Antitrust Reform in Political Perspective: A Constructive Critique for the Neo-Brandeisians

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Abstract

Today, it is common for antitrust policy reformers to contend that today's lax enforcement scheme is the byproduct of an elite ideological movement, started in the 1970s and 1980s and led by lawyers and economists at the University of Chicago. I argue that it arose instead from political activism within both political parties, drawing on broadly held values and concerns, and was sustained over time by monumental shifts in American political institutions, party coalitions, and partisan strategies for producing economic growth. I specify a new framework for analyzing the distributional conflict of antitrust politics and propose reforms that will better align policy with public values and expectations, with the aim of making antitrust policy more democratic and less technocratic.

Introduction

As the dimensions of America's market power problem come into sharper focus,[1] legal scholars have debated the role that lax antitrust enforcement plays in rising market concentration, the extent to which rising market concentration exacerbates income and wealth inequality, and how policymakers should respond. On one side of the debate stand defenders of the status quo. For these scholars, the current "consumer welfare" framework that guides antitrust enforcement is generally sound and deserves at best minor adjustments.[2] On the other side stand reformers—sometimes referred to as Neo-Brandeisians—who call for new laws that will abandon many of the principles, like the consumer welfare standard, that have been the lodestar of antitrust analysis since 1981.[3]

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[1] JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY CH. 1 (2019).; *see also* Lina M. Kahn, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J. FORUM 960, 960 n.1 (2018).
[2] *See, e.g.,* Daniel Crane, *The New Crisis in Antitrust (?)*, 83 ANTITRUST L. J. 253, 253-268 (2020); Herbert Hovenkamp, *Whatever* Did *Happen to the Antitrust Movement*, 94 NOTRE DAME L. REV. 583, 583-93 (2018); BAKER, *supra* n.1, at 1-7 (defending economic analysis in antitrust).
[3] *See, e.g.,* Lina M. Kahn and Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 237 (2017); MATT STOLLER, GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY

A central claim, for reformers, is that the current antitrust enforcement regime is the byproduct of an intellectual movement led by lawyers and economists at the University of Chicago.[4] Chicago scholars like Aaron Director, Ward Bowman, Robert Bork, and Richard Posner began to assert, in the 1960s, that officials had overestimated the extent to which large U.S. businesses could exercise market power, that companies mostly grew in size to capture efficiency gains that are passed on to consumers in the form of lower prices, and that improving consumer welfare is the only yardstick by which officials should determine whether to intervene.[5] This ideology then gradually gained adherence in 1970s within the bureaucracy[6] and the judiciary.[7] For reformers, this ideology supports an excessively lax enforcement regime that has caused the nation's market power problem, and the key to moving forward lies in developing an alternative framework that is more consistent with legislative intent and more aggressive in policing industrial concentration.[8]

This narrative is effective in that it crystallizes ideas and simplifies a complex historical moment in ways that are easy, for those unfamiliar with the debate, to understand. But the complexities of that moment also offer important lessons about why the contemporary approach to antitrust enforcement

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POWER AND DEMOCRACY (2019); BARRY C. LYNN, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION (2010).

[4] Kahn, *supra* n.1, at 967-68; STOLLER, *supra* n.3, at x-xvii. Many of these same ideas were embraced and amplified by "Harvard School" scholars as well. William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double-Helix*, 2007 COLUM. BUS. L. REV. 1, 6-8 (2007) (arguing that while "Chicago's influence is unmistakably profound," Harvard scholars Phillip Areeda and Donald Turner, and their colleague turned Supreme Court Justice, Stephen Breyer, also played major roles).

[5] Robert H. Bork and Ward S. Bowman, Jr. *The Goals of Antitrust: A Dialogue on Policy*, 65 COLUMBIA L. REV. 363, 363-76 (1965); Kahn, *supra* n.1, at 967-68; BINYAMIN APPELBAUM, THE ECONOMISTS' HOUR: FALSE PROPHETS, FREE MARKETS, AND THE FRACTURE OF SOCIETY CH. 5 (2019); *see also* Richard Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STANFORD L. REV. 1562 (1969).

[6] STOLLER, *supra* n.3, at 251-56; Marc Allen Eisner and Kenneth J. Meier, *Presidential Control Versus Bureaucratic Power: Explaining the Reagan Revolution in Antitrust*, 34 AM. J. POLI. SCI. 269, 276-77 (1990); ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST: HOW EFFICIENCY REPLACED EQUALITY IN U.S. PUBLIC POLICY CHS. 4, 6 (2022).

[7] *Compare Brown Shoe v. U.S.*, 370 U.S. 294 (1962) *with Continental Television v GTE Sylvania*, 433 U.S. 36 (1977); *see also* BAKER, *supra* n.1, at 43.; Filippo Lancieri, Eric A. Posner, and Luigi Zingales, *The Political Economy of the Decline of Antitrust Enforcement in the United States* (March 2023) (unpublished manuscript) 47-57, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4011335.

[8] Khan, *supra* n.1, at 964 (arguing that "[t]he sweeping market power problem we confront today is a result of the current antitrust framework" and that many existing proposals "pick at the symptoms of an ideology rather than the ideology itself").

has had such surprising staying power despite the Democratic Party's historical commitment to much more aggressive enforcement. Ignoring those lessons may make reform more difficult or less politically sustainable.

I argue that the reformist narrative is incomplete in four ways, each of which provides insight into the politics that has sustained a forty-plus-year equilibrium in antitrust policy. First, reformers place too much emphasis on the consumer welfare standard (and the work of Robert Bork and Richard Posner) while ignoring other important aspects of Chicago School scholarship that influenced the move towards less stringent antitrust enforcement in the early 1980s. Specifically, the reformist narrative overlooks influential scholarship about corruption in antitrust enforcement, embodied in George Stigler's writings on "regulatory capture,"[9] and about redefining the corporate purpose towards maximizing shareholder value, embodied in Henry Manne's writing on the benefits of "takeover markets."[10] Along with the microeconomic theory behind the consumer welfare standard, these theories also support the contemporary antitrust regime.

Second, reformers contend that the Reagan-era shift in antitrust policy was mostly an elite-driven, ideological movement, but little in the reformist cannon explores whether the new economic thinking tapped into deeper social and political undercurrents.[11] Doing so reveals that the consumer welfare standard was not simply an ideological vehicle for a deregulatory movement pushed by political conservatives; the standard became popular in the 1970s partly because it appealed to consumer activists on the political left who were participating in what Lizabeth Cohen calls the "third wave consumer movement."[12] Similarly, concern about regulatory capture in antitrust had special poignancy

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[9] George Stigler, *The Theory of Economic Regulation*, 2 THE BELL J. OF ECONOMICS AND MANAGEMENT SCI. 3, 3-21 (1971), APPELBAUM, *supra* n.5, at CH. 6.
[10] Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. OF POLITICAL ECONOMY 110, 110-20 (1965); GERALD F. DAVIS, MANAGED BY THE MARKETS: HOW FINANCE RE-SHAPED AMERICA 44, 81-84 (2009).
[11] For an exception, see Lancieri, Posner, and Zingales, *supra* n.7, at 10-15.
[12] LIZABETH COHEN, A CONSUMER'S REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA CH. 8 (2003); BERMAN, *supra* n.6, at 13 ("the most important advocates for the economic style in governance consistently came from the center-left").

in the 1970s because, as the Watergate hearings revealed, President Nixon had actually abused his power in office to influence antitrust enforcement.[13] Consumer advocates, like Ralph Nader, also embraced the theory and encouraged liberal activists to believe that the American government was inherently corrupt.[14] Manne's arguments about corporate takeover markets were similarly rooted in a much broader shift towards shareholder capitalism, making antitrust deregulation an essential mechanism for redirecting corporate governance towards shareholder interests.[15]

Third, reformers overlook tectonic changes in American political institutions that hastened the demise of the New Deal approach to antitrust or assume that these changes are further evidence of ideological struggle. The composition of the Supreme Court changed dramatically starting in the late 1960s as the tenure of Earl Warren came to an end and that of Warren Burger began. After the 1974 election, the Democratic Party also shifted agenda-setting power to the party leadership and loosened the seniority system for selecting committee chairs, undermining some of the most ardent supporters of the New Deal approach in the process.[16] Though these changes made room for new ideologies to take root, it is inaccurate to consider them byproducts of ideological contestation, given their various motivations—from the resistance of Southern Democrats with important committee assignments to civil rights to widespread public concerns about judicial overreach on cases involving desegregation, criminal justice, abortion, and other issues. As durable institutional shifts, these changes arguably create more significant barriers to reform than economic ideology.

Fourth, reformers neglect significant changes within the Democratic Party as it struggled to articulate an alternative to Reaganism and came to embrace the knowledge economy. The implications of antitrust deregulation for various interest groups are easy to miss because the Chicago School

[13] *See infra* text accompanying notes 61-63.
[14] *See infra* text accompanying notes 43-48, 64-68.
[15] DAVIS, *supra* n.10, at CHS. 2-3.
[16] Stoller, *supra* n.3, at CH. 11.

perspective teaches that the only relevant cleavage, when it comes to antitrust *policy*, is that between producers and consumers. However, the most relevant cleavages, when it comes to antitrust *politics*, are those between workers, managers, and investors.[17] As the Democratic Party sought to bring technical, legal, and financial professionals into the party coalition and became increasingly ambivalent towards organized labor, antitrust became a less salient issue.[18] As it sought to increase the profitability of U.S. companies over their foreign competitors and demonstrate, to the public, that it had a viable innovation-based strategy for promoting economic growth, the Party's historic commitment to aggressive antitrust enforcement became a liability instead of an asset.[19]

In sum, the school of thought that enabled such a massive shift in the American political economy was broader than the consumer welfare standard, and the proponents of this ideology leveraged significant social and political developments of the 1970s and 1980s to make their demands more salient and to suggest that consumerist antitrust had broader public support than often assumed. True, elected officials did not campaign on antitrust reform, nor did voters give officials a clear mandate to change regulatory standards.[20] Rather, activists within both parties, drawing on broadly shared values and concerns, lobbied in support of antitrust reform in the name of consumer rights and achieved great success during the Reagan administration.[21] Changes in American political institutions and in partisan strategies for promoting economic development, as well as the coalitions supporting those strategies, also diminished the Democratic Party's willingness to emphasize antitrust in its governing agenda. Historical, sociological, and political scholarship on this period therefore reveals that the consumerist turn in antitrust arose from a combination of: (1) new economic ideas (section 1), (2)

[17] On the transactional perspective that better identifies political cleavages, *see infra* 15-16.
[18] See *infra* Section 3.
[19] *Id.*
[20] Lancieri, Posner, and Zingales, *supra* n.7.
[21] On liberal support for neoliberal reforms, more generally, *see* GARY GERSTLE, THE RISE AND FALL OF THE NEOLIBERAL ORDER: AMERICAN AND THE WORLD IN THE FREE MARKET ERA CHS 2, 5 (2022).

institutional shifts that created opportunities for those ideas to take hold (section 2), and (3) changes in interest group politics and party coalitions that weakened the Democratic Party's historical commitments to more robust enforcement (section 3).[22] From the vantage point of this political economy perspective, it is easier to identify the political barriers to reform and the kinds of reforms that will be consistent with public concerns and values moving forward (Conclusion).

In developing these arguments below, I focus on antitrust policy towards mergers and acquisitions. Doing so makes the argument more tractable, as a diverse array of conduct falls within the penumbra of antitrust oversight. Mergers are also one area where the Chicago School and New Deal approaches dramatically differed, and where enforcement policy significantly shifted in 1981.[23] Mergers also plays an important role in the American political economy, with the combined value of acquisitions reaching 13-15 percent of GDP in some years,[24] and they are the main way in which business both grow and *stay* large enough to acquire market power.

1. Chicago's Influence Beyond the Consumer Welfare Standard

The third-wave movement and consumer "rights"

Antitrust are reformers are correct in one crucial respect: the consumer welfare standard is the chief legacy of the consumerist turn in antitrust policy.[25] The consumer welfare standard uses a neoclassical economic framework (developed decades after Congress adopted the main antitrust

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[22] *See, e.g.,* MARK BLYTH, GREAT TRANSFORMATIONS: ECONOMIC IDEAS AND INSTITUTIONAL CHANGE IN THE TWENTIETH CENTURY CH. 2 (2002).

[23] Nicholas Short, *Antitrust Deregulation and the Politics of the American Knowledge Economy* (Dec. 17, 2019) (unpublished manuscript), https://nick-short.com/wp-content/uploads/2022/08/paper-4-antitrust-deregulation-and-the-politics-of-the-american-knowledge-economy.pdf.

[24] Jordan Brennan, *They Just Get Bigger: How Corporate Mergers Strangle the Economy: Corporate Mergers Kill Competition and Cause Economic Stagnation*, EVONOMICS: THE NEXT EVOLUTION OF ECONOMICS (Feb. 19, 2017), https://evonomics.com/corporate-mergers-strangle-economy-jordan-brennan/.

[25] Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 THE J. OF COMPETITION LAW 65, 65-68 (2019). Robert Bork supported a different welfare standard that counseled against intervening in mergers or acquisitions where consumer loss was more than offset by cost savings to the producer. *Id.*; W. KIP VISCUSI, JOSEPH E. HARRINGTON, JR., AND JOHN M. VERNON, ECONOMICS OF REGULATION AND ANTITRUST 135-27 (4th ed. 2005). But it is the consumer welfare standard described here that gained adherence among courts and antitrust officials.

statutes) to analyze the economic impact of mergers and acquisitions and other potentially anti-competitive conduct.[26] In this framework, the only relevant cleavage is that between producers and consumers, or those who sell and those who buy goods and services.[27] Events that enhance a producer's market power, like a horizontal merger with a competitor, allow a producer to raise prices which causes a deadweight efficiency loss from lower output (fewer products are consumed in total) but also a wealth transfer from consumers to producers flowing from anti-competitive pricing.[28] Antitrust officials then analyze proposed mergers to determine whether consumers will be harmed in any market and intervene only upon finding proof of likely consumer harm.[29]

Chicago School scholars developed and advocated on behalf of this framework starting in the 1960s,[30] though it became the dominant framework for antitrust analysis only after Ronald Reagan appointed conservatives to lead the Federal Trade Commission (FTC) and the Department of Justice's (DOJ's) Antitrust Division in 1981.[31] Richard Posner went so far as to claim that "justice" was equivalent to maximizing efficiency.[32] Robert Bork authored a popular book (based on his prior scholarship) in which he claimed that "the legislative histories of the antitrust statutes…do not support any claim that Congress intended the courts to sacrifice consumer welfare to any other goal."[33] These views, however troubling in retrospect, were well received by a broad audience, including some Supreme Court justices. In a 1979 antitrust case, the Court concluded that the floor debates on antitrust legislation "suggest that Congress designed the Sherman Act as a 'consumer welfare

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[26] Hovenkamp, *supra* n.25, at 65-68; Kahn, *supra* n.1, at 971-74; BAKER, *supra* n.1, at 26-27; Kahn and Vaheesan, *supra* n.3, at 238-39.
[27] Hovenkamp, *supra* n.25, at 65-68.
[28] Kahn and Vaheesan, *supra* n.3, at 238-39.
[29] Christine S. Wilson, *Welfare Standards Underlying Antitrust Enforcement: What You Measure Is What You Get*, Address at the George Mason Law Review 22nd Annual Antitrust Symposium, Antitrust at the Crossroads? (Feb. 15, 2009), https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf.
[30] APPELBAUM, *supra* n.5, at CH. 5.
[31] *See* EISNER AND MEIER, *supra* n.6, at 273-75.
[32] APPELBAUM, *supra* n.5, at 145.
[33] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 66 (1978).

prescription"', citing directly to Bork.[34] These same ideas took root within the bureaucracy after the election of 1980, when the Republican Party took control of the White House and the Senate. In the Senate hearing on William Baxter's appointment to lead the DOJ Antitrust Division, the new Chairman, Strom Thurmond (R-SC), repeated the claim that "[t]he objective and goal of the antitrust laws is, first and foremost, the protection of the American consumer…"[35] Baxter, and his counterpart at the FTC, James C. Miller III, promulgated new merger guidelines and implemented other policies that relied heavily on the consumer welfare standard.[36]

But reformers fail to explain why the consumer welfare standard gained legitimacy throughout the 1970s, when Democrats controlled Congress, and why it became a central pillar in antitrust analysis after Ronald Reagan's victory in 1980, when the House of Representatives—which shares oversight responsibilities with the Senate on antitrust matters—remained under Democratic control.

One reason is that the consumer welfare standard reframed antitrust policy in a way that appealed to liberal activists in the "third wave" consumer movement, which began in 1962.[37] The post-war era in which the New Deal antitrust system flourished was what Lizabeth Cohen calls a Consumer's Republic.[38] In the Consumer's Republic, consumer activism waned while simultaneously mass consumption came to be seen as a civic obligation, as an act that ordinary people could undertake to rebuild the economy.[39] But in 1962, consumer activism grew rapidly after President Kennedy claimed that consumers lacked representation in government, and that he himself would be their lobbyist.[40]

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[34] *Reiter v. Sonotone*, 442 U.S. 330, 343 (1979) (citing BORK, *supra* n.33, at 66); *see also* APPELBAUM, *supra* n.5, at 150; Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 835 (2014).
[35] *Hearing Before the Committee on the Judiciary, United States Senate, 97th Congress, First Session, on The Nomination of William F. Baxter to Be Assistant Attorney General—Antitrust Division*, 97th Cong. 1 (1981) (opening statement of Chairman Strom Thurmond).
[36] MARC ALLEN EISNER, ANTITRUST AND THE TRIUMPH OF ECONOMICS: INSTITUTIONS, EXPERTISE, AND POLICY CHANGE 109, 188-89, 198-201 (1991).
[37] COHEN, *supra* n.11, at CH. 3.
[38] *Id.* at 7-9.
[39] *Id.* at 11, 113, 119.
[40] *Id.* at 345.

This third wave consumer movement had strong ties to the Democratic Party and played a role in producing at least 33 separate bills between 1960 and 1978.[41] It differed from the Consumer's Republic in that it embraced the rights-based discourse of the period to shift attention away from the collective goals achieved through consumption and towards the interests of consumers as individuals.[42] In short, consumerism transitioned from an individual obligation to promote public interests to a public obligation to protect individual rights.

The consumer welfare standard naturally appealed to consumer rights activists because it sidelined all other antitrust objectives, like protecting the competitive process or the rights of small businesses to set retail prices, and made the individual consumer interest the only interest worthy of protection. In the late 1960s, Ralph Nader began organizing law school students (William Greider later called them Nader's Raiders) to investigate and publish critical exposes of federal agencies, often characterizing agency officials as lazy, closed-minded, ineffective, and protective of industry but indifferent to consumers. Their first target, in 1969, was the Federal Trade Commission, and their inflammatory report motivated Congress to reorganize the agency later that same year.[43] In later debates over antitrust reform legislation, a Texas Congressman claimed that "[t]he unknowing, unwitting coalescing of big business and consumer advocates resulted in the silent repeal of Robinson-Patman [antitrust legislation]."[44] And when the Raiders turned their attention to antitrust policy and the Department of Justice, in the early 1970s, they argued on behalf of an antitrust regime focused on

[41] *Id.* at 360, Table 7.
[42] *Id.* at 351.
[43] PAUL SABIN, PUBLIC CITIZENS: THE ATTACK ON BIG GOVERNMENT AND THE REMAKING OF AMERICAN LIBERALISM CH. 3 (2021); STOLLER, *supra* n.3, at 327-29. Nader may have collaborated with conservatives inside the FTC to produce the report. *Id.* at 327-28; *see also* WILLARD F. MUELLER, FIGHTING ANTITRUST POLICY: THE CRUCIAL 1960'S 80 (2009).
[44] STOLLER, *supra* n.3, at 329 (quoting *Recent Efforts to Amend or Repeal the Robinson-Patman Act—Part 1, Hearings Before the Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters of the Committee on Small Business, House of Representatives* 94th Cong. 35 (1975)).

consumer demands.[45] In fact, their report opens with the claim that "if the consumer movement wanted to focus on the issue with the most impact on the purchasing public, it would choose the failure of antitrust enforcement."[46] Importantly, while the report acknowledged the broader social and political concerns that motivated the major antitrust statutes, it also embraced Chicago School ideology to describe the harm that flows from rising industrial concentration.[47] In their own words: "[t]he maximization of consumer welfare was our talisman…"[48]

Whether the broader public supported, or was even aware of, these changes is a difficult question. On the one hand, litigation-based activism, for liberals and conservative, is premised on the belief that building broad public coalitions and seeking change slowly through Congress is a fool's errand.[49] Polls from the 1980s also show that the public was skeptical that mergers provide any consumer benefits at all and so, to the extent new standards would be more permissive towards mergers, it ran afoul of public demands.[50] Reagan administration officials also believed the public would not support their efforts to "throttle" enforcement, so they would have to do so through the bureaucracy rather than seek new legislation.[51]

On the other hand, the public broadly supported the goals of consumer advocacy groups, even if the public was likely unfamiliar with those groups' specific policy proposals or positions on antitrust. In 1979, 80 percent of adults believed that "the consumer movement will become stronger" over the

[45] MARK J. GREEN, BEVERLY C. MOORE, JR., AND BRUCE WASSERSTEIN, THE CLOSED ENTERPRISE SYSTEM: RALPH NADER'S STUDY GROUP REPORT ON ANTITRUST ENFORCEMENT 436-37 (1972).
[46] *Id.* at 5.
[47] *Id.* at 14.
[48] *Id.* at xviii ("The maximization of consumer welfare was our talisman…").
[49] SABIN, *supra* n.43, at CH. 3; STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT CH. 1 (2008).
[50] Nicholas Short, Sophie Hill, and Jacob R. Brown, *What is Ideological Capture and How Do We Measure It?: Using Antitrust Reform to Understand Expert-Public Cleavages* Appendix I (July 19, 2024) (unpublished manuscript), https://nick-short.com/wp-content/uploads/2024/05/Short-Hill-and-Brown-What-is-Ideological-Capture.pdf.
[51] Erik Peinert, *Mergers and Smoking Guns*, PROMARKET, May 13, 2022, https://www.promarket.org/2022/05/13/mergers-and-smoking-guns/.

next ten years.[52] That same year, when asked about which groups have "too little power and influence over our country's politics," the most popular answers were the poor (58 percent of adults) and consumer groups (31 percent).[53] And in 1980, 50 percent of adults said that consumer groups were doing an excellent or a very good job "to make our society acceptably safe."[54] The movement's popularity, in this sense, likely gave its demands—including the consumer welfare standard—the veneer of public support, even when movement leaders advocated for policies that were not necessarily consistent with public demands.

In sum, though some political conservatives may have found the consumer welfare standard to be a convenient ideological vehicle for advancing a deregulatory, laissez-faire agenda, the standard also appealed to consumer activists with strong ties to the Democratic Party. Long before the election of 1980, consumer interest groups, which seemed to have broad public support, directly targeted the two main antitrust agencies and advocated for reforms that would force those agencies to focus solely on consumer welfare. These developments likely led many public officials to see the consumer welfare standard as a bi-partisan reform effort, even if support for the standard came mostly from activists who are not representative of the broader public.

Corruption and capture

The beliefs that motivated these consumer activists were also quite broad. Chief among them was the view that the post-war political economy, with its cozy relationships between business managers, labor unions, and regulators, did not produce policies that advanced the public interest, but instead

[52]ABC News/Louis Harris and Associates, ABC News/Louis Harris and Associates Poll: September 1979, Question 5, USABCHS.030380.R1E, ABC News/Louis Harris and Associates, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1979), Survey question, DOI: 10.25940/ROPER-31103376.
[53] The Roper Organization, Roper Reports 79-9, Question 14, USROPER.79-9.R09, The Roper Organization, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1979), Survey question, DOI: 10.25940/ROPER-31097355.
[54] Marsh & McLennan, Marsh & McLennan Poll: December 1979, Question 58, USHARRIS.80RISK.R26C, Louis Harris & Associates, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1979), Survey question, DOI: 10.25940/ROPER-31103436.

bred corruption and policies that advanced the corporate interest.[55] As a result, another Chicago School doctrine—the theory of regulatory capture—seemed to resonate with liberal activists of the time and motivate the push for a change in regulatory frameworks.

The theory of regulatory capture was articulated most clearly in 1971 by George Stigler, who claimed "that, as a rule, regulation is acquired by the [regulated] industry and is designed and operated primarily for its benefit."[56] This theory laid the intellectual foundation for much of the deregulatory movement that President Reagan capitalized upon, but which began with President Carter. It had surprising appeal to consumer activists,[57] many of whom were, in a somewhat contradictory fashion, escalating their demands for new laws and regulations in the consumer interest. Nader himself championed deregulation.[58] President Carter, who, like JFK, saw himself as the voice of consumers in Washington,[59] chose the economist Alfred Kahn to launch a deregulatory movement in transportation (airlines, trucking, and rail).[60]

Antitrust regulators were uniquely susceptible to this attack. Congressional investigations into the Watergate scandal revealed that President Nixon had intervened in pending antitrust suits against one of the nation's largest industrial conglomerates, International Telephone and Telegraph, in exchange for a $400,000 donation to the Republican National Convention.[61] The public also knew about the

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[55] SABIN, *supra* n.43, at 40-41.

[56] Stigler, *supra* n.9, at 3; Daniel Carpenter and David A. Moss, *Introduction*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 5-16 (Daniel Carpenter and David A. Moss eds., 2014); *see also* JUDITH STEIN, PIVOTAL DECADE: HOW THE UNITED STATES TRADED FACTORIES FOR FINANCE IN THE SEVENTIES 250-51 (2010) (suggesting the theory comes from Samuel Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE LAW JOURNAL 467 (1952)). Others, including BERMAN, *supra* n.6, at 158-9, emphasize similar themes ("clientelism") in THEODORE LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES (1969).

[57] BENJAMIN C. WATERHOUSE, LOBBYING AMERICA: THE POLITICS OF BUSINESS FROM NIXON TO NAFTA 32-33, 152-55 (2014).

[58] APPELBAUM, *supra* n.5, at 167-68; COHEN, *supra* n.12, at 355.

[59] APPELBAUM, *supra* n.5, at 170.

[60] *Id.* at 170-80; *see also* THOMAS K. MCCRAW, PROPHETS OF REGULATION CH. 7 (1984).

[61] E.W. Kenworthy, *The Extraordinary I.T.T. Affair: What's Good for a Corporate Giant May Not Be Good for Everyone Else*, N.Y. TIMES, Dec. 16, 1973, at E3. Nixon may not have been the only President to undermine the independence of the DOJ's Antitrust Division. Jonathan Baker contends, for example, the President Johnson directly intervened in a bank merger review because one of the banks was owned by a critical newspaper editor. BAKER, *supra* n.1, at 53.

scandal. A nationwide poll from April of 1972 showed that 59 percent of respondents had "read or heard about the ITT…anti-trust case, in which the case was settled out of court at the same time ITT was supposed to be pledging $400,000 for the Republican convention in San Diego."[62] A month earlier, fewer respondents knew about the scandal (29 percent), but 33 percent of those who knew about it believed that there was wrongdoing on the part of both ITT and government officials, and 16 percent of all respondents believed that President Nixon was "directly involved" in arranging a quid pro quo.[63]

The ITT scandal may have been unique, but it gave credence to the theory that powerful business interests could influence supposedly independent agencies and that elected officials would abuse their power to extract personal favors. This concern was not confined to anti-government conservatives but was shared by anti-government liberals like Ralph Nader and his acolytes. An entire chapter of the Raider's report on antitrust enforcement, which was published *before* the ITT scandal broke, tried to establish widespread corruption among bureaucrats and Congressional overseers, even though the evidence of any actual corporate influence or abuse of power was, at that time, quite thin.[64]

The values motivating this critique also had deep roots. For example, in 1976, 65 percent of registered voters agreed or said they were not sure "that there is something morally wrong with the country at this time,"[65] and of that sub-sample, 55 percent strongly agreed that "our political and business leaders are more corrupt than they used to be."[66] Despite the deep economic turmoil of that

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[62] Louis Harris & Associates, Louis Harris & Associates Poll: April 1972, Question 12, USHARRIS.050172.R1 (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1972), Survey question, DOI: 10.25940/ROPER-31107700.
[63] Opinion Research Corporation, ORC Public Opinion Index, Question 15, USORC.031972.R13E (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1972), Survey question, DOI: 10.25940/ROPER-31107767.
[64] GREEN, MOORE, AND WASSERSTEIN, *supra* n.45, at CH. 2.
[65] Time Magazine, Time Soundings Poll # 8510: Government/1976 Presidential Election, Question 26, USYANK.768510.Q07B, Yankelovich, Skelly & White, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1976), Survey question, DOI: 10.25940/ROPER-31099132.
[66] Time Magazine, Time Soundings Poll # 8510: Government/1976 Presidential Election, Question 28, USYANK.768510.Q07C2, Yankelovich, Skelly & White, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1976), Survey question, DOI: 10.25940/ROPER-31099132.

period, almost equal shares of respondents (40 and 41 percent) asserted that "straightening the economy" and "improving the moral leadership of our country" was the most important issue in the 1976 election.[67] These concerns also appear to have been stable. In 1982, the second year of the Reagan administration, 48 percent of adults believed that, compared to Watergate, national politics is about the same or more corrupt.[68]

In short, consumer rights advocates amplified the public's growing mis-trust of American political institutions, after Watergate, and in doing so, they weakened the case for strengthening enforcement (apart from their support for a shift in regulatory standards). For a brief moment, in 1981, almost half of American adults had "no real feelings" about mergers involving large companies,[69] and only 31-34 percent in a sample of adults and college students supported government efforts to "make it harder" for companies to merge.[70]

Financialization, shareholder capitalism, and "takeover markets"

However useful the consumer welfare standard is when it comes to antitrust administration, it is not a helpful framework for understanding antitrust politics. In fact, the avowed purpose of the framework is to create the appearance that antitrust enforcement is apolitical[71] even though the singular focus on consumers is itself an expression of political values.[72]

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[67] Time Magazine, Time Soundings Poll # 8510: Government/1976 Presidential Election, Question 25, USYANK.768510.Q07A, Yankelovich, Skelly & White, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1976), Survey question, DOI: 10.25940/ROPER-31099132.
[68] Associated Press/NBC News, NBC News/Associated Press Poll: National Poll, June 1982, Question 25, USNBCAP.80.R32, Associated Press/NBC News, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1982), Survey question, DOI: 10.25940/ROPER-31094626.
[69] The Roper Organization, Roper Reports 1981-08: Economy/Business, Question 121, USROPER.81-8.R45I, The Roper Organization, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1981), Survey question, DOI: 10.25940/ROPER-31097374.
[70] General Electric, General Electric Quarterly Survey 81-04, Versions I & II and College Student, Question 122, USGE.198103.Q11BV1, General Electric, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1981), Survey question, DOI: 10.25940/ROPER-31092171; General Electric, General Electric Quarterly Survey 81-04, Versions I & II and College Student, Question 61, USGE.198104.Q10BV2, General Electric, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1981), Survey question, DOI: 10.25940/ROPER-31092171.
[71] *See* Hovenkamp, *supra* n.25, at 65-68 (arguing that the consumer welfare standard is not redistributive and that the protected classes are so broad that the standard effectively helps everyone in a certain capacity)
[72] Short, Hill, and Brown, *supra* n.50, at 1-3; BERMAN, *supra* n.6, at 4-6, 16-17.

An alternative perspective, still rooted in economic analysis, might place more emphasis on rent extraction. Mergers are not simply events that may increase prices. They are also transactions from which management consultants, lawyers, and financial advisors profit enormously; in which financial institutions, especially investment banks and private equity firms, generate substantial returns; in which realizing "efficiencies of scale" tends to mean layoffs and outsourcing for company employees; and in which changing management often means replacing an executive with ties to the local community with one who has none. Managers can also finance a merger with debt to make claims on a company's retained earnings, which can make the target company financially unstable and more prone to seek a government bailout, at taxpayer expense. In this transactional view, the relevant cleavages are those between workers and service professionals, workers and managers, managers and investors, and investors and taxpayers.

The transactional perspective for analyzing antitrust politics offers several benefits. To start, the relationship between antitrust policy and inequality comes into much clearer focus. Contrary to the prevailing view (even among many reformers) the main redistributive problem in antitrust policy arises not from abstractions like consumer loss or market power[73] but from concrete transactions that tend to eliminate jobs while paying handsome royalties to groups that are relatively affluent.[74] The framework also formalizes various critiques of the consumer welfare standard that reformers have already recognized. Stoller, for example, notes that, in contrast with Nader, Brandeis thought consumerism was short-sighted and cared much more about people in their capacities as workers and

[73] Kahn and Vaheesan, *supra* n.3, at 239. Those authors contend that firms with market power, in the neoclassical sense, acquire supra-competitive profits or rents that accrue mostly to the benefit of managers and shareholders, but the connection between abstract "market power rents" and rising executive compensation, for example, is poorly specified. *Id.* at 239-45. The authors also rely on the same neoclassical framework for specifying the relationship between market power and inequality that Khan, *supra* n.1, at 960-65, sees as inherently problematic.

[74] Short, *supra* n.23, at 13-16 (showing that, when merger activity outpaces growth in total income, state-level fiscal income inequality tends to increase, that the effect size depends on the state's share of total income from legal or financial professionals, and that the effect exists even after controlling for capital income effects).

as citizens.[75] Appelbaum notes that Democratic appointees like Alfred Kahn, who took a dim view of organized labor, intentionally pursued deregulation in order to transfer wealth from workers to consumers.[76] A transactional framework allows these cleavages to come to light while adding some additional nuance. Not all workers are disadvantaged, for example: white-collar knowledge economy professionals often stand to reap great rewards even if blue-collar workers who are deemed redundant suffer.

Another value of the transactional perspective is that it emphasizes the unique interests that financial institutions have in the consumerist approach to antitrust, which complicates the politics of reform. The first hostile takeover wave following the consumerist turn in antitrust law came at the behest of junk bond traders, like Michael Milliken, who leveraged financial deregulation to press huge pools of new capital into the service of acquisitions and divestitures.[77] Private equity firms, many of which are located in Democratic leaning Connecticut, have since replaced the "corporate raiders" of the 1980s as takeover specialists.[78] Together with hedge fund managers, their political power is largely believed to be responsible for the infamous "carried interest" provision that taxes much of the fund managers' income at the lower capital gains rate rather than the higher rate paid by wage earners.[79] Investment bankers, many of which are located in solidly Democratic New York, earn lucrative advisory fees from mergers and have profited enormously from lax antitrust environment.[80] These

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[75] STOLLER, *supra* n.3, at 327, 351; *see also* APPELBAUM, *supra* n.5, at 150 (lamenting that consumerism has undermined the extent to which individuals identify as workers).
[76] APPELBAUM, *supra* n.5, at 179.
[77] EILEEN APPELBAUM AND ROSEMARY BATT, PRIVATE EQUITY AT WORK: WHEN WALL STREET MANAGES MAIN STREET 21-34 (2014).
[78] *Id.*
[79] *Id.* at 51-52.
[80] Financial institutions that earn advisory fees in connection with mergers and acquisition self-report certain metrics, like the net debt of target firms for the deals in which each institution participated, to earn high rankings in "league tables" published by Thomson Reuters and to enhance their reputation as experts. In 1985, the first year for which league table data is available, investment banks worked on deals involving about 160 billion dollars in net target debt but by the year 2000 they worked on deals involving about 3.5 trillion dollars in net target debt. These are nominal figures not adjusted for inflation, but assuming advisory fee structures captured about 1 percent of net debt (which is reasonable given historical data), they suggest that advisory fees increased from about 1.6 to 35 billion dollars in just 15 years, which translates to a growth rate of about 2,188 percent. In 2018, the top five banks ranked by net target debt were Morgan

financial institutions also have substantial stakes in secondary markets for the corporate debt that finances mergers, as those obligations can also be securitized and traded.[81]

From the vantage point of the transactional perspective, then, the consumerist turn in antitrust was also driven by increasing financialization in the American political economy and the Chicago School theories that abetted that trend. Financialization refers to the "tendency for profit making in the economy to occur increasingly through financial rather than productive activities," as evidenced by a growing financial share of total corporate profits and a growing share of profits among non-financial firms flowing from financial investments.[82] Financialization in the American political economy arose from government action—especially deregulation and changes in monetary policy during the Reagan era—and from a sea change in attitudes about corporate governance among business managers and investors, which took place in the 1970s and 1980s.[83] Both sources of financialization had conservative intellectual underpinnings, and each promoted a *laissez-faire* approach towards mergers.

In the early 1980s, the Federal Reserve experimented with monetarism to reduce inflation, a policy advocated most forcefully by Chicago School economist, Milton Friedman.[84] The experiment generated exceptionally high interest rates that caused a huge inflow of foreign capital while also creating a punishing environment for making productive investments in the domestic economy, thereby pushing non-financial firms to pursue high returns that could only, at that time, be generated in financial markets.[85] A founding member of the American Business Conference testified before the Joint Economic Committee in April of 1983 that American companies faced such high costs of capital

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Stanley, Goldman Sachs, JP Morgan, Citi, and Bank of America and aggregate net target debt of deals involving financial advisors remained around 3.1 trillion dollars.

[81] DAVIS, *supra* n.10, at 116.

[82] GRETA R. KRIPPNER, CAPITALIZING ON CRISIS: THE POLITICAL ORIGINS OF THE RISE OF FINANCE 4, 27-57 (2011).

[83] *Id.* at CH. 1; DAVIS, *supra* n.10, at CH. 1.

[84] APPELBAUM, *supra* n.5, at CHS. 2-3.

[85] KRIPPNER, *supra* n.82, at CHS. 4-5.

relevant to competitors in Japan and elsewhere that "the only economically viable investment for their funds is to acquire other companies."[86] He also lamented that these kinds of acquisitions "do not contribute to job creation or to the economic wealth of the United States,"[87] a surprising admission from a business lobbyist. The shift to the consumer welfare standard may have opened the door to an explosion in mergers and acquisitions, by removing an essential regulatory barrier. But the broader macroeconomic environment and the monetarist experiment within the American government pushed many businesses through that door by creating economic incentives to pursue mergers in lieu of investments that might create jobs or enhance productivity.[88]

In addition to these changes in macroeconomic management, financialization also arose from a shift in attitudes towards corporate governance among investors and business managers.[89] Legal and normative theories of corporate governance are grounded in the idea that there is an "agency problem" that arises from the separation of ownership and control, in which only a handful of managers make critical decisions about the performance of a company that is funded by many investors.[90] During the period in which the New Deal antitrust system thrived, the American political economy was driven

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[86] *The High Cost of Capital: Hearing Before the Joint Economic Committee*, 98th Cong. 4 (1983) (statement of George N. Hatsopoulos); *see also* KRIPPNER, *supra* n.82, at 56.
[87] *Id.*
[88] Though beyond the scope of this article, the tax system also incentivizes mergers. Alan J. Auerbach and David Reishus, *The Impact of Taxation on Mergers and Acquisitions*, in *Mergers and Acquisitions* 69-86 (Alan J. Auerbach ed., 1988).
[89] Steven Dunning, *Why Maximizing Shareholder Value is Finally Dying*, FORBES (Aug. 19, 2019 6:06pm), https://www.forbes.com/sites/stevedenning/2019/08/19/why-maximizing-shareholder-value-is-finally-dying/?sh=4263f3d86746. There is little evidence that this theory ever had public support. In 1985, when asked about plant closings, only 19 percent answered that a company had a primary responsibility to shareholders while 77 percent answered that the company's primary responsibility was to its employees, the local community, or some combination including employees and the community. Cambridge Reports/Research International, Cambridge Reports/Research International Poll: January 1985, Question 139, USCAMREP.85JAN.R147, Cambridge Reports/Research International, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1985), Survey question, DOI: 10.25940/ROPER-31104148. In 1996, only 5 percent agreed that "U.S. corporations should have only one purpose...to make the most profit for their shareholders…and their pursuit of that goal will be the best for America in the long run." Business Week Magazine, Business Week Magazine Poll: February 1996, Question 35, USHARRBW.031196.R09, Louis Harris & Associates, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1996), Survey question, DOI: 10.25940/ROPER-31109028; *see also* Democratic Leadership Council, Democratic Leadership Council Poll: October 1998, Question 34, USPENN.99DLCDA.R17, Penn, Schoen & Berland Associates, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1998), Survey question, DOI: 10.25940/ROPER-31108528.
[90] DAVIS, *supra* n.10, at CH. 2.

by a form of "managerial capitalism" characterized by attitudes towards corporate governance that left investors relatively powerless but gave managers lots of discretion, discretion that managers often used to satisfy a diverse array of stakeholders including not only investors but also workers and community members.[91] By the 1980s, managerial capitalism had largely been replaced by "shareholder capitalism," which limited managerial prerogatives and committed managers to the pursuit of a single goal: maximizing the return to their shareholders.[92] The intellectual roots for this development again lay with Friedman and the Chicago School.[93]

For Chicago School scholars like Henry Manne, antitrust deregulation performed an important role in making shareholder capitalism function. In an influential 1965 article, Manne argued that managers who do not maximize shareholder returns can only be disciplined in the market for "corporate control," in which takeovers allow shareholders to capture capital gains from displacing ineffective management.[94] He also argued that mergers, rather than the direct purchase of shares in the market place (or proxy fights), were the most efficient way of creating an effective market for corporate control so that a more relaxed approach to antitrust scrutiny of mergers could improve economic welfare.[95] He even entertained the possibility that, "so long as entry into industry is kept open, there is no reason at all for rules against mergers," though he recognized that reform along those lines would be politically difficult.[96]

Manne's theory did not change the way that antitrust enforcement agencies police mergers as the consumer welfare standard proved much easier to administer. Nevertheless, it is an important subcomponent of Chicago School ideology that supports the lax approach to antitrust and it is one

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[91] *Id.* at CHS. 2-3.
[92] *Id.*
[93] Steve Denning, *The Origins of 'The World's Dumbest Idea': Milton Friedman*, FORBES (June 26, 2013), https://www.forbes.com/sites/stevedenning/2013/06/26/the-origin-of-the-worlds-dumbest-idea-milton-friedman/.
[94] Manne, *supra* n.10, at 113.
[95] *Id.* at 119.
[96] *Id.*

that achieved broad dissemination not just through scholarly articles but also through Manne's judicial seminars, which almost 20 percent of all federal judges had attended by 1980.[97] Businesses who wish to merge despite government resistance typically seek redress through the federal courts. Careful empirical work shows that the judges who attended these seminars became significantly more likely to invoke ideas from the law and economics movement, associated with the Chicago School, and to render more conservative verdicts in economics cases, including antitrust cases.[98]

In sum, the ideological scaffolding underneath the current system of lax antitrust enforcement goes well beyond the consumer welfare standard, though that standard is the most important plank. The consumerist critique of antitrust was also rooted in a concern about regulatory capture and political corruption and in the need to create effective markets for corporate control to keep managers focused on maximizing shareholder value. Some of these arguments tapped into deeper political and economic trends. Consumer activists on the political left embraced the consumer welfare standard and echoed the view that antitrust regulators were prone to regulatory capture, ideas which resonated with the American public after Watergate and in a time when restraining the growth of consumer prices, or inflation, was a paramount economic problem. The public also seems to have supported the work of consumer groups and to have been briefly indifferent to business mergers in the early 1980s. Many business managers and financial professionals of mixed political tendencies also came to support shareholder capitalism and began to see aggressive antitrust enforcement as interfering with, rather than supporting, free market capitalism, especially when it came to the "market" for managerial control. With singular focus on the consumer welfare standard, the reformist perspective

[97] APPELBAUM, *supra* n.5, at 148-49.
[98] Elliott Ash, Daniel L. Chen, and Suresh Naidu, *Ideas Have Consequences: The Impact of Law and Economics on American Justice* (Nat'l Bureau of Econ. Research, Working Paper No. 29788, 2022) (unpublished manuscript), https://www.nber.org/papers/w29788.

misses these other important components of the ideological movement, and the unique political context in which they took root.

2. Dismantling Institutional Constraints

The Burger Court

Other important developments, including changes in American political institutions, supported the consumerist turn in antitrust. Arguably the most important change took place within the judiciary. The New Deal approach to antitrust may have started with entrepreneurial bureaucrats like Thurman Arnold and Wendell Berge,[99] but it was also supported by Supreme Court justices who favored the interventionist approach long after officials like Arnold and Berge had retired, especially Justices Warren, Black, and Douglas.[100] In a 1962 case, for example, the Court suggested that the antitrust laws not only allowed antitrust officials to scrutinize horizontal and vertical mergers, but also conglomerate mergers.[101] It then affirmed an order unwinding a vertical merger between a shoe manufacturer and a shoe retailer, partly because the government had established an industry trend toward concentration and partly because the antitrust laws, in the majority view, were meant to preserve industries composed of small businesses—concerns that go well beyond consumer price.[102]

The composition of the Court changed dramatically by the middle of the 1970s, when the Chicago School movement was reaching its apogee. Earl Warren retired in 1969 and President Nixon appointed Warren Burger in his stead; Hugo Black and John Harlan both retired in 1971 and President

[99] *See, e.g.,* STOLLER, *supra* n.3, at CH. 5; DAVID M. HART, FORGED CONSENSUS: SCIENCE, TECHNOLOGY, AND ECONOMIC POLICY IN THE UNITED STATES, 1921-1953 CH. 4 (1998).
[100] Eleanor M. Fox, *Modernization of Antitrust: A New Equilibrium*, 66 CORNELL. L. REV. 1140, 1142-43 n.8 (1980-81).
[101] *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 317 (1962).
[102] *Id.* at 332-33.

Nixon appointed Lewis Powell and William Rehnquist, respectively, to fill those seats; William Douglas retired in 1975 and President Ford subsequently appointed John Paul Stevens to the bench.[103]

Justice Powell is known for writing a memorandum for the Chamber of Commerce in 1971 in which he argued that American capitalism was "under broad attack," a memo that some political scholars credit with fueling the rise of business lobbying that unfolded later in the 1970s.[104] But Powell's own judicial activism, rather than the business community's mobilization, had a more enduring impact on antitrust policy. In the early 1970s, though many business managers had come to see antitrust laws as interfering with rather than protecting free markets, many also believed it would be political folly to try and reform the laws in their favor given the laws' broad popular support.[105] Powell, in contrast, patiently waited for an antitrust case to come up through which he could instantiate Chicago School ideas.[106] That opportunity arose with the 1977 case of *Continental T.V., Inc. v. GTE Sylvania, Inc.*, in which Justice Powell, joined by Justices Burger, Stevens, and another Nixon appointee, Harry Blackmun, authored a majority opinion citing heavily to Bork and Posner to conclude that vertical restrictions imposed on retailers have pro-competitive merit.[107] Only two years later, Justice Burger, joined by every justice except Brennan, codified the consumer welfare standard into law.[108] Slowly, over time, the Court adopted consumerist views on a wide range of anti-competitive conduct.[109]

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[103] *Justices 1789 to Present*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/members_text.aspx.

[104] Lewis F. Powell Jr., *Attack On American Free Enterprise System* (Aug. 23, 1971) https://scholarlycommons.law.wlu.edu/powellmemo/1; *see also* JACOB S. HACKER AND PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 116-20 (2010).

[105] LEONARD SILK AND DAVID VOGEL, ETHICS AND PROFITS: THE CRISIS OF CONFIDENCE IN AMERICAN BUSINESS 177 (1976). When business interests did advocate for changes in antitrust policy later in the 1970s, they focused on rules that prohibited joint ventures and other activity that, from their perspective, inhibited innovation, an issue that I take up in the next section.

[106] Andrew I. Gavil, *A First Look at the Powell Papers:* Sylvania *and the Process of Change in the Supreme Court*, 17 ANTITRUST 8, 9-11 (2002); BAKER, *supra* n.1, at 43.

[107] 433 U.S. 36, 54-59 (1977).

[108] *Reiter v. Sonotone*, 442 U.S. 330, 343 (1979) (citing BORK, *supra* n.33, at 66).

[109] BAKER, *supra* n.1, at 44.

The changing composition of the Court allowed the Chicago School perspective on antitrust to have dramatically more influence than it otherwise would have had if its only adherents had been presidential appointees to the antitrust bureaucracy. Agency officials in one administration might change enforcement standards or promulgate new regulatory guidelines, but little stands in the way of officials in the next administration should they take a different view. When the Supreme Court altered the meaning of the antitrust laws, that bureaucratic discretion evaporated. Undoing the Supreme Court's revisionist interpretation requires an act of Congress. In the absence of such an act, bureaucrats are forced to work within the limits of the consumerist approach.[110]

This institutional shift should not be lumped in with the law and economics movement that it leveraged. It is not clear that Nixon's appointees to the Supreme Court sought to hobble antitrust enforcement because of Chicago School ideology rather than using it as a pretext to accomplish an outcome motivated by a more general antipathy to an interventionist state or by a desire to align antitrust policy with perceived public demands.[111] The counterfactual claim, in other words, is that the Supreme Court would not have pushed antitrust law in a new direction—or would have been much less likely to do so—in the absence of the Chicago School. Because of the multiple forces converging in favor of deregulation, described above and below, it is not clear that this is true.

Changes in Congressional Institutions

The Supreme Court is not the only political institution for which momentous changes abetted the consumerist turn in antitrust. Congress also went through substantial changes after the election of 1974, during Watergate, changes that substantively influenced the politics of antitrust and weakened support for the New Deal system. Prior to 1974, Congress was organized in such a way that the

[110] BERMAN, *supra* n.6, at 16.
[111] BERMAN, *supra* n.6, at 17 (arguing that political appointees in the Reagan administration were strategic in their use of economic analysis, rejecting it when it would bolster the welfare state, "while expanding it in areas like antitrust and environmental policy, where he thought it would support his preferences for less regulation").

seniority system gave substantial discretion and power to committee and subcommittee chairmen,[112] some of whom were important advocates for the New Deal antitrust regime, like Wright Patman of Texas and Emanuel Celler of New York in the House of Representatives and Estes Kefauver of Tennessee and Philip Hart of Michigan in the Senate.[113] The demise of the aggressive antitrust overseers was in part tragic happenstance: Kefauver died in 1963 and then Hart, who took over for Kefauver as chairman of the Senate Subcommittee on Antitrust and Monopoly, succumbed to cancer in 1976.[114] Part of their demise reflected the changing politics of the time: Emmanuel Celler, who represented New York in the House for almost 50 years, lost a Democratic primary in 1972 to Elizabeth Holtzman after announcing his opposition to the Equal Rights Amendment, a concrete warning that historical commitments to economic populism would not carry much weight with the New Left.[115]

But their demise was also hastened by a substantial shift in the organization of Congress in the early 1970s.[116] The Democratic coalition of the New Deal had always included many conservative southern Democrats whose position on civil rights had become untenable for liberals.[117] Some of these conservatives held powerful committee chairmanships which they used to obstruct progress on civil rights legislation, and the seniority system used for selecting committee chairs insulated these conservatives from attack by more liberal members of the Democratic Party.[118] Though liberals in the Democratic caucus had tried to disempower committee chairs since 1948, it was not until the election

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[112] *See, e.g.,* ERIC SCHICKLER, DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS Ch. 5 (2011).
[113] STOLLER, *supra* n.3, at 186, 318.
[114] *Estes Kefauver is Dead at 60 After Heart Attack: Democratic Senator From Tennessee Was Foe of Crime and Monopoly*, N.Y. TIMES, Aug. 111, 1963, at A1, https://www.nytimes.com/1963/08/11/archives/estes-kefauver-is-dead-at-60-after-heart-attack-democratic-senator.html; *Senator Philip A. Hart Dies at 64: Was Called Conscience of the Senate*, N.Y. TIMES, Dec. 27, 1976, at D11, https://www.nytimes.com/1976/12/27/archives/senator-philip-a-hart-dies-at-64-was-called-conscience-of-senate.html.
[115] STOLLER, *supra* n.3, at 296.
[116] SCHICKLER, *supra* n.112, at CH. 5.
[117] JOHN A. LAWRENCE, THE CLASS OF '74: CONGRESS AFTER WATERGATE AND THE ROOTS OF PARTISANSHIP CH. 1 (2018).
[118] *Id.*

of 1974, which produced a landslide class of 93 freshmen, that the balance of power within the Democratic caucus finally tipped.[119] Liberal Democrats seized the opportunity and passed a set of procedural reforms that diminished the power of committee chairs and aggrandized the power of the caucus over committee appointments and the power of the leadership to control the flow of bills presented on the floor.[120] The caucus then used its new powers over committee appointments to topple two senior members from their committee chairmanships, one of whom was Wright Patman.[121] Afterwards, when reporters asked one of the new class members "whether she felt that Patman's main foe, concentration of power in the big corporations and banks, was the right one" she responded: "I don't know. I haven't had a chance to study that."[122]

Celler's lost primary and Patman's lost committee seat were partly the result of tectonic, generational political shifts that elevated feminism, environmentalism, and other rights-based causes (including consumerism) to the top of the Democratic political agenda while pushing aside other issues like the growth of big business. In other words, they were symptoms of much larger changes within the Democratic Party coalition, which I take up in the next section. But the Democratic Party of the 1970s also authored new rules for organizing Congress. And those rules made it harder for idiosyncratic members out of step with the Party leadership to enforce the laws in a manner consistent with Congressional intent, as the rank and file deepened their commitments to consumerism and economic analysis. In the related area of financial regulation, for example, new archival research shows that Democratic Party leaders, not Republicans, backed sweeping deregulatory reforms, and they used procedural mechanisms to achieve those goals over the objection of committee members.[123] Patterns

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[119] *Id.* at 6.
[120] *Id.* at CHS. 4-5.
[121] *Id.* at 98, 107-14; *see also* STOLLER, *supra* n.3, at 341-47.
[122] Alexander Cockburn and James Ridgeway, *Why They Sacked the Bane of the Banks*, THE VILLAGE VOICE, Feb. 3, 1975, at 19-20.
[123] For a discussion of the effect of this change on financial deregulation more broadly, *see* Richard Barton, *Upending the New Deal Regulatory Regime: Democratic Party Position Change on Financial Regulation*, 22(2) PERSPECTIVES ON POLITICS 391, 391-408 (2024).

in Congressional voting behavior on financial deregulation further suggest that the 1974 organizational changes severed the electoral connection, giving many members the leeway to pursue partisan objectives championed by the Party leadership while giving much less weight to constituent demands.[124] For all its costs, then, the seniority system seems to have played a role in propping up the interventionist approach to antitrust because it insulated passionate political mavericks, like Patman, from intra-party pressure.

3. Economic Strategy and Democratic Interest Groups

Antitrust reformers not only look past important institutional changes that complicate antitrust politics, they also look past important changes in interest group and party politics associated with the rise of the knowledge economy. The New Deal system of antitrust intervention was supported primarily by the New Deal coalition within the Democratic Party, a coalition that matured during the Fordist period, when manufacturing was believed to be the primary mechanism for generating economic prosperity, and a coalition in which organized labor accordingly played a pivotal role.[125] The nature of that coalition began to shift in the 1970s, as George McGovern in 1972 and then Jimmy Carter in 1976 began to amplify the demands of middle-class professionals and consumer activists but grew increasingly indifferent to organized labor.[126] The coalition also came under strain as the Democratic Party turned towards the knowledge economy in the 1980s.

Legal Professionals and Organized Labor in the Democratic Coalition

As white-collar professionals acquired more power in setting the Democratic Party agenda, the New Deal system of antitrust enforcement began to wither. When Ralph Nader began building

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[124] *Id.*
[125] GARY GERSTLE, THE RISE AND FALL OF THE NEOLIBERAL ORDER CHS. 1-2 (2022); DANIEL SCHLOZMAN, WHEN MOVEMENTS ANCHOR PARTIES: ELECTORAL ALIGNMENTS IN AMERICAN HISTORY CHS. 6-7 (2015).
[126] STEIN, *supra* n.47, at CHS. 3, 6; LILY GEISMER, DON'T BLAME US: SUBURBAN LIBERALS AND THE TRANSFORMATION OF THE DEMOCRATIC PARTY CH. 6 (2015).

durable institutions for consumer advocacy in the late 1960s, he chose to follow other interest groups that primarily pursued policy reform through litigation, like the Legal Defense Fund of the NAACP and the American Civil Liberties Union.[127] The Raiders who became active in this "public interest movement" and who drafted scathing critiques of the antitrust agencies were predominately young, White lawyers or law school students from the Ivy League.[128] As their reports reveal, these affluent legal professionals readily embraced Chicago School ideology.

This accommodation of consumerist ideals among legal professionals—even staunchly liberal ones—is not a fleeting characteristic of the 1970s, nor is it confined to the subset of lawyers involved in the consumer rights movement. In one study of public opinion from 1980-2014, individuals in the 18-34 age bracket and those who make more than $100,000 expressed lower support for "doing more" to enforce the antitrust laws, as did those who resided in states with high shares of income in legal services.[129] The subset of states where merger waves have a close association with income inequality (suggesting large economic benefits flowing from merger activity) are also states that tend to strongly favor Democratic presidential candidates, and in these states, higher Democratic vote shares are associated with *lower* support for doing more to enforce the nation's antitrust laws.[130] Another study found that support for abandoning the consumer welfare standard is pervasive among the public (69.5 percent of strong Republicans and 81.5 percent of strong Democrats), but much lower (36.7 percent) among antitrust lawyers, even though the lawyer sample was mostly Democrats.[131] And, while lawyers make up only one-half of one percent of the U.S. adult population,[132] they are an important

[127] SABIN, *supra* n.43, at CH. 3
[128] *Id.*
[129] Short, *supra* n.23, at 16-20.
[130] *Id.*
[131] Short, Hill, and Brown, *supra* n.50, at 24-26, Fig. 5.
[132] A recent survey put the total count of lawyers at 1.3 million in 2022, compared to an adult population of about 260 million. American Bar Association, *ABA survey finds 1.3M lawyers in the U.S.*, June 20, 2022, https://www.americanbar.org/news/abanews/aba-news-archives/2022/06/aba-lawyers-survey/.

constituency in Democratic politics: in the 2020 election, lawyers donated more than $300 million dollars to political campaigns, with 81.5 percent of it going to Democratic candidates.[133]

As the Democratic Party became more attentive to the demands of lawyers and legal activists, it also increasingly marginalized the one group that bore the brunt of consumerist antitrust: organized labor. The merger waves that gained momentum in the 1980s were especially punishing to blue-collar workers.[134] Today, with union density at the lowest levels in over a century,[135] union membership does not predict support for abandoning the consumer welfare standard.[136] But historically, people who resided in states with higher levels of unionization in the private work force expressed higher levels of support for doing more in antitrust enforcement.[137] In fact, this empirical association is about equal in size, and opposite in direction, to the association between legal services and public opinion, described above.[138] In sum, though union membership may not influence individual attitudes towards antitrust enforcement, living and working in areas that rely on unionized labor has historically increased support for stronger antitrust. As the Democratic Party embraced consumerist antitrust, it also marginalized the people and places that suffered the most from this policy shift.

The Turn Towards the Knowledge Economy

The turn towards the knowledge economy on the political left has also undermined the New Deal system of antitrust. As a theoretical construct, the knowledge economy is best understood as a liberal (some would say neoliberal) response to the idea of a post-industrial society popularized by Daniel Bell. It should not be confused with Bell's original theory, in which the economic transition from

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133 OpenSecrets.org, *Lawyers / Law Firm Summary*, https://www.opensecrets.org/industries/indus?cycle=2020&ind=K01.

134 Bruce C. Fallick and Kevin A. Hassett, *Unionization and Acquisitions*, 69 THE J. OF BUSINESS 51, 51-54 (1996) (noting political opposition to mergers among labor leaders and theorizing that the threat of voiding existing labor contracts can make acquisitions a tool for effecting wealth transfers).

135 PAUL D. ROMERO AND JULIE M. WHITTAKER, CONG. RESEARCH SERV., A BRIEF EXAMINATION OF UNION MEMBERSHIP DATA (June 16, 2023), https://sgp.fas.org/crs/misc/R47596.pdf

136 Short, Hill, and Brown, *supra* n.50, at Appendix G.

137 Short, *supra* n.23, at 18-19.

138 *Id.*

goods to services played a bigger role than technology.[139] Nor should it be confused with the much broader catalogue of neoliberal thought, which embraced many other ideas about public-private partnerships, welfare reform, and other issues.[140] It instead expresses the normative view of some Democratic officials, including the so-called "Atari Democrats" in Congress and prominent governors like Jerry Brown in California, about what a post-industrial society should look like.

Their views arose as much from economic theory (especially the work of Joseph Schumpeter) as from their own experiences with communities experiencing industrial decline.[141] Champions of the knowledge economy rejected the then-popular idea among liberals that, to avoid future catastrophe and achieve sustainable development, the nation must pursue zero economic growth.[142] It embraced, instead, the idea that technological development would allow the nation to generate growth in an age of limits; it would also deliver a message of hope to communities experiencing economic stagnation without committing the nation to a path of accelerating resource depletion and environmental degradation.[143] In this view, the nation would press its comparative advantage in the production of ideas and technology—innovation—which would resolve the crisis of declining productivity in the domestic economy and declining business competitiveness in the global economy.[144]

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[139] DANIEL BELL, THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING 1-45 (1973); *see also* KRIPPNER, *supra* n.68, at 1-2 (arguing that Bell's version of the post-industrial society was predicated on a service transition that was driven by increasing demand for public services). Bell did claim that theoretical knowledge would play a central role in the post-industrial society, and he believed that "science-based industries" would dominate manufacturing. BELL, *infra*, at 14, 25. Neoliberal Democrats seized on these parts of Bell's theory to claim that America could develop a comparative advantage in technological innovation. RANDALL ROTHENBERG, THE NEOLIBERALS: CREATING THE NEW AMERICAN POLITICS 85 (1984). But this strayed substantially from Bell's original claim, which had more to do with the rising primacy of theoretical over empirical knowledge among both inventors and policymakers, both of whom would require more formal training in theory to succeed. BELL, *infra*, at 20-26.

[140] ROTHENBERG, *supra* n.139, at CHS. 9-12, 15-18.

[141] *See, e.g., id.* at 79-83 (describing Jerry Brown's visit to the industrial northeast in 1980).

[142] *Id. at* CH. 5. An influential MIT report from 1972, *The Limits of Growth*, had warned of dire consequences if all economic growth was not stopped immediately. *Id.* at 64.

[143] *Id.* at CH. 13. In effect, the Atari Democrats abandoned Keynes and embraced Austrian economist, Joseph Schumpeter, who gave the entrepreneur and innovator the central role of instigating "creative destruction." *Id.* at 147-50; *see also* JOSEPH A. SCHUMPETER, THE THEORY OF ECONOMIC DEVELOPMENT (1934).

[144] ROTHENBERG, *supra* n.139, at 85.

But the knowledge economy is not merely a rhetorical construct; it is also a political artifact, and one that is better understood by examining the areas where Democrats reached sufficient consensus to create new policies.[145] The Atari Democrats who first conceived of the knowledge economy faced substantial defeat on several policy fronts throughout the 1980s, especially when it came to "industrial policies" and increased spending on higher education.[146] But Democratic advocates of the knowledge economy managed to generate political consensus in another important policy domain: patent reform.[147] To press the nation's advantage in the production of new technologies, the nation would need laws that provided much stronger patent protection to inventors, thereby providing much stronger economic incentives for innovation and entrepreneurship.[148] A cascade of patent reform legislation, often passed on voice vote in the House with broad bi-partisan support, worked its way through Congress from 1980 through 1994.[149]

For those who advocated on behalf of a more interventionist antitrust policy in the middle decades of the 20th century, patents were seen almost exclusively as monopolistic devices and so antitrust officials dedicated massive resources to force firms with substantial patent portfolios to license their patents to competitors. In a 1960 report, for example, the Senate Judiciary Committee found that antitrust officials had entered over 107 judgments involving the compulsory licensing of about 40-50,000 patents between 1941 and 1959, making compulsory licensing "one of the most common forms of relief in antitrust cases."[150] In a similar vein, the two largest antitrust cases that

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145 Nicholas Short, *The Politics of the American Knowledge Economy*, 36(1) Studies in American Political Development 41, 43-44 (2022).
146 ROTHENBERG, *supra* n.139, at Ch. 19; *see also* OTIS L. GRAHAM, JR., LOSING TIME: THE INDUSTRIAL POLICY DEBATE (1992); PETER K. EISINGER, THE RISE OF THE ENTREPRENEURIAL STATE: STATE AND LOCAL DEVELOPMENT POLICY IN THE UNITED STATES CHS. 9-12 (1988).
147 Short, *supra* n.145, at 43-44.
148 *Id.* at 54-58.
149 *Id.* at Table 2.
150 HART, *supra* n.99, at 95-96 (citing *Compulsory Patent Licensing under Antitrust Judgments*, *Staff Report of the Subcommittee on Patents, Trademarks, and Copyrights of the Committee of the Judiciary, United States Senate*, 86th Cong. 2d s. (1960)); *see also* Stoller, *supra* n.3, at 191-95.

remained on the docket as President Reagan assumed office in 1981 involved two of the nation's biggest industrial innovators, AT&T and IBM.[151]

By virtue of their new commitments to the knowledge economy, Democrats abandoned this legacy of the New Deal antitrust system. In 1982, when the House remained under Democratic control, Congress created a specialized court to hear appeals in patent cases to eliminate the judicial influence of anti-patent circuit court justices.[152] Congress also passed the National Cooperative Research Act in 1984 to remove antitrust liability for joint ventures engaged in research and development.[153] During the Clinton administration, antitrust agencies made only minor changes to the 1984 merger guidelines, but also added guidelines on the licensing of intellectual property based on the assumption that "intellectual property laws and antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare."[154] The new guidelines made clear that the antitrust agencies would not presume that patents confer market power or that market power, if established, violates antitrust laws.[155] In sum, during these crucial years of knowledge economy development, Democrats turned towards lax antitrust enforcement not just because of a preference for market alternatives following the Chicago School, but also because their primary tool of market intervention—the U.S. patent—would inevitably create firms with substantial market power.[156] Undermining that power through antitrust would in some sense be self-defeating.

The knowledge economy also relied on an inherently different mechanism for promoting entrepreneurship and business growth, which further constrained Democratic officials interested in reverting to the New Deal system. Hard as it is to imagine, the businesses that Democratic Party

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151 STOLLER, *supra* n.3, at 355-59, 386-89.
152 Short, *supra* n.145, at 56, Table 2.
153 *Id.* at Table 2.
154 U.S. Dept. of Justice and Fed. Trade Comm'n, *Antitrust Enforcement and Intellectual Property Rights* Section 1 (April 6, 1995), https://www.justice.gov/atr/archived-1995-antitrust-guidelines-licensing-intellectual-property.
155 *Id.* at Section 2.
156 On the relationship between intellectual property and antitrust, see BRETT CHRISTOPHERS, THE GREAT LEVELER: CAPITALISM AND COMPETITION IN THE COURT OF LAW (2016).

leaders supported in the 1980s and 1990s were not the behemoths that characterize today's knowledge economy, but much smaller startup companies. In contrast with the manufacturers of the Fordist era, these companies are too risky for conventional financing through commercial lending, and as a result, they largely receive financial support through venture capital. Venture capitalists, in turn, generate a return on these risky investments upon "exit," specifically a public stock offering or an acquisition.[157] Over time, however, initial public offerings have become increasingly rare, while merging with an established company has become the norm.[158] Relaxed antitrust—at least with respect to technology companies—is therefore central to the innovation-centered model of economic development that the Democratic Party has championed for more than forty years.

The interest groups that depend on this economic model—the inventors, entrepreneurs, venture capitalists, and the service professionals who support them—should therefore have starkly different antitrust policy preferences, and a variety of empirical and anecdotal evidence suggests that they do. While measures of exposure to merger activity like union membership or having worked at a merging company do not predict support for replacing the consumer welfare standard, working at a technology company has a significant negative effect, and the size of the effect is larger than the effect of partisanship in the public.[159] Prominent technology companies have also invested millions of dollars, over more than a decade, to influence antitrust officials and disseminate scholarship (without conflict of interest disclosures) that would not only maintain the current consumer-oriented system of antitrust, but make it even more deferential to business interests.[160]

Finally, as an economic strategy, the knowledge economy was meant to resolve a lingering productivity crisis in which American businesses were losing market share to foreign competitors, and

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[157] Mark A. Lemley and Andrew McCreary, *Exit Strategy*, 101(1) BOSTON UNIVERSITY LAW REVIEW 1, 6-7 (2020).
[158] *Id.* at 7.
[159] Short, Hill, and Brown, *supra* n.50, at Appendix G.
[160] Brody Mullins, *The Hiden Life of Google's Secret Weapon*, THE WALL STREET JOURNAL, June 6, 2024, https://www.wsj.com/us-news/law/google-lawyer-secret-weapon-joshua-wright-c98d5a31.

the nature of that imperative shaped political preferences among elected officials and their policy advisors.[161] For the most part, liberal intellectuals of the 1980s and 1990s failed to conceptualize a positive role for antitrust enforcement in a global economy where American businesses would need to acquire significant market power in order to compete with comparably large companies abroad (companies that often had the unwavering financial support of their national government). Lester Thurow popularized Chicago School theory for liberal audiences, arguing that, aside from laws prohibiting price fixing and cartels, all antitrust laws had become obsolete and that global integration, rather than bureaucratic oversight, would better guarantee maximum competition.[162] Robert Reich argued that the U.S. economy suffered from "paper entrepreneurialism," in which business managers, lawyers, and consultants dedicated massive amounts of resources to mergers and tax avoidance schemes in pursuit of short-term profits.[163] But while Reich proposed tax reforms to disincentivize this kind of behavior, his primary solution called for investments in human capital to support a more dynamic and flexible system of production to smooth the knowledge economy transition.[164] More forceful efforts to limit corporate consolidation were never seriously considered.

In the absence of a compelling counter-argument from the political left, the competitiveness crisis shifted the goal post for antitrust policy and unleashed a deregulatory race-to-the-bottom. The goal was no longer to establish policy in a manner consistent with public values, but to ensure that U.S. businesses were not shackled by domestic regulations. During the Clinton administration, for example, major policy reforms in banking and telecommunications ostensibly sought to promote

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[161] Short, *supra* n.45, at 7, 10.
[162] LESTER C. THUROW, THE ZERO-SUM SOCIETY: DISTRIBUTION AND THE POSSIBILITIES FOR CHANGE 145-153 (1980); Lester C. Thurow, *Let's Abolish the Antitrust Laws*, N.Y. TIMES, Oct. 19, 1980, at B2; *see also* STOLLER, *supra* n.3, at 368.
[163] ROBERT R. REICH, THE NEXT AMERICAN FRONTIER CH. 8 (1983).
[164] *Id.* at CH. 11.

innovation and competition, but actually fueled unprecedented levels of consolidation through mergers.[165]

Polls conducted at the time of these reforms suggests that the public was either unaware of or had mixed feelings about them. A 1999 survey found that 58 percent of respondents had not heard about recent legislation to repeal the "Glass-Steagall law prohibiting banks, security firms and insurance companies from being involved in each other's business."[166] In another survey, 65 percent believed that the recent telecom mergers were "bad for the country because they will reduce competition too much."[167] And yet, 83 percent were also somewhat or very likely to purchase all of their telecom services through a single provider if given the option to do so, suggesting some consumer support for consolidations.[168]

But recent experimental work suggests that, had the public been asked to evaluate antitrust policy in terms of its impact on global competitiveness in the 1980s, it likely would have supported more lax enforcement. Relative to those who were asked if they support strengthening antitrust law (with no additional information), those who were told that antitrust laws promote competition and increase efficiency were not significantly different, but those who were told that antitrust laws reduce American competitiveness by putting American companies at a disadvantage were significantly less likely to support strengthening the nation's antitrust laws.[169] These results were also consistent across sub-groups and did not vary according to nationalism, exposure to import competition, or other

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[165] NELSON LICHTENSTEIN AND JUDITH STEIN, A FABULOUS FAILURE: THE CLINTON PRESIDENCY AND THE TRANSFORMATION OF AMERICAN CAPITALISM CH. 13 (2023).
[166] UBS, Gallup/UBS Poll 1999-INVEST11: November, 1999 US Investor Optimism Index, Question 26, USGALLUP.99UBSNV.R84, Gallup Organization, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1999), Survey question, DOI: 10.25940/ROPER-31089544.
[167] NBC News/Wall Street Journal, NBC News/WSJ Survey # 6001: 2000 Election/Economy, Question 72, USNBCWSJ.99OCT.R18B, Hart-Teeter Research Companies, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1999), Survey question, DOI: 10.25940/ROPER-31094793.
[168] National Consumers League, National Consumers League Poll: April 1999, Question 78, USHARRIS.99NCL2.R610, Louis Harris & Associates, (Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, 1999), Survey question, DOI: 10.25940/ROPER-31108670.
[169] Ryan Brutger and Amy Pond, *International Economic Relations and American Support for Antitrust Policy* (July 13, 2023) (unpublished manuscript) (on file with author).

factors. They suggest that, even today, when public concern about big business is pervasive, the public is much more willing to support lax antitrust if the laws are presented as an impediment to American competitiveness.[170]

In sum, while Chicago School ideology may have made 1981 a critical juncture in antitrust policy, that ideology is only one of multiple forces that have sustained that new equilibrium to the present day. While it is true that Democratic Party representatives have, until recently, remained relatively indifferent to antitrust law and enforcement, it is an oversimplification to say that this indifference stems solely from a co-optation of Chicago School ideology. On the contrary, the Democratic Party's preferred tool for hastening the knowledge economy transition—the U.S. patent—has clear anticompetitive implications. And the voters and interest groups that the Party sees as crucial to the knowledge economy transition have significantly lower levels of support for the interventionist strategy than older members of the Party coalition. In fact, the Democratic Party's relationship with technology firms seems to have implicitly influenced the reformist movement, which chose big tech instead of big oil or big agriculture or big finance as its initial target.[171] The mixed outcome of that effort arguably has more to do with the politics of the knowledge economy and less to do with the persistence of the consumer welfare standard.

Conclusion

The Chicago School approach to antitrust in general, and the consumer welfare standard in particular, makes for easy fodder. But it is important to acknowledge that the consumerist approach

[170] These results are consistent with a long literature in political science showing that voters seldom evaluate policy in terms of their own self-interest, but frequently evaluate policy in terms of its effect on various groups, with national identity often playing a significant role. DIANA MUTZ, WINNERS AND LOSERS: THE PSYCHOLOGY OF FOREIGN TRADE (2021); CHRISTOPHER H. ACHEN AND LARRY M. BARTELS, DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT (2016).

[171] STAFF OF H. SUBCOMM. ON ANTITRUST, COMMERCIAL AND ADMIN. LAW OF THE COMM. ON THE JUDICIARY, 116TH CONG., 2ND S., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS (2020), https://democrats-judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

to antitrust met important social and political needs in its time. It limited the role of government intervention at a time when many were legitimately concerned about political corruption. It created rules that antitrust officials could try to apply impartially—or at least appear to do so—at a time when antitrust administration seemed arbitrary to many. It refocused antitrust policy towards consumer interests at a time when consumer activism was rising, and it emphasized the reduction of prices when runaway inflation was the prevailing macroeconomic concern. As part of a broader deregulatory movement, it created a mechanism for reducing managerial discretion in a setting where some believed that corporations existed only to maximize shareholder profits. And it accepted the risks of monopolization in a setting where many believed that inherently monopolistic policy tools like patents would be needed to hasten the knowledge economy transition and where foreign governments were cultivating their own corporate giants in an increasingly global economy.

Times have changed, and the consumerist approach to antitrust seems outdated and anachronistic in many respects. But the greater challenge is to envision a new antitrust philosophy for the 21st century. Connecting the consumerist turn in antitrust to the American political economy of the 1970s and 1980s does not undermine the case for reform. Rather, it undermines the case for yet more technocracy.[172] Antitrust law and policy is not an apolitical "truth" or solution to a differential equation around which the public must be forced to acquiesce; it is, and should be, a deliberate output of political conflict.[173]

When it comes to policing mergers and acquisitions, current policy seems to be sinking under the weight of three deliberate policy choices with concrete political ramifications. First, under the consumerist approach, officials choose to assume that reducing consumer prices (or maximizing

[172] Harry First and Spenser Webber Waller, *Symposium: The Goals of Antitrust: Antitrust's Democracy Deficit*, 81 FORDHAM LAW REVIEW 2543, 2543-45 (2013) (arguing that transforming antitrust into a technical enterprise "has led to an antitrust system captured by lawyers and economists advancing their own self-referential goals, free of political control and economic accountability" and characterizing "this shift towards technocracy as antitrust's democracy deficit").
[173] *Id.* at 2344.

allocative efficiency) is the only legitimate objective of antitrust enforcement, but in doing so, they marginalize other values and goals that are important to the public.[174] Economic policymakers must routinely confront the fact that the pursuit of greater efficiency often conflicts with the pursuit of greater equality.[175] Under current policy, officials either pretend these tradeoffs do not exist or assume that real-world consumers (i.e. the public) have the same interests as fictionalized consumers (i.e. *homo economicus*) who only care about prices. That assumption is not empirically plausible. Studies in the "fair trade" literature repeatedly show that, when given sufficient information, consumers are willing to pay higher prices on basic goods, like coffee, to achieve social and political objectives, like using sustainable growing techniques or delivering a basic livelihood to growers.[176] When political scientists use the same techniques to evaluate antitrust policy, they find that avoiding job loss and worsening product quality is much more important to the public than reducing prices, and avoiding the risks of more lobbying or becoming "too big to fail" were about equally important.[177] Broadening the definition of the consumer interest to accommodate some of these concerns would arguably make antitrust regulation more democratic by deepening its connection to broadly held social and political values.

Second, antitrust enforcement policy lacks transparency and accountability, a surprising failing given widespread public concern about market power and regulatory capture. Companies proposing mergers are not obligated to share data on product-level prices with the public, making it virtually impossible to determine if companies ever deliver on their promises of improved efficiency and price savings. What little evidence we have suggests that companies routinely fail to do so. Agency officials

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[174] For a similar perspective, see BERMAN, *supra* n.6, at 15-16.
[175] ARTHUR M. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF CH. 1 (2015). Okun also argued that the most objectionable areas in which dollars "transgressed" rights was in the use of market power to exert political influence, and that the conglomerate merger movement of the 1960s and 1970s was an example of unregulated economic activity that had great potential to disturb the democratic process. *Id.* at 29.
[176] Raluca Dragusanu, Daniele Giovannucci, and Nathan Nunn, *The Economics of Fair Trade*, 28 J. OF ECON. PERSPECTIVES 217, 217-219 (2014).
[177] Short, Hill, and Brown, *supra* n.50, at 28-32.

also do not disclose their reasoning for *not* challenging a merger, and often resolve the mergers they do challenge through legal mechanisms, like consent decrees, that leave the public in the dark about the details.[178] Even modest measures, like requiring companies to provide a fuller accounting of a proposed merger's impact (on prices, employment, and local tax revenues), would make it easier to satisfy public concern about the potential for abuse and enable more rigorous assessments of policy effectiveness.

Third, the one-size-fits-all nature of the consumerist approach makes it harder for elected officials to experiment with, and generate public approval for, new approaches. Mergers have become an important vehicle for allowing venture capitalists to recognize gains in the innovation-driven knowledge economy, and though scholars increasingly believe that these mergers undermine innovation,[179] it is far from clear whether more rigorous policing of technology company mergers will have beneficial or detrimental effects overall. The advocates of any one approach will have strong psychological and political motives to turn that approach into a law that binds subsequent administrations. But in areas where the costs and benefits are uncertain, it is arguably more democratic to let elected officials adapt policy to the current economic context and make their case with voters as to whether the policy advances the public interest.

From a legal perspective, the antitrust reform debate is about aligning bureaucratic action with Congressional intent and reducing reliance on Chicago School ideology. From a political perspective, the antitrust reform debate should be about making policy more consistent with public values, more transparent, and easier to evaluate while also giving officials more discretion to experiment with new enforcement strategies when effects are uncertain.

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[178] JOHN E. KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 2-4 (2015).
[179] Lemley and McCreary, *supra* n.57, at 9-10.