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

1. Introduction

As the dimensions of America’s market power problem come into sharper focus, legal scholars have vigorously debated the role that lax antitrust enforcement has played in producing rising market concentration, the extent to which rising market concentration has in turn exacerbated income and wealth inequality, and how policymakers should respond. On one side of the debate stand defenders of the status quo. For these scholars, current policy, which takes a relaxed laissez-faire attitude towards large mergers and acquisitions and other anti-competitive conduct, is generally sound and deserves at best minor policy reforms. On the other side stand reformers like Lina Kahn—sometimes referred to as neo-Brandeisians—who have called for a substantial overhaul of the antitrust system and 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.

A central claim in the reformist perspective is that the current antitrust enforcement regime is the byproduct of an intellectual movement led by lawyers and economists at the University of Chicago. Accordingly, in the 1960s, scholars like Aaron Director, Ward Bowman, Robert Bork and Richard Posner began to suggest that enforcement officials had severely overestimated the extent of monopolistic competition, that companies mostly grew in size to capture efficiency gains that are passed on to consumers in the form of lower prices, and that economic welfare that flows to consumers from these corporate consolidations is the only standard by which government officials should determine whether to intervene. This conservative ideology then gradually gained adherence throughout the 1970s not only amongst Republican elected representatives, but also within the bureaucracy and eventually within the judiciary. For reformers, then, the key to moving forward lies in recognizing and ultimately purging this ideology from antitrust discourse.

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. __, at 1-7 (defending economic analysis in antitrust).
4 Kahn, supra n. __, at 967-68; Stoller, supra n. __, at x-xvii;
This plank of the reformist platform suffers from a few drawbacks. Specifically, the reformers tend to both understate and overstate the role of conservative ideology in producing and maintaining the current antitrust regime. It underestimates the role of conservative ideology by placing too much emphasis on the consumer welfare standard and the scholarship of Robert Bork and Richard Posner, thereby ignoring other aspects of Chicago School scholarship that also influenced the move towards antitrust deregulation. Specifically, it ignores conservative perspectives about undue political influence on antitrust enforcement, embodied by George Stigler’s writings on “regulatory capture,”8 and on the redefinition of the corporate purpose towards maximizing shareholder value, embodied by Henry Manne’s writing on the benefits of “takeover markets.”9 In conjunction with the consumer welfare standard, these theories also undergird the current system of lax enforcement.

The reformist perspective also understates the role of Chicago School ideology by failing to connect these intellectual movements to important contemporary developments in American political economy, developments that gave the conservative perspective special poignancy. For example, the consumer welfare standard was not simply a convenient ideological vehicle for political conservatives. On the contrary, 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 has dubbed the “third wave consumer movement.”10 Similarly, concern about regulatory capture carried weight among the public in the 1970s because, as the Congressional investigations into the Watergate scandal revealed, Richard Nixon had actually abused his power in office to influence antitrust enforcement. And it carried weight amongst liberal activists because consumer advocates, like Ralph Nader, embraced the theory and began conditioning liberals to believe that the American government was inherently corrupt. Manne’s arguments about corporate takeover markets effectively rode the momentum of a much broader shift from managerial to shareholder capitalism, making antitrust deregulation an essential component to redirect corporate governance towards shareholder interests.11

But the reformist perspective also overstates the role of ideological changes by neglecting other important political shifts that contributed to the demise of the New Deal standard and which maintain today’s conservative framework. Some of these shifts relate to political institutions. Reformers tend to acknowledge, but not give due weight, to changes in the composition of the Supreme Court as the tenure of Earl Warren came to an end and that of Warren Burger began.12 Similarly, reformers tend to acknowledge, but not give due weight, to changes within Congress after the midterm election of the 1974, which shifted power from Congressional committees and their chairmen—some of whom played a pivotal role in maintaining the New Deal antitrust system—to the party caucuses.13 Though these changes made room for new ideologies to take

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11 DAVIS, supra n._, at CHS. 2-3.
12 These considerations are implicit in, but not explicitly acknowledged in, articles like Kahn, supra n._ and Kahn and Vaheesan, supra n._.
13 STOLLER, supra n._, at Ch. 11.
root, it is inaccurate to label them as purely ideological shifts, and failure to make the distinction can lead to confusion. In fact, one of the strongest books in the reformist arsenal, Matt Stoller’s *Goliath*, purports to describe an ideological revolution but then conveys a deeply political story, rich with historical nuance, that is somewhat at odds with the book’s main thesis.  

More importantly, reformers generally overlook interest group politics and specifically ignore changes within the political coalition supporting the Democratic Party in the 1980s, as it struggled to articulate an alternative to Reaganism and came to embrace globalism and the knowledge economy. The implications of antitrust deregulation for various interest groups is easy to miss because the Chicago School perspective teaches that the only relevant political cleavage in antitrust policy is that between producers and consumers when in fact the most relevant political cleavages are those between workers on the one hand and managers and investors on the other hand. 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. As the Democratic Party searched for post-Keynesian ideas to promote economic growth and the neoliberals rose to power, the Party’s historic commitment to antitrust enforcement became a liability instead of an asset.

In these ways, the reformist perspective is not so much incorrect as incomplete. In some respects, the ideological argument remains underdeveloped; in other ways, the ideological argument overlooks essential political considerations. The argument offered below is meant to bolster, not undermine, the reformers’ essential claim that antitrust law and policy has lost its intellectual and political moorings. It attempts to do by integrating the legal debate with historical, sociological, and political scholarship bearing on these important questions. It draws on a common framework for analyzing changes in political life in which ideas but also institutions and interests play important roles. A central claim is that, by describing all of the above developments as ideological, the reformers fail to confront some difficult facts about the evolution of today’s antitrust framework that complicate the reformist agenda. Specifically, the reform movement will eventually be forced to confront, if it has not already confronted, Democratic Party commitments to consumerism, financialization, and the knowledge economy and broader public concern about regulatory capture and political corruption.

In the argument that follows, I focus on antitrust policy towards mergers and acquisitions (M&A) for a few reasons. One advantage is that doing so provides focus given that a diverse array of conduct falls within the penumbra of antitrust oversight. More importantly, it focuses on an area in which there is a concrete difference between the Chicago School and the New Deal approach, a difference that led to a critical and substantial change in antitrust policy towards M&A in 1981. But it also focuses on a kind of conduct that indisputably plays an important role in the American political economy. The aggregate value of M&A deals in some recent years has reached as much as 13-15 percent of GDP, indicating that enormous amounts of

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14 *Id.* at Chs. 11-16.
15 *See*, e.g., Mark Blyth, *Great Transformations* Ch. 2 (2002).
16 Short…
economic resources are consumed in this one type of conduct, and it is arguable the primary vehicle by which business both grow and stay large enough to generate significant political concern about rising market power.

The argument is organized as follows. In Section 2 on ideas, I contend that the Chicago School had enormous impact on antitrust enforcement not just through the consumer welfare standard, but also through its theories of regulatory capture and takeover markets, and that contemporary political developments made those arguments especially salient. In Section 3 on institutions, I describe changes in the judiciary and in Congress that abetted the conservative turn towards antitrust deregulation. In Section 4 on interests, I describe changes in interest group politics that also abetted the conservative turn, with special emphasis on the Democratic Party’s embrace of the knowledge economy. In Section 5, I sketch two alternative analytical frameworks for antitrust analysis that might be used to displace the conservative approach, and the consumer welfare standard argument in particular. In Section 6, I conclude by arguing that the conservative approach fulfilled important social and political functions in its time, and that today’s challenge is to replace Chicago School philosophy with an analytical framework more attuned to the contemporary political economy.

2. The Chicago School’s Influence Outside of the Consumer Welfare Standard

Reformers are correct in one crucial respect: the consumer welfare standard is the chief legacy of the conservative turn in antitrust policy engineered by the Chicago School. The consumer welfare standard uses a neoclassical economic framework (developed decades after Congress adopted the main antitrust statutes) to analyze the economic impact of mergers acquisitions and other market power enhancing events. In this framework, the only relevant cleavage is between producers and consumers. 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. 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.

18 Herbert Hovenkamp, Is Antitrust’s Consumer Welfare Principle Imperiled?, 45 THE J. OF COMPETITION LAW 485, 491 (2019). Robert Bork actually supported a different welfare standard, which would counsel 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.

19 Hovenkamp, supra n. 18, at ___-___; Kahn, supra n. 18, at 971-74; Baker, supra n. 18, at 26-27; Kahn and Vaheesan, supra n. 18, at 238-39.

20 Id.

21 Id.

Chicago School scholars developed and advocated on behalf of this framework starting in the 1960s, 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. Richard Posner went so far as to claim that “justice” was equivalent to the maximizing efficiency. Robert Bork went on to author a popular book based on his prior scholarship in which he falsely 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.” Bork’s shoddy scholarship was well received by a broad audience, including among 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 prescription’”, citing directly to Bork. These same ideas took root within the bureaucracy after the election of 1980, in which Republicans 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, repeated the claim that “[t]he objective and goal of the antitrust laws is, first and foremost, the protection of the American consumer...” 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.

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—which shares oversight responsibilities with the Senate on antitrust matters—remained under Democratic control. Part of the reason this happened is that the consumer welfare standard reframed antitrust policy in a way that appealed to liberal activists in the “third wave” consumer movement that began in 1962. Consumer political movements have deep roots in the American political tradition, but the post-war era in which the New Deal antitrust system flourished was what Lizabeth Cohen calls a Consumer’s Republic. 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 help rebuild the economy. But consumer activism then grew rapidly in the years after President Kennedy campaigned on the claim that consumers lacked representation in government, and that he himself would take on the mantle of consumer

23 APPELBAUM, supra n. _, at Ch. 5.
24 See Eisner and Meier, supra n. _, at 273-75.
25 Id. at 145.
28 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).
30 COHEN, supra n. _, at Ch. 3.
31 Id. at 7-9.
32 Id. at 11, 113, 119.
lobbyist. This third wave consumer movement had strong ties to the Democratic Party and played a role in producing at least 33 separate consumer-oriented pieces of legislation geared between 1960 and 1978. And yet the movement differed from the Consumer’s Republic in that it merged with 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.

The consumer welfare standard naturally appealed to consumer rights activists because it sidelined all other antitrust objectives, like protecting the competitive process or protecting the rights of small businesses to set retail prices, and made the individual consumer interest the only interest worthy of protection. It is therefore not surprising that when the law school students who followed Ralph Nader, known as Nader’s Raiders, turned their attention to antitrust policy in the early 1970s, they argued for much more robust antitrust enforcement to meet consumer demands. 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.” Importantly, while the report drew attention to the social and political concerns that generated the major antitrust statutes, it also embraced the consumer welfare standard to describe the harm that flows from rising industrial concentration. As the authors put it: “[t]he maximization of consumer welfare was our talisman…”

While the consumer welfare standard naturally appealed to advocates of consumer rights and diminished support for the New Deal framework on the political left, another Chicago School doctrine—the theory of regulatory capture—resonated with liberal activists in a more surprising way. 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.” Despite a lack of empirical validation, the theory of regulatory capture was the intellectual foundation for much of the deregulatory movement that President Reagan capitalized upon, but which actually began with President Carter. The theory had surprising appeal to consumer activists, 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. President Carter, who, like JFK, saw himself as the voice of

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33 Id. at 345.
34 Id. at 360, TABLE 7.
35 Id. at 351.
37 Id. at 5.
38 Id. at 14.
39 Id. at xviii (“The maximization of consumer welfare was our talisman…”).
40 Stigler, supra n. , at 3. Some scholars locate the idea of agency capture in an earlier law review article by Samuel Huntington. See 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 L.J. 467 (1952)). Despite Huntington’s potential influence, the theory was most ardently developed and promulgated by Stigler.
42 APPELBAUM, supra n. , at 167-68; Cohen, supra n. , at 355;
consumers in Washington.\(^{43}\) chose the economist Alfred Kahn to launch a deregulatory movement that began with airlines and then moved to trucking.\(^ {44}\)

Antitrust law and antitrust regulators were uniquely susceptible to this attack for at least a few reasons. First and foremost, Congressional investigations into the Watergate scandal revealed that President Nixon had actually 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.\(^ {45}\) Moreover, the public was very much aware of the scandal. In April of 1972, when Louis Harris and Associates conducted a poll of adults, they found 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.”\(^ {46}\) In an earlier poll from March of that year, though fewer respondents had read or heard about the scandal (29 percent), 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 (including those who did not know about the scandal) believed that President Nixon was “directly involved” in arranging a quid pro quo.\(^ {47}\)

The ITT scandal may have been unique, but it almost certainly gave credence to the theory that powerful business interests could influence supposedly independent agencies in their favor and might even demand regulation to protect their own interests. And this concern was not confined to anti-government conservatives but was also 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 amongst both bureaucrats and Congressional overseers, despite the fact that the evidence of any actual corporate influence or abuse of power was, at that time, quite thin.\(^ {48}\) An earlier investigation critical of the FTC created an opportunity for the Nixon administration to drastically reorganize the Commission with substantial policy implications.\(^ {49}\) In response, one 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].”\(^ {50}\)

\(^{43}\) *Id.* at 170.

\(^{44}\) *Id.* at 170-80; see also THOMAS K. McCRAW, PROPHETS OF REGULATION Ch. 7 (1984),

\(^ {45}\) 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 bank’s was owned by a critical newspaper editor. Baker, *supra* n._, at 53.

\(^ {46}\) Louis Harris & Associates Poll: April 1972, Question 12 [USHARRIS.050172.R1], Cornell University, Ithaca, NY: Roper Center for Public Opinion Research. [note: format for cites to polls?]


\(^ {48}\) GREEN, MOORE, AND WASSERSTEIN, *supra* n._, at Ch. 2.

\(^ {49}\) STOLLER, *supra* n._, at 327-29. Nader may have actually 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).

\(^ {50}\) *Id.* 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)).
Before turning to other ways in which the Chicago School adherents generated support for antitrust deregulation, it is important to note that, however useful the consumer welfare standard is when it comes to bureaucratic administration, it is not necessarily the most useful framework for understanding the politics of antitrust law and policy. In fact, the avowed purpose of the framework is to create the appearance that antitrust enforcement is apolitical, despite the fact that the singular focus on the consumer is itself an expression of political values. An alternative perspective, still rooted in economic analysis, might place more emphasis on rent extraction. Mergers and acquisitions, for examples, are not just events that have the potential to enhance the combined firm’s market power leading to higher prices. They are also transactions from which management consultants, lawyers, and financial advisors profit enormously, and transactions in which realizing “efficiencies of scale” tends to mean layoffs and outsourcing for company employees. They are also deals that managers often pursue to appreciate the combined firm’s stock market capitalization to the benefit of investors, and that often use debt financing to make claims on retained earnings, which makes the companies less able to survive financial downturns and more prone to seek a government bailout, at taxpayer expense. In this view—which is not a standard for administering antitrust laws but for understanding antitrust politics—the relevant cleavages are those between employees and service professionals, between employees and managers, between both employees and managers and investors, and between investors and taxpayers.

This is not the only alternative framework for analyzing antitrust politics. But one benefit this framework has over the consumer welfare standard is that the relationship between antitrust policy and economic inequality is much more concrete. The main redistributive problem comes not from the abstract and hard to quantify future consumer loss, but from transactions that tend to eliminate jobs while paying handsome royalties to groups that are relatively affluent. Another benefit of this framework is that it formalizes various critiques of the consumer welfare standard that reformers have already recognized. Stoller, for example, presciently notes that in contrast with Nader, Brandeis thought consumerism was short-sighted and cared much more about people in their capacities as workers and as citizens. Appelbaum notes that this was, in some cases, an intentional result, as Democratic appointees like Alfred Kahn pursued deregulation in order to transfer wealth from workers to consumers. A transactional framework for analyzing mergers and acquisitions allows these cleavages to come to light while adding some additional nuance. Not all workers are disadvantaged, for example, as the so-called knowledge economy professionals stand to reap great rewards even if the employees of the firms involved might suffer.

Another value of the transactional perspective is that it emphasizes the unique interests that financial institutions have in the conservative approach to mergers and acquisitions, which complicates the politics of antitrust reform. There is no question that financial institutions have a

51 Kahn and Vaheesan, supra n. , at __.
52 Short, forthcoming…
53 supra n. , at 327, 351; see also APPELBAUM, supra n. , at 150 (lamenting that consumerism has undermined the extent to which individuals identify as workers).
54 APPELBAUM, supra n. , at 179.
concrete economic stake in lax antitrust enforcement. The first hostile takeover wave following the conservative 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.\textsuperscript{56} Private equity firms, many of which are located in Democratic leaning Connecticut, have since replaced the “corporate raiders” of the 1980s as takeover specialists.\textsuperscript{57} 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 much lower capital gains rate rather than rate paid by wage earners.\textsuperscript{58} Investment bankers, many of which are located in solidly Democratic New York, earn lucrative advisory fees in connection with mergers and acquisitions and have profited enormously from the lax antitrust environment.\textsuperscript{59} Both financial institutions also have substantial stakes in secondary markets for the corporate debt that finances mergers and acquisitions, as those obligations can also be securitized and traded in tranches.\textsuperscript{60}

With the transactional perspective in mind, then, it becomes clear that antitrust deregulation was also tied to increasing financialization in the American economy and to 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 amongst non-financial firms flowing from financial investments.\textsuperscript{61} Financialization in the American political economy arose both from government action—especially financial deregulation and changes in monetary policy during the Reagan era—and from a sea change in attitudes about corporate governance amongst business managers and investors that took place in the 1970s and 1980s.\textsuperscript{62} Both sources of financialization had conservative intellectual underpinnings, and each abetted a relaxed attitude towards mergers and acquisitions.

For example, in the early 1980s, the Federal Reserve experimented with monetarism to reduce inflation, a policy advocated most forcefully by Chicago School economist Milton Friedman.\textsuperscript{63} 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 in pursuit of the high returns that could only, at that time, be generated in financial markets.\textsuperscript{64} Unsurprisingly, then, a founding member of the American Business Conference, a prominent business lobbying organization, testified before the Joint Economic Committee in April of 1983 that American companies faced such high costs of capital relevant to competitors in Japan and elsewhere that “the only economically viable

\textsuperscript{56} EILEEN APPELBAUM AND ROSEMARY BATT, PRIVATE EQUITY AT WORK: WHEN WALL STREET MANAGES MAIN STREET 21-34 (2014).
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 51-52.
\textsuperscript{59} [note: need cite]
\textsuperscript{60} DAVIS, supra n. _, at 116.
\textsuperscript{62} Krippner and Davis
\textsuperscript{63} APPELBAUM, supra n. _, at CHS. 2-3.
\textsuperscript{64} Krippner, supra n. _, at CHS. 4-5.
investment for their funds is to acquire other companies.”\textsuperscript{65} He also lamented that these kinds of acquisitions “do not contribute to job creation or to the economic wealth of the United States,”\textsuperscript{66} a surprising admission from a business lobbyist. Antitrust deregulation based on the consumer welfare standard opened the door to the subsequent explosion in mergers and acquisitions by removing an essential regulatory barrier. But the broader macroeconomic environment and the monetarist experiment in particular pushed many businesses through that door by creating economic incentives to pursue those investments in lieu of others that might create jobs or enhance productivity.

In addition to government action and public policy, financialization also arose from a massive shift in attitudes towards corporate governance amongst investors and business managers,\textsuperscript{67} and Chicago School scholars leveraged this shift to argue that lax antitrust enforcement creates an important mechanism for disciplining managers who do not make the maximization of shareholder returns their sole priority. Legal and normative theories of corporate governance try to solve the 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.\textsuperscript{68} During the period in which the New Deal antitrust system thrived, the American political economy was driven by a form of “managerial capitalism” characterized by attitudes towards corporate governance that left investors relatively powerless and gave managers lots of discretion, discretion that managers could use to try and satisfy a diverse array of stakeholders including not only investors but also workers and community members.\textsuperscript{69} By the 1980s, managerial capitalism had largely been replaced by a form of “shareholder capitalism” characterized by attitudes towards corporate governance that substantially limited managerial prerogatives and commanded that managers seek only to maximize the return to their shareholders.\textsuperscript{70}

\textsuperscript{65} 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.\textunderscore , at 56.

\textsuperscript{66} Id.

\textsuperscript{67} 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=4263D3d86746. Though the statements of business executives and lobbyists make clear that this view strongly prevailed amongst managers and financial professionals, there is little evidence that the theory ever had broader public support. In one 1996 national poll of adults, only 5 percent of Americans 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 Poll: February 1996, Question 35 [USHARRBW.031196.R09], Louis Harris & Associates, Cornell University, Ithaca, NY: Roper Center for Public Opinion Research. A 1998 poll of registered voters found only 8 percent in support of the claim that “[c]ompanies should maximize profits for the benefit of shareholders.” 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. However, there is some evidence that the public wanted companies to do more for investors in the early 1980s. Two polls of adults conducted in 1981 and 1983 found that 24 and 29 percent of respondents, respectively, felt that business was not doing enough to increase dividend payments to shareholders. Opinion Research Corporation Poll: July 1981, Question 26 [USORC.81AUG.R13I], Opinion Research Corporation, Cornell University, Ithaca, NY: Roper Center for Public Opinion Research; Opinion Research Corporation Poll: June 1983, Question 26 [USORC.83AUG.R13I], Opinion Research Corporation, Cornell University, Ithaca, NY: Roper Center for Public Opinion Research.

\textsuperscript{68} DAVIS, supra n.\textunderscore , at Ch. 2.

\textsuperscript{69} Id. at Chs. 2-3.

\textsuperscript{70} Id.
For Chicago School scholars like Henry Manne, antitrust deregulation performed an important role in making such a system 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.\(^{71}\) 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 and acquisitions could improve economic welfare.\(^{72}\) 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 was politically impossible.\(^{73}\) 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 part of the intellectual scaffolding that supports the lax approach to antitrust and it is one that achieved broad dissemination not just through influential articles but also through Manne’s judicial seminars, which almost 20 percent of all federal judges had attended by 1980.\(^{74}\)

In sum, the ideological scaffolding underneath the current system of lax antitrust enforcement goes well beyond the consumer welfare standard, though that standard is perhaps the most important plank. The conservative 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 shareholder value. Each of these arguments also tapped into much deeper political and economic trends, creating an intellectual movement with broad support. Consumer activists on the political left embraced the consumer welfare standard and echoed the view that antitrust regulators were prone to regulatory capture, an idea supported by some anecdotes but little empirical evidence. Many business managers and financial professionals of mixed political tendencies began to embrace new ideas about the role of the corporation in American society, and accordingly came to see antitrust enforcement as interfering with, rather than supporting, free market capitalism, especially when it came to the labor market for managerial control. With singular focus on the consumer welfare standard, the reformist perspective misses these other important components of the conservative argument, and the unique political context in which they took root.

3. Purging Institutional Constraints

Other important developments, including changes in American political institutions, supported the conservative turn in antitrust, though these trends are seldom explicitly acknowledged by reformers. 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,\(^{75}\) 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

\(^{71}\) Manne, supra n. _, at 113.

\(^{72}\) Id. at 119.

\(^{73}\) Id.

\(^{74}\) Appelbaum, supra n. _, at 148-49.

\(^{75}\) See, e.g., Stoller, supra n. _, at Ch. 5; David M. Hart, Forged Consensus: Science, Technology, and Economic Policy in the United States, 1921-1953 (1998)
Warren, Black, and Douglas. In a 1962 case, for example, the Court suggested that 1950 amendments to the antitrust laws not only allowed antitrust officials to scrutinize horizontal and vertical mergers, but also conglomerate mergers. 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 choice and price.

But the composition of the Court had 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 Nixon appointed Lewis Powell and William Rehnquist, respectively, to fill those open seats; William Douglas retired in 1975 and President Ford subsequently appointed John Paul Stevens to the bench. Justice Powell is well known for having authored an inflammatory memorandum for the Chamber of Commerce in 1971 arguing that the American capitalism was “under broad attack,” a memo that many political scholars credit with fueling the rise of business lobbying that unfolded later in the 1970s. But Powell’s own 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’ populist heritage. Powell, in contrast, patiently waited for an antitrust case to come up through which he could instantiate Chicago School ideas. 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. Only two years later, Justice Burger, joined by every Justice except Brennan, codified the consumer welfare standard into law. Slowly, over time, the Court adopted Chicago School views on a wide range of anti-competitive conduct.

The changing composition of the Court allowed the Chicago School perspective on antitrust to have dramatically more influence that it otherwise would have had if its only adherents had been

78 Id. at 332-33.
80 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.
81 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. _, at 43.
82 See infra n._.
83 BAKER, supra n. _, at 44.
presidential appointees to the antitrust bureaucracy. But it can be misleading to lump this institutional shift in with the conservative ideological movement that it leveraged. The problem with the Chicago School perspective, as reformers emphasize, is that it is based on a revisionist and deeply flawed interpretation of the Congressional intent inherent in the main antitrust laws. Inasmuch as conservative ideology, which has substantially influenced precedent, stifles reform, so has the judicial activism of Justices like Lewis Powell. Successful reform will therefore require new laws that reverse multiple Supreme Court findings, which the reformers have advocated. But to avoid policy reversion, it may also require a countervailing theory to guide antitrust enforcement after Congress explicitly rejects the consumer welfare standard and other Chicago School theories. In other words, failing to confront the institutional problem may lead reform efforts down a path with mixed or counter-productive outcomes.

Failing to distinguish institutional shift behind antitrust deregulation also papers over questions about political accountability that may be more important to political scholars than to reformers, but are nevertheless important to understanding how we got to where we are. Though Nixon appointed a slew of conservative Justices that embraced Chicago School ideas, they were each confirmed by a Senate that remained under Democratic control throughout the 1970s. And while it is true that Bork’s nomination to the Court in 1987 became highly politicized, the Democratic backlash focused almost entirely on Bork’s positions on civil rights and his role in firing Watergate special prosecutor, Archibald Cox, not on his revisionist interpretation of antitrust law. If these conservative justices are responsible for codifying Chicago School ideology into the common law, they have done so with at least some degree of implicit bipartisan support. This points to deeper problems with the Democratic Party’s commitments to the reform effort, which I take up in the next section.

The Supreme Court is not the only political institution for which momentous changes abetted the conservative turn. Congress also went through substantial changes after the election of 1974, in the midst of 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 seniority system gave substantial discretion and power to committee and subcommittee chairmen, 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 and Estes Kefauver of Tennessee and Philip Hart of Michigan in the Senate. The demise of the aggressive antitrust overseers was in part simply 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. 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

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85 [need cite for 2020 House Report]

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populism would not carry much weight in a Party consumed by the Vietnam War, Watergate, and equal rights.\textsuperscript{87}

But their demise was also partly the byproduct of a substantial shift in the organization of Congress in the early 1970s. The Democratic coalition of the New Deal had always included many conservative southern Democrats whose position on civil rights had become untenable for liberals.\textsuperscript{88} 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 the conservatives from attack by more liberal members of the Party.\textsuperscript{89} Though liberals in the Democratic caucus had sought reforms to disempower committee chairs since 1948, it was not until the election of 1974, which produced a landslide class of 93 freshmen, that the balance of power within the Democratic Party finally tipped in favor of the liberals.\textsuperscript{90} 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.\textsuperscript{91} 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.\textsuperscript{92} Afterwards, when reporters asked one of the 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.”\textsuperscript{93}

Celler’s lost primary and Patman’s lost committee seat were partly the result of tectonic, generational political shifts that elevated feminism, environmentalism, and the War in Vietnam to the top of the Democratic political agenda while pushing aside other issues like antitrust enforcement. 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 New Left also authored new rules for organizing Congress, rules which make it harder for idiosyncratic members out of step with the Party’s caucus to achieve and retain the power needed to ensure that antitrust officials enforce the laws in a manner consistent with Congressional intent. This is the second institutional obstacle that reformers face. The seniority system played a role in propping up the interventionist approach to antitrust because it insulated passionate political mavericks, like Patman, from intra-party pressure. The new system, in contrast, will require reformers to build a much broader base of consensus within the Democratic Party caucus and possibly across party lines to succeed in any meaningful way.

4. The Democratic Party and the Global Knowledge Economy

\textsuperscript{87} [need cite]
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 6.
\textsuperscript{91} Id. at CHS. 4-5.
\textsuperscript{92} Id. at 98, 107-14; see also Stoller, supra n.\textsubscript{1}, at 341-47.
\textsuperscript{93} Alexander Cockburn and James Ridgeway, Why They Sacked the Bane of the Banks, THE VILLAGE VOICE, Feb. 3, 1975, at 19-20.
By placing such heavy emphasis on the consumer welfare standard, 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. As suggested above, the New Deal system of antitrust intervention was supported primarily by the New Deal coalition within the Democratic Party, a coalition in which populists from the South and West played a pivotal role. The nature of that coalition began to shift dramatically in the 1970s, as George McGovern in 1972 and then Jimmy Carter in 1976 began to court middle-class professionals and consumer activists but grew increasingly indifferent to organized labor. At the same time, the “New Democrat” emphasis on civil rights, gender equality, political corruption, and other “moral” or “post-materialist” issues came at a cost: the economic turmoil of the 1970s had revealed hidden flaws in the Keynesian approach towards macroeconomic management in a global economy, and neither political party seemed capable of articulating a coherent alternative.

The Republicans won surprising victories in the election of 1980, taking both the presidency and control of the Senate, in part because Ronald Reagan convincingly articulated one possible alternative based on supply-side tax cuts, de-regulation, and monetarism. But the Democrats only began to coalesce around their alternative—the knowledge economy—after the wakeup call of Reagan’s victory. As a theoretical construct, the knowledge economy is best understood as a neoliberal response to the idea of a post-industrial society popularized by Daniel Bell. It should not be confused with Daniel Bell’s original theory, in which the economic transition from goods to services played a bigger role than technology. 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. It instead expresses the normative view of neoliberal politicians, including the so-called “Atari Democrats” in Congress and prominent Democratic governors like Jerry Brown in California, about what a post-industrial society should look like, a view born not just of academic speculation but of political experience with communities experiencing industrial decline. The knowledge economy, thus conceived, rejected the then-popular idea amongst liberals that, to avoid future catastrophe and achieve

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94 Wright Patman represented Texas and Estes Kefauver represented Tennessee in Congress. Thurman Arnold was from Wyoming and Wendell Berge was from Nebraska.
96 STEIN, supra n., at Chs. 7-8.
97 Id. at Ch. 11.
98 DANIEL BELL, THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING 1-45 (1973); see also KRIPPNER, supra n., 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. And neoliberals 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.
99 ROTHENBERG, supra n., at Chs. 9-12, 15-18.
100 See, e.g., id. at 79-83 (describing Jerry Brown’s visit to the industrial northeast in 1980).
sustainable development, the nation must pursue zero economic growth. It embraced, instead, the idea that technological development would allow the nation to generate growth in an age of limits and solve the conundrum of how to deliver a message of hope and prosperity to communities experiencing industrial decline without committing the nation to a path of accelerating resource depletion and environmental degradation. In this fashion, the knowledge economy would also enable the nation to 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.

But the knowledge economy is not merely a theoretical construct; it is also a political artifact, and one that is better understood by emphasizing the areas where neoliberals reached sufficient consensus to create new policies. The neoliberals who first conceived of the knowledge economy faced substantial defeat on several policy fronts throughout the 1980s, especially when it came to championing an “industrial policy” that would abandon macro-economic tools, like supply-side tax cuts, to generate economic growth in favor of the more targeted micro-economic interventions used in Japan and elsewhere. It is misleading, therefore, to associate the knowledge economy with those arguments because those arguments never generated any sufficient consensus to cause a change in policy. But Democratic advocates of the knowledge economy were able to generate political consensus in another important policy domain: patent reform. To press the nation’s advantage in the production of ideas, the nation would need laws that provided much stronger patent protection to inventors, thereby providing much stronger economic incentives for innovation and entrepreneurialism. A cascade of patent reform legislation, often passed on voice vote reflecting broad bi-partisan support, worked its way through Congress from 1980 through 1994.

This shift in the orientation of the Democratic Party created multiple problems for the New Deal system of antitrust. First, the Party increasingly courted and tied its future prospects to the younger, suburban, more affluent, and highly educated voters deemed capable of accelerating the knowledge economy transition, and these voters do not support the interventionist approach to antitrust as much as members of the New Deal coalition, including organized labor. For example, in a prior study, I analyzed public opinion data on antitrust reform and found that, while a bare majority of the public favors “doing more” to enforce the antitrust laws nationwide, the levels of support are significantly lower amongst individuals in the 18-34 age bracket and

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101 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.
102 Id. at Ch. 13. On a theoretical level, the neoliberals were abandoning Keynes and embracing Austrian economist, Joseph Schumpeter, who gave the entrepreneur and innovator the central role of instigating “creative destruction.” Id. at 147-50; JOSEPH A. SCHUMPETER, THE THEORY OF ECONOMIC DEVELOPMENT (1934). But they accepted that theory in part because it was based on their experience with communities experiencing deindustrialization.
103 ROTHENBERG, supra n. _, at 85.
104 Id. 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).
those who make more than $100,000. Levels of support are also much lower amongst those who reside in states that are deeply integrated into the knowledge economy (as proxied by their share of national income in legal services). At the same time, the Party has increasingly marginalized the one group that bore the brunt of antitrust deregulation: organized labor. The merger and acquisition waves that gained momentum in the 1980s were especially punishing to blue-collar workers. Predictably, people who reside in states with higher levels of unionization in the private work force tend to express much higher levels of support for doing more in antitrust enforcement, as do voters who are 65 and older. When these demographic trends are aggregated at the state level, they suggest that voters in states that are deeply integrated into the knowledge economy have fundamentally different preferences about antitrust enforcement. Whereas other states show support for “doing more” rising with liberalism (proxied by the Democratic Party presidential vote share), knowledge economy states show flat or even declining support for “doing more” as liberalism increases.

Second, the Party has also become more dependent upon campaign contributions from affluent professionals with a concrete financial stake in lax antitrust enforcement. Figure 1 shows the total amount of campaign contributions to federal campaigns and committees (Panel A), as well as the Democratic share of that total (Panel B), from M&A professionals for each campaign cycle from 1980 through 2014. M&A professionals are considered to be those who listed their occupation as “investment banker” or “M&A advisor” in their donation disclosure or who are employed by a financial institution that was ranked amongst the top 25 producers of M&A advisory fees in the same years as the campaign cycle. Figure 1 shows that, by 2012, M&A professionals donated more than $30 million dollars in federal elections, and that Democratic candidates and committees garnered a majority of those donations in 10 out of those 18 elections. The numbers favor Democrats slightly more if one focuses on the total number of donors rather than total contributions, with more M&A professionals donating to Democratic candidates and committees in 13 out of these 18 elections (data not shown). Though M&A professionals are only a small subset of the financial industry, Democrats perform comparably in the broad industry as a whole, and the decision whether or not to pursue more onerous regulation can have stark consequences. Some, for example, credit the drastic downturn in the Democratic share of financial industry contributions in 2010 with the Party’s decision to more aggressively regulate Wall Street in the wake of the financial crisis.

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107 Id.

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

109 Short, supra n. _, at 18-19.

110 Id. at 19-20.


112 About 32 percent of all contributions in finance, insurance, and real estate in the 2012 cycle went to Democrats.

113 Id.
Figure 1. Panel A shows total campaign contributions, in millions of nominal dollars, to federal campaigns and committees from investment bankers and M&A advisors and those who are employed by the top 25 financial institutions ranked by M&A advisory fees. Panel B shows the Democratic Party share of total contributions. Campaign contribution data comes from the DIME database.\textsuperscript{114} League table rankings come from the SDC Platinum database.

But the turn towards the knowledge economy on the political left has also created ideological problems for the New Deal system of antitrust. For those who advocated on behalf of a more interventionist antitrust policy in the middle decades of the 20\textsuperscript{th} century, patents were seen almost exclusively as monopolistic devices and so antitrust officials dedicated substantial 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.”\textsuperscript{115} In a similar vein, the two largest antitrust cases that remained on the docket as President Reagan assumed office in 1981 involved two of the nation’s biggest industrial innovators, AT&T and IBM.


\textsuperscript{115} HART, \textit{supra} n._, at 95-96 (citing \ldots).
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. Congress also passed the National Cooperative Research Act in 1984 to remove antitrust liability for joint ventures engaged in research and development. During the Clinton presidency, antitrust agencies made only minor changes to Baxter’s 1984 merger guidelines, which embraced Chicago School doctrine, 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.” The guidelines made clear that the antitrust agencies would not presume that patents confer market power or that market power, if established, violates antitrust laws. In the crucial years of knowledge economy development, from 1980 to 1994, 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.

The neoliberal turn towards globalism only hastened the Democratic retreat. The neoliberal vision of the knowledge economy was, after all, meant to resolve a lingering productivity crisis in which American businesses were losing market share to its competitors in Japan and Germany, former aggressors in World War II. But liberal intellectuals failed to conceptualize a positive role for antitrust enforcement in a global economy where American businesses might have to acquire domestic market power in order to compete with comparably large companies abroad. 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. Robert Reich aptly diagnosed an economy sick with “paper entrepreneurialism” in which business managers, lawyers, and consultants dedicated massive amounts of resources to mergers and acquisitions and tax avoidance schemes in pursuit of short-term profits. 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.

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 from a co-optation of conservative ideology. On the contrary, while the Republican Party in the 1980s and 1990s remained committed to an altered form of

116 Short, supra n. _, at .
117 Id.
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120 LESTER C. THUROW, THE ZERO SUM SOCIETY: DISTRIBUTION AND THE POSSIBILITIES FOR CHANGE 145-153 (1980); see also STOLLER, supra n. _, at 368.
122 Id. at CH. 11.
Keynesian *macro*-economic management, using foreign borrowing to finance supply-side tax cuts instead of demand-side spending enhancements, the Democratic Party of the 1980s and 1990s sought to usher in a completely new mode of *micro*-economic management based on the principles of Schumpeter, not Keynes. That move has deeply complicated the Democratic position on antitrust because their preferred tool for promoting technological innovation has clear anticompetitive implications, and because 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. The mixed outcome of that effort arguably has more to do with the politics of the knowledge economy and almost nothing to do with the persistence of the consumer welfare standard.

5. The Politics of Antitrust Reform After Clinton

As the analysis above suggests, the antitrust reform movement will have to confront significant ideological, institutional, and political obstacles to achieve lasting success. Some of the news is promising. Consumer activists sympathetic to the consumer welfare standard are no longer a major force in Democratic Party politics. Many prominent business managers have explicitly rejected the idea that they must only seek to maximize shareholder profits, and as that theory declines, so does the demand for unregulated “takeover markets.” But some of the news complicates the path to reform. Setting aside much more troubling macro trends like rising political polarization, public concern about regulatory capture or, alternatively, political abuse of antitrust power, suggests that reformers will have to devise a coherent theory to replace the consumer welfare standard or enact bright line rules that give enforcement officials little discretion. The conservative drift in the Supreme Court further supports this view, as reverting to the practice of relying on broad statutory language and sprawling legislative histories will give the Court sufficient latitude to turn any new legislation to its own purposes. Perhaps most importantly, to the extent that Democratic representatives will lead the reform effort, reformers will likely have to build a viable coalition of small business owners and blue-collar workers while also addressing resistance to reform amongst segments of the Party’s existing coalition.

Though it is far from clear how we should think about a post-Chicago antitrust framework, I want to sketch two possibilities. The first approach would replace the limited set of tradeoffs analyzed in the consumer welfare standard with a broader set of tradeoffs that arise not just from individual transactions (a microeconomic analysis) but from the systemic effects those transactions have, in aggregate, in the American political economy (a macroeconomic analysis). The second approach retains the consumer welfare standard, but expands the definition of the consumer interest to go well beyond price, consistent with empirical work on fair trade laws. Hopefully, one of these sketches may provide a starting point for envisioning a new antitrust analysis appropriate to the 21st century.

In an influential book first published in 1975, the economist Arthur Okun argued that all economic policy ultimately had to confront the fact that the pursuit of greater economic

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123 House Report, *supra* n._, at __.
efficiency (defined in neoclassical terms) often conflicted with the pursuit of greater equality. Moreover, the efficiency loss was justified—to an extent—so long as it supported a democratic government that protected individual rights and avoided the creation of a society where everything could be bought and sold. For Okun, who had spent his career studying the tradeoff between inflation and employment, efficiency was a macroeconomic outcome that also came with tradeoffs, the most important being diminished equality. Channeling Brandeis, Okun then argued that the most objectionable areas in which dollars “transgressed” rights was in the use of market power to exert political influence. He even identified the conglomerate merger movement of the 1960s and 1970s as an example of unregulated economic activity that had great potential to disturb the democratic process. By creating companies that sprawled across industries and territory, conglomerate managers had a presence in many Congressional districts which amplified their voice in government.

Okun’s framework can and should be adapted to consider antitrust policy in a macroeconomic perspective. To start, Okun’s original concern about the tradeoff between efficiency and equality captures many of the original concerns that motivated Congressional action on antitrust. Brandeis and John Sherman worried, for example, that individuals had little meaningful power in their dealings with large corporations which undermined their “industrial liberty.” Early reformers also focused on the ways that industrial concentration undermined American democracy by increasing corporate influence in government and by diminishing the public’s trust in government—a particularly salient concern today given that trust in government remains at historic lows. They also worried about the extent to which industrial concentration created firms that operated in many communities but were managed by individuals in far-away places who had few if any ties to those communities. The loss of local control over the community’s economic performance might in turn undermine individual self-governance and erode civic responsibility. There is even an equality component to consumer interests. When industrial concentration leads to both higher prices and less consumer choice, it may lead to a wealth transfer consistent with the conventional economic perspective. But it also effectively creates an anti-democratic system of taxation in which consumers are deprived of the right to “vote” on their tax burden. All of these concerns tap into the possibility that the pursuit of greater efficiency may undermine equality in the American political economy for workers, voters, and citizens, as well as for consumers.

But Okun’s framework can also be expanded to consider other possible tradeoffs. For example, to the extent mergers and acquisitions are financed by saddling the merged entity with large amounts of debt, unregulated merger markets can create firms that face excessive risk during recessions, a pathology that American voters may not wish to encourage. It may also create firms that are “too big to fail” and need government bailouts when they become financially distressed, at substantial cost to the taxpayer. In these regards, efficiency trades off against

124 Id. at 12
125 Id.
126 Id. at 29.
127 Id.
economic stability. Efficiency may similarly trade off against political stability. A core concern of early- and mid-century reformers was that industrial concentration leads to increased popular demands for government intervention and increases the public’s receptivity towards less liberal forms of government like corporatism, social democracy, and even fascism. This concern also seems particularly salient given that recent elections have been characterized by a turn towards social democracy on the political left and a turn towards authoritarianism (in the guise of “populism”) on the political right.

A modified version of Okun’s framework clarifies that there are macro- motivations to antitrust intervention, separate and apart from the conventional micro- concerns that now dominate antitrust policy, which helps to clarify goals. Specifically, the goal of the debate should not necessarily be to identify yet another system for weighing the merits of individual transactions, leaving tremendous discretion in the hands of bureaucrats, judges, and economic analysts. The goal should instead be for elected officials to weigh the explicit political and economic tradeoffs flowing from lax antitrust enforcement, in the aggregate, and then articulate rules and regulations that capture a political consensus about how those costs and benefits to society can best be managed. Such a rule might, for example, prohibit all mergers and acquisitions valued over some limit in the absence of a showing—or even a guarantee—that the deal will meet certain benchmarks, like increasing employment and lowering consumer prices without assuming excessive debt.

But the framework has the additional benefit in that it gives an overarching structure to guide debate about the reformist agenda. Okun’s framework does not bring new concerns to the table. None of the motivations for reform mentioned above are novel; they are recurring themes that reformers have raised for over a century. But Okun’s framework does allow us to integrate a sprawling laundry list of concerns into a more coherent discussion of the tradeoffs inherent in any approach to antitrust policy. And it enables a more nuanced discussion of costs and benefits in light of broader macroeconomic principles. In some ways, the conservative approach has outgrown its usefulness partly because it remains centered on one concern, commodity prices, that, while still important, are not paramount in a society where services and the production of intellectual property have become far more important than manufacturing. Okun’s framework could tolerate, for example, a different balance of costs and benefits involving firms with substantial patent portfolios, to the extent that such a difference engenders political consensus.

Alternatively, to the extent political consensus on the proper balance is difficult to strike and we must retain the current system of transaction-by-transaction analysis, reformers should consider institutionalizing an alternative system that broadens the definition of the consumer’s interest to consumer factors other than price. A large and growing economic literature suggests that consumers are in fact willing to pay higher prices in the marketplace to meet various goals, including the use of environmentally sustainable production techniques and delivering a basic livelihood to producers (like coffee growers). ¹²⁹ In this sense, another way in which the conservative approach has outgrown its usefulness is because it has not adapted to consider consumer interests beyond produce choice and price, despite mounting evidence that consumer interests are heterogeneous. While it might be preferable to factor these components of the

consumer interest into a larger political bargain over antitrust enforcement, antitrust officials might still consider those interests on a case by case basis. This would increase the need for polling on deal-specific questions, like the size of a price increase that consumers would tolerate in order to avoid eliminating a certain predicted number of jobs, so that antitrust officials could enforce the laws in an impartial way. But given the sizeable amounts of legal and economic analysis that already goes into these transactions, this is a modest concern.

6. 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 conservative approach to antitrust fulfilled important social and political needs in its time. It limited the role of government intervention at a time when many were legitimately concerned about corporate influence over the government, to say nothing of outright 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 and when runaway inflation was the prevailing macroeconomic concern. It created a mechanism for reducing managerial discretion in a setting where many 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 abroad in an increasingly global economy.

Times have changed, and the conservative 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, and this will require less scholarship looking backward with a critical eye and more scholarship looking forward to develop a vision for the future that accounts for important aspects of today’s political economy. One possibility, following Okun, calls on elected officials—not judges and bureaucrats—to acknowledge that, even assuming that the current system delivers efficiency gains in the aggregate (an open question), those gains trade off against a variety of equally important objectives and to generate a political consensus behind a new set of rules that strike a more appropriate balance in light of those tradeoffs. Another possibility avoids the need to generate political consensus behind a new system, but pushes administrators—judges and bureaucrats—to evaluate how consumers value a similar set of tradeoffs, and incorporate those more diverse consumer interests into antitrust analysis. Future scholarship will hopefully hone these or develop even better alternative frameworks moving forward.