The Spirit of Antitrust: How Antitrust Lost Its Way, and How It Can Be Revived

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This paper explores the history of antitrust in the United States, and how the goals of competition policy evolved over time. In particular the paper explains how antitrust was enfeebled in the post-war, and how this has contributed to current economic issues. The link between monopolies and fascism is also discussed.

Introduction

"The problems with which the antitrust laws are concerned—the problems of distribution of power within society –are second only the questions of survival in the face of threats of nuclear weapons." Thus, warned Lee Loevinger, President John F. Kennedy's antitrust czar, during his interview for the role. He spoke of antitrust as his "secular religion," an antidote to the excesses and evils that accompany industrial bigness. Senator John Sherman, the namesake of the first antitrust legislation in the United States, warned of the unchecked powers possessed by amassers of enormous amounts of capital. To him, the "kingly prerogative" of the Gilded Age's "robber barons" ran counter to the democratic ideals of the republic, and it was with this vision that the antitrust laws were first enacted and enforced in the United States.

Antitrust laws play a vital role in securing a competitive economy. They are used to break up or prevent excessively large firms that can use their market dominance to charge excessive prices, prevent innovation, and constrain individual and businesses' economic freedom. They also prevent the accumulations of industrial power in the hands of a few decision makers, which serves a further political role, for antitrust laws serve as a complement to the democratic system of checks and balances. They serve as a constitutional restraint on private power: "the same principles that prevent Congress from delegating regulatory power to private entities – a restriction contained in constitutional law – also prevent private entities from taking regulatory power for themselves – a restriction contained in the antitrust laws." Their role in protecting competition has been compared to that of the Bill of Rights; after all, "Competition is a public good, and society cannot expect the victims of anticompetitive conduct to protect themselves." This is called "political antitrust", and is one of the most important functions of antitrust law that will be explored in this paper.

For the first seven decades of their existence, these laws ensured a "decentralization… of influence and power" that ensured a fairer, more democratic society. Countries like Germany that failed to reckon with their own nascent monopolies suffered from monopolies' propensity to facilitate totalitarianism. Beginning in the 1970s, however, antitrust laws in the U.S. were devalued and stripped of their bite, to the detriment of the economy and American democracy. What were once viewed by their creators and enforcers as a constitutional check on private power became relegated to the status of a mere "consumer welfare prescription." What was the result? I need not regale you on the structural economic problems facing the U.S., but the troubling picture of a second Gilded Age emerges– in which 38.6 percent of the national wealth is owned by 1 percent of the population , where inequality, an unsteady economy , increased private sector concentration, and a political system ever more responsive to private money and less accountable to voter interests all threaten the health of our democracy. How did we get here? The current economic situation of the U.S. has been impacted by a variety of factors, to be sure, but the lack of antitrust enforcement has played a large part. The problems plaguing the United States in the 1890s and the problems plaguing it now face a common cause: increasing corporate consolidations. In order to begin tackling some of these larger issues, a dialogue about how these laws should be interpreted, and how they ought to be updated for the 21st Century, is in order. This paper will provide an outline of the history of antitrust in the United States. It will discuss how the interpretation of the antitrust laws, as well as understandings of their purpose, has changed. Lastly, it will argue for a return to robust antitrust enforcement, which ought to be a priority for those seeking reform of the U.S. political and economic system.

The Foundations of Antitrust

First, we must begin in 1890, with the passage of the Sherman Antitrust Act. It is remarkable in its brevity, containing just two sections that can be explained on the back on a napkin, and it is from this simplicity that the modern antitrust debate, and the current antitrust problem, arises. The law proscribes "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations", and likewise any act of monopolization or attempt at monopolization of said interstate commerce. That is all the act says; if taken literally it bans almost any possible commercial agreement. The interpretation of the law would therefore be up for debate in subsequent years, and the courts would have to make sense of what Congress had actually meant by its language when dealing with business practices like horizontal dealings, vertical arrangements, and the legality of dissolving trusts. The problem of deducing Congress' intent in writing the Sherman Act is a difficult one to solve, but we can darkly observe that "Congress elected generally to leave specific enforcement decisions to the judiciary."

The law was written with such broad language, forbidding so much, to appease those clamoring for government action against the increasing concentration of American industry without bringing about any radical action. Still, the need for antitrust law was there. A nation born in rebellion against mistreatment by British Crown monopolies, "a nation of founders and small-town entrepreneurs – ambitious, mobile, optimistic, speculative, anti-authoritarian, egalitarian, and competitive," was beginning to resemble the America envisioned by advocates of laissez-faire capitalism in the Trust Movement – "centralized, run by great men, free from any government interference." Between 1895 and 1904, the U.S. witnessed 2,274 manufacturing firms consolidate into 157 giants, the majority of which dominated their industries. The results were staggering: industrial titans, conglomerations of capital unprecedented in human history, largely controlled the economy. An owning class of 4,000 families controlled just as much wealth as everyone else combined while millions of farmers, industrial workers, and urban poor struggled. It really was a tale of two Americas: one an experiment in democracy and liberalism which had resulted in breakneck growth and the largest economy in the history of the world, and another an extremely unequal, crisis-prone economy controlled by a few private interests. If this picture seems familiar, it is because the same problems affecting the U.S. today share at least one similar root cause with the problems of the Gilded Age – the decline of competition. Consequently, just as the squalor of the cities, the depravities of child labor, and excesses of industrial capitalism provoked the ire of Progressive reformers, so did the trusts. Following an decade of unusually violent and frequent strikes, and with "wide discussion of alternative labor systems," Congress decided to enact the Sherman Act to "head off direct regulation or Marxist solutions." In the first decade of its existence the law saw little use. During the administration of Theodore Roosevelt, however, antitrust grew its teeth, and we must look to him when considering how to grow them back.

The Trust-Buster

Theodore Roosevelt is famous for many things, but one moniker of his that has endured is that of "trust-buster." It is easy to imagine "old rough and ready" wrangling the out-of-control monopolies with the might of someone who was truly larger than life, but the reality of his crusade against the trusts is both more complex and more significant. It began just two weeks before the assassination of his predecessor, President McKinley, when he gave a speech condemning the trusts. He argued the "vast combinations of capital which have marked the development of the industrial system create new conditions, and necessitate a change from the old attitude of the State and the nation toward property." Contrast this to the administration of President McKinley, which embodied laissez-faire in all but name . McKinley alluded to the trust problem just once in his presidency, in a state of the Union speech. Tellingly, when J.P Morgan's proposed buyout of Andrew Carnegie's steel trust was announced, he held a White House dinner in his honor. The McKinley administration's competition policy was "as if the Sherman Act did not exist."

Just two weeks later, there was a President who was not just critical of the trusts, but supported government intervention against them, regardless of contemporary norms about the relationship between government and property. Roosevelt knew he had to proceed carefully and so he did. First, recognizing that without enforcement the Sherman Act was stillborn, he ordered Attorney General Philander Knox to investigate Morgan's Northern Securities Company, which was formed after a merger to monopoly in the railroad industry. In an unprecedented move, he announced that this trust violated the Sherman Act of 1890, and a few weeks later, his administration filed suit against the Northern Securities Company. Morgan's attitude in this episode was telling, as he assured Roosevelt, "If we have done anything wrong, send your man to my man and they can fix it up." Roosevelt later remarked that he felt as though Morgan saw his administration as a rival business, either to be bargained with or crushed. After two trials, the Northern Securities case made it to the Supreme Court, where Justice John Marshall Harlan sided with Roosevelt and provided the 5-4 majority needed to stop the merger and break up the trust. Roosevelt's legal sally into antitrust enforcement was the beginning of an era of robust antitrust enforcement that would last well past his term. In planning his assaults on Northern Securities, and later other cartels, Roosevelt secured both legal victories allowing for later antitrust regulation and established a precedent of what was to be done about excessive bigness.

Roosevelt was a peculiar choice for a trust-buster. He was, after all, from the wealthy New York aristocracy himself, and admired the largeness and scale present in the new industrial behemoths, just as he respected size in affairs of state and institutions more generally. But he had a strong democratic impulse, and a sense of fairness that put the interests of the public before the interests of large firms. Further, while he was not anti-business and certainly no socialist, he had a clear understanding of public opinion. Roosevelt worried that without democratic reform of the excesses of industrial capitalism, the U.S. would be susceptible to the anarchist and communist unrest that was affecting Europe. For him, the trust problem was not really an inevitability of modern times, but a very real threat to the foundations of American democracy. It follows that the solutions to the trust problem would have to be centered on democratic ideals, and that the solutions would have to be cognizant of the constitutional relationship between private and public power. Roosevelt would have balked at the current view of antitrust laws as a "consumer welfare prescription," to be used for punishing wicked behavior but not to effect a larger vision for a country's political system. By Roosevelt's logic, antitrust enforcement should not be seen as a technocratic affair, but instead as a political necessity. Supreme Court Justice Louis Brandeis, who excoriated "bigness" and also believed in antitrust's political role, wrote, "Men are not free if dependent industrially on the arbitrary will of another." As he put quite elegantly, "whether it has exceeded the point of greatest economic efficiency or not, [a corporation] may be too large to be tolerated among the people who desire to be free." It follows that successful but abusive firms, or banks that are profitable but too big to fail, are problematic. It is from this basis that Roosevelt set out to wrangle the trusts, and it is this basis that has been forgotten by current politicians and Supreme Court justices. It is to these foundations that antitrust law and its interpretation must return, lest the U.S. slide deeper into its second Gilded Age.

The 1912 Antitrust Referendum

By 1912, antitrust law had become a "primary level of economic policymaking." Roosevelt's administration filed forty-five cases, with Taft adding another seventy-five in just one term, causing the breakup of almost every major trust in America. 1912 was also an election year – and it would be a pivotal one for antitrust policy. It

was the last election where debates surrounding antitrust played a decisive role, and "one of the few… where the public was engaged with and voting on what kind of economic order they wished to live in." There were four candidates: Woodrow Wilson, William Taft, Theodore Roosevelt, and Eugene Debs. Each of them has endured in the American consciousness, with three serving as Presidents, and Debs mounting the most successful socialist Presidential campaign of the 20th Century. A modern analog might be Ronald Reagan, Barack Obama, Donald Trump, and Bernie Sanders running in the same Presidential election. Surely enough the contest was among the most dramatic in U.S. history, with the candidates trading insults, an assassination attempt on Roosevelt, the loss of Taft's confidant Archie Butt in the sinking of the Titanic, and the death of Taft's running mate days before the election.

At issue were not just the personalities involved, but a vision for the future of the economy. Each of the candidates proposed a different vision of the economy and thus the direction antitrust laws ought to take. The reasoning and politics behind their viewpoints are relatively complex, but Crane argues that they stem from three questions about how the American economy ought to work:

(1) Do we want a competitive economy or a managed one?
(2) Is antitrust necessary to a competitive economy?
(3) What sort of institutional arrangements produce the best antitrust enforcement?

Both Roosevelt and Debs would have answered no to competitiveness on the first question. Roosevelt's viewpoint might seem strange to those who know him as the famous "trust-buster", but he had undergone somewhat of a change of heart over the course of his presidency. He had come to view his antitrust legacy as bringing "bad" trusts to heel, leaving the "good" trusts to be regulated not dissolved. In 1906, before initiating the suit against Standard Oil, Roosevelt proposed to its leadership that it accept government oversight, or even become a "public" trust. Standard Oil refused, and what could have been the American equivalent of Saudi Aramco instead was dismantled. Debs was also against industrial competition, albeit for different reasons. Recognizing the immense power of the industrial giants and adhering to a Marxist vision of human material progress, Debs thought the monopolies should not be dissolved, or regulated, but nationalized, their earnings collectivized. Further, he believed that more concentrated an industry, the easier it was to nationalize, and so did not believe in any antitrust enforcement whatsoever. Lastly, Debs faced added pressure to disavow antitrust from the socialist left, which criticized the law that was used to break up strikes and prevent unions from forming.

This left only Taft and Wilson as advocates for the kind of competition policy that had been practiced until that moment. While they both believed in using antitrust law as a way of ensuring competitiveness, they disagreed on the finer points of doing so. Taft favored what is called a common-law incrementalism approach, which leaves antitrust enforcement broadly in the hands of the court system. Wilson favored something in between what Taft and Roosevelt proposed, which stresses the importance of the courts in enforcing antitrust but empowers government agencies to investigate monopolists, as part of an expert-commission model. Wilson's approach of an administration leading antitrust efforts promised more immediate action than Taft's, whose approach depended on the antitrust leanings of the judges that were appointed, and the Presidents who appointed them. Wilson's credentials were bolstered because Taft, a Republican, was tied to his party's support of import tariffs. As the other central economic locus of debate in that election cycle, import tariffs were seen as a tool used by the trusts to shield themselves from competition, and Wilson seized on this issue in a number of speeches. Wilson won the election, and it was his antitrust platform that was enacted. It came in the form of the Clayton Act of 1914 and the Federal Trade Commission, in addition to the reduction of tariffs.

The 1912 election was a clear referendum on the economic direction voters wanted the U.S. to take and serves as a reminder that almost no argument in antitrust is new. Current advocates of any competition policy ought to study this election for the lessons it provides. The relationship between the tariff and trust issues is worth noting, too. Voters should be skeptical of politicians who put up barriers to entry, and vigilant about who stands to gain from industry lobbying on trade. Lastly, the outcomes of the options championed by the other candidates, especially Debs' and Roosevelts', are worth considering. Roosevelt's regulated, but broadly anticompetitive industrial conglomerates would in Germany and Japan give rise to monopolies that contributed to the rise of fascism, and Debs' calls for collectivized monopolies would be replicated in the Soviet Union. These experiments in what would later be known as corporatism, would have dire consequences.

I. G. Farben and the Nazi State: How Monopolies Give Rise to Fascism

The link between industrial monopolies and fascism has been explored before but there is an important lesson in the "bad history, bad policy, and bad law" that results from "[excluding] certain political values in interpreting the antitrust laws." A useful example is the firm I. G. Farben in Germany. It began as Bayer in 1899, selling primarily aspirin, but would grow into the industrial arm of the Nazi regime. In 1904 Bayer formed a cartel with Afga and BASF, just as seven rival firms were doing the same. These two cartels merged in 1916, forming a "mega-cartel", or profit-sharing pool, that coordinated on research, pricing, insurance, legal matters, and patents. Finally, in 1925, the members of the cartel consolidated into one "integrated, widely-held corporation," completing the monopolization process. By the time that Hitler's rearmament program was escalating, I.G. Farben became "deeply allied with and enmeshed with the Germany war effort." The benefits to it were enormous: the firm extracted immense profits and grew its market share even as the rest of Germany continued to suffer from the Great Depression. By the invasion of Poland in 1939 it controlled nearly all chemical production, "including 100% of synthetic rubber, 100% of lubricating oils, 100% of serums, 90% of plastics, 88% of magnesium, 64% of explosives, and 75% of nitrogen." The truly heinous result of I.G. Farben's integration into the German war machine, however, was its use of slave labor and manufacturing of the Zyklon B gas used to exterminate millions in the Holocaust. While it was not the only German firm to participate in such atrocities, its highly centralized structure, which concentrated power in its president, made its role easier.

In a recent paper, Crane provides some historical reasons for I.G. Farben's infamous rise, offering insights about the relationship between concentrated industries and the erosion of democracy more generally. It is important to note, after all, that what happened in Germany in the lead-up to World War II also occurred in pre-war

Japan and Italy. So, what is the link between these two phenomena?

First, the interests of monopolists and fascists overlap to a significant degree. Monopolies seeking higher profits can ally themselves with a regime which provides them with business; fascist regimes are particularly alluring because their programs of conquest provide a guarantee of sales. In addition to necessitating exploitable surges in government spending, wars of aggression provide new markets to dominate. This can be especially lucrative; in the territories annexed by Germany, I.G. Farben was the economic arm of conquest, "coercing firms in conquered territories to sell cheaply or simply taking them over." Fascist governments benefit from consolidation, when firms become easier to coordinate with on military matters (as evidenced by the U.S.'s relaxing of antitrust efforts during the war), and easier to control. The Nazi government was heavily reliant upon I.G. Farben and other such conglomerates to enact its war mobilization. Hitler remarked in 1936 that "the minister of economics has only to set the tasks of the national economy; private industry has to fulfill them." And while the state takes on control over key business decisions for its own purposes, the capital remains private. All the benefits of government economic policy are therefore privatized. During periods of popular unrest big business interests accept fascism over other insurgent movements like communism, of course because fascism allows them to remain private but also because they can profit from exploitation of the workforce. Thus programs of military buildup, wars of expansion, and the logistics of building a war machine suit the interests of both parties.

> Heeding the lessons learned from World War II, American and European lawmakers drafted new antitrust legislation for the post-war age that consciously embodied anti-fascist impulses

Second, monopolists and fascists can also aid and abet each other's rise to dominance. The suspension of broad rule of law and constitutional checks allow authoritarian governments to favor certain firms and suppress labor movements with little political resistance. On the other hand, monopoly firms can use their abnormally bloated cash and sprawling investments to support fascist parties. On February 27, 1933 – the day of the infamous Reichstag fire – I.G. Farben deposited RM 400,000 into the Nazi Party's reserves. Later the firm's money was used to bankroll government projects, and its media resources were used to disseminate Nazi propaganda to bring other institutions under the control of the state. The institution of fascism in Germany has been described as "the political victory of… finance capital… coalesced by the end of 1932 on a policy bent on violent expansion and war." Furthermore, large firms are more successful at wielding political power than small firms working together because of the nature of cartel organization, which is hampered by divergence on the finer points of political and economic interests.

Finally, the broader economic structure of a society is a unifying goal for monopolists and fascists. As mentioned earlier, the robber barons in the U.S. sought to create firms that were "centralized, run by great men, free from any government interference," Simply replace "government interference" with "civil interference," and the grand visions of both actors have much in common. Totalitarian and monopolistic systems lack the decentralized basis underpinning democracies and markets that allows "individuals in small groups… [to] strive for whatever they wish." Instead both benefit from systems that centralize power: fascism by strengthening the role of the state rather than constraining it, and in I.G. Farben's case the series of steps to centralize power within the firm which allowed it to "[replicate] many of the democracy-quashing changes occurring in the political regime, with the effect of extending totalitarian control from the political to the business realm." Their mutual interests, ability to aid each other's rise, and, perhaps more abstractly, their common visions for society provide a clear platform for cooperation.

Deducing the direction of causality is trickier. Whether monopolies have historically caused movements toward fascism or whether fascism has resulted in dangerous levels of concentration has been a subject of academic debate. In Germany, however, the direction of causality is clear. The broad structure of the I.G. Farben monopoly preceded the rise of Nazism, with the major acts of consolidation in the chemical industry occurring decades before the ascension of the Nazi Party to power. Moreover, Hitler's early reliance on the firm's "abnormal financial resources, ubiquitous local presence, and—in particular—the power to direct an entire industry" are all indicative on the preexistence of a monopoly. The case of I.G. Farben shows the U.S. made the correct decision in the 1912 election, eschewing an anticompetitive state of affairs that could have been dangerous had it been allowed to continue. More broadly, this episode shows that concentrated economic power can cause concentration of political power, which Crane argues has "corrosive effects on democracy." Governments and the public should therefore be watchful of trends in concentration, not just for their consumer welfare implications but also for their effects on politics. In the era of fascism-lite, there may not be political effects that rise to the magnitude of the horrors witnessed in Nazi Germany. Instead, one can look to subtler consequences of concentration, like money in politics (re: Citizens United), the use of consolidated media to bolster political campaigns (re: Roger Ailes' support of Donald Trump or Silvio Berlusconi's use of his media empire to dominate Italian elections), or the role that industrial firms have played in starting and prolonging U.S. military campaigns (re: Haliburton with the invasion of Iraq). All represent the erosion of democratic principles even if they do not amount to outright fascism and could be warnings of more sinister developments.

Heeding the lessons learned from World War II, American and European lawmakers drafted new antitrust legislation for the post-war age that consciously embodied anti-fascist impulses. In 1950, the U.S. Congress created the Celler-Kefauver Act of 1950, which focused especially on anticompetitive mergers. It closed loopholes that had allowed some firms to merge even despite the Clayton Act of 1914, but most importantly the law factored in clearly articulated pro-democracy ideals. In particular section 7 of the Act was written with Congress' "clear concern that an economic order dominated by a few corporate giants could, during a time of domestic stress or disorder, facilitate the overthrow of democratic institutions and the installation of a totalitarian regime." Senators Emanuel Celler and Estes Kefauver, the law's cosponsors, warned of the extreme danger posed to democracy by industrial concentration, and in floor speeches, both cited Nazi Germany as a warning. The

Supreme Court even acknowledged Congress' intent in passing the law not just to challenge "accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose." The U.S. thus entered the postwar period with a clear, political stance on antitrust, updated with anti-totalitarian language. This moral stance was strengthened with tools to prevent mergers to monopoly before they happened rather than breaking up monopolies years after they formed. It would not be until the 1960s that the Chicago school of antitrust would succeed in convincing large swathes of economists – and the Supreme Court – that monopolies can be tolerated.

The Chicago School and the "Economics" of Antitrust

"Congress intended the courts to implement … only that value we would today call consumer welfare. To put it another way, the policy the courts were intended to apply is the maximization of wealth or consumer … satisfaction." This is the thesis of Robert Bork's 1966 paper, "Legislative Intent and the Policy of the Sherman Act," which Wu calls "the most influential single antitrust paper in history." This paper became a part of the cannon of the Chicago school of antitrust; its name refers to the intellectual developments in economics and other fields that took place in and around the University of Chicago from the 1950s until the 1980s. Bork himself innovated on the work of his mentor, Aaron Director, who worked with classic price theories to attack the antitrust case law as lacking concern about consumer welfare. But he took his mentor's message a step further. Bork argued not just about what contemporary antitrust law ought to do, but alleged that "consumer welfare", essentially competitive prices, is what the laws were solely intended to protect.

With a proverbial stroke of the pen, Bork succeeded in erasing six decades of democratic choice about what antitrust meant, in what has been called the greatest victory of the Chicago intellectual school. This reorientation of the intent behind the Sherman, Clayton, and Celler-Kefauver Acts, as well as abandonment of the legal conclusions in previous antitrust case law, has almost no basis in the historical record. But still by the end of the 1970s the Supreme Court had adopted many of Bork's principles, and by 1979 Chief Justice Burger was writing that "Congress designed the Sherman Act as a 'consumer welfare prescription,'" citing Bork's book. Why did his ideas gain such prominence?

To understand the Chicago school's rise from the fringes of the antitrust debate to prominence, it is important to understand the background of this era. The 1950s and 60s were the time of the Warren Court, which was arguably the greatest expansion of judicial power in American history. While it succeeded in expanding in civil liberties and improving racial equality, the Warren Court revolution became a victim of its own success. During this time, "judicial activism," or the courts acting in place of Congress to enact policy, became a rallying point for conservatives. Antitrust law had likewise reached its peak era of enforcement, with Justice Stewart lamenting, "the sole consistency that I can find is that in litigation under s 7 [of the Clayton Act], the Government always wins." Antitrust law provided Bork an opportunity to hitch his ideas to the battle for the courts being waged in the culture war. Just as a conservative backlash against Supreme Court "overreach" produced remarkable political success in the 1970s and 80s, so did Bork's critique of antitrust's vigorous enforcement.

The ammunition for Bork's offensive was readily available. For many, antitrust enforcement often meant "'coonskin cap' law enforcement– the blind firing of muskets at companies that just seemed bad." In one incident, the Justice Department blocked a merger between two grocery chains that would have led to a combined market share of 7.5 percent. Comparisons between the justice department and an out of control frontier sheriff led the Justice Department to try to find the analog to "modern" forms of policing. Mainstream schools of antitrust, especially the Harvard school which had led the field previously, were forced to adopt many of the Chicago school's tenets, as lawyers and judges sought the "appearance of rigor" promised by Bork's ideas. It is perhaps harsh to say that the Chicago school of antitrust provided judges "an easy way to deal with hard cases," but the doctrine of focusing solely on prices led to a substantial deterioration of antitrust action. If a merger could not be shown to raise prices, for instance, it was allowed – regardless of whether it substantially reduced competition in the market in the long run.

The first casualties were per se (absolute) bans on vertical restraints, which were the most difficult bans to justify. As a flurry of legal challenges to antitrust rules produced victory after victory, robust enforcement of antitrust laws declined. Meaningful anti-merger action, for example, declined substantially in the post-Bork years. Ultimately the cost of this movement was nothing less than the spirit of antitrust, with entirely theoretical, often questionable economics being used to justify an attack on judicial precedent. After all, the research produced by the Chicago school was based purely in price theory, with little supporting empirical evidence, and centered on the assumption that "the existing structure is the most efficient structure." This assumption was as absurd as it was damaging for it assumed that anticompetitive effects "which did not exist in theory did not exist in practice." In other words, acts that had heretofore been considered anticompetitive must, if undertaken by a profit-maximizing firm, have been done to improve efficiency. This efficiency is (somehow) bound to result in lower prices for the consumer; therefore, what is in the interest of the would-be monopolist must (somehow) also be in the consumer interest; this was (somehow) obviously the intent of the framers of the antitrust laws. Such an outlook includes "preferences for economic models over facts, the tendency to assume that the free market mechanisms will cure all market imperfections, the belief that only efficiency matters," and finding a way to justify any non-intervention position. Taken together this attitude flies in the face of the main principles that had hitherto been enshrined in the Sherman Act, and that had been reiterated with the Clayton and Celler-Kefauver Acts. Nonetheless, its siren song of respectability and 'economic tools' to address difficult legal questions succeeded in swaying much of the legal establishment. All this came to a head during the 1970s, when antitrust lawyers and economists convinced the courts to "adopt an exclusively economic approach to antitrust questions" on an unprecedented level.

This reframing of the laws did not universally result in court decisions that lowered prices, which from the focus on price theory and "consumer welfare" one might think they would. Take resale price maintenance, a type of vertical restraint that manufacturers use to force retailers to sell at a specified (typically inflated) price, which was per se illegal until the 2007 Supreme Court decision in Leegin vs. PSKS. Advocates for resale price maintenance used economic theory to argue it provided consumers with better utility, and therefore better value. This was despite empirical evidence showing that states that at the time allowed resale price maintenance saw prices rise by 19% to

27%. It also ignored the potential for resale price maintenance to be used to disguise cartels. Even advocates of a laser-like focus on price levels could look the other way on occasion, preferring classical price theory to evidence. The Supreme Court ended up ruling that resale price maintenance ought to be judge on a rule-of-reason basis, which considers the procompetitive and anticompetitive effects of such a restraint, as well as the firm's market power to use such a restraint to entrench itself in the market.

More broadly, the rule-of-reason analysis is now applied near-universally, and its concern om maximizing consumer welfare is almost always about price. When this comes at the expense of competition, this presents a problem. After all, less competition might mean a more streamlined market, through say less sales and marketing costs, but this ignores that antitrust laws are fundamentally about preserving economic freedom and deconcentrating economic power. Furthermore, applying the Chicagoan doctrine precludes investigation of issues like income distribution, impacts on small businesses, and respect for civil rights, that all relate to how business is conducted. Indeed many of the anticompetitive effects of monopolistic practices that has previously been dismissed only saw robust academic validation in the post-Chicago era, with barriers to entry explored by Thomas Krattenmaker and Steven Salop, the use of patents to slow new market entrants shown by Carl Shapiro, the deleterious effects of mergers on innovation proven by Michael Katz and Howard Shelanski, and improved econometric models to answer theory with empirical evidence produced by Daniel Rubinfield and others. Unfortunately it was too late, as antitrust enforcement entered an all-time low. The U.S. fought the last of its major dissolution cases against AT&T in the 1970s, and thereafter stopped pursuing major action. During the Reagan administration, the Justice Department aggressively pursed cartels but virtually stopped other forms of enforcement. An investigation by President Clinton's Justice Department into Microsoft, which controlled 90% of the operating system market and tried to corner the nascent internet browser market, became another casualty of the far-reaching election of 2000.

During the Bush administration, a record zero anti-monopoly antitrust cases were pursued, and no big mergers were blocked. Justice Antonin Scalia was arguing that "the mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free market system." Monopolies – in this case Verizon, which had held a century-long monopoly – were no longer evil, they were the unsung heroes of capitalism. And although Barack Obama promised "an antitrust division… that actually believes in antitrust law," the judiciary he faced had accepted many of Bork's ideas. Three quarters of American industries saw increased concentration between 1997 and 2012, 95% of mergers were allowed without further investigation. A swift-moving digital technology industry that in the 1990s promised compactness and an unprecedented level of creative destruction has consolidated into just a handful of sprawling giants. Facebook, an eight-year-old (old in the context of the internet) dominant firm, was allowed to buy one of its only real challengers, eighteen-month-old Instagram. There was no challenge from regulators on either side of the Atlantic, who absurdly concluded that the two were not competitors. Next came their purchase of WhatsApp, along with 65 more unchallenged acquisitions. Not to be outdone, Amazon and Google undertook 91 and 214 (of which only a couple came with conditions) respectively. Telephones, banking, cable, airlines, pharmaceuticals, ticket sales, agriculture, food, and a whole host of industries have consolidated into a handful of players. AT&T, which was the last major breakup in the U.S., has seen its constituent parts re-group. The need for a return to a tradition of more robust antitrust enforcement is dire, and without action, things can only get worse.

Where We Go From Here

The current problems stemming from a more anticompetitive economy are not new; they are the same that prompted the first rounds of antitrust laws. Therefore, we need to revive the spirit of antitrust. This means cultivating a clear understanding of the dangers monopolies pose, not just to consumers' wallets but also to a functioning democracy. I am not proposing we abandon microeconomic analysis or scientific methods of tackling antitrust cases altogether. But getting rid of political considerations altogether because they are harder to deal with than microeconomics was a mistake. Robert Pitofsky warned us in 1979, as the Chicago school reached its zenith: "an antitrust policy that failed to take political concerns into account would be unresponsive to the will of Congress and out of touch with the rough political consensus that has supported antitrust enforcement for almost a century." Squabbling over whether a merger will increase the price of a service by a few cents per month risks ignoring the larger effects that consolidation has on society. Drawn-out court battles over the price effects of "moats" put up by firms with even some monopoly power can risk forgetting factors like innovation and the often-sinister reasons they are put into place to begin with. And treating internet giants with "free" services under the same rules as traditional firms must also be reconsidered.

Considering it has been nearly seventy years since the passing of the last landmark antitrust law, Congress needs to pass legislation updating antitrust for the current era. This means setting stricter rules for mergers and acquisitions, guidelines for dealing with firms that take users data instead of charging prices, specific criteria for investigating persistent monopolies, and procedures for breaking them up. To avoid any question of intent, the law should clearly state its democratic goals: preventing the centralization of private power and reaffirming to sovereignty of the people over the trusts. This will help the courts avoid the mistake of reinterpreting new antitrust legislation in ways that weaken its use.

Second, the public must be won over, for no substantial action can happen without its support. A good place to start is moving conversations around antitrust out of academia and the government and back into the public consciousness. There is substantial opportunity to do so: already Americans are three times more likely to express confidence in small business than big business, and this gap has only widened since the Great Recession. The tech monopolies in particular have been subject to greater scrutiny in recent years, which is reflected in Google and Facebook's record-breaking spending on lobbying in 2018 after a year of scandals. Economic inequality and the declining power of labor, which have become rallying cries for political reform, should be tied to antitrust. Political parties need to be held accountable for their antitrust agendas, and there is also good news on this front. The 2016 Democratic Party platform promised greater enforcement in order to "prevent excessively consolidated economic and political power, which can be corrosive to a healthy democracy." Matt Stoller, policy director at the Open Markets Institute, credits Senator Elizabeth Warren with this change. He argues that until a 2016 pro-antitrust speech, "monopoly wasn't

really an issue on people's radars," and after pressure from Senators Warren and Bernie Sanders, the party included stronger language in its 2017 "Better Deal" blueprint. There are signs the party rank-and-file are following this movement even as it threatens their longtime alliance with the tech industry, which gave twice as much to democratic candidates than republican candidates in the midterm elections. There is therefore evidence that political antitrust is back on the menu. Finally, government officials need to be held accountable on antitrust. Public awareness and scrutiny can make the bureaucrats in regulatory agencies accountable to their actions, as well as limit the damage dealt by the revolving door between industry and those who police it. Judges up for appointment should have their views on antitrust, and especially their interpretation of its purpose, thoroughly examined just as their positions on abortion, gun control, and the constitution are routinely scrutinized.

Third, the U.S. must pursue bold action against the persistent monopolies and force the dissolution of firms in heavily consolidated industries. This is the most important tool for any meaningful antitrust action, just as Roosevelt's trust-busting was the natural conclusion to the conditions of the Gilded Age. There is no reason to believe that breakups should be off-limits except in dire cases; for most of antitrust's history they were the default remedy to persistent monopolies. It is likewise fiction to claim that breakups are impossible. Sure, there are political costs involved, but logistically breakups are much like the spin-offs and reorganizations that have become popular in business. And while a monopoly might at first resist a breakup, it can be as good for the company as it can be transformative for the industry: consider the case of Standard Oil, whose constituent parts doubled in value just one year after its dissolution, and had quintupled in value just a few years later. The diseconomies of scale that harms consumers also holds back the giants and the stock markets that value them. There is therefore much to be said for the big case tradition. At worst, big cases can keep monopolists in line with a "policeman at the elbow," as seen by AT&T's avoidance of anticompetitive behavior while it was under investigation in the 1970s. At their best, breakups can transform entire industries, give rise to previously suppressed ones, lower prices, and boost stock market performance – all while safeguarding democracy from the danger posed by extreme concentrations of wealth.

Conclusion

Solving the antitrust problem will not make the larger problems in society disappear, nor is this essay the perfect guide for what should be done. Instead there needs to be a robust debate about the economic order the public wants to live in, and the direction the U.S. ought to take in this century. What is at stake is more than just the prices consumers pay at the register – it is one of the cornerstones of American democracy, which needs to be restored and bolstered once again. Just as the history of antitrust shows what happens when extreme concentrations of wealth are not reckoned with, it also shows that change is possible. We should look to this history to bring back the spirit of antitrust and strengthen our democracy.

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