Maurice Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Cambridge, MA: Harvard University Press, 2016).

[1] Consolidation took many different forms: vertical integration, horizontal merger or acquisition, combination, and trust. Although there were very few actual trusts, the popular press conflated these new forms of business organization, along with large-scale corporations, into a general category of trusts and contrasted it with competition. On the Standard Oil Trust, see Ida M. Tarbell, *The History of the Standard Oil Company* (New York: Macmillan, 1904); Ron Chernow, *Titan: The Life of John D. Rockefeller, Sr.* (New York: Random House, 1998). On trusts versus other forms of business organization, see Alfred D. Chandler Jr., *The Visible Hand: The Managerial Revolution in American Business* (Cambridge, MA: Harvard University Press, 1977). On the popular press's conflation of various types of business organization into the single category of trusts, see William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (Chicago: University of Chicago Press, 1965); Hans Thorelli, *Federal Antitrust Policy: Origination of an American Tradition* (Baltimore: Johns Hopkins University Press, 1956).

[2] Tony Freyer, "Antitrust Legislation and Law," in *The Oxford Encyclopedia of American Political and Legal History*, ed. Donald T. Critchlow and Philip R. VanderMeer (New York: Oxford University Press, 2012).

[3] Sherman Antitrust Act of 1890, 26 Stat. 209, 15 U.S.C. §§ 1–7.

[4] Richard Hofstadter, "Whatever Happened to the Antitrust Movement?" in *The Paranoid Style in American Politics and Other Essays* (New York: Harper & Row, 1964; New York, Vintage Books, 2008), 188–237; Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (New York: Vintage Books, 1995).

[5] See Laura Phillips Sawyer, American Fair Trade: Proprietary Capitalism, Corporatism, and the "New Competition," 1890–1940 (New York: Cambridge University Press, 2018).

[6] The term *economy of scale* refers to the reduction in the unit cost of production that occurs when the total quantity produced increases. The term *economy of scope* refers to the reduction in the unit cost of production that occurs when two or more goods are produced jointly.

[7] According to common law, a contract could be struck down as an invalid restraint of trade only if it was deemed too broad in its application. See Diamond Match Co. v. Roeber 106 N.Y. 473 (1887), in which

the New York State Court of Appeals ruled that the exclusionary contract prohibiting Roeber from engaging in business anywhere in the United States except Nebraska and Montana was "partial" and thus reasonable.

[8] James May, "Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law: 1880–1918," *University of Pennsylvania Law Review* 135 (March 1987): 503, 495–593.

[9] James Willard Hurst, The Legitimacy of the Business Corporation in the Law of the United States, 1780–1970 (Charlottesville: University Press of Virginia, 1970).

[10] May, "Antitrust Practice and Procedure," 500. People v. Chicago Gas Trust Company, 130 Ill. 268 (1889), dissolving the gas trust as a violation of corporate law; New York v. North River Sugar Refining Company, 121 N.Y. 582 (1890), holding that the creation of the Sugar Trust violated New York State law (General Manufacturing Act of 1848, N.Y. Laws, ch. 40); State v. Standard Oil Co., 30 N.E. 279 (1892), ordering the dissolution of the trust because it created a monopoly; State v. Nebraska Distilling Co., 46 N.W. 155 (1890), ordering the dissolution of the trust as an "illegal combination" with the intent to "destroy competition and create a monopoly"; Distilling & Cattle Feeding Co. v. People, 41 N.E. 188 (1895), dissolving the trust under *quo warranto* proceedings.

[11] Daniel A. Crane, "Antitrust Antifederalism," *California Law Review* 96 (Feb. 2008): 14, 1–62.

[12] Lincoln Steffens, "New Jersey: A Traitor State," *McClure's Magazine*, May 1905, 41–55.

[13] By 1899, ten years after New Jersey created this safe haven, 61 of 121 corporations with a capitalization of more than $10 million were incorporated in that state. See Areeda and Hovenkamp, *Antitrust Law*, ¶102c3.

[14] Charles W. McCurdy, "The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869–1903," *Business History Review* 53 (Autumn 1979): 304–42.

[15] US Constitution, article 1, section 8, clause 3.

[16] Robert H. Bork, "Legislative Intent and the Policy of the Sherman Act," *Journal of Law and Economics* 9 (Oct. 1966): 7–48. Bork drew his interpretation from "conventional indicia of legislative intent," which included Congressional debate, statutory text, structural features of the law, and inference from administrative law. Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978), 71.

[17] Robert H. Lande, "Wealth Transfer as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged," *Hastings Law Journal* 34 (Sept. 1982): 69–70, 65–152.

[18] Areeda and Hovenkamp, *Antitrust Law*, ¶103b; Herbert Hovenkamp, "Antitrust's Protected Classes," *University of Michigan Law Review* 88 (Oct. 1989): 22, 1–48.

[19] *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895). See McCurdy, "Knight Sugar Decision," 304–42.

[20] May, "Antitrust in the Formative Era"; Rudolph J. R. Peritz, Competition Policy in America, 1888–1992 (New York: Oxford University Press, 1996); Martin J. Sklar, The Corporate Reconstruction of American Capitalism, 1890–1916: The Market, the Law, and Politics (New York: Cambridge University Press, 1988).

[21] United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897). See also *Addyston Pipe and Steel Co. v. U.S.*, 175 U.S. 211 (1897).

[22] Naomi Lamoreaux, *The Great Merger Movement in American Business, 1895–1904* (New York: Cambridge University Press, 1985).

[23] United States v. Workingmen's Amalgamated Council of New Orleans (1893), applying the Sherman Act against laborers. Throughout the late nineteenth and early twentieth centuries, courts used labor injunctions to intervene on behalf of employers engaged in labor disputes. See William E. Forbath, "The Shaping of the American Labor Movement," *Harvard Law Review* 102 (April 1989): 1149, 1109–256. See also Daniel Ernst, *Lawyers against Labor: From Individual Rights to Corporate Liberalism* (Urbana: University of Illinois Press, 1995).

[24] Northern Securities Co. v. United States, 193 U.S. 197 (1904).

[25] *Id.* at 401–11.

[26] United States v. Addyston Pipe & Steel Co., 85 F.271 (1898).

[27] Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

[28] Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).

[29] United States v. American Tobacco Co., 221 U.S. 106 (1911).

[30] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

[31] Phillips Sawyer, *American Fair Trade*, 96–106.

[32] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007). The Court had loosened this rule in 1997, allowing manufacturers to set price ceilings. See *State Oil v. Kahn*, 522 U.S. 3 (1997).

[33] For a discussion of the pro-competitive effects of resale price maintenance contracts, see Lester G. Tesler, "Why Should Manufacturers Want Fair Trade?" *Journal of Law and Economics* 3 (October 1960): 86–105; Kenneth G. Elzinga and David E. Mills, "Leegin and Procompetitive Resale Price Maintenance." *Antitrust Bulletin* 55 (2010): 349–80.

[34] Phillips Sawyer, "Trade Associations, State Building, and the Sherman Act: The U.S. Chamber of Commerce, 1912–25," in *Capital Gains: Business and Politics in Twentieth-Century America*, eds. Richard R. John and Kim Phillips-Fein (Philadelphia: University of Pennsylvania Press, 2017), 25–26, 25–42.

[35] Daniel A. Crane, "All I Really Need to Know about Antitrust I Learned in 1912," *Iowa Law Review* 100 (July 2015): 2026–27, 2025–38.

[36] See Louis D. Brandeis, "A Curse of Bigness," *Harper's Weekly*, Dec. 20, 1913, 18–21. The article was later included as one of the essays in Brandeis, *Other People's Money and How the Bankers Use It* (New York: Frederick A. Stokes Co., 1914), 162–88.

[37] Federal Trade Commission Act, 15 U.S.C. § 41 (1914); Clayton Antitrust Act, 15 U.S.C. § 12 (1914).

[38] Sidney M. Milkis, Theodore Roosevelt, the Progressive Party, and the Transformation of American Democracy (Lawrence: University of Kansas Press, 2009).

[39] In *F.T.C. v. Gratz*, 253 U.S. 421 (1920), the Court held that the judiciary, not the FTC, would determine what constituted "unfair trade practices," which section 5 of the Federal Trade Commission Act prohibited.

[40] Chicago Board of Trade v. United States, 246 U.S. 231 (1918).

[41] United States v. Colgate & Co., 250 U.S. 300 (1919).

[42] United States v. United States Steel Corp., 251 U.S. 417 (1920).

[43] Robert D. Cuff, The War Industries Board: Business-Government Relations During World War I (Baltimore: Johns Hopkins Press, 1973). See also Robert F. Himmelberg, The Origins of the National

Recovery Administration: Business, Government, and the Trade Association Issue, 1921–1933, 2nd ed. (New York: Fordham University Press, 1993).

[44] Phillips Sawyer, "Trade Associations, State Building, and the Sherman Act," 28, 25–42.

[45] Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925).

[46] Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921). The *Maple Flooring* decision implicitly affirmed Justice Brandeis's dissent in *American Column*, in which he argued that information sharing had actually encouraged competition because it had leveled the playing field by reducing information gathering costs, especially for smaller competitors. *American Column & Lumber*, 414–19 (Brandeis J., dissenting) (1921).

[47] United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

[48] Martin Sklar, The Corporate Reconstruction of American Capitalism, 1890–1916: The Market, the Law, and Politics (New York: Cambridge University Press, 1988); William Letwin, Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act, rev. ed. (New York: Random House, 1965). See alsoWilliam E. Kovacic, "Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration," Iowa Law Review 74 (July 1989): 1115–16, 1105–50.

[49] Ellis W. Hawley, "Herbert Hoover, the Commerce Secretariat, and the Vision of an 'Associative State,' 1921–1928," *Journal of American History* 61 (June 1974): 139–40, 116–40. See also Himmelberg, *Origins*; Louis Galambos, *Competition and Cooperation: The Emergence of a National Trade Association* (Baltimore: Johns Hopkins Press, 1966); Daniel Crane, *The Institutional Structure of Antitrust Enforcement* (New York: Oxford University Press, 2011); Phillips Sawyer, *American Fair Trade*.

[50] William E. Kovacic and Carl Shapiro, "Antitrust Policy: A Century of Economic and Legal Thinking," *Journal of Economic Perspectives* 14 (Winter 2000): 46–47, 43–60.

[51] David Kennedy, Freedom from Fear: The American People in Depression and War, 1929–1945 (New York: Oxford University Press, 1999); William J. Barber, Designs within Disorder: Franklin D. Roosevelt, the Economists, and the Shaping of American Economic Policy, 1933–1945 (New York: Cambridge University Press, 1996).

[52] Other policies representative of the First New Deal included the "bank holiday," an executive order that closed all banks for four days to assess bank balance sheets; the Emergency Banking Act, which pressured the Federal Reserve into guaranteeing federal deposits; and the Banking Act of 1933, which formally created the Federal Deposit Insurance Corporation (FDIC). These policies reassured depositors, curtailing both bank runs and currency hoarding. Another critical piece of the First New Deal was the Agricultural Adjustment Act of 1933, which intended to raise agricultural prices by limiting output. See Kennedy, *Freedom from Fear*, chap. 5.

[53] Ellis W. Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (Princeton: Princeton University Press, 1966), 19–20, 31–32.

[54] Hawley, New Deal and the Problem of Monopoly, 130.

[55] A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The Court also struck down the Agricultural Adjustment Act in United States v. Butler, 297 U.S. 1 (1936) and a New York state minimum wage law in Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936).

[56] Franklin D. Roosevelt, "The Two Hundred and Ninth Press Conference, May 31, 1935," in *The Public Papers and Addresses of Franklin D. Roosevelt*, vol. 4, *The Court Disapproves*, *1935*, ed. Samuel L. Rosenman (New York: Random House, 1938), 221, 200–26.

[57] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Robert’s vote has been described as the “switch in time to save the nine” and the “constitutional revolution of 1937.” See William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal, 1932–1940* (New York: Harper & Row, 1963), 143–46; Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995), 132–33.

[58] Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998). For an overview of this historiographical debate, see G. Edward White, “Constitutional Change and the New Deal: The Internalist/Externalist Debate,” *The American Historical Review* 110 (Oct. 2005): 1094–115; Laura Kalman, “Law, Politics and the New Deal(s),” *Yale Law Journal* 108 (1998–1999): 2165, 2170–78.

[59] Nebbia v. New York, 291 U.S. 502 (1934).

[60] Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936)

[61] Miller-Tydings Act of 1937, 50 Stat. 693, 15 U.S.C. § 1 (August 17, 1937), amending section 1 of the Sherman Act.

[62] Robinson-Patman Act of 1936 (or Anti-Price Discrimination Act), 49 Stat. 1526, 15 U.S.C. § 13, amending the Clayton Act. See also Roger D. Blair and Christina DePasquale, “‘Antitrust’s Least Glorious Hour’: The Robinson-Patman Act,” *Journal of Law & Economics* 57, no. S3 (Aug. 2014): S201–15, arguing that enforcement of the act would increase consumer prices and therefore be contrary to the currently accepted goals of antitrust policy.

[63] Wickard v. Filburn, 317 U.S. 111 (1942).

[64] *Id.* at 123–29.

[65] See Howard Gillman, The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence (Durham, NC: Duke University Press, 1993).

[66] Alan Brinkley, “The Antimonopoly Ideal and the Liberal State: The Case of Thurman Arnold,” *Journal of American History* 80 (Sept. 1993): 564–65, 557–79.

[67] Ibid., 565.

[68] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[69] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

[70] Kovacic, “Failed Expectations,” 1117. Congress authorized the Circuit Court of Appeals to act as the court of last resort because the Supreme Court lacked a quorum to hear the case. Four justices had disqualified themselves for unstated reasons but presumably because they had previously been involved in prosecuting Alcoa with the Justice Department. See Spencer Weber Walter, *Thurman Arnold: A Biography* (New York: New York University Press, 2005), 94.

[71] *Alcoa*, 148 F.2d at 422–25, 431.

[72] *Id.* at 425.

[73] *Id.* at 431–32.

[74] Kovacic, “Failed Expectations,” 1118.

[75] *Alcoa*, 148 F.2d at 416.

[76] *Id.* at 444. *Alcoa* reversed *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), which had required the alleged antitrust infringement to take place within the United States.

[77] Brinkley, “Antimonopoly Ideal,” 579.

[78] On the long New Deal order, see for example Steve Fraser and Gary Gerstle, eds., *The Rise and Fall of the New Deal Order, 1930–1980* (Princeton, NJ: Princeton University Press, 1989); Jennifer Klein, "A New Deal Restoration: Individuals, Communities, and the Long Struggle for the Collective Good," *International Labor and Working-Class History* 74 (Fall 2008): 42–48. On peak antitrust enforcement, see Herbert Hovenkamp, *Opening of American Law: Neoclassical Legal Thought, 1870–1970* (New York: Oxford University Press, 2014), 206–19.

[79] Joe S. Bain, "Workable Competition in Oligopoly: Theoretical Considerations and Some Empirical Evidence," *American Economic Review* 49 (May 1950): 35–47; Bain, *Industrial Organization* (New York: Wiley, 1959). See also Edward S. Mason, *Barriers to New Competition: Their Character and Consequences in Manufacturing Industries* (Cambridge, MA: Harvard University Press, 1956), 21–4; Hovenkamp, *Opening of American Law*, 202–15; Tony A. Freyer, *Antitrust and Global Capitalism, 1930–2004* (New York: Cambridge University Press, 2006), 8–59.

[80] United States v. Columbia Steel Co., 334 U.S. 495 (1948).

[81] Clayton Act Amendments 1950 (Celler-Kefauver Act), Pub. L. No. 81-899, 64 Stat. 1125 (1950).

[82] Brown Shoe Co. v. United States, 370 U.S. 294, 334 (1962).

[83] *Id.* at 34.

[84] United States v. Continental Can Co., 378 U.S. 441 (1964).

[85] United States v. Philadelphia National Bank, 374 U.S. 321, 334 (1963).

[86] United States v. Von's Grocery Co., 384 U.S. 270 (1966).

[87] *Merger Guidelines* (1968), 4 Trade Reg. Rep. (CCH) § 1, https://www.justice.gov/archives/atr/1968-merger-guidelines.

[88] Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969).

[89] United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

[90] United States v. Container Corp. of America, 393 U.S. 333 (1969).

[91] Director worked at the US Department of Commerce and the War Department during World War II. He became a professor at the University of Chicago law school in 1947 and in 1962 helped found the university's Committee on a Free Society, whose mission was to "clarify and reinforce the tradition of individual liberty in its economic, political, historical, and philosophical dimensions." University of Chicago News Office, "Aaron Director, Founder of the Field of Law and Economics," news release, September 13, 2004, http://www-news.uchicago.edu/releases/04/040913.director.shtml.

[92] See Rob Van Horn and Philip Mirowski, "The Rise of the Chicago School of Economics and the Birth of Neoliberalism," in *The Road from Mont Pelèrin: The Making of the Neoliberal Thought Collective*, ed. Philip Mirowski and Dieter Plehwe (Cambridge, MA: Harvard University Press, 2009), 139–80.

[93] Milton Friedman, with the assistance of Rose D. Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962). Friedman built on the work on Friedrich von Hayek, an economist and philosopher who joined the University of Chicago Committee on Social Thought in 1950. See F. A. Hayek, *The Road to Serfdom* (New York: Routledge, 1944). See also Angus Burgin *The Great Persuasion: Reinventing Free Markets since the Depression* (Cambridge, MA: Harvard University Press, 2012).

[94] Milton Friedman and Anna Jacobson Schwartz, *A Monetary History of the United States: 1867–1960* (Princeton, NJ: Princeton University Press, 1963).

[95] George Stigler, "A Theory of Oligopoly," *Journal of Political Economy* 72 (Feb. 1964): 44–61. Two decades later the economist William J. Baumol expanded on Stigler's analysis, arguing that the ability of

firms to raise prices was limited by the ease of market entry and substitutability of their products, even in highly concentrated industries. See William J. Baumol, "Contestable Markets: An Uprising in the Theory of Industry Structure," *American Economic Review* 72 (March 1982): 1–15.

[96] On Nixon appointees to the Court, see Kevin J. McMahon, *Nixon's Court: His Challenge to Judicial Liberalism and Its Political Consequences* (Chicago: University of Chicago Press, 2011).

[97] For example, in his 1966 essay "Antitrust," Alan Greenspan argued that "the entire structure of antitrust statutes in this country is a jumble of economic irrationality and ignorance" because it was too interventionist and did not allow the capital markets to regulate competition themselves through the free market. Greenspan, "Antitrust," in *Capitalism: The Unknown Ideal*, by Ayn Rand, with additional articles by Nathaniel Branden, Alan Greenspan, and Robert Hessen (New York: New American Library, 1966), 70, 63–71. See also Benjamin C. Waterhouse, *Lobbying America: The Politics of Business from Nixon to NAFTA* (Princeton, N.J.: Princeton University Press, 2014).

[98] Ronald Coase, "The Nature of the Firm," *Economica* 4 (Nov. 1937): 386–405. Coase, a British economist, joined the University of Chicago law school faculty in 1964.

[99] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) and making clear that the Court would look at "demonstrable economic effect[s]" rather than "formalistic line drawing" to determine whether a vertical restraint violated section 1 of the Sherman Act. *Sylvania*, 433 U.S. at 59.

[100] See Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984), ruling that Monsanto had violated section 1 of the Sherman Act but also affirming the *Colgate* doctrine by holding that the courts could not infer a price conspiracy from either complaints or termination of a distributor contract; Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988), holding that a manufacturer's termination of its sales contract with a price-cutting retailer was not per se illegal unless clear evidence of price coordination could be shown.

[101] *Leegin*, 551 U.S. 877.

[102] Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986), holding that for a lower court to issue a summary judgment, there must be evidence that "tends to exclude the possibility" that the conspirators merely acted independently. *Id.* at 585.

[103] *Id.* at 587. Justice Powell, writing for the Court, cited then-Professor Robert H. Bork, *Antitrust Paradox* (1978), and economist Frank Easterbrook, "Predatory Strategies and Counterstrategies," *University Chicago Law Review* 48 (1981): 263, to conclude that "there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful." *Matsushita*, 475 U.S. at 589.

[104] United States v. AT&T Co., 552 F. Supp. 131 (D.D.C. 1982).

[105] See W. Brooke Tunstall, Disconnecting Parties: Managing the Bell System Break-Up: An Inside View (New York: McGraw-Hill, 1985).

[106] United States v. Terminal Railroad Ass'n, 224 U.S. 383 (1912), holding that a railroad combination violated section 1 of the Sherman Act and requiring that the association grant full and equal access to nonmember railroads.

[107] United States v. Otter Tail Power Co., 410 U.S. 366 (1973).

[108] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985), holding that termination of the "All-Aspen" multi-area ski lift pass deprived consumers of a superior product, injured a competitor's ability to provide rival services, and had no legitimate business justification. See Herbert Hovenkamp, "The Monopolization Offense," *Ohio State Law Journal* 61, no. 3 (2000): 1035–49.

[109] See MCI Communications Corp. v. AT&T Co., 708 F.2d 1081, 1132–33 (7th Cir. 1983), accepting a consent decree to break apart AT&T; Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004), holding that that essential facilities doctrine did not apply because agency oversight from the Federal Communications Commission (FCC) had the power to compel access. See also Phillip Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles," *Antitrust Law Journal* 58, no. 3 (1989): 841–53.

[110] United States v. General Dynamics Corp., 415 U.S. 486 (1974).

[111] Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94–435, 15 U.S.C. § 18a (1976). See also Gerald R. Ford, "Statement on Signing the Hart-Scott-Rodino Antitrust Improvements Act of 1976," September 30, 1976, in *The American Presidency Project*, Gerhard Peters and John T. Woolley, ed., www.presidency.ucsb.edu/ws/?pid=6394.

[112] United States v. Waste Management, Inc. and EMW Ventures, Inc, 743 F.2d 976 (2d Cir. 1984). See also United States v. Syufy Enterprises, 903 F.2d 1206 (9th Cir. 1990).

[113] United States v. Baker Hughes Inc., 908 F.2d 981 (D.C. Cir. 1990).

[114] *Merger Guidelines* (1982), 47 Fed. Reg. 28,493 (1982), https://www.justice.gov/archives/atr/1982-merger-guidelines. The 1982 guidelines updated the 1968 guidelines.

[115] Herbert Hovenkamp, "Post-Chicago Antitrust: A Review and Critique," *Columbia Business Law Review* 2001, no. 2 (2001): 257–337; Jonathan B. Baker, "Competition Policy as a Political Bargain," *Antitrust Law Journal* 73, no. 2 (2006): 483–530, 483.

[116] See Herbert Hovenkamp, "The Harvard and Chicago Schools and the Dominant Firm," in *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust*, ed. Robert Pitofsky (New York: Oxford University Press, 2008), 109, 109–22. See also William E. Kovacic, "The Intellectual DNA of Modern U.S. Competition Law for Dominant Firms Conduct: The Chicago/Harvard Double Helix," *Columbia Business Law Review* 2007, no. 1 (2007): 1–80.

[117] Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992).

[118] Hovenkamp, "Post-Chicago Antitrust," 277. See also Robert Lande, "Chicago Takes it on the Chin: Imperfect Information Could Play a Crucial Role in the Post-*Kodak* World," *Antitrust Law Journal* 62 (1993): 193.

[119] Hovenkamp, "Harvard and Chicago and the Dominant Firm," 113.

[120] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993). See also *Trinko*, 540 U.S. 398, stating that "*Aspen Skiing* is at or near the outer boundary of section 2 liability" under the Sherman Act. *Id.* at 409.

[121] See Jean Tirole, *The Theory of Industrial Organization* (Cambridge: MIT Press, 1988), 367–74; Fiona Scott Morton, "Entry and Predation: British Shipping Cartels, 1879–1929," *Journal of Economic & Management Strategy* 6 (Winter 1997): 679–724.

[122] See for example SMS System Maintenance Services v. Digital Equipment Corp., 833 F. Supp. 2d 166 (D. Mass. 1998), holding that the *Kodak* ruling does not apply when the primary good and the aftermarket good are sold simultaneously.

[123] See United States v. Microsoft, 253 F.3d 34 (2001); 87 F. Supp. 2d 30 (D.D.C. 2000), conclusion of law; 84 F. Supp. 2d 9 (D.D.C. 1999), finding of fact.

[124] For example, see the Open Markets Institute, https://openmarketsinstitute.org/; Barry C. Lynn, *Cornered: The New Monopoly Capitalism and the Economics of Destruction* (New York: Wiley, 2010).

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125 Daniel Crane, "Four Questions for the Neo-Brandeisians," *CPI Antitrust Chronicle* (April 2018), https://www.competitionpolicyinternational.com/wp-content/uploads/2018/04/CPI-Crane.pdf.

126 Lina M. Khan, "Amazon's Antitrust Paradox," *Yale Law Journal* 126 (Jan. 2017): 710–805. See also Ariel Ezruchi and Maurice Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Cambridge, MA: Harvard University Press, 2016).

127 See Spencer Soper, "Amazon Turns Investor Attention from Growth to Big Profits," *Bloomberg*, July 27, 2018.

128 See K. Sabeel Rahman, "Private Power, Infrastructure, and the Revival of the Public Utility Tradition," *Yale Journal on Regulation* 35 (forthcoming).

129 See Maurice E. Stucke, "Reconsidering Antitrust's Goals," *Boston College Law Review* 53 (2012): 551-629, https://lawdigitalcommons.bc.edu/bclr/vol53/iss2/4.